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The opportunity for a hearing, the right to receive notice of the hearing and the right to introduce evidence—litigants often presume they will receive these fundamental rights in the United States court system. Parties to an administrative hearing, however, are not always guaranteed these fundamental rights during the administrative hearing process. The Missouri Administrative Procedure Act (MAPA)[1] guarantees the basic due process rights of notice and a hearing prior to and during an administrative hearing only to a party to a contested case.[2] A party to a non-contested case is not guaranteed these rights by the statute. Instead, the participants in a non-contested case have two options for receiving due process: (1) proving that the proceeding invokes the constitutional due process protections;[3] or (2) requesting judicial review of the agency decision.[4]

Classifying an administrative proceeding as a contested case thus serves two purposes: (1) assuring basic due process rights such as notice and opportunity to have a hearing; and (2) defining the scope and standard of judicial review of agency decisions.[5] If a proceeding is a contested case, the trial court must determine if the agency's findings are supported by "competent and substantial evidence."[6] In contrast, in a non-contested case, the judiciary is limited to deciding whether the agency's findings conform "to the constitution, [and] the laws and is not 'otherwise unreasonable, arbitrary or

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1. MO. REV. STAT. §§ 536.010-.215 (1986).

2. *Id.* §§ 536.063-.095.

3. Under this option the attorney would need to prove that the proceeding rose to the level necessary to invoke the "flexible" due process guaranteed in Mathews v. Eldridge, 424 U.S. 319 (1976).

4. The party receives due process under this option by virtue of *de novo* judicial review of the agency decision. See *infra* notes 7-9 and accompanying text for an explanation of *de novo* review.

5. MO. REV. STAT. § 536.100-.150 (1986).

6. MO. CONST. art. V, § 18. The statutory guidelines for judicial review of contested cases are set out at MO. REV. STAT. §§ 536.100-.140 (1986). *See also* Wood v. Wagner Elec. Corp., 355 Mo. 670, 197 S.W.2d 647 (1946) (en banc); Travers v. Board of Trustees of Employees' Retirement Sys., 756 S.W.2d 623 (Mo. Ct. App. 1988).

capricious or involves an abuse of discretion.'"[7] To decide if the noncontested case meets this standard, the judge conducts a *de novo* hearing.[8] During this *de novo* hearing, the judge acts much like the administrative tribunal in a contested case. The judge may "hear evidence on the merits of the case, to find the facts, and to make a record."[9]

Thus, determining which administrative proceedings rise to the level of a contested case becomes the threshold question. An attorney practicing administrative law may find the statutory definition of a contested case very ambiguous. The attorney may be frustrated further by the maze of legal precedent which attempts to define "contested case." As a result, the attorney often cannot readily determine if his client's proceeding is a contested case and thus entitled to the elaborate and well-defined adjudicatory processes guaranteed by MAPA.

A contested case is defined as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."[10] This definition has generated an endless battle between administrative agencies and parties subject to administrative control. The courts, however, have been unable to settle the question of when a hearing is "required by law." Courts have found hearings required by statutes to be hearings "required by law."[11] Courts have also found hearings required by municipal ordinances to be hearings "required by law."[12] The courts have had more difficulty determining if a hearing required by a constitutional provision such as due process or by an administrative regulation is a hearing "required by law."[13]

In 1989 alone, twenty-five Missouri decisions dealt with the contested case issue.[14] Despite extensive case law, courts have not consistently

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7. Phipps v. School Dist. of Kansas City, 645 S.W.2d 91, 95 (Mo. Ct. App. 1983) (citations omitted). *See also* MO. CONST. art. V, § 18. Although the term "noncontested case" has not been defined by the Missouri Legislature, the courts have generally held that adjudicatory agency decisions made without a hearing are noncontested cases. *See* State *ex rel.* Wilson Chevrolet, Inc. v. Wilson, 332 S.W.2d 867, 870 (Mo. 1960); Phipps v. School Dist. of Kansas City, 645 S.W.2d 91, 94 (Mo. Ct. App. 1982). The statutory mechanism for obtaining judicial review of noncontested cases is set out in MO. REV. STAT. § 536.150 (1986).

8. *Phipps*, 645 S.W.2d at 94-95.

9. *Id.*

10. MO. REV. STAT. § 536.010(2) (1986).

11. Mills v. Federal Soldiers Home, 549 S.W.2d 862 (Mo. 1977) (en banc).

12. E & H Enters. v. Skaggs, 607 S.W.2d 215 (Mo. Ct. App. 1980).

13. *See* A. NEELY & D. SHIN, ADMINSTRATIVE PRACTICE AND PROCEDURE § 8.10 (1986).

14. Reifschneider v. City of Des Peres, 776 S.W.2d 1 (Mo. 1989) (en banc); Cuivre River Elec. Co-op, Inc. v. State Tax Comm'n, 769 S.W.2d 431 (Mo. 1989);

interpreted the definition. For example, in *Franklin v. Board of Directors, School District of Kansas City*,[15] the court found that a hearing expressly required by statute was a contested case.[16] In contrast, in *Benton-Hecht Moving & Storage, Inc. v. Call*,[17] the court found that a hearing expressly required by another statute was *not* a contested case.[18] The same court issued these opinions in the same year.

Thus, the practicing attorney finds precedent very confusing. The attorney finds that the courts have proceeded on an *ad hoc* basis formulating and changing rules and constructions of the definition of contested case as varying fact patterns are presented. This Comment has two goals. First, the Comment seeks to provide some practical guidelines for the attorney confronted with a contested case issue. Second, the Comment seeks to suggest a new definition of "contested case" which may alleviate the current confusion.

Missouri enacted MAPA in 1945.[19] This statute defined a contested case as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by statute to be determined after hearing."[20] The proposed Model State Administrative Procedure Act ("Model

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Golden Rule Ins. Co. v. Crist, 766 S.W.2d 637 (Mo. 1989) (en banc); Hercules, Inc. v. State Tax Comm'n, 787 S.W.2d 739 (Mo. Ct. App. 1989); Benton-Hecht Moving & Storage, Inc. v. Call, 782 S.W.2d 668 (Mo. Ct. App. 1989); Walker v. Supervisor of Liquor Control, 781 S.W.2d 113 (Mo. Ct. App. 1989); Romans v. Director of Revenue, 1989 WL 106634 (Mo. Ct. App. 1989); Phil Crowley Steel Corp. v. Kine, 778 S.W.2d 800 (Mo. Ct. App. 1989); John W. Meara & Co. v. George, 774 S.W.2d 552 (Mo. Ct. App. 1989); Franklin v. Board of Directors, School Dist. of Kansas City, 772 S.W.2d 873 (Mo. Ct. App. 1989); Gray v. Jackson, 773 S.W.2d 202 (Mo. Ct. App. 1989); Essex Contracting, Inc. v. City of DeSoto, 775 S.W.2d 208 (Mo. Ct. App. 1989); APC, Inc. v. Director of Revenue, 770 S.W.2d 481 (Mo. Ct. App. 1989); Stelling v. Stelling, 769 S.W.2d 450 (Mo. Ct. App. 1989); Lebedun v. Robinson 768 S.W.2d 219 (Mo. Ct. App. 1989); State v. Thurwalker, 766 S.W.2d 483 (Mo. Ct. App. 1989); Carter v. Greene County, 765 S.W.2d 665 (Mo. Ct. App. 1989); Missouri Health Care Ass'n v. Missouri Health Facilities Review Comm'n, 777 S.W.2d 241 (Mo. Ct. App. 1989); Salameh v. County of Franklin, 767 S.W.2d 66 (Mo. Ct. App. 1989); Mickles v. Board of Trustees of Policemen's and Firemen's Retirement Fund, 770 S.W.2d 697 (Mo. Ct. App. 1989); Cox v. City of Columbia, 764 S.W.2d 501 (Mo. Ct. App. 1989); State *ex rel.* Missouri Ozarks Economic Opportunity Corp. v. Long, 763 S.W.2d 381 (Mo. Ct. App. 1989).

15. 772 S.W.2d 873 (Mo. Ct. App. 1989).

16. *Id.* at 877.

17. 782 S.W.2d 668 (Mo. Ct. App. 1989).

18. *Id.* at 671.

19. 1945 MO. LAWS 1504.

