14.2 AGENCY REVIEW OF THE RECORD BEFORE DECISION

When the ALJ issues his or her recommended decision,[1] the ALJ certifies the official record to the agency.[2] Upon receipt of the record, the agency conducts its own quasi-judicial determination of the contested case. In reaching its decision, the agency must rely solely on the record. Both statute[3] and due process[4] require that the agency decisionmaker consider only factual information or evidence that is part of the record.

Consistent with this requirement, decisionmakers may not decide cases on the basis of information acquired from ex parte contacts. Due process, in particular, generally forbids such contacts as inconsistent with the fundamental premises inherent in our concept of adversary hearings.[5] Ex parte contacts with an agency decision maker may be regarded as fraud on the agency.[6] But not all such contacts result in a due process violation.[7] The issue is whether the contact has created a risk of actual bias.[8] An ex parte contact has been found to not violate due process where those objecting to the contact had the opportunity to confront, cross-examine, or argue concerning the information received by the adjudicator in the contact.[9] A clandestine ex parte contact not made part of the record would afford the objector no such opportunity.[10]

The agency can take notice of facts of which judicial notice could be taken and also of general, technical, and scientific facts within its specialized knowledge, provided that before or during the hearing, parties have been given notice and an opportunity to contest any such facts.[11] In evaluating the evidence in the record, however, the agency may utilize its experience, technical competence, and specialized knowledge.[12]

The ALJ's report is not ordinarily binding on the agency.[13] It is, however, entitled to some credence. Determinations of the credibility of witnesses by the ALJ are, for example, entitled

1 MINN. STAT. § 14.50 (2014) (providing that ALJ's report contain findings of fact, conclusions of law, and recommendation on action to be taken by agency).

2 *Id.* § 14.58.

3 *Id.* §§ 14.60, subd. 2, .62.

4 *See* Hosking v. Metro. House Movers Corp., 272 Minn. 390, 397, 138 N.W.2d 404, 409 (1965) (dictum); Hunter v. Zenith Dredge Co., 220 Minn. 318, 325-28, 19 N.W.2d 795, 799-800 (1945).

5 Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981); Camero v. United States, 375 F.2d 777, 780-81 (Ct. Cl. 1967) (opining that due process forbids adversary to proceeding from communicating privately with decision maker); *see* Doe v. Hampton, 566 F.2d 265, 276-77 (D.C. Cir. 1977) (dictum); *see also* Hard Times Café v. City of Minneapolis, 625 N.W.2d 165, 174 (Minn. Ct. App. 2001) (finding substantial evidence of procedural irregularities where city council members considered evidence outside the record and transferring the case to district court to take testimony); MINN. R. PROF. CONDUCT 3.5(g) (forbidding ex parte communications).

6 *In re* Minn. Pub. Utils. Comm'n, 417 N.W.2d 274, 280-83 (Minn. Ct. App. 1987).

7 Simer v. Rios, 661 F.2d 655, 679 (7th Cir. 1981).

8 *See* Barlau v. City of Northfield, 568 F. Supp. 181, 187 (D. Minn. 1983).

9 *Simer*, 661 F.2d at 679; *Barlau*, 568 F. Supp. at 186-87.

10 *Barlau*, 568 F. Supp. at 186; *see supra* text accompanying note 8 (discussing *Barlau*); *see also Simer*, 661 F.2d at 680-81.

11 MINN. STAT. § 14.60, subd. 4 (2014); *see also* § 10.4 in this volume.

12 MINN. STAT. § 14.60, subd. 4 (2014); *see* Kollmorgen v. Bd. of Med. Exam'rs, 416 N.W.2d 485, 487-88 (Minn. Ct. App. 1987).

13 City of Moorhead v. Minn. Pub. Utils. Comm'n, 343 N.W.2d 843, 847 (Minn. 1984) (stating that relationship between agency and ALJ differs in regard to findings of fact from that between appellate court

to some weight.[14] On the other hand, inferences and conclusions drawn from the facts by the ALJ may be given less weight.[15] Moreover, it is within the particular expertise of the agency to evaluate the weight to be given expert testimony.[16] An agency might, for example, focus on certain witnesses' testimony, and give one witness's testimony more weight.[17] In fact, the agency decision maker owes no deference to the agency's own expert witnesses.[18] While the ALJ's report is part of the record for the agency's consideration,[19] it is only one part of the record and is usually only a recommendation to the agency.[20] Agency officials render the final decision under the APA.[21] The agency must conduct its own review of the record and reach its own independent determination of all issues, whether legal or factual. It may not rubber-stamp the findings and conclusion of the ALJ.[22]

The agency may make its own findings differing from those of the ALJ as long as the agency's findings are supported by substantial evidence in the record. It is not restricted to reviewing the findings of the ALJ and changing them only when they are not supported by substantial evidence.[23] In addition, an agency is not bound to adopt stipulations of fact and

and lower court); Hymanson v. City of St. Paul, 329 N.W.2d 324, 326-27 (Minn. 1983) (dictum); *In re* 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). An agency may, however, delegate final decisionmaking authority to an ALJ. MINN. STAT. § 14.57(a) (2014).

