

6.3 CONSOLIDATION AND BIFURCATION

6.3.1 Consolidation

In the absence of a statute to the contrary, two or more contested cases may be consolidated for hearing if they present substantially the same issues of law and fact, a holding in one case would affect the rights of parties in another, consolidation would save time and costs, and consolidation would not prejudice any party.¹ Consolidation may occur by agency action or order, by agreement of the parties, or by order of the ALJ issued either on the petition of a party or on the judge's own motion. An agency's authority to consolidate contested cases must be exercised before any of them are referred to the OAH.² A referral occurs when the agency requests the assignment of an ALJ.³ Agency consolidations are reviewable by the ALJ on the filing of a petition for severance.⁴ Contested cases may also be consolidated on the agreement of all parties. To obtain a consolidation order, the parties must file a written stipulation for consolidation signed by all of them.⁵

The ALJ may order the consolidation of contested cases on his own motion⁶ or on the petition of a party.⁷ However, *sua sponte* consolidation orders are limited to cases that are pending before the same judge.⁸ If the cases to be consolidated are pending before different judges, consolidation must be obtained by agreement or by petition. Since a consolidation order issued by the judge on his or her own motion may be reviewed by a petition for severance, *ex parte* orders are permissible. The contested case rule does not authorize the ALJ to consolidate a contested case that has been commenced by the agency with a matter that has not been commenced as a contested case.

Petitions for consolidation must be served on all parties to the cases to be consolidated and on the agency if it is not a party. The original petition, with proof of service, must be filed with the ALJ. Any party objecting to the petition must serve and file its objections within ten calendar days following service of the petition.⁹ Where more than one judge is assigned to the cases that are the subject of a petition for consolidation, the ALJ assigned to the first case submitted to the office will make the determination.¹⁰ That

¹ MINN. R. 1400.6350, subp. 1 (2013).

² *Id.*, subp. 2.

³ *Id.* 1400.5300. The rule requires an agency to file its proposed notice of and order for hearing together with a request for the assignment of an ALJ before a contested case is commenced under MINN. R. 1400.5600, subp. 1 (2013). Since this is the initial referral of a contested case to the OAH, and since the word *referral* rather than *commenced* or *filed* is used, the request for an ALJ under part 14.00.5300 must be the referral contemplated in the consolidation rule. Such a construction is consistent with part 1400.7600, which prohibits an agency from deciding any motions after a judge has been assigned to a contested case. The initial referral of a contested case is frequently made by telephone. Where that is done, the date of the telephone call would be the operative date by which the agency may consolidate cases.

⁴ *Id.* 1400.6350, subp. 2.

⁵ *Id.*, subp. 6.

⁶ *Id.*

⁷ *Id.*, subp. 3.

⁸ *Id.*, subp. 6.

⁹ *Id.*

¹⁰ *Id.*, subp. 4. It is unclear when a contested case is submitted. It could mean when filed, commenced, or referred.

determination may be made with or without a hearing. Consequently, the petition and any objections to the petition should contain the factual allegations the parties are relying on to support their positions. The order granting or denying consolidation must be made by a written order containing a description of the cases, the reasons for the order, and notification of a consolidated prehearing conference if one is to be scheduled.¹¹

Any party may file a petition for severance following the receipt of a notice of, or order for, consolidation.¹² The severance procedure is designed to provide parties with an opportunity to object to consolidation made by an agency or ordered on the ALJ's own motion. It is not designed to reconsider the objections previously considered in connection with a petition for consolidation. The severance petition should contain the factual averments necessary to establish that consolidation is prejudicial to the petitioner, and it must be served on all parties and the agency at least seven business days before the first scheduled hearing date.¹³ Parties objecting to severance should promptly file their objections with the ALJ and serve copies of their objections on the petitioner, the agency, and other parties.¹⁴ The ALJ may order a hearing on the severance petition or make a determination on the basis of the filings made. If the ALJ finds that consolidation will be prejudicial to the petitioner, the ALJ may order severance or other relief that will prevent the prejudice from occurring.¹⁵

Normally, consolidation is a matter of administrative discretion.¹⁶ It is designed to avoid a multiplicity of parties and the duplication of effort,¹⁷ or to permit consideration of the component parts of the same problem.¹⁸ Fairness and convenience may require the consolidation of two or more contested cases.¹⁹ Thus, under the so-called *Ashbacker* doctrine,²⁰ consolidated or comparative hearings will be required to consider applications for mutually exclusive authority.²¹ Under the *Ashbacker* doctrine, the party seeking

¹¹ *Id.*, subp. 5.

