

[As Amended by Senate Committee of the Whole]

As Amended by Senate Committee

[As Amended by House Committee of the Whole]

Session of 2008

Substitute for HOUSE BILL No. 2618

By Committee on Judiciary

2-27

14 AN ACT concerning *state agency actions; relating to* administrative
15 procedure; ~~[relating to interpretation of federal statutes, regu-~~
16 ~~lations and national codes;]~~ amending K.S.A. 77-502, 77-512, 77-
17 516, 77-525, 77-526, ~~[77-619,]~~ 77-620 ~~and 77-621],~~ **77-621 and 82a-**
18 **1037]** and K.S.A. 2007 Supp. 75-37,121, 77-514, 77-527 ~~and 77-551,~~
19 ~~77-551 and 82a-1037 [and 77-551]~~ and repealing the existing sec-
20 tions; also repealing K.S.A. 2007 Supp. 74-599, K.S.A. 2003 Supp. 77-
21 514, as amended by section 39 of chapter 145 of the 2004 Session
22 Laws of Kansas, and K.S.A. 77-551, as amended by section 43 of chap-
23 ter 145 of the 2004 Session Laws of Kansas.

24
25 *Be it enacted by the Legislature of the State of Kansas:*

26 ~~[New Section 1. In the event a Kansas state agency is inter-~~
27 ~~preting or enforcing a federal regulation, a federal statute or a~~
28 ~~national building or fire code and such regulation, statute or code~~
29 ~~is interpreted less restrictively by state officials in other states;~~
30 ~~such less restrictive interpretation shall be applicable in Kansas~~
31 ~~unless such less restrictive interpretation conflicts with a Kansas~~
32 ~~statute, regulation or local ordinance or resolution;~~

33 ~~[Sec. 2. K.S.A. 77-619 is hereby amended to read as follows:~~
34 ~~77-619. (a) The court may receive evidence, in addition to that~~
35 ~~contained in the agency record for judicial review, only if it relates~~
36 ~~to the validity of the agency action at the time it was taken and is~~
37 ~~needed to decide disputed issues regarding:~~

38 ~~—(1) Improper constitution as a decision-making body; or im-~~
39 ~~proper motive or grounds for disqualification, of those taking the~~
40 ~~agency action; or~~

41 ~~—(2) unlawfulness of procedure or of decision-making process;~~

42 ~~or~~

43 ~~—(3) interpretations in other states when a party is claiming the ap-~~

1 ~~plication of section 1, and amendments thereto.~~

2 ~~[(b) The court may remand a matter to the agency, before final~~
3 ~~disposition of a petition for judicial review, with directions that the~~
4 ~~agency conduct fact-finding and other proceedings the court con-~~
5 ~~siders necessary and that the agency take such further action on~~
6 ~~the basis thereof as the court directs, if:~~

7 ~~[(1) The agency was required to base its action exclusively on~~
8 ~~a record of a type reasonably suitable for judicial review, but the~~
9 ~~agency failed to prepare or preserve an adequate record;~~

10 ~~[(2) the court finds that (A) new evidence has become available~~
11 ~~that relates to the validity of the agency action at the time it was~~
12 ~~taken, that one or more of the parties did not know and was under~~
13 ~~no duty to discover, or did not know and was under a duty to dis-~~
14 ~~cover but could not reasonably have discovered until after the~~
15 ~~agency action, and (B) the interests of justice would be served by~~
16 ~~remand to the agency;~~

17 ~~[(3) the agency improperly excluded or omitted evidence from~~
18 ~~the record; or~~

19 ~~[(4) a relevant provision of law changed after the agency action~~
20 ~~and the court determines that the new provision may control the~~
21 ~~outcome;~~

22 New Section ~~±~~ ~~[3.]~~ 1. The presiding officer from the office of ad-
23 ministrative hearings, on such presiding officer's own motion or the mo-
24 tion of any party, may order certification of policy issues to an agency of
25 this state when it appears to the presiding officer that there are involved
26 in the proceeding before such presiding officer questions of policy which
27 may be determinative of the proceeding then pending and it appears to
28 the presiding officer that there are no established policies in statutes, rules
29 and regulations or agency precedents which are determinative of such
30 questions of policy.

31 Sec. ~~2.~~ ~~[4.]~~ 2. K.S.A. 2007 Supp. 75-37,121 is hereby amended to
32 read as follows: 75-37,121. (a) There is created the office of administrative
33 hearings within the department of administration, to be headed by a di-
34 rector appointed by the secretary of administration. The director shall be
35 in the unclassified service under the Kansas civil service act.

36 (b) The office may employ or contract with presiding officers, court
37 reporters and other support personnel as necessary to conduct proceed-
38 ings required by the Kansas administrative procedure act for adjudicative
39 proceedings **or any adjudicative hearings** of the state agencies, boards
40 and commissions specified in subsection (h). The office shall conduct
41 adjudicative **hearings or** proceedings of any state agency which is spec-
42 ified in subsection (h) when requested by such agency. Only a person
43 admitted to practice law in this state or a person directly supervised by a

1 person admitted to practice law in this state may be employed as a pre-
2 siding officer. The office may employ regular part-time personnel. Per-
3 sons employed by the office shall be under the classified civil service.

4 (c) If the office cannot furnish one of its presiding officers within 60
5 days in response to a requesting agency's request, the director shall des-
6 ignate in writing a full-time employee of an agency other than the re-
7 questing agency to serve as presiding officer for the **hearing or** proceed-
8 ing, but only with the consent of the employing agency. The designee
9 must possess the same qualifications required of presiding officers em-
10 ployed by the office.

