Judicial Council Administrative Procedure Advisory Committee
Report to the Special Committee on the Judiciary
November 1, 2007

Introduction: The Administrative Procedure Advisory Committee is grateful for the opportunity to present its views concerning the important issues surrounding the relationship between the Office of the Administrative Hearings and administrative agencies.[1] 2007 SB 351 and the related topics assigned to the Special Committee on the Judiciary raise fundamental questions concerning the proper balance between agency control of policy and hearing officer independence in adjudications under the Kansas Administrative Procedure Act (KAPA). On August 28, 2007, the advisory committee presented written and oral testimony to the Special Committee on the Judiciary, in which the advisory committee made four key recommendations:

1. Agency heads should retain the option to hear cases that the agency considers to present important policy issues or to require agency expertise for resolution.
2. Agencies should have the capacity to reverse a hearing officer decision in order to make policy and ensure the consistency of decisions with agency policy.
3. Abuse by agencies should be constrained by enhanced judicial review of reasoned decision-making where an agency has reversed a hearing officer; and
4. Consideration should be given to strengthening the separation of functions provisions of KAPA.

These recommendations reflected the advisory committee's effort to strike a balance between the agency's need to control policy and the interests in a fair and impartial hearing when agency adjudication affects private rights. This balance is a difficult one because there are powerful arguments reflecting fundamental principles on both sides.

In light of other testimony presented at the hearing and questions that arose in connection with the advisory committee's oral testimony, the Committee on the Judiciary asked the advisory committee to consider the separation of functions issue and report back to the Committee on the Judiciary with more specific proposals. In addition, attention turned to the burden of proof in agency hearings, particularly those involving suspension or revocation of occupational licenses. Given the importance of occupational licenses, it was suggested by some legislators that a "preponderance of the evidence" standard was too low and provided insufficient protection for the license-holder. The Committee on the Judiciary requested the advisory committee to look into this issue as well. The advisory committee addressed these questions at its next meeting on October 19, 2007, and this report reflects the results of that discussion.

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[1] This Report has been prepared and is presented on behalf of the advisory committee by Professor Richard E. Levy of the University of Kansas School of Law. Professor Levy's affiliation is noted for identification purposes only and his statements do not represent the views of the University of Kansas or the School of Law. The Report was submitted to the Judicial Council for review and approval at its meeting on November 30, 2007, and the Council directed that the statutory changes recommended herein be proposed as amendments to the bill that will be introduced by the Special Committee on Judiciary in the 2008 session.

Based on its deliberations and in response to the Committee on the Judiciary's request, the advisory committee's recommendations have been revised and expanded as follows:

1. Agency heads should retain the option to hear cases that the agency considers to present important policy issues or to require agency expertise for resolution.
2. Agencies should have the capacity to review a hearing officer decision in order to make policy and ensure the consistency of decisions with agency policy.
3. Abuse by agencies should be constrained by enhanced judicial review of reasoned decision-making where an agency has reversed a hearing officer;
4. The separation of functions and ex parte communication provisions of KAPA should be strengthened so as to preclude investigatory or prosecutorial personnel from having any involvement with the adjudicatory process; and
5. For disciplinary actions in occupational and professional licensure cases involving individuals, the burden of proof should be by "clear and convincing" evidence.

The advisory committee believes that these recommendations best accommodate the competing interests of agency control and individual rights. The remainder of this Report discusses the rationale for the advisory committee's recommendations. An appendix proposes specific amendments to relevant statutes that would implement the recommendations. The Report and appendix incorporate some portions of the written testimony presented on August 28, 2007.

Rationale for Recommendations: The structure and process of agency adjudication represents a balance that may range along a spectrum from very strong agency control to complete adjudicatory independence. In practice, the balance of agency control and adjudicatory independence is affected by several features of the administrative process, including (1) the extent to which the agency, rather than the Office of Administrative Hearings may conduct an adjudication; (2) whether and with what degree of deference the agency may review the decision of a hearing officer in the Office of Administrative Hearings; (3) how the courts review agency decisions that reverse the decision of a hearing officer in the Office of Administrative Hearings; (4) separation of functions within agencies; and (5) the agency's burden of proof.

