FILED

JUL 3 0 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COA No. 333060-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

ABDULLATIF ARISHI,

Petitioner-Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent-Appellee.

On Appeal from Whitman County Superior Court
Whitman County No. 14-2-00157-4

Brief of Appellant

Steve Martonick, WSBA #32213
Martonick Law Office
207 East Main Street
Pullman, WA 99163

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ASSIGNMENT OF ERROR 1

II. ISSUE PRESENTED FOR REVIEW 1

III. STATEMENT OF THE CASE 1

Whether a university student conduct proceeding, comprising of contested factual issues and threatening a student with expulsion, trespass, fines, and other sanctions, involves "issue and interests" requiring a full adjudicative proceeding under the Administrative Procedures Act?

IV. ARGUMENT 3

Standard of Review. 4

The APA entitled Arishi to a Full Adjudicative Hearing 5

WSU's own rules required that Arishi receive a Full Adjudicative Hearing 12

Hearings at other State Colleges and Universities 15

V. CONCLUSION 17

IV. ATTORNEY FEES 18

Cases:

Birgen v. Dep't of Labor & Indus. of State,

___ Wn. App. __, 347 P.3d 503 (2015) 6

Cerrillo v. Esparza, 158 Wn.2d 194 (2006) 6

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1 (2002) 4

Five Corners Family Farmers v. State, 173 Wn.2d 296 (2011) 6

Muckleshoot Indian Tribe v. Wash. Dep't of Ecology,

112 Wn.App. 712 (2002) 7

Nieshe v. Concrete School Dist. 129 Wn.App. 632 (2005) 11

Pierce Cnty. Sherriff v. Civil Serv. Comm'n, 98 Wn.2d 690 (1983) 5

Qwest v. City of Kent, 157 Wn.2d 545 (2006) 6

Reninger v. State Dept. of Corrections, 134 Wn.2d 347 (1998) 12

State v. Riles, 135 Wn.2d 326 (1998) 11

State v. Roggenkamp, 153 Wn.2d 614 (2005) 6

Tapper v. State Emp't Sec. Dept., 122 Wn.2d 397 (1993) 4

Rules & Statutes:

Chapter 34.05, RCW 3, 15

IRLJ 3.3 15

Laws of 1988, ch. 288, §18 7

MODEL ACT § 4-201 7

MODEL ACT § 4-203 7

MODEL ACT § 4-210 7

MODEL ACT § 4-211 8

MODEL ACT § 4-212 7

Model Act § 4-401 8

Model Act § 4-402 8,9

Model Act § 4-502 8

RCW 4.84.350 18

RCW 28B.10.560 15

RCW 34.05.250 4

RCW 34.05.410 4

RCW 34.05.413 4

RCW 34.05.428 4

RCW 34.05.446 4

RCW 34.05.452 4

RCW 34.05.476 4

RCW 34.05.482 4,5,10,13

RCW 34.05.485 4

RCW 34.05.491 13,15

RCW 34.05.570 4

WAC 10-08-001 4

WAC 504-04-010 13

WAC 504-26-403 13

WAC 504-26-405 14

WAC 504-26-407 15

WAC 478-120-115 16

WAC 478-120-030 15

WAC 132C-108-050 16

WAC 132A-125-050 16

WAC 132F-121-190 16

WAC 132U-125-050 16

WAC 132J-126-280 16

WAC 495D-121-360 16

WAC 495E-110-210 16

I. ASSIGNMENT OF ERROR

1. The Superior Court erred in sustaining the Final Order of the Washington State University Student Conduct Board expelling the Petitioner from the University. (CP 517-19.)

II. ISSUE PRESENTED FOR REVIEW

1. Whether a university student conduct proceeding, comprising of contested factual issues and threatening a student with expulsion, trespass, fines, and other sanctions, involves "issue and interests" requiring a full adjudicative proceeding under the Administrative Procedures Act?

III. STATEMENT OF THE CASE

After a hearing held on May 21, 2014, the Washington State University Student Conduct Board ("Conduct Board") found Abdullatif Arishi "responsible" for various violations of the student conduct code. (CP 38-41.) The proceeding was conducted as an informal or "brief" adjudicative proceeding. (CP 164.) Prior to the hearing, Arishi had made demand for a formal or full adjudicative proceeding under the Administrative Procedures Act ("APA"). (CP 166.) The crux of the charges was the allegation that Arishi had sexual contact with an underage

female who was not a student at the University. (CP 38-41.) Arishi denied the allegations. (CP 39.) Upon finding Arishi responsible for violation of the student conduct code, the Conduct Board expelled him from Washington State University and "trespassed" him from all university property. (CP 40.) The trespass order required Arishi to move from his home that he rented on campus. (CP 164.)

Arishi was denied a formal proceeding where he could confront and cross-exam the one witness against him. (CP 23.) In fact, the alleged victim did not testify. (RP 217, 228.) Arishi was also threatened with the removal of his attorney from the Conduct Board proceeding if his attorney attempted to represent him. (CP 120, 223.) Arishi appealed the sanctions to the University Appeals Board ("Appeals Board"). (CP 33-35.) On review the Appeals Board sustained the action of the Conduct Board without modification. (CP 22-23.)

Arishi filed a petition for judicial review in the Whitman County Superior Court on July 16, 2014. (CP 1.) In the petition for judicial review Arishi requested the following relief:

> 1. Set aside the Final Order of the Washington State University Appeals Board;
>
> 2. Enjoin or stay enforcement of the Final Order and enter a declaratory judgment that the Final Order's banishment of the Petitioner is contrary to the laws and Constitutions of the State of Washington and the United States of America;

3. Remand the matter to the University for a Formal Adjudicative Proceeding;

4. Impose attorney fees and other expenses per RCW 4.84.350.

(CP 10.) The Superior Court entered an order denying the Petition on March 26, 2015. (CP 307-309.)

IV. ARGUMENT

The APA creates two standard types of contested hearings, formal adjudicative proceedings and informal or brief adjudicative proceedings. *See* Chapter 34.05, RCW. The two proceedings are readily distinguishable. For example, in a formal adjudicative hearing a party may be represented by counsel. *See* RCW 34.05.428. Subpoenas, discovery, and protective orders are also allowed in a formal hearing. *See* RCW 34.05.446. In addition, rules of evidence apply, and a party may cross-examine witnesses. *See* RCW 34.05.452. Further, witnesses must be sworn. *See* RCW 34.05.452(3). In contrast, none of the foregoing protections are available to a party in a brief adjudicative proceeding. About the only statutory requirements for brief proceedings are notice and a hearing. *See* RCW 34.05.485.

Brief adjudicative hearings are not authorized by the APA when the "*issue and interests* involved in the controversy do not warrant use of

the procedures . . ." RCW 34.05.482(1)(d) (emphasis added). In fact, the APA states that the presumptive proceeding is the formal proceeding and brief proceedings are the exception. *See* RCW 34.05.410(1) ("Adjudicative proceedings are governed by RCW 34.05.413 through 34.05.476, [regarding formal adjudicative proceedings,] *except* as otherwise provided.") (emphasis added). Furthermore, the APA requires all agencies to adopt the model rules of procedure for formal hearings or to state the reasons for not doing so. *See* RCW 34.05.250. The chief administrative law judge has promulgated rules in conformance with the statutory directive. *See* WAC 10-08-001.

Standard of Review

Under the Washington Administrative Procedure Act, chapter 34.05, RCW, the appellate court "sits in the same position as the superior court . . ." when reviewing administrative action. *Tapper v. State Emp't Sec. Dept.*, 122 Wn.2d 397, 402 (1993). In addition, an appellate court reviews de novo issues of statutory interpretation. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 (2002).

Per the APA, the Superior Court may grant relief from agency action for any one or more of the reasons listed in RCW 34.05.570(3). The reasons that are of particular relevance here are:

1. The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
2. The agency has erroneously interpreted or applied the law;
3. The agency has not decided all issues requiring resolution by the agency;
4. The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
5. The order is arbitrary or capricious.

Id.

The University failed to provide, or even consider providing, Arishi with a formal adjudicative proceeding as required by law and as mandated by its own rules, which entitles him to relief under the above paragraphs. Failure of an agency to abide by its own rules is per se arbitrary and capricious. *See, e.g.*, *Pierce Cnty. Sherriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 694 (1983). "Violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental." *Id.*

The APA entitled Arishi to a Full Adjudicative Hearing

The "*issue and interests* involved in the controversy" determines the type of hearing to be provided. *See* RCW 34.05.482(1)(d) (emphasis added). Where a statute is "clear on its face," it is not ambiguous and its

meaning is to be derived from the language of the statute alone. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 201 (2006). Here, the meaning of the phrase "issue and interest" is unclear. Which "interest" and what "issues" require a formal hearing? The APA does not explain or define the term "issue or interests" nor does it list which "issue and interests" require a full adjudicative proceeding. The phrase is ambiguous because its meaning is not clear and cannot be discerned from the statute or related statutes.

Where a statute is ambiguous, courts "may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 306 (2011) (citation omitted). The goal of statutory interpretation is to "fulfill the intent of the legislature." *Qwest v. City of Kent*, 157 Wn.2d 545, 551 (2006). "Each word of a statute is to be accorded meaning" because it is presumed the Legislature did not use "superfluous words." *State v. Roggenkamp*, 153 Wn.2d 614, 624 (2005).

Additionally, if the statute has an "applicable statement of purpose, the statute must be read in a manner consistent with the stated purpose." *Birgen v. Dep't of Labor & Indus. of State*, ___ Wn. App. __, 347 P.3d 503, 509 (2015). In the purpose section of the APA the "Legislature instructed that the act should conform to the decisions of federal and other state courts and with the model state administrative procedure act."

