

STATE OF NEW YORK

8410

2017-2018 Regular Sessions

IN ASSEMBLY

June 13, 2017

Introduced by M. of A. ABINANTI -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state administrative procedure act, in relation to the establishment of agency adjudication plans

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative intent. The legislature hereby finds and
2 declares that administrative adjudication was developed to provide
3 expert, efficient, timely and fair resolution of claims, rights and
4 disputes before state agencies. Administrative adjudication often
5 addresses complex scientific, technical, financial, medical, legal and
6 related issues under the jurisdiction of state agencies with specialized
7 knowledge, and should be a more flexible alternative to, rather than a
8 duplication of, the civil and criminal court system. Administrative
9 adjudication must meet due process standards and should resolve disputes
10 in a manner that is fair and appears fair to the public. The fairness of
11 administrative adjudication and the appearance of fairness are partic-
12 ularly important when a state agency is a party to the administrative
13 proceeding. To assure expert, efficient, timely and fair adjudication,
14 hearing officers who preside at administrative hearings should be know-
15 ledgeable, competent, impartial, objective and free from inappropriate
16 influence.

17 § 2. The state administrative procedure act is amended by adding a new
18 section 309 to read as follows:

19 § 309. Agency adjudication plans. 1. As used in this section:

20 (a) "Agency" shall mean any department, board, bureau, commission,
21 division, office, council, committee or officer of the state authorized
22 by law to make final decisions in adjudicatory proceedings but shall not
23 include the governor, agencies created by interstate compact or interna-
24 tional agreement, the department of audit and control, the department of
25 law, the division of military and naval affairs to the extent it exer-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 cises its responsibility for military and naval affairs, the division of
2 state police, the identification and intelligence unit of the division
3 of criminal justice services, the office of children and family services
4 to the extent it exercises its responsibilities pursuant to article
5 nineteen-G of the executive law, the state insurance fund, the workers'
6 compensation board, the state division of parole, the department of
7 corrections and community supervision, the joint commission on public
8 ethics, the state education department and the division of tax appeals.

9 (b) "Hearing officer" shall mean a person designated and empowered by
10 an agency to conduct adjudicatory proceedings as defined in this
11 section, including but not limited to hearing officers, hearing examin-
12 ers and administrative law judges; provided, however, that such term
13 shall not apply to the head of an agency or to members of a state board
14 or commission.

15 (c) "Adjudicatory proceedings" shall mean any activity before an agen-
16 cy in which a determination of legal rights, duties or privileges of
17 named parties thereto is required by law to be made only on a record and
18 after an opportunity for a formal adversarial hearing; provided, howev-
19 er, that such term shall not apply to: (i) a rule making proceeding;
20 (ii) an employee disciplinary action or other personnel action pursuant
21 to article five of the civil service law; or (iii) representation
22 proceedings conducted by the public employment relations board.

23 2. Every agency that conducts adjudicatory proceedings shall ensure
24 that such proceedings are impartial, efficient, timely, expert and fair.

25 3. (a) Unless otherwise authorized by law and except as provided in
26 paragraph (b) of this subdivision, a hearing officer shall not communi-
27 cate, directly or indirectly, in connection with any issue that relates
28 in any way to the merits of an adjudicatory proceeding pending before
29 the hearing officer with any person except upon notice and opportunity
30 for all parties to participate.

31 (b) A hearing officer may consult on questions of law with supervi-
32 sors, agency attorneys or other hearing officers, provided that such
33 supervisors, hearing officers or attorneys have not been engaged in
34 investigative or prosecuting functions in connection with the adjudica-
35 tory proceeding under consideration or a factually related adjudicatory
36 proceeding. Hearing officers may also consult with supervisors, other
37 hearing officers, support staff or court reporters on ministerial
38 matters such as scheduling or the location of a hearing. The head of
39 each agency shall strictly enforce the prohibition set forth in this
40 subdivision.

41 (c) The provisions of subdivision (a) of this paragraph shall not
42 apply: (i) in determining applications for initial licenses for public
43 utilities or carriers; or (ii) to proceedings involving the validity or
44 application of rates, facilities, or practices to public utilities or
45 carriers.

46 4. No agency shall consider whether a hearing officer's rulings, deci-
47 sions or other actions favor or disfavor the agency or the state in
48 establishing the hearing officer's salary, promotion, benefits, working
49 conditions, case assignments or opportunities for employment or
50 promotion. The work of hearing officers shall only be evaluated on the
51 following general areas of performance: competence, objectivity, fair-
52 ness, productivity, diligence and temperament.

53 5. No agency shall establish quotas or similar expectations for any
54 hearing officer that relate in any way to whether the hearing officer's
55 rulings, decisions or other actions favor or disfavor the agency or the
56 state.

1 6. In any pending adjudication proceeding, the agency may not order or
2 otherwise direct a hearing officer to make any finding of fact, to reach
3 any conclusion of law, or to make or recommend any specific disposition
4 of a charge, allegation, question or issue, except by remand, reversal,
5 or other decision on the record of the proceeding; provided, however,
6 that such provision shall not preclude a supervisor from giving legal
7 advice or guidance to a hearing officer where the supervisor determines
8 that such advice or guidance is appropriate to assure the quality stand-
9 ards of the agency or to assure consistent or legally sound decisions.

10 7. If the head of an agency, or a designee, issues a decision that
11 includes findings of fact or conclusions of law that conflict with the
12 findings, conclusions or recommended decision of the hearing officer,
13 the head of the agency, or the designee, shall set forth in writing the
14 reasons why the head of the agency reached a conflicting decision.

