

20.5 POST-HEARING PROCEDURES

20.5.1 Post-Hearing Comments

At the close of the hearing, the record remains open for at least five working days, or, at the discretion of the ALJ, for up to twenty calendar days in order to allow the submission of additional comments by the agency and interested persons. The length of the comment period is announced at the hearing. At the close of this period, both the agency and interested persons have five working days to comment on any proposed modifications or new information submitted.¹ The 20-day period is now called the “comment period” and the five day period is called the “rebuttal period.”² This five-day rebuttal period is not available for the submission of new evidence.

20.5.2 Administrative Law Judge's Report and Chief Administrative Law Judge's Review

The ALJ must prepare a report within thirty days of the close of the record unless the chief ALJ grants an extension on the written request of the agency or the ALJ.³ If the report finds a defect — in that it concludes that the agency has proposed changes to the rule that are substantial, that the rule as proposed is not needed or reasonable, or that the agency lacks statutory authority or has proposed a rule with a legal defect — then the report is submitted to the chief ALJ, who then prepares his or her own report.⁴ If the ALJ report finds no defects, and recommends the adoption of the rule as proposed or modified, finds that the rule is needed, reasonable, and legal, and finds no changes proposed by the agency to be substantial, the report is submitted directly to the agency. The agency need not return the rule to the chief ALJ unless it makes changes to the rule other than those recommended by the ALJ. If such changes are made, the record is returned to the chief ALJ for a review on the issue of substantial difference only.⁵ The modified rule cannot be “substantially different” than the rules proposed, unless the agency meets the OAH rule requirements for adopting a substantially different rule.⁶ The “substantial difference” requirement is discussed further in chapter 22.

As part of the “legal” review, the ALJ must disapprove a rule if it:

1. was not adopted in compliance with the procedural requirements of Minn. Rules, chapter 1400, Minn. Stat. chapter 14, or other law or rule;⁷
2. is not rationally related to the agency’s objective or the record does not demonstrate the need for or reasonableness of the rule;⁸
3. is substantially different than the proposed rule, and the agency did not

¹ MINN. R. 1400.2230, subd. 2 (2013); *see also* MINN. STAT. § 14.15, subd. 1 (2014).

² MINN. STAT. § 14.15, subd. 1 (2014).

³ *Id.*, subd. 2 ().

⁴ *Id.* subds. 3,4; MINN. R. 1400.2240, .2100 (2013).

⁵ MINN. STAT. § 14.16, subd. 1 (2014); MINN. R. 1400.2240, .2100 (2013).

⁶ *See* MINN. R.1400.2110 (2013).

⁷ MINN. R.1400.2100(A) (2013) (stating further that an administrative law judge may find that a procedural error must be disregarded if it meets the criteria under Minn. Stat. § 14.15, subd. 5, or 14.26, subd. 3 (d) (2014)).

⁸ *Id.*(B).

follow the procedures of Minn. Rules, 1400.2110;⁹

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;¹⁰

5. is unconstitutional or illegal;¹¹

6. improperly delegates the agency's powers to another agency, person, or group;¹²

7. is not a "rule" as defined in Minn. Stat. §14.02, subd. 4, or by its own terms cannot have the force and effect of law;¹³ or

8. is subject to the requirements of Minn. Stat. § 14.25, subd. 2, regarding withdrawal of hearing requests and the withdrawal is not consistent with Minn. Stat. § 14.001, clauses (2), (4), and (5).¹⁴

If the chief judge agrees with the adverse conclusion of the ALJ that the rule has been substantially changed or that there is a defect related to either procedural or substantive requirements, the chief judge advises both the agency and the revisor of statutes of changes that will correct the defect.¹⁵ The agency is required to alter the rule consistent with the findings of the chief ALJ, or, if applicable, show that the agency has satisfied the rule requirements for the adoption of a substantially different rule, or it cannot adopt the rule.¹⁶ The agency may also make a request that the chief ALJ reconsider the disapproval.¹⁷ The agency also has the option of withdrawing a rule. This option is available unless the withdrawal of a rule part makes the remainder of the rule substantially different.¹⁸

If the chief ALJ determines that the rule is not needed or reasonable, however, the agency—if it still wishes to adopt the rule — submits the proposed rule to the Legislative Coordinating Commission and to the House of Representatives and Senate Policy Committees. The agency must consider the commission and committees' advice and comment on the rule, but the agency may adopt the rule even against the advice of the commission and committees. The agency may proceed to adopt the rule after 60 days even if the commission and committees has not yet provided advice and comment.¹⁹

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.²⁰ 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

⁹ *Id.*(C).

¹⁰ *Id.*(D).

¹¹ *Id.*(E).

¹² *Id.*(F).