11 (d) The director may furnish presiding officers on a contract basis to
12 any governmental entity to conduct any **hearing or** proceeding other than
13 a proceeding as provided in subsection (h).

14 (e) The secretary of administration may adopt rules and regulations:

15 (1) To establish procedures for agencies to request and for the di-
16 rector to assign presiding officers. An agency may neither select nor reject
17 any individual presiding officer for any **hearing or** proceeding except in
18 accordance with the Kansas administrative procedure act;

19 (2) to establish procedures and adopt forms, consistent with the Kan-
20 sas administrative procedure act, the model rules of procedure, and other
21 provisions of law, to govern presiding officers; and

22 (3) to facilitate the performance of the responsibilities conferred
23 upon the office by the Kansas administrative procedure act.

24 (f) The director may implement the provisions of this section and
25 rules and regulations adopted under its authority.

26 (g) The secretary of administration may adopt rules and regulations
27 to establish fees to charge a state agency for the cost of using a presiding
28 officer.

29 (h) *Except as provided in subsection (j)*, the following state agencies,
30 boards and commissions shall utilize the office of administrative hearings
31 for conducting adjudicative hearings, *as defined in K.S.A. 77-502, and*
32 ~~*amendments thereto, under the Kansas administrative procedures pro-*~~
33 ~~*cedure act in which the presiding officer is not the agency head or one*~~
34 ~~*or more members of the agency head:*~~

35 (1) On and after July 1, 2005: Department of social and rehabilitation
36 services, juvenile justice authority, department on aging, department of
37 health and environment, Kansas public employees retirement system,
38 Kansas water office, Kansas animal health department and Kansas insur-
39 ance department.

40 (2) On and after July 1, 2006: Emergency medical services board,
41 emergency medical services council, Kansas health policy authority and
42 Kansas human rights commission.

43 (3) On and after July 1, 2007: Kansas lottery, Kansas racing and gam-

1 ing commission, state treasurer, pooled money investment board; *and*
2 Kansas department of wildlife and parks ~~and state board of tax appeals.~~

3 (4) On and after July 1, 2008: Department of ~~human resources~~ **labor**,
4 ~~state corporation commission~~, state conservation commission, agricultural
5 labor relations board, department of administration, department of rev-
6 enue, board of adult care home administrators, Kansas state grain in-
7 spection department, board of accountancy and Kansas wheat
8 commission.

9 (5) On and after July 1, 2009, all other ~~Kansas administrative proce-~~
10 ~~dure act hearings~~ *state agencies, boards or commissions* not mentioned
11 in subsections (1), (2), (3) and (4).

12 (i) (1) ~~Effective July 1, 2005, any presiding officer in agencies spee-~~
13 ~~ified in subsection (h)(1) which conduct hearings pursuant to the Kansas~~
14 ~~administrative procedure act, except those exempted pursuant to K.S.A.~~
15 ~~77-551 and amendments thereto, and support personnel for such presid-~~
16 ~~ing officers, shall be transferred to and shall become employees of the~~
17 ~~office of administrative hearings. Such personnel shall retain all rights~~
18 ~~under the state personnel system and retirement benefits under the laws~~
19 ~~of this state which had accrued to or vested in such personnel prior to~~
20 ~~the effective date of this section. Such person's services shall be deemed~~
21 ~~to have been continuous. All transfers of personnel positions in the clas-~~
22 ~~sified service under the Kansas civil service act shall be in accordance~~
23 ~~with civil service laws and any rules and regulations adopted thereunder.~~
24 ~~This section shall not affect any matter pending before an administrative~~
25 ~~hearing officer at the time of the effective date of the transfer, and such~~
26 ~~matter shall proceed as though no transfer of employment had occurred.~~

27 ~~—(2)—Effective July 1, 2006, any presiding officer in agencies specified~~
28 ~~in subsection (h)(2) which conduct hearings pursuant to the Kansas ad-~~
29 ~~ministrative procedure act, except those exempted pursuant to K.S.A. 77-~~
30 ~~551 and amendments thereto, and support personnel for such presiding~~
31 ~~officers, shall be transferred to and shall become employees of the office~~
32 ~~of administrative hearings. Such personnel shall retain all rights under~~
33 ~~the state personnel system and retirement benefits under the laws of this~~
34 ~~state which had accrued to or vested in such personnel prior to the ef-~~
35 ~~fective date of this section. Such person's services shall be deemed to~~
36 ~~have been continuous. All transfers of personnel positions in the classified~~
37 ~~service under the Kansas civil service act shall be in accordance with civil~~
38 ~~service laws and any rules and regulations adopted thereunder. This sec-~~
39 ~~tion shall not affect any matter pending before an administrative hearing~~
40 ~~officer at the time of the effective date of the transfer, and such matter~~
41 ~~shall proceed as though no transfer of employment had occurred.~~

42 ~~—(3)—Effective July 1, 2007, any presiding officer in agencies specified~~
43 ~~in subsection (h)(3) which conduct hearings pursuant to the Kansas ad-~~

