2005 YLD Summer Seminar

Administrative Practice/Procedure

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Presentation by:

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I. RULEMAKING

A. Required Rulemaking

Amendment (1999): In addition to other requirements imposed by Constitution or statute, each agency shall . . . As soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this chapter, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers. Iowa Code § 17A.3(1)(c).

Comment: Agencies must develop appropriate standards, principles, and procedural safeguards by rule "as soon as feasible and to the extent practicable." This encourages agencies to adopt rules but does not preclude proceeding case-by-case where appropriate. An agency is not be required to adopt rules before it has sufficient experience to assess what standards or procedures are needed.

B. Waivers/Principal Reasons

Amendment (1999): An agency shall include in a preamble to each rule it adopts a brief explanation of the principal reasons for its action and, if applicable, a brief explanation of the principal reasons for its failure to provide in that rule for the waiver of the rule in specified situations if no such waiver provision is included in the rule. This explanatory requirement does not apply when the agency adopts a rule that only defines the meaning of a provision of law if the agency does not possess delegated authority to bind the courts to any extent with its definition. In addition, if requested to do so by an interested person, either prior to adoption or within thirty days thereafter, the agency shall issue a concise statement of the principal reasons for and against the rule ~~it~~ adopted, incorporating therein the reasons for overruling considerations urged against the rule. This concise statement shall be issued either at the time of the adoption of the rule or within thirty-five days after the agency receives the request. Iowa Code § 17A.4(1)(b).

Comment (Waivers): Agencies must consider whether to provide waivers or exceptions to rules and explain if an adopted rule contains no waiver provision. This requires agencies to consider in each new rule whether it makes sense to provide a “safety valve”

for hardship cases or to provide exceptions for small business or others. Agencies must explain in the preamble to an adopted legislative rule if the rule contains no waiver provision. The explanatory requirement of section 17A.4(1)(b) does not apply if the rule "only defines the meaning of a provision of law if the agency does not possess delegated authority to bind the agency to any extent with its definition." Rules that are simply interpretations and do not purport to be binding, therefore, do not require the explanation of the absence of a waiver provision.

Comment (Principal Reasons): The preamble of an adopted rule must briefly explain the principal reasons for the rule. This is in contrast to the more comprehensive "concise statement of reasons" which must be prepared only upon request. The goal is to encourage agencies to explain the general reasons for adopting a rule without forcing agencies to routinely prepare briefs concerning every possible argument about a rule. The statute requires only a brief explanation of the principal reasons for the rule and does not preclude judicial consideration of additional reasons.

C. Regulatory Analysis

Amendment (1999):

1. An agency shall issue a regulatory analysis of a proposed rule that complies with subsection 2, paragraph "a", if, within thirty-two days after the published notice of proposed rule adoption, a written request for the analysis is submitted to the agency by the administrative rules review committee or the administrative rules coordinator. An agency shall issue a regulatory analysis of a proposed rule that complies with subsection 2, paragraph "b", if the rule would have a substantial impact on small business and if, within thirty-two days after the published notice of proposed rule adoption, a written request for analysis is submitted to the agency by the administrative rules review committee, the administrative rules coordinator, at least twenty-five persons signing that request who each qualify as a small business or by an organization representing at least twenty-five such persons. If a rule has been adopted without prior notice and an opportunity for public participation in reliance upon section 17A.4, subsection 2, the written request for an analysis that complies with subsection 2, paragraph "a" or "b", may be made within seventy days of publication of the rule.

2. a. Except to the extent that a written request for a regulatory analysis expressly waives one or more of the following, the regulatory analysis must contain all of the following:

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

(2) A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons, including a description of the nature and amount of all of the different kinds of costs that would be

incurred in complying with the proposed rule.

(3) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

(4) A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.

(5) A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule.

(6) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

b. In the case of a rule that would have a substantial impact on small business, the regulatory analysis must contain a discussion of whether it would be feasible and practicable to do any of the following to reduce the impact of the rule on small business:

(1) Establish less stringent compliance or reporting requirements in the rule for small business.

(2) Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.

(3) Consolidate or simplify the rule's compliance or reporting requirements for small business.

(4) Establish performance standards to replace design or operational standards in the rule for small business.

(5) Exempt small business from any or all requirements of the rule.

c. The agency shall reduce the impact of a proposed rule that would have a substantial impact on small business by using a method discussed in paragraph "b" if the agency finds that the method is legal and feasible in meeting the statutory objectives which are the basis of the proposed rule.

3. Each regulatory analysis must include quantifications of the data to the extent practicable and must take account of both short-term and long-term consequences.

