

## 1.9 SUBSEQUENT CHANGES

After all of the attention given to the APA in 1995, things slowed down considerably in 1996. Only one significant change was adopted, which dealt with agency rules setting out penalties or fines.<sup>1</sup> This change provided specific factors for agencies to consider in determining fines, and prohibited agencies from adopting fines of more than \$700 for a single violation by rule without legislative authorization.<sup>2</sup>

The legislature waited until the longer 1997 session to pursue legislation made necessary by the 1995 changes, or raised in the CORE and Legislative Auditor reports and not addressed in 1995. Two important bills were passed. The first dealt with agency exemptions from rulemaking. Preparation for this bill actually began in the 1996-97 interim when a rulemaking exemption subcommittee of the Legislative Coordinating Commission (LCC) conducted a careful review of agency exemptions from the rulemaking requirements of the APA. This study resulted in a lengthy bill that eliminated some exemptions, concluded some exemptions were not rules, and amended some retained exemptions.<sup>3</sup> The legislation also authorized two or more members of the LCC or five members of the legislature to initiate review of a state rule by the LCC.<sup>4</sup> This legislation also contained a new expedited process for rulemaking that can be used only when specifically permitted by the legislature in the law authorizing rulemaking.<sup>5</sup> The process is a simple notice and comment procedure followed by legal review by an administrative law judge.<sup>6</sup> The legislature may also specify an optional procedure under which a public hearing would be held if requested by 100 or more persons.<sup>7</sup>

The second major bill in 1997 established the LCC as the successor to most of the functions of the LCRAR.<sup>8</sup> The LCC or a subcommittee appointed by the LCC has the power to file objections to rules, request a public hearing on a rule, and review findings of a lack of need or reasonableness by the chief administrative law judge.<sup>9</sup> Some of the duties of the LCRAR were transferred to other agencies. For example, agencies now submit their SONAR's to the legislative reference library.<sup>10</sup> In addition, the chief administrative law judge now has authority to authorize agencies to omit the text of a rule from the notice published in the state register.<sup>11</sup> Some of the LCRAR's duties were abolished, including the power to suspend a rule, the duty to make reports to the legislature, and the duty to publish a bulletin.<sup>12</sup>

The 1998 legislative session was a quiet one for administrative law issues. One bill was passed that underscored the legislature's interest in performance-based

1 1996 Minn. Laws ch. 390, §11, at 445.

2 *Id.*

3 1997 Minn. Laws ch. 187, art. 1-4, at 1285-1324.

4 1997 Minn. Laws ch. 187, art. 5, §1, at 1324.

5 1997 Minn. Laws ch. 187, art. 5, §5, at 1327.

6 1997 Minn. Laws ch. 187, art. 5, §5, at 1327-28.

7 *Id.*

8 1997 Minn. Laws ch. 98, §1, at 710-11.

9 *Id.*

10 1997 Minn. Laws ch. 98, §6, at 713.

11 1997 Minn. Laws ch. 98, §7, at 713.

12 1997 Minn. Laws ch. 98, §17, at 718.

regulation. This addition to the APA required agencies to develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximize flexibility for the regulated party and the agency in meeting those objectives, "whenever feasible".<sup>13</sup> The agency must describe how it considered and implemented the legislative policy supporting performance-based regulatory systems in its statement of need and reasonableness.<sup>14</sup> The legislation also required agencies to report on obsolete rules and identify rules that are unnecessary or duplicative of state or federal statutes or rules.<sup>15</sup> The agency is required either to repeal the rules identified or prepare legislation to accomplish the task.<sup>16</sup>

A gubernatorial veto was added to the rulemaking process in 1999.<sup>17</sup> The governor may veto all or a severable portion of a rule by publishing notice of the veto in the State Register within 14 days of receiving a copy.<sup>18</sup> The law was later amended to require submission to, rather than publication in, the State Register within 14 days.<sup>19</sup> A second major addition to rulemaking in 1999 was the adoption of a petition process allowing cities, or counties, to petition a state agency for amendment or repeal of a rule or a portion of a rule.<sup>20</sup> If the agency declines to grant the petition, it is referred to OAH for hearing.<sup>21</sup> The agency is required to demonstrate the need for and reasonableness of the rule at the hearing, and the administrative law judge is authorized to declare the rule invalid if the agency fails to meet its burden.<sup>22</sup>