20. *Id.*

APA"), developed by the Commission on Uniform State Laws in 1944,[21] provided the basic framework for MAPA. The Commission drafted the Model APA because of concerns that the states were commingling legislative and judicial powers.[22] The first administrative agencies had broad grants of legislative powers subject to limited judicial review.[23] Many of the agencies performed both legislative and judicial functions.[24] This commingling of powers by one administrative body prompted the concern that a fourth branch of government existed which was not subject to constitutional safeguards.[25] The Missouri Supreme Court acknowledged this concern by noting that even a limited delegation of power "can result in the stifling of due process when agencies are required to exercise rulemaking, enforcement and adjudicative functions concurrently."[26]

The MAPA drafters espoused similar goals.[27] Specifically, MAPA drafters sought to define types of administrative proceedings, and to provide both procedural guidelines for proceedings and mechanisms to review administrative rules and decisions.[28]

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21. Pecora, *The Model State Administrative Procedure Act: Planned Restraint on the Consolidation of Power by Executive Branches of State Governments*, 32 VILL. L. REV. 451, 453 (1987).

22. *Id.* at 458. Most agencies are delegated broad quasi-legislative power to enact rules and regulations. For example, the Missouri Division of Transportation (DOT) enacts rules and regulations governing the operations of motor carriers. The agencies are also delegated the quasi-judicial power to grant or revoke professional and business licenses. The DOT is also granted the power to issue and revoke authority for motor carriers to operate in the state.

23. Pecora, *supra* note 21, at 452.

24. *Id.* at 454.

25. *Id.* at 458. At its 1933 meeting a report by the Special Committee on Administrative Law noted explained this concern as follows:

> When the safeguard of isolation of the judicial function is dispensed with, the practice of law degenerates all too often into a glorified form of lobbying, all semblance of ethics disappear, cases are decided off the record according to the wishes of politicians, and the profession, at times deservedly, falls into disrepute.

Id. (citing 58 A.B.A. REP. OF THE FIFTY-SIXTH ANN. MEETING 318 (1933)). *See also* Comment, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355 (1985).

26. State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 74 (Mo. 1982) (en banc).

27. Reed, *The 1945 Missouri Constitution and Administrative Agency Legislation*, 19 UMKC L. REV. 283, 287 (1951).

28. *See* State *ex rel.* Leggett v. Jensen, 318 S.W.2d 353, 356 (Mo. 1958) (en banc); 1945 Mo. LAWS 1504; 1957 Mo. LAWS 748.

Soon after MAPA's enactment, its deficiencies became apparent. One of the principal criticisms of MAPA was the definition of a contested case.[29] Statutory language governing agency procedure was often ambiguous because the legislature created agencies as the need for regulatory bodies arose. Procedural statutes often failed to "indicate with any degree of certainty whether particular agency determinations are, *by the statute*, required to be made only after hearing."[30] In an attempt to provide clearer, more comprehensive guidelines pertaining to the procedural mechanisms available in contested cases, the Missouri Legislature substantially revised the MAPA in 1957.[31] Under the original MAPA, a contested case was one in which a hearing was required by statute.[32] In 1957, the legislature redefined a contested case to be one required by law.[33] The legislature changed the definition because the 1945 MAPA "was never intended to be a complete or adequate statute on administrative review or procedure."[34] The Commission on Uniform State Laws revised the Model APA in 1961.[35] As of 1989, the District of Columbia and twenty-eight states, including Missouri, have enacted administrative procedure acts based on the Model APA.[36]

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29. *See supra* notes 19-20 and accompanying text.

30. Reed, *supra* note 27, at 288 (emphasis in original).

31. 1957 MO. LAWS 748. With the 1957 amendments, the Legislature redefined a contested case to mean "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." *Id.* This definition continues to be used by the Legislature. *See* MO. REV. STAT. § 536.010(2) (1986).

32. 1945 MO. LAWS 1504.

33. 1957 MO. LAWS 749.

34. *Report of the Administrative Law Committee of the Missouri Bar*, 4 J. MO. B. 161, 171 (1948).

35. Pecora, *supra* note 21, at 460.

36. *See* ALA. CODE §§ 41-22-1 to -27 (1975); ARIZ. REV. STAT. ANN. §§ 41-1001 to -1066 (1985 & Supp. 1989); ARK. STAT. ANN. §§ 25-15-201 to -214 (1987); CONN. GEN. STAT. ANN. §§ 4-166 to -189 (1988); D.C. CODE ANN. §§ 1-1501 to -1511 (1981); GA. CODE ANN. §§ 50-13-1 to -21 (Harrison Supp. 1989); HAW. REV. STAT. §§ 91-1 to -18 (1985); IDAHO CODE §§ 67-5201 to -5218 (1989); ILL. ANN. STAT. ch. 127, paras. 1001-1021 (Smith-Hurd 1981); IOWA CODE ANN. §§ 17A.1-17A.23 (West 1989); LA. REV. STAT. ANN. §§ 49.950-.970 (West 1987); ME. REV. STAT. ANN. tit. 5, §§ 8001-11008 (1989); MD. STATE GOV'T CODE ANN. §§ 10-101 to -405 (1984); MICH. COMP. LAWS ANN. §§ 24.201-.315 (West 1981); MISS. CODE ANN. §§ 25-43-1 to -19 (Supp. 1989); MO. REV. STAT. §§ 536.010-.215 (1986); MONT. CODE ANN. §§ 2-4-101 to -711 (1989); NEB. REV. STAT. §§ 84-901 to -920 (1987); NEV. REV. STAT. §§ 233B.010 to -.150 (1987); N.Y. A.P.A. LAW §§ 100-501 (McKinney 1984); OKLA. STAT. ANN. tit. 75, §§ 301-322 (West 1987 & Supp. 1990); OR. REV. STAT. §§ 183.025-.725 (1989); R.I. GEN. LAWS §§ 42-35-1 to -18 (1988); S.D. CODIFIED LAWS ANN. §§ 1-26-1 to -41 (1985); TENN. CODE ANN. §§ 4-5-101 to -324 (1985 & Supp.

By redefining a contested case as a hearing required by law rather than by statute, the legislature broadened the scope of the definition. This broadened definition, however, created the present ambiguity in the law. The original definition created one possible category of contested cases: those required by a statute. The 1957 definition, however, created the possibility of many categories of contested cases. For example, one could argue that "law" includes statutes, municipal ordinances, administrative regulations and constitutional provisions. Because these possibilities are not explicitly addressed by the statute, individuals may argue that various administrative proceedings qualify as contested cases.

A recent case which illustrates how the courts are continuing to wrestle with the intricacies of the contested case definition is *Benton-Hecht Moving & Storage, Inc. v. Call.*[37] This case represents a good starting point for the practitioner confronted with a contested case issue because it illustrates how the courts have been unable to resolve satisfactorily the issue.

In *Benton-Hecht* the National Council on Compensation Insurance ("Council") filed an application with the Missouri Division of Insurance for a rate increase for compensation insurance.[38] The Council analyzes statistics relating to workers' compensation for insurance companies.[39] The Division's director, as required by statute,[40] scheduled a public hearing to determine if the proposed rate changes were "fair, reasonable and adequate."[41] Notice of the hearing appeared in newspapers in St. Louis, Kansas City and Jefferson City.[42]

Hearing procedures adopted by the director allowed an opportunity for anyone desiring to comment on the proposed rates to offer unsworn testimony.[43] Only the Division's hearing officer and staff could interrogate witnesses.[44] Witnesses were not subject to cross-examination.[45] Following this hearing, Benton-Hecht's insurance increased 18.55%.[46]

1989); VT. STAT. ANN. tit. 3, §§ 801-849 (1985); W. VA. CODE 29A-1-1 to -7-4 (1986); WIS. STAT. ANN. §§ 227.01-.60 (West 1982 & Supp. 1989); WYO. STAT. §§ 16-3-101 to -115 (1977).

37. 782 S.W.2d 668 (Mo. Ct. App. 1989).

38. *Id.* at 670.

39. *Id.*

40. *See* MO. REV. STAT. § 287.320 (1986).

41. *Benton-Hecht*, 782 S.W.2d at 670.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

Benton-Hecht petitioned the Cole County Circuit Court for judicial review of the agency decision. Basing its decision solely on the evidence received by the director at the hearing, the court affirmed the rate increase.[47] Benton-Hecht then appealed the circuit court's decision to the Missouri Court of Appeals. The issue on appeal was two-fold: 1) whether the agency hearing was a contested case; and 2) whether the circuit court had employed the proper standard of review.

