8.5 DISCOVERY AVAILABLE AT THE DISCRETION OF THE ADMINISTRATIVE LAW JUDGE

8.5.1 Introduction

Potentially, any relevant nonprivileged information or material may be subject to prehearing discovery in an administrative contested case hearing to the same extent as would be appropriate in a district court proceeding.[1] If the party from whom discovery is sought refuses to make disclosure, the party seeking discovery must show in a motion proceeding that the discovery is needed for the proper presentation of the party's case, that it is not interposed for purposes of delay, and that the issues or amounts in controversy are of sufficient significance to warrant the discovery.[2] In the motion proceeding, the party resisting discovery may raise any objections to the discovery that would be available under the civil rules, including lack of relevancy and privilege.[3]

Administrative discovery practices place the burden of establishing the propriety of discovery on the party seeking disclosure rather than on the party resisting discovery.[4] A motion to compel discovery is addressed to the sound discretion of the ALJ whose determination will be upheld absent an abuse of discretion.

The full panoply of formal discovery methods available under the rules of civil procedure may be had in a contested case, including depositions on oral examination or written questions, written interrogatories, the production of documents or things, permission to enter on the real property of another for purposes of inspection and other purposes, physical and mental examinations, and requests for admissions.[5]

Several additional means of discovery have evolved in contested case proceedings outside of the rules of civil procedure. In complex cases, particularly those involving detailed and expert testimony, ALJs have frequently ordered testimony to be prefiled. The prefiling of testimony may be required when it will expedite the hearing without imposing an undue burden on any party.[6] The prefiling of a party's testimony may also be required by governing statute as a condition to initiating the contested case proceeding.[7] Discovery may also be obtained as a consequence of a prehearing conference and the resultant order.[8] The conference may be a full-scale discovery device where opposing parties exchange evidentiary exhibits and documents, discuss claims and defenses, including relevant legal

1 MINN. R. 1400.6700, subp. 2 (2013); *see also In re* Parkway Manor Healthcare Ctr., 448 N.W.2d 116, 118 (Minn. Ct. App. 1989) (potentially, any matter discoverable under MINN. R. CIV. P. 26.02(a) can be obtained under MINN. R. 1400.6700, subp. 2 (2103)). Additionally, a rule allows the ALJ to order the exchange of witness lists and written exhibits, and requires a party to make any foundational objections to exchanged exhibits two working days before a hearing or the objection is waived. MINN. R. 1400.6950 (2013).

2 MINN. R. 1400.6700, subp. 2 (2013).

3 *Cf. id.; see also* Parkway Manor, 448 N.W.2d at 118.

4 *See* MINN. R. 1400.6700, subp. 2 (2013).

5 *Id.* 26.02(a).

6 MINN. R. 1400.5500(L) (2013).

7 *See, e.g.,* MINN. STAT. §§ 216B.16, subd. 1 , 237.075, subd. 1 (2014).

8 For a discussion of prehearing conferences generally, see § 7.3.

authority, and identify proposed witnesses.[9] In rate proceedings before the public utilities commission, a practice of filing information requests has developed that is similar to interrogatories to a party in a civil proceeding. ALJs hearing contested cases involving utility rates have continued the practice of authorizing the use of information requests without a showing of need for the information sought.

Although not usually considered a discovery device, the Minnesota Government Data Practices Act[10] may be used by a party to a contested case to obtain data that would be available to that party in the absence of the proceeding.[11] A governmental entity may not refuse to disclose data otherwise subject to disclosure because of the pendency of a contested case proceeding. However, investigation data collected as part of an active investigation undertaken for the purpose of bringing or defending a civil legal action, including an administrative contested case, is not subject to disclosure under the Act.[12]

8.5.2 Discretion of the Administrative Law Judge

If a party resists requested discretionary discovery, the ALJ must determine in a motion proceeding that the discovery (1) is needed for the proper presentation of a party's case, (2) is not requested for purposes of delay, and (3) the issues or amounts in controversy are significant enough to warrant such discovery.[13] In *Surf & Sand Nursing Home v. Department of Human Services*, the court held that a denial of requested discretionary discovery in a contested case was not an abuse of discretion by the ALJ.[14] The court reasoned that, since the requested discovery could not provide material information, the showing required by Minnesota Rules part 1400.6700, subpart 2 had not been made.[15] In *In re Parkway Manor Healthcare Center*, the court held that the same discretion that applies to a trial court in ruling on discovery matters applies to the decision of the ALJ in ruling on a discovery request made under Minnesota Rules part 1400.6700, subpart 2.[16] The determination in either a judicial or administrative context will be reversed only for a clear abuse of discretion.