Muckleshoot Indian Tribe v. Wash. Dep't of Ecology, 112 Wn. App. 712, 721 (2002).

> The legislature intends, by enacting this 1988 Administrative Procedure Act, to clarify the existing law of administrative procedure, to achieve greater consistency with other states and the federal government in administrative procedure, and to provide greater public and legislative access to administrative decision making. The legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the Administrative Procedure Act in effect before the effective date of this act shall remain in effect. The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.

Laws of 1988, ch. 288, §18.

The 1988 Legislature would have had before it the Model Administrative Procedure Act of 1981 (Model Act). The Model Act, like the APA provides that formal adjudicative proceedings are the default administrative hearing. *See* MODEL ACT § 4-201. The formal proceeding under the Model Act contains the same protections as a formal hearing under the APA. A party may be represented by counsel. *See id.* § 4-203. Subpoenas, discovery, and protective orders are allowed in a formal hearing. *See id.* § 4-210. In addition, the rules of evidence apply, witnesses must be sworn, and there is an opportunity for cross-examination. *Id.* §§ 4-211 to 212.

The Model Act also creates informal proceedings similar in nature to the brief proceeding of the APA. There are two types of Model Act informal hearings, other than for emergency matters, called "conference adjudication," *id.* § 4-401, and "summary adjudication," *id.* § 4-502. The Model Act describes "conference proceedings" as a "peeled down" version of the formal adjudicative proceeding. *See id.* § 4-402 cmt. Conference proceedings are only authorized for use where there is no constitutional obstacles, no disputed issue of fact and only if it involves:

1. A monetary amount less than $1,000;
2. Disciplinary action against a prisoner;
3. Disciplinary action against a student which does not involve expulsion or suspension for more than ten days;
4. Disciplinary action against a public employee which does not involve suspension for more than ten days, or
5. Disciplinary action against a licensee which does not involve revocation or amendment of the license.

MODEL ACT § 4-401.

"Summary proceedings" are the least formal of the informal procedures. Subject to constitutional limits, summary adjudications can be used only in the most trivial cases involving, for example:

1. A monetary amount less than $100;
2. A reprimand or purely verbal sanction against a prisoner, student or public employee;
3. Denial of application for admission to educational institution;
4. A matter that is resolved on the sole basis of inspections, examinations, or tests;

5. The acquisition, leasing, or disposal of property or the procurement of goods or services by contract;
6. Any matter having only trivial potential impact upon the affected parties.

Id. § 4-402.

These specific enumerations give a sense of what kinds of cases the Model Act drafters thought were appropriate for an informal process. Clearly they are cases involving relatively minor issues with trivial or insignificant impacts and few, if any, lasting consequences. To indicate when such proceedings could be used, the Washington legislature used a general, functional formula as distinguished from the Model Act's more specific approach. Two kinds of drafting strategies were possible. The drafters could have leaned in the direction of specificity, enumerating in detail the kinds of cases where brief proceedings could be used. On the other hand, the drafters could have used a more general, functional formula to guide resolution of the question. The Model Act drafters chose the first strategy, the Washington legislature the second.

The APA's brief adjudicative proceeding resembles the informal proceedings of the Model Act. Under the APA, brief proceedings can be used only when:

1. The use would not violate another provision of law;
2. The public interest does not require notice beyond parties to the case;

3. The agency has adopted a rule for use of brief adjudicative proceedings in the category of cases in question;
4. The issue and interests do not warrant formal process.

RCW 34.05.482(1).[1]

The key provision is number four. Two elements stand out in this provision. (1) Even if the constitution would allow it, the APA seems to prohibit the use of brief proceedings in those cases where the interests of the affected parties are of sufficient weight to warrant the fuller protection of the formal process. It is not clear what criteria beyond the constitutional would be used to assess the weight of an interest, but providing for interest weighing in addition to requiring compliance with the constitution ("any provision of law")[2] implies that the legislature contemplated settings in which protections above the constitutional minimums might be warranted. (2) The provision seems to say that no matter what the weight of the interest, brief proceedings still should not be used when the issues in dispute can be better resolved by formal process. That, appears to mean

---

[1] RCW 34.05.482(2) provides the brief proceedings are not permitted where public benefits are at issue. There certainly may at least be an indirect effect on educational benefits when a student is expelled from school.

[2] The APA does not define the term "provision of law" but it is defined in the Model Act as including the state and federal constitutions. *See* MODEL ACT § 4-102(9).

that where the issues are such that cross-examination, discovery, representation by an attorney, etc. would facilitate the search for truth, brief proceedings cannot be used.

In the real world, of course, these two considerations cannot be wholly separated. One would expect brief proceedings to be inadequate in cases involving significant interest even in the absence of a showing that the procedural protections of the full hearing would contribute greatly to the search for truth. Conversely, brief proceedings may not be appropriate even in relatively minor cases where cross examination, e.g., seemed essential to determine what really happened.

Expulsion and suspension from a university for misconduct implicates the fundamental interest a person has in their reputation. "A liberty right is implicated '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.'" *Nieshe v. Concrete School Dist.,* 129 Wn.App. 632, 641 (2005) (citation omitted). Likewise, the University's trespass order is of constitutional magnitude as it implicates protected First Amendment interests. "The freedom to associate and travel is a protected liberty interest granted by the First Amendment." *State v. Riles*, 135 Wn.2d 326, 346 (1998). "As is true for any quasi-judicial proceeding under the Administrative Procedure Act (APA), appropriate procedural protections

must be afforded the parties." *Reninger v. State Dept. of Corrections*, 134 Wn.2d 347, 350 (1998).

Regardless of what procedure due process may require in the instant case, the interests involved in Arishi's student conduct hearing were more than relatively minor matters with trivial or insignificant impacts and few, if any, lasting consequences. The consequences will follow him for the rest of his life, as it will impact his ability to obtain a degree from almost any university anywhere.

The issues involved also required something more than a brief adjudicative proceeding. The fact finders in Arishi's case never had the opportunity to even see the alleged victim or judge her credibility for themselves. Other than Arishi himself, she was the sole witness to his alleged offenses. The search for the truth could only have been advanced by the techniques available in the formal process.

These are not the types of issue and interests the Legislature contemplated as being addressed in a brief adjudicative proceeding. These are the types of matters typically heard in a court of law with all the protections afforded thereby. In the administrative context, Arishi's interest and issues can only be fairly dealt with in a full adjudicative proceeding.

WSU's own rules required that Arishi receive a Full Adjudicative Hearing

Conduct Board hearings, by default, are conducted as brief adjudicative proceedings. *See* WAC 504-04-010. "The following proceedings are matters to be treated as brief adjudications pursuant to RCW 34.05.482 through 34.05.491: (1) Student conduct proceedings." *Id.* The University has adopted administrative rules for their informal hearings. *See* Chapter 504-26, WAC. The University is required to give notice of the proceedings to the student. *See* WAC 504-26-403(1). The student has an opportunity to present her version of events, WAC 504-26-401(6), and to offer witnesses, WAC 504-26-403(4)(a)(v). After the hearing, the Board is required to make written findings of fact and conclusions of law. *See* WAC 504-26-403(4)(c).

The University rules do not provide for testimony to be presented under oath, nor do the rules of evidence apply. *See* WAC 504-26-403(4)(a)(xi). "Formal rules of process, procedure, and/or technical rules of evidence, such as are applied in criminal or civil court, are not used in conduct proceedings." *Id.* Moreover, a student has no right of cross-examination or to question witnesses directly in the University's informal hearings. *See* WAC 504-26-403(4)(a)(vi). "Questions may be suggested by the accused student and/or complainant to be answered by each other or by other witnesses. Written questions are directed to the conduct board

chair, rather than to the witness directly." *Id.* Further, attorneys are not allowed to represent students because "advisors are not permitted to address the board, witnesses, conduct officers or any party or representatives invited by the parties to the hearing, or to participate directly in any university conduct hearing." WAC 504-26-403(4)(a)(v). The proceedings are referred to as "educational in tone" and seek to avoid an "unduly adversarial environment." *See* WAC 504-26-403(4).

Nevertheless, students before the Conduct Board face a variety of sanctions which are more than mere pedagogical opportunities. Students found to have violated the code of conduct may, in addition to other sanctions, be ordered to: pay restitution, WAC 504-26-405(1)(d); pay a fine, WAC 504-26-405(1)(q); complete community service, WAC 504-26-405 (1)(f); move from their residence, WAC 504-26-405(1)(h); be trespassed from "university premises," WAC 504-26-405(1)(m); and, not to have contact with an individual or group, WAC 504-26-405(1)(p). All in addition to being suspended, WAC 504-26-405(1)(i), or expelled, WAC 504-26-405 (1)(j), from the University.

As stated, the APA contemplates two primary types of adjudicative proceedings. The University's own student conduct rules provide that: "The appeals board *shall* make any inquiries necessary to ascertain whether the [student conduct] proceeding must be converted to a formal

adjudicative hearing under the Administrative Procedure Act (chapter 34.05 RCW)." WAC 504-26-407(1)(c) (emphasis added); *see also* RCW 34.05.491(3).

A student receiving a parking ticket has more procedural rights than Arishi had in a proceeding which resulted in his being expelled from graduate school and kicked out of his home. A person receiving a parking ticket on campus may be represented by an attorney, conduct discovery and subpoena and cross examine witnesses. *See* RCW 28B.10.560(2); IRLJ 3.3. It is clear that WSU recognizes the need for a full adjudicative hearing when the issues and interests involved require such; it is just that the University never actually offers or provides the hearing its rules require even when requested. It is also clear that brief proceedings are intended to be for "educational" purposes. What is unclear is how the Conduct Board intended to find the truth of the matter without the "victim" testifying or further Arishi's education by terminating it.

