

**REPORT OF THE JUDICIAL COUNCIL  
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE**

**APPROVED BY THE JUDICIAL COUNCIL ON  
DECEMBER 9, 2008**

**BACKGROUND**

In June 2006, the Judicial Council's Administrative Procedure Advisory Committee requested that the Council assign it the task of studying the Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.*, and the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* Both Acts were originally passed in 1984 and had not been significantly amended since that time. Advisory Committee members were aware of several areas in which the Acts could be improved and believed that a comprehensive review of both Acts was needed. The Judicial Council agreed and made the requested assignment.

**COMMITTEE MEMBERSHIP**

The members of the Administrative Procedure Advisory Committee taking part in this study were:

Carol L. Foreman, Chair, Topeka; Deputy Secretary of the Department of Administration  
Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings  
James G. Flaherty, Ottawa; practicing attorney  
Jack Glaves, Wichita; practicing attorney  
Hon. Steve Leben, Topeka; Kansas Court of Appeals Judge  
Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law  
Brian J. Moline, Topeka; practicing attorney and former member of the Kansas Corporation Commission  
Camille A. Nohe, Topeka; Assistant Attorney General  
Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice  
Steve A. Schwarm, Topeka; practicing attorney  
John S. Seeber, Wichita; practicing attorney  
Mark W. Stafford, Topeka; practicing attorney

**METHOD OF STUDY**

In conducting its study of KAPA and KJRA, the Administrative Procedure Advisory Committee held 24 meetings over two and a half years. The Committee solicited and considered input from a variety of sources, including state agencies, agency legal counsel, and other attorneys practicing in the area of administrative law. The Committee also met with two students in the University of Kansas Law School's Public Policy Clinic who prepared a research paper

addressing specific administrative law issues suggested by the Committee.

As it reviewed each Act, the Committee considered the case law interpreting each section. Because the original versions of KAPA and KJRA were based, at least in part, on the 1981 Model State Administrative Procedure Act, the Committee also considered a revised version of the Model Act currently under consideration by the Uniform Law Commissioners.<sup>1</sup> When proposing amendments to KAPA and KJRA, the Committee adapted language from the revised Model Act if the Act's language was consistent with the Committee's resolution of an issue, because the Model Act's language has been carefully vetted and because using that language would promote consistency with other states.

During the period in which the Committee was studying the KAPA and KJRA, various bills were introduced in the Kansas Legislature proposing amendments to those statutes. Responding to legislative requests, the Committee provided testimony or commented on several of these bills, and in several instances suggested specific language that was the product of the Committee's ongoing discussions. This report represents the culmination of the Committee's comprehensive review of both statutes, although it incorporates a number of recommendations or comments already submitted to the legislature.

## **COMMITTEE RECOMMENDATIONS**

The Committee proposes the adoption of a number of amendments to KAPA and KJRA, which are contained in 2009 SB 87. The "Comments" section beginning at page 7 of this report discusses the reasons for each of the amendments, many of which are technical or intended for purposes of clarification. This report will not discuss technical or clarifying amendments, but rather will focus on the Committee's most important recommendations concerning agency adjudication and judicial review. Most of these recommendations address the same concerns that prompted legislative attention to KAPA and KJRA over the last few years: Whether the agency's role in investigating and prosecuting violations of the laws it administers is compatible with its acting as a fair and impartial adjudicator. States respond to this issue in a variety of ways, ranging from giving agencies complete control over adjudication to making hearing officers independent and precluding agency review.<sup>2</sup> Currently, Kansas law provides agencies with very strong tools to control adjudication and offers relatively few protections to ensure fair and impartial agency adjudications. Many of the Committee's recommendations are intended to significantly strengthen the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities.

The Committee recommendations, which concern both the conduct of hearings under KAPA and the effectiveness of judicial review under KJRA, can be summarized as follows:

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<sup>1</sup> National Conference of Commissioners on Uniform State Laws, Revised Model State Administrative Procedure Act (Draft), available on line at [http://www.law.upenn.edu/bll/archives/ulc/msapa/2008\\_amdraft.htm](http://www.law.upenn.edu/bll/archives/ulc/msapa/2008_amdraft.htm).

<sup>2</sup> 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).

