7.3 PREHEARING CONFERENCES AND SETTLEMENT PROCEDURES

7.3.1 Prehearing Conferences

A contested case is commenced when the notice of and order for hearing or other authorized pleading is served by the agency.[1] At that time, the ALJ obtains jurisdiction over the case and the contested case rules become operative. Those rules specifically authorize prehearing conferences.[2] The prehearing conference may be scheduled by the agency in its hearing notice, or the judge may order that one be held. The judge's order may be issued on the judge's own motion or at the request of a party.[3]

The purpose of the prehearing conference is apparent from the broad language of the rule. It states that the purpose of the prehearing conference is to simplify issues, to consider amendments to the hearing notice, to obtain factual and evidentiary stipulations, to consider proposed witnesses, to identify and exchange documentary evidence, to establish discovery deadlines and hearing dates, to explore settlement or the use of available settlement procedures, and to consider other necessary and advisable matters relating to the case.[4]

The subjects addressed at the prehearing conference will vary significantly from one case to another depending on the nature of the issues and the number of parties involved. In some cases, it may be necessary to establish a detailed schedule of prehearing procedures, including deadlines for the filing of intervention petitions, motions, and prefiled testimony. It may also be necessary to establish a discovery timetable, determine the order and burden of proof, ascertain the desire for court reporters, transcripts and/or interpreters, discuss the possibility of mediation, and resolve other housekeeping matters. The prehearing conference is commonly used to establish procedures to decide legal issues that should be resolved before the hearing. Thus, where evidentiary or jurisdictional issues are identified, a timetable for filing the necessary motions and argument may be set. Likewise, if no material facts are in dispute, procedures for resolving the matter on a motion for summary disposition can be set.

Prehearing conferences are generally held by telephone at a prescheduled time before the scheduled hearing date. Telephone conferences are particularly appropriate when one party resides outside the metropolitan area or when the prehearing issues to be considered are limited in number and simple in nature. Whether conducted by telephone or in person, a record of the proceeding may be made. With limited exceptions, prehearing conferences are not required to be on the record and are usually recorded only in complex cases or at a party's request. Under the contested case rules, any matters addressed at the prehearing conference, including the agreements and stipulations of the parties, may be entered on the record or may be made the subject of an order by the judge.[5] Commonly, the agreements, stipulations, and orders made during the prehearing conference are incorporated into a subsequent prehearing order issued by the judge. If the prehearing order

1 MINN. R. 1400.5600, subp. 1 (2013).
2 *Id.* 1400.6500.
3 *Id.*
4 *Id.*
5 *Id*.

misstates any agreements made or any proceedings had, it must be promptly challenged. If no challenge is made, the parties will be bound by the order issued.

The major impediment to a productive prehearing conference is confusion over the parties' respective claims and defenses. Although the agency is required to include a statement of the allegations or issues involved in the contested case in its notice of and order for hearing, agency statements are frequently framed in broad and general terms. This is often due to the agency's lack of knowledge of the grounds for appeal that have been taken from administrative decisions.[6] Issue confusion also arises because respondents are not generally required to file a responsive pleading to the agency's hearing notice.[7] Therefore, issue identification is a fundamental goal of many prehearing conferences. Until the issues are known, the parties are unable to determine their discovery needs, the witnesses and exhibits they intend to use, or the expected duration of their cases-in-chief.

In order to have a productive prehearing conference, the judge is authorized to require that the parties file a prehearing statement before the scheduled conference.[8] The judge may require the parties to address any matters he or she deems necessary for a productive prehearing conference in the statement. In many cases, the most useful prehearing statement is one that clarifies and sharpens the factual and legal issues in dispute. Consequently, prehearing statements are commonly required to contain each party's statement of the issues, his or her claims and defenses, and a short summary of the facts relied on. In other cases, such as lengthy and complex ratemaking proceedings, the prehearing statement may be made in the form of a proposed prehearing order suggesting a detailed procedural timetable governing all prehearing matters.

7.3.2 Settlement Procedures

Under the contested case rules, a variety of formal and informal settlement procedures are available. These include prehearing conferences, settlement conferences, mediation, and orders for settlement discussions. Generally, the ALJ may make settlement inquiries and explore the parties' interest in mediating their dispute during the prehearing conference. Where there are few issues and a limited number of factual disputes, the prehearing conference can be a useful vehicle for productive settlement discussions. If the parties are reluctant to seriously discuss a settlement in the judge's presence, they may ask the judge to excuse himself or herself while they do so. In such cases, the judge may either recess the prehearing conference while settlement discussions take place or conclude the conference and request that the parties discuss a settlement after the judge leaves.

7.3.3 Settlement Conference

[6] Many agency rules permit appeals from staff determinations without requiring a statement of the grounds for the appeal.

