

11.5 THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION

After the hearing and the filing of written briefs, if any, the ALJ must prepare a recommended decision that contains findings of fact, conclusions of law, and a recommendation. With several important exceptions,¹ the ALJ's report is a recommendation only. However, the recommended decision of the ALJ becomes final if the agency fails to act within 90 days of the close of the record. When the agency fails to act within 90 days on a licensing case, the agency must return the record of the proceeding to the ALJ for consideration of disciplinary action.² The final decision is made by the agency after the receipt of the ALJ's report and is based on a consideration of the entire record.

The findings of fact and conclusions of law must be stated with clarity and completeness, and the findings of fact must be specific.³ Specific findings are those that are definite and detailed so as to disclose the basis of the recommendation or order and permit an intelligent review.⁴ A summarization of the testimony will not constitute specific findings of fact.⁵ The ALJ is expected to find which facts are true. The report must also state the reasons for the conclusions of law and recommendation.⁶ The reasons are often set out in a memorandum that explains why the ALJ credited or relied on certain evidence and relates the facts to the law or policy involved.⁷

Under federal law, the requirements regarding specific findings are even more demanding. In 1993, the United States District Court for the District of Minnesota held:

To be legally sufficient, the ALJ must make an express credibility determination, must set forth the inconsistencies in the record which have led to the rejection of the Plaintiff's testimony, must demonstrate that all relevant evidence was considered and evaluated, and must detail the reasons for discrediting pertinent testimony. These requirements are not suggestive guidelines, but are mandates, which impose affirmative duties upon the deliberative process of the ALJs.⁸

¹ ALJs make final decisions in human rights discrimination cases, state employee personnel cases, occupational safety and health cases, and special education cases, among others. See § 14.2, n.28 (discussing statutory exceptions where the agency is bound by the ALJ's findings and conclusions). Under MINN. STAT. § 14.57(a) (2014), an agency may provide that the ALJ report constitutes the final decision in the case.

² MINN. STAT. § 14.62, subd. 2a (2014).

³ *People for Env'tl. Enlightenment & Responsibility (PEER) v. Minn. Env'tl. Quality Council*, 266 N.W.2d 858, 865, 871-72 (Minn. 1978).

⁴ *Brinker Trucking Co. v. Ill. Commerce Comm'n*, 166 N.E.2d 18, 19-20 (Ill. 1960); see *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 202, 94 N.W.2d 711, 717-18 (1959).

⁵ *Minn. Power & Light Co. v. Minn. Pub. Serv. Comm'n*, 310 N.W.2d 686, 689 (Minn. 1981); *Valley & Siletz R.R. v. Flagg*, 247 P.2d 639, 652-53 (Or. 1952).

⁶ *Indus. Union Dep't A.F.L.-C.I.O. v. Am. Petro. Inst.*, 448 U.S. 607, 631 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

⁷ *Carter v. Olmstead Cnty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 733 (Minn. Ct. App. 1998) (concluding that hearing officer's findings of fact held insufficient where the findings fail to mention, or explain the basis for failing to credit evidence in support of party's claim).

⁸ *Garthus v. Sec'y of Health & Human Servs.*, 847 F.Supp. 675, 689 (D. Minn. 1993) (citations omitted).

In most contested cases, the agency may issue a decision that differs from the recommendation of the ALJ.⁹ The Minnesota Supreme Court has made it clear that agency decisionmakers owe no deference to the recommendations of the ALJ, to the department staff or to its experts.¹⁰ The agency head may also make findings of fact or conclusions contrary to those made by the ALJ. Although an agency is not required to articulate reasons for rejecting the findings of fact, conclusions of law, or recommendation of the ALJ, it would be good practice to do so according to the Minnesota Supreme Court.¹¹ An agency's failure to explain on the record its reasons for rejecting the ALJ's findings may be evidence of an arbitrary decision and may indicate the agency's desire to exercise its will, and not its judgment.¹² For example, the Minnesota Court of Appeals required an agency to explain why it rejected the ALJ's findings of fact.¹³ But where the agency explains its deviation from the ALJ's findings, it does not act arbitrarily and capriciously.¹⁴