1 ~~administrative procedure act, except those exempted pursuant to K.S.A. 77-~~
2 ~~551 and amendments thereto, and support personnel for such presiding~~
3 ~~officers, shall be transferred to and shall become employees of the office~~
4 ~~of administrative hearings. Such personnel shall retain all rights under~~
5 ~~the state personnel system and retirement benefits under the laws of this~~
6 ~~state which had accrued to or vested in such personnel prior to the ef-~~
7 ~~fective date of this section. Such person's services shall be deemed to~~
8 ~~have been continuous. All transfers of personnel positions in the classified~~
9 ~~service under the Kansas civil service act shall be in accordance with civil~~
10 ~~service laws and any rules and regulations adopted thereunder. This sec-~~
11 ~~tion shall not affect any matter pending before an administrative hearing~~
12 ~~officer at the time of the effective date of the transfer, and such matter~~
13 ~~shall proceed as though no transfer of employment had occurred.~~

14 ~~—(4)~~ Effective July 1, 2008, any full-time presiding officer in agencies
15 specified in subsection (h)(4) which conduct *adjudicative* hearings ~~pur-~~
16 ~~suant to the Kansas administrative procedure act, as defined in K.S.A.~~
17 ~~77-502, and amendments thereto~~, except those exempted pursuant to
18 K.S.A. 77-551 and amendments thereto, and support personnel for such
19 presiding officers, shall be transferred to and shall become employees of
20 the office of administrative hearings. Such personnel shall retain all rights
21 under the state personnel system and retirement benefits under the laws
22 of this state which had accrued to or vested in such personnel prior to
23 the effective date of this section. Such person's services shall be deemed
24 to have been continuous. All transfers of personnel positions in the clas-
25 sified service under the Kansas civil service act shall be in accordance
26 with civil service laws and any rules and regulations adopted thereunder.
27 This section shall not affect any matter pending before an administrative
28 hearing officer at the time of the effective date of the transfer, and such
29 matter shall proceed as though no transfer of employment had occurred.

30 ~~(5)~~ (2) Effective July 1, 2009, any full-time presiding officer in agen-
31 cies specified in subsection (h)(5) which conduct *adjudicative* hearings
32 ~~pursuant to the Kansas administrative procedure act, as defined in~~
33 ~~K.S.A. 77-502, and amendments thereto~~, except those exempted pur-
34 suant to K.S.A. 77-551, and amendments thereto, and support personnel
35 for such presiding officers, shall be transferred to and shall become em-
36 ployees of the office of administrative hearings. Such personnel shall re-
37 tain all rights under the state personnel system and retirement benefits
38 under the laws of this state which had accrued to or vested in such per-
39 sonnel prior to the effective date of this section. Such person's services
40 shall be deemed to have been continuous. All transfers of personnel po-
41 sitions in the classified service under the Kansas civil service act shall be
42 in accordance with civil service laws and any rules and regulations adopted
43 thereunder. This section shall not affect any matter pending before an

1 administrative hearing officer at the time of the effective date of the
2 transfer, and such matter shall proceed as though no transfer of employ-
3 ment occurred.

4 (j) *Except as provided in K.S.A. 77-551, and amendments thereto, the*
5 *provisions of this section shall not apply to the state board of tax appeals*
6 ~~*and*~~, *the state corporation commission [or the Kansas insurance de-*
7 *partment as to hearings held under K.S.A. 40-222b, 40-2c19, 40-*
8 *2d19, 40-510, 40-512, 40-1219a, 40-1618, 40-1706, 40-2109, 40-*
9 *3011, 40-3302, 40-3304, 40-3305, 40-3308, 40-3309, 40-3413,*
10 *40-3610, 40-3613, 40-3625, 40-4002 and 40-4004, and amendments*
11 *thereto].*

12 Sec. ~~3.~~ 5. 3. K.S.A. 77-502 is hereby amended to read as follows:
13 77-502. As used in this act:

14 (a) “State agency” means any officer, department, bureau, division,
15 board, authority, agency, commission or institution of this state, except
16 the judicial and legislative branches of state government and political
17 subdivisions of the state, which is authorized by law to administer, enforce
18 or interpret any law of this state.

19 (b) “Agency head” means an individual or body of individuals in
20 whom the ultimate legal authority of the state agency is vested by any
21 provision of law.

22 (c) “License” means a franchise, permit, certification, approval, reg-
23 istration, charter or similar form of authorization required by law for a
24 person to engage in a profession or occupation.

25 (d) “Order” means a state agency action of particular applicability
26 that determines the legal rights, duties, privileges, immunities or other
27 legal interest of one or more specific persons.

28 (e) “Party to state agency proceedings,” or “party” in context so in-
29 dicating, means:

30 (1) A person to whom an order is specifically directed; or

31 (2) a person named as a party to a state agency proceeding or allowed
32 to intervene as a party in the proceeding.

33 (f) “Person” means an individual, partnership, corporation, associa-
34 tion, political subdivision or unit thereof or public or private organization
35 or entity of any character, and includes another state agency.

36 (g) “Political subdivision” means political or taxing subdivisions of the
37 state, including boards, commissions, authorities, councils, committees,
38 subcommittees and other subordinate groups or administrative units
39 thereof, receiving or expending and supported in whole or in part by
40 public funds.