Hearings at other State Colleges and Universities

The WSU procedure somewhat parallels the procedure utilized by the University of Washington. At the University of Washington, in "exceptional circumstances," student conduct matters are referred to an appeals board. *See* WAC 478-120-030(4). Exceptional circumstances include those instances where termination or suspension is a

recommended sanction. *See id.* The appeals board then conducts a formal adjudicative hearing if requested in writing by the student or if "deemed appropriate" by the board. *See* WAC 478-120-115(1).

Consistent with the Model Act, several state colleges only allow brief adjudicative proceedings for suspensions of less than ten days. *See, e.g.,* WAC 132A-125-050 (Peninsula College); WAC 132C-108-050 (Olympic College); WAC 132F-108-050, 132F-121-190 (Seattle Community College); WAC 132J-126-280 (Green River Community College); WAC 132U-125-050 (Whatcom Community College); WAC 495D-121-360 (Lake Washington Institute of Technology); WAC 495E-110-210 (Renton Technical College). The standard language addressing the appeal process for suspensions of ten days or more and expulsions is: "Brief adjudicative proceedings shall be used in regard to . . . student conduct appeals involving the following disciplinary actions . . . suspensions of ten instructional [business] days or less." WAC 132C-108-050 (Olympic College). The inference from these rules is any expulsion or suspension of ten instructional days or more will require a formal adjudicative proceeding. This is reasonable given brief adjudicative proceedings were created to deal with minor disciplinary proceedings. *See* MODEL STATE APA §§ IV–V (1981).

Therefore, had Arishi been a Husky instead of a Cougar his right to adequate process would have been guaranteed. As a Cougar, he was expelled from graduate school and trespassed from his own home without so much as a single word spoken under oath by the only witness against him.

V. CONCLUSION

The interest and issues in Arishi's case entitled him under the APA to the full adjudicative hearing he demanded. This court should reverse the final order and remand for a full adjudicative proceeding.

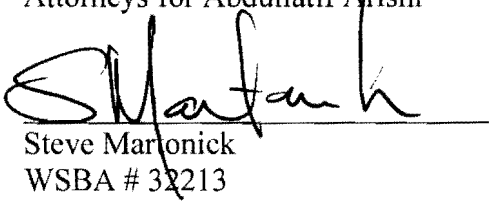
VI. ATTORNEY FEES

Should the Court grant some, or all of the relief requested, Petitioner requests attorney fees and other expenses per RCW 4.84.350 which provides that "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees …." Said costs and fees are to be paid to a petitioner who shall "have obtained relief on a significant issue that achieves some benefit … sought." *Id.*

Dated this 28 day of July 2015.

Submitted:

MARTONICK LAW OFFICE
Attorneys for Abdullatif Arishi



Steve Martonick
WSBA # 32213

APPENDIX

SELECTED STATUTES AND RULES

RCW 28B.10.560
Police forces for universities and The Evergreen State College — Establishment of traffic regulations — Adjudication of parking infractions — Appeal.

(1) The boards of regents of the state universities, and the boards of trustees of the regional universities and of The Evergreen State College, acting independently and each on behalf of its own institution, may each:

(a) Establish and promulgate rules and regulations governing pedestrian traffic and vehicular traffic and parking upon lands and facilities of the university or college;

(b) Adjudicate matters involving parking infractions internally; and

(c) Collect and retain any penalties so imposed.

(2) If the rules or regulations promulgated under subsection (1) of this section provide for internal adjudication of parking infractions, a person charged with a parking infraction who deems himself or herself aggrieved by the final decision in an internal adjudication may, within ten days after written notice of the final decision, appeal by filing a written notice thereof with the college or university police force. Documents relating to the appeal shall immediately be forwarded to the district court in the county in which the offense was committed, which court shall have jurisdiction over such offense and such appeal shall be heard de novo.

RCW 34.05.250
Model rules of procedure.

The chief administrative law judge shall adopt model rules of procedure appropriate for use by as many agencies as possible. The model rules shall deal with all general functions and duties performed in common by the various agencies. Each agency shall adopt as much of the model rules as is reasonable under its circumstances. Any agency adopting a rule of procedure that differs from the model rules shall include in the order of adoption a finding stating the reasons for variance.

RCW 34.05.410
Application of Part IV.

(1) Adjudicative proceedings are governed by RCW 34.05.413 through 34.05.476, except as otherwise provided:

(a) By a rule that adopts the procedures for brief adjudicative proceedings in accordance with the standards provided in RCW 34.05.482 for those proceedings;

(b) By RCW 34.05.479 pertaining to emergency adjudicative proceedings; or

(c) By RCW 34.05.240 pertaining to declaratory proceedings.

(2) RCW 34.05.410 through 34.05.494 do not apply to rule-making proceedings unless another statute expressly so require.

RCW 34.05.413
Commencement — When required.

(1) Within the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

(2) When required by law or constitutional right, and upon the timely application of any person, an agency shall commence an adjudicative proceeding.

(3) An agency may provide forms for and, by rule, may provide procedures for filing an application for an adjudicative proceeding. An agency may require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, and within specified time limits. The agency shall allow at least twenty days to apply for an adjudicative proceeding from the time notice is given of the opportunity to file such an application.

(4) If an agency is required to hold an adjudicative proceeding, an application for an agency to enter an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

(5) An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted.

RCW 34.05.428
Representation.

(1) A party to an adjudicative proceeding may participate personally or, if the party is a corporation or other artificial person, by a duly authorized representative.

(2) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by provision of law, other representative.

RCW 34.05.446
Subpoenas, discovery, and protective orders.

(1) The presiding officer may issue subpoenas and may enter protective orders. A subpoena may be issued with like effect by the agency or the attorney of record in whose behalf the witness is required to appear.

(2) An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used.

(3) Except as otherwise provided by agency rules, the presiding officer may decide whether to permit the taking of depositions, the requesting of admissions, and all other procedures authorized by rules 26 through 36 of the superior court civil rules. The presiding officer may condition use of discovery on a showing of necessity and unavailability by other means. In exercising such discretion, the presiding officer shall consider: (a) Whether all parties are represented by counsel; (b) whether undue expense or delay in bringing the case to hearing will result; (c) whether the discovery will promote the orderly and prompt conduct of the proceeding; and (d) whether the interests of justice will be promoted.

(4) Discovery orders and protective orders entered under this section may be enforced under the provisions of this chapter on civil enforcement of agency action.

(5) Subpoenas issued under this section may be enforced under RCW 34.05.588(1).

(6) The subpoena powers created by this section shall be statewide in effect.

(7) Witnesses in an adjudicatory proceeding shall be paid the same fees and allowances, in the same manner and under the same conditions, as provided for witnesses in the courts of this state by chapter 2.40 RCW and by RCW 5.56.010, except that the agency shall have the power to fix the allowance for meals and lodging in like manner as is provided in RCW 5.56.010 as to courts. The person initiating an adjudicative proceeding or the party requesting issuance of a subpoena shall pay the fees and allowances and the cost of producing records required to be produced by subpoena.

RCW 34.05.452
Rules of evidence — Cross-examination.

(1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

(3) All testimony of parties and witnesses shall be made under oath or affirmation.

(4) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(5) Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency's specialized knowledge, and (c) codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a

nationally recognized organization or association. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed. A party proposing that official notice be taken may be required to produce a copy of the material to be noticed.

RCW 34.05.476
Agency record.

(1) An agency shall maintain an official record of each adjudicative proceeding under this chapter.

(2) The agency record shall include:

(a) Notices of all proceedings;

(b) Any prehearing order;

(c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(d) Evidence received or considered;

(e) A statement of matters officially noticed;

(f) Proffers of proof and objections and rulings thereon;

(g) Proposed findings, requested orders, and exceptions;

(h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(i) Any final order, initial order, or order on reconsideration;

(j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and

(k) Matters placed on the record after an ex parte communication.

(3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.

RCW 34.05.482
Brief adjudicative proceedings — Applicability.

(1) An agency may use brief adjudicative proceedings if:

(a) The use of those proceedings in the circumstances does not violate any provision of law;

(b) The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties;

(c) The matter is entirely within one or more categories for which the agency by rule has adopted this section and RCW 34.05.485 through 34.05.494; and

(d) The issue and interests involved in the controversy do not warrant use of the procedures of RCW34.05.413 through 34.05.479.

(2) Brief adjudicative proceedings are not authorized for public assistance and food stamp or benefit programs provided for in Title 74 RCW, including but not limited to public assistance as defined in *RCW74.04.005(1).

RCW 34.05.485
Brief adjudicative proceedings — Procedure.

(1) If not specifically prohibited by law, the following persons may be designated as the presiding officer of a brief adjudicative proceeding:

(a) The agency head;

(b) One or more members of the agency head;

(c) One or more administrative law judges; or

(d) One or more other persons designated by the agency head.

(2) Before taking action, the presiding officer shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter.

(3) At the time any unfavorable action is taken the presiding officer shall serve upon each party a brief statement of the reasons for the decision. Within ten days, the presiding officer shall give the parties a brief written statement of the reasons for the decision and information about any internal administrative review available.

(4) The brief written statement is an initial order. If no review is taken of the initial order as

authorized by RCW 34.05.488 and 34.05.491, the initial order shall be the final order.

RCW 34.05.491
Brief proceedings — Administrative review — Procedures.

Unless otherwise provided by statute:

(1) If the parties have not requested review, the agency may review an order resulting from a brief adjudicative proceeding on its own motion and without notice to the parties, but it may not take any action on review less favorable to any party than the original order without giving that party notice and an opportunity to explain that party's view of the matter.

