

19.4 RULE ADOPTION; REVIEW AND APPROVAL BY THE OFFICE OF ADMINISTRATIVE HEARINGS; REVISOR OF STATUTES

If no hearing is required under Minnesota Statutes section 14.25 (2014), the rulemaking agency may adopt the rule, either as proposed or as modified.¹ The agency examines all the comments received and makes modifications to the proposed rule either based on the comments or on the agency's own initiative.² However, the rule as modified cannot be "substantially different" than the rules proposed, unless the agency meets the requirements of Minnesota Rule, part 1400.2110 for adopting a substantially different rule.³

The agency must then submit the rule and related documents to the OAH,⁴ which must approve or disapprove the rule within 14 days of submission.⁵ The agency's submission of the rule must take place within 180 days of the day the comment period on the rule is over or the rule is automatically withdrawn and the agency must begin the rulemaking process again.⁶

Among the specific documents that must accompany the submission of the adopted rule to the OAH is the agency's Order Adopting Rules, which explains any modifications made from the proposed rule and why those changes do not make the rules substantially different.⁷ Other documents that the agency must submit to the OAH include the Request for Comments published in the *State Register*,⁸ a petition for rulemaking if the rule was proposed in response to it;⁹ the proposed rule, including the revisor's approval; the SONAR;¹⁰ the notice of intent to adopt rules as mailed and as published in the *State*

¹ MINN. STAT. § 14.26, subd. 1 (2014); see MINN. R. 1400.2300-.2310 (2013).

² MINNESOTA RULEMAKING MANUAL: A REFERENCE BOOK FOR THE PRACTITIONER ch. 8, at 84 (Patricia Winget et al. eds., 19th ed. 2014), available at <http://www.health.state.mn.us/rules/manual/2014manual.pdf>

³ After a determination by the chief ALJ that the modifications are substantially different, part 1400.2110 requires the agency to mail or deliver, to each person or group that made a comment during the rule proceeding or registered at the rule hearing, a copy of the substantially different rule and a statement stating that the chief judge found the rule to be substantially different, explaining the agency's reasons for modifying the rule, telling the recipient that the agency must accept written comments for 15 days, and giving the end date for the comment period. The agency then takes into consideration any comments received on the substantially different rule and submits the comments, any agency response to the comments, and the notice documents to the chief ALJ. The chief ALJ will review the agency's submission to determine whether (1) the agency has met the procedural requirements of part 1400.2110; (2) the substantially different modifications to the rule are based on comments or evidence in the record; (3) the substantially different rule complies with the legal standards under part 1400.2100; and (4) in light of the nature of the substantially different modification and the course of the rule proceeding, it would not be fair to affected persons to allow the agency to adopt the modification without initiating a new rule proceeding. MINN. R. 1400.2110, subp. 4 (2013); see also § 22.3.

⁴ MINN. STAT. § 14.26, subd. 1 (2014); MINN. R. 1400.2300, .2310 (2013).

⁵ MINN. STAT. § 14.26, subd. 3 (2014).

⁶ *Id.*, subd. 1 ("The agency shall report its failure to adopt the rules and the reasons for that failure to the Legislative Coordinating Commission, other appropriate legislative committees, and the governor.").

⁷ MINN. R. 1400.2310(N) (2013); see *id.* 1400.2090 (listing requirements for the order adopting rules).

⁸ See MINN. STAT. § 14.101, subd. 1 (2014).

⁹ See *id.* § 14.09.

¹⁰ See *id.* § 14.23.

Register,¹¹ a copy of the document authorizing the omission of the publication of text from the *State Register*, if applicable;¹² the certificate of mailing the notice of intent to adopt rules and certificate of mailing list; the certificate of additional notice, if given; documentation showing that the SONAR was sent to the legislative reference library;¹³ written comments and submissions on the proposed rules; any requests for hearing and withdrawals of requests for hearing; required documents showing that the agency obtained the withdrawal of hearing requests to reduce the number of requests for a hearing below 25 and evidence that the agency sent a notice of withdrawal to persons who requested a hearing, if applicable;¹⁴ a copy of the adopted rule showing any modifications and the revisor's approval of them; documentation of compliance with the procedure for adopting a substantially different rule, if applicable; the order adopting the rule; documentation that notice of submission of the rule to OAH was provided to anyone who requested this notice; and other documents or evidence required to show compliance with any other law or rule.¹⁵

On the day of receipt, the OAH must send one copy of the rule to the revisor of statutes, who has five working days to approve or disapprove the form of the rule.¹⁶

The OAH conducts a review of the legality of the rule¹⁷ and must disapprove the rule if it—

1. was not adopted in compliance with the procedural requirements of chapter 1400 of the Minnesota Rules, chapter 14 of the Minnesota Statutes, or other law or rule;¹⁸
2. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;¹⁹
3. is substantially different than the proposed rule, and the agency did not follow the procedures of Minnesota Rules, part 1400.2110;²⁰
4. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;²¹
5. is unconstitutional or illegal;²²

¹¹ See *id.* § 14.22, subd. 1(a).