41 (h) “Adjudicative hearing” means any hearing or proceeding requir-
42 ing resolution of disputed facts to formulate and issue a decision or order.
43 Notwithstanding the use of any other term, if the hearing or proceeding

1 *requires resolution of disputed facts it shall be deemed an adjudicative*
2 *hearing, **whether or not such hearing is conducted in accordance***
3 ***with the Kansas administrative procedure act. [Adjudicative hear-***
4 ***ing shall not include hearings or proceedings conducted by the de-***
5 ***partment of corrections or parole board.] [“Adjudicative hearing”***
6 ***shall not include any informal conference conducted pursuant to or***
7 ***in the manner prescribed by K.S.A. 79-5a05, 79-6a04, 79-3226 or***
8 ***subsection (d) of 79-5205, and amendments thereto, or any admin-***
9 ***istrative hearing authorized pursuant to K.S.A. 8-255 or 8-1020,***
10 ***and amendments thereto.]***

11 Sec. ~~4.~~ 6. 4. K.S.A. 77-512 is hereby amended to read as follows:
12 77-512. (a) A state agency may not revoke, suspend, modify, annul, with-
13 draw, refuse to renew, or amend a license unless the state agency first
14 gives notice and an opportunity for a hearing in accordance with this act.
15 This section does not preclude a state agency from ~~(a)~~ (1) taking imme-
16 diate action to protect the public interest in accordance with K.S.A. 77-
17 536, and amendments thereto, or ~~(b)~~ (2) adopting rules and regulations,
18 otherwise within the scope of its authority, pertaining to a class of licens-
19 ees, including rules and regulations affecting the existing licenses of a
20 class of licensees.

21 (b) *Unless otherwise provided by law, the burden of proof for dis-*
22 *puted issues of fact in occupational or professional licensing disciplinary*
23 *proceedings against an individual shall be by clear and convincing evi-*
24 *dence.*

25 Sec. ~~5.~~ 7. 5. K.S.A. 2007 Supp. 77-514 is hereby amended to read
26 as follows: 77-514. ~~(a) For agencies listed in subsection (h) of K.S.A. 75-~~
27 ~~37,121, and amendments thereto, the agency head, one or more members~~
28 ~~of the agency head or a presiding officer assigned by the office of admin-~~
29 ~~istrative hearings shall be the presiding officer. For all other agencies, the~~
30 ~~agency head, one or more members of the agency head, a presiding officer~~
31 ~~assigned by the office of administrative hearings, or, unless prohibited by~~
32 ~~K.S.A. 77-551, and amendments thereto, one or more other persons des-~~
33 ~~ignated by the agency head shall be the presiding officer. (a) (1) Not-~~
34 ~~withstanding any other provision of law to the contrary, on and after July~~
35 ~~1, 2008, through June 30, 2009, for agencies listed in subsections (h)(1),~~
36 ~~(h)(2), (h)(3) and (h)(4) of K.S.A. 75-37,121, and amendments thereto, a~~
37 ~~presiding officer assigned by the office of administrative hearings shall be~~
38 ~~the presiding officer for all adjudicative hearings. The presiding officer~~
39 ~~shall render an initial order, which becomes a final order unless reviewed~~
40 ~~in accordance with K.S.A. 77-527, and amendments thereto.~~

41 (2) *Notwithstanding any other provision of law to the contrary, except*
42 *as provided in K.S.A. 77-551, and amendments thereto, on and after July*
43 *1, 2009, for all state agencies, a presiding officer assigned by the office of*

1 *administrative hearings shall be the presiding officer for all adjudicative*
2 *hearings. The presiding officer shall render an initial order, which be-*
3 *comes a final order unless reviewed in accordance with K.S.A. 77-527,*
4 *and amendments thereto.*

5 (b) Any person serving or designated to serve alone or with others as
6 presiding officer is subject to disqualification for administrative bias, prej-
7 udice or interest.

8 (c) Any party may petition for the disqualification of a person
9 promptly after receipt of notice indicating that the person will preside or
10 promptly upon discovering facts establishing grounds for disqualification,
11 whichever is later.

12 (d) A person whose disqualification is requested shall determine
13 whether to grant the petition, stating facts and reasons for the
14 determination.

15 (e) If a substitute is required for a person who is disqualified or be-
16 comes unavailable for any other reason, any action taken by a duly ap-
17 pointed substitute for a disqualified or unavailable person is as effective
18 as if taken by the latter.

19 (f) If the office of administrative hearings cannot provide a presiding
20 officer, a state agency may enter into agreements with another state
21 agency to provide presiding officers to conduct proceedings under this
22 act.

23 (g) *Prior to July 1, 2009, as applicable, notwithstanding any quorum*
24 *requirements, if the agency head of a professional or occupational li-*
25 *censing agency is a body of individuals, the agency head, unless prohibited*
26 *by law, may designate one or more members of the agency head to serve*
27 *as presiding officer and to render a final order in the proceeding.*

28 (h) *Except as otherwise provided by law, in any proceeding under*
29 *this act, a person shall not be eligible to act as presiding officer, and shall*
30 *not provide confidential legal or technical advice to a presiding officer in*
31 *the proceeding, if such person:*

32 (1) *Has participated in any stage of an investigation or prosecution*
33 *associated with the proceeding or a proceeding arising out of the same*
34 *event or transaction;*

35 (2) *is supervised or directed by a person who would be disqualified*
36 *under paragraph (1); or*

37 (3) *has participated in an investigatory or prosecutorial capacity in*
38 *the creation of a summary order as part of another stage of the proceeding.*

39 Sec. ~~6-8~~ **6.** K.S.A. 77-516 is hereby amended to read as follows:
40 77-516. The presiding officer designated to conduct the hearing may con-
41 duct a prehearing conference. If the conference is conducted:

42 (a) *Prior to July 1, 2009, as applicable, the state agency may assign a*
43 *presiding officer, if such agency is not required to use a presiding officer*

1 *from the office of administrative hearings*, for the prehearing conference,
2 exercising the same discretion as is provided by K.S.A. 77-514, and
3 amendments thereto, concerning the selection of a presiding officer for
4 a hearing.