Although the considerations of delay and the importance of the issues concerned are largely self-explanatory, the depth of the required showing of need is open to subjective interpretation. The word *necessary* has no single meaning. It may mean indispensable or merely convenient, useful, or conducive to the end sought.[17] Courts have often defined the word *necessary* as used in a discovery rule or statute to mean expedient or appropriate as opposed to indispensable.[18]

9 MINN. R.1400.6500, subp. 1 (2013). For a comparison with the purposes of a pretrial hearing in a judicial proceeding, see MINN. R. CIV. P. 16.01-.06.

10 MINN. STAT. §§ 13.01-.90 (2014).

11 For a discussion of the Minnesota Government Data Practices Act generally, see chapter 13.

12 MINN. STAT. § 13.39, subd. 2 (2014).

13 MINN. R. 1400.6700, subp. 2 (2013).

14 422 N.W.2d 513, 520 (Minn. Ct. App. 1988).

15 *Id*.

16 448 N.W.2d 116, 118 (Minn. Ct. App. 1989).

17 Kay Cnty. Excise Bd. v. Atchison, T. & S. F. Ry., 185 Okla. 327, 91 P.2d 1087, 1088 (1939).

18 *See* Myers v. Stratmann, 245 Iowa 1060, 1063, 65 N.W.2d 356, 358 (1954); Quirino v. N.Y. City Transit Auth., 60 Misc. 2d 634, 638, 303 N.Y.S.2d 991, 996 (1969); Dep't of Revenue v. Capital Shelters, Inc., 295 Or. 561, 564, 668 P.2d 1214, 1215-16 (1983).

A method that has been employed in orders of ALJs of the OAH is to focus on the type of discovery sought in the context of the particular administrative proceeding. Since particular types of discovery are more burdensome than other types of discovery, this analytical approach involves a two-stage inquiry: whether the type of discovery sought is appropriate in the context of the particular administrative proceeding; and, if the discovery is appropriate, whether the information is relevant to the subject matter of the proceeding and whether the producing party would have grounds for a protective order under rule 26.03 of the Minnesota Rules of Civil Procedure barring its production.[19] Under this analysis, the ALJ would consider the three enumerated factors with respect to the propriety of a particular means of discovery in the context of the individual proceeding. If the ALJ is satisfied that the specific administrative proceeding merits the use of a particular means of discovery, the policies that sanction broad discovery in a judicial forum would apply. The producing party would be protected from abuse by the same limitations and considerations applicable in a judicial proceeding.[20]

In *Buysse v. Baumann-Furrie & Co*., the Minnesota Court of Appeals summarized the circumstances under which discovery is appropriately limited or denied:

> The trial court may limit discovery on its own initiative if:
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> (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is either more convenient, less burdensome, or less expensive;
> (b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
> (c) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.[21]

Irrespective of the analytical method of weighing the enumerated factors in ruling on a motion for discovery, the ALJ is most likely to be influenced by the size and importance of the case, the hardship of complying with the discovery request, the timing of the discovery request relative to the expeditious conduct of the proceeding, the importance of the request for prehearing preparation, and the factors enumerated in rule 26.03 of the Minnesota Rules of Civil Procedure.

In *Zahavy v. University of Minnesota*, a professor at the university, who was accused of holding two full-time tenured positions, sought to discover the names of other professors who held tenured positions at other universities concurrent with their tenured positions at the University of Minnesota.[22] The university denied the request claiming it would require a

[19] *See* Petition of Burlington N. R.R. to Establish a Centralized Freight Agency in St. Cloud, Minn., OAH Docket No. DOT-83-017-BC, D-5253, R-3930, ORDER ON MOTION TO COMPEL DISCOVERY (July 28, 1983), at 2.

