20.4 NATURE OF THE HEARING

In addition to the mandated procedures, the rulemaking hearing is adapted by the ALJ, after consultation with the agency and interested parties, to the problems arising out of the rules proposed, the subject matter sought to be regulated, the requirements of law, and the interests of nonagency participants. In most instances, the hearing involves accepting the agency's documents as exhibits, hearing statements from agency staff and attendees in the form of oral or written testimony and answering questions. On a few occasions, a proceeding has evolved into something very much like a trial at which witnesses are examined. The participants at the hearing are the agency and its legal counsel, the ALJ, and interested persons.

20.4.1 Participants

20.4.1(1) The Agency

At the hearing, staff members active in drafting the rule and the statement of need and reasonableness usually speak for the agency. In more complex rulemakings, the agency may also offer expert witnesses to support and expand on the conclusions of the agency. The agency may be represented by agency leadership, program staff with expertise in the rulemaking area, agency rulemaking staff, or a representative from the attorney general's office. Agency representatives at the hearing may advise staff on developing the record and may ask questions on behalf of the agency of other participants making comments on the proposed rule.

20.4.1(2) The Administrative Law Judge

Pursuant to statute, the chief ALJ assigns the ALJ who will conduct the hearing.[1] ALJs are not subject to any automatic disqualification, as is the case with judicial branch judges. Rather, by the terms of the rules of the OAH, ALJs may be disqualified only for cause.[2]

The ALJ is an active participant in many rulemaking proceedings. His or her first obligation is to manage the hearing and to create an accurate record. The ALJ must also ensure that all persons involved in the rule hearing are treated fairly and impartially.[3] More substantively, however, the ALJ independently examines the entire record and the language of the proposed rules to determine if the agency has shown, among other things, the rules to be needed and reasonable. In effect, the agency must meet a limited burden of proof about its rules that is independent of the strength of any opposition presented.[4]

The agency is not required to demonstrate on judicial review that its rules are supported by "substantial evidence."[5] Rather, the rules must meet the more general legislative standard that they not be arbitrary and capricious.[6] In making this analysis, a

1 MINN. STAT. § 14.14, subd. 2a (2014).
2 MINN. R. 1400.2020, subps. 2,3 (2013).
3 MINN. STAT. §§ 14.14, subd. 2a, .50 (2014).
4 *See* Manufactured Housing Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984) ; *see also* § 22.2.1.
5 *Pettersen*, 347 N.W.2d at 244.
6 *Id*.

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reviewing court will make a "searching and careful" inquiry of the record to ensure that the agency action has a rational basis.[7] It is the agency's responsibility to explain the evidence on which it is relying and how the evidence connects rationally with the agency's choice of action to be taken.[8]

The ALJ's final obligation is the preparation of a report with findings and conclusions on each section of the rules proposed by the agency. The report examines compliance with procedural requirements, compliance with substantive requirements of law, and whether the agency has shown the need for and reasonableness of the proposed rules. The report may examine the rationale offered by the agency. The report may also criticize the rule, offer alternative language, or recommend deletion or changes in the rule as proposed.[9] Finally, the report will determine whether the changes or modifications offered by the agency after the published notice, or proposed by the ALJ, are "substantially different" than the rules as proposed.[10]

In addition to testing the rule for need and reasonableness, the ALJ's report must examine the relation of the rule to the particular statutory grant on which the rule is based to see if the agency has statutory authority for the rule. The agency and the courts may properly rely on the legislative history of the statute in rationalizing the need and reasonableness of the rule.[11]

20.4.1(3) "Interested Persons"

In addition to the agency and the ALJ, "interested persons"[12] may participate in the hearing process. The notice of hearing includes the reminder that persons seeking to affect the rule are subject to lobbying reporting requirements of the campaign finance and public disclosure board.[13]

Interested persons who participate may include businesses or persons affected by the new rule, their lobbyists, attorneys, and expert witnesses. The participation of interested persons may range from the submission of written comments to a complete presentation of witnesses and argument, legal and factual, on the proposed rule.