5 (b) The presiding officer for the prehearing conference shall set the
6 time and place of the conference and give reasonable notice to all parties
7 and to all persons who have filed written petitions to intervene in the
8 matter.

9 (c) The notice shall include:

10 (1) The names and mailing addresses of all parties and other persons
11 to whom notice is being given by the presiding officer;

12 (2) the name, official title, mailing address and telephone number of
13 any counsel or employee who has been designated to appear for the state
14 agency;

15 (3) the official file or other reference number, the name of the pro-
16 ceeding and a general description of the subject matter;

17 (4) a statement of the time, place and nature of the prehearing
18 conference;

19 (5) a statement of the legal authority and jurisdiction under which
20 the prehearing conference and the hearing are to be held;

21 (6) the name, official title, mailing address and telephone number of
22 the presiding officer for the prehearing conference;

23 (7) a statement that at the prehearing conference the proceeding,
24 without further notice, may be converted into a conference hearing or a
25 summary proceeding for disposition of the matter as provided by this act;
26 and

27 (8) a statement that a party who fails to attend or participate in a
28 prehearing conference, hearing or other stage of an adjudicative pro-
29 ceeding may be held in default under this act.

30 (d) The notice may include any other matters that the presiding of-
31 ficer considers desirable to expedite the proceedings.

32 Sec. ~~7.~~ **7.** K.S.A. 77-525 is hereby amended to read as follows:
33 77-525. (a) A presiding officer serving in an adjudicative proceeding may
34 not communicate, directly or indirectly, regarding any issue in the pro-
35 ceeding while the proceeding is pending, with any party or participant,
36 with any person who has a direct or indirect interest in the outcome of
37 the proceeding or with any person who *has served in an investigatory or*
38 *prosecutorial capacity* or presided at a previous stage of the proceeding,
39 without notice and opportunity for all parties to participate in the
40 communication.

41 (b) A member of a multimember panel of presiding officers may com-
42 municate with other members of the panel regarding a matter pending
43 before the panel, and any presiding officer may receive aid from staff

1 assistants if the assistants do not:

2 (1) Receive *ex parte* communications of a type that the presiding
3 officer would be prohibited from receiving; or

4 (2) furnish, augment, diminish or modify the evidence in the record.

5 (c) Unless required for the disposition of *ex parte* matters specifically
6 authorized by statute, no party to an adjudicative proceeding, and no
7 person who has a direct or indirect interest in the outcome of the pro-
8 ceeding or who presided at a previous stage of the proceeding, may di-
9 rectly or indirectly communicate in connection with any issue in that
10 proceeding, while the proceeding is pending, with any person serving as
11 presiding officer unless notice and an opportunity are given all parties to
12 participate in the communication.

13 (d) If, before serving as presiding officer in an adjudicative proceed-
14 ing, a person receives an *ex parte* communication of a type that could not
15 properly be received while serving, the person, promptly after starting to
16 serve, shall disclose the communication in the manner prescribed in sub-
17 section (e).

18 (e) A presiding officer who receives an *ex parte* communication in
19 violation of this section shall place on the record of the pending matter
20 all written communications received, all written responses to the com-
21 munications and a memorandum stating the substance of all oral com-
22 munications received, all responses made and the identity of each person
23 from whom the presiding officer received an *ex parte* communication and
24 shall advise all parties that these matters have been placed on the record.
25 Any party desiring to rebut the *ex parte* communication must be allowed
26 to do so, upon requesting the opportunity for rebuttal within 10 days after
27 notice of the communication.

28 (f) If necessary to eliminate the effect of an *ex parte* communication
29 received in violation of this section, a presiding officer who receives the
30 communication may be disqualified and the portions of the record per-
31 taining to the communication may be sealed by protective order.

32 (g) The state agency shall, and any party may, report any willful vio-
33 lation of this section to appropriate authorities for any disciplinary pro-
34 ceedings provided by law. In addition, each state agency, by rule and
35 regulation, may provide for appropriate sanctions, including default, for
36 any violations of this section.

37 (h) This section shall not apply to adjudicative **hearings or** proceed-
38 ings before:

39 (1) The state corporation commission. Such proceedings shall be sub-
40 ject to the provisions of K.S.A. 77-545, *and amendments thereto*;

41 (2) the commissioner of insurance concerning any rate, or any rule,
42 regulation or practice pertaining to the rates over which the commissioner
43 has jurisdiction or adjudicative proceedings held pursuant to the Kansas

1 insurance holding companies act. Such proceedings shall be subject to
2 the provisions of K.S.A. 77-546, *and amendments thereto*; and

3 (3) the director of taxation. Such proceedings shall be subject to the
4 provisions of K.S.A. 77-548, *and amendments thereto*.

5 Sec. ~~8. [10.]~~ 8. K.S.A. 77-526 is hereby amended to read as follows:
6 77-526. (a) *Except as provided in K.S.A. 77-514, and amendments thereto*,
7 if the presiding officer is the agency head or designated in accordance
8 with subsection (g) of K.S.A. 77-514, and amendments thereto, the pre-
9 siding officer shall render a final order.