[20] MINN. R. CIV. P. 26.03 authorizes limitations on discovery in the interests of justice to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *See also* MINN. R. 1400.6700 subp. 4 (2013).

[21] 428 N.W.2d 419, 425-26 (Minn. Ct. App. 1988), *rev. on other grounds*, 445 N.W.2d 865 (Minn. 1989).

[22] 544 N.W.2d 32, 35, 39 (Minn. Ct. App. 1996).

manual review of 3,100 personnel files.[23] The Minnesota Court of Appeals concluded that the denial was not an abuse of discretion, which the court said was the appropriate standard for review of university discovery decisions.[24]

As a practical matter, the only real distinction between the discretionary discovery rule of the OAH[25] and rule 26.03 is the placement of the burden of showing good cause. Under rule 26.03, the burden is on the party seeking to limit discovery. Under the rules of the OAH, the burden is on the party seeking to obtain discretionary discovery. ALJs have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts.

8.5.3 Review of Discretionary Discovery Ruling

A motion to grant specific discovery is addressed to the sound discretion of the ALJ and will be reversed only if that discretion is abused.[26] Courts have employed various phrases to describe the standard for finding an abuse of discretion. In *Thermorama, Inc. v. Shiller*, the Minnesota Supreme Court applied the standard of no reasonable support for the order in the record.[27] In *McNamara v. Office of Strategic & Long Range Planning*, the Minnesota Court of Appeals found no abuse of discretion due to the existence of "substantial evidence in the record supporting the ALJ's decision."[28] In *Electromec Design & Development Co. v. NLRB*, the Ninth Circuit defined an abuse of discretion as a ruling that is demonstrated to clearly prejudice the complaining party.[29] Often a reviewing court will determine whether an abuse of discretion has occurred without specifying any standard for judgment.[30]

A party aggrieved by a decision of the ALJ on a motion for discretionary discovery may employ a variety of means to obtain review of that decision, although this does not generally include bringing a motion directly before the agency.[31] Instead, the initial method of obtaining review of a decision of the ALJ on an issue of discovery is to appeal to the agency by filing an exception to the recommended report on the ground that an erroneous discovery decision constituted a procedural defect substantially affecting the ultimate recommendation.[32] Decisions of the ALJ on questions of discovery are not binding on the agency's decisional authority.[33] Filing formal exceptions to the ALJ's discovery

[23] *Id*. at 39.

[24] *Id*. at 39-40.

[25] MINN. R. 1400.6700, subp. 2 (2013).

[26] *See Zahavy*, 544 N.W.2d at 39; *see also* First Nat'l Bank of Shakopee v. Dep't of Commerce, 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976); Thermorama, Inc. v. Shiller, 271 Minn. 79, 83, 135 N.W.2d 43, 46 (1965).

[27] 271 Minn. at 83, 135 N.W.2d at 46.

[28] 628 N.W.2d.620, 628 (Minn. Ct. App. 2001).

[29] 409 F.2d 631, 635 (9th Cir. 1969).

[30] *See, e.g., In re* Haugen, 278 N.W.2d 75, 80-81 (Minn. 1979); *First Nat'l Bank*, 310 Minn. at 135, 245 N.W.2d at 866.

[31] MINN. R. 1400.7600 (2013).

[32] *See* MINN. STAT. § 14.61 (2014); *see also* MINN. R. 1400.8200 (2013).

[33] *Cf.* Surf & Sand Nursing Home v. Dep't of Human Servs., 422 N.W.2d 513, 519 (Minn. Ct. App. 1988).

determinations is not jurisdictional to a judicial review of the propriety of his or her rulings.[34] Several agencies have adopted procedural rules governing the filing of exceptions. The rules of the public utilities commission, for example, require that exceptions specifically set forth "the grounds relied upon or errors claimed."[35]

