

# A CALL FOR UNIFORMITY

by Susan P. Leviton

**T**he number of disputes between agencies and the public has increased dramatically in the past seven decades. Indeed, far more citizens are affected by the decisions of administrative law judges and hearing officers, than will ever appear before a judge in a court proceeding. Administrative decisions concern a wide range of issues including welfare benefits, health care benefits, unemployment compensation, workers' compensation, utility rates, licensing, and environmental matters.

Because agencies are a pervasive influence, it is not surprising that the procedures governing administrative hearings are currently the subject of critical scrutiny. Maryland attorneys who have appeared before state agencies have raised serious questions about the fairness and efficiency of state administrative hearings. In particular, critics note that state agencies lack a common or consistent core of administrative procedural rules. Instead, each agency has promulgated its own unique and increasingly complex procedural rules in a largely piecemeal fashion. As a consequence, administrative procedure is unnecessarily confusing, and administrative practice is costly, and for some practitioners, impractical.

In response to this concern, the subcommittee on Practice Before Administrative Agencies, Section of Administrative Law of the Maryland State Bar Association has drafted proposed model procedural regulations for contested adjudicatory hearings. These regulations provide uniform procedures and standards for the conduct of

**The adoption of uniform procedural regulations for contested adjudicatory hearings could benefit all involved parties.**

contested due process hearings. The procedural rules represent a synthesis of court decisions and agency regulations intended to promote efficient and fair adjudication. The subcommittee hopes the Attorney General's Office will use these model regulations when drafting procedural rules for agencies. However, anyone can petition an agency to adopt these model rules, or an appropriate version of them, and, under §10-123 of the State Government Article, can require the agency to hold a hearing on the adoption and state reasons in writing if the petition is denied.

Uniform regulations benefit both the agencies and the citizens who are involved in an agency adjudication. If the model rules were adopted by most state agencies, attorneys would be able to save time and the client's money by avoiding research into the intricacies of each agency's procedural rules. In addition, adoption of a uniform system of procedural rules would make it easier for individuals to represent themselves before agencies in less complex cases. Uniform regulations would also provide a minimum standard to which all agencies could be held, and should help to prevent arbitrary decision-making. Review of agency deci-

sions would become less complicated because the uniform rules would promote a consistent approach to judicial review.

A uniform set of procedural rules may be necessary if the proposed system of independent hearing officers is adopted.

One fear regarding the adoption of a uniform set of procedural rules is that the rules may mandate procedures which are not appropriate for all agencies. After all, the various agencies process diverse claims, serve different claimants or litigants, and vary as to the complexity of the subject matter which forms the basis for the claims. However, the uniform model provisions allow for agency flexibility. Specific provisions which are inappropriate for a particular agency need not be adopted by that agency. In deciding which provisions would be appropriate, agencies should consider the following factors:

1. the interest at stake;
2. the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards;
3. the government's interest, including the function involved and the fiscal or administrative burdens that additional or substitute procedures will cause;
4. the sophistication of the parties;
5. whether the parties are usually represented by counsel; and
6. the statutory provisions governing the agency's authority.

The uniform rules can be divided into four general sections. The first section concerns those regulations which insure access and administrative organization. These regulations pertain to the hearing docket, the record, and the hearing transcript. Under these rules, both the hearing docket and the record are available for public inspection.

*Ms. Leviton chaired the subcommittee that drafted the proposed model rules that are the subject of this article.*

The second section notes explicitly the powers and duties of the hearing officer. The subpoena powers of the hearing officer are listed separately from other powers in order to highlight their importance. Of course, the rules regarding subpoenas will apply only to those agencies that have statutory authority to compel attendance of witnesses and production of documents. The subcommittee noted that the unavailability of subpoenas (either for discovery purposes or for the production of evidence at the hearing) may result in unfairness to the parties in some proceedings and has suggested that the State Administrative Procedure Act be amended to provide all agencies with subpoena power, and to permit the agencies to adopt regulations providing for discovery.

The second section includes two other important provisions; petition for the disqualification of a hearing officer requiring the individual whose disqualification is requested to determine whether to grant the petition, stating facts and reasons for the determination, and a provision that all parties must be notified of their right to appeal after a decision is made.

The third section concerns the rights

of the parties. These rules include: the right to be represented by counsel, notice of a right to a hearing, and procedures for requesting a hearing. In addition, the agency is required to notify parties of the basic reasons for its action. While the rules do not require an elaborate explanation, the agency must explain briefly the factual and legal basis for its proposed action.

The third section also provides for pre-hearing conferences that may be helpful to discuss settlement, to enter into stipulations, and to resolve any preliminary matters. Another important provision in this section concerns discovery and disclosure. Over the years, discovery has assumed an increasingly important role in the process of litigation. The objectives of discovery include the expeditious conduct of the hearing, the promotion of fairness, and the encouragement of settlement. These goals are no less important within the context of agency adjudication. Thus litigants appearing before administrative agencies, pursuant to the model rules, have a right to discovery similar in scope to that granted by the Maryland Rules of Civil Procedure with one important difference. Permission of the hearing officer is re-

quired before emerging in discovery, thus providing firm control over the discovery stage. Since the Maryland rules are derived from the federal rules, case law which concerns the standards and application of the federal rules may serve as a guide to the agency. While agency regulations should be based upon the successful experience of the judiciary, each agency would be free to depart from that experience when the unique nature of its administrative process so required.

The fourth and final section of the Uniform Rules governs the conduct of the hearing itself. These rules govern aspects of the hearing such as the powers of the hearing officer while conducting the hearing, the rules regarding evidence, the burden of going forward and persuasion, who may intervene in a proceeding and how that party may intervene, the rules regarding ex parte communications, the decision, and motions for reconsideration.

A very important provision in this final section is the rule which provides that a party may obtain, upon request, any written statement which pertains to the direct examination of a witness called by the agency. This proposed rule is similar to 18 U.S.C.A. § 3500(a),

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which is a codification of the holding in *Jencks v. United States*, 353 U.S. 657 (1957). The purpose of this requirement is to permit a party to obtain any statement that records with substantial accuracy and completeness the testimony of an agency witness. The federal and model rule require the production of statements following the direct examination of the witness. In practice, however, the statements are usually provided to the opposing party prior to the trial, so as to prevent unnecessary delay in the conduct of the trial.

The final section also includes two important provisions regarding ex parte communications and the separation of functions. Under the proposed rules, a party may communicate with a hearing officer only by means of (1) a written communication which is served on the other parties, or (2) an oral communication in the presence of the other parties or their representatives. A hearing officer who receives an ex parte communication in violation of this provision may withdraw from the proceeding, terminate the proceeding without prejudice, or may be subjected to a petition for disqualification. In addition, a person who has served as an investigator, prosecutor or advocate in an adjudicative proceeding may not serve as a hearing officer, or assist a hearing officer, in the same adjudicative proceeding. This prohibition extends to any person subject to the authority, direction or discretion of the former investigator, prosecutor or advocate.

The proposed model rules do not modify the substantive rights and responsibilities of litigants appearing before administrative agencies. Rather, the rules create only procedural rights and impose only procedural duties. The intent of the drafters is to strike a reasonable balance between the need for efficient, economical and effective government administration, and the need to provide persons adequate procedural protection from arbitrary agency action. It is hoped that the adoption of uniform procedures will promote increased public awareness of agency process, and the cost-effective use of that process. ■

**Note:**

*The reader may obtain a copy of the proposed model regulations from Susan Leviton, Chair, Administrative Law Section, University of Maryland Law School, 500 W. Baltimore Street, Baltimore, Maryland 21201.*

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