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Section 6 amending K.S.A. 77-512)
2. The separation of agency adjudicators from personnel involved in investigations and prosecutions should be strengthened. (Section 8 amending K.S.A. 77-514 and Section 13 amending K.S.A. 77-525)
3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give "due regard" to the hearing officer's opportunity to observe witnesses. (Section 14 amending K.S.A. 77-527)
4. Unnecessary technical barriers to judicial review of agency action should be removed. (Sections 26, 27, and 28 amending K.S.A. 77-612, 77-614, and 77-617, respectively)
5. KJRA should emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Section 29 amending K.S.A. 77-621) **Note:** This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather would restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.
6. Additional amendments should be adopted to clarify the computation of time (Section 4 amending K.S.A. 77-503 and Section 11 amending K.S.A. 77-521) and to provide greater protection for confidential information (New Section 1, Section 2 amending K.S.A. 45-221 and Section 12 amending K.S.A. 77-523).

**A. Recommended Amendments to KAPA:** The first three recommendations involve amendments to KAPA to provide greater protections to parties in the conduct of KAPA hearings.

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Section 6 amending K.S.A. 77-512)

The advisory committee recommends raising the burden of proof to "clear and convincing evidence" for disciplinary actions concerning occupational and professional licenses in order to provide greater protection for these especially important interests. Occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual's pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of

proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.<sup>3</sup> This higher standard of proof already applies by virtue of Supreme Court Rule in attorney disciplinary proceedings and may apply to other licenses as well.<sup>4</sup> The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct 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 initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

2. The separation of agency adjudicators from personnel involved in investigations or prosecutions should be strengthened. (Section 8 amending K.S.A. 77-514 and Section 13 amending K.S.A. 77-525)

The most troubling situation from a fundamental fairness perspective is when agency personnel who act in an investigatory, prosecutorial or adversarial capacity on a case are also involved in the adjudication of that case. Currently, K.S.A. 77-514, which governs the presiding officer in hearings, does not contain any separation of functions requirement and K.S.A. 77-525, which prohibits *ex parte* communications, would not appear to apply to communications between the agency head serving as presiding officer and agency personnel who had investigatory or prosecutorial roles. Although judicial decisions in Kansas require separation of functions,<sup>5</sup> the advisory committee recommends the addition of a separation of functions requirement to K.S.A. 77-514 to provide more specific guidance. To reinforce this separation, the Committee recommends that the prohibition on *ex parte* communications under KAPA should be expanded to bar communications between presiding officers and investigatory or prosecutorial personnel regarding pending cases.

3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give “due regard” to the hearing officer’s opportunity to observe witnesses. (Section 14 amending K.S.A. 77-527)

Under current law, agencies review decisions of hearing officers in the Office of Administrative hearings “*de novo*”; *i.e.*, without any deference to the hearing officer decision. While such *de novo* review power is critical to the agency’s policy making function and to the application of its expertise (which hearing officers lack), concerns may arise because the hearing officer rather than the agency has the opportunity to observe the witnesses and because this

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<sup>3</sup> See, e.g., *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339, 1345-47 (Okla.1996); *Nguyen v. State*, 144 Wash.2d 516, 29 P.3d 689, 690-97 (2001); *Painter v. Abels*, 998 P.2d 931, 941-42 (Wyo.2000). *But see Eaves v. Board of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991); *Rucker v. Michigan Bd. of Med.*, 138 Mich.App. 209, 360 N.W.2d 154, 155 (1984); *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456, 461 (1993); *In re Polk*, 90 N.J. 550, 449 A.2d 7, 12-17 (1982); *Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17, 19-20 (1998); *Gandhi v. Medical Examining Bd.*, 168 Wis.2d 299, 483 N.W.2d 295, 298-300 (Ct.App.1992).

<sup>4</sup> See *Lacy v. Kansas Dental Bd.*, 274 Kan. 1031, 1036 58 P.3d 668, 673 (2002) (application of clear and convincing evidence standard in case involving dentist’s license).

<sup>5</sup> *E.g.*, *Pork Motel, Corp v. Kansas Department of Health and Environment*, 234 Kan. 374, 383 (1983).

standard appears to give the agency authority to disregard the findings of fact made by the independent hearing officer. The advisory committee believes that the draft Revised Model State Administrative Procedure Act,<sup>6</sup> which requires the agency to have “due regard” for the hearing officer’s obligation to view witnesses takes a reasonable approach and its proposed amendment to K.S.A. 77-527 reflects this approach. Under this standard, the agency would, in effect, be required to explain why it is rejecting the credibility determinations of the hearing officer. This requirement in turn interacts with the Committee’s proposals to strengthen judicial review, discussed below.