Legislative review of rules was considered by the 2000 legislature. The authority of the LCC to object to rules was extended to the governmental operations committees in both the house of representatives and the senate.<sup>23</sup> The two committees were also given authority to advise the agency regarding adoption of a rule found not to be necessary and reasonable by the chief administrative law judge.<sup>24</sup> The legislation also set up a schedule for major agencies to justify existing rules to the legislature beginning in 2002 and ending in 2005.<sup>25</sup> The same session law also established a rules task force made up of legislators, and public members appointed by the governor.<sup>26</sup> The task force was directed to study legislative review of rules and recommend changes to rulemaking procedures.<sup>27</sup>

A second law passed in 2000 was an initiative advanced by OAH, providing that administrative law judges and workers compensation judges be subject to the code of

<sup>13</sup> 1998 Minn. Laws ch. 303, § 1, at 368.

<sup>14</sup> 1998 Minn. Laws ch. 303, § 4, at 369.

<sup>15</sup> 1998 Minn. Laws ch. 303, § 2, at 368.

<sup>16</sup> *Id.*

<sup>17</sup> 1999 Minn. Laws ch. 129, §1, at 525, codified as Minn. Stat. § 14.05, subd. 6 (2014).

<sup>18</sup> *Id.*

<sup>19</sup> 2001 Minn. Laws ch. 179, § 1, at 669, codified as Minn. Stat. § 14.05, subd. 6. The process for rule review by the governor is explained *infra* § 17.3.

<sup>20</sup> 1999 Minn. Laws ch. 193, §1, at 1044-45, codified as Minn. Stat. § 14.091 (2014). The following year, sanitary districts were added. *See* 2000 Minn. Laws ch. 335, §1, at 286.

<sup>21</sup> 1999 Minn. Laws ch. 193, §1, at 1044-45, codified as Minn. Stat. § 14.091.

<sup>22</sup> *Id.* The petition process is explained further *infra* § 17.1.2.

<sup>23</sup> 2000 Minn. Laws ch. 469, § 1, at 1380-81, codified as Minn. Stat. § 3.842, subd. 4a (2014).

<sup>24</sup> 2000 Minn. Laws ch. 469, § 2, at 1381.

<sup>25</sup> 2000 Minn. Laws ch. 469, § 4, at 1382-83.

<sup>26</sup> 2000 Minn. Laws ch. 469, § 5, at 1383-84.

<sup>27</sup> *Id.*

judicial conduct – the same code applicable to judicial branch judges.<sup>28</sup> The provision directed the chief administrative law judge to apply the code to the judges at OAH consistent with the interpretations of the board of judicial conduct.<sup>29</sup> The chief administrative law judge was made subject to the jurisdiction of the board of judicial standards.<sup>30</sup> This law also allowed administrative law judges and workers compensation judges to hear cases in each other's area with appropriate training.<sup>31</sup>

The report of the rules task force was presented to the 2001 legislature, and most of the recommendations were adopted. The resulting legislation added another avenue for legislative review by authorizing the standing house or senate committee with jurisdiction over the subject matter of a proposed rule to delay implementation of a proposed rule until after the next full legislative session.<sup>32</sup> The law also created a new procedure to challenge agency enforcement of unadopted rules. A petition may be filed with OAH seeking a final order determining that an agency is enforcing a policy, guideline or bulletin as a rule.<sup>33</sup> The order may direct the agency to cease enforcement, and is appealable to the court of appeals.<sup>34</sup> The 2001 law also set up a simplified process to repeal obsolete rules, requiring only a notice and comment procedure without a SONAR.<sup>35</sup> However, if 25 people object to the simplified procedure, the repeal must be done through a standard APA rule proceeding.<sup>36</sup> The law also made the governor's veto authority over rules permanent.<sup>37</sup> Finally, the legislation set out a procedure for the filing of a petition with an agency to obtain a variance from a rule. Discretionary variances may be granted where the rule creates a hardship for the applicant, and the variance is in the public interest and would not prejudice the rights of any person or entity.<sup>38</sup> The variance statute was effective July 1, 2002.<sup>39</sup>