4. Upon receipt by an agency of a timely request for a regulatory analysis, the agency shall extend the period specified in this chapter for each of the following until at least twenty days after publication in the administrative bulletin of a concise summary of the regulatory analysis:

a. The end of the period during which persons may make written submissions on the proposed rule.

b. The end of the period during which an oral proceeding may be requested.

c. The date of any required oral proceeding on the proposed rule.

In the case of a rule adopted without prior notice and an opportunity for public participation in reliance upon section 17A.4, subsection 2, the summary must be published within seventy days of the request.

5. The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding

thereon if one is not already provided. Agencies shall make available to the public, to the maximum extent feasible, the published summary and the full text of the regulatory analysis described in this subsection in an electronic format, including, but not limited to, access to the documents through the internet.

6. If the agency has made a good faith effort to comply with the requirements of subsections 1 through 3, the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

7. For the purpose of this section, "small business" means any entity including but not limited to an individual, partnership, corporation, joint venture, association, or cooperative, to which all of the following apply:

a. It is not an affiliate or subsidiary of an entity dominant in its field of operation.

b. It has either twenty or fewer full-time equivalent positions or less than one million dollars in annual gross revenues in the preceding fiscal year.

For purposes of this definition, "dominant in its field of operation" means having more than twenty full-time equivalent positions and more than one million dollars in annual gross revenues, and "affiliate or subsidiary of an entity dominant in its field of operation" means an entity which is at least twenty percent owned by an entity dominant in its field of operation, or by partners, officers, directors, majority stockholders, or their equivalent, of an entity dominant in that field of operation. Iowa Code § 17A.4A.

Comment: Section 17A.4A contains more detail for the "regulatory analyses" required in economic impact statements and small business regulatory flexibility analyses. Only the Administrative Rules Review Committee or the Administrative Rules Coordinator can request the cost-benefit analysis type of economic impact statement. For both the cost-benefit analysis and the small business analysis, a rule may be invalidated because of agency noncompliance with the analytical requirements *only* if the agency has failed to act in good faith.

D. Requests for Review of Rules

Amendment (1999):

1. An interested person may petition an agency requesting the ~~promulgation~~ adoption, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within sixty days after submission of a petition, the agency either shall deny the petition in writing on the merits, stating its reasons for the denial, or initiate rulemaking proceedings in accordance with section 17A.4, or issue a rule if it is not required to be issued according to the procedures of section 17A.4, subsection 1.

2. Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator for an agency to conduct a formal review of a specified rule of that agency to determine whether the rule should be repealed or amended or a new rule adopted instead. The administrative rules coordinator shall

determine whether the request is reasonable and does not place an unreasonable burden upon the agency.

If the agency has not conducted such a review of the specified rule within a period of five years prior to the filing of the written request, and upon a determination by the administrative rules coordinator that the request is reasonable and does not place an unreasonable burden upon the agency, the agency shall prepare within a reasonable time a written report with respect to the rule summarizing the agency's findings, its supporting reasons, and any proposed course of action. The report must include, for the specified rule, a concise statement of all of the following:

a. The rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached.

b. Written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by the agency.

c. Alternative solutions regarding the subject matter of the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes.

A copy of the report shall be sent to the administrative rules review committee and the administrative rules coordinator and shall be made available for public inspection. Iowa Code § 17A.7.

Comment: The agency is required to review a rule upon request if the agency has not reviewed the rule in the past five years ***and*** the Administrative Rules Coordinator determines that the request does not place an unreasonable burden upon the agency. To complete a review, the agency needs to maintain for five years written criticisms of rules as well as copies of petitions for waiver of each rule.

E. Legislative Referral

Amendment (1999): Upon a vote of two-thirds of its members, the administrative rules review committee may delay the effective date of a rule until the adjournment of the next regular session of the general assembly. The committee shall refer a rule whose effective date has been delayed to the speaker of the house of representatives and the president of the senate who shall refer the rule to the appropriate standing committees of the general assembly. A standing committee shall review a rule within twenty-one days after the rule is referred to the committee by the speaker of the house of representatives or the president of the senate and shall take formal committee action by sponsoring a joint resolution to disapprove the rule, by proposing legislation relating to the rule, or by refusing to propose a joint resolution or legislation concerning the rule. The standing committee shall inform the administrative rules review committee of the committee action taken concerning the rule. If the general assembly has not disapproved of the rule by a joint resolution, the rule shall become effective. The speaker of the house of representatives and the president of

the senate shall notify the administrative code editor of the final disposition of each rule delayed pursuant to this subsection. If a rule is disapproved, it shall not become effective and the agency shall rescind the rule. This section shall not apply to rules made effective under section 17A.5, subsection 2, paragraph "b." Iowa Code § 17A.8(9).

Comment: Legislative standing committees are to review rules referred by the Administrative Rules Review Committee within 21 days of referral.