(2) The reviewing officer may be any person who could have presided at the brief proceeding, but the reviewing officer must be one who is authorized to grant appropriate relief upon review.

(3) The reviewing officer shall give each party an opportunity to explain the party's view of the matter and shall make any inquiries necessary to ascertain whether the proceeding must be converted to a formal adjudicative hearing.

(4) The order on review must be in writing, must include a brief statement of the reasons for the decision, and must be entered within twenty days after the date of the initial order or of the request for review, whichever is later. The order shall include a description of any further available administrative review or, if none is available, a notice that judicial review may be available.

(5) A request for administrative review is deemed to have been denied if the agency does not make a disposition of the matter within twenty days after the request is submitted.

RCW 34.05.570
Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

WAC 10-08-001
Declaration of purpose.

(1) Chapter 10-08 WAC contains the model rules of procedure which RCW 34.05.250 requires the chief administrative law judge to adopt for use by as many agencies as possible. The model rules deal with general functions and duties performed in common by the various agencies. The model rules supplement Administrative Procedure Act provisions which contain grants of rulemaking authority to agencies. It is not the purpose of the model rules to duplicate all procedural provisions of the Administrative Procedure Act. This chapter sets forth general rules applicable to proceedings before many state agencies. It should be read in

conjunction with the provisions of the Administrative Procedure Act (chapter 34.05 RCW) and with any administrative rules governing adjudicative proceedings which have been adopted by the particular agency.

(2) Except to the extent an agency is excluded from chapter 34.05 RCW or parts of chapter 34.05RCW, each agency must adopt as much of the model rules as is reasonable under its circumstances. Any agency adopting a rule of procedure that differs from these model rules must include in the order of adoption a finding stating the reasons for variance.

(3) Adoption of these 1999 amendments to the model rules does not invalidate any variances in rules adopted by agencies between the effective date of the 1988 amendments to the Administrative Procedure Act and the effective date of these 1999 amendments to the model rules.

(4) In the absence of other rules to the contrary, these model rules shall govern any adjudicative proceedings under the Administrative Procedure Act.

WAC 504-04-110
Adoption of model rules of procedure for formal proceedings—Exception.

In formal proceedings pursuant to RCW 34.05.413 through 34.05.476 Washington State University adopts the model rules of procedure adopted by the office of administrative hearings, chapter 10-08 WAC, with the following exception:

WAC 10-08-190 Adjudicative proceedings, cameras-recording devices.

See WAC 504-04-120 which determines the use of cameras and recording devices at adjudicative proceedings.

Other procedural rules adopted in this title and this chapter are supplementary to the model rules. In the case of a conflict between the model rules and procedural rules adopted by Washington State University, the procedural rules adopted by the university shall govern.

WAC 504-26-403
Conduct board proceedings.

(1) Any student charged by a conduct officer with a violation of any provision of the standards of conduct for students that is to be heard by a conduct board is provided notice as described in WAC504-26-401(5).

(2) The written notice shall be completed by the conduct officer and shall include:

(a) The specific complaint, including the university policy or regulations allegedly violated;

(b) The approximate time and place of the alleged act that forms the factual basis for the charge of violation;

(c) The time, date, and place of the hearing;

(d) A list of the witnesses who may be called to testify, to the extent known;

(e) A description of all documentary and real evidence to be used at the hearing, to the extent known, including a statement that the student shall have the right to inspect his or her student conduct file.

(3) Time for hearings.

(a) The conduct board hearing is scheduled not less than seven days after the student has been sent notice of the hearing, except in the case of interim suspensions as set forth in WAC 504-26-406.

(b) Requests to extend the time and/or date for hearing must be addressed to the chair of the university conduct board, and must be copied to the office of student standards and accountability. A request for extension of time is granted only upon a showing of good cause.

(4) University conduct board hearings are conducted by a university conduct board. A goal of the hearing is to have an educational tone and to avoid creation of an unduly adversarial environment. The hearings are conducted according to the following guidelines, except as provided by subsection (6) of this section:

(a) Procedures:

(i) University conduct board hearings are conducted in private.

(ii) The complainant, accused student, and his or her advisor, if any, are allowed to attend the entire portion of the university conduct board hearing at which information is received (excluding deliberations). Admission of any other person to the university conduct board hearing is at the discretion of the university conduct board chair and/or the student conduct officer.

(iii) In university conduct board hearings involving more than one accused student, the student conduct officer, at his or her discretion, may permit joint or separate hearings.

(iv) In university conduct board hearings involving graduate students, board memberships are comprised to include graduate students and graduate teaching faculty to the extent possible.

(v) The complainant, the accused student, and the student conduct officer may arrange for witnesses to present pertinent information to the university conduct board. The conduct officer tries to arrange the attendance of possible witnesses who are identified by the complainant. Complainant witnesses must provide written statements to the conduct officer at least two weekdays prior to the hearing. Witnesses identified by the accused student must provide written statements to the conduct officer at least two weekdays prior to the conduct hearing. The accused student is responsible for informing his or her witnesses of the time and place of the hearing. Witnesses provide information to and answer questions from the university conduct board, the complainant, and the accused student, as appropriate. Questions may be suggested by the accused student and/or complainant to be answered by each other or by other witnesses. Written questions are directed to the conduct board chair, rather than to the witness directly. This method is used to preserve the educational tone of the hearing and to avoid creation of an unduly adversarial environment, and to allow the board chair to determine the relevancy of questions. Questions concerning whether potential information may be received are resolved at the discretion of the chair of the university conduct board. The chair of the university conduct board shall have the discretion to determine admissibility of information.

(vi) Pertinent records, exhibits, and written statements (including student impact statements) may be accepted as information for consideration by a university conduct board at the discretion of the chair and/or conduct officer.

(vii) Questions related to the order of the proceedings are subject to the final decision of the chair of the university conduct board.

(viii) After the portion of the university conduct board hearing concludes in which all pertinent information is received, the university conduct board shall determine (by majority vote) whether the accused student has violated each section of the standards of conduct for students as charged and what sanctions, if any, are appropriate.

(b) If the accused student is found responsible for any of the charges, the board may, at that time, consider the student's past contacts with the office of student standards and accountability in determining an appropriate sanction.

(c) The accused student or recognized student organization is notified of the conduct board's decision within ten calendar days from the date the matter is heard. The accused student or recognized student organization shall receive written notice of the decision, the reasons for the decision (both the factual basis therefore and the conclusions as to how those facts apply to the standards of conduct for students), the sanction, notice that the order will become final unless internal appeal is filed within twenty-one days of the date the letter was personally delivered, deposited in the U.S. mail, or electronically mailed, and a statement of how to file an appeal.

(i) The written decision is the university's initial order.

(ii) If the student or recognized student organization does not appeal the conduct board's decision before twenty-one calendar days from the date of the decision letter, it becomes the university's final order.

(5) There is a single verbatim record, such as an audio record, of all university conduct board hearings (not including deliberations). Deliberations are not recorded. The record is the property of the university.

(6) If an accused student to whom notice of the hearing has been sent (in the manner provided above) does not appear before a university conduct board hearing, the information in support of the complaint is presented and considered in his or her absence, and the board may issue a decision based upon that information.

(7) The university conduct board may for convenience or to accommodate concerns for the personal safety, well-being, and/or fears of confrontation of the complainant, accused student, and/or other witnesses during the hearing provide separate facilities, and/or permit participation by telephone, audio tape, written statement, or other means, as determined in the sole judgment of the vice-president for student affairs or designee to be appropriate.

WAC 504-26-405
Sanctions.

(1) The following sanctions may be imposed upon any student found to have violated the standards of conduct for students:

(a) Warning. A notice in writing to the student that the student is violating or has violated institutional regulations.

(b) Probation. Formal action placing conditions upon the student's continued attendance at the university. Probation is for a designated period of time and warns the student or recognized student organization that suspension, expulsion, loss of recognition, or any other sanction outlined in this section may be imposed if the student is found to violate any institutional regulation(s) or fails to complete his or her conditions of probation during the probationary period. A student on probation is not eligible to run for or hold an office in any recognized student group or organization; she or he is not eligible for certain jobs on campus, including but not limited to resident advisor or orientation counselor; and she or he is not eligible to serve on the university conduct or appeals board.

(c) Loss of privileges. Denial of specified privileges for a designated period of time.

(d) Restitution. Compensation for loss, damage, or injury. This may take the form of appropriate service and/or monetary or material replacement.

(e) Education. The university may require the student to successfully complete an educational project designed to create an awareness of the student's misconduct.

(f) Community service. Imposition of service hours (not to exceed eighty hours per student or per member of a recognized student organization).

(g) Residence hall suspension. Separation of the student from a residence hall or halls for a definite period of time, after which the student may be eligible to return. Conditions for readmission may be specified.

(h) Residence hall expulsion. Permanent separation of the student from a residence hall or halls.

(i) University suspension. Separation of the student from the university for a definite period of time, after which the student is eligible to request readmission. Conditions for readmission may be specified.

(j) University expulsion. Permanent separation of the student from the university. Also referred to as university dismissal. The terms are used interchangeably throughout this chapter.

(k) Revocation of admission and/or degree. Admission to or a degree awarded from the university may be revoked for fraud, misrepresentation, or other violation of law or university standards in obtaining the degree, or for other serious violations committed by a student before awarding of the degree.

(l) Withholding degree. The university may withhold awarding a degree otherwise earned until the completion of the process set forth in this standards of conduct for students, including the completion of all sanctions imposed, if any.

(m) Trespass. A student may be restricted from any or all university premises based on his or her misconduct.

