

8.2 AUTHORITY TO PROVIDE FOR DISCOVERY

The Minnesota Administrative Procedure Act (APA) does not specifically authorize the OAH to adopt a rule allowing prehearing discovery in contested cases. The chief ALJ, however, is directed to adopt rules to govern the procedural conduct of all hearings.¹ Statutory authority to adopt a pretrial discovery rule may also be inferred from the ability of the chief ALJ to issue subpoenas for the attendance of witnesses at hearings and the production of documents.²

The Minnesota Supreme Court has never directly determined that the OAH has statutory authority to adopt discovery rules for contested case proceedings. The court has, however, upheld a sanction imposed for violation of an analogous discovery rule of the Minnesota Department of Commerce, which was adopted without specific statutory authority.³ The authority of the department of commerce to adopt the discovery rule was not litigated in the case. The Minnesota Court of Appeals has upheld discovery orders and sanctions under the OAH rules.⁴

There is federal authority for the conclusion that the adoption of a pretrial discovery rule is contained within the authority to adopt procedural rules. In *FCC v. Schreiber*, the United States Supreme Court held that the issuance of an investigatory subpoena for the production of information at a public hearing was a subordinate question of procedure within the applicable federal statute.⁵ Although certain federal administrative agencies have specific authority to provide for discovery,⁶ most such agencies have promulgated a pretrial discovery rule under a general grant of authority to adopt rules governing the conduct of their internal affairs.

Courts of other states have also affirmed the promulgation of discovery rules based on general grants of authority to implement statutory purposes.⁷ The authority of the OAH to adopt a prehearing discovery rule is likely to be upheld by a reviewing court if challenged.⁸

¹ MINN. STAT. § 14.51 (2014).

² *See id.*

³ *First Nat'l Bank of Shakopee v. Dep't of Commerce*, 310 Minn. 127, 134-35, 245 N.W.2d 861, 865-66 (1976).

⁴ *In re Parkway Manor Healthcare Ctr.*, 448 N.W.2d 116, 122 (Minn. Ct. App. 1989) (affirming ALJ's order mandating discovery in a contested case proceeding); *Caucus Distributions v. Comm'r of Commerce*, 422 N.W.2d 264, 268-69 (Minn. Ct. App. 1988) (upholding a discovery sanction imposed by ALJ for failure to comply with order under discovery rule).

⁵ 381 U.S. 279, 289, 294 (1965). But see *Miner v. Atlass*, 363 U.S. 641, 651-52 (1960), where the United States Supreme Court held that a federal district court, sitting in admiralty, had no authority to allow pretrial discovery depositions. Although noting that pretrial discovery is concededly a "procedural" matter, the Court observed that it may be of such importance to litigants as to constitute a "substantive" doctrine. *Id.* at 650; *see also* *Fed. Maritime Comm'n v. Anglo-Canadian Shipping Co.*, 335 F.2d 255, 259-61 (9th Cir. 1964).

⁶ *See, e.g.*, 49 U.S.C. § 46104 (2012).

⁷ *Cf. Ciszewski v. Indus. Accident Bd.*, 367 Mass. 135, 142-43, 325 N.E.2d 270, 274-75 (1975).

⁸ *See id.*; *see also* MINN. STAT. § 14.51 (2014).