A housekeeping bill proposed by OAH containing technical changes to the APA rulemaking provisions was also passed by the 2001 legislature. It allowed the chief administrative law judge to reduce the time period between a request for comments and a notice of intent to 30 days, if good cause is shown.<sup>40</sup> It also clarified that the 5-20 day period after a rule hearing is called the comment period, and the subsequent five business day period is called the rebuttal period.<sup>41</sup> It also provided that a rule hearing may not be cancelled by an agency within three days of the hearing.<sup>42</sup>

Several changes designed to expedite the resolution of contested cases were adopted in 2002 and . The legislation offered two new final resolution alternatives to

28 2000 Minn. Laws ch. 355, §1, at 375-76, codified as Minn. Stat. § 14.48 (2014).

29 *Id.*

30 *Id.*

31 *Id.*

32 2001 Minn. Laws ch. 179, §5, at 672.

33 2001 Minn. Laws ch. 179, §8, at 673.

34 *Id.*

35 2001 Minn. Laws ch. 179, §9, at 674-75.

36 *Id.*

37 2001 Minn. Laws ch. 179, §1, at 669.

38 2001 Minn. Laws ch. 179, §2, at 669-71.

39 *Id.*

40 2001 Minn. Laws ch. 106, §6, at 267.

41 2001 Minn. Laws ch. 179, §9, at 269.

42 2001 Minn. Laws ch. 179, §14, at 272.

agencies with contested cases at OAH: arbitration by an administrative law judge or delegation of the final contested case decision to the ALJ.<sup>43</sup> Both resolution options streamlined the OAH contested case process by avoiding agency consideration of the case after an ALJ issued a decision. The arbitration option also bypassed discovery and provides limited grounds for appeal of the decision.

Two other 2002 legislative changes were aimed at greater agency accountability. One specified that an ALJ recommended decision became final if not modified or rejected by the agency within 90 days after the close of the agency record.<sup>44</sup> The chief ALJ may order an extension of the 90-day deadline.<sup>45</sup> The other change required an agency to state its reasons for each rejection or modification of the findings of fact, conclusions, or recommendation issued by an ALJ.<sup>46</sup>

The 2003 regular and special sessions saw four separate amendments to the APA. The first was an addition to the requirements of the SORAR, a document that must be prepared by an agency to support rulemaking.<sup>47</sup> The amendment required more specificity in estimating the probable costs of compliance with the new rule, and also required an estimate of the costs or consequences of not adopting the rule.<sup>48</sup> The second change added new procedures to the abbreviated “good cause exemption” rulemaking process. The agency is now required to give notice of adoption to its rulemaking list and allow five business days for comments to OAH.<sup>49</sup> If the rules are reviewed by the chief administrative law judge, the agency is also required to give notice of that review to its rulemaking list.<sup>50</sup> This amendment was added in response to complaints regarding a lack of public notice and opportunity to comment on a controversial drivers’ license rule related to homeland security that was adopted under the good cause exemption process. Also in 2003, OAH sponsored a change requiring ALJs and workers compensation judges to retire at age 70 and authorizing retired judges to hear cases for the office.<sup>51</sup> Finally, the sunset provision for an APA provision allowing local governments to petition for amendment or repeal of a state rule was removed.<sup>52</sup>

The 2004 regular session made one change to the APA relating to agency rulemaking efforts, requiring an agency to consult with the commissioner of finance<sup>53</sup> to help evaluate the fiscal impact and fiscal benefits of the proposed rules on units of local government.<sup>54</sup> This information should be included in the Statement of Need and Reasonableness.<sup>55</sup>

<sup>43</sup> 2002 Minn. Laws ch. 251, § 1, at 234, codified as Minn. Stat. § 14.57 (2014).

