

20.1 INTRODUCTION

Rulemaking in Minnesota has been described by one commentator as being “unnecessarily complicated, cumbersome, costly, and time consuming.”¹ Others have identified procedures similar to Minnesota law as “designed to insure that rulemaking determinations are democratic as well as technocratic.”² Subjective opinions aside, formal procedures governing rulemaking with a hearing before an administrative law judge (ALJ) with the Minnesota Office of Administrative Hearings (OAH) are well established. The public's opportunity to be heard during rulemaking has a clear basis in statute and procedural rules.

Proposals to substitute more informal rulemaking procedures similar to the Model State Administrative Procedure Act have been introduced but have never been enacted in Minnesota.³ Amendments to the Minnesota Administrative Procedure Act (APA) in 1982 and 1984 streamlined the rulemaking process and authorized rulemaking without a hearing while retaining other formal public participation procedures in most instances. More recently, amendments to the APA have added additional regulatory analysis for the agency to include in the Statement of Need and Reasonableness (SONAR) and a requirement that the agencies seek additional methods of notifying affected persons regarding the proposed rule.⁴ Further amendments to the rules of the OAH governing rulemaking were adopted in 1985, 1996, and 2001.⁵

The Minnesota process of rulemaking with a hearing is one in which an agency proposes a rule in its entirety before the hearing. The hearing process becomes an opportunity to test the rule as proposed and is not generally a forum in which facts are gathered to create the rule. At the hearing, the department may defend and support its proposal but is willing to listen and accept other proposals from those commenting on the proposed rules. A hearing supports the goal of transparency and community participation in the formal rulemaking process and provides a venue for affected parties to come forth and provide feedback, both in support and in opposition to the proposed rule, and gives the agency an opportunity to listen to feedback and consider other rule proposals. Any agency that wishes to control the time and money spent on the rulemaking process will, therefore, treat the period before the rule is proposed as one in which the agency actively seeks information and feedback from and negotiates with persons affected by the proposed rule. Agencies usually have been in contact with affected parties through task forces, stakeholder groups or by soliciting comments before the hearing from expert

¹ Carl A. Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 152 (1979).

² Arthur Earl Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I: General Provisions, Access to Agency Law and Policy, Rulemaking and Review of Rules*, 34 AD. L. REV. 1, 7 (1982).

³ S.F. 2467 (2013-14); H.F. 2724 (2013-14); H.F. 830 (1995-96); H.F. 1899 (1993-94); H.F. 783 (1985-86).

⁴ MINN. STAT. § 14.131 (2009 & 2012).

⁴ MINN. STAT. § 14.131 (2009 & 2012).

⁵ Adopted Permanent Rules Governing Rulemaking Procedure, Contested Case and Revenue Recapture Act Hearings, and Awards of Expenses and Attorneys Fees to Prevailing Parties, 26 Minn. Reg. 391 (Sept. 17, 2001); Adopted Permanent Rules Governing Rule Adoption Proceedings, 20 Minn. Reg. 2058 (January 29, 1996); Adopted Rules Relating to Rulemaking Procedures of the Office of Administrative Hearings; and Adopted Rules Relating to Contested Case Hearings, 9 Minn. Reg. 2276 (April 8, 1985).

reviewers as well as any affected parties. Through this process agencies and affected parties have an opportunity to become aware of the controversial issues and either try to resolve them early in the process or go to hearing with the remaining unresolved issues. This chapter will address adopting rules with a public hearing, which is initiated by publishing a Notice of Intent to Adopt Rules with a Hearing or by a request of 25 persons in response to a Notice of Intent to Adopt Rules Without a Hearing. Agencies may also adopt rules with a public hearing after publishing a Dual Notice of Intent to Adopt Rules. The procedures for adopting rules using a “dual notice” are discussed fully in chapter 19 and will only be briefly mentioned in this chapter.