The circuit court had reviewed the agency decision as if a contested case hearing had been conducted. The director, however, had conducted the case in the format of a non-contested case by refusing to accept sworn testimony and by refusing to allow cross-examination of witnesses.[48] The *Benton-Hecht* court was, therefore, presented with a dilemma "because the director of insurance conducted the public hearing as in a non-contested case, but the circuit court did not take evidence and reach any independent determination of the facts, a review procedure applicable only to a contested case."[49] If the agency proceeding was a contested case, then the circuit court should have remanded the case for a new agency hearing conducted in accordance with contested case guidelines.[50] If the agency proceeding was a non-contested case, then the circuit court should have conducted a *de novo* hearing[51] as the proper method of judicial review of the agency action.[52] The circuit court's decision meant that the plaintiffs did not receive due process. They were neither allowed to present evidence nor to cross-examine witnesses during the agency proceeding. Then, during the judicial review, they were again denied the opportunity to present their case.

The *Benton-Hecht* court noted that even though a case may present a contest about rights, duties or privileges, the case may not meet the contested case definition.[53] Instead, the element of adversity is essential to the meaning of a contested case.[54] The hallmarks of a contested case are notice to opposing parties, adversarial alignment and the right to introduce evidence.[55]

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47. *Id.*

48. *Id.* at 671.

49. *Id.* at 669.

50. See MO. REV. STAT. §§ 536.063-.095 (1986) for the procedures which must be used in contested cases.

51. See *supra* notes 7-9 and accompanying text for an explanation of the *de novo* hearing requirement.

52. *Benton-Hecht*, 782 S.W.2d at 671.

53. *Id.* at 670.

54. *Id.*

55. *Id.* at 671.

Applying these rules, the court concluded that even though required by statute, the proceeding at issue was not a contested case. The court reasoned that since the hearing did not include any of the elements of a contested case, the hearing was not a contested case.[56] The court noted the statute did not expressly require notice to potential parties.[57] The court further noted that the hearing was not adversarial.[58] The court described the director's function as "supervisory."[59] The director is charged with determining whether the workers' compensation rates are fair and reasonable. The court concluded that the purpose of the hearing in the statute was "supervisory and not adversarial."[60]

The *Benton-Hecht* holding is faulty for two reasons. First, the court used hindsight to analyze the procedures employed by the agency. The court examined what process and procedures the agency actually provided during the hearing. This process is backwards. The court should have examined what process and procedures were mandated by the statute which required the hearing. In other words, the court should answer the question of whether the agency provided the proper type of hearing rather than whether the procedures employed by the agency constituted a contested or non-contested case.

Second, the court misinterpreted the legislative intent of the hearing requirement in the statute. The primary function of administrative agencies is to provide expertise in specific areas of law. For example, the Division of Insurance presumably has expertise in matters relating to insurance. The hearing at issue here was designed to determine whether proposed rate increases are fair and reasonable. The director of the Division of Insurance is undoubtedly in the best position to make this determination. The *Benton-Hecht* holding, however, ignores the value of agency expertise. By terming the hearing a non-contested case, the court prevented the director from applying his expertise. Instead, the judges of the Cole County Circuit Court will have the burden of rate-making since non-contested cases receive *de novo* review. One cannot reasonably believe that the legislature intended for judges, rather than agency experts, to make specific determinations regarding rates.

To understand how the courts have arrived at the confusion of *Benton-Hecht*, one must understand the history of the contested case issue. Following the revisions in the MAPA, the Missouri Supreme Court's first attempt to

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

construe the legislative definition of a contested case occurred in *State ex rel. Leggett v. Jensen.*[61]

In *Jensen*, plaintiffs John Barker and Floyd Jacobs provided legal services to the Division of Insurance in litigation against an insurance company which had overcharged its customers.[62] Plaintiffs' normal fee contract dictated that attorney's fees were paid out of any money recovered from the insurance company. The insurance code, however, provided exclusive methods by which attorneys could recover fees incurred during litigation against insurance companies.[63] Plaintiffs filed a claim with the Superintendent of the Division of Insurance seeking an administrative declaration as to their right to recover the fees owed them.[64] The Superintendent denied plaintiffs' claim without granting plaintiffs a hearing.[65]

Arguing that their claim was a contested case, plaintiffs requested judicial review of the order in the Circuit Court of Jackson County.[66] The Superintendent then instituted a proceeding in prohibition seeking to prevent the Jackson County Circuit Court from exercising jurisdiction in the case.[67]

The court held a contested case "does not mean every case in which there may be a contest about 'rights, duties or privileges' but instead one in which the contest is required by law to be decided in a hearing before an administra-

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61. 318 S.W.2d 353 (Mo. 1958) (en banc).

62. *Id.* at 355.

63. *Id.* The Insurance Code provided two methods by which plaintiffs should seek to recover their fees. Under MO. REV. STAT. § 374.220 (1949) "the expenses of proceedings against insurance companies . . . shall be assessed by the superintendent upon the company proceeded against . . . and shall be in the first instance paid by such company, on the order of the superintendent directly to the person or persons rendering the service." MO. REV. STAT. § 374.260 (1949) (repealed 1981) provided that when the expenses of the Division of Insurance exceed the fees collected, "the superintendent shall, annually, assess upon all insurance companies doing business in this state a sum equal to such excess."

64. *Jensen*, 318 S.W.2d at 355. The plaintiffs sought a declaration from the Superintendent because the legislature empowered the Superintendent to assess expenses of proceedings against an insurance company either against the particular company which was the subject of a proceeding or *pro rata* against all insurance companies doing business in the state. As the *Jensen* court noted, "[t]he intent of these provisions, of course, is that all expense of the operation of the Division of Insurance shall be paid by the companies so that it would cost the state nothing." *Id.*

65. *Id.*

66. *Id.* at 354.

67. *Id.* If the proceeding was classified as a noncontested case, proper venue for review of the case would be in Cole County pursuant to MO. REV. STAT. § 536.110 (1949). *See also ex rel.* State Comm'n v. Walsh, 315 S.W.2d 830 (1958) (en banc).

tive agency."[68] The court reached its decision after analyzing how the contested case definition evolved in the Missouri legislature.[69]

The language of the original MAPA, however, greatly influenced the court's decision.[70] This influence is evidenced by the language of the court's analysis. The court noted that the plaintiffs could "point to no law requiring a hearing on their claim . . . such as is required to make it a *contested case* . . . within the meaning of the Act."[71] The court continued, noting several statutory provisions of the Insurance Code which specifically required a hearing.[72] The court further noted, "the Legislature did provide for hearings where it deemed hearings should be required before action by the Superintendent."[73] This language suggests that the court read the words "required by law" to mean "required by statute."[74] Because no statute specifically required that the Superintendent hold a hearing before issuing an order, the court concluded that no hearing was required by law. Thus, the decision of the Superintendent was not subject to review as a contested case, and Jackson County did not have jurisdiction in the case.[75]

While Missouri appellate courts often cite *Jensen* when attempting to define administrative proceedings,[76] the decision did not produce clear guidelines for future decisions. The *Jensen* court based its decision on the idea that no statute expressly granted the plaintiffs the right to a hearing. Thus, the court established the rule that if a statute expressly requires a hearing, then the hearing is a contested case.[77] The court, however, did not

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68. *Jensen*, 318 S.W.2d at 356.

69. *Id.* at 356-57. See *supra* notes 19-28 and accompanying text for a discussion of how the definition evolved in Missouri.

70. *Jensen*, 318 S.W.2d at 358.

71. *Id.*

72. *Id.*

73. *Id.*

74. The court noted that some provisions of the Insurance Code codified at MO. REV. STAT. § 375 (1949 & Supp. 1957) specifically required administrative hearings. "[T]he Legislature did provide for hearings where it deemed hearings should be required . . . ." *Jensen*, 318 S.W.2d at 358.

75. *Id.* at 360.