20.4.2 Hearing Procedure and Questioning of Witnesses and Participants[14]

At the commencement of the hearing, the ALJ will provide an oral explanation of the process to be followed.[15] The hearing is usually tape-recorded, although in some cases a court reporter may be employed. In any event, a transcript can be prepared if the agency desires one or if there is to be appellate consideration of the rulemaking. The agency then submits for the record the jurisdictional documents that demonstrate the

7 *Id.*
8 *Id.*
9 *See* MINN. STAT. §§ 14.15, .50 (2014); MINN. R. 1400.2240 (2013).
10 MINN. STAT. § 14.15, subd. 3 (2014); see § 22.3.
11 *See Pettersen*, 347 N.W.2d at 242; *see also* chapter 22.
12 MINN. STAT. § 14.14, subd. 2a (2014).
13 MINN. R. 1400.2080, subp. 4(H)i(2013).
14 *See* MINN. STAT. § 14.14, subd. 2a (2014).
15 MINN. R. 1400.2210, subp. 2 (2013)

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agency's compliance with the APA's procedural rulemaking requirements.[16]

Under Minnesota Rule 1400.2220, the agency submission into the hearing record includes: the Request for Comments published in the *State Register*,[17] a petition for rulemaking if the rule was proposed in response to it; [18] the proposed rule, including the revisor's approval; the SONAR;[19] the notice of intent to adopt rules as mailed and as published in the *State Register*,[20] a copy of the document authorizing the omission of the publication of text from the *State Register*, if applicable;[21] the certificate of mailing the notice of intent to adopt rules and certificate of mailing list; the certificate of additional notice, if given; the certificate showing that the SONAR was sent to the legislative reference library;[22] written comments and submissions on the proposed rules; and other documents or evidence required to show compliance with any other law or rule.[23]

Next, the agency proceeds to demonstrate its substantive case. The APA requires the agency to make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule at the hearing and to fulfill any relevant substantive or procedural requirements of law or rule.[24] The agency may rely on facts presented by others to support its proposed rule.[25] In general, the agency's case is contained in the statement of need and reasonableness. In effect, the statement of need and reasonableness is the text of the evidence and argument that the agency submits for review by the public and examination by the ALJ. In many instances, the agency's only submission at the hearing will be this document. The agency may, however, present additional oral evidence.[26] OAH rules provide that an agency may rely on its statement of need and reasonableness as its affirmative presentation at the hearing.[27] The agency is required to have copies of the proposed rules and the SONAR at the hearing.[28] However, agency personnel familiar with the rules must still attend the hearing.[29] If the agency presents testimony or evidence that was not summarized in its statement, a continuance of the hearing is possible.[30]

Members of the public and interested persons who appear need not submit in advance any documents outlining the objections, criticism, or support they intend to offer to the rule. At the time of the hearing, their testimony and/or their written statement may be submitted.[31] There is no prehearing registration requirement for persons intending to speak at the hearing. Persons attending may indicate on a registration sheet at the

16 *See* MINN. STAT. §§ 14.14, subd. 2a, .365 (2014); MINN. R.. 1400.2200-.2220 (2013).
17 MINN. STAT. § 14.101, subd. 1 (2014).
18 *Id.* § 14.09.
19 *Id.* § 14.131.
20 *Id.* § 14.14, subd. 1a(a).
21 *Id.* § 14.14, subd. 1a(b).
22 *Id.* § 14.131.
23 *See* chapter 9 (discussing state agency procedures in adopting rules with a public hearing). .
24 MINN. STAT. § 14.14, subd. 2 (2014).
25 *Id.*
26 *Id.* § 14.14, subd. 2a (); MINN. R. 1400.2210, subp. 3 (2013).
27 Minn. R. 1400.2200, subp. 3 (2013).
28 *Id.* , subp. 2 ().
29 *Id.*, subp. 4.
30 *Id.* 1400.2210, subp. 3.
31 MINN. STAT. § 14.14, subd. 2a (2014); MINN. R. 1400.2210, subp. 5 (2013).