(n) Loss of recognition. A recognized student organization's recognition may be withheld permanently or for a specific period of time. A fraternity or sorority may be prohibited from housing freshmen. Loss of recognition is defined as withholding university services, privileges, or administrative approval from a student organization. Services, privileges, and approval to be withdrawn include, but are not limited to, intramural sports (although individual members may participate), information technology services, university facility use and rental, campus involvement office organizational activities, and office of Greek life advising.

(o) Hold on transcript and/or registration. A hold restricts release of a student's transcript or access to registration until satisfactory completion of conditions or sanctions imposed by a conduct officer or university conduct board. Upon proof of satisfactory completion of the conditions or sanctions, the hold is released.

(p) No contact order. A prohibition of direct or indirect physical, verbal, and/or written contact with another individual or group.

(q) Fines. Previously established and published fines may be imposed. Fines are established each year prior to the beginning of the academic year and are approved by the vice-president for student affairs.

(2) More than one of the sanctions listed above may be imposed for any single violation.

(3)(a) In determining an appropriate sanction, the conduct officer or relevant board may consider any record of past contacts with the office of student standards and accountability, and the nature and severity of such past contact(s).

(b) The conduct board and/or appeals board may consider suspending or expelling any student found responsible for violating the university's sexual misconduct code (WAC 504-26-221).

(4) Other than university expulsion or revocation or withholding of a degree, disciplinary sanctions are not made part of the student's permanent academic record, but shall become part of the student's disciplinary record.

(5) In cases heard by university conduct boards, sanctions are determined by that board. The student conduct officer has the authority to assign sanctions in any conduct officer hearing.

(6) Academic integrity violations.

No credit need be given for work that is not a student's own. Thus, in academic integrity violations, the responsible instructor has the authority to assign a grade and/or educational sanction in accordance with the expectations set forth in the relevant course syllabus. The instructor's choices may include, but are not limited to, assigning a grade of "F" for the assignment and/or assigning an educational sanction such as extra or replacement assignments, quizzes, or tests, or assigning a grade of "F" for the course.

WAC 504-26-407
Review of decision.

(1) The findings and sanctions rendered by the university conduct board or a conduct officer may be appealed by the complainant and accused student(s) in the manner prescribed in the decision letter containing the findings and sanctions. Such appeal must be made before twenty-one days of the date of the decision letter. The director of student standards and accountability provides a copy of the appeal request by one party to the other party (parties) as appropriate.

(a) The university president or designee, of his or her own initiative, may direct that an appeals board be convened to review a conduct board or conduct officer decision without notice to the parties. However, the appeals board may not take any action less favorable to the accused student(s), unless notice and an opportunity to explain the matter is first given to the accused student(s).

(b) If the complainant or accused student and/or the student conduct officer or designee wish to explain their views of the matter to the appeals board they shall be given an opportunity to do so in writing.

(c) The appeals board shall make any inquiries necessary to ascertain whether the proceeding must be converted to a formal adjudicative hearing under the Administrative Procedure Act (chapter34.05 RCW).

(2) Except as required to explain the basis of new information, an appeal is limited to a review of the verbatim record of the university conduct board hearing and the conduct file for conduct board decisions or the conduct file for conduct officer decisions for one or more of the following purposes:

(a) To determine whether the university conduct board hearing was conducted fairly in light of the charges and information presented, and in conformity with prescribed procedures giving the complaining party a reasonable opportunity to prepare and to present information that the standards of conduct for students were violated, and giving the accused student a reasonable opportunity to prepare and to present a response to those allegations. Deviations from designated procedures are not a basis for sustaining an appeal unless significant prejudice results.

(b) To determine whether the decision reached regarding the accused student was based on substantial information, that is, whether there were facts in the case that, if believed by the fact finder, were sufficient to establish that a violation of the standards of conduct for students occurred.

(c) To determine whether the sanction(s) imposed were appropriate for the violation of the standards of conduct for students which the student was found to have committed.

(d) To consider new information, sufficient to alter a decision, or other relevant facts not brought out in the original hearing, because such information and/or facts were not known to the person appealing at the time of the original university conduct board hearing.

(3) The university appeals board shall review the record and all information provided by the parties and take one of the following actions:

(a) Affirm, reverse, or modify the conduct board's or conduct officer's decision;

(b) Affirm, reverse, or modify the sanctions imposed by the conduct board or conduct officer;

(c) Set aside the findings and sanctions or remand the matter back to the conduct board or conduct officer with instructions for further proceedings.

(4) The appeals board's decision shall be personally delivered, sent via regular U.S. mail, or electronically mailed to the student. Such decision shall be delivered or mailed to the last known address of the accused student(s) or electronically mailed to the student's official university electronic mail account. It is the student's responsibility to maintain a correct and updated address with the registrar. The university appeals board's decision letter is the final order and shall advise the student or recognized student organization that judicial review may be available. If the appeals board does not provide the student with a response within twenty days after the request for appeal is received, the request for appeal is deemed denied.

(5) The appeals board decision is effective as soon as the order is signed, except in cases involving expulsion or loss of recognition. In cases involving expulsion or loss of recognition, the appeals board decision is effective ten calendar days from the date the order is signed, unless the university president or designee provides written notice of additional review as provided in subsection (6) of this section.

(6) For cases involving expulsion or loss of recognition, the university president or designee may review a decision of the appeals board by providing written notice to the student or recognized student organization no later than ten calendar days from the date the appeals board decision is signed.

(a) This review is limited to the record and purposes stated in subsection (2) of this section.

(b) Prior to issuing a decision, the president or designee shall make any inquiries necessary to determine whether the proceeding should be converted into a formal adjudicative hearing under the Administrative Procedure Act (chapter 34.05 RCW).

(c) If the complainant or accused student and/or the student conduct officer or designee wish to explain their views of the matter to the president or designee, they shall do so in writing.

(d) The president or designee's decision is in writing, includes a brief statement of the reasons for the decision, and is issued within twenty calendar days after the date of the appeals board order. The decision becomes effective as soon as it is signed and includes a notice that judicial review may be available.

(7) Students may petition to delay the date that the final order of the university becomes effective by directing a petition to the chair of the appeals board, or the president or designee, as applicable, within ten calendar days of the date the order was personally delivered to the student or placed in the regular U.S. mail, or electronically mailed. The chair, or the president or designee, as applicable, shall have authority to decide whether to grant or deny the request.

(8) There is no further review beyond that of the findings of responsibility or outcomes assigned by university or college academic integrity hearing boards.

WAC 478-120-115
Formal hearings before the faculty appeal board.

(1) The faculty appeal board shall conduct a formal hearing when exceptional circumstances exist and the student has requested in writing a formal hearing. Additionally, the faculty appeal board may conduct a formal hearing in other circumstances as the board deems appropriate.

(2) Within thirty days after receipt of a written petition for a formal hearing before the faculty appeal board, the board shall notify the requesting party of any obvious errors or omissions in the party's petition, request any additional information the board wishes to obtain and is permitted by law to require, and notify the requesting party of the name, mailing address, and telephone number of an office or person who may be contacted regarding the formal hearing.

(3) Within ninety days after receipt of a written petition for formal hearing or within ninety days after the party's response to a timely request from the board as provided in subsection (1) of this section, the board shall either deny the formal hearing or commence the formal hearing.

(4) Once the board decides to conduct a formal hearing, the chair of the faculty appeal board shall schedule the time and place of the hearing and give not less than seven days advance written notice of the hearing to all parties. That notice shall include:

(a) The names and addresses of all parties to whom notice is being given, and if known, the names and addresses of their representatives;

(b) The name, business address, and telephone number of the person designated to represent the university at the hearing;

(c) The official file number and name of the proceeding;

(d) The name, mailing address, and telephone number of the chair of the faculty appeal board;

(e) A statement of the time, place, and nature of the hearing;

(f) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(g) A reference to the particular sections of university rules that are involved;

(h) A short and plain statement of the charges against the student; and

(i) A statement that a student who fails to attend the hearing or otherwise respond to this notice may lose his or her right to a formal hearing.

(5) If a student fails to attend or participate in a formal hearing, the faculty appeal board may serve upon all parties a default or other dispositive order which shall include a statement of the grounds for the order. Within seven days after service of a default order, the student may file a written motion requesting that the order be vacated, and stating the grounds relied upon.

(6) The student may be represented by counsel and/or be accompanied by an advisor of the student's choice. No student shall be compelled to give self-incriminating evidence.

(7) The chair shall determine whether discovery is to be available, and, if so, which forms of discovery may be used. The chair may condition the use of discovery procedures on a showing of necessity and unavailability by other means. In exercising such discretion, the chair shall consider:

(a) Whether all parties are represented by counsel;

(b) Whether undue expense or delay in bringing the case to a hearing will result;

(c) Whether the use of discovery will promote the orderly and prompt conduct of the proceeding; and

(d) Whether the interests of justice will be promoted.

The chair may decide whether to permit the taking of depositions, the requesting of admissions, or any other procedures authorized by rules 26 through 37 of the superior court rules.

(8) At appropriate stages of the hearing, the chair may give all parties an opportunity to submit and respond to briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders. To the extent necessary for a full disclosure of all relevant facts and issues, the chair shall afford both parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. A party filing a pleading, brief, or other paper with the chair shall serve copies on all other parties.

(9) Evidence, including hearsay evidence, is admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Evidence is not admissible if it is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The chair shall decide rulings on the admissibility of evidence, and the Washington rules of evidence shall serve as guidelines for those rulings.

(10) All testimony of parties and witnesses shall be made under oath or affirmation.