F. Waivers and Variances

Amendment (2000):

1. Any person may petition an agency for a waiver or variance from the requirements of a rule, pursuant to the requirements of this section, if the agency has established by rule an application, evaluation, and issuance procedure permitting waivers and variances. An agency shall not grant a petition for waiver or a variance of a rule unless the agency has jurisdiction over the rule and the waiver or variance is consistent with any applicable statute, constitutional provision, or other provision of law. In addition, this section does not authorize an agency to waive or vary any requirement created or duty imposed by statute.

2. Upon petition of a person, an agency may in its sole discretion issue a waiver or variance from the requirements of a rule if the agency finds, based on clear and convincing evidence, all of the following:

a. The application of the rule would pose an undue hardship on the person for whom the waiver or variance is requested.

b. The waiver or variance from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person.

c. The provisions of a rule subject to a petition for a waiver or variance are not specifically mandated by statute or another provision of law.

d. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver or variance is requested.

3. The burden of persuasion rests with the person who petitions an agency for the waiver or variance of a rule. Each petition for a waiver or variance shall be evaluated by the agency based on the unique, individual circumstances set out in the petition. A waiver or variance, if granted, shall be drafted by the agency so as to provide the narrowest exception possible to the provisions of the rule. The agency may place any condition on a waiver or a variance that the agency finds desirable to protect the public health, safety, and welfare. A waiver or variance shall not be permanent, unless the petitioner can show that a temporary waiver or variance would be impracticable. If a temporary waiver or variance is granted, there is no automatic right to renewal. At the sole discretion of the agency, a waiver or variance may be renewed if the agency finds all of the factors set out

in subsection 2 remain valid.

4. A grant or denial of a waiver or variance petition shall be indexed, filed, and available for public inspection as provided in section 17A.3. The administrative code editor and the administrative rules coordinator shall devise a mechanism to identify rules for which a petition for a waiver or variance has been granted or denied and make this information available to the public.

5. Semiannually, each agency which permits the granting of petitions for waivers or variances shall prepare a report of these actions identifying the rules for which a waiver or variance has been granted or denied, the number of times a waiver or variance was granted or denied for each rule, a citation to the statutory provisions implemented by these rules, and a general summary of the reasons justifying the agencies' actions on the waiver or variance request. To the extent practicable, this report shall detail the extent to which the granting of a waiver or variance has established a precedent for additional waivers or variances and the extent to which the granting of a waiver or variance has affected the general applicability of the rule itself. Copies of this report shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.

6. For purposes of this section, "a waiver or variance" means an agency action which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

Comment: An amendment adding statutory authority for agencies to grant waives and variances from the requirements of a rule was added in 2000. Note that the process must be initiated by petition. See AT&T Communications of The Midwest, Inc. v. Iowa Utilities Bd., 687 N.W.2d 554 (Iowa 2004). The statute also requires clear and convincing evidence that specific criteria are met. The grant or denial of a waiver or variance must be indexed, filed, and available for public inspection.

II DECLARATORY ORDERS

Amendment (1999):

1. Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection 2.

However, an agency shall not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

2. Each agency shall adopt rules that provide for the form, contents, and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions. The rules must describe the classes of

circumstances in which the agency will not issue a declaratory order and must be consistent with the public interest and with the general policy of this chapter to facilitate and encourage agency issuance of reliable advice.

3. Within fifteen days after receipt of a petition for a declaratory order, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons.

4. Persons who qualify under any applicable provision of law as an intervenor and who file timely petitions for intervention according to agency rules may intervene in proceedings for declaratory orders. The provisions of sections 17A.10 through 17A.18 apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

5. Within thirty days after receipt of a petition for a declaratory order, an agency, in writing, shall do one of the following:

a. Issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances.

b. Set the matter for specified proceedings.

c. Agree to issue a declaratory order by a specified time.

d. Decline to issue a declaratory order, stating the reasons for its action.

6. A copy of all orders issued in response to a petition for a declaratory order must be mailed promptly to the petitioner and any other parties.

7. A declaratory order has the same status and binding effect as any final order issued in a contested case proceeding. A declaratory order must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion.

8. If an agency has not issued a declaratory order within sixty days after receipt of a petition therefor, or such later time as agreed by the parties, the petition is deemed to have been denied. Once a petition for a declaratory order is deemed denied or if the agency declines to issue a declaratory order pursuant to subsection 5, paragraph "d", a party to that proceeding may either seek judicial review or await further agency action with respect to its petition for a declaratory order. Iowa Code § 17A.9.