Agency control over administrative adjudication reflects the agency's delegated authority and responsibility to implement statutory policy. The Legislature makes basic regulatory policy, but for important practical considerations of expertise and efficiency, delegates the implementation of that policy to agencies. While the basic policy is set by statute, moreover, the Legislature cannot foresee and resolve every policy issue that may arise in the implementation of the regulatory regime. Thus, implicit in the delegation of regulatory authority to an agency is the responsibility to resolve the countless subsidiary policy issues that arise under any statutory scheme. Agencies can and do resolve important policy issues through regulations, but no matter how specific the regulations, there will be policy questions that remain to be resolved on a case by case basis through adjudication. If the head of an agency can neither conduct a hearing nor review decisions made by independent hearing officers in the Office of Administrative Hearings, these subsidiary policy decisions will be made by the hearing officers or the courts (when they

review hearing officer decisions), rather than by the agency. Even when policy issues are not involved, agency expertise may be essential to the evaluation of the evidence.

On the other side of the coin, however, are fundamental issues of fairness, because the agency also may act as a party to the case. It is a basic principle of due process that no person should be judge in his or her own cause. Yet in many statutory schemes, the agency has a dual role. The problem is most pronounced in situations like disciplinary hearings when the agency acts as a prosecutor as well as an adjudicator. But it is also present in other circumstances, such as benefit decisions. This inherent conflict may affect decisions without the agency head being aware of it, even when the agency head is trying to be fair. It is only natural to see things from the agency perspective. In this regard, perception is also important, and the appearance of a conflict deepens mistrust of the administrative process and leads to dissatisfaction with adverse outcomes. Nonetheless, it is also important to bear in mind that administrative adjudication is not the same thing as a trial, and the adversarial model of traditional judicial proceedings is not applicable to many forms of agency adjudication.

States have adopted a variety of responses to this delicate balance, ranging from giving agencies complete control over adjudication to making hearing officers independent and precluding agency review.[2] In practice, most states come down somewhere in the middle, accommodating the competing concerns through some kind of compromise. Currently, Kansas law provides agencies with very strong tools to control adjudication. Although adjudication by agency employees is being phased out, the agency head retains the option to adjudicate a case itself or to review the decisions of independent hearing officers "de novo," which means that the agency is free to decide the case without deferring to the hearing officer. Moreover, when the agency does reverse a hearing officer, the Kansas courts' approach to judicial review affords the hearing officer's decision little weight, notwithstanding the officer's ability to observe the witnesses.[3] As will be discussed more fully below, under the Kansas Supreme Court's approach to the "substantial evidence" standard of review, courts should consider only the evidence in the record that favors the agency decision, and disregard contrary evidence.[4] In addition, while separation of functions is required under Kansas Supreme Court precedent,[5] the contours of this requirement are unclear because it is not explicitly or adequately addressed in KAPA.

The advisory committee has considered and discussed these issues at some length and, while there are some differences in view, it reached a nearly unanimous consensus that while the head of an agency must have sufficient control over adjudication to make and implement agency policy, increased protection for parties to agency adjudication should be provided through

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[2] Two fairly recent articles by the same author provide a useful compendium and summary of state approaches to these issues. *See* James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 Ind. L. Rev. 401 (2005); James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 Admin. L. Rev. 1355, 1382-85 (2002).

[3] *See*, *e.g.*, Tire Disposal Facilitators, Inc. v. State ex rel. Harder, 22 Kan.App.2d 491, 919 P.2d 362 (Kan. Ct. App. 1996).

[4] *See*, *e,g.*, Blue Cross and Blue Shield of Kansas v. Praeger, 276 Kan. 232, 263, 75 P.3d 226, 246 (2003) ("[T]he courts are not concerned with evidence contrary to the agency findings but must focus solely on evidence in support of the findings.")