¹² See *id.*(b).

¹³ See *id.* § 14.23.

¹⁴ See *id.* § 14.25.

¹⁵ See, e.g., MINNESOTA RULEMAKING MANUAL, *supra* note 2, at 84 (requiring approval from the Governor's office). Chapter 8 of the rulemaking manual includes a detailed discussion of state agency procedures for adopting rules without a public hearing. *Id.* at 84-90.

¹⁶ MINN. STAT. § 14.08(a), (b) (2014); see ch. 18 (providing a thorough discussion of the Revisor's powers and duties).

¹⁷ MINN. STAT. § 14.26, subd. 3 (2014); see ch. 23 (providing a general discussion of review for legality).

¹⁸ MINN. STAT. § 14.26, subd. 3 (2014); MINN. R. 1400.2100(A) (2013). An ALJ may find that a procedural error must be disregarded if the error meets the criteria under MINN. STAT. § 14.15, subd. 5 (2014), or MINN. STAT. § 14.26, subd. 3(d) (2014).

¹⁹ MINN. R. 1400.2100(B) (2013).

²⁰ *Id.*(C).

²¹ *Id.*(D).

²² *Id.*(E).

6. improperly delegates the agency's powers to another agency, person, or group;²³
7. is not a "rule" as defined in Minnesota Statutes section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law;²⁴ or
8. is subject to the requirements of Minnesota Statutes section 14.25, subdivision 2, regarding withdrawal of hearing requests and the withdrawal is not consistent with section 14.001, clauses (2), (4), and (5).²⁵

In disapproving a rule, the ALJ must state in writing the rule's deficiencies and make recommendations to overcome the defects. The written reasons for disapproval must be submitted to the chief judge for review, who must approve or disapprove the ALJ's determination within five working days.²⁶ This written document must be filed with the rulemaking agency, the Legislative Coordinating Commission, the attorney general, the revisor of statutes, the governor, the house of representatives and senate policy committees with primary jurisdiction over state governmental operations and persons who requested notification that the chief judge's report is available.²⁷ The disapproved rule cannot be filed with the secretary of state or be published in the *State Register* and cannot, therefore, become effective until the agency corrects the defects.²⁸

If the rule is disapproved on the grounds that the need and reasonableness has not been established, and if the agency does not elect to follow the recommendations of the chief ALJ to correct the defect, then the agency must submit the proposed rule to the Legislative Coordinating Commission and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations review for advice and comment. The agency may not adopt the rule until it has received and considered the advice of the commission and committees. The agency is not required to wait more than 60 days for the commission's or committee's advice.²⁹

If an agency makes a procedural error in the rulemaking process, the rule will not be disapproved if the ALJ determines that the error or corrective action to cure the error or defect did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.³⁰ Therefore, if the agency makes what has been determined to be a "harmless error" in the rulemaking proceeding, the agency will not have to start the rulemaking process all over but can proceed with the adoption of the rule.

The rulemaking agency may cure the rule defects that have not been found to be "harmless" and resubmit the rule for another OAH review³¹ as long as it does so within the 180-day period after the end of the rule's comment period. This period is effectively extended, however, if it expired during the OAH's review of the rule that led to the rule's

²³ *Id.* (F).

²⁴ *Id.* (G).

²⁵ *Id.* (H).

²⁶ MINN. STAT. § 14.26, subd. 3(b) (2014); MINN. R. 1400.2300, subp. 6 (2013).

²⁷ MINN. R. 1400.2300 (2013).

²⁸ *See* MINN. STAT. §§ 14.26-.28 (2014).

²⁹ *Id.* § 14.26, subd. 3(c); *see also* ch. 25.

³⁰ MINN. STAT. § 14.26, subd. 3(d) (2014).

³¹ If the text of the rule is modified as a result of the OAH's review, the rule must be resubmitted to the revisor of statutes for recertification of approval of its form. MINN. STAT. § 14.08(a) (2014).

disapproval. In this case, the agency is permitted to resubmit the rule within 30 days of the date it received written notice of the disapproval.³² If the OAH approves the rules, four copies of the rules are filed with the secretary of state, who in turn forwards one of the copies to the revisor of statutes, one to the agency, and one to the governor.³³ The governor may veto all or a several portion of a rule by submitting notice of the veto to the *State Register* within 14 days of receiving a copy of the rule from the secretary of state. The veto is effective when the veto notice is submitted to the *State Register*. The governor must notify the chairs of the legislative committees having jurisdiction over the agency whose rule was vetoed.³⁴

³² *Id.* § 14.26, subd. 2.

³³ *Id.*, subd. 3.

³⁴ *Id.*, subd. 6. The veto authority applies only to the extent the agency itself has authority to take action through rulemaking.