76. *See, e.g.*, City of Richmond Heights v. Board of Equalization, 586 S.W.2d 338, 342 (Mo. 1979) (en banc); Randle v. Spradling, 556 S.W.2d 10, 11 (Mo. 1977) (en banc); Travers v. Board of Trustees of Employees' Retirement Sys., 756 S.W.2d 623, 625 (Mo. Ct. App. 1988); Phipps v. School Dist. of Kansas City, 645 S.W.2d 91, 95 (Mo. Ct. App. 1982); Dunning v. Board of Pharmacy, 630 S.W.2d 155, 158 (Mo. Ct. App. 1982); Hunter v. Madden, 565 S.W.2d 456, 458 (Mo. Ct. App. 1978); Moore v. Damos, 489 S.W.2d 465, 468 (Mo. Ct. App. 1972); Kopper Kettle Restaurants, Inc. v. City of St. Robert, 439 S.W.2d 1, 3 (Mo. Ct. App. 1969).

77. *Jensen*, 318 S.W.2d at 358.

provide substantive guidelines on whether a hearing required by municipal ordinance, administrative regulation or constitutional provision is "required by law" within the meaning of the contested case definition.

Instead, the language of the *Jensen* opinion merely suggested that administrative hearings other than those required by statute might be contested cases. For example, in its discussion of the legislative history behind MAPA, the *Jensen* court noted "a 'contested case' . . . is a case which *must* be contested before an administrative agency because of a requirement (by constitutional provision, statute, municipal charter provision or ordinance . . .) *for a hearing before it* of which a record must be made unless waived."[78] As stated above, however, the court limited its analysis of the *Jensen* facts to the question of whether a statute required a hearing.[79] The *Jensen* opinion left unanswered the question of whether an agency regulation, municipal ordinance or constitutional provision could create a contested case. Furthermore, the *Jensen* decision is not dispositive on the issue of whether a hearing required by statute is a contested case. Instead, litigants and the courts have turned to questions such as whether the statutorily-required hearing is supervisory[80] or adversarial.[81] Thus, the contested case question remains a source of constant litigation in all types of administrative proceedings. This is manifested by the sheer number of cases which address the contested case issue each year.[82]

Missouri's courts have repeatedly held a hearing required by statute is a hearing required by law, and therefore, is a contested case.[83] Despite this body of precedent, parties continue to bring this issue before the courts. *Franklin v. Board of Directors, School District of Kansas City*,[84] illustrates how litigants can read ambiguity into the contested case definition even when a statute mandates a hearing. The Board of Directors of the School District

78. *Id.* at 356.

79. *Id.* at 359.

80. St. Louis County v. State Tax Comm'n, 608 S.W.2d 413, 414 (Mo. 1980) (en banc).

81. Franklin v. Board of Directors, School Dist. of Kansas City, 772 S.W.2d 873, 877 (Mo. Ct. App. 1989).

82. *See supra* notes 11-18 and accompanying text.

83. *See* Randle v. Spradling, 556 S.W.2d 10, 11 (Mo. 1977) (en banc); Wilson v. Morris, 369 S.W.2d 402, 406 (Mo. 1963); Pinzino v. Supervisor of Liquor Control, 334 S.W.2d 20, 25-26 (Mo. 1960); Gamble v. Hoffman, 695 S.W.2d 503, 508 (Mo. Ct. App. 1985); State *ex rel.* City of Springfield v. Crouch, 687 S.W.2d 639, 641 (Mo. Ct. App. 1985); Dunning v. Board of Pharmacy, 630 S.W.2d 155, 158 (Mo. Ct. App. 1982).

84. 772 S.W.2d 873 (Mo. Ct. App. 1989).

of Kansas City ("Board") demoted Melvin Franklin from principal to teacher.[85] After receiving notice of the demotion, Franklin requested a hearing before the Board of Directors of the School District of Kansas City.[86] The Board sustained the demotion.[87] Franklin then sought judicial review of the Board's decision, questioning whether the proceeding was a contested case.[88] This determination was crucial to what standard of review the trial court should use.[89]

Relying on precedent such as the *Jensen* decision, the *Franklin* court repeated that the hearing requirement is essential to the classification of any proceeding.[90] The court then noted that the hearing must be adversarial to qualify as a contested case.[91] The court found the hearing in question was adversarial in nature because "[t]he purpose of such a hearing is to give the certified employee an opportunity to offer evidence sustaining his defense . . . and an opportunity to persuade and convince the Board that it is mistaken in its decision."[92]

Franklin argued that the hearing was not adversarial, but rather was post-determinative in that it was conducted subsequent to the Board's decision to demote him.[93] The court rejected Franklin's argument because the statute

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85. *Id.* at 875.

86. *Id.* The rights of a school principal in a nonmetropolitan school district are governed by MO. REV. STAT. § 168.101 (1986). *Franklin*, 772 S.W.2d at 876. This statutory section grants any employee who has been with the school district for at least five years the right to request a hearing regarding his demotion or lack of reemployment. Specifically, the statute provides:

> The board shall grant such certificated employee a hearing if requested in writing by him within ten days after the receipt of statement of reasons, the hearing to be held within ten days after the request therefor, and to be open at the request of the certificated employee. The certificated employee may have counsel at the hearing; may testify and offer testimony of witnesses as well as other evidence sustaining his defense and may cross-examine adverse witnesses.

MO. REV. STAT. § 168.101(6) (1986).

87. *Franklin*, 772 S.W.2d at 875.

88. *Id.*

89. See *supra* notes 5-9 and accompanying text for an explanation of the standards of judicial review.

90. *Franklin*, 772 S.W.2d at 876.

91. *Id.* The concept of adversity as an essential element of a contested case was established in St. Louis County v. State Tax Comm'n, 608 S.W.2d 413, 414 (Mo. 1980) (en banc).

92. *Franklin*, 772 S.W.2d at 877.

93. *Id.* at 876.

required the Board to grant a hearing if the certificated employee properly requested such a hearing.[94]

Thus, the *Franklin* court, like the *Jensen* court, construed the words "required by law" to include a hearing required by a statute. Such a finding is inherently consistent with the legislative creation of the laws of the state. The finding is also supported by the original definition of the contested case which focused on hearings required by statute.

The cases which have established that hearings required by statute are contested cases provide some guidelines as to what elements make a hearing required by law. As discussed in *Franklin*,[95] the hearing requirement is the key to any contested case classification. Of equal importance, however, is the element of adversity.[96] An attorney participating in an administrative hearing, therefore, may rely on *Jensen* and *Franklin* for the proposition that a hearing required by a statute may be required by law within the definition of a contested case if the hearing is adversarial. Thus, an understanding of the adversity concept is essential to any challenge of an agency action. Three decisions effectively illustrate this concept.

In *St. Louis County v. State Tax Commission*,[97] St. Louis County sought review of an order of the State Tax Commission requiring the county to implement a plan for equalization of real estate assessments.[98] The court had to decide if the order was reviewable as the product of a contested case.[99]

The court reiterated that a contested case is not necessarily every case in which there may be a contest about rights, duties or privileges.[100] Instead, the General Assembly contemplated an adversarial hearing by using the term contested case in section 536.100.[101] Because the State Tax Commission

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94. *Id.* at 877.

95. *Id.* at 876.

96. *See* Benton-Hecht Moving & Storage, Inc. v. Call, 782 S.W.2d 668 (Mo. Ct. App. 1989) (holding that the feature most indicative of a contested case is adversity—a contest of opponents favoring divergent results).

97. 608 S.W.2d 413 (Mo. 1980) (en banc).

98. *Id.* at 414.

99. *Id.*

100. *Id.*

101. *Id.* MO. REV. STAT. § 536.100 (1986) provides:

> Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in sections 536.100 to 536.140, unless some other provision for judicial review is provided by statute; provided, however, that nothing in this chapter contained shall prevent any person from attacking any void order of an agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on

acts as a supervisory body over local assessing officials, there is no element of adversity in the relationship.[102]

By statute, the State Tax Commission must review county reassessment plans.[103] After a statutorily required hearing,[104] the Commission has sixty days to approve or reject the county's plan. During the hearing, the Commission hears evidence only from the county officials who submitted the plan.[105] The court ruled that the legislative intent of the hearing was to "aid in the equalization of real property assessments."[106] The purpose of the hearing was to "review equalization plans proposed by the counties and to ensure that the general property tax laws are properly executed."[107] The court concluded that requiring a full-blown adversarial hearing would impede the goal of equalization.[108] Accordingly, the order was not reviewable under the contested case provisions.[109]

Smith v. Missouri State Board of Probation & Parole[110] provides another slant on the adversarial aspect of the contested case discussion. In this case, Smith, an inmate of the Missouri Eastern Correctional facility, filed for judicial review of his denial of probation.[111] The Board contended that Smith had no statutory authority to seek judicial review.[112] Smith, however, argued that MAPA allowed him to seek judicial review.[113]

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the part of any agency in deciding any contested case shall be grounds for an order of the court either compelling action by the agency or removing the case to the court for decision.