14 *See* First Nat'l Bank v. Dep't of Commerce, 310 Minn. 127, 134, 245 N.W.2d 861, 865 (Minn. 1976); Saif Food Mkt. 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 observing that the court defers to agency credibility determinations); *In re* Friedenson, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998) (finding that board, in deviating from the ALJ's findings of fact and conclusions of law, "did not reject the ALJ's credibility assessments, but rather occasionally disagreed with inferences or conclusions based on testimony").

15 *City of Moorhead*, 343 N.W.2d at 846-47 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (hearing examiner's report part of record under Taft-Hartley Act)).

16 *In re* Hutchinson, 440 N.W.2d 171, 177 (Minn. Ct. App. 1989).

17 Petition of N. States Power Gas Util., 519 N.W.2d 921, 926 (Minn. Ct. App. 1994) (citing Minn. Power & Light Co. v. Minn. Pub. Util. Comm'n, 342 N.W.2d 324, 330 (Minn. 1983)).

18 *In re* Excess Surplus Status of Blue Cross & Blue Shield of Minn., 624 N.W.2d 264, 278 (Minn. 2001). *But see* Hurrle v. Cnty. of Sherburne, 594 N.W.2d 246, 251 (Minn. Ct. App. 1999) (reiterating that decisionmaking entity may not reject expert testimony without adequate reasons).

19 *City of Moorhead*, 343 N.W.2d at 847; Big Fish Lake Sportsmen's Club v. Water Res. Bd., 400 N.W.2d 416, 421 (Minn. Ct. App. 1987).

20 *City of Moorhead*, 343 N.W.2d at 847; Hymanson v. City of St. Paul, 329 N.W.2d 324, 326-27 (Minn. 1983) (dictum). There are several exceptions created by statute where the agency is bound by the ALJ's findings and conclusions. *E.g.*, MINN. STAT. §§ 182.661, subd. 3 (OSHA citations), .669 (OSHA discrimination cases), 244.052, subd. 6 (sex offender notice), 363A.29, subds. 3, 7 (human rights cases) (2014).

21 *Excess Surplus of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 278 (agency decisionmaker owes no deference to the recommendations of the ALJ); *City of Moorhead*, 343 N.W.2d at 846; *In re* Application of the Grand Rapids Pub. Utils. Comm'n, 731 N.W.2d 866, 870 (Minn. Ct. App. 2007) (stating the commission need not defer to ALJ's findings, conclusions, or recommendation).

22 *See* Urban Council on Mobility v. Minn. Dep't of Natural Res., 289 N.W.2d 729, 736 (Minn. 1980); PEER v. Minn. Envt'l. Quality Council, 266 N.W.2d 858, 873 (Minn. 1978); Brinks v. Minn. Pub. Utils. Comm'n, 355 N.W.2d 446 (Minn. Ct. App. 1984).

23 *City of Moorhead*, 343 N.W.2d at 847; *In re* Friedenson, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998); BAL, Inc. v. City of St. Paul, 469 N.W.2d 341, 343 (Minn. Ct. App. 1991) (stating that city council may reject or modify ALJ's findings); *In re* Hutchinson, 440 N.W.2d 171, 175 (Minn. Ct. App. 1989). *But see In re*

may look to other evidence in the record.[24] An agency, however, may not base its decision on evidence outside the record even where that evidence was part of the record in a previous contested case.[25]

Since 2000, the APA has required an agency that rejects or modifies a finding of fact, conclusion, or recommendation of an ALJ to state the reasons for each rejection or modification.[26] Before this amendment, case law had encouraged an agency to state its reasons for changing an ALJ recommended decision. If the agency rejects an ALJ's recommendations, the "better practice" is for the agency to articulate its reasons for doing so.[27] An agency's rejection of an ALJ's findings, or its significant departure from them, without any comment or explanation suggests that the agency exercised its will rather than its judgment.[28]

What constitutes a review of the record by the agency adequate to ensure that the agency is deciding independently and is not rubber-stamping the report of the ALJ is determined on a case-by-case basis. A ten-hour review by an agency head of a voluminous record, in which the agency head (1) reviewed the entire transcript, reading verbatim the areas of testimony he felt were of substance or in dispute, (2) examined every exhibit, and (3) received a four- or five-hour briefing from his staff reviewing the evidence and the arguments of the parties, has been held sufficient.[29] Where two of three decision makers acting as a commission had read the entire record before the hearing examiner and the third had read one-half of the record and all had considered the written and oral objections of the parties before decision, the review of the record was sufficient.[30] And where all of the agency decision makers had heard oral arguments, read briefs and appendices and the recommended decision of the ALJ but only one member and the advising assistant attorney general had read the whole transcript, the review of the record was consistent with due process.[31]

Lidberg, 529 N.W.2d 376, 381 (Minn. Ct. App. 1995) (holding commissioner in error for rejecting ALJ's conclusion after adopting ALJ's findings).