[5] Pork Motel, Corp v. Kansas Department of Health and Environment, 234 Kan. 374, 383 (1983).

reforms to judicial review under the substantial evidence standard, enhanced separation of functions requirements, and requiring a higher burden of proof for agency action in certain cases.

1. Agency heads should retain the option to hear cases that the agency considers to present important policy issues or to require agency expertise for resolution.

As discussed above, many cases decided by agencies present important policy issues whose resolution has been delegated to the agency under statutory provisions. When a policy is clearly established through statutory provisions, administrative regulations, and/or agency precedents, the resolution of disputed facts and the application of established policies can be performed by independent hearing officers in the Office of Administrative Hearings without compromising the agency's policymaking responsibilities and expertise. But some types of decisions, such as rate setting or resolution of previously unresolved issues, involve important policy decisions that should be resolved by the agency. In addition, some adjudications involve matters best resolved in the first instance through application of the agency's technical expertise. For these reasons, the agency (or one or more members of a multi-member board) should retain the option of hearing such cases itself.

2. Agencies should have the capacity to review a hearing officer decision in order to make policy and ensure the consistency of decisions with agency policy.

Even if a particular case does not present policy issues of sufficient moment to warrant adjudication by an agency head, the decision applies policy and that application may be unclear on the facts or the implications of the evidence may be unclear to hearing officers lacking expertise. If agencies cannot review hearing officer decisions (or if that review is too constrained) the agency loses its ability to make and enforce policy decisions and to apply its expertise in the evaluation of the facts. A majority of the advisory committee believes that review should remain de novo, but there is some support for limiting review of what have been variously referred to as "basic", "judicial" or "historical" facts, by which is meant "who did what to whom, where, when, and why" kinds of facts that are typically within the experience and knowledge of witnesses involved in the events. With respect to such factual determinations, the hearing officer's opportunity to view the demeanor of the witnesses is important, the policy implications are minimal, and there is less need for agency expertise. Thus, limiting agency review of these facts is arguably more important for considerations of fairness and less likely to interfere with agency policy than other kinds of facts (sometimes called "legislative facts") that relate more to policy judgments and are typically generated through expert testimony, scientific investigation, and statistical data. The advisory committee believes that the draft Revised Model State Administrative Procedure Act[6] takes a reasonable approach to this problem and recommends the addition of language to K.S.A. 77-527(d) from the model act. A draft amendment reflecting this recommendation is included in the appendix to this Report.

[6] Nat'l Conf. of Commissioners on Uniform State Laws, Revised Model State Administrative Procedure Act § 418(e) (Draft), at http://www.law.upenn.edu/bll/archives/ulc/msapa/2007annualmeeting_draft.htm#_Toc170030717.

3. Abuse by agencies should be constrained by enhanced judicial review of reasoned decision-making where an agency has reversed a hearing officer.

At the federal level, the relationship between the hearing officer and agency decisions is addressed through judicial review. In particular, the courts recognize that the decision of the hearing officer (called an administrative law judge or "ALJ") is part of the record considered by the court on judicial review. The courts have developed special rules for judicial review in these circumstances and those rules focus on the reasons given for the agency decision, with special attention to the reasons for reversing the ALJ. In particular, the agency must have especially good reasons for reversing credibility determinations when those determinations are based on the opportunity to observe the witnesses because the ALJ observes the witnesses and the agency does not. This approach allows the agency to control policy while at the same time limiting the ability of the agency to reverse the ALJ for no good reason.