¹³ *Id.*(G).

¹⁴ *Id.*(H).

¹⁵ MINN. STAT. § 14.15, subd. 3 (2014); MINN. R. 1400.2240, subp. 4 (2013).

¹⁶ MINN. STAT. §§ 14.15, subd. 3, .16, subd. 2 (2014).

¹⁷ MINN. R 1400.2240, subp. 4 (2013).

¹⁸ *Id.*, subp. 8.

¹⁹ MINN. STAT. § 14.15, subd. 4 (2014)

²⁰ *Id.* subd. 5.

rulemaking process all over again and the ALJ will make a finding to this effect and proceed with the completion of the rulemaking process.

20.5.3 Agency Findings and Adoption of the Rule

Once the report of the ALJ is submitted or the objections of the chief ALJ have been met, the agency may then determine independently, on the basis of the record, whether to adopt the rule. As previously stated, if the ALJ report contained no defects, and the agency only makes changes as recommended by the ALJ, the agency may proceed to adopt the rule without resubmission to the chief ALJ. If the ALJ report contained defects or the agency makes changes other than those recommended by the chief ALJ, the agency must resubmit the rule to the chief ALJ.²¹ Upon resubmission, the agency must file with the chief judge: the proposed rule, a proposed order adopting rule and rule containing the agency's changes and the hearing record if requested by the chief judge.²² The proposed order discusses changes in the rule, the rationale supporting the changes in the rule, and it makes conclusions about the legal validity of the rule.²³ Failure to explain agency findings that deviate from the ALJ report is grounds for voiding a rule.²⁴

Although the APA requires findings of fact and conclusions in contested cases,²⁵ it does not require them in rulemaking proceedings. In the order adopting rules, the agency will set forth the reasons for changes between the rule as proposed and the rule to be adopted, including discussion of relevant testimony, data, and evidence. If the agency takes exception to the findings of the ALJ, the agency should set forth the basis of the exceptions with citations to the record showing its rationale. The agency's findings must be signed by a person authorized to make the order.²⁶

The order adopting the rules should supplement the ALJ's report if there is any question about completeness. Such detailed findings allow for review by a court, should one be sought. Finally, any subsequent changes in the text of the rule between the initial proposal and the rules as finally adopted must be approved for form by the revisor.²⁷ Often the findings and conclusions of the ALJ will be adopted by the agency in their entirety.

In rulemaking with a hearing, the agency is required to submit its notice of adoption of the rule to the *State Register* within 180 days of the date of the ALJ's report,²⁸ or the rule is withdrawn.

20.5.4 Post-Adoption Procedures to Make a Rule Effective

²¹ *Id.* . § 14.16, subds. 1, 2 ; MINN. R. 1400.2240, subps. 4, 5 (2013).

²² MINN. R. 1400.2240, subp. 5 (2013).

²³ *Id.* 1400.2090; *see also id.* 1400.2560 (form for recommended order adopting rules).

²⁴ *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 245-46 (Minn. 1984); *see also Yellowbird v. M.S.P. Express*, 377 N.W.2d 490, 493 (Minn. Ct. App. 1985) (concluding, in a contested case, that "[i]n the absence of findings, [the court is] unable to determine whether substantial evidence supports the Board's findings, conclusions or decision").

²⁵ *See* chapter 14.

²⁶ MINN. R. 1400.2090(G) (2013).

²⁷ MINN. STAT. §§ 14.07, subd. 2, .08(b),.20 (2014).

²⁸ *Id.* § 14.19.

Once the agency adopts the rule, certain steps remain before a rule is effective. Three copies of the rules as adopted must be filed with the Minnesota Secretary of State.²⁹ Notice of adoption must be published in the *State Register*.³⁰ Generally, the rule is effective five working days after publication unless a later date is specified.³¹

20.5.5 Custody of the Rulemaking Record

The agency is the repository of the official rulemaking record for every rule adopted.³² The record must be available for public inspection, and it will form the basis of the agency defense to any legal challenge to the validity of the rule. This record must be retained according to the agency's record retention schedule or policy. Generally, rulemaking records are retained permanently or as long as the rule is effective. An agency may determine how long to retain official rulemaking records. The state archives frequently determines that rulemaking records are archival in nature and can thus be transferred to the state archives for permanent retention once an agency's retention period has been satisfied, if the agency does not wish to retain the records.

²⁹ *Id.* § 14.16, subd. 3. In Minnesota, the Office of Administrative Hearings files the rules with the secretary of state, and the revisor is then notified to draft the Notice of Adoption for agency publication to complete the formal rulemaking process.

³⁰ *Id.* § 14.18, subd. 1.

³¹ *Id.*

³² *Id.* § 14.365.