(11) The faculty appeal board may appoint an examiner to conduct the actual hearing. The decision to use a hearing examiner requires the approval of a majority of the board members. The hearing examiner will then conduct the hearing and submit a detailed report to the faculty appeal board according to the provisions of this section.

(a) If a hearing examiner conducts the hearing, an audio recording of the hearing must be kept, and the recording and any transcription thereof must be provided to the board.

(b) The faculty appeal board may, at its option, request the hearing examiner to provide recommendations as to findings, conclusions, and decisions, but those recommendations shall not be binding on the board. The hearing examiner shall transmit to the board the full and complete record of the hearing and the board shall make its own findings, conclusions, and decisions based on the record.

(c) The hearing examiner will make initial rulings on the use of discovery, the admissibility of evidence, and the procedures for the hearing.

(d) The hearing examiner must be a member of the bar. Any member of the faculty appeal board who is also a member of the bar, including the chair, may serve as the hearing examiner.

(12) The chair of the faculty appeal board may issue subpoenas and enter protective orders.

(13) Members of the faculty appeal board must avoid ex parte communications with any party involved in the hearing regarding any issue other than communications necessary to maintaining an orderly procedural flow to the hearing. Ex parte communications received by members of the board must be placed on the record, and the other party must be informed of the ex parte communication and given an opportunity to respond on the record.

(14) Findings, conclusions, and decisions by the faculty appeal board shall be based exclusively on the evidence of record from the hearing and on matters officially noted in the record.

(15) The board shall enter an initial order which shall be served in writing on the student within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings, whichever is later, unless the period is waived or extended for good cause shown. The student shall be informed of procedures for appealing the decision. If the student does not appeal the board's initial order within the time set out in WAC 478-120-075(1), the initial order of the board shall become the final order, except all orders of dismissal shall be reviewed by the president or the president's delegate.

(16) The chair shall maintain an official record of the hearing. The record shall contain those items specified in RCW 34.05.476.

WAC 478-120-030
General procedures for disciplinary sanctions.

(1) This section describes the general process under the student conduct code for enforcing the university's rules, regulations, procedures, policies, standards of conduct, and orders. The specific procedures to be used at each step of the process are described in the following sections of this chapter. In all situations, whether handled formally or informally, basic standards of fairness will be observed in the determination of:

(a) The truth or falsity of the charges against the student;

(b) Whether the alleged misconduct violates this code; and if so,

(c) The sanctions to be imposed, if any.

The criteria for judging student misconduct shall include, but not be limited to, the standards of conduct as stated in WAC 478-120-020 and 478-120-025. Informal hearings shall use the procedures in chapter 34.05 RCW governing brief adjudicative proceedings. Formal hearings conducted by the faculty appeal board shall follow the procedures required by chapter 34.05 RCW for formal adjudicative proceedings. Informal settlements may be conducted under the authority of RCW34.05.060.

(2) Persons who believe that a violation of the student conduct code has been committed should contact the vice-president for student life at the University of Washington Seattle campus, or the chancellor of the University of Washington Bothell or Tacoma campuses, whichever is appropriate.

(3) Only the vice-president for student life, the dean of the school or college at the University of Washington Seattle or, at the University of Washington Bothell and Tacoma campuses, the dean or director of the program in which a student is enrolled or the chancellors of the University of Washington Bothell and Tacoma campuses, may initiate disciplinary proceedings against a student under this code of conduct. (See WAC 478-120-050.) The deans, the vice-president for student life, or the chancellors of the University of Washington Bothell and Tacoma campuses may delegate the authority to initiate disciplinary proceedings consistent with this chapter to members of their staffs and to students. They may also establish student or student-faculty hearing bodies to advise or to act for them in disciplinary matters. The person initiating a disciplinary proceeding shall be referred to as the initiating officer.

(4) The initiating officer will begin a disciplinary proceeding by holding, or directing a member of his or her staff to hold, an informal hearing with the student charged with misconduct. Based on this informal disciplinary hearing, the initiating officer may choose to exonerate the student, dismiss the action, impose an appropriate sanction, and/or refer the matter to the appropriate university disciplinary committee. (See WAC 478-120-065.) If the initiating officer identifies a potential or existing exceptional circumstance, as defined in WAC 478-120-100 (3)(b)(i),

"Exceptional circumstances exist when:

(A) The sanction of dismissal has been recommended; or

(B) The student has been charged with hazing; or

(C) The sanction of restitution (in excess of three hundred dollars) has been recommended; or

(D) Suspension has been recommended," the matter shall be referred directly to the faculty appeal board. (See WAC 478-120-100.)

(5) Students have the right to appeal any sanction imposed at an informal hearing to the appropriate university disciplinary committee, except that when such sanction identifies an existing or potential exceptional circumstance as defined in WAC 478-120-100 (3)(b)(i), the matter shall be referred directly to the faculty appeal board.

(6) Any decisions of the university disciplinary committees may be appealed to the faculty appeal board. All decisions of the university disciplinary committees identifying existing or potential exceptional circumstances as defined in WAC 478-120-100 (3)(b)(i) shall be referred directly to the faculty appeal board. In addition, the university disciplinary committees may, at any time, at their discretion, refer a matter directly to the faculty appeal board. The faculty appeal board performs distinct functions. In most cases, the faculty appeal board conducts an administrative review. In certain cases (defined in WAC 478-120-100(3)), the faculty appeal board conducts a formal hearing.

(7) Any decision based on a formal hearing conducted by the faculty appeal board may be appealed to the president of the university or the president's delegate for a final review. All orders of dismissal shall be reviewed by the president or the president's delegate. Orders entered by the president or the president's delegate are final. (See WAC 478-120-125.)

(8) The president or delegate, or chancellors or their delegates, may take emergency disciplinary action when a student's conduct threatens the health, welfare, or safety of the university community or members thereof. (See WAC 478-120-140.)

(9) When questions of mental or physical health are raised in conduct cases, the dean, the vice-president for student life, the chancellors of the University of Washington Bothell and Tacoma campuses or their delegates, the university disciplinary committees, or the faculty appeal board may request the student to appear for examination before two physician-consultants designated by the dean of the school of medicine. The physician-consultants may call upon the student health center for any other professional assistance they deem necessary. After examining the student and/or consulting with the student's personal physician, the physician-consultants shall make a recommendation to the dean, the vice-president for student life, the chancellor of the University of Washington Bothell or Tacoma campuses, whichever is appropriate, or their delegates, the appropriate university disciplinary committee, or the faculty appeal board as to whether the case should be handled as a disciplinary matter or as a case for medical or other treatment. Any decision made based upon the recommendation of the physician-consultants may be appealed in accordance with the provisions of this chapter.

(10) The following persons conducting proceedings under this chapter shall have the authority to issue protective orders and subpoenas: Deans, or at the University of Washington Bothell and Tacoma campuses, the dean or director of the program in which the student is enrolled, the vice-president for student life, the chancellors of the University of Washington Bothell and Tacoma campuses, or the chairs of their respective university disciplinary committees, the chair of the faculty appeal board, and the president or his or her delegate.

(11) In a case involving an alleged sexual offense, the accuser and the accused are entitled to the same opportunities to have others present during a disciplinary hearing and they shall both be informed of the outcome of such disciplinary proceeding.

(12) Any final order resulting from a disciplinary proceeding shall become a part of the student's disciplinary record, unless the student is exonerated. (See WAC 478-120-145.)

(13) In accord with the Family Educational Rights and Privacy Act and pursuant to RCW34.05.250, all hearings conducted under this chapter generally will be held in closed session out of respect for the privacy of all the students involved. However, the students involved

may waive in writing this requirement and request a hearing in open session, and the initiating or presiding officer shall conduct the hearing in a room that will accommodate a reasonable number of observers. The initiating or presiding officer may exclude from the hearing room any persons who are disruptive of the proceedings and may limit the number who may attend the hearing in order to afford safety and comfort to the participants and orderliness to the proceedings.

APPENDIX

SELECTED SECTIONS OF MODEL ACT

UNIFORM LAW COMMISSIONERS' MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981)

ARTICLE I

GENERAL PROVISIONS

Section
1-101. [Short Title.]
1-102. [Definitions.]
1-103. [Applicability and Relation to Other Law.]
1-104. [Suspension of Act's Provisions When Necessary to Avoid Loss of Federal Funds or Services.]
1-105. [Waiver.]
1-106. [Informal Settlements.]
1-107. [Conversion of Proceedings.]
1-108. [Effective Date.]
1-109. [Severability.]

ARTICLE II

PUBLIC ACCESS TO AGENCY LAW AND POLICY

2-101. [Administrative Rules Editor; Publication, Compilation, Indexing, and Public Inspection of Rules.]
2-102. [Public Inspection and Indexing of Agency Orders.]
2-103. [Declaratory Orders.]
2-104. [Required Rule Making.]
2-105. [Model Rules of Procedure.]

ARTICLE III

RULE MAKING

Chapter 1

Adoption and Effectiveness of Rules

3-101. [Advice on Possible Rules before Notice of Proposed Rule Adoption.]
3-102. [Public Rule-making Docket.]
3-103. [Notice of Proposed Rule Adoption.]
3-104. [Public Participation.]
3-105. [Regulatory Analysis.]
3-106. [Time and Manner of Rule Adoption.]
3-107. [Variance between Adopted Rule and Published Notice of Proposed

Rule Adoption.]
3-108. [General Exemption from Public Rule-making Procedures.]
3-109. [Exemption for Certain Rules.]
3-110. [Concise Explanatory Statement.]
3-111. [Contents, Style, and Form of Rule.]
3-112. [Agency Rule-making Record.]
3-113. [Invalidity of Rules Not Adopted According to Chapter; Time Limitation.]
3-114. [Filing of Rules.]
3-115. [Effective Date of Rules.]
3-116. [Special Provision for Certain Classes of Rules.]
3-117. [Petition for Adoption of Rules.]