In Kansas, however, the courts' approach to the substantial evidence standard has prevented the development of similar rules. Because reviewing courts are instructed to disregard contrary evidence in the record and focus solely on the evidence that supports the agency findings,[7] the hearing officer's contrary decision carries little or no weight on judicial review. This approach is a significant departure from the historical understanding of the requirement that an agency decision be supported by substantial evidence ***in light of the record as a whole***, which includes consideration of the contrary evidence in the record and specifically treats a hearing officer's decision as part of that record.[8] The advisory committee believes that addressing this approach to the substantial evidence standard is the best means of accommodating the competing concerns at issue because careful judicial review of the agency's reasons for reversing a hearing officer's decision reinforces the importance of the neutral hearing officer's factual findings – particularly credibility determinations based on the opportunity to view the witnesses– without impairing the agency's legitimate policy making functions.

Once again, the draft Revised Model State Administrative Procedure Act takes a reasonable approach to these issues, both clarifying the substantial evidence standard and explicitly addressing the role of the hearing officer's decision. The language in the draft is consistent with the historical understanding of the substantial evidence standard and strikes an appropriate balance between protecting the independent factual findings of a hearing officer and preserving the agency's role as the entity to which the Legislature delegated policy-making authority. Proposed amendments to K.S.A. 77-621 reflecting this recommendation are included in the appendix to this Report.

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[7] *See* Blue Cross and Blue Shield of Kansas v. Praeger, 276 Kan. 232, 263, 75 P.3d 226, 246 (2003), Kaufman v. State Department of Social and Rehabilitation Services, 248 Kan. 951, 962, 811 P.2d 876, 884 (1991); *In re* Andover Antique Mall, L.L.C., 33 Kan. App. 3d 199, 207-08, 99 P.3d 1117, 1124 (Kan. Ct. App. 2004).

[8] *See generally*, Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 Kansas Bar Association Journal 22, 27-29 (June/July 1995).

4. The separation of functions and ex parte communication provisions of KAPA should be strengthened so as to preclude investigatory or prosecutorial personnel from having any involvement with the adjudicatory process.

The most troubling situation, from a fundamental fairness perspective, is when agency personnel who act in an investigatory, prosecutorial or adversarial capacity are also involved in the adjudication by the agency. Thus, for example, it is problematic for agency personnel who prosecute a license revocation case before a hearing officer to later serve in an advisory capacity to the agency head who considers the appeal from the hearing officer decision. At the federal level, this issue is addressed through strict separation of functions requirements, as well as the prohibition of ex parte communications. Currently, neither K.S.A. 77-514, which governs the presiding officer in hearings, nor the ex parte communications prohibition in K.S.A. 77-525, offer comparable protections. K.S.A. 77-514 does not contain any separation of functions requirement. K.S.A. 77-525 prohibits communications relating to the merits between the presiding officer and "any party or participant, with any person who has a direct or indirect interest in the outcome of the proceeding or with any person who presided at a previous stage of the proceeding." This language would appear to permit the agency head, while serving as presiding officer, to communicate with agency personnel who had investigatory or prosecutorial roles. The advisory committee recommends the addition of a separation of functions requirement to K.S.A. 77-514 and the expansion of the prohibition on ex parte communications to prohibit intra-agency communications between presiding officers and investigatory or prosecutory personnel. Specific amendments to K.S.A. 77-514 and K.S.A. 77-525 reflecting this recommendation are included in the appendix to this Report.

5. For disciplinary actions in occupational and professional licensure cases involving individuals, the burden of proof should be by "clear and convincing" evidence.

One concern that emerged at the hearing in August was that the preponderance of the evidence standard provided insufficient protection for defendants in disciplinary cases whose occupational or professional licenses are at stake. Under the preponderance standard, the agency can revoke or suspend a license if the weight of the evidence is only slightly in favor of such action. Although the standard is sometimes stated as requiring that the evidence favor the agency by 51% to 49%, the standard turns on the quality rather than the quantity of the evidence and cannot be measured that precisely. The preponderance standard interacts with the standard of judicial review to make it extremely difficult to challenge agency factual findings. The evidence in the record need only be sufficiently "substantial" to support the agency's determination that the preponderance of the evidence supports disciplinary action. In some professional licensure cases, such as attorney disciplinary actions, a higher standard is employed: the "clear and convincing" evidence standard. After extended discussion, the advisory committee determined that the application of the clear and convincing evidence standard should be extended to all disciplinary actions concerning occupational and professional licenses of individuals. These licenses are of vital importance to the individual; they represent a substantial