10 (b) *Except as provided in K.S.A. 77-514, and amendments thereto*, if
11 the presiding officer is neither the agency head nor designated in accord-
12 ance with subsection (g) of K.S.A. 77-514, and amendments thereto, the
13 presiding officer shall render an initial order, which becomes a final order
14 unless reviewed in accordance with K.S.A. 77-527 and amendments
15 thereto.

16 (c) A final order or initial order shall include, separately stated, find-
17 ings of fact, conclusions of law and policy reasons for the decision if it is
18 an exercise of the state agency's discretion, for all aspects of the order,
19 including the remedy prescribed and, if applicable, the action taken on a
20 petition for stay of effectiveness. Findings of fact, if set forth in language
21 that is no more than mere repetition or paraphrase of the relevant pro-
22 vision of law, shall be accompanied by a concise and explicit statement of
23 the underlying facts of record to support the findings. The order shall
24 also include a statement of the available procedures and time limits for
25 seeking reconsideration, administrative review or other administrative re-
26 lief. An initial order shall include a statement of any circumstances under
27 which the initial order, without further notice, may become a final order.
28 If the presiding officer has been designated in accordance with subsection
29 (g) of K.S.A. 77-514, and amendments thereto, the final order shall so
30 state. Any final order, for which a petition for reconsideration is not a
31 prerequisite for seeking judicial review, and any initial order, for which
32 further administrative review is not available, shall state the agency officer
33 to receive service of a petition for judicial review on behalf of the agency.

34 (d) Findings of fact shall be based exclusively upon the evidence of
35 record in the adjudicative proceeding and on matters officially noticed in
36 that proceeding.

37 (e) If a substitute presiding officer is appointed pursuant to K.S.A.
38 77-514 and amendments thereto, the substitute presiding officer shall use
39 any existing record and may conduct any further proceedings appropriate
40 in the interests of justice.

41 (f) The presiding officer may allow the parties a designated amount
42 of time after conclusion of the hearing for the submission of proposed
43 findings.

- 1 (g) A final order or initial order pursuant to this section shall be ren-
2 dered in writing and served within 30 days after conclusion of the hearing
3 or after submission of proposed findings in accordance with subsection
4 (f) unless this period is waived or extended with the written consent of
5 all parties or for good cause shown. If extended for good cause, such good
6 cause shall be set forth in writing on or before expiration of the 30 days.
- 7 (h) The presiding officer shall cause copies of the order to be served
8 on each party and, if the order is an initial order, on the agency head in
9 the manner prescribed by K.S.A. 77-531 and amendments thereto.
- 10 (i) Notwithstanding the other provisions of this section, if the presid-
11 ing officer in a hearing before the state corporation commission is not
12 the agency head, the presiding officer shall not render an initial order but
13 shall make written findings and recommendations to the commission. The
14 commission shall render and serve a final order within 60 days after con-
15 clusion of the hearing or after submission of proposed findings in accord-
16 ance with subsection (f) unless this period is waived or extended with the
17 written consent of all parties or for good cause shown. If extended for
18 good cause, such good cause shall be set forth in writing on or before
19 expiration of the 60 days.
- 20 Sec. ~~9~~ ~~11~~ **9**. K.S.A. 2007 Supp. 77-527 is hereby amended to read
21 as follows: 77-527. (a) The agency head, upon its own motion may, and
22 upon petition by any party or when required by law shall, review an initial
23 order, except to the extent that:
- 24 (1) A provision of law precludes or limits state agency review of the
25 initial order; or
- 26 (2) the agency head (A) determines to review some but not all issues,
27 or not to exercise any review, (B) delegates its authority to review the
28 initial order to one or more persons, unless such delegation is expressly
29 prohibited by law, or (C) authorizes one or more persons to review the
30 initial order, subject to further review by the agency head.
- 31 (b) A petition for review of an initial order must be filed with the
32 agency head, or with any person designated for this purpose by rule and
33 regulation of the state agency, within 15 days after service of the initial
34 order. If the agency head on its own motion decides to review an initial
35 order, the agency head shall give written notice of its intention to review
36 the initial order within 15 days after its service. If the agency head de-
37 termines not to review an initial order in response to a petition for review,
38 the agency head shall, within 20 days after filing of the petition for review,
39 serve on each party an order stating that review will not be exercised.
- 40 (c) The petition for review shall state its basis. If the agency head on
41 its own motion gives notice of its intent to review an initial order, the
42 agency head shall identify the issues that it intends to review.
- 43 (d) In reviewing an initial order, the agency head or designee shall

1 exercise all the decision-making power that the agency head or designee
2 would have had to render a final order had the agency head or designee
3 presided over the hearing, except to the extent that the issues subject to
4 review are limited by a provision of law or by the agency head or designee
5 upon notice to all parties. *In reviewing findings of fact in initial orders*
6 *by presiding officers, the agency head shall give due regard to the presid-*
7 *ing officer's opportunity to observe the witnesses. The agency head shall*
8 *consider the agency record or such portions of it as have been designated*
9 *by the parties.*

10 (e) The agency head or designee shall afford each party an opportu-
11 nity to present briefs and may afford each party an opportunity to present
12 oral argument.

13 (f) The agency head or designee shall render a final order disposing
14 of the proceeding or remand the matter for further proceedings with
15 instructions to the person who rendered the initial order. Upon remand-
16 ing a matter, the agency head or designee may order such temporary
17 relief as is authorized and appropriate.

18 (g) A final order or an order remanding the matter for further pro-
19 ceedings shall be rendered in writing and served within 30 days after
20 receipt of briefs and oral argument unless that period is waived or ex-
21 tended with the written consent of all parties or for good cause shown.