Chapter II

Review of Agency Rules

3-201. [Review by Agency.]
3-202. [Review by Governor; Administrative Rules Counsel.]
3-203. [Administrative Rules Review Committee.]
3-204. [Review by Administrative Rules Review Committee.]

ARTICLE IV

ADJUDICATIVE PROCEEDINGS

Chapter I

Availability of Adjudicative Proceedings; Applications; Licenses

4-101. [Adjudicative Proceedings; When Required; Exceptions.]
4-102. [Adjudicative Proceedings; Commencement.]
4-103. [Decision Not to Conduct Adjudicative Proceeding.]
4-104. [Agency Action on Applications.]
4-105. [Agency Action Against Licensees.]

Chapter II

Formal Adjudicative Hearing

4-201. [Applicability.]
4-202. [Presiding Officer, Disqualification, Substitution.]
4-203. [Representation.]
4-204. [Pre-hearing Conference-Availability, Notice.]
4-205. [Pre-hearing Conference-Procedure and Pre-hearing Order.]

4-206. [Notice of Hearing.]
4-207. [Pleadings, Briefs, Motions, Service.]
4-208. [Default.]
4-209. [Intervention.]
4-210. [Subpoenas, Discovery and Protective Orders.]
4-211. [Procedure at Hearing.]
4-212. [Evidence, Official Notice.]
4-213. [Ex parte Communications.]
4-214. [Separation of Functions.]
4-215. [Final Order, Initial Order.]
4-216. [Review of Initial Order; Exceptions to Reviewability.]
4-217. [Stay.]
4-218. [Reconsideration.]
4-219. [Review by Superior Agency.]
4-220. [Effectiveness of Orders.]
4-221. [Agency Record.]

Chapter III

Office of Administrative Hearings

4-301. [Office of Administrative Hearings-Creation, Powers, Duties.]

Chapter IV

Conference Adjudicative Hearing

4-401. [Conference Adjudicative Hearing-Applicability.]
4-402. [Conference Adjudicative Hearing-Procedures.]
4-403. [Conference Adjudicative Hearing-Proposed Proof.]

Chapter V

Emergency and Summary Adjudicative Proceedings

4-501. [Emergency Adjudicative Proceedings.]
4-502. [Summary Adjudicative Proceedings-Applicability.]
4-503. [Summary Adjudicative Proceedings-Procedures.]
4-504. [Administrative Review of Summary Adjudicative Proceedings-Applicability.]
4-505. [Administrative Review of Summary Adjudicative Proceedings-Procedures.]
4-506. [Agency Record of Summary Adjudicative Proceedings and Administrative Review.]

§ 4-105. [Agency Action Against Licensees].

An agency may not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice and an opportunity for an appropriate adjudicative proceeding in accordance with this Act or other statute. This section does not preclude an agency from (i) taking immediate action to protect the public interest in accordance with Section 4-501 or (ii) adopting rules, otherwise within the scope of its authority, pertaining to a class of licensees, including rules affecting the existing licenses of a class of licensees.

COMMENT

This is adapted from the 1961 Revised Model Act, Section 14(c) regarding license revocation, suspension, etc.

The final clause of this section is intended to prevent any conflict between this section and the definition of "rule" in Section 1-102(10). As indicated in the Comment to the definition, "licensing determinations of general applicability, that is, addressed to all members of a class by description, are 'rules' subject to the rule-making provisions of this statute." The approach taken here is consistent with American Airlines, Inc. v. C.A.B., 359 F.2d 624 (D.C.Cir.1966), certiorari denied 385 U.S. 843 (1966) and Air Line Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960). While rules amending the licenses of a class of licensees are covered by the rule making provisions of this Act, conversion of the proceedings from rule making to adjudication could be considered in appropriate situations; on conversion, see Section 1-107 and Comments.

CHAPTER II

FORMAL ADJUDICATIVE HEARING

§ 4-201. [Applicability].

An adjudicative proceeding is governed by this chapter, except as otherwise provided by:

(1) a statute other than this Act;

(2) a rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this Act for those proceedings;

(3) Section 4-501 pertaining to emergency adjudicative proceedings; or

(4) Section 2-103 pertaining to declaratory proceedings.

COMMENT

This section declares the formal hearing to be required in all adjudicative proceedings, except where otherwise provided by statute, agency rule pursuant to this Act, the emergency provisions of this Act, or Section 2-103 on declaratory proceedings.

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 1-105 and 1-106. However, a person who requests agency action without expressly requesting the agency to conduct appropriate proceedings will not be regarded, on that account, as having waived the appropriate procedures; see Section 4-102(c) and Comment.

The 1961 Revised Model Act described a single type of adjudicative hearing-the contested case (sections 9 to 14). This is a type of proceeding that is generally described as "formal," involving the presentation of evidence, cross-examination and rebuttal in a manner similar to non-jury trials, with the requirement that the decision be based exclusively upon the evidence of record.

The 1961 Revised Model Act made passing reference to other possible types of adjudication. Section 9(d) permitted "informal disposition" of any contested case by "stipulation, agreed settlement, consent order, or default," Section 2(a)(2) required each agency to adopt rules of practice setting forth "the nature and requirements of all formal and informal procedures available." These provisions obviously did not establish any procedural framework for adjudicative proceedings of any type other than the "formal" contested case.

This Act, by contrast, establishes three procedural models for adjudication. The first, called "formal adjudicative hearing," is an elaborate but generally recognizable development of the "contested case" of the Model Act. The other two models are new. They are called, respectively, "conference adjudicative hearing" and "summary adjudicative proceedings." In addition, emergency adjudication is authorized when necessary.

The notion of establishing more than one model adjudicative procedure is found in some of the more recent state acts, including Delaware, Florida, Montana and Virginia; see Comment to Section 4-102. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. A recent example is S. 2147, Cong.Record Dec. 18, 1979 at S 19039. See also 31 Ad.L.Rev. 31, 47 (1979). A justification for providing a variety of procedures is that, without them, many agencies will either attempt to obtain enactment of statutes to establish procedures specifically designed for such agencies, or proceed "informally" in a manner not spelled out by any statute. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel and reviewing courts, as well as for lawyers. These results have already happened, to a considerable extent, at the federal level. The number of available procedures in the administrative procedure act should not, however, be so large as to make the act too complicated or to create uncertainty as to which type of procedure is applicable. This Act establishes three basic types of adjudicative procedure, as a proposed middle ground between the approach taken by the 1961 Revised Model Act with a formal hearing only, and other theoretical alternatives that could establish large numbers of models.

§ 4-202. [Presiding Officer, Disqualification, Substitution].

(a) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to

One consequence of determining who shall preside is provided in Sections 4-215 and 4-216. According to Section 4-215, if the agency had presides, the agency head shall issue a final order. If any other presiding officer presides, an initial order must be rendered. Section 4-216 establishes the general appealability of initial orders to the agency head, unless otherwise prescribed by a provision of law.

Section 4-202 deals also with the disqualification of individual presiding officers and the appointment of substitutes for individuals who become unavailable for any reason.

§ 4-203. [Representation].

(a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by law, other representative.

COMMENT

This section provides detail not found in the 1961 Revised Model Act.

The right to "participate in person" would be satisfied either by physical presence at a single place by all participants, or by the use of telephone, television or other electronic means as provided by Sections 4-205(a) and 4-211(4).

The right of a corporation or other artificial person to participate as a party by a "duly authorized representative" is intended to permit a corporation to participate by either an attorney or a non-attorney, unless participation by a non-attorney violates state law regarding the unauthorized practice of law, in which case the non-attorney would not a be a "duly authorized" representative.

Subsection (b) guarantees to each party the right to be advised and represented, at the party's expense. This subsection incorporates other laws of the state, regarding the extent if any to which nonlawyers may perform the functions of advice and representation. Thus this Act is not a source of authority for nonlawyers to advise or represent parties to agency proceedings, neither does this Act prohibit such functions by nonlawyers if other law confers permission.

§ 4-204. [Pre-hearing Conference-Availability, Notice].

The presiding officer designated to conduct the hearing may determine, subject to the agency's rules, whether a pre-hearing conference will be conducted. If the conference is conducted:

(1) The presiding officer shall promptly notify the agency of the determination that a pre-hearing conference will be conducted. The agency shall assign or request the office of administrative hearings to assign a presiding officer for the pre-hearing conference, exercising the same discretion as is provided by Section 4-202 concerning the selection of a presiding officer for a hearing.

detail.

The distinction between subsections (a) and (b) deserves emphasis. If a party satisfies the standards of subsection (a), the presiding officer shall grant the petition to intervene. In situations not qualifying under subsection (a), the presiding officer may grant the petition to intervene upon making the determination described in subsection (b).

Paragraph (a)(2) confers standing upon a petitioner to intervene, as of right, upon demonstrating that the petitioner's "legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding . . ." However, paragraph (a)(3) imposes the further limitation, that the presiding officer shall grant the petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings upon the legal rights, etc. of the petitioner for intervention, paragraph (a)(2), against the interests of justice and the need for orderly and prompt proceedings, paragraph (a)(3).

Subsection (c), authorizing the presiding officer to impose conditions upon the intervener's participation in the proceedings, is intended to permit the presiding officer to facilitate reasonable input by interveners, without subjecting the proceedings to unreasonably burdensome or repetitious presentations by intervenors.

By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, subsection (d) is intended to give the parties and the petitioners for intervention an opportunity to prepare for the adjudicative proceedings or, if the order was unfavorable, to seek judicial review on an expedited basis before the hearing commences.