investment of time, energy, and resources and are a prerequisite to the individual's pursuit of a chosen profession. In light of these factors, it is not unreasonable to expect that strong evidence should be presented before disciplinary action is taken against such licenses. At the same time, the advisory committee believes that similar concerns do not apply to license applications or to other kinds of licenses, as that term is broadly defined under the Kansas Administrative Procedure Act. A proposed amendment to K.S.A. 77-512 reflecting this recommendation is included in the appendix to this Report.

Appendix: Proposed Amendments

To implement the recommendations discussed in this report, the advisory committee proposes amendments to several provisions of the Kansas Administrative Procedure Act and the Kansas Judicial Review Act, which are set forth below. The provisions are in the order that they appear in the Kansas Statutes Annotated and are followed by brief comments explaining the amendment and tying it to the recommendation it implements. In some sections, immaterial provisions have been omitted to save space.

77-512. Orders affecting licensure; requirements.

(a) A state agency may not revoke, suspend, modify, annul, withdraw, refuse to renew, or amend a license unless the state agency first gives notice and an opportunity for a hearing in accordance with this act. This section does not preclude a state agency from (a) taking immediate action to protect the public interest in accordance with K.S.A. 77-536, and amendments thereto, or (b) adopting rules and regulations, otherwise within the scope of its authority, pertaining to a class of licensees, including rules and regulations affecting the existing licenses of a class of licensees.
(b) Unless otherwise provided by law, the burden of proof for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual shall be by clear and convincing evidence.

Comment: This amendment implements recommendation 5 by making the clear and convincing evidence standard applicable in disciplinary licensing cases.

77-514. Presiding officer.

(a) The agency head, one or more members of the agency head, an administrative law judge assigned by the office of administrative hearings, or, unless prohibited by K.S.A. 77-551, and amendments thereto, one or more other persons designated by 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 disqualification for administrative bias, prejudice or interest.
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(h) Except as otherwise provided by law, in any proceeding under this act, a person shall not be eligible to act as presiding officer, and shall not provide confidential legal or technical advice to a presiding officer in the proceeding, if that person:
(1) Has participated in any stage of an investigation or prosecution associated with the proceeding or a proceeding arising out of the same event or transaction;
(2) is supervised or directed by a person who would be disqualified under paragraph (1); or
(3) has participated in the creation of a summary order as part of another stage of the proceeding.

Comment: This amendment imposes a separation of functions requirement. It implements recommendation 4.

77-525. Ex parte communications; exemption for certain agencies.

(a) 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 or participant, with any person who has a direct or indirect interest in the outcome of the proceeding or with any person who ***has served in an investigatory or prosecutorial capacity or*** presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

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Comment: This amendment implements recommendation 4 by prohibiting communications between presiding officers and investigatory or prosecutorial personnel.

K.S.A. 77-527. Review of initial order; exceptions to reviewability.

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(d) ***Subject to KSA 77-621 and amendments thereto, i***n reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. ***In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.***

Comment: This amendment preserves the power of the agency to reverse a hearing officer's finding of fact, but requires that due regard be given to the ability of the hearing officer to observe the witnesses. It implements recommendation 2 and works in conjunction with amendments to K.S.A. 77-621 to implement recommendation 3.

77-621. Scope of review.

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(c) The court shall grant relief only if it determines any one or more of the following:

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(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) ***For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record, compiled pursuant to KSA 77-620 and amendments thereto, that are cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.***

(e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error.

Comment: This amendment directs the reviewing court, when applying the substantial evidence standard of review, to consider the whole record, including the evidence that detracts from the agency finding and specifically requires consideration of any contrary hearing officer findings. It implements recommendation 3.