Comment: The amended declaratory ruling process was revised by providing more detail, calling the ruling a “declaratory order,” and requiring agencies to adopt rules on declaratory orders. The agency may deny a petition for declaratory order *only* on grounds specified in its rules. The statutory amendment does not affect the validity of the grounds for denial of a petition; those listed in the uniform rule on declaratory rulings would continue to be appropriate standards for denial.

A timing problem for the issuance of declaratory rulings and for judicial review under current law was corrected. A petition will be deemed denied if not issued within sixty days or such longer time as agreed upon by the parties. The statute permits the petitioner to await further agency action on the petition, rather than requiring the party to seek judicial review before the agency acts on the petition.

III. CONTESTED CASES

A. Summary Judgments

Amendment (1999): Upon petition by a party in a matter that would be a contested case if there was a dispute over the existence of material facts, all of the provisions of this chapter applicable to contested cases, except those relating to presentation of evidence, shall be applicable even though there is no factual dispute in the particular case. Iowa Code § 17A.10A.

Comment: The definition of, and procedure for, "contested cases" was unchanged by the amendment. This amendment merely allows a person who does not dispute facts to obtain summary judgment if the case is type of matter for which contested cases would be provided to resolve issues of fact. In this summary judgment process the procedural protections of a contested case, e.g., disqualification of a biased decision maker, continue to apply.

B. Presiding Officers

Amendment (1999):

1. a. If the agency or an officer of the agency under whose authority the contested case is to take place is a named party to that proceeding or a real party in interest to that proceeding the presiding officer may be, in the discretion of the agency, either the agency, one or more members of a multimember agency, or one or more administrative law judges assigned by the division of administrative hearings in accordance with the provisions of section 10A.801. However, a party may, within a time period specified by rule, request that the presiding officer be an administrative law judge assigned by the division of administrative hearings. Except as otherwise provided by statute, the agency shall grant a request by a party for an administrative law judge unless the agency finds, and states reasons for the finding, that any of the following conditions exist:

(1) There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

(2) A qualified administrative law judge is unavailable to hear the case within a reasonable time.

(3) The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

(4) The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

(5) Funds are unavailable to pay the costs of an administrative law judge and an intra-agency appeal.

(6) The request was not timely filed.

(7) There is other identified good cause, as specified by rule, for denying the request.

b. If the agency or an officer of the agency under whose authority the contested case is to take place is not a named party to that proceeding or a real party in interest to that proceeding the presiding officer may be, in the discretion of the agency, either the agency, one or more members of a multimember agency, an administrative law judge assigned by the division of administrative hearings in accordance with the provisions of section 10A.801, or any other qualified person designated as a presiding officer by the agency. Any other person designated as a presiding officer by the agency may be employed by and officed in the agency for which that person acts as a presiding officer, but such a person shall not perform duties inconsistent with that person's duties and responsibilities as a presiding officer.

c. For purposes of paragraph "a", the division of administrative hearings established in section 10A.801 shall be treated as a wholly separate agency from the department of inspections and appeals.

2. Any person serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is or may be disqualified.

3. Any party may timely request the disqualification of a person as a presiding officer by filing a motion supported by an affidavit asserting an appropriate ground for disqualification, after receipt of notice indicating that the person will preside or upon discovering facts establishing grounds for disqualification, whichever is later.

4. A person whose disqualification is requested shall determine whether to grant the request, stating facts and reasons for the determination.

5. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute shall be appointed by either of the following:

a. The governor, if the disqualified or unavailable person is an elected official.

b. The appointing authority, if the disqualified or unavailable person is an appointed official.

6. Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter. Iowa Code § 17A.11.

Comment: Provisions applicable to presiding officers turn on the role of the agency in the contested case proceeding. Where the agency is a party or the real party in interest, this section permits the presiding officer to be the agency, one or more members of the agency or an administrative law judge assigned from the Department of Inspections and Appeals. The statute, therefore, preserves the authority of the agency head to preside over a contested case. However, except as otherwise provided by statute, if a party *requests* that an ALJ preside over the taking of evidence, the agency must either grant that request or explain the reasons in writing if it refuses the request. The statute provides several grounds on which an agency head can refuse a request to assign a contested case in which the agency is a party to an ALJ. Additionally, the agency can identify in rules

other good cause to deny such a request.

Where the agency is not a party but serves as a decision maker between adverse parties, as in worker's compensation disputes or proceedings before the Public Employment Relations Board, the agency can designate an employee as presiding officer.

Further, this section authorizes the appointment of a substitute for a presiding officer who is disqualified or unavailable. This solved a significant problem where the single-member head of an agency is disqualified from deciding a contested case. In Blinder, Robinson, & Co. v. Goettsch, 431 N.W.2d 336, 341 (Iowa 1988), the Iowa Supreme Court rejected an argument that the doctrine of necessity would permit deputy insurance commissioners to hear a contested case despite the disqualification of the agency head who had previously represented a party. The Court held that hearing officers outside the agency could preside at the contested case but did not address the propriety of delegating final decision-making authority in a second agency.