**B. Recommended Amendments to KJRA:** Recommendations 4 and 5 involve amendments to KJRA designed to make judicial review more available and meaningful as a check on the fairness of agency decisions without interfering with the agencies’ expertise and legitimate policy making functions.

4. Unnecessary technical barriers to judicial review of agency action should be removed. (Sections 26, 27, and 28 amending K.S.A. 77-612, 77-614, and 77-617, respectively)

During its review of KJRA, the Committee received comments expressing concern that pleading and exhaustion requirements in KJRA were being applied to dismiss or reject challenges to agency action for technical reasons unrelated to the merits of the challenge. The Committee believed that some of these technical barriers were unreasonable and unnecessary. First, with regard to the initiation of actions for judicial review, K.S.A. 77-614 contains a number of very specific pleading requirements that are not required in ordinary civil actions. While more detailed information is necessary and helpful in conducting the action for judicial review, many courts have interpreted these requirements as jurisdictional, applied them very strictly, and refused to allow amendments to correct minor errors. This strict application is not necessary to the effective conduct of judicial review and deprives many parties of their day in court. Thus, the Committee recommends amendments to clarify that the pleading requirements are not jurisdictional in the sense that pleadings can be amended to correct mistakes if doing so will not cause prejudice. Second, the Committee also recommends language to clarify an exception to exhaustion requirements in K.S.A. 77-612 when administrative remedies are inadequate or when exhausting administrative remedies would cause irreparable harm. These exceptions have been recognized in some court cases in Kansas, and the committee believes that they should be defined by statute. Similarly, the Committee also recommends expanding an exception in K.S.A. 77-617 to allow parties to raise issues on review that were not presented to the agency if those issues were not reasonably knowable during the administrative process.

5. KJRA should be amended to emphasize the obligation of courts reviewing an agency’s factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Section 29 amending K.S.A. 77-621)

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<sup>6</sup> Revised Model State Administrative Procedure Act § 418(e).

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.<sup>7</sup> The Committee believes that this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. It is particularly problematic when the agency reverses the decision of a hearing officer, because it treats the hearing officer’s decision as essentially irrelevant. The Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) 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. The Committee believes that amending K.S.A. 77-621 to ensure that on judicial review the court will consider contrary evidence in the record, including the hearing officer’s contrary decision, would reinforce 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. This change would work together with the Committee’s recommendation that the agencies should be required to give due regard to the hearing officer’s ability to observe witnesses. More broadly, it would require agencies to explain more fully their reasons for rejecting contrary evidence in the record. This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.)

The language of the Committee’s proposed amendment is adapted from one of two alternative versions of the scope of review standards in the Revised Model State Administrative Procedure Act.<sup>8</sup> The other alternative version is consistent with the current version of the KJRA in Kansas and the Committee considered additional language clarifying the reviewing court’s obligation to consider all the evidence in the record to be necessary. After hearing concerns from some agencies that the Committee’s proposed language would adopt the de novo standard of review, which was never the Committee’s intention, the Committee added additional language to specify that de novo review does not apply. That language is not adapted from the Revised Model Act.

**C. Additional Recommendation:** Recommendation 6 addresses additional issues.

6. Additional amendments should be adopted to clarify the computation of time (Section 4 amending K.S.A. 77-503 and Section 11 amending K.S.A. 77-521) and to provide greater protection for confidential information (New Section 1, Section 2 amending K.S.A. 45-221 and Section 12 amending K.S.A. 77-523).

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<sup>7</sup> 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.”); *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). See generally, Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 Kansas Bar Association Journal 22, 27-29 (June/July 1995).

<sup>8</sup> Revised Model State Administrative Procedure Act § 509 (Alternative 2).

Two additional aspects of the Committee's proposals warrant mention, even though they are not related to the central issue of strengthening the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities. First, the Committee proposes new language in K.S.A. 77-503 to clarify the computation of time and make that computation workable for the time limits incorporated in KAPA. The Committee has also proposed conforming amendments to some other provisions in KAPA that set time limits. These changes are not intended to significantly alter the existing time limits, but rather to address particular issues that arise because of the very short time limits associated with some actions under KAPA. Second, the Committee proposes a new section of KAPA (77-503a) that would permit presiding officers to keep the personal information regarding victims of crimes out of the public record to protect their health, safety, and liberty. The Committee has included a similar amendment for the Kansas Open Records Act, which would add such information to the exceptions to Act in K.S.A. 45-221. In addition, the Committee proposes an amendment to K.S.A. 77-523 that would authorize a hearing officer to close a KAPA hearing when information required by law to be kept confidential would otherwise be disclosed.