An interlocutory review of a decision of an ALJ regarding discretionary discovery may only be had in a judicial forum. Injunctive relief or use of the extraordinary writs of prohibition and mandamus can be used to obtain the requested review.[36] An action for declaratory and injunctive relief brought in district court might be used in an appropriate case to prevent discovery mandated in an administrative proceeding by an ALJ. In such cases seeking to enjoin administrative action, however, Minnesota courts have held that one is not entitled to injunctive relief against administrative action until the remedy of appeal has been exhausted unless the party seeking injunctive relief can demonstrate that the pursuit and exhaustion of the administrative remedy will cause him imminent and irreparable harm.[37] The time and expense of further participation in the agency proceeding do not constitute irreparable injury.[38] In the absence of imminent and irreparable injury, neither an action exceeding the agency's jurisdiction nor a constitutional challenge will justify injunctive relief.[39]

In exceptional cases, the extraordinary writs have been used to secure an interlocutory review of the propriety of a discovery order.[40] Although that use of the extraordinary writs has typically arisen where a review of a court's discovery ruling is sought, the same considerations that dictate their use to prevent irreparable injury by a trial court apply equally to administrative hearing officers. Courts have employed the extraordinary writs to review administrative agency decisions regarding discovery.[41] Although the extraordinary writs may have limited application to administrative practice, in an appropriate case, they may be used to prevent a clear abuse of discretion by an ALJ.[42]

34 *See id*.

35 MINN. R. 7829.3000 (2013).

36 City of Wyoming v. Minnesota Office of Admin. Hearings, 735 N.W.2d 746, 750 (Minn. Ct. App. 2007).

37 *See* Garavalia v. City of Stillwater, 283 Minn. 335, 347, 168 N.W.2d 336, 345 (1969) (injunctive relief will not be granted against an administrative agency prior to exhaustion of statutory remedies, unless imminent and irreparable harm can be shown by petitioner); *see also* State *ex rel.* Turnbladh v. Dist. Court, 259 Minn. 228, 238, 107 N.W.2d 307, 314 (1960); State *ex rel.* Sheehan v. Dist. Court, 253 Minn. 462, 466-67, 93 N.W.2d 1, 4-5 (1958); Thomas v. Ramberg, 240 Minn. 1, 4-5, 60 N.W.2d 18, 20-21 (1953).

38 *Sheehan*, 253 Minn. at 467, 93 N.W.2d at 5.

39 *Thomas,* 240 Minn. at 5-6, 60 N.W.2d at 20-21.

40 *See* Waller v. Powers Dep't Store, 343 N.W.2d 655, 656 (Minn. 1984); Cumis Ins. Soc'y, Inc., v. Blum, 304 N.W.2d 328, 328 (Minn. 1981); Parker v. Hennepin Cnty. Dist. Court, 285 N.W.2d 81, 82 (Minn. 1979); O'Connor v. Johnson, 287 N.W.2d 400, 401-02 (Minn. 1979); Mampel v. E. Heights State Bank, 254 N.W.2d 375, 376 (Minn. 1977); Thermorama v. Shiller, 271 Minn. 79, 83-84, 135 N.W.2d 43, 46 (1965); Ellingson & Assocs. v. Keefe, 396 N.W.2d 694, 696 (Minn. Ct. App. 1986); Bioline, Inc. v. Wilfley, 365 N.W.2d 338, 339 (Minn. Ct. App. 1985).

41 A number of commentators have discussed the use of the extraordinary writs to control administrative action. For such discussions, see Duncan H. Baird, *Judicial Review of Administrative Procedures in Minnesota,* 46 MINN. L. REV. 451 (1962); Duncan H. Baird, *Remedies by Judicial Review of Agency Action in Minnesota,* 4 WM. MITCHELL L. REV. 277 (1978); Risenfeld, Bauman & Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota,* 33 MINN. L. REV. 569 (1949), 36 MINN. L. REV. 435 (1952), 37 MINN. L. REV. 1 (1952).

42 *See* Peoples Natural Gas Co. v. Pub. Utils. Comm'n, 626 P.2d 159, 162 (Colo. 1981).