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hearing if they wish to speak or to be notified of either the date of issuance of the ALJ's report or the date of the filing of the rules with the secretary of state.[32]

During the hearing, the ALJ is required to allow questioning of agency representatives, of witnesses, and of interested persons making oral statements.[33] At most rule hearings, the questioning process is informal. If trial-type facts must be resolved in order to determine the reasonableness of the rule, the hearing may increasingly resemble a trial-type proceeding in which the witnesses are cross-examined by interested persons and/or their attorneys. The form of the examination of witnesses is within the discretion of the ALJ, but the available trial-type legal models tend to govern as the hearings become more adversarial.[34] Questioning on the purpose or intended operation of a rule is always allowed.[35] Questioning will be allowed for other purposes, such as to test the validity of data supporting the rule, if it is material to the evaluation or formulation of the proposed rule.[36]

20.4.3 The Rulemaking Record and Ex Parte Communications

The goal of both the agency and the ALJ is to build a careful record that will explain the basis of the rule.[37] The agency should attempt to address all material issues raised by interested parties and by the ALJ, either by oral answers to questions or in written submissions after the close of the hearing. The record that the ALJ prepares for submission to the agency includes:

1. the jurisdictional documents submitted by the agency;
2. all written materials submitted by participants;
3. a tape recording of the hearing, or a transcript if one has been requested and prepared[38];
4. all exhibits or other items of physical evidence; and

[32] MINN. R. 1400.2210, subp. 1 (2013).

[33] MINN. STAT. § 14.14, subd. 2a (2014); MINN. R. 1400.2210, subp. 4 (2013).

[34] *See* Carl A. Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 184 (1979); *see also* Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, 435 U.S. 519, 524 (1978) (stating that "the formulation of procedures was basically to be left within the discretion of the agencies" and "cautioning reviewing courts against engrafting their own notions of proper procedures"); City of Morton v. Minn. Pollution Control Agency, 437 N.W. 2d 741, 748 (Minn. Ct. App. 1989) (concluding that availability of an exhibit at a rulemaking hearing makes it a part of the record without further evidence that it was affirmatively presented by the agency); *In re* Hibbing Taconite Co., 431 N.W.2d 885, 894-95 (Minn. Ct. App. 1988) (stating that development of a record on policymaking to be done through rulemaking and applied in a contested case).

[35] MINN. STAT. § 14.14, subd. 2a (2014).

[36] *Id.*

[37] *See* Mammenga v. Dep't of Human Servs., 442 N.W.2d 786, 791 (Minn. 1989) (stating that the rulemaking record varies with the nature of the rule; some cases require a substantial evidentiary record while others may rely on "common knowledge" or "common sense"); Manufactured Housing Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984) (stating that "in determining if the agency acted arbitrarily and capriciously the court must make a 'searching and careful' inquiry of the record to ensure that the agency action has a rational basis").

[38] An agency may be billed for a transcript of a hearing. Determine whether your agency has encumbered funds for this cost.

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5. the report of the ALJ.

Certain ex parte contact with agency members by interested persons is allowed by the APA in the rulemaking process.[39] As such, the process of rulemaking is more analogous to the legislative process than to a judicial determination.[40] One could assert that First Amendment issues may be involved in the process of petitioning the government.

This informality is difficult to reconcile with the mandate of a formal and "exclusive" record.[41] In a formal hearing the agency has the obligation to create a record showing that the proposed rule is needed, reasonable, and consistent with law. The agency also has the responsibility to listen to feedback and consider proposed changes put forth from affected and interested parties. The agency need not show that no other rule could have been adopted or that no considerations outside the record have entered into its promulgation. The discretional decisions of the agency before the rule is noticed are legislative; and the decision by the agency on whether to alter the proposed rule, either slightly or to the degree of "substantial difference," is also legislative.

It also appears that the ALJ is not bound by any express ex parte limitations. Although the OAH has an explicit ex parte contact prohibition for contested cases,[42] no such rule exists for formal rulemaking. This fact must be understood, however, within the context of the obligation of the ALJ to provide a fair and impartial hearing and the existence of an "exclusive" record for purposes of judicial review.

[39] *See* MINN. STAT. § 14.101 (2014) (advice on possible rules); *see also id.* § 14.15, subd. 2 () (requiring agency to wait five working days after receipt of ALJ report before taking any action).

[40] *See* Sierra Club v. Costle, 657 F.2d 298, 386 (D.C. Cir. 1981) (discussing ex parte contact between the EPA and coal industry advocates, including a Senator).

[41] MINN. STAT. § 14.365 (2014).

[42] MINN. R. 1400.7700 (2013).

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