## **COMMENTS TO 2009 SB 87**

### **New Section 1.**

The Advisory Committee recommends the addition of a new section to KAPA to protect the names, addresses and other contact information of alleged victims of crime, abuse, domestic violence or sexual assault. The Committee also recommends a related amendment to K.S.A. 45-221(a) of the Open Records Act to provide that agencies are not required to disclose such information pursuant to an Open Records request.

### **Section 2 (amending K.S.A. 45-221).**

The Advisory Committee recommends that the Open Records Act be amended to provide that agencies are not required to disclose the name, address, location or other contact information of alleged victims of crime, abuse, domestic violence or sexual assault if release of that information might jeopardize their health, safety, or liberty . The Advisory Committee also recommends a new section be added to KAPA (77-503a) to allow a presiding officer to protect this kind of sensitive information.

### **Section 3 (amending K.S.A. 77-501).**

This technical amendment reflects the addition of various new sections to KAPA since the Act was originally enacted in 1984.

#### **Section 4 (amending K.S.A. 77-503).**

New subsection (c) is intended to clarify that, when a time requirement under KAPA is expressed in days, all days must be counted including intervening Saturdays, Sundays and legal holidays, unless the statute specifically provides otherwise. Those portions of new subsection (c) relating to the first and last days of any counting period are based on K.S.A. 60-206(a). However, K.S.A. 60-206(a) was not adopted in its entirety.

#### **Section 5 (amending K.S.A. 77-511).**

The technical amendment in subsection (c) is intended to clarify that subsection (c) applies to the commencement of a hearing, whether upon an application for order pursuant to subsection (a) or upon a request for hearing pursuant to subsection (b), but not to other KAPA hearings.

#### **Section 6 (amending K.S.A. 77-512).**

The Advisory Committee recommends raising the burden of proof to “clear and convincing evidence” for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual in order to provide greater protection for these especially important interests. The amendment is narrowly drafted so that it applies only to proceedings against an individual licensee and not business licensing proceedings. Also, if another statute states a different burden of proof, that statute will control.

The clear and convincing evidence standard is met when the evidence shows that the truth of the facts asserted is “highly probable.” *In re B.D.-Y.*, 286 Kan. \_\_\_, 187 P.3d 594 (2008). The Advisory Committee believes this heightened standard is appropriate because occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual’s pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.

This higher standard of proof already applies in attorney disciplinary proceedings by virtue of Supreme Court Rule 211(f). (2007 Kan. Ct. R. Annot. 304.) It may also apply to other licenses as well. See *Lacy v. Kansas Dental Bd.*, 274 Kan. 1031, 1036, 58 P.3d 668, 673 (2002) (application of clear and convincing evidence standard in case involving dentist’s license) and Attorney General Opinion No. 95-54 (in professional license or registration disciplinary proceedings, an agency should establish its claim by clear and convincing evidence). The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct should be presented before disciplinary action is taken against such licenses. At the same time, the Committee believes that similar concerns do not apply to initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

The Advisory Committee acknowledges that the issue of what burden of proof should apply to occupational and professional licensing disciplinary proceedings is a difficult one and not without some disagreement among different agencies. The Committee considered the

alternative option of amending individual licensing statutes to change the burden of proof on a case-by-case basis, instead of recommending an amendment that will apply to licensing proceedings across the board. However, the Committee believes its recommended amendment is a more workable solution.

The Committee's other recommended amendments to this section are mostly technical, but one point is important to note. Under the provisions of subsection (c), the heightened burden of proof does not apply to emergency proceedings.

#### **Section 7 (amending K.S.A. 77-513).**

The technical amendment in subsection (b) reflects the addition of a new section to KAPA in 1990.

#### **Section 8 (amending K.S.A. 77-514).**

New subsection (h) is a separation of functions provision that is intended to address the troubling situation that arises when agency personnel who act in an investigatory or prosecutorial capacity in a proceeding are also involved in the adjudication by the agency. The amendment would prohibit a person who has participated in an investigatory or prosecutorial capacity in connection with a proceeding, or who is supervised by such a person, from acting as presiding officer or providing confidential legal or technical advice to a presiding officer in that proceeding.