§ 4-210. [Subpoenas, Discovery and Protective Orders].

(a) The presiding officer [at the request of any party shall, and upon the presiding officer's own motion,] may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure.

(b) Subpoenas and orders issued under this section may be enforced pursuant to the provisions of this Act on civil enforcement of agency action.

COMMENT

The 1961 Revised Model Act did not address this matter.

The parties to whom this section applies include intervenors. Their participation, including their use of subpoenas and discovery, may be limited by conditions attached to the order granting intervention as provided by Section 4-209(c) and (d).

§ 4-211. [Procedure at Hearing].

At a hearing:

(1) The presiding officer shall regulate the course of the proceedings in conformity with any pre-hearing

order.

(2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(3) The presiding officer may give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

(4) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(5) The presiding officer shall cause the hearing to be recorded at the agency's expense. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption.

(6) The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

COMMENT

This is a greatly expanded treatment of procedures that were briefly addressed in the 1961 Revised Model Act, portions of Sections 9 and 10.

Participation by non-parties, paragraph (3), is adapted from the Florida Act, Section 120.57(1)(b) 4.

Telephone, television, or other electronic means may be used; see Comments to Section 4-205.

The hearing is open to public observation unless otherwise provided by law, paragraph (6). This provision may have to be aligned with general laws on open meetings.

On the opportunity to "see the entire proceeding" if it is conducted by telephone, television or other electronic means, refer to Comment to Section 4-205.

As an alternative to receiving a statement from a nonparty, the presiding officer may, within the general power to regulate the course of the proceedings, suggest that the nonparty file a petition for intervention; see Section 4-209.

§ 4-212. [Evidence, Official Notice].

(a) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence. Evidence may not be excluded solely because it is hearsay.

(b) All testimony of parties and witnesses must be made under oath or affirmation.

(c) Statements presented by nonparties in accordance with Section 4-211(3) may be received as evidence.

(d) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

(e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.

(f) Official notice may be taken of (i) any fact that could be judicially noticed in the courts of this State, (ii) the record of other proceedings before the agency, (iii) technical or scientific matters within the agency's specialized knowledge, and (iv) codes or standards that have been adopted by an agency of the United States, of this State or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.

COMMENT

This is an adaptation of the 1961 Revised Model Act Section 10, regarding the admissibility of evidence. Separate treatment is devoted, in Section 4-215(d) of this Act, to the type of evidence that may support a finding of fact.

Section 4-212(a) prohibits the exclusion of evidence solely because it is hearsay. This is consistent with Section 4-215(d), which rejects the requirement that findings must be supported by a "residuum" of legally admissible evidence.

Section 4-212(e) requires that parties be given an opportunity to compare a copy with the original, "if available." If the original is not available, the copy may still be received in evidence, but its probative effect is likely to be weaker than if the original were available.

§ 4-213. [Ex parte Communications].

(a) Except as provided in subsection (b) or unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided

candidates will be considered for employment, and the manner in which public notice of vacancies in the staff of the office will be given;

(2) to establish procedures for agencies to request and for the director to assign administrative law judges; however, an agency may neither select nor reject any individual administrative law judge for any proceeding except in accordance with this Act;

(3) to establish procedures and adopt forms, consistent with this Act, the model rules of procedure, and other provisions of law, to govern administrative law judges;

(4) to establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges; and

(5) to facilitate the performance of the responsibilities conferred upon the office by this Act.

(f) The director may:

(1) maintain a staff of reporters and other personnel; and

(2) implement the provisions of this section and rules adopted under its authority.

COMMENT

The 1961 Revised Model Act did not discuss the possibility of creating an independent organization of administrative law judges. A number of states have such systems, including California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, Tennessee and Washington. The question whether the use of administrative law judges from the central panel is permissive or mandatory depends upon whether or not a state adopts certain language that is bracketed in Section 4-202(a); see that subsection and the related comment.

This Act uses the term "administrative law judge," which is used in a number of state statutes as well as in the Federal APA. Some jurisdictions use other terms, such as "hearing examiner," "hearing officer" or "referee," to denote persons performing similar functions.

Cross-reference should be made to Sections 4-215 and 4-216, regarding the powers of administrative law judges when they preside over formal adjudicative proceedings. Since the administrative law judges are obviously not the agency head, they come within the requirements of Section 4-215(b), to the effect that a presiding officer who is not the agency head shall render an initial order. Such orders are generally appealable to the agency head, under Section 4-216(a), but a provision of law may depart from this general structure. Consequently, a provision of law may confer finality upon the initial order of an administrative law judge, or may declare an initial order to be appealable to one or more persons other than the agency head.

The provisions on initial orders and final orders of Sections 4-215 and 4-216 apply also to conference adjudicative hearings, since Section 4-402 incorporates into the conference adjudicative hearing all procedures of the Act pertaining to formal hearings unless otherwise stated, and no special provisions have been inserted

regarding presiding officers at conference adjudicative hearings.

Administrative law judges may also preside at summary adjudicative proceedings, pursuant to Section 4-503(a). As regards emergency adjudication, Section 4-501 does not specify who may serve as presiding officer. Thus the Act does not preclude the use of an administrative law judge in such proceedings, if this would fulfill the requirement of subsection (b) that the agency take "only such action as is necessary."

The present section locates the office of administrative hearings within the "Department of _____" without attempting to identify the appropriate department. The intent is to place the office in the most neutral possible organizational position, so as to maximize the independence of the office.

The power conferred upon the office of administrative hearings by paragraph (e)(4), to establish standards and procedures for the evaluation, training, promotion and discipline of administrative law judges, should be related to the civil service law of the state.

CHAPTER IV

CONFERENCE ADJUDICATIVE HEARING

§ 4-401. [Conference Adjudicative Hearing-Applicability].

A conference adjudicative hearing may be used if its use in the circumstances does not violate any provision of law and the matter is entirely within one or more categories for which the agency by rule had adopted this chapter [; however, those categories may include only the following:

(1) a matter in which there is no disputed issue of material fact; or

(2) a matter in which there is a disputed issue of material fact, if the matter involves only:

(i) a monetary amount of not more than [$1,000];

(ii) a disciplinary sanction against a prisoner;

(iii) a disciplinary sanction against a student which does not involve expulsion from an academic institution or suspension for more than [10] days;

(iv) a disciplinary sanction against a public employee which does not involve discharge from employment or suspension for more than [10] days;

(v) a disciplinary sanction against a licensee which does not involve revocation, suspension, annulment, withdrawal, or amendment of a license; or

(vi) . . . .]

COMMENT

(f) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(g) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

COMMENT

This authorizes summary proceedings for emergencies, a matter not addressed in the 1961 Revised Model Act. This section is adapted from the Florida Act, Section 120.59(3).

If the emergency proceedings have rendered the matter completely moot, subsection (e) does not direct the agency to conduct useless follow-up proceedings, since these would not be "required" in the circumstances; see Comment to Section 4-104.

Subsection (f) requires the agency to maintain an official agency record, consisting of any documents that were considered or prepared by the agency in the emergency proceedings. However, subsection (g) states that, unless required by another provision of law, this agency record need not constitute the exclusive basis, either for the agency action in the emergency or for judicial review. The agency thus has flexibility to act on the basis of non-record information, and to render its order orally, if necessary to cope with the emergency.

If the emergency adjudicative order is issued orally, a person seeking judicial review of the order must set forth, in the petition for review, a summary or brief description of the agency action; see Section 5-109. See also Sections 5-113, 114 and 115 on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

§ 4-502. [Summary Adjudicative Proceedings-Applicability].

An agency may use summary adjudicative proceedings if:

(1) the use of those proceedings in the circumstances does not violate any provision of law;

(2) the protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties; and

(3) the matter is entirely within one or more categories for which the agency by rule has adopted this section and Sections 4-503 to 4-506 [; however, those categories may include only the following:

(i) a monetary amount of not more than [$100];

(ii) a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner, student, public employee, or licensee;

(iii) the denial of an application after the applicant has abandoned the application;

(iv) the denial of an application for admission to an educational institution or for employment by an agency;

(v) the denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with Section 4-504;

(vi) a matter that is resolved on the sole basis of inspections, examinations, or tests;

(vii) the acquisition, leasing, or disposal of property or the procurement of goods or services by contract;

(viii) any matter having only trivial potential impact upon the affected parties; and

(ix) .....]

COMMENT

This section imposes three conditions on the use of the summary adjudicative proceeding. First, the use of this type proceeding in the circumstances must not violate any provision of law.

The second condition on the use of the summary adjudicative proceeding is that protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties. This condition overlaps with the first condition, in situations where a provision of law other than this Act requires the agency to give such notice and opportunity, since the requirement is then imposed, both by a provision of law (thereby violating condition No. 1) and by the needs of the public interest as expressed by the provision of law (thereby violating the public interest test of condition No. 2). But even if no provision of law requires that notice and an opportunity to participate be given to persons other than parties, the second condition would be violated if the agency failed to give but should have given such notice and opportunity, on the basis of the agency's own perception of the needed protection of the public interest. A dispute on this matter would ultimately be resolved by judicial review. The notion that the protection of the public interest may require notice and an opportunity to participate to be given to persons other than the parties is adapted from the Delaware Act, Section 6424, which uses the term "matter of general public interest" in a somewhat similar context.

The third condition is that the matter must be entirely within one or more of the categories for which the agency has by rule adopted the summary adjudicative proceeding. A series of bracketed categories suggests the situations for which an agency may by rule adopt the summary adjudicative proceeding.

On the possibility of overlap between the availability of the summary adjudicative proceeding and the availability of the conference adjudicative hearing, see Comment to Section 4-401.