C. Defaults

Amendment (1999): If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. The parties shall be duly notified of the decision, together with the presiding officer's reasons for the decision, which is the final decision of the agency, unless within fifteen days, or such period of time as otherwise specified by statute or rule, after the date of notification or mailing of the decision, further appeal is initiated. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate. Iowa Code § 17A.17A12(3).

Comment: This section expressly provides for a default procedure in contested cases. Prior to amendment, defaults were referenced, but only briefly. Section 12 previously stated that "[i]f a party fails to appear in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, proceed with the hearing and make a decision in the absence of the party." This same section later stated that "informal disposition may be made of any contested case by . . . default. . . ." Under the amended procedure, if a party fails to appear or participate, the presiding officer may either enter a default decision or proceed with the hearing and rule on the merits of the case. The defaulting party can request that the decision be vacated. The time for seeking

to vacate the default decision is fifteen days unless a longer or shorter period is provided in agency rules. If a timely request to vacate a default is received, the time for further appeal is stayed pending the presiding officer's decision.

D. Review by Agency Head

Amendment (1999): When the presiding officer makes a proposed decision, that decision then becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule. On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule. The agency may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding, or may reverse or modify any conclusion of law that the agency finds to be in error. In cases where there is an appeal from a proposed decision or where a proposed decision is reviewed on motion of the agency, an opportunity shall be afforded to each party to file exceptions, present briefs and, with the consent of the agency, present oral arguments to the agency members who are to render the final decision. Iowa Code § 17A.15(3).

Comment: When the head of the agency reviews a proposed decision, it may modify a finding of fact if a preponderance of the evidence will support the finding as reversed or modified; the agency may reverse or modify any conclusion of law that the agency finds to be in error. The preponderance of the evidence standard is the evidentiary standard applied in contested cases. Arora v. Board of Medical Examiners, 564 N.W.2d 4 (Iowa 1997). Amendments to this section, therefore, were basically explanatory of existing law.

E. Findings of Fact

Amendment (1999): A proposed or final decision or order in a contested case shall be in writing or stated in the record. A proposed or final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of underlying facts supporting the findings. The decision shall include an explanation of why the relevant evidence in the record supports each material finding of fact. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by cited authority or by a reasoned opinion. Parties shall be promptly notified of each proposed or final decision or order by the delivery to them of a copy of such decision or order in the manner provided by section 17A.12, subsection 1. Iowa Code § 17A.16(1).

Comment: Under this language contested case decisions must explain why the relevant evidence in the record supports each material finding of fact, but the decision need not address individual items of evidence. Although agency decisions need not explain why evidence to the contrary was rejected, agencies may be wise to do so because a reviewing court will now consider evidence contrary to the agency finding in determining whether a decision is supported by substantial evidence. This new language makes explicit a requirement that had been previously implicit. In Bridgestone/Firestone, Pacific Employers Insurance v. According, 561 N.W.2d 60, 62 (Iowa 1997), the Supreme Court stated:

> This court has long held that the commissioner must 'state the evidence relied upon and [ ] detail reasons for his conclusions.' Moreover, the commissioner's decision must be 'sufficiently detailed to show the path he has taken through conflicting evidence.' We have refrained, however, from reading 'unnecessary and burdensome' requirements into the statute. Thus we have held the commissioner need not discuss every evidentiary fact and the basis for its acceptance or rejection so long as the commissioner's analytical process can be followed on appeal. So also have we held the commissioner's duty to furnish a reasoned opinion satisfied if 'it is possible to work backward ... and to deduce what must have been [the agency's] legal conclusions and [its] findings of fact.'

The amended language similarly requires the agency to explain why the evidence supports the material findings the agency made without requiring a discussion of individual pieces of evidence.

F. Combination of Functions

Amendment (1999): ~~No~~ An individual who participates in the making of any proposed or final decision in a contested case shall not have personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties. ~~Nor shall any~~ In addition, such an individual shall not be subject to the authority, direction, or discretion of any person who has personally investigated, prosecuted, or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties. However, this section shall not be construed to preclude a person from serving as a presiding officer solely because that person determined there was probable cause to initiate the proceeding. Iowa Code § 17A.17(8).

Comment: In addition to existing grounds for disqualification for bias or combination

of functions, this language bars a person who has "personally investigated" the matter from either serving as presiding officer or assisting the presiding officer. Also disqualified would be persons who serve under the supervision of an investigator in that case. Notably, a decision maker is not disqualified if the decision maker participated in a determination of probable cause. The amended language expressly states that a board member or agency head can still determine probable cause exists to hold a hearing and later preside at the hearing.