Id.

102. *St. Louis County*, 608 S.W.2d at 414.

103. MO. REV. STAT. § 137.750 (1979).

104. *Id.* § 137.750(6).

105. *St. Louis County*, 608 S.W.2d at 414.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. 743 S.W.2d 123 (Mo. Ct. App. 1988).

111. *Id.* at 124.

112. *Id.* State regulations provide that an inmate may appeal an adverse parole board decision if said appeal is made within thirty days on the proper form. MO. CODE REGS. tit. 14, § 80-2.010(9)(A) (1989). The record on appeal did not reveal whether Smith had complied with this review procedure.

113. Smith relied on the following provision of the Missouri statutes:

Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in sections 536.100 to 536.140, unless some other provision for judicial review is provied by statute . . . .

The *Smith* court noted there was a statutory requirement that an inmate receive a hearing regarding his application for parole.[114] The court reasoned, however, that a hearing requirement does not automatically translate into a contested case.[115] Instead, the court must determine if the hearing is of an adversarial nature.[116]

The court concluded that after reviewing an inmate's records and progress, the Board must evaluate the inmate as a person to determine his suitability for parole. These duties suggested that the relationship between the Board and the inmate was supervisory in nature.[117] The court based its holding on the perceived legislative intent that the purpose of MAPA was not "to confer jurisdicton to review Board decisions where the regulatory statute itself precludes judicial review."[118]

In *Welsch v. Department of Elementary & Secondary Education*,[119] the court directly confronted the issue of whether a hearing was adversarial. In this case, Welsch requested approval for a sheltered workshop program.[120] The Department of Elementary and Secondary Education ("Department") held a public hearing as required by Missouri statute[121] to entertain public statements of support or opposition.[122] Following the hearing, the Department notified Welsch the proposed workshop did not meet statutory guidelines.[123] Welsch appealed the decision to the St. Louis County Circuit Court, alleging that the Department's hearing amounted to a contested case.[124]

The court first noted the hearing at issue was required by statute and, therefore, met the initial hurdle of the contested case definition.[125] After

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MO. REV. STAT. § 536.100 (1986).

114. *Smith*, 743 S.W.2d at 124. This requirement may be found in MO. REV. STAT. § 217.690.2 (1986).

115. *Smith*, 743 S.W.2d at 124.

116. *Id.*

117. *Id.* at 125.

118. *Id.*

119. 731 S.W.2d 450 (Mo. Ct. App. 1987).

120. *Id.* at 451. Welsh submitted an application for a hearing before the Department of Elementary and Secondary Education pursuant to MO. REV. STAT. § 178.920.1 (1978).

121. MO. REV. STAT. § 178.920.2 (1978).

122. *Welsch*, 731 S.W.2d at 451.

123. *Id.* at 451-52.

124. *Id.* at 452. If the proceeding was a contested case, proper venue would be in St. Louis County per MO. REV. STAT. § 536.110 (1978). In contrast, if the proceeding was not a contested case, then proper venue would only lie in Cole County under the rationale of State *ex rel.* State Tax Comm'n v. Walsh, 315 S.W.2d 830 (Mo. 1958) (en banc). *Welsch*, 731 S.W.2d at 452.

125. *Welsch*, 731 S.W.2d at 452.

analyzing the procedures prior to and during the hearing, the court concluded the hearing was not adversarial. Thus, it could not be a contested case.[126] This method of analysis represents the same type of backward analysis which the court used in *Benton-Hecht.* Rather than looking at what type of procedures *should* have been used by the agency, the court looked at what procedures the agency actually employed.

While the *Welsch* analysis is faulty, the court did provide specific guidance on what elements constitute an adversarial proceeding: (1) an agency-instituted proceeding leading to a proposed agency action; (2) parties entitled to notice; (3) sworn testimony by parties testifying at the proceeding; (4) a right to direct or cross examination of witnesses; and (5) evidentiary rules.[127] The first element outlined by the *Welsch* court is questionable since some agency proceedings may be instituted by private individuals rather than by the agency.

The courts have placed emphasis on the element of adversity because due process concerns are an inherent component of an adversarial relationship. When an agency brings or entertains an action against a citizen, the agency is in a superior position to the citizen because of the agency's expertise. The agency specializes in formulating and applying specific areas of law. When the agency brings an action against a private citizen, the parties are usually working towards opposite goals. Thus, these adversarial proceedings create the concern that the private citizen receive fundamental due process rights from the beginning of the proceeding. To address this concern, the contested case definition guarantees minimum due process rights. The elements of due process necessary in an adversarial proceeding are: (1) an impartial tribunal; (2) notice and opportunity to be heard; (3) hearing procedures analogous to those provided at a trial; and (4) a hearing transcript or administrative record which will allow adequate judicial review.[128] Furthermore, the decision of the administrative tribunal should be subject to specific judicial review to ensure that the tribunal has not exceeded its power or acted in a prejudicial manner.

Based on the cases analyzed thus far, one can conclude that if a statute requires an adversarial hearing, then the proceeding will be a contested case. Unfortunately, the administrative lawyer often confronts proceedings in which a hearing is not expressly required by a statute.

Instead, the hearing may be mandated by a municipal ordinance, agency regulation or due process concerns. Thus, the question inherent in all administrative proceedings is whether a hearing may be required by law if it

126. *Id.* at 453.

127. *Id.*

128. Blackford, Moody & Kochery, *A Survey of Missouri Administrative Agencies,* 19 UMKC L. REV. 233, 237 (1951).

is not expressly required by a state statute. The *Jensen* decision set forth the notion that a hearing required by statute is a hearing required by law. The next logical question to come before the courts is whether a hearing required by municipal ordinance is required by law. The dicta in *Jensen* suggested that this question would be answered yes.

Indeed, the very definition of "agency"[129] suggests that a municipality is within the ambit of MAPA.[130] This argument is further supported by the fact that the Missouri legislature created a new definition and classification of agency in 1976.[131] One of the potential problems with applying MAPA to municipalities was whether local governments would be bound by the rulemaking provisions in MAPA.[132] Rather than enacting a provision to specifically exempt municipalities from MAPA, the legislature chose to create a new classication of a "state agency."[133] Only those entities defined as state agencies are bound by MAPA's rulemaking requirements.[134] Therefore, the legislature left open the possibility that MAPA could bind municipalities.

Missouri appellate courts have classified hearings conducted pursuant to municipal ordinances or regulations in a number of cases.[135] Perhaps the best known of these cases is *Kopper Kettle Restaurants, Inc. v. City of St.*

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129. MAPA defines "agency" as "any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases." MO. REV. STAT. § 536.010(1) (1986).

130. Davis, *The Missouri Administrative Procedure Act and the Cities*, 35 J. MO. B. 433, 435 (1979).

131. 1976 MO. LAWS 769.

132. Davis, *supra* note 130, at 435.

133. A state agency is defined as:

> [E]ach board, commission, department, officer or other administrative office or unit of the state other than the general assembly, the courts, the governor, or a political subdivision of the state, existing under the constitution or statute, and authorized by the constitution or statute to make rules or to adjudicate contested cases.

MO. REV. STAT. § 536.010(5) (1986).

134. MO. REV. STAT. § 536.021-.025 (1986) governs the rulemaking procedures to be employed by *state agencies*. Since a state agency does not include political subdivisions of the state, a municipality is not bound by MAPA's rulemaking requirements.

135. State *ex rel.* City of Springfield v. Crouch, 687 S.W.2d 639 (Mo. Ct. App. 1985); Feltz v. Hesselback, 675 S.W.2d 60 (Mo. Ct. App. 1984); E & H Enters., Inc. v. Skaggs, 607 S.W.2d 215 (Mo. Ct. App. 1980); Hunter v. Madden, 565 S.W.2d 456 (Mo. Ct. App. 1978); State *ex rel.* Steak n Shake, Inc. v. City of Richmond Heights, 560 S.W.2d 373 (Mo. Ct. App. 1977).