<sup>44</sup> 2002 Minn. Laws ch. 251, §5, at 234, codified as Minn. Stat. § 14.62, subd. 2a (2014).

<sup>45</sup> *Id.*

<sup>46</sup> 2002 Minn. Laws ch. 251, § 4, at 234, codified as Minn. Stat. § 14.62, subd. 1 (2014).

<sup>47</sup> 2003 Minn. Laws, ch. 3, §1, at 88-89, codified as Minn. Stat. § 14.131(6) (2014).

<sup>48</sup> *Id.*

<sup>49</sup> 2003 Minn. Laws 1st Spec. Sess. ch. 6, §1, at 1485-86, codified as Minn. Stat. § 14.388 (2014).

<sup>50</sup> *Id.*

<sup>51</sup> 2003 Minn. Laws 1st Spec. Sess. ch. 1, art. 2, § 30, at 1326, codified as Minn. Stat. § 14.48 (2014).

<sup>52</sup> 2003 Minn. Laws 1st Spec. Sess. ch. 1, art. 2, § 29, at 1324, codified as Minn. Stat. § 14.091(h) (2014).

<sup>53</sup> In June 2008, the Minnesota Departments of Finance and Employee Relations merged to form Minnesota Management and Budget.

<sup>54</sup> 2004 Minn. Laws ch. 274, § 1, at 274-75, amending Minn. Stat. § 14.131 (2014).

<sup>55</sup> *Id.* See also *infra* subsection 17.2.2(10).

Effective July 1, 2004, OAH was charged with implementing a new process for the speedy resolution of complaints of unfair campaign practices.<sup>56</sup> Prior law mandated that county attorneys investigate all campaign complaints, which often delayed the resolution of such complaints until some time after the relevant election had taken place. The new process required that all campaign complaints be filed with OAH,<sup>57</sup> and that administrative law judges make a preliminary determination as to whether a complaint stated a prima facie violation within 1-3 business days of filing.<sup>58</sup> During the campaign season, complaints must be processed very quickly. For example, if an ALJ finds that a complaint sets forth a prima facie violation, a probable cause hearing must be scheduled within three days.<sup>59</sup> After the hearing, a complaint is either dismissed as frivolous or for lack of probable cause, or scheduled for an evidentiary hearing in front of a three-judge panel.<sup>60</sup> In some cases, the panel must hold a hearing within 10 days of assignment.<sup>61</sup> The intent of these tight timelines was to considerably shorten the time necessary to resolve complaints of unfair campaign practices, ensuring that at least some complaints would be resolved before an election was held. The new process also provides other procedural rights, such as appeals to the chief administrative law judge,<sup>62</sup> as well as the option of levying costs and respondents' attorneys' fees against those bringing frivolous complaints.<sup>63</sup>

The 2005 regular session saw several changes to the APA. The first amendment required the Revisor of Statutes to provide to OAH, free of charge, three copies of all compilations, reissues, or supplements to the Minnesota Statutes and Minnesota Rules.<sup>64</sup> The second amendment removed the requirement that an administrative law judge make conclusions in a report following a hearing about whether an agency fulfilled all relevant *substantive* requirements of law or rule.<sup>65</sup> However, the administrative law judge is still required to reach a conclusion on the *procedural* requirements of law or rule. The third change allowed the chief administrative law judge to adopt rules to govern the procedural conduct of all types of hearings conducted by OAH.<sup>66</sup> In addition, the subpoena powers of the chief administrative law judge were expanded to *any* matter being heard by OAH.<sup>67</sup> Fourth, the chief administrative law judge was directed to consult with the commissioner of finance, instead of the commissioner of administration, to assess agencies the costs of services rendered to them.<sup>68</sup> The fifth change to the APA required an agency, upon failing to act within 90 days on a licensing case, to return the record of the proceeding to the administrative law judge for consideration of disciplinary action.<sup>69</sup> This amendment

<sup>56</sup> 2004 Minn. Laws ch. 277, §7, at 1167-68, codified as Minn. Stat. §§ 211B.31-.37 (2014).