G. Ex parte communications

Amendment (1999):

1. Unless required for the disposition of ex parte matters specifically authorized by statute, ~~individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law~~ a presiding officer in a contested case, shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with any person or party, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules.

However, without such notice and opportunity for all parties to participate, ~~individuals assigned to render a proposed or final decision or to make findings of fact and conclusions of law~~ a presiding officer in a contested case may communicate with members of the agency, and may have the aid and advice of persons other than those with a personal interest in, or those engaged in personally investigating, prosecuting or advocating in, either the case under consideration or a pending factually related case involving the same parties so long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

2. Unless required for the disposition of ex parte matters specifically authorized by statute, parties or their representatives in a contested case and persons with a direct or indirect interest in such a case shall not communicate, directly or indirectly, in connection with any issue of fact or law in that contested case, with ~~individuals assigned t to render a proposed or final decision or to make findings of fact and conclusions of law~~ a presiding officer in that contested case, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules. ~~The agency's rules may require the recipient of a prohibited communication to submit the communication if written or a summary of the communication if oral for inclusion in the record of the proceeding. As sanctions for violations, the rules may provide for a decision against a party who violates the rules; for censuring, suspending or revoking a privilege to practice before the agency; and for censuring, suspending or dismissing agency personnel.~~

3. If, before serving as the presiding officer in a contested case, a person receives an ex parte communication relating directly to the merits of the proceeding over which that person subsequently presides, the person, promptly after starting to serve, shall disclose to all parties any material factual information so received and not otherwise

disclosed to those parties pursuant to section 17A.13, subsection 2, or through discovery.

4. A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all such written communications received, all written responses to the communications, and a memorandum stating the substance of all such oral and other communications received, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the prohibited ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within ten days after notice of the communication.

5. If the effect of an ex parte communication received in violation of this section is so prejudicial that it cannot be cured by the procedure in subsection 4, a presiding officer who receives the communication shall be disqualified and the portions of the record pertaining to the communication shall be sealed by protective order.

6. The agency and any party may report any violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule shall provide for appropriate sanctions, including default, suspending or revoking a privilege to practice before the agency, and censuring, suspending, or dismissing agency personnel, for any violations of this section.

7. A party to a contested case proceeding may file a timely and sufficient affidavit alleging a violation of any provision of this section. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.
Iowa Code § 17A.17.

Comment: Chapter 17A has long prohibited parties from discussing issues in a contested case with the presiding officer "ex parte," i.e., without the other side being present. The prohibition now extends beyond parties to any persons with a direct or indirect interest in the case and to persons who have personally investigated in the matter. Other than barring participation of a person who has personally investigated the matter or is under that person's supervision, the new language does not change the definition of prohibited ex parte communications. The scope of activity that constitutes "personally investigating" is not further defined. Uniform Rules on Agency Procedure define "personally investigating" as "taking affirmative steps to interview witnesses directly or to obtain documents directly." This definition expressly excludes "direction and supervision of assigned investigators or unsolicited receipt of oral information or documents which are relayed to assigned investigators." This same definition has been incorporated into model rules to implement the new amendments to Chapter 17A and may be adopted by agencies as the applicable definition.

Note that the language does require disclosure of material information that a

presiding officer has learned prior to the contested case. If a presiding officer received an ex parte communication prior to the commencement of a contested case, the presiding officer would be required to disclose any material factual information which had not been disclosed to the non-agency party either through a request for agency records under Iowa Code section 17A.13 or through discovery. For example, a licensing board member would be required to disclose factual information of which the member was aware if that information related directly to the merits but was not contained in the investigatory reports and other materials provided to the licensee. This is intended to assure that a person has a chance to rebut relevant information known to the presiding officer, even where the information is not sufficient to disqualify the officer. It does not require that the presiding officer attempt to catalog every communication received prior to the contested case. Instead, it focuses on materially relevant information known to the presiding officer.

The remedies for prohibited ex parte communications are changed under the amended language. Section 17A.17(4) will require that a prohibited ex parte communication be placed in the record. (Prior law stated that agency rules *may* provide for this.) The presiding officer may be disqualified if the effect of an ex parte communication is so prejudicial that it cannot be cured by disclosure. Rules may provide for additional sanctions.

H. Emergency Adjudicative Proceedings

Amendment (1999):

1. Notwithstanding any other provision of this chapter and to the extent consistent with the Constitution, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

2. The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

3. The agency shall issue an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

4. The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when issued.

5. After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

6. 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.

7. 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. Iowa Code § 17A.18A.