The amendments contained in subsection (a) were inadvertently picked up by the Revisor's office from a Committee Note contained in the Advisory Committee's draft amendments to KAPA. The amendments were part of 2004 SB 141 and, pursuant to that bill, will take effect July 1, 2009. See L. 2004, Ch. 145, § 39. Thus, the amendment to subsection (a) in this bill is redundant, but does no harm.

#### **Section 9 (amending K.S.A. 77-519).**

The amendment to subsection (c) allows a presiding officer to determine the manner of service.

#### **Section 10 (amending K.S.A. 77-520).**

New subsection (e) is intended as a clarification of whether a default order is an initial order or a final order depending upon who issues it.

#### **Section 11 (amending K.S.A. 77-521).**

In general, time limits under KAPA which are expressed in days refer to calendar days rather than business days. The amendments to this section create an exception to the general rule; the time limits in this section should be counted as business days rather than calendar days. "Business day" is defined at K.S.A. 77-503(c).

**Section 12 (amending K.S.A. 77-523).**

The amendments to subsection (f) are intended to clarify that a presiding officer may close parts of a hearing pursuant to any statute which expressly authorizes closure or requires information to be kept confidential. In addition, any hearing under KAPA is deemed not to be a meeting pursuant to the Open Meetings Act.

**Section 13 (amending K.S.A. 77-525).**

The amendment in subsection (a) expands the prohibition on ex parte communications by prohibiting intra-agency communication between presiding officers and investigatory or prosecutorial personnel.

**Section 14 (amending K.S.A. 77-527).**

The amendment to subsection (d) deals with agency review of a presiding officer's initial order. The amendment requires an agency head, in reviewing findings of fact by a presiding officer, to give due regard to the presiding officer's credibility determinations. The language of this amendment was taken from the draft Revised Model State Administrative Procedure Act, which the Advisory Committee believes strikes an appropriate balance between protecting the independent fact findings of a hearing officer and preserving the agency's policy-making role.

**Section 15 (amending K.S.A. 77-528).**

The technical amendment is intended to make this section read more clearly.

**Section 16 (amending K.S.A. 77-529).**

The amendment to subsection (b) is intended to clarify that findings of fact and conclusions of law are required in an order on reconsideration that alters a prior order, but not in an order that merely states the prior order will be reconsidered.

New subsection (c) clarifies, when there are multiple parties to a proceeding and one party has filed a petition for judicial review, the agency retains jurisdiction to consider a petition for reconsideration filed by another party to the proceeding, so long as it is timely filed.

**Section 17 (amending K.S.A. 77-531).**

The technical amendment is intended to make this section read more clearly.

**Section 18 (amending K.S.A. 77-532).**

The amendments to this section clarify that confidential internal communications permitted under K.S.A. 77-525 are not part of the state agency record, while oral or written statements allowed by a presiding officer pursuant to K.S.A. 77-523(c) are part of the state agency record.

**Section 19 (amending K.S.A. 77-534).**

Although a prehearing conference may be rarely needed before a conference hearing, the Advisory Committee believes there is no justification for a blanket prohibition on prehearing conferences in this context.

**Section 20 (amending K.S.A. 77-537).**

This amendment is intended to clarify that, when an agency enters a summary order and one of the parties requests a hearing, the burden of proof does not shift to the party requesting the hearing to prove that the summary order was entered in error. If a hearing is requested, the burden of proof remains with the party who sought the summary order in the first instance.

**Section 21 (amending K.S.A. 77-549).**

The amendments are intended as a clarification.

**Section 22 (amending K.S.A. 77-550).**

The amendment is intended as a clarification.

**Section 23 (amending K.S.A. 77-551).**

The technical amendment in subsection (c) corrects what appears to have been a drafting oversight.

The amendment contained in subsection (a) was inadvertently picked up by the Revisor's office from a Committee Note contained in the Advisory Committee's draft amendments to KAPA. The amendment was part of 2004 SB 141 and, pursuant to that bill, will take effect July 1, 2009. See L. 2004, Ch. 145, § 43. Thus, the amendment to subsection (a) in this bill is redundant, but does no harm.