¹² *Id.*, subp. 7.

¹³ Normally this should be the hearing date originally noticed by the agency, and not the first actual day of hearing. If the hearing is continued, the time for filing a severance petition should not be changed. Severance petitions should be resolved promptly so that unnecessary delays and expenses, such as those concomitant with discovery, can be avoided.

¹⁴ The rule does not mention objections to severance petitions, but parties would have a right to file them. The whole purpose of the severance petition process is to review prior ex parte consolidation decisions and provide the parties with an opportunity to address them.

¹⁵ MINN. R. 1400.6350, subp. 7 (2013).

¹⁶ *Am. Trucking Ass'n v. United States*, 326 U.S. 77, 83 (1945); *Bostick v. Martin*, 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322, 324 (1966); *Bayron v. N.Y. State Dep't of Motor Vehicles*, 284 N.Y.S.2d 187, 187, 28 A.D.2d 993, 993, (1967).

¹⁷ *Wales v. United States*, 108 F. Supp. 928, 932 (N.D. Tex. 1952).

¹⁸ *Chi. B. & Q. R.R.*, 154 Neb. 281, 287, 47 N.W.2d 577, 581 (1951).

¹⁹ *Great W. Packers Express, Inc. v. United States*, 263 F. Supp. 347, 350 (D. Colo. 1966).

²⁰ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1946).

²¹ *REA Express, Inc. v. United States*, 568 F.2d 940, 950 (2d Cir. 1977); *Delta Airlines v. CAB*, 228 F.2d 17, 21 (D.C. Cir. 1955). The doctrine is not limited to the transportation or communications fields. *See, e.g., Bio-Medical Applications of Clearwater v. Dep't of Health*, 370 So. 2d 19, 20 (Fla. Dist. Ct. App. 1979) (discussing the licensure of a kidney dialysis center); *Bay State Harness Horse Racing & Breeding Ass'n v. State Racing Comm'n*, 342 Mass. 694, 702, 175 N.E.2d 244, 250 (1961) (discussing mutually exclusive horse racing licenses); *Huron Valley Hosp. v. Mich. State Health Facility Comm'n*, 110 Mich. App. 236, 248, 312 N.W.2d 422, 427 (1981) (hospital certificate of need).

consolidation must show the mutual exclusivity of two bona fide applications.²² Intervention is not an acceptable substitute for consolidation under the *Ashbacker* doctrine.²³

6.3.2 Bifurcation of Issues

The issues in the contested case are sometimes bifurcated between liability and money or damage issues. This is done when the methodology for making numerical calculations or other legal issues are in dispute but the actual calculations themselves will not likely be disputed. In such cases, establishing the alternative dollar amounts would be a waste of time. As a result, those calculations are omitted. An agency is also permitted to bifurcate proceedings between jurisdictional issues and the merits.²⁴ Likewise, in discrimination cases, liability and damage issues are frequently bifurcated in class actions so that the damages payable to a large number of persons are not considered before liability is established. In many cases, however, bifurcation of the issues may not save time because interlocutory appeals from a resolution of one of the liability issues may not be available.²⁵

²² *Midw. Gas Transmission Co. v. Fed. Energy Regulatory Comm'n*, 589 F.2d 603, 621 (D.C. Cir. 1978).

²³ *See, e.g., Bio-Medical Applications*, 370 So. 2d at 23.

²⁴ *Hentges v. Minn. Bd. Water & Soil Res.*, 638 N.W.2d 441, 448-49 (Minn. Ct. App. 2002).

²⁵ *In re Commodore Hotel Fire & Explosion Case*, 318 N.W. 2d 244, 246 (Minn. 1982). In *State v. Sports & Health Club*, 370 N.W.2d 844, 848 (Minn. 1985), the court held that discretionary review of liability and class certifications in human rights cases is available in an appropriate case.