

FINAL REPORT

**IOWA ADMINISTRATIVE PROCEDURES
STUDY COMMITTEE**

Presented to the Legislative Council
and the Iowa General Assembly
February 1997

Prepared by the Legislative Service Bureau



Legislative
Service
Bureau

FINAL REPORT

Iowa Administrative Procedures Study Committee

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MEMBERS

Senator Tom Vilsack,
Co-chairperson
Senator Gene Maddox
Senator Mary Neuhauser

Representative Janet Metcalf,
Co-chairperson
Representative Minnette Doderer
Representative Sandra Greiner

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AUTHORIZATION AND APPOINTMENT

The Iowa Administrative Procedures Study Committee was established by the Legislative Council for the 1996 Interim. The Committee was authorized two meeting days and was charged to consider the proposed new Iowa Administrative Act, reflected in Senate File 2404 as introduced during the 1996 legislative session, and recommendations of state agencies and other interested parties and to attempt to balance the rights of executive branch agencies and citizens in the operation of administrative law.



Iowa Administrative Procedures Study Committee

1. Overview of Committee Proceedings.

The Committee held meetings on November 22, 1996, and January 8, 1997. Prior to the first meeting, the Committee solicited comments from interested parties, including state agencies, concerning proposed changes to the current Iowa Administrative Procedure Act which were distributed to the members of the Committee. During the first meeting, the Committee received testimony from the Iowa State Bar Association, the Attorney General, several state agency representatives, and a representative from private industry, concerning the Iowa State Bar Association's proposal to replace Iowa's Administrative Procedure Act. At the conclusion of the first meeting, the Committee requested that the various parties concerned with the Bar Association proposal try and meet in order to resolve as many of their differences as possible and present a compromise proposal to the Committee. At the second meeting, the Iowa State Bar Association and Attorney General presented and recommended to the Committee a joint compromise proposal to make amendments to the current Administrative Procedure Act. The Committee then recommended that the joint proposal be drafted in bill form and presented to the General Assembly for consideration during the 1997 legislative session.

2. November 22, 1996, Meeting.

a. Iowa State Bar Association Proposal (dated November 21, 1996) - General Comments.

(1) Reasons for the adoption of the proposal. Mr. Roger Stetson, President, Iowa State Bar Association, and Professor Arthur Bonfield, University of Iowa College of Law, described the proposed legislation which would replace current Iowa Code chapter 17A and enumerated several reasons for the proposal.

(a) Coping with the Growth of Administrative Law. The current statute is too sketchy and inadequate to deal with the enormous growth of administrative law.

(b) Balancing Competing Interests. The proposal represents a more equitable balance between efficient and economical government and the rights and needs of citizens.

(c) Creating Proportional Adjudicatory Procedures. The current statute makes no effort to proportion adjudication procedures based on the importance of the matters at stake.

(d) Providing Greater Political Control. The proposal seeks to ensure effective political control over agency action.

(e) Discouraging Overregulation. The current statute does not adequately deal with agency overregulation.

(f) Enhancing Public Access to Agency Law and Policy. The proposal enhances public access to agency law and policy.

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(g) Enhancing Judicial Review. The proposal enhances the availability and effectiveness of judicial review of agency action.

(2) *Comments Concerning the Bar Association Proposal.* Mr. Tom Miller, Attorney General, and Ms. Elizabeth Osenbaugh, Solicitor General, enumerated several concerns over the Bar Association proposal.

(a) Exclusion from Developing the Proposed Legislation. The Attorney General's Office was excluded from the process of developing the Bar Association proposal.

(b) Breadth of the Proposed Legislation. Although the current law probably provides the state with too many advantages, the Bar Association proposal goes far beyond any real or perceived problems with the current Administrative Procedure Act.

(c) Complexity. The new Act is far too complex. Merely increasing the extent of the administrative process does not necessarily lead to greater public fairness or access. In addition, increasing the complexity of process will decrease agency flexibility and may result in additional court action.

