## 5.3 SERVICE OF THE NOTICE OF AND ORDER FOR HEARING

For a notice to be timely, it must provide a reasonable opportunity for the parties to prepare for the hearing.[1] For example, a two-day notice before a hearing regarding the dismissal of a teacher does not constitute due process.[2] However, a three-day written notice of a hearing for a substitute teacher alleged to have abandoned his position was found to constitute due process. According to the Minnesota Court of Appeals, the notice and opportunity to be heard must be appropriate in relation to the nature of the charges made.[3] A seven-day notice in a welfare benefits termination case was not constitutionally insufficient per se.[4] However, where the appeal period ended on a weekend, a welfare benefit recipient had until the next business day to appeal.[5] Where a pawnbroker was sent a notice of hearing about the revocation of his license by first class mail in a plain envelope ten days before the hearing, the Court of Appeals found that the notice satisfied due process even though the licensee was on vacation until just before the hearing and failed to open the letter.[6] The Court of Appeals rejected suggestions that the letter should have been sent by certified mail or marked "urgent," as well as the argument that ten days was too short of a notice period. In contrast, a notice and order of revocation was "actively misleading" and denied the petitioner due process of law based on its failure to clearly state that a petition needed to be filed 33 days from the date of mailing.[7] The failure of the Commissioner of Public Safety to provide a full seven-day notice of the effective date of a prehearing license revocation under the Minnesota implied consent law did not deny due process where the statute had no specific notice requirement and the notice was provided weeks or months after the licensees failed blood or urine tests.[8]

The APA sets no time period for service of the notice prior to the hearing. However, the notice must not be served less than thirty days before the hearing unless otherwise provided by law, unless the Chief ALJ approves a shorter time period.[9] In addition, agency statutes or rules sometimes set a shorter notice period,[10] and specify the method of service for the notice, which is commonly by first-class or certified mail.[11]

In the absence of a statutory provision, service is governed by an OAH rule defining service as either personal service or service by first class United States mail addressed to the party at his or her last known address.[12] Service by a licensed overnight express mail service is also authorized. An affidavit of service is not required. A certificate of service must be prepared for any type of service. It must list the name of the person

1 Fisher v. Indep. Sch. Dist. No. 118, 298 Minn. 238, 243, 215 N.W.2d 65, 69 (1974)
2 Hardy v. Indep. Sch. Dist. No. 694, 301 Minn. 373, 378, 223 N.W.2d 124, 127-28 ( 1974)
3 Forbes v. Indep. Sch. Dist. No. 196, 358 N.W.2d 150, 153 (Minn. Ct. App. 1984).
4 Goldberg v. Kelly, 397 U.S. 254, 268 (1970)
5 Franco v. Ramsey Cnty. Cmty. Human Servs., 413 N.W.2d 869, 872 (Minn. Ct. App. 1987).
6 *In re* West Side Pawn, 587 N.W.2d 521, 522-23 (Minn. Ct. App. 1998).
7 Plocher v. Comm'r of Pub. Safety, 681 N.W.2d 698, 705 (Minn. Ct. App. 2004) (reversing district court's dismissal of appeal because it had been filed one day late).
8 Williams v. Comm'r of Pub. Safety, 830 N.W.2d 442, 446-47 (Minn. Ct. App. 2013).
9 MINN. R. 1400.5600, subp. 3 (2013).
10 *See, e.g., id.* 1400.8550 (Revenue Recapture Act hearings).
11 *See e.g.,* MINN. STAT. § 80C.22, subd. 7 (2014) (service by certified mail under the Minnesota Franchise Act).
12 MINN. R. 1400.5550 (2013).

accomplishing the service, but need not be signed or notarized.[13] There is a presumption that mail properly addressed and posted is duly received by the addressee .[14] Several agency licensing statutes require a licensee to keep his or her current address on file with the commissioner or board, and to advise the licensing authority of any change of address.[15] Based on this presumption, default judgment may be entered against a party who does not appear at the hearing even where the mailed notice is returned undelivered.[16] Some agency licensing statutes provide for substituted service of process on the licensing authority.[17]

In some instances, regulatory statutes specifically provide for publication of the notice of hearing either in place of, or in addition to, service on individuals. In the absence of such a statute, notice by publication would not satisfy due process requirements with respect to a person directly affected by the contested case proceeding whose name and address are easily ascertainable.[18] Service by publication is often a means of alerting nonparties to the existence of a contested case that may affect their rights. Such notice may be employed in contested cases involving applications by financial institutions for new facilities, or applications by common carriers for new privileges that may substantially affect the business interests of competitors. The "best notice practicable" is authorized to advise potential members of a class of a class action in a contested case initiated by the Department of Human Rights.[19] The adequacy of notice by publication is generally judged on a case-by-case basis.[20] For example, a statute requiring notice given only to landowners for an upcoming inventory and mapping of wetlands and public waters is constitutional..[21] Where a rule or statute requires publication of a notice of hearing in newspapers with general circulation, a failure to publish pursuant to the requirements set out in the rule or statute will be treated as a jurisdictional defect, render the notice inadequate, and require a remand of the case for rehearing.[22] Cost is not an adequate reason to refrain from publication.[23]

[13] *Id.* 1400.5100, subp. 9.

[14] Nemo v. Local Joint Exec. Bd. and Hotel and Rest. Employees' Local No. 556, 227 Minn. 263, 266-67, 35 N.W.2d 337, 339-40 (1948).

[15] *See, e.g.,* MINN. STAT. § 45.0112 (2014) (Department of Commerce licensees).

[16] *But see* Marsh v. Builders Bd., 540 Or. App. 242, 634 P.2d 803, 805 (1981) (holding undelivered notice is not reasonable if respondent is no longer licensed by the agency).

[17] MINN. STAT. § 45.028 (2014) (Commissioner of Commerce can receive service of process on commerce licensees).

[18] Schroeder v. City of N.Y., 371 U.S. 208, 212-13 (1962).

[19] MINN. R. 5000.1100, subp. 3 (2013).

[20] *See, e.g.,* Bank of Commerce v. Bd. of Governors, 513 F.2d 164, 166-67 (10th Cir. 1975).

[21] *In re* Christenson, 417 N.W.2d 607, 611 (Minn. 1987).

[22] *In re* Wilmarth Line of the CU Project, 299 N.W.2d 731, 735 (Minn. 1980); Bartlett v. Joint Cnty. Sch. Comm., 11 Wis.2d 588, 590, 106 N.W.2d 295, 296 (1960).

[23] *Wilmarth,* 299 N.W.2d at 735.