Comment: Chapter 17A continues to permit summary emergency proceedings when an immediate danger to the public health, safety, or welfare requires swift action. The amended language added procedural requirements in this situation. In a situation where the statute would require a full contested case before suspending a license but for the emergency, the agency must give as much notice as possible before the summary action becomes effective and must provide full contested case procedures afterwards. This provision helps agencies comport with appropriate due process requirements for summary adjudication.

In addition, the agency must tailor its action to take only such action as is necessary to avert the immediate danger. The order for emergency action must be include a brief statement findings of fact, conclusions of law and policy reasons - if the action is discretionary - that support the emergency action.

IV. JUDICIAL REVIEW

A. Timing/Declaratory Orders

Amendment (1999):

1. A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter. When agency action is pursuant to rate regulatory powers over public utilities or common carriers and the aggrievement or adverse effect is to the rates or charges of a public utility or common carrier, the agency action shall not be final until all agency remedies have been exhausted and a decision prescribing rates which satisfy the requirements of those provisions of the Code has been rendered. A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy. If a declaratory ~~ruling~~ order has not been rendered within ~~thirty~~ sixty days after the filing of a petition therefor under section 17A.9, or by such later time as agreed by the parties, or if the agency declines to issue such a declaratory ~~ruling~~ order after receipt of a petition therefor, any administrative remedy available under section 17A.9 shall be deemed inadequate or exhausted. Iowa Code § 17A.19(1).

Comment: The amendment addressed the change in the timing of judicial review of declaratory orders. The current thirty-day period to issue declaratory rulings before they were deemed denied was too short for agencies meeting monthly; this section extends the

period for agencies to act to 60 days or such later time as agreed by the parties.

B. Stays of Agency Action:

Amendment (1999):

a. The filing of the petition for review does not itself stay execution or enforcement of any agency action. ~~Upon application the agency or the reviewing court may, in appropriate cases, order such a stay pending the outcome of the judicial review proceedings~~ Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

b. A party may file an interlocutory motion in the reviewing court, during the pendency of judicial review, seeking review of the agency's action on an application for stay or other temporary remedies.

c. If the agency refuses to grant an application for stay or other temporary remedies, or application to the agency for a stay or other temporary remedies is an inadequate remedy, the court may grant relief but only after a consideration and balancing of all of the following factors:

(1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.

(2) The extent to which the applicant will suffer irreparable injury if relief if not granted.

(3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.

(4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

d. If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms, or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies. Iowa Code § 17A.19(5) .

Comment: The amended statutory language incorporated the test for granting a stay of agency action which had developed in the case law. The language applies the familiar test from Teleconnect v. Iowa State Commerce Commission, 366 N.W.2d 511, 513 (Iowa 1985). The agency or a court must consider the likelihood of petitioner succeeding on the merits, the threat of irreparable injury, harm to other parties, and the public interest.

Note that the petitioner must first seek a stay from the agency before going into district court. This changed the law, but was not inconsistent with the obligation of a petitioner to exhaust remedies before the agency prior to seeking judicial review. Pro Farmer Grain, Inc. v. Iowa Dept. of Agriculture and Land Stewardship, 427 N.W.2d 466 (Iowa 1988).

C. Standards for Judicial Review

Amendment (1999):

8. Except to the extent that this chapter provides otherwise, in suits for judicial review of agency action all of the following apply:

a. The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.

b. The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time that action was taken.

9. The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

10. The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:

a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.

b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.

c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.

e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.

f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:

(1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

(2) "Record before the court" means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.

(3) "When that record is viewed 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 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.

g. Action other than a rule that is inconsistent with a rule of the agency.

h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

i. The product of reasoning that is so illogical as to render it wholly irrational.

j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

11. In making the determinations required by subsection 10, paragraphs "a" through "n", the court shall do all of the following:

a. Shall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency.

b. Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.

c. Shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency.

12. A defendant in a suit for civil enforcement of agency action may defend on any of the grounds specified in subsection 10, paragraphs "a" through "n", if that defendant, at the time the enforcement suit was filed, would have been entitled to rely upon any of those grounds as a basis for invalidating the agency action in a suit for judicial review of that action brought at the time the enforcement suit was filed. If a suit for civil enforcement of agency action in a contested case is filed within the time period in which the defendant could have filed a petition for judicial review of that agency action, and the agency subsequently dismisses its suit for civil enforcement of that agency action against the defendant, the defendant may, within thirty days of that dismissal, file a petition for judicial review of the original agency action at issue if the defendant relied

upon any of the grounds for judicial review in subsection 10, paragraphs "a" through "n", in a responsive pleading to the enforcement action, or if the time to file a responsive pleading had not yet expired at the time the enforcement action was dismissed. Iowa Code § 17A.19(8).