<sup>57</sup> Minn. Stat. § 211B.32 (2014).

<sup>58</sup> Minn. Stat. § 211B.33 (2014).

<sup>59</sup> Minn. Stat. § 211B.34 (2014).

<sup>60</sup> Minn. Stat. §§ 211B.34-.35 (2014).

<sup>61</sup> Minn. Stat. § 211B.35 (2014).

<sup>62</sup> Minn. Stat. § 211B.34 (2014).

<sup>63</sup> Minn. Stat. § 211B.36 (2014).

<sup>64</sup> 2005 Minn. Laws ch. 16, § 1, at 173, amending Minn. Stat. § 14.47, subd. 8 (2014).

<sup>65</sup> 2005 Minn. Laws ch. 16, § 2, at 174, amending Minn. Stat. § 14.50 (2014).

<sup>66</sup> 2005 Minn. Laws ch. 16, § 3, at 174, amending Minn. Stat. § 14.51 (2014).

<sup>67</sup> *Id.*

<sup>68</sup> 2005 Minn. Laws ch. 16, § 4, at 175, amending Minn. Stat. § 14.53 (2014).

<sup>69</sup> 2005 Minn. Laws ch. 16, § 5, at 175, amending Minn. Stat. § 14.62, subd. 2a (2014).

expanded upon the 2002 change making the decision of the administrative law judge final if the agency did not act within 90 days after the close of the agency record. The sixth change made during the 2005 regular session expanded upon the description of Department of Corrections rules that do not fall under the definition of a rule as set forth by Minnesota Statute Section 14.02.<sup>70</sup>

The final addition to the APA during the 2005 regular session required an agency to determine if the cost of complying with a proposed rule in the first year after the rule takes effect would exceed \$25,000 for businesses with less than 50 full-time employees or statutory or home rule charter cities with less than ten full-time employees.<sup>71</sup> This determination must be made before the close of the record, and the administrative law judge must review and approve or disapprove the agency's determination.<sup>72</sup> If the agency or the ALJ determines that the cost of complying with the proposed rule will exceed \$25,000 for small businesses or cities in the first year, then the affected entity may file a written statement with the agency claiming a temporary exemption from the rules.<sup>73</sup> If a city or business meeting the criteria files such a statement, the rule does not apply to that entity until the rules are approved by a law enacted after the agency determination or the ALJ disapproval of that determination.<sup>74</sup> The legislation contains several exceptions to the process, as well as a severability provision, and became effective July 1, 2005.<sup>75</sup> The legislature added conforming language to Minnesota Statute Section 14.19.<sup>76</sup>

The Minnesota Legislature made no changes to the APA in the 2006 and 2007 sessions. In 2008, only one minor conforming change went into effect regarding what is not included in the definition of a rule in Minnesota Statute Section 14.02, subdivision 4.<sup>77</sup>

In 2009, the legislature required that an agency proposing rules determine if a local government unit will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules.<sup>78</sup> This determination must be made before the close of the hearing record, or before the agency submits the record to the administrative law judge if there is no hearing.<sup>79</sup> If the proposed rule requires adoption or amendment of an ordinance, the rule may not become effective until: (1) the next July 1 or January 1 after notice of final adoption is published in the State Register; or (2) a later date provided by law or specified in the proposed rule.<sup>80</sup> The law provided some exceptions to this requirement.<sup>81</sup>

<sup>70</sup> 2005 Minn. Laws ch. 136, art. 4, § 2, at 971, amending Minn. Stat. § 14.03, subd. 3(b) (1) (2014).

<sup>71</sup> 2005 Minn. Laws ch. 156, art. 2, § 9, at 1652, codified in Minn. Stat. § 14.127 (2014). *See also infra* subsection 17.2.4.

<sup>72</sup> 2005 Minn. Laws ch. 156, art. 2, § 9, at 1652, codified in Minn. Stat. § 14.127 (2014).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 2005 Minn. Laws ch. 156, art. 2, § 10, at 1653, amending Minn. Stat. § 14.19 (2014).