In a case where the ALJ's findings rest on the credibility of witnesses, the agency still has final responsibility to determine the findings of fact.¹⁵ However, the credibility determinations of the ALJ, who actually saw the witnesses, are entitled to some weight.¹⁶ The agency may need to show a sufficient basis to reverse the credibility findings of the

⁹ *In re Pautz*, 295 N.W.2d 635, 637 (Minn. 1980).

¹⁰ *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

¹¹ *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984); *Big Fish Lake Sportsmen's Club v. Water Res. Bd.*, 400 N.W.2d 416, 421 (Minn. Ct. App. 1987) (affirming agency may modify hearing examiner's findings and conclusions based on the entire record).

¹² *In re Orr*, 396 N.W.2d 657, 662 (Minn. Ct. App. 1986) (finding commissioner's decision arbitrary where only explanation for deviating from ALJ's findings was that the commissioner's findings more accurately reflected the record); *N. Messinger v. Airport Couriers*, 376 N.W.2d 285, 290 (Minn. Ct. App. 1985); *Five Star Trucking v. Minn. Transp. Regulation Bd.*, 370 N.W.2d 666, 670 (Minn. Ct. App. 1985); *Beaty v. Minn. Bd. of Teaching*, 354 N.W.2d 466, 472 (Minn. Ct. App. 1984).

¹³ *Dep't of Human Servs. v. Muriel Humphrey Residences*, 436 N.W.2d 110, 117 (Minn. Ct. App. 1989) ("DHS should not reject a factual finding without explanation when the Commissioner is neither reaching a different conclusion based on facts in the record, nor drawing different inferences from undisputed facts. If we allow an agency to reject a factual finding in this manner, we would effectively insulate it from meaningful judicial review. We do not allow the agency to avoid judicial review here, and find that the commissioner's amended finding number . . . is not supported by substantial evidence.").

¹⁴ *Brinks v. Minn. Pub. Utils. Comm'n*, 355 N.W.2d 446, 452 (Minn. Ct. App. 1984).

¹⁵ *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).

¹⁶ *In re Lecy*, 304 N.W.2d 894, 898 (Minn. 1981); *First Nat'l Bank v. Dep't of Commerce*, 310 Minn. 127, 134, 245 N.W.2d 861, 865 (1976); *Downie v. Indep. Sch. Dist. No. 141*, 367 N.W.2d 913, 916 (Minn. Ct. App. 1985); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 531 (Minn. Ct. App. 2007); *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. Ct. App. 2000).

ALJ.¹⁷ On judicial review, the findings of the ALJ may bear on the determination of whether substantial evidence supports the final agency decision.¹⁸

In reviewing the ALJ's recommendation, the agency's decision must be based on the entire record.¹⁹ In *In re the Rate Appeal of Sleepy Eye Care Center v. Commissioner of Human Services*,²⁰ the Minnesota Court of Appeals reversed a decision by the Department of Human Services and held that the commissioner acted contrary to law by excluding all the evidence presented during the contested case hearing and granting summary disposition based on only the documents submitted during desk audits and administrative appeals.²¹ The court noted that the statutes and rules governing contested case proceedings allow for discovery, the presentation of evidence, and the submission of summary disposition motions. Moreover, the court found that a meaningful opportunity to introduce evidence exists only if both the ALJ and commissioner are bound to consider properly presented and relevant evidence. The court remanded the matter back to the commissioner and specifically directed him to base his decision on the entire record as it existed during the contested case proceeding.²²