24 *In re* N. States Power Co., 440 N.W.2d 138, 140 (Minn. Ct. App. 1989).

25 *Id*.

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

27 *City of Moorhead*, 343 N.W.2d at 847; *In re Hutchinson*, 440 N.W.2d at 176 (finding appellate court's review more critical where conclusions differ from ALJ's); *In re* Perron, 437 N.W.2d 92, 96 (Minn. Ct. App. 1989); Dep't of Human Servs. v. Muriel Humphrey Residences, 436 N.W.2d 110, 117 (Minn. Ct. App. 1989).

28 *In re* Revocation of the Family Child Care License of 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 the record supported revocation); *In re* Sentry Ins. Payback Program, 447 N.W.2d 454, 460 (Minn. Ct. App. 1989); *In re* Orr, 396 N.W.2d 657, 662 (Minn. Ct. App. 1986); Five Star Trucking, Inc. 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, 471 (Minn. Ct. App. 1984).

29 Urban Council on Mobility v. Minn. Dep't of Natural Res., 289 N.W.2d 729, 736 (Minn. 1980).

30 *In re* Lecy, 304 N.W.2d 894, 898-99 (Minn. 1981).

31 *In re Hutchinson*, 440 N.W.2d at 176; *see also* Kells (BWSR) v. City of Rochester, 597 N.W.2d 332, 339-40 (Minn. Ct. App. 1999) (upholding agency decision although only five of the seventeen members of the Board of Water and Soil Resources heard oral argument or read the briefs, because the statute specifically requires that appeals on wetland replacement plans must be heard by the five-member dispute resolution committee of the Board).

An agency decision maker may consult agency staff in arriving at a decision.[32] Due process may, however, prevent the decision maker from consulting an agency staff member involved in the investigation of the case if, under the circumstances, the consultation would result in biasing the decision maker.[33] Statutes governing the health-related and non-health-related licensing boards prevent a board member consulted during an investigation from voting on the decision in the case but allow the member to participate at the hearing.[34] The Minnesota Court of Appeals has commented that review of the agency's draft order before issuance by the attorney who represented the agency in the hearing as an advocate is objectionable, as it creates an appearance of possible prejudice and a risk of biasing the agency.[35]

If the agency decision maker is a group of persons, such as a board or commission, the Minnesota open meeting law[36] may sometimes apply. The open meeting law does not, however, require that decision makers who have independently reviewed the record and deliberated individually have a collegial discussion.[37] The individuals need not orally discuss in public a decision on which they have reached independent judgments.[38]

[32] *See Urban Council on Mobility*, 289 N.W.2d at 736 (upholding agency decision where agency staff provided four- or five-hour briefing to agency head); *In re* Otter Tail Power Co., 417 N.W.2d 677, 680 (Minn. Ct. App. 1988) (finding agency staff and counsel acted as advisors, making suggestions and recommendations and informing the agency of possibilities based upon their knowledge and expertise).

[33] *Urban Council on Mobility*, 289 N.W.2d at 736 ("The nature of the administrative process is such that a division of the agency may properly act as an advocate where the ultimate decision is made by the agency head. So long as the decision-maker remains unbiased, the combination of functions by an agency does not conflict with the dictates of due process."). *See generally* Withrow v. Larkin, 421 U.S. 35, 46-55 (1975) (finding combination of adjudicative and investigative functions in an agency does not constitute a due process violation except where, against a presumption of administrative regularity, a showing of disqualifiable bias such that a neutral decisionmaker is not presiding has been made).

[34] MINN. STAT. § 214.10, subd. 2 (2014).

[35] *See* Richview Nursing Home v. Minn. Dep't of Pub. Welfare, 354 N.W.2d 445, 460 (Minn. Ct. App. 1984).

[36] MINN. STAT. § 13D (2014). The open meeting law is not applicable to agencies, boards, or commissions when they are exercising quasi-judicial powers involving disciplinary proceedings. *Id.* § 13D.01, subd. 2.

[37] *In re* Lecy, 304 N.W.2d 894, 899 (Minn. 1981).

[38] *Id.*