<sup>77</sup> 2008 Minn. Laws ch. 238, art. 3, § 1, at 6-7, amending Minn. Stat. § 14.03, subd. 3(b) (2014).

<sup>78</sup> 2009 Minn. Laws ch. 152, §1, at 1-2, codified at Minn. Stat. § 14.128 (2014).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

The 2009 legislature also authorized agencies to use electronic mail to send rulemaking notices to persons who have registered with the agency to receive notices.<sup>82</sup> In 2010, the legislature clarified electronic mail notices by providing that persons may register to receive notice of agency rulemaking proceedings by submitting to the agency either their electronic mail address or their name and United States mail address.<sup>83</sup> The 2010 legislature also assigned OAH new duties relating to alleged violations of the Minnesota Government Data Practices Act.<sup>84</sup>

No changes to the rulemaking or contested case provisions of the APA were enacted in 2011. The 2011 legislature made some changes in the laws governing assignment of compensation judges in OAH to conduct workers' compensation proceedings.<sup>85</sup>

The 2012 legislature required that when an agency mails notice of intent to adopt a rule, the agency must send a copy of the notice and the agency's SONAR to the LCC (in addition to sending these materials to the chair and ranking minority members of the policy and budget committees with jurisdiction over the subject matter of the rules, as required by prior law).<sup>86</sup> The same 2012 law required by January 15 each year, an agency must submit its rulemaking docket and the rulemaking record from rules adopted in the prior year to the chairs and ranking minority members of relevant legislative committees.<sup>87</sup> The law also required that the SONAR include an assessment of the cumulative effect of the proposed rule with other federal and state regulations related to the specific purpose of the rule.<sup>88</sup> The 2012 legislature also repealed the requirement that an administrative law judge or workers compensation judge retire at age 70.<sup>89</sup>

In 2013, the legislature required that in an appeal of a contested case, the petition for a writ of certiorari filed with the court of appeals must be served on all parties to the contested case.<sup>90</sup> The law previously required the petition to be served on the agency. In 2014, the legislature repealed the Chapter 14 requirement that the Commissioner of Administration publish a guidebook of state agencies at least once every four years.<sup>91</sup>

One of the most significant recent legislative developments in administrative rulemaking involved not a change in law, but rather an action by the Revisor of Statutes. In 2013, the revisor began providing an administrative rule status feature on the revisor's website. This system allows users to follow many of the actions taken by state agencies when they adopt administrative rules. It also provides access to historical rule information, documents, and notices for rules adopted since 1980. This system provides access to the entire State Register in electronic form, to over 1,140 SONARs, and to over 900 documents from the Office of Administrative Hearings.

<sup>82</sup> 2009 Minn. Laws ch. 71, §1, at 1, amending Minn. Stat. §§ 14.07, subd. 6, 14.14, subd. 1a, 14.22, subd. 1, 14.389, subd. 2, 14.3895, subd. 3 (2014).

<sup>83</sup> 2010 Minn. Laws ch.280, § 1, at 1, amending Minn. Stat. § 14.14, subd.1a (2014).

<sup>84</sup> 2010 Minn. Laws ch. 297, §3, at 2, codified at Minn. Stat. § 13.085 (2014).

<sup>85</sup> 2011 Minn. Laws ch.89, §2, at 1-2, amending Minn. Stat. §§ 14.48, subds.2-3, 14.49, 14.50 (2014).

<sup>86</sup> 2011 Minn. Laws ch.89, § 3, at 2.

<sup>87</sup> *Id.*

<sup>88</sup> 2012 Minn. Laws ch. 238, §§ 1-2, at 1-2, amending Minn. Stat. §§ 14.116, 14.131 (2014).

<sup>89</sup> 2012 Minn. Laws ch. 224, §1, at 1, amending Minn. Stat. § 14.48, subd. 4 (2014).

<sup>90</sup> 2013 Minn. Laws ch. 56 § 1, at 1, amending Minn. Stat. § 14.63 (2014).

<sup>91</sup> 2014 Minn. Laws ch. 248, § 19, at 9, repealing Minn. Stat. § 14.04 (2014).