22 (h) A final order or an order remanding the matter for further pro-
23 ceedings under this section shall identify any difference between this
24 order and the initial order and shall state the facts of record which support
25 any difference in findings of fact, state the source of law which supports
26 any difference in legal conclusions, and state the policy reasons which
27 support any difference in the exercise of discretion. A final order under
28 this section shall include, or incorporate by express reference to the initial
29 order, all the matters required by subsection (c) of K.S.A. 77-526, and
30 amendments thereto.

31 (i) The agency head shall cause copies of the final order or order
32 remanding the matter for further proceedings to be served on each party
33 in the manner prescribed by K.S.A. 77-531, and amendments thereto.

34 (j) Unless a petition for reconsideration is a prerequisite for seeking
35 judicial review, a final order under this section shall state the agency
36 officer to receive service of a petition for judicial review on behalf of the
37 agency.

38 Sec. ~~10.~~ **10.** K.S.A. 2007 Supp. 77-551 is hereby amended to
39 read as follows: 77-551. (a) ~~Except as provided in subsection (b), in all~~
40 ~~hearings of any state agency specified in subsection (h) of K.S.A. 75-~~
41 ~~37,121, and amendments thereto, that are required to be conducted in~~
42 ~~accordance with the provisions of the Kansas administrative procedure~~
43 ~~act, the presiding officer shall be the agency head, one or more members~~

1 ~~of the agency head or a presiding officer assigned by the office of admin-~~
2 ~~istrative hearings. (a) (1) Notwithstanding any other provision of law to~~
3 ~~the contrary, except as provided in subsection (b), on and after July 1,~~
4 ~~2008, through June 30, 2009, in all adjudicative hearings of any state~~
5 ~~agency specified in subsections (h)(1), (h)(2), (h)(3) and (h)(4) of K.S.A.~~
6 ~~75-37,121, and amendments thereto, that are required to be conducted in~~
7 ~~accordance with the provisions of the Kansas administrative procedure~~
8 ~~act, the presiding officer shall be a presiding officer assigned by the office~~
9 ~~of administrative hearings.~~

10 (2) Notwithstanding any other provision of law to the contrary, except
11 as provided in subsection (b), on and after July 1, 2009, in all adjudicative
12 hearings of any state agency ~~that are required to be conducted in accord-~~
13 ~~ance with the provisions of the Kansas administrative procedure act,~~ the
14 presiding officer shall be a presiding officer assigned by the office of ad-
15 ministrative hearings.

16 (b) (1) The provisions of this section shall not apply to the employ-
17 ment security law, pursuant to K.S.A. 44-701 et seq., and amendments
18 thereto, or article 5 of chapter 44, and amendments thereto, except K.S.A.
19 44-532 and 44-5,120, and amendments thereto, concerning the workers
20 compensation act.

21 (2) Notwithstanding any other provision of law to the contrary, in all
22 **adjudicative** hearings of the state board of tax appeals and the state
23 corporation commission ~~that are required to be conducted in accordance~~
24 ~~with the provisions of the Kansas administrative procedure act,~~ the pre-
25 siding officer shall be the agency head or one or more members of the
26 agency head. If the agency head or one or more members of the agency
27 head is not the presiding officer, an officer assigned by the office of ad-
28 ministrative hearings shall serve as the presiding officer.

29 **[(3) Notwithstanding any other provision of law to the contrary,**
30 **all adjudicative hearings of the Kansas insurance department held**
31 **under K.S.A. 40-222b, 40-2c19, 40-2d19, 40-510, 40-512, 40-1219a,**
32 **40-1618, 40-1706, 40-2109, 40-3011, 40-3302, 40-3304, 40-3305,**
33 **40-3308, 40-3309, 40-3413, 40-3610, 40-3613, 40-3625, 40-4002**
34 **and 40-4004, and amendments thereto, the presiding officer shall**
35 **be the agency head as provided by law.]**

36 (c) ~~Notwithstanding~~ Subject to the provisions of subsection (a) the
37 agency head or one or more members of the agency who will serve as a
38 presiding officer may designate any other person to serve as a presiding
39 officer to determine procedural matters that may arise prior to the hear-
40 ing on the merits, including but not limited to conducting prehearing
41 conferences pursuant to K.S.A. 77-516 and 77-517 and amendments
42 thereto.

43 (d) This section shall be part of and supplemental to the Kansas ad-

1 ministrative procedure act.

2 Sec. ~~11. [13.]~~ **11.** K.S.A. 77-620 is hereby amended to read as fol-
3 lows: 77-620. (a) Within 30 days after service of the petition for judicial
4 review, or within further time allowed by the court or by other provision
5 of law, the agency shall transmit to the court the original or a certified
6 copy of the agency record for judicial review of the agency action, con-
7 sisting of any agency documents expressing the agency action; other doc-
8 uments identified by the agency as having been considered by it before
9 its action and used as a basis for its action; *any materials concerning a*
10 *hearing conducted by, or initial order issued by, the office of administra-*
11 *tive hearings related to the agency action;* and any other material required
12 by law as the agency record for the type of agency action at issue, subject
13 to the provisions of this section.

14 (b) If part of the record has been preserved without a transcript, the
15 agency shall prepare a transcript for inclusion in the record transmitted
16 to the court, except for portions that the parties stipulate to omit in ac-
17 cordance with subsection (c). Unless otherwise ordered by the court, the
18 cost of the preparation of the transcript shall be paid by the appellant.