(d) Accountability. The proposal weakens accountability by providing for waivers of rules and for enhanced gubernatorial veto power over rules.

(e) Greater Regulation. The proposed legislation encourages more regulation by agencies required to adopt more rules. This would result in additional costs both by agencies and by citizens required to depend upon attorneys.

(f) The Proposal Is Untested. No state has adopted the new model Administrative Procedure Act upon which the proposed legislation is based.

b. Iowa State Bar Association Proposal (dated November 21, 1996) - Rulemaking Issues.

The following individuals addressed the Committee concerning the rulemaking provisions of the proposed legislation: Professor Arthur Bonfield; Ms. Elizabeth Osenbaugh; Mr. Paul Tanaka, Director, University Legal Services, Iowa State University; Ms. Kay Williams, Executive Director, Ethics and Campaign Finance Disclosure Board; Ms. Suzan Stewart, Managing Attorney, Mid-American Energy Company; Mr. Carl Castelda, Department of Revenue and Finance; Ms. Julie Fitzgerald, Iowa Department of Transportation; Ms. Mary Ann Walker, Department of Human Services; and Ms. Clair Cramer, Iowa Workforce Development.

(1) *Preference for Rulemaking Over Case-By-Case Adjudication.* Professor Bonfield indicated that the proposal attempts to encourage agencies to adopt law and policy through rulemaking, thereby making it subject to public comment and legislative and gubernatorial oversight, rather than through case-by-case adjudication. The goal is not increased regulation, but rather increased use of the rulemaking process.



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Mr. Tanaka, formerly an attorney in the State of Washington, indicated that the State of Washington recently adopted similar provisions concerning rulemaking and that the resultant increase in agency rulemaking was not beneficial. He noted that a moratorium on rules was requested by the Governor after numerous complaints from business and the legislature later acknowledged that the attempt to increase the use of rulemaking by agencies was not a success.

(2) *Cost/Benefit Analysis.* Many agency presenters indicated the rulemaking provisions of the proposal will increase their costs through increased record keeping requirements and through the need for additional staff time to comply with the additional rulemaking requirements. In addition, the presenters indicated that many of these provisions are not likely to be used by the public and will not increase public access to rulemaking. Professor Bonfield indicated that the proposal does entail some additional cost, as did the enactment of the current Administrative Procedure Act in the 1970s, but that the agencies' concerns are likely exaggerated. Ms. Stewart indicated that the proposal would require more work for Mid-American Energy that could be better used in adapting to the rapidly changing nature of the utility industry.

(3) *Concise Explanatory Statement.* The proposal requires agencies to provide a statement of reasons for any particular rule and also requires agencies to rely only on the reasons provided when attempting to later defend the validity of the rule in subsequent litigation. Professor Bonfield indicated that this requirement enhances the ability of the public to understand rules.

Several presenters indicated that this proposal will require a substantial increase in resources for agencies for little benefit. Currently, persons can request a concise statement but very few do. In addition, given the legal significance of the statement, the reasons are likely to be so detailed or so general so as not to be useful for the general public.

(4) *Waiver of Rules.* The proposal provides for the waiver of rules under certain situations. Professor Bonfield indicated that this provision is important to try and reduce agency overregulation and to give agencies some flexibility in their rules. Furthermore, he indicated that it is best for the Legislature, and not individual agencies, to set the guidelines for requesting a waiver.

Ms. Walker indicated that the Department of Human Services already provides for the ability of persons to request an exception to a rule. Other presenters indicated concern that the public expects an even-handed application of the rules and that this provision could lead to special privileges for a few.

(5) *Public Access to Rulemaking.* Several agency presenters indicated their concern that under current law, the general public does not become involved in the rulemaking process. However, most of these presenters indicated that the increased procedural hurdles contemplated by the proposal would not solve the problem of public input in the rulemaking process.