Comment: The standards for judicial review changed in the following ways:

- *More Detailed Standards* -- the amended language details the ways in which a court may find agency action to be arbitrary and capricious or unreasonable. The language provides much more specific standards for review of agency action than the current law. However, most of the changes merely detail what would be arbitrary and capricious or unreasonable under current law. For example, new language in section 17A.19(8)(i) provides that a court shall reverse action that is "[t]he product of reasoning that is so illogical as to render it wholly irrational."

- *Deference* -- A court is to defer to the agency only on matters that have been vested by a provision of law in the discretion of the agency. The new language will incorporate the "black letter law" statement that an agency has only that authority or discretion delegated to it by law.

- *Substantial Evidence* -- One of the most significant changes revises the "substantial evidence" test to require a court reviewing a finding of fact in a contested case decision to consider both the cited evidence that supports and the cited evidence that detracts from the finding. Notice that the parties must cite any evidence they wish the court to consider in reviewing a finding of fact.

- *Defenses in Enforcement Actions* – The amendment includes a provision allowing the defendant to raise grounds for judicial review in a responsive pleading to a civil enforcement action if that suit was brought during the time the defendant could have sought judicial review on those grounds. Notice that this section does not permit the grounds for judicial review to be raised defensively in a civil enforcement action if the time for judicial review expired prior to the suit.

Case Law:

- Robinson v. State, 687 N.W.2d 591 (Iowa 2004); P.D.S.I. v. Peterson, 685 N.W.2d 627 (Iowa 2004). Agency power to "adopt rules and procedures for the handling, processing and investigation of claims" under the Tort Claims Act does not constitute a clear vesting with interpretive powers with respect to what type of notice is required to commence the statute of limitations.
- Mycogen Seeds v. Sands, 686 N.W.2d 457 (Iowa 2004). Workers' Compensation Commissioner's decision regarding apportionment of disability benefits,

reimbursement of lost wages, and penalty benefits that is based upon statutory interpretation of Chapter 85 but without any indicia that the legislature has delegated any special powers to the agency regarding statutory interpretation, leaves the Iowa Supreme Court free to substitute its judgment de novo for the agency's interpretation.

- Moser v. DIA, 671 N.W.2d 501 (Iowa 2003). Iowa Code section 235B.3(1) does not support the conclusion that DIA has the power to interpret the Chapter 235B definitions with the "binding force of law" when conducting adult abuse hearings. It would be inconsistent with the statutory scheme placing overall responsibility for dependent adult abuse on DHS to give DIA the discretion to interpret the statute. The legislature expressly granted DHS the discretion to elaborate on the statutory definition of "dependent adult" found in chapter 235B. See Iowa Code § 235B.2(4) (giving detailed definition of the term "dependent adult"and then including the alternative "or as defined by departmental rule,"referring to DHS). Because DHS, not DIA, clearly has discretion to interpret this particular provision, it would be contrary to the language of the statute for the court to hold that DIA has the discretion to elaborate on the statutory definition of this term.

- Locate.Plus.Com v. DOT, 650 N.W.2d 609 (Iowa 2002). It is for the courts, not the Department, to interpret Iowa Code section 321.11 addressing disclosure of personal information from driver's license records and, in turn, 18 U.S.C. § 2721, the federal statute prohibiting release of such records under certain circumstances.
- Auen v. Alcoholic Beverages Div., Iowa Dept. of Commerce, 679 N.W.2d 586 (Iowa 2004). Where the legislature specifically gave the ABD power to adopt rules governing "the conditions and qualifications necessary for the obtaining of licenses and permits," Iowa Code § 123.21(11), by necessity, the ABD must interpret the limitations on business interests as contained in section 123.45. The legislature, therefore, has clearly vested the interpretation of section 123.45 with the agency, *but* the exercise of that power to adopt the rule under consideration is an illogical interpretation prohibited by statute.

- ABC Disposal Systems, Inc. v. DNR, 681 N.W.2d 596 (Iowa 2004). By statute, the legislature gave the Environmental Protection Commission (EPC) authority to establish policy for the DNR and adopt rules necessary to provide for the effective administration of Iowa Code chapter 455B. The legislature also gave the EPC power to establish rules for the proper administration Iowa Code chapter 455B relating to the establishment and location of sanitary disposal projects, sanitary practices, inspection of sanitary disposal projects, collection of solid waste, disposal of solid waste, pollution controls, the issuance of permits, approved methods of private disposition of solid waste, the general operation and maintenance of sanitary disposal projects, and the implementation of this part. Because the legislature has clearly vested the interpretation of the provisions of the

law dealing with the permitting of a sanitary disposal project in the discretion of the Environmental Protection Commission the Supreme Court could disturb the Commission's interpretation of the law based *only* upon an irrational, illogical, or wholly unjustifiable interpretation of this provision of the law.