ALJs will not recommend specific disciplinary action in occupational licensing cases, such as a recommendation of a three-month suspension or a revocation, under the OAH's current policy. The basis of the policy is that the agency is better able to achieve uniformity in matters of discipline and should have the full policy-making authority in this regard. This policy has been approved by the Minnesota Court of Appeals.²³ However, if an agency fails to act on a license case within 90 days of the close of the agency record, the case is returned to the ALJ for imposition of a specific disciplinary action.²⁴ When the agency rejects such a specific recommendation, it has been held that due process requires the agency to explain its rationale.²⁵

¹⁷ *Loomis Courier Serv. v. NLRB*, 595 F.2d 491, 499 (9th Cir. 1979); *Saif Food Market v. Dep't of Health*, 664 N.W.2d 428, 431 (Minn. Ct. App. 2003) (noting adverse credibility determination by ALJ regarding owner's testimony and observed that the court defers to agency credibility determinations); *In re Friedenson*, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998) (finding that in deviating from ALJ's findings of fact and conclusions of law, "the board did not reject the ALJ's credibility assessments, but rather occasionally disagreed with inferences or conclusions based on testimony"); *see also Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. Ct. App. 2006).

¹⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Burton v. Illinois Civil Serv. Comm'n*, 57 Ill. App. 3d 835, 842, 373 N.E.2d 765, 770 (1978); *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984).

¹⁹ MINN. STAT. § 14.62, subd. 1 (2014).

²⁰ 572 N.W.2d 766 (Minn. Ct. App. 1998).

²¹ *Id.* at 771.

²² *Id.* at 770; *see also In re the Rate Appeal of Elim Homes, Inc.*, 575 N.W.2d 845, 849 (Minn. Ct. App. 1998) (declining to adopt a doctrine of administrative-judicial comity that would require the commissioner to defer to the ALJ's legal expertise, just as courts defer to the commissioner's technical expertise).

²³ *Padilla v. Minn. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 886-87 (Minn. Ct. App. 1986).

²⁴ MINN. STAT. § 14.62 subd. 2a (2014).

²⁵ *Ga. Real Estate Comm'n v. Horne*, 141 Ga. App. 226, 233-34, 233 S.E.2d 16, 20 (1977); *In re Revocation of Family Child Care License of Gail Burke*, 666 N.W.2d 724, 728 (Minn. Ct. App. 2003) (finding commissioner of human services abused his discretion in revoking a child care license where ALJ recommended less severe discipline and agency failed to explain how record supported revocation-license discipline must not exceed seriousness of violation); *CUP Foods v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. Ct. App. 2001) (finding city council's failure to explain why it rejected the suggestion of the ALJ

Finally, as a general rule, neither an ALJ nor an agency head can declare a statute or rule unconstitutional on its face in a contested case proceeding, since that power is vested in the judicial branch of government.²⁶ It is permissible, however, for an agency or an ALJ to determine a constitutional question in the interpretation of a statute or its application to particular facts, taking into account relevant judicial decisions.²⁷ Notwithstanding that the ALJ may not make a declaration of unconstitutionality, any evidence relevant to unconstitutionality should be offered for purposes of creating a record.²⁸

for conditional licensure, and instead imposed a six month closure, rendered the decision arbitrary and capricious).

²⁶ *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993). *But see* *Schultz v. Springfield Forest Prods.*, 141 Or. App. 727, 730, 951 P.2d 169, 170-71 (1997).

²⁷ *Smith v. Willis*, 415 So. 2d 1331, 1336 (Fla. Dist. Ct. App. 1982); *Jackson Cnty. Educ. Ass'n v. Grass Lake Cmty.*, 95 Mich. App. 635, 641, 291 N.W.2d 53, 56 (1979); *Petterssen v. Comm'r of Emp't Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975); *Marykay Foy*, *The Authority of an Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry*, 17 J. NAT. ASSOC. ADMIN. LAW JUDGES 173 (Spr. 1997).

²⁸ *See* § 9.5 (discussing discovery related to constitutional questions).