

10.7 EXCLUSIVENESS OF RECORD

Numerous provisions of both the APA¹ and the OAH rules² reinforce the requirement that contested cases are to be decided solely on the hearing record. This requirement, frequently referred to as “the exclusiveness of the record,” has been observed to be fundamental to a fair hearing.³

Because the record is the exclusive source of factual information and evidence on which the agency's decision must be based, it is impossible to overemphasize the importance of developing a clear and complete record. Only in rare circumstances will a party seeking judicial review be permitted to present additional evidence that should have been presented and made a part of the hearing record.⁴ Under the APA, the record is the exclusive basis for decision, from the standpoint of both nonagency parties and the agency itself. The APA specifically requires that an agency make all evidence in its possession “of which it desires to avail itself,” including data that is classified as not public,⁵ a part of the exclusive record.⁶

The one limitation on the requirement that the record is exclusive is the APA's recognition that agencies may, in evaluating the evidence contained in the record, “utilize their experience, technical competence, and specialized knowledge.”⁷ This provision recognizes that agencies tend to be specialists in their individual areas and permits them to use their special knowledge in deciding what weight the evidence is to be given and what inferences may reasonably be drawn.⁸ In practical application, however, it may be difficult to determine whether an agency is merely utilizing its expertise to evaluate the evidence in the record or is relying on extra-record facts that should have been proved or officially noticed⁹ on the record.¹⁰ In addition, it may be unclear whether the agency has relied on

¹ MINN. STAT. §§ 14.60, subd. 2 (all evidence relied on by agency or offered by party made part of record); .60, subd. 4 (official notice to be taken on record); .62, subd. 1 (agency decisions shall be based on record); .67 (additional evidence ordered by reviewing court becomes part of record); .68 (judicial review of agency decision confined to record, absent procedural irregularities not shown in record) (2014).

² MINN. R. 1400.6400 (stating affidavits of prejudice are determined as part of record); .7300, subp. 2 (stating evidence must be offered and made part of record); .7300, subp. 4 (official notice to be taken on record); .7400, subp. 1 (contents of record); .7800(J) (close of record); .8100, subp. 1 (stating only record evidence is to be considered) (2013).

³ 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 430-31 (1965).

⁴ MINN. STAT. §§ 14.67 (stating that the application to present additional evidence must be based on “good reasons” for failure to present it before agency); .68 (stating that testimony on judicial review confined to procedural irregularities not reflected in record) (2014)).

⁵ *See Id.* § 13.02.

⁶ *Id.* § 14.60, subd. 2.

⁷ *Id.* subd. 4; *see Minneapolis Street Ry. v. City of Minneapolis*, 251 Minn. 43, 62, 86 N.W.2d 657, 670 (1957).

⁸ *Crookston Cattle Co. v. Minn. Dep't of Natural Res.*, 300 N.W.2d 769, 777 (Minn. 1980) (explaining that courts defer to agencies in areas involving technical expertise and skill); *N. Mem'l Med. Ctr. v. Minn. Dep't of Health*, 423 N.W.2d 737, 738 (Minn. Ct. App. 1988) (stating that courts give deference to agency's skill, expertise, and technical experience).

⁹ *See supra* § 10.3 note 45 - § 10.4, note 11 and accompanying text in those subchapters

¹⁰ To the extent this determination requires an inquiry directed to the finder of fact, the information may be difficult or impossible to obtain. *Mampel v. E. Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977) (“Discovery of the mental processes by which an administrative decision is made generally is not proper.”)

expertise in an area where logic and common-sense would have been more appropriate and might have led to alternate conclusions.¹¹ Because of the potential for unfairness, courts can be expected to more carefully scrutinize findings and conclusions based on agency expertise where it would have been reasonable for the agency to offer evidence or take notice of the basis for its conclusion on the record.

¹¹ See *Crookston Cattle Co.*, 300 N.W.2d at 780 (Yetka, J., concurring in part and dissenting in part).