
Statutes

Administrative Practice and Procedure

Chapter 5 — Administrative Procedure

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§ 500. Administrative practice; general provisions*

- (a) For the purpose of this section —
 - (1) “agency” has the meaning given it by § 551 of this title; and
 - (2) “State” means a State, a territory or possession....
- (b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified... and is authorized to represent the particular person....
- (c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service... on filing... a written declaration that he is currently qualified... and is authorized to represent the particular person in whose behalf he acts.
- (d) This section does not —
 - (1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c)... the right to appear...;
 - (2) authorize or limit... discipline, including disbarment...;
 - (3) authorize an individual who is a former employee of an agency to represent a person...; or
 - (4) prevent an agency from requiring a power of attorney....
- (e) Subsections (b)-(d) of this section do not apply to practice before the [PTO] with respect to patent matters that continue to be covered by... title 35.
- (f) When a participant... is represented by an individual qualified under subsection (b) or (c) of this section, a notice or other written communication required... in the matter shall be given to the representative....

§ 551. Definitions [APA § 2]

For the purpose of this subchapter —

- (1) “agency” means each authority of the Government of the U.S., whether or not it is within or subject to review by another agency, but does not include—
 - [Congress; U.S. courts; governments of U.S. territories or possessions; the government of D.C.]; or except as to the requirements of § 552 of this title...
- (E) agencies composed of representatives of the parties....
- (2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;
- (3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;
- (4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements... and includes the approval or prescription for the future of rates, wages... or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
- (5) “rule making” means agency process for formulating, amending, or repealing a rule;
- (6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
- (7) “adjudication” means agency process for the formulation of an order;
- (8) “license” includes the whole or a part of an agency permit, certificate, approval,

* The body of the Agency Practice Act, P.L. No. 89-332 (1965).

registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency —

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief; ... or

(C) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency —

(A) grant of money, ..., exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports....

§ 553. Rule making [APA § 4]

(a) This section applies... except to the extent that there is involved —

(1) a military or foreign affairs function of the U.S.; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice... in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required..., this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, §§ 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

- (2) interpretative rules and statements of policy; or
 - (3) as otherwise... for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications [APA § 5]

(a) This section applies... in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
- (2) the selection or tenure of an employee...;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or
- (6) the certification of worker representatives.

(b) Persons entitled to notice... shall be timely informed of —

- (1) the time, place, and nature of the hearing;
- (2) the legal authority... [for] the hearing; and
- (3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with §§ 556 and 557....

(d) The employee who presides at the reception of evidence pursuant to § 556 of this title shall make the recommended decision or initial decision required by § 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to § 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§ 555. Ancillary matters [APA § 6]

- (a) This section applies... except as otherwise provided by this subchapter.
- (b) A person compelled to appear... is entitled to be... advised by counsel or, if permitted..., by other qualified representative. A party is entitled to appear in person or by or with counsel.... So far as the orderly conduct of public business permits, an interested person may appear.... With due regard for the convenience and necessity of the parties... within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear....
- (c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued... except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript....
- (d) Agency subpoenas authorized by law shall be issued... on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.
- (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision [APA § 7]

- (a) This section applies... to hearings required by § 553 or 554 of this title to be conducted in accordance with this section.
 - (b) There shall preside at the taking of evidence —
 - (1) the agency;
 - (2) one or more members of the body which comprises the agency; or
 - (3) one or more administrative law judges appointed under § 3105 of this title.
- This subchapter does not supersede the conduct of specified classes of proceedings... provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with § 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of... disqualification..., the agency shall determine the matter as a part of the record and decision in the case.
- (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —
 - (1) administer oaths and affirmations;
 - (2) issue subpoenas authorized by law;
 - (3) rule on offers of proof and receive relevant evidence;
 - (4) take depositions or have depositions taken when the ends of justice would be served;
 - (5) regulate the course of the hearing;
 - (6) hold conferences for the settlement or simplification...;
 - (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
 - (8) require the attendance at any conference...;
 - (10) make or recommend decisions...; and
 - (11) take other action authorized by agency rule....

(d) Except as otherwise provided..., the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice..., consider a violation of § 557(d)... sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of... evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record... in accordance with § 557.... When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record [APA § 8]

(a) This section applies... when a hearing is required to be conducted in accordance with § 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee... shall initially decide the case unless the agency requires... the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee... shall first recommend a decision, except that in rule making or determining applications for initial licenses —

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit... —

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law —

(A) no interested person outside the agency shall make or knowingly cause to be made to any... employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication...;

(B) no... employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication...;

(C) a member of the body... or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency... or other employee presiding... may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed... or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless....

(2) This subsection does not constitute authority to withhold information from Congress.

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses [APA § 9]

(a) This section applies... to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated... and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all..., shall set and complete proceedings required to be conducted in accordance with §§ 556 and 557... or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given —

(1) notice by the agency in writing...; and

(2) opportunity to demonstrate or achieve compliance....

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

§ 559. Effect on other laws; effect of subsequent statute [APA § 12]

This subchapter, chapter 7, and sections... of this title, and the provisions of § 5335(a)(B)... that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise

required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute [sic] may not be held to supersede or modify this subchapter, chapter 7, §§ 1305..., or the provisions of § 5335(a)(B)...., except to the extent that it does so expressly.

Chapter 7 — Judicial Review

§ 701. Application; definitions [APA § 10]

- (a) This chapter applies... except to the extent that —
 - (1) statutes preclude judicial review; or
 - (2) agency action is committed to agency discretion by law.
- (b) For the purpose of this chapter —
 - (1) “agency” [has a slightly different definition from that provided in § 551 — of no apparent consequence in this course.]
 - (2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by § 551....

§ 702. Right of review [APA § 10(a)]

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action... seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the U.S. or that the U.S. is an indispensable party. The U.S. may be named as a defendant..., and a judgment or decree may be entered against the U.S.: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers..., and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief...; or (2) confers authority to grant relief if any other statute... expressly or impliedly forbids [it].

§ 703. Form and venue of proceeding [APA § 10(b)]

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the U.S., the agency..., or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in... proceedings for... enforcement.

§ 704. Actions reviewable [APA § 10(c)]

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of

reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review [APA § 10(d)]

When an agency finds that justice so requires, it may postpone... judicial review. [T]o the extent necessary to prevent irreparable injury, the reviewing court..., may issue all necessary and appropriate process to postpone the effective date of an agency action....

§ 706. Scope of review [APA § 10(e)]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to §§ 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.