[7] In some cases, responsive pleadings are required under the rules of the agency involved in the contested case. In discrimination cases under the Minnesota Human Rights Act, both a complaint and an answer must be filed. *See* MINN. R. 5000.0900, .1200 (2013).

[8] *Id*. 1400.6500, subp. 2.

In addition to prehearing conferences, the contested case rules specifically authorize settlement conferences.[9] The purposes of a settlement conference and the procedures applicable to such a conference are different from the purposes and procedures of a prehearing conference. The principal purpose of a settlement conference is to assist the parties in resolving the dispute; the consideration of other issues commonly addressed at a prehearing conference is secondary.

Settlement conferences are held only at the direction of the chief ALJ and on the request of a party or the judge assigned to the case. If requested, the chief judge is required to assign the case to a judge other than the assigned hearing judge for the purpose of conducting the settlement conference. Using a judge other than the one who will preside at the hearing encourages the parties to discuss their cases openly and without fear of prejudice. It also permits the settlement judge to take an active role in the settlement negotiations that might otherwise be deemed improper. If the parties have previously engaged in mediation, a settlement conference will be ordered only if all parties agree. Similarly, unless all parties and the settlement judge agree, a unilateral request for a settlement conference does not constitute good cause for a continuance.[10]

Settlement conferences are held at a time and place agreeable to all parties and the settlement judge. If any party would be required to travel more than 50 miles to attend the conference, it must be conducted by telephone unless the traveling party otherwise agrees. The parties are required to attend or be available by telephone at the time of the settlement conference and must be prepared to participate in meaningful settlement discussions. Although the primary purpose of the conference is to reach a settlement, the parties must also be prepared to provide information on and to discuss the other matters contained in the prehearing conference rules. The parties are also required to discuss settlement options before the conference if they believe that a reasonable basis for settlement exists.[11] This requirement is designed to encourage the parties to resolve the case, if possible, before the settlement conference in order to save the judge's time and reduce the costs of the proceeding. Even if unsuccessful, this requirement helps the parties identify the specific matters in dispute and gives them an opportunity to hear and evaluate their adversary's position before the settlement conference is held. In that way, the settlement conference can be conducted with greater dispatch and in a more meaningful manner.

If a settlement is not reached during the settlement conference, other prehearing procedures and issues are considered just as they would be at a prehearing conference. If any agreements or stipulations are made pertaining to the facts or other issues in the case, the settlement judge must issue an order approving those agreements or stipulations. That order is binding on the judge who will preside at the hearing.[12]

7.3.4 Mediation

In the early 1980s, public interest grew in alternative forms of dispute resolution in civil and administrative proceedings. Parties and their attorneys were looking for ways to resolve disputes that did not involve the costs, delays, and strained relations associated with

9 *Id.* 1400.6550.
10 *Id.,* subp. 2.
11 *Id.,* subp. 4.
12 *Id.,* subp. 6.

litigation. This interest prompted an amendment to the APA authorizing the chief ALJ to adopt rules governing voluntary mediation in rulemaking and contested cases.[13] In 1985, rules governing voluntary mediation in contested cases were adopted.[14] As defined in those rules, mediation is a voluntary process undertaken by the parties, with the assistance of a neutral mediator, in an attempt to resolve the dispute.

Mediation is a substantially different process from other settlement procedures under the rules. It is wholly voluntary and is undertaken only on the agreement of all the parties. Unlike other settlement procedures, legal issues are not decided, and prehearing procedures are not considered. Moreover, mediation sessions are not held before the judge who may hear the case, and the mediator, unlike a judge, issues no orders and usually expresses no opinion on the merits of the parties' positions. The mediator has no authority to impose a settlement on the parties and will not express preferences on settlement options, propose solutions, or evaluate the strengths or weaknesses of a party's case. The parties have sole responsibility for reaching an agreement.

Mediation has a variety of benefits over litigation. It can substantially reduce the costs and time delays of formal legal proceedings, and it helps preserve the relationship between the parties. Moreover, mediation involves no coercion. A party may refuse to mediate a dispute, and even if consent is given, it can be revoked at any time.[15] Since the parties retain complete control over the matter, they can avoid an "imposed" decision, and they are generally more satisfied with the ultimate resolution of the matter. This results in better compliance than that which would come from a decision on the merits. Mediation may also free staff time and may permit more active involvement by administrators and experts and less involvement by attorneys.

Mediation may be particularly useful in contested cases that do not involve major factual disputes or in very complex cases that would be extremely difficult and expensive to litigate. Mediation may also be useful in those cases where the agency involved has some discretion. Where the dispute involves policy choices and agency discretion, the agency will be in a better position to mediate a settlement than it will be in cases where a statute or rule mandates a specific result.