Robert.[136] Pursuant to municipal ordinance,[137] Kopper Kettle applied to the Board of Aldermen of St. Robert for a license to sell liquor by the drink.[138] The Board denied the application.[139] Kopper Kettle then appeared before the Board and requested that the board reconsider the application. The Board tabled Kopper Kettle's request for reconsideration.[140]

Kopper Kettle filed a petition for judicial review of the Board's action.[141] The court acknowledged "[t]he dispositive question before us is whether or not the proceeding before the board of aldermen was a 'contested case' as that term is used in our Administrative Procedure Act."[142]

In analyzing the question, the court explained the statutory definition of a contested case as "a case which *must* be contested because of some requirement by statute, municipal charter, ordinance or constitutional provision for a hearing of which a record must be made unless waived."[143] Kopper Kettle argued the "showing" required by the ordinance amounted to a contested case.[144]

The court rejected Kopper Kettle's argument for two reasons. First, the ordinance regulating city liquor licenses did not expressly require notice and a hearing on the application.[145] The court was unwilling to imply a hearing requirement because "an applicant may make a 'showing' sufficient to warrant the issuance of a license or a permit without appearing and giving evidence."[146] For these reasons, the court held "absent a statutory requirement, notice and a hearing are not prerequisites to the exercise of discretionary authority to grant or deny a liquor license."[147] In other words, the Board's consideration of Kopper Kettle's application was not a contested case.

The *Kopper Kettle* decision, however, did not definitively establish that hearings held pursuant to municipal ordinance are never contested cases. Since the court found that the municipal ordinance did not require a hearing,

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136. 439 S.W.2d 1 (Mo. Ct. App. 1969).

137. The ordinance in question provided that any license applicant "show to the satisfaction of the City Board" that certain requirements relating to available facilities and location of the business had been met by the applicant. *Id.* at 3.

138. *Id.* at 2.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 3.

143. *Id.* (emphasis in original).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 4.

the court left unanswered the question of whether a hearing expressly required by a municipal ordinance is a contested case.

Following the *Kopper Kettle* decision, the courts have held that a hearing expressly required by municipal ordinance is indeed a contested case.[148] One such decision is *Vorbeck v. McNeal*.[149] Vorbeck was a sergeant in the St. Louis Metropolitan Police Department. During a meeting of the Board of Police Commissioners, Vorbeck made some disparaging remarks about the Board's president, McNeal.[150] At the next Board meeting, the Board publicly censured Vorbeck.[151] Vorbeck then filed for judicial review alleging the public censure amounted to disciplinary action. This disciplinary action occurred without the notice and hearing required by the Board's regulations.[152]

The court acknowledged that a municipal ordiance or regulation which required a hearing could amount to a contested case.[153] The court ruled that the facts surrounding Vorbeck's censure had not generated a contested case hearing.[154] The court reasoned that Vorbeck was not actually disciplined because the Board took no action to deprive him of any of the privileges of his office or employment. Therefore, "no rights required by law to be determined after a hearing" were at issue.[155] *Vorbeck*, therefore, suggests that a hearing required by municipal ordinance may be a contested case if the element of adversity is present.

Another case addressing a hearing required by municipal ordinance is *Housing Authority of St. Louis County v. Lovejoy*.[156] This case represents thoughtful analysis by a court in determining whether a hearing rose to the level of a contested case. In *Lovejoy*, Maurice Lovejoy was a tenant of a public housing program in St. Louis. In 1985 the Housing Authority notified Lovejoy his lease would not be renewed.[157] At a hearing before the

148. Medvick v. Ollendorf, 727 S.W.2d 473, 474 (Mo. Ct. App. 1987); State *ex rel.* City of Springfield v. Crouch, 687 S.W.2d 639 (Mo. Ct. App. 1985); Feltz v. Hesselback, 675 S.W.2d 60 (Mo. Ct. App. 1984); E & H Enters., Inc. v. Skaggs, 607 S.W.2d 215 (Mo. Ct. App. 1980); Vorbeck v. McNeal, 560 S.W.2d 245 (Mo. Ct. App. 1977).

149. 560 S.W.2d 245 (Mo. Ct. App. 1977).

150. *Id.* at 248.

151. *Id.*

152. *Id.* at 249.

153. *Id.* at 250.

154. *Id.*

155. *Id.*

156. 762 S.W.2d 843 (Mo. Ct. App. 1988).

157. *Id.* at 844.

Housing Authority, a hearing panel decided that the non-renewal was proper.[158] The Housing Authority then proceeded with an unlawful detainer action against Lovejoy.[159] The circuit court eventually granted the Housing Authority's motion for summary judgment. The court held Lovejoy was collaterally estopped from raising issues which had been determined by the hearing panel. The circuit court believed the Housing Authority hearing was a contested case. Accordingly, Lovejoy had thirty days in which to seek judicial review of the hearing panel's decision.[160] Since Lovejoy did not appeal the panel's decision, he waived his right to raise any issues addressed at the hearing. Lovejoy appealed the circuit court's decision.[161]

On appeal, the reviewing court held the Housing Authority hearing was not a contested case.[162] The court began its analysis by looking at the procedures the Housing Authority employed during the hearing. The court noted that "the hearing received did not conform to the procedures of a contested case." The court wrote that "[t]he inability of [Lovejoy] to put on or rebut evidence as well as the absence of sworn testimony demonstrated the hearing was not conducted with the adversarial nature necessary for a 'hearing' under the MAPA."[163] This initial analysis is reminiscent of that used by the court in both *Benton-Hecht* and *Welsch*. The court evaluated the procedures employed by the agency and then determined whether the procedures rose to the level of a contested case. The *Housing Authority* court, however, did not commit the error of *Benton-Hecht* and *Welsch*. Rather than stopping the analysis at what procedures had been employed by the agency, the court delved into the statutuory intent behind the hearing. Thus, the court was concerned with whether the agency had employed the procedures required by the statute.

The procedures for the Housing Authority hearing provided that "[a] decision by . . . [the] hearing panel . . . in favor of [the Housing Authority] or which denies the relief requested by the complainant . . . shall not . . . affect . . . any rights the complainant may have to a trial *de novo* or judicial review."[164] Based on this language, the court determined that the hearing was not intended to determine Lovejoy's rights and therefore, was not a contested case. The court's decision is supported by the fact that judicial review of a non-contested case is by trial *de novo*.[165]

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158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 846.
163. *Id.* at 845.
164. *Id.*
165. MO. REV. STAT. § 536.150 (1986). *See* Phipps v. School Dist. of Kansas

Missouri is fairly unique in extending the provisions of its Administrative Procedure Act, including the contested case definition, to municipalities.[166] Most jurisdictions have exempted municipalities and local governmental bodies from Administrative Procedure Act provisions because the municipal officers are responsible to an electorate.[167]

Whether a hearing required or suggested by agency regulation creates a contested case has been a far more troubling question for the courts. In at least one case, *Phipps v. School District of Kansas City*,[168] the Western District Court of Appeals of Missouri was willing to "assume . . . without deciding, that a requirement for hearing by a regulation suffices to meet the definition 'required by law.'"[169] The court was willing to make this assumption because the contested case issue did not turn on the assumption. Instead, the hearing requirement at issue was set out in a school district policy book. The court held the policy was analogous to a municipal ordinance, not an administrative regulation.[170]

More often, the contested case issue arises when an agency head is granted the discretion to hold a hearing before rendering a decision. Many legislative delegations of authority to agencies grant the agency broad powers. The agency may then enact regulations outlining specific procedures to be utilized in various types of decisions such as ratemaking cases or penalty cases. Alternatively, the agency may authorize the agency head to decide on a case-by-case basis. For example, prior to making a ruling on a particular issue, the agency head could elect to receive written comments or to take oral testimony at a public hearing. When the agency head decides to hold a public hearing, the issue often arises as to whether the hearing is a contested case. The 1989 *en banc* decision in *Golden Rule Insurance Co. v. Crist*,[171] effectively illustrates how the courts have analyzed these discretionary administrative regulations.

The Missouri Division of Insurance ("Division") investigated Golden Rule in 1984. The investigation culminated in the preparation of a Market Conduct

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City, 645 S.W.2d 91, 95 (Mo. Ct. App. 1982).

