10.4 OFFICIAL NOTICE

The APA provides that administrative agencies, in deciding contested cases, may take notice of facts if they are "judicially cognizable facts" or if they are "general, technical or scientific facts" within the specialized knowledge of the agency.[1] This type of notice, commonly referred to as official or administrative notice, is parallel to but broader than the concept of judicial notice utilized by the courts.

Under the APA, agencies are not limited to taking notice of facts that could properly be noticed by a court. Because agencies are considered to be experts in their individual areas of practice, the APA permits agencies to take notice of facts within their specialized knowledge.[2] However, because the vast majority of contested cases are heard and initially decided by ALJs,[3] it is necessary to consider whether administrative judges, who may not possess the same specialized knowledge as the agency, are entitled to take notice of facts within the agency's specialized knowledge in rendering their decisions.

At first blush, the rules of the OAH appear to restrict official notice by ALJs to those facts that could be noticed by a court. The OAH rules setting forth rules of evidence for contested cases provide: "The judge may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any party to contest the facts so noticed."[4] This rule appears to narrow the scope of official notice by the ALJ to less than what the APA permits when the agency makes its decision. Such an inconsistency could lead to substantial deviation between the ALJ's initial decision and the agency's final decision, as the agency would be permitted to consider additional "facts" when it decides the case. The result would be a weakening of the value of the ALJ's decision and a tendency to make the administrative process appear "stacked" in favor of the agency.

Read properly, however, the above rule is not a limitation on the ALJ's role but is merely a statement that the concept of judicial notice is recognized in administrative cases. This interpretation is made clear by the rule governing the basis for the judge's recommended decision, which provides:

> The judge and agency may take administrative notice of general, technical, or scientific facts within their specialized knowledge in conformance with Minnesota Statutes, section 14.60.[5]

This rule recognizes that both the ALJ and the agency may take administrative notice of facts within "their" specialized knowledge in deciding a contested case. But does the rule provide that the ALJ can take notice of facts within the *agency's* knowledge or only that the ALJ may notice facts within his or her own individual expertise?

Although the rule is not a model of clarity, the better view, as stated above, is that the authority of the ALJ to take notice of facts should be coextensive with that of the agency to avoid needless inconsistency in the decision-making process. First, the APA favors the use of ALJs who do in fact possess "expertise in the subject to be dealt with in the hearing."[6]

1 MINN. STAT. § 14.60, subd. 4 (2014).
2 *Id.*
3 *Id.* § 14.50.
4 MINN. R.1400.7300, subp. 4 (2013).
5 *Id.*1400.8100, subp. 2.
6 MINN. STAT. § 14.50 (2014).

Second, through its use of divisions, the OAH attempts to assign ALJs to cases that, at least in a general way, are within their individual fields of expertise. Finally, because noticed facts are part of the record and may be rebutted, there is no substantial harm caused by permitting the ALJ to take notice of all the facts the agency intends to take notice of in rendering its decision, even if they are not facts within the individual judge's specialized knowledge.

What are the limitations on the use of official notice under the APA? Assuming that a fact falls within the scope of the APA's official notice provision (judicially noticeable or within agency expertise), it is nonetheless generally recognized that unless a fact is of common or general knowledge, only "legislative" (as opposed to "adjudicative" or "litigation") facts are a proper subject of official notice.[7] For example, although an agency might have sufficient specialized knowledge to take notice that the release of a particular chemical into public waters would be a source of pollution, it could hardly be permitted to take notice, based on its own investigation or "knowledge," that the respondent in a particular contested case had, in fact, released that pollutant into state waters. The latter type of fact, which is peculiar to the conduct of an individual litigant, must obviously be proved by specific admissible evidence.[8]

A further limitation on the use of official notice is the necessity that noticed facts be made a part of the hearing record. The APA requires that parties "be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record" of the facts that the agency intends to officially notice.[9] Similarly, the OAH rules limit the use of official notice by the ALJ to notice that is taken "on the record."[10] Finally, both the ALJ and the agency are limited in their decisions to a consideration of evidence that is "a part of the record."[11]

In addition to simple fairness, the requirement that official notice be taken as a part of the hearing record offers nonagency parties the opportunity to attempt to disprove the officially noticed fact. Both the APA and the OAH rules recognize that use of official notice is limited by the provision that a party may contest or attempt to rebut noticed facts.[12] So, for example, where an agency takes notice that a certain chemical causes water pollution, a party may offer proof that the chemical is not harmful, or that its effects are much less hazardous than those of which the agency intends to take notice.

The result is that official notice operates much like a rebuttable presumption. Agencies may take notice of certain facts that are within their special knowledge and that will have a presumption of truth by making them part of the hearing record. Nonagency parties, however, may attempt to disprove or lessen the impact of officially noticed facts by

7 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 418 (1965).

8 It is important to distinguish official notice from the use of expertise by an agency in deciding a case, based on the evidence in the record. In the process of deciding, as opposed to proving a case, agencies have great latitude in the application of their expertise to the evidence before them. COOPER, *supra* note 7, at 419. In applying their expertise to the facts in the record, agencies are utilizing the same evaluation or "thought" processes a judge or jury would use, based on their experience and knowledge, in evaluating the evidence in a trial. Therefore, MINN. STAT. § 14.60, subd. 4 (2014), specifically permits agencies to "utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record."

9 MINN. STAT. § 14.60, subd. 4 (2014).

10 MINN. R. 1400.7300, subp. 4 (2013).

11 *Id.* . 1400.8100, subp. 1.

12 MINN. STAT. § 14.60, subd. 4 (2014); MINN. R.1400.7300, subp. 4, .8100, subp. 2 (2013).

contesting them with their own evidence. In this way, official notice may shift the burden of producing or going forward with evidence on a particular fact from the agency to nonagency parties.[13] The ultimate burden of proof of a fact, however, whether or not it may be noticed, should properly remain with the party who has the burden of proof on the issue the fact is offered to prove.

[13] Official notice also has the indirect effect of shifting the financial burden of proving facts within the agency's specialized knowledge by permitting the agency to presume the fact is true and requiring parties contesting the noticed fact to disprove it.