Agencies must comply with statutory requirements and are usually bound by their own rules.[16] Hence, any settlement agreement reached during mediation must be consistent with state and federal statutes and must normally be consistent with agency rules. This is appropriate because mediation should not be used as a vehicle for avoiding compliance with agency rules. If mediation could be used in that manner, politics and favoritism could corrupt the mediation process and the rule of law.

Under the rule, OAH mediation services may be provided to any state agency, court, or political subdivision. The services are available in contested case proceedings or in any other contested matter except labor relation disputes under the jurisdiction of the bureau of

13 1985 Minn. Laws ch. 13, § 87, at 2166 (amending MINN. STAT. § 14.51 (1984)).

14 MINN. R. 1400.5950 (2013).

15 *Id.*

16 *See* White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare, 319 N.W.2d 7, 7-9 (Minn. 1982) (rule); Sellner Mfg. Co. v. Comm'r of Taxation, 295 Minn. 71, 74, 202 N.W.2d 886, 888 (1972) (statute). However, courts have recognized that agencies may depart from their rules in limited circumstances. *See, e.g.,* State Dep't of Commerce v. Matthews Corp., 358 So. 2d 256, 259 (Fla. Dist. Ct. App. 1978); Koronis Manor Nursing Home v. Dep't of Pub. Welfare, 311 Minn. 375, 379-80, 249 N.W.2d 448, 451 (1976).

mediation services.[17] A contested case need not be commenced in order to obtain the services. In order to initiate mediation when a contested case has not been commenced, the state agency, court, or political subdivision must file a written request with the chief ALJ. Copies of the request must be served on all persons that would be named as parties if a contested case were commenced. If a contested case has been commenced, the request for mediation may be made by any party or the judge assigned to the case.[18]

On receipt of a request for mediation, the chief judge must contact all parties or persons directly affected to determine if they are willing to mediate the dispute. If there is any opposition to mediation, the request will be denied. However, if all the parties or persons directly affected are willing to participate, an order for mediation setting forth the name of the mediator and the date by which mediation must be initiated will be issued. Parties may properly express a preference for particular mediators. The mediator appointed will be an ALJ.[19]

If mediation is unsuccessful and the same judge who mediated the dispute is assigned to hear it, or if that judge discusses the mediation with the judge assigned to hear the case, the parties could be prejudiced. Recognizing this, parties would be reluctant to mediate or to engage in the type of frank and open discussions necessary in mediation sessions. The mediation rule contains several provisions that were designed to eliminate any such prejudice and to remove any inhibition to the free flow of information and ideas in the mediation process. The mediator is precluded from hearing the matter if mediation is unsuccessful[20] and may not, without the consent of the participants, directly or indirectly communicate with any person regarding the facts and issues involved in the mediation.[21] Moreover, any offers to compromise or evidence of conduct or statements made during mediation are not admissible in any subsequent hearing.[22]

The mediation rule does not specify how mediation sessions are to be conducted or spell out the role of the mediator or the parties. As a general rule, the mediator will meet with all the participants and their representatives to discuss the underlying facts, the participants' respective positions, and proposed settlement offers. When necessary to further negotiations, the mediator may caucus privately with one party. The mediation sessions are informal meetings. No testimony is taken and no record is made. Although the participants may be represented by counsel, the parties will normally take an active role in the meetings held. The initial meeting will usually be devoted to the establishment of guidelines for future meetings. At that time, deadlines may be established for the exchange of information and the mediator's role can be discussed. Because mediation is a voluntary process and entails the active involvement of all participants, the rule allows them to fashion procedures and schedules they feel are appropriate to the nature of the case.

Since mediation is a voluntary process, the mediator, the judge, and the chief judge have no power to require the parties to perform any specific act, to require a person to appear at a mediation session, or to rule on any motions. Likewise, once mediation has begun, there are no procedures whereby interested persons may intervene in the mediation

17 MINN. R. 1400.5950, subp. 2 (2013).
18 *Id.*, subp. 3.
19 MINN. STAT. § 14.48, subd 3(e) (2014).
20 MINN. R. 1400.5950, subp. 7 (2013).
21 *Id.*, subp. 4.
22 *Id.*, subp. 6.

process or comment on any agreements made. However, as discussed elsewhere, interested persons other than those who participated in the mediation process may have a right to comment on any settlement agreement made.[23]

Mediation is terminated when any participant announces an unwillingness to continue or when a settlement agreement is negotiated and signed.[24] On termination, the mediator must forward the agreement to the agency or the judge assigned to the case for appropriate action, or give notice that mediation has been terminated without agreement. When a contested case has been initiated, the settlement agreement should be submitted to the judge assigned to it. If no contested case has been commenced, the agreement may be submitted directly to the agency, court, or political subdivision involved.

23 *See* § 7.5 in this chapter.

24 MINN. R. 1400.5950, subp. 5 (2013).