19 (c) By stipulation of all parties to the judicial review proceedings, the
20 record may be shortened, summarized or organized.

21 (d) The court may tax the cost of preparing transcripts and copies for
22 the record against a party who unreasonably refuses to stipulate to
23 shorten, summarize or organize the record.

24 (e) Additions to the record pursuant to K.S.A. 77-619, *and amend-*
25 *ments thereto,* shall be made as ordered by the court.

26 (f) The court may require or permit subsequent corrections or ad-
27 ditions to the record.

28 Sec. ~~12. [14.]~~ **12.** K.S.A. 77-621 is hereby amended to read as fol-
29 lows: 77-621. (a) Except to the extent that this act or another statute
30 provides otherwise:

31 (1) The burden of proving the invalidity of agency action is on the
32 party asserting invalidity; and

33 (2) the validity of agency action shall be determined in accordance
34 with the standards of judicial review provided in this section, as applied
35 to the agency action at the time it was taken.

36 (b) The court shall make a separate and distinct ruling on each ma-
37 terial issue on which the court's decision is based.

38 (c) The court shall grant relief only if it determines any one or more
39 of the following:

40 (1) The agency action, or the statute or rule and regulation on which
41 the agency action is based, is unconstitutional on its face or as applied;

42 (2) the agency has acted beyond the jurisdiction conferred by any
43 provision of law;

- 1 (3) the agency has not decided an issue requiring resolution;
2 (4) the agency has erroneously interpreted or applied the law;
3 (5) the agency has engaged in an unlawful procedure or has failed to
4 follow prescribed procedure;
5 (6) the persons taking the agency action were improperly constituted
6 as a decision-making body or subject to disqualification;
7 (7) the agency action is based on a determination of fact, made or
8 implied by the agency, that is not supported by evidence that is substantial
9 when viewed in light of the record as a whole, which includes the agency
10 record for judicial review, supplemented by any additional evidence re-
11 ceived by the court under this act; or
12 (8) the agency action is otherwise unreasonable, arbitrary or
13 capricious.

14 (d) *For purposes of this section, “in light of the record as a whole”*
15 *means that the adequacy of the evidence in the record before the court to*
16 *support a particular finding of fact shall be judged in light of all the*
17 *relevant evidence in the record cited by any party that detracts from such*
18 *finding as well as all of the relevant evidence in the record, compiled*
19 *pursuant to K.S.A. 77-620, and amendments thereto, cited by any party*
20 *that supports such finding, including any determinations of veracity by*
21 *the presiding officer who personally observed the demeanor of the witness*
22 *and the agency’s explanation of why the relevant evidence in the record*
23 *supports its material findings of fact.*

24 (e) In making the foregoing determinations, due account shall be
25 taken by the court of the rule of harmless error.

26 **[New Sec. 13. (a) Notwithstanding any other provision of law,**
27 **if any state agency’s order is adverse to a party to a state agency**
28 **proceeding, costs incurred by the state agency in conducting any**
29 **proceeding under the Kansas administrative procedure act may be**
30 **assessed against the parties to the proceeding in such proportion of**
31 **all relevant circumstances including the nature of the proceeding**
32 **and the level of participation by the parties. If the state agency is**
33 **the unsuccessful party, the costs shall be paid by the state agency.**

34 **[(b) This section shall be part of and supplemental to the Kansas**
35 **administrative procedure act.]**

36 **Sec. ~~13~~. [14.] K.S.A. 82a-1037 is hereby amended to read as**
37 **follows: 82a-1037. (a) In any case where proceedings for the des-**
38 **ignation of an intensive groundwater use control area are initiated,**
39 **~~the chief engineer shall hold and conduct~~ a public hearing on the**
40 **question of designating such an area as an intensive groundwater**
41 **use control area [shall be conducted]. Written notice of the hearing**
42 **shall be given to every person holding a water right in the area in**
43 **question and notice of the hearing shall be given by one publication**

1 ***in a newspaper or newspapers of general circulation within the area***
2 ***in question at least ~~thirty (30)~~ 30 days prior to the date set for such***
3 ***hearing. The notice shall state the question and shall denote the***
4 ***time and place of the hearing. At the hearing, documentary and oral***
5 ***evidence shall be taken, and a full and complete record of the same***
6 ***shall be kept.***

7 (b) *Such hearing shall be considered an adjudicative hearing, as de-*
8 *finied in K.S.A. 77-502, and amendments thereto.*

9 Sec. ~~13.~~ ~~15.~~ ~~14.~~ ~~15.~~ **[15.]** On and after July 1, 2009, K.S.A. 77-551, as
10 amended by section 43 of chapter 145 of the 2004 Session Laws of Kansas,
11 and K.S.A. 2003 Supp. 77-514, as amended by section 39 of chapter 145
12 of the 2004 Session Laws of Kansas are hereby repealed.

13 Sec. ~~14.~~ ~~16.~~ ~~15.~~ ~~16.~~ K.S.A. 77-502, 77-512, 77-516, 77-525, 77-
14 526, ~~[77-619,]~~ 77-620 ~~and 77-621,~~ **77-621 and 82a-1037** and K.S.A.
15 2007 Supp. 74-599, 75-37,121, 77-514, 77-527 and 77-551 are hereby
16 repealed.

17 Sec. ~~15.~~ ~~17.~~ ~~16.~~ ~~17.~~ This act shall take effect and be in force
18 from and after its publication in the Kansas register.