15 8. (a) Every agency responsible for administrative adjudication shall
16 develop an administrative adjudication plan. An agency may adopt such
17 plan and may amend such plan as necessary following notice of a proposed
18 plan or amendment thereto in the state register and an opportunity for
19 public comment. The agency shall post its current administrative adjudi-
20 cation plan on its website.

21 (b) The administrative adjudication plan shall, at a minimum, include
22 the following:

23 (i) an attestation by the head of the agency that the plan adheres to
24 the principles of administration adjudication set forth in subdivisions
25 one, two, three, four, five, six and seven of this section;

26 (ii)(A) an organization of administrative adjudication that ensures
27 that hearing officers do not report with regard to functions that relate
28 to the merits of adjudicatory proceedings to any agency official other
29 than the head of the agency, a supervisor of hearing officers or the
30 general counsel. Wherever practical, hearing officers shall be assigned
31 to an administrative unit made up exclusively of hearing officers,
32 supervisors and support staff. The unit may be part of the agency coun-
33 sel's office but may not be part of any agency bureau, office or divi-
34 sion with programmatic functions unless such functions are not the
35 subject of adjudicatory proceedings within the agency nor may it include
36 attorneys responsible for prosecutions or other adversarial presentation
37 of agency position. Unless otherwise proscribed by law, hearing offi-
38 cers may be assigned duties in addition to serving as a hearing officer
39 provided that: (1) such duties do not conflict with the hearing offi-
40 cer's responsibilities as a hearing officer; and (2) such duties do not
41 involve functions related to prosecutions or adversarial presentations
42 of agency positions. Hearing officers may be assigned to conduct inves-
43 tigatory hearings provided that the standards of independence and objec-
44 tivity specified in this section are adhered to; and

45 (B) an agency may establish an organization of administrative adjudi-
46 cation for less complex cases that does not satisfy the requirements of
47 clause (A) of this subparagraph provided that any such organization and
48 its justification is set forth in the agency's administrative adjudi-
49 cation plan; and

50 (C) in order to comply with the requirement that a hearing officer not
51 report with regard to functions that relate to the merits of adjudicato-
52 ry proceedings to any agency official other than the head of the agency,
53 a supervisor of hearing officers or the general counsel as set forth in
54 item (A) of this clause, an agency may request the services of a hearing
55 officer from a different agency;

1 (iii) provisions for the hiring of hearing officers that allow, to the
2 extent practical and consistent with the civil service law, opportu-
3 nities for non-agency personnel to compete for open hearing officer
4 positions;

5 (iv) location of hearing officers that separates, to the extent prac-
6 tical, hearing officers, supervisors and support staff from other agency
7 staff;

8 (v) duly promulgated procedural regulations governing adjudicatory
9 hearings that include, without limitation, requirements for clear and
10 detailed notices of hearing and statements of charges; permission for
11 answers and responsive pleadings, where appropriate; provisions for
12 discovery to the extent permitted by the agency; and a procedure for any
13 party to request recusal of a hearing officer;

14 (vi) a description of continuing education and training programs for
15 hearing officers. Training programs shall include an explanation of the
16 need for objectivity and fairness and the avoidance of a pro-agency
17 bias. The governor's office of employee relations shall develop training
18 programs to assist agencies in providing continuing education and train-
19 ing to hearing officers;

20 (vii) a description of efforts to consult and share resources with
21 other agencies;

22 (viii) the use of outside hearing officers, to be paid on a per diem
23 or contract basis, where such outside officers are necessary to imple-
24 ment the provisions of this section;

25 (ix) for agencies that adjudicate fifty or more adjudicatory
26 proceedings per year, a management system intended to effect timely
27 disposition of adjudicatory proceedings;

28 (x) a description of the agency's existing system of administrative
29 adjudication and a discussion of the changes in such system that the
30 proposed plan would effect; and

31 (xi) the summary of the agency's rules governing procedures on adjudi-
32 catory proceedings and appeals required pursuant to subdivision three of
33 section three hundred one of this article.

34 9. The governor shall designate an oversight entity to monitor agency
35 compliance with the requirements of this section, and to receive any
36 complaints from an individual or organization that an agency's system of
37 administrative adjudication is not consistent with this order; provided,
38 however, that such oversight entity shall have no jurisdiction to review
39 a complaint until a complainant has exhausted all of the complainant's
40 administrative and judicial remedies with regard to the administrative
41 proceeding at issue. In reviewing any such complaint, the oversight
42 entity shall not review the merits of an individual case determination
43 nor shall it review issues that have been ruled upon by a court, but its
44 review shall be limited to whether the system of adjudication utilized
45 by the agency is consistent with the provisions of this section. In the
46 event that this review identifies areas of an agency's system of admin-
47 istrative adjudication that appear to be inconsistent with the
48 provisions of this section, the oversight entity shall notify the agency
49 and the complainant. Such notification shall be advisory in nature and
50 not binding on an agency.

51 10. Every two years after the effective date of this section, every
52 agency shall make public a report that sets forth the steps taken by the
53 agency to comply with this section. Such report shall also include
54 statistics on proceedings brought against adjudications of the agency
55 pursuant to the provisions of article seventy-eight of the civil prac-
56 tice law and rules, including the outcome of such proceedings and the

1 reasons for any reversal or modification of an agency determination.
2 Such report shall be published in the state register and posted on the
3 agency's website.

4 11. Public authorities and corporations and agencies not covered by
5 this section are encouraged to administer their systems of administra-
6 tive adjudication in a manner consistent with the principles of this
7 section.

8 § 3. This act shall take effect immediately, and every agency subject
9 to its provisions shall be in full compliance with the provisions of
10 this act on or before January 1, 2018.