166. Davis, *supra* note 130, at 434.

167. *Id.* at 434-35.

168. 588 S.W.2d 128 (Mo. Ct. App. 1979).

169. *Id.* at 133. The court was probably willing to make this assumption because it could ultimately find that even if a hearing required by agency regulation was required by law, the hearing in question was not required by an agency regulation. Instead, the hearing was required by an agreement between the school district and its union employees.

170. *Id.*

171. 766 S.W.2d 637 (Mo. 1989) (en banc).

Report ("Report") prepared by the Division staff.[172] Based on information in the Report, the Division ordered Golden Rule to show cause why it should not be disciplined.[173] Eventually, the parties entered into a settlement agreement. Under the terms of the agreement, the Division admitted that certain allegations in the Report were meritless.[174] The Division further agreed to delete certain portions of the Report.[175]

During the settlement negotiations, the parties were not able to agree whether, following the corrections and deletions, the Report should be filed as a public document or kept confidential.[176] The Division granted Golden Rule a hearing to resolve this issue.[177]

During the hearing, Division director Lewis Crist, heard testimony from witnesses for both Golden Rule and the Division. Noting the presumption in favor of making documents public, the director ordered the Report filed as a public document.[178] Golden Rule appealed, arguing for review of the director's decision as a contested case.[179]

Relying on its earlier decision,[180] the court held "[t]he Director's decision to hear evidence to aid him in the exercise of his discretion does not raise the level of the proceeding to a 'contested case.'"[181] Thus, the *Golden Rule* decision suggests that when an agency exercises its discretionary powers to hold a hearing, the proceeding will not be a contested case. This rule is supported by the statutory definition of "contested case" which refers to a

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 638.

177. *Id.* The Division's director is expressly granted authority to decide whether to make reports public records as follows:

> The office shall be a public office and the records shall be public records and shall at all times be open to the inspection of the public subject to such rules as the director shall make for their safekeeping; provided, however, that the work proudct of the director, his employees and agents, including but not limited to work papers of examinations of companies, work papers of investigations of companies, agents, brokers and insurance agencies and confidential communications to the division of insurance, shall not be considered public records except as the director may decide otherwise, or until the matter to which the work papers are related becomes final.

MO. REV. STAT. § 374.070.1 (1986).

178. *Golden Rule*, 766 S.W.2d at 638.

179. *Id.*

180. Jackson County Pub. Water Supply Dist. v. State Highway Comm'n, 365 S.W.2d 553, 559 (Mo. 1963).

181. *Golden Rule*, 766 S.W.2d at 638.

hearing *required* by law.[182] A discretionary hearing is obviously not required by law. Therefore, the practicing attorney may rely on *Golden Rule* for the proposition that a discretionary agency hearing is not a contested case.

These cases have not held that a hearing required by adminstrative regulation may be a contested case. At this point, the courts have not expressly answered this question. Therefore, the practicing attorney is left to wonder whether a hearing required by administrative regulation is a contested case. The attorney can find some guidance on this issue by applying similar Missouri cases and federal case law.

First, the Missouri courts have expressly held "[r]egulations and rules promulgated by government agencies pursuant to delegation of authority from Congress have the force and effect of law."[183]

Secondly, the Missouri courts have frequently analogized administrative regulations to Missouri statutes. For instance, Missouri's Western District Court of Appeals has compared an administrative regulation governing notice procedures to state statutes regarding notice.[184] The court has also adopted a standard of rational basis review for constitutional challenges to administrative regulations which is analogous to the review of Missouri statutes.[185] Finally, the courts have directly analogized administrative rules to procedural statutes.[186]

This variety of case law strongly suggests that the courts would find that an admistrative regulation is analogous to a statute for contested case purposes. The administrative regulation could, therefore, give rise to a contested case.

Whether a hearing mandated or suggested by a constitutional provision such as due process creates a hearing required by law within the meaning of a contested case often presents the most difficulty for the court. In answering this question, the court must consider the due process requirements of both the federal and Missouri constitutions.[187]

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182. MO. REV. STAT. § 536.010(2) (1986) (emphasis added).

183. Macalco, Inc. v. Gulf Ins. Co., 550 S.W.2d 883, 887 (Mo. Ct. App. 1977); *see also* Insurance Co. v. West Plains Air, Inc., 637 S.W.2d 444, 446 (Mo. Ct. App. 1982).

184. Hedges v. Department of Social Services, 585 S.W.2d 170, 172 (Mo. Ct. App. 1979).

185. State *ex rel.* Kirkpatrick v. Board of Election Comm'rs, 686 S.W.2d 888, 895 (Mo. Ct. App. 1985).

186. St. Louis Police Officers' Ass'n v. Sayad, 685 S.W.2d 913, 917 (Mo. Ct. App. 1984). *See also* State v. Kummer, 741 S.W.2d 285, 289 (Mo. Ct. App. 1987).

187. The Missouri constitution provides "no person shall be deprived of life, liberty or property without due process of law." MO. CONST. art. I, § 10. The federal constitution provides no state shall "deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

The Missouri Supreme Court has noted that due process provisions are "for the protection of life, liberty, and property as against State governmental action through . . . administrative authority."[188] The basic elements of procedural due process at issue are: (1) opportunity to be heard; (2) an impartial decision-maker; (3) notice; (4) opportunity to confront and cross-examine witnesses; and (5) the opportunity to present evidence.[189]

Walker v. Personnel Advisory Board[190] illustrates how the court may read the federal constitution to require a contested case hearing. Due to funding problems, Missouri's Personnel Advisory Board laid off two employees of Farmington State Hospital.[191] The employees, Walker and Mobrice, argued that they were laid off because of animosity between themselves and the superintendent of Farmington State Hospital.[192]

The court began its analysis by noting "no statute, municipal charter or ordinance require[d] a pre-termination hearing for an employee who is to be laid off."[193] The statute governing layoffs granted hospital superintendents the discretion to lay off public employees during fiscal crises.[194] The court concluded "this was not a contested case under the statute unless due process rights mandate[d] a hearing."

The court reasoned that due process considerations arise only when a deprivation of interests encompassed by the fourteenth amendment's protection of property and liberty is at issue.[195] A property interest protected by the fourteenth amendment is "an individual entitlement grounded in state law which cannot be removed except 'for cause.'"[196]

Applying this property interest standard, the court concluded that the employees did not have an entitlement to continued employment. The court based its decision on the fact that the statute[197] provided for administrative

188. Junkins v. Local Union No. 6313, 263 S.W.2d 337, 340 (Mo. 1954).

189. Mueller v. Ruddy, 617 S.W.2d 466, 475 (Mo. Ct. App. 1981), *cert. denied*, 454 U.S. 1055 (1981).

190. 670 S.W.2d 1 (Mo. Ct. App. 1984).

191. *Id.* at 2. In 1981 the Missouri Department of Mental Health ordered the layoff of 900 employees. Farmington State Hospital is one of several facilities under the control of the Department. One hundred and thirty-nine employees at Farmington were laid off. Only Walker and Mobrice appealed their layoffs.

192. *Id.*

193. *Id.* at 3.

194. *Id. See* MO. REV. STAT. § 36.360 (1978).

195. *Walker*, 670 S.W.2d at 3 (quoting Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972)).

196. *Id.* (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982)).

197. MO. REV. STAT. § 36.360 (1978).

discretion in determining whether employees should be laid off during financial difficulties.[198]

The court continued its analysis by considering whether the layoff without hearing had violated any liberty interest. The court relied on the United States Supreme Court decision in *Board of Regents v. Roth*[199] for the elements of a fourteenth amendment liberty interest violation. *Roth* established that state conduct amounts to a liberty interest violation when the conduct "might seriously damage [the employee's] standing and associations in his community."[200] Of primary concern is whether the state conduct imposes "a stigma or other disability that foreclose[s] [the employee's] freedom to take advantage of other employment opportunities."[201]

Applying these standards, the court found that the employees' liberty interest had not been violated.[202] The letters informing Walker and Mobrice of their layoffs contained no reference to unsatisfactory performance or conduct by the employees.[203]

Another case which analyzes the fourteenth amendment due process concerns is *State v. Brackman*.[204] James Anding was an inmate in the Missouri Eastern Correctional Center in Franklin County. The Division of Adult Institutions decided to transfer Anding to the Missouri Training Center for Men in Randolph County. Anding sought judicial review of the transfer. At issue was whether the Division's decision to transfer Anding amounted to a contested case.[205]

After establishing that no statute or agency regulation required a contested case hearing, the court considered whether a constitutional provision mandated a hearing.[206] The court held "an inmate enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to an administrative transfer."[207]

These cases suggest that the courts will consider whether the parties have a "right" which is at issue in the hearing. If a "right" is at issue, then the courts will rule that due process requires a full-blown, adversarial hearing.