**Section 24 (amending K.S.A. 77-601).**

The first amendment reflects the addition of various new sections to the KJRA since it was originally enacted in 1984. The second amendment changes the name of the act to the Kansas judicial review act. Because both bench and bar commonly refer to the act by that short title and commonly abbreviate the title as the "KJRA," the Advisory Committee recommends that the name of the act be changed to reflect common usage.

**Section 25 (amending K.S.A. 77-603).**

This amendment provides that the KJRA does not apply to agency actions concerning the civil commitment of sexually violent predators pursuant to K.S.A. 59-29a01 *et seq.* The amendment is intended as a direct response to *Williams v. DesLauriers*, 38 Kan. App. 2d 629,

172 P.3d 42 (2007), which held that the KJRA, rather than petition for writ of habeas corpus, was the appropriate method for a sexually violent predator who was civilly committed to a state hospital to assert his due process claim.

**Section 26 (amending K.S.A. 77-612).**

The purpose of the recommended amendment is to clarify and codify existing case law exceptions to the requirement that a petitioner for judicial review must first exhaust administrative remedies. See, e.g., *State ex Rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 172 P.3d 1154 (2007) (if no agency remedy is available or if remedy is inadequate, exhaustion of administrative remedies is not required); *In re Lietz Const. Co.*, 273 Kan. 890, 47 P.3d 1275 (2002) (constitutional issues do not lend themselves to administrative determination and are subject to de novo review; thus, they are properly before the court even though they were not first argued before the agency). The language of the amendment was taken from Section 507(e) of the draft Revised Model State Administrative Procedure Act.

**Section 27 (amending K.S.A. 77-614).**

The amendments to this section are intended to accomplish three objectives: 1) prevent dismissal of an appeal for lack of jurisdiction when there is some defect in the petition for judicial review; 2) allow the petition to be amended under the same standard as K.S.A. 60-215; and 3) provide that substantial compliance with service requirements is sufficient under the same standard as K.S.A. 60-204. Because the amendments are based on provisions from the code of civil procedure, any existing case law interpretations of the corresponding provisions will be helpful to courts interpreting the amendments.

The amendments are intended as a direct response to *Bruch v. Dept. of Revenue*, 282 Kan. 764, 148 P.3d 538 (2006), and similar cases which have required strict compliance with the pleading requirements of this section. The Advisory Committee believes that pleading and service requirements for judicial review of an administrative action should be no more difficult or technical than similar requirements under the code of civil procedure.

**Section 28 (amending K.S.A. 77-617).**

The amendment in subsection (d)(2) is intended to allow a party to raise an issue which the party was not aware of, and could not reasonably have been aware of, before the filing of the petition for judicial review. For example, a party might find out about an *ex parte* communication with the agency only after a petition for judicial review was filed. K.S.A. 77-619 already allows a district court to receive evidence about the unlawfulness of the decision-making process. The amendment to this section explicitly allows such an issue to be raised.

**Section 29 (amending K.S.A. 77-621).**

Under current Kansas law, courts reviewing administrative decisions are instructed to disregard contrary evidence in the record and focus solely on the evidence that supports the agency findings. See *Blue Cross and Blue Shield of Kansas v. Praeger*, 276 Kan. 232, 263, 75

P.3d 226, 246 (2003). The Advisory Committee believes this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. The current Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) 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. See, e.g., *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456 (1951).

The amendment contained in new subsection (d) 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. The amendment is adapted from one of two alternative versions of the scope of review standards contained in Section 509 of the draft Revised Model State Administrative Procedure Act. The Committee chose the alternative which best clarifies the substantial evidence standard and explicitly addresses the role of the hearing officer’s decision. The Committee believes that the amendment 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.

The Committee heard concerns from some agencies that the Committee’s recommended amendment would encourage courts to adopt a de novo standard of review. To clarify that this is not the intended effect of the amendment, the Committee added the final sentence in subsection (d) indicating that courts are not to reweigh evidence or engage in de novo review. The Committee believes this would restore the original intent of the KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record. The last sentence added to subsection (d) was not adapted from the Revised Model Act.

The amendment to subsection (c)(7) is intended to clarify that the appropriate standard of judicial review of an agency’s factual determination is dependent on the underlying standard of proof.

### **Section 30 (repealer).**

The Advisory Committee recommends repeal of K.S.A. 77-507, 77-507a, and 77-605 because they are no longer needed.