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3. January 8, 1997, Meeting.

a. Iowa State Bar Association and Attorney General Joint Proposal to Amend the Iowa Administrative Procedure Act.

Representatives of the Iowa State Bar Association and the Attorney General of Iowa presented to the interim committee a compromise proposal for making revisions to the current Iowa Administrative Procedure Act. The compromise includes provisions dealing with the regulatory analysis of proposed rules, requests for review of rules, declaratory orders by agencies, administrative law judges, including establishment of an independent office of administrative hearings, default orders, ex parte communications and separation of functions, emergency adjudicative proceedings, and judicial review. The Attorney General indicated that the proposal reflects an agreement with its office and not that of other state agencies who may have other concerns.

b. Comments Concerning the Joint Proposal - Department of Inspections and Appeals.

Mr. Kim Schmett, Director, Iowa Department of Inspections and Appeals, addressed the Committee concerning the joint proposal. He made the following points:

(1) Distinguishing between types of hearings by requiring consideration by administrative law judges with independent office would reduce the effectiveness of creating a central agency to consider all hearings.

(2) The chief administrative law judge should retain merit system protection and not be subject to gubernatorial appointment.

(3) Concern as to how to provide for agency certification of specific administrative law judges eligible to hear certain cases.

(4) The proposal would allow agencies to establish different procedural requirements for their cases. This practice could create confusion and reduce uniformity in consideration of cases by administrative law judges.

c. Public Access Concerns.

Mr. Wallace Taylor, an attorney with the Sierra Club, addressed the Committee. He indicated that the Iowa Administrative Procedure Act should be changed to provide easier access to members of the general public in bringing a contested case proceeding and that neither the initial Bar Association proposal, nor the compromise proposal, addresses this concern.

4. Committee Recommendations.

The interim committee recommended that the joint Bar Association and Attorney General proposal to revise the Iowa Administrative Procedure Act be drafted as a study bill from the interim committee to be presented and considered by the appropriate legislative standing committees. This proposed study bill is on file with



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the Legislative Service Bureau. The interim committee indicated that the committees considering this proposal should carefully examine issues concerning the independence of administrative law judges and the ability of the public to participate in contested case proceedings.

5. Written Materials Filed with the Legislative Service Bureau.

- a. Proposed study bill (LSB 1598ic).
- b. Iowa State Bar Association drafts, by bill number or date, of proposed legislation revising the Iowa Administrative Procedure Act:
 - ◆ Senate File 2404
 - ◆ September 16, 1996
 - ◆ November 21, 1996
- c. Amendments to the Iowa Administrative Procedure Act proposed by the Iowa State Bar Association and Attorney General of Iowa (January 7, 1997).
- d. Written comments concerning the proposed new Iowa Administrative Procedure Act from the following agencies or groups in response to Committee request for comments:
 - ◆ Attorney General of Iowa, Iowa Lottery, Public Employment Relations Board, Department of Inspections and Appeals, Insurance Division of the Department of Commerce, Iowa Civil Rights Commission, Department of Natural Resources, Iowa Workforce Development, Iowa Division of Banking of the Department of Commerce, Iowa Department of Transportation, Secretary of State, Department of Revenue and Finance, Professional Licensing Division of the Department of Commerce, Department of Personnel, Department of Economic Development, Department of General Services, Department of Human Services, Department of Public Safety, Iowa Public Employees' Retirement System, and Department of Corrections.
- e. Washington Administrative Procedure Act (Chapter 34.05 Revised Code of Washington), distributed by Mr. Paul Tanaka, Iowa State University.
- f. "State Administrative Policy Formulation and the Choice of Lawmaking Methodology", Professor Arthur Bonfield, 42 Administrative Law Review 121 (Spring 1990).
- g. Comments from Mr. Wallace Taylor on behalf of the Iowa Chapter of the Sierra Club, dated December 11, 1996.
- h. Comments from Mr. Kim Schmett, Director, Iowa Department of Inspections and Appeals, concerning the compromise proposal dated January 8, 1997.