198. *Walker*, 670 S.W.2d at 3.
199. 408 U.S. 564 (1972).
200. *Id.* at 573.
201. *Id.*
202. *Walker*, 670 S.W.2d at 4.
203. *Id.*
204. 737 S.W.2d 516 (Mo. Ct. App. 1987).
205. *Id.* at 518.
206. *Id.*
207. *Id.* at 519 (citing Meachum v. Feno, 427 U.S. 215, 225-28 (1976)).

Accordingly, the proceeding will probably be classified as a contested case.[208]

One exception to this general rule has evolved. When a property right is at issue, the court may rule that the contested case hearing or judicial review of the hearing may be postponed.[209] Thus, the court may find that a state may act first and then grant either administrative or judicial review of the action. This state conduct will generally be condoned when the purpose or goal of the state action would be seriously undermined if the action was delayed by a hearing.[210]

The goal of this Comment was to provide some practical guidelines for the attorney confronted with a contested case before an administrative agency. Because the courts have not interpreted "contested case" consistently,[211] however, formulating general rules is very difficult. Furthermore, following the *Benton-Hecht* decision,[212] the courts seem unwilling to give weight to the legislative intent behind a hearing requirement. Even worse, the courts tend to evaluate what procedures the agency has employed in a particular hearing rather than what procedures should have been employed. This method of analysis lets the agency decide whether a hearing will be treated as a contested or non-contested case on an ad hoc basis.

At best, a practicing attorney can rely on the fact that a hearing required by a statute or municipal ordinance will be a contested case if the parties are in an adversarial posture. Furthermore, due process concerns may also prompt a contested case hearing.

These guidelines are not very helpful to one confronted with an administrative agency proceeding. Considering the confusion and lack of uniform decisions in this area of law, two alternatives are particularly appealing. First, the Missouri Supreme Court could accept the transfer of a case and then set out some definitive guidelines for contested cases. Alternatively, the Missouri Legislature could amend the MAPA to include a more comprehensive definition of a contested case. This alternative is

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208. This conclusion is supported by the United States Supreme Court decision of Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), *modified*, 339 U.S. 908 (1950). In *Wong Yang Sung*, the Court noted that the federal APA established formal hearing requirements only for adjudications "required by statute to be determined on the record after opportunity for an agency hearing." *Id.* at 48. The Court held, however, that the constitutional requirement of procedural due process mandated a formal adjudication in certain cases, even if no statute required such an adjudication. *Id.* at 51-53.

209. Springer v. United States, 102 U.S. 586 (1881); Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).

210. *Walker*, 670 S.W.2d at 4 (citing Phillips v. Commissioner, 283 U.S. 589 (1931)).

211. *See supra* notes 15-18 and accompanying text.

212. *See supra* notes 37-60 and accompanying text.

preferable because the legislature could enact a comprehensive, less ambiguous definition of a contested case which could ease the burden on the courts. The legislature should focus on the following considerations in enacting a new definition.

First, attention should be directed to the "required by law" phrase in the current contested case definition. In enacting this general language, the legislature probably hoped to guarantee contested case due process protection to administrative proceedings other than those expressly required by statute. Such a goal is admirable. The goal, however, has not been realized. While the courts have granted contested case status to a variety of administrative proceedings, the actual result of this definition has been continual litigation over what types of law can generate a contested case hearing. The cases decided between MAPA amendment to the contested case definition and today show that hearings required by statute,[213] municipal ordinance,[214] and constitutional provisions[215] can be contested cases. Since these are clearly sources of law in Missouri, the legislature could amend the definition to specifically include the language that a "hearing required by statute, municipal ordinance, or constitutional provision" is a contested case, provided other criteria are met.

The legislature would also have to decide whether hearings required by administrative regulation should be contested cases. Since case law suggests that administrative regulations are a source of law, the legislature should include "administrative rule or regulation" in the new definition.

One factor which the legislature needs to address is the adversity element which the courts have emphasized.[216] Initially, the courts used the adversity element to distinguish between cases required by law which were not intended to be contested cases. For example, the State Tax Commission was not intended to have an adversarial relationship with municipal taxing authorities. Instead, the intent in establishing the Commission was to create a supervisory body that could monitor the municipal taxing authorities.[217] In contrast, the court found that the director of the Division of Insurance is in a supervisory position over employers who must pay workers' compensation insurance.[218]

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213. Franklin v. Board of Directors, School Dist. of Kansas City, 772 S.W.2d 873 (Mo. Ct. App. 1989).

214. Vorbeck v. McNeal, 560 S.W.2d 245 (Mo. Ct. App. 1977).

215. Walker v. Personnel Advisory Bd., 670 S.W.2d 1 (Mo. Ct. App. 1984).

216. St. Louis County v. State Tax Comm'n, 608 S.W.2d 413, 414 (Mo. 1980) (en banc); *Franklin*, 773 S.W.2d at 877; Smith v. Missouri State Bd. of Probation & Parole, 743 S.W.2d 123, 124 (Mo. Ct. App. 1988).

217. *St. Louis County*, 608 S.W.2d at 414.

218. Benton-Hecht Moving & Storage, Inc. v. Call, 782 S.W.2d 668, 671 (Mo. Ct. App. 1989).

This finding seems to stretch the supervisory concept to its limit since the director is making findings which require employers to pay increased rates. Such a relationship seems adversarial rather than supervisory.

To prevent inaccurate characterizations by the courts in the future, the legislature needs to state explicitly whether adversity is a key factor in defining contested cases. The adversity element is useful since proceedings which were clearly not intended to be contested cases, such as those between local taxing authorities and the State Tax Commission, do not receive contested case benefits and protections. If the legislature agrees with this reasoning, then the legislature should explain what types of relationships are adversarial. The *Welsch* opinion could prove particularly helpful here. The *Welsch* court outlined the elements which create an adversarial relationship.[219] By modifying the first element and adopting the other four, the legislature could arrive at a solid definition of adversarial proceedings. The elements to be included in the definition should be: (1) an administrative proceeding leading to a proposed agency action; (2) parties entitled to notice; (3) sworn testimony by parties testifying at the proceeding; (4) a right to direct or cross examination of witnesses; and (5) evidentiary rules.

Furthermore, the legislature should caution the courts to consider what types of procedures should have been employed in a hearing. Currently, the courts often look merely at what types of procedures were employed.[220] This process means that the agency, not the legislature, often determines whether a case is a contested or non-contested proceeding. When the legislature has provided guidance on this issue, ignoring the guidance means that the agency is exercising more power than it really has.

Finally, the courts often seem unwilling to look at legislative intent behind a hearing requirement.[221] In their haste to classify hearings as non-contested cases, the court often fails to consider whether the administrative expertise available in a contested case should be of the utmost concern. The legislature should give the court clear guidance on what type of proceeding is desired when a hearing is required by statute.[222]

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219. *See supra* text accompanying note 127.

220. *See* text and analysis following note 60.

221. *See* text and analysis following note 60.

222. The legislature should amend MO. REV. STAT. § 536.010(1) to read:

"Adversarial proceeding" means any proceeding before an administrative tribunal in which

(a) parties are entitled to notice;

(b) parties may present sworn testimony at the proceeding;

(c) parties have the right to direct and/or cross examination of witnesses; and,

(d) parties must follow evidentiary rules promulgated by the agency.

The legislature should amend MO. REV. STAT. § 536.010(3) to read:

The contested case definition is a central part of the MAPA. Since the courts have been unwilling to apply a consistent meaning to the definition, the legislature should amend the definition. Otherwise, more decisions like *Benton-Hecht* will occur—decisions in which the parties do not receive their basic due process rights and in which administrative expertise is disregarded.

SARAH J. MAXWELL

"Contested case" means an adversarial proceeding before an agency in which legal rights, duties or privileges of specific parties are required by statute, municipal ordinance, constitutional provision, or administrative rule or regulation to be determined after hearing.