

23.3 PROCEDURAL REQUIREMENTS

All rules must be adopted in accordance with specific notice and comment procedures established by statute, and failure to comply with the necessary procedures results in the invalidity of the rule.¹ The procedures with which the agency must comply are outlined in the Minnesota APA² and the applicable rules of the OAH.³ Among the statutory procedural requirements that the ALJ is required to review is “whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rule.” Minnesota Statutes section 14.26 (2014). In *Minnesota League of Credit Unions v. Minnesota Department of Commerce*,⁴ the Minnesota Supreme Court held that the Department failed to comply with the procedural rule requiring that the statement of need and reasonableness (SONAR) contain a summary of all of the evidence and argument which is anticipated to be presented by the agency at the hearing justifying the need for and reasonableness of the proposed rules. The court found that while the SONAR was inadequate to support the rule, the Department’s oral presentation at the hearing demonstrated the need for and reasonableness of the rule and did not surprise those objecting to the rule and therefore the defect was not prejudicial.

Cases involving the adequacy of the rulemaking record include *Mammenga v. Department of Human Services*⁵ (concluding rulemaking record varies with the nature of the rule: “in some cases a substantial evidentiary record may be needed, as in *Manufactured Housing*,^[6] while in other cases ‘common knowledge’ or ‘common sense’ will suffice”); *City of Morton v. Minnesota Pollution Control Agency*⁷ (denying challenge of inadequate record due to an absent exhibit, since that exhibit was available as a handout throughout the hearing); *Minnesota Association of Homes for the Aging v. Department of*

¹ MINN. STAT. § 14.45 (2014); *St. Otto’s Home v. Dep’t of Human Servs.*, 437 N.W.2d 35, 43 (Minn. 1989) (finding commissioner’s definition of Medicare filing requirement constitutes a new rule that should have been adopted through the procedures of the Minnesota APA); *White Bear Lake Care Ctr. v. Minn. Dep’t of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982); *Ebenezer Soc’y v. Dep’t of Human Servs.*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988) (finding introduction of a new standard without rulemaking process is invalid); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 895 (Minn. Ct. App. 1988) (finding agency erred in creating a new rule without following the statutory procedures); *In re NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 405 (Minn. Ct. App. 1988) (concluding agency did not engage in unpromulgated rulemaking in its interpretation of a rule); *In re Deregulation of the Installation & Maint. of Inside Wiring*, 420 N.W. 2d 650, 659 (Minn. Ct. App. 1988) (finding petitioner’s argument that commission should have adopted rules not persuasive as commission was simply following procedures set forth in statute); *In re Orr*, 396 N.W.2d 657, 633 (Minn. Ct. App. 1986) (concluding agency improperly adopted a moratorium without first engaging in rulemaking procedures); *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 683 (Minn. Ct. App. 1984) (finding interpretive manual valid as a restatement of existing law but lacking legal authority of an interpretive rule, since manual was not promulgated according to APA).

² MINN. STAT. § 14.05, subd. 1 (2014).

³ MINN. R. 1400.2000-2410 (2013). These rules have the force of law. MINN. STAT. § 14.38, subd. 1 (2014).

⁴ 486 N.W.2d 399, 405-406 (Minn. 1992).

⁵ 442 N.W.2d 786, 791 (Minn. 1989).

⁶ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁷ 437 N.W.2d 741, 748 (Minn. Ct. App. 1989).

*Human Services*⁸ (finding no procedural error because the agency did not discuss an amendment to the proposed rules in its SONAR).

Another procedural issue the ALJ reviews is *substantial difference*, whether the adopted rule is substantially different from the rule as proposed. Minnesota Statute sections 14.16 and 14.26 (2014). Cases involving substantial difference include *Minnesota League of Credit Unions v. Minnesota Department of Commerce*⁹ (finding changes to the rule, which were suggested by the ALJ and adopted by the agency, not substantial changes since they only narrowed and clarified the rule); *City of Morton v. Pollution Control Agency*¹⁰ (concluding agency's revision to the proposed rule did not constitute a substantial change); *Minnesota Association of Homes for the Aging v. Department of Human Services*¹¹ (concluding amendment offering an alternative to the original proposal is not a substantial change to the rule). Furthermore, individual state agency statutes or rules may set out procedures beyond those required by the APA or its authorizing rules.¹²

The Minnesota APA does not contain any qualification that a rule that has "substantially complied" with the procedural requirements of the APA is a valid rule. In one case, the Minnesota Supreme Court refused to apply the "substantial compliance" doctrine, stating that even if the court were inclined to read the doctrine into the APA, through an application of the harmless error doctrine, this was not the appropriate case in which to do so.¹³ In 1995, the legislature specifically added a "harmless error" provision to the APA.¹⁴ The "harmless error" provision directs the ALJ to disregard a procedural error or defect if the ALJ finds that the error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."¹⁵ With a "harmless error" ruling made by an ALJ, the agency no longer has to start the rulemaking process over due to a minor procedural error made in the rulemaking process.

⁸ 385 N.W.2d 65, 69 (Minn. Ct. App. 1986).

⁹ 486 N.W.2d at 406. For an analysis of *substantial difference*, see § 22.3 of this text.

¹⁰ 437 N.W.2d at 747.

¹¹ 385 N.W.2d at 69.

¹² See, e.g., MINN. STAT. § 115.43, subd. 1 (2014); *Handle with Care v. Dep't of Human Servs.*, 406 N.W.2d 518, 523 (Minn. 1987) (finding, after examination of the legislative history, that a statutory requirement was not a precondition to the adoption of the rule).

¹³ *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 241-42 (Minn. 1980).

¹⁴ MINN. STAT. §§ 14.15, subd. 5, .26, subd. 3(d) (2014).

¹⁵ *Id.* § 14.26, subd. 3(d).