The extraordinary writs may be used only in exceptional cases. In *Ex Parte Fahey,*[43] Justice Jackson described the limited use of the extraordinary writs:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.[44]

The Minnesota Supreme Court has similarly limited the use of the extraordinary writs to review pretrial discovery orders.[45] Normally, a party seeking an extraordinary writ of prohibition or mandamus must demonstrate a clear abuse of discretion resulting in substantial prejudice that may not be obviated by an appeal.[46] The Minnesota Supreme Court, however, has indicated that an extraordinary writ may also be available in a discovery context when jurisdiction is clearly exceeded, the action of the court relates to a matter that is decisive of the case, or, in rare instances, when it will settle a rule of practice of general interest.[47]

In *Silver Bay Area Citizens Concerned for Quality Education v. Lake Superior School District No. 381*, the court discussed the availability of mandamus:

> Even if the district court had jurisdiction to issue a writ of mandamus, respondent is not entitled to this extraordinary remedy. A party seeking a writ of mandamus must not only establish it has no adequate remedy at law, but also "the existence of a law specifically requiring the performance of an act which is a *duty* imposed on a person resulting from the office that person occupies." *Friends of Animals and Their Environment (FATE) v. Nichols*, 350 N.W.2d 489, 491 (Minn. App. 1984) (emphasis in original); *see* Minn. Stat. § 586.01 (1988).
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> Mandamus may issue to compel a ministerial act; it is not properly issued when the official has discretion with respect to the act in question. *Electronics Unlimited, Inc. v. Village of Burnsville*, 289 Minn. 118, 125-26, 182 N.W.2d 679, 684 (1971). Mandamus may, however, be used to set an agency's exercise of discretion in motion. *FATE*, 350 N.W.2d at 491 (citing *Zion Evangelical Church v. City of Detroit Lakes*, 221 Minn. 55, 21 N.W.2d 203 (1945)); *see* Minn. Stat. § 586.01 (A writ of mandamus "may require an inferior tribunal to exercise its judgment ... but it cannot control judicial discretion").[48]

43 332 U.S. 258 (1947).

44 *Id*. at 259-60.

45 *See, e.g., Thermorama,* 271 Minn. at 85, 135 N.W.2d at 47.

46 *See id*. at 83-84, 135 N.W.2d at 46-47; *see also* Mampel v. E. Heights State Bank, 254 N.W.2d 375, 377 (Minn. 1977); *cf.* Hancock-Nelson Mercantile Co. v. Weisman, 340 N.W.2d 866, 870 (Minn. Ct. App. 1983).

47 *See* Leininger v. Swadner, 279 Minn. 251, 259, 156 N.W.2d 254, 260 (1968); *Thermorama,* 271 Minn. at 84, 135 N.W.2d at 46.

48 448 N.W.2d 92, 96 (Minn. 1989).

In several decisions, the Minnesota Court of Appeals has granted discretionary review of a discovery order when the requisite showing for an extraordinary writ had not been made.[49] When no questions of general interest beyond the individual proceeding have been presented, however, the court has denied discretionary review.[50]

The final method of obtaining review of an administrative decision regarding discretionary discovery is to appeal from the final agency decision by asserting that an error in the resolution of the discovery motion substantially prejudiced the aggrieved party. Any person aggrieved by the final decision of an administrative agency in a contested case may secure judicial review.[51] There is a presumption in favor of review, even when not specifically provided for by statute, and even when the hearing has not been conducted as a contested case proceeding under the Minnesota APA.[52] The standard of review is prescribed by statute.[53] Appeal of the final decision of the administrative agency is the most common method of securing judicial review of interlocutory discovery orders.[54] Because of the strict standard of requiring a showing of a clear abuse of discretion resulting in material and substantial prejudice, the reversal of a final decision of an administrative agency for an erroneous discovery determination is a rare occurrence.[55] However, in *Northern Messenger, Inc. v. Airport Couriers*, a final decision of the Transportation Regulation Board was reversed because of an incorrect discovery decision by an ALJ.[56]

49 *See In re* Parkway Manor Healthcare Center, 448 N.W.2d 116, 118 (Minn. Ct. App. 1989); *In re* Rice Lake Auto, Inc., 430 N.W.2d 881, 882-83 (Minn. Ct. App. 1988).

50 *See* Clark v. Monnens, 436 N.W.2d 830, 831 (Minn. Ct. App. 1989).

51 MINN. STAT. § 14.63 (2014).

52 Minn. Pub. Interest Research Grp. v. Minn. Envtl. Quality Council, 306 Minn. 370, 376-81, 237 N.W.2d 375, 379-82 (1975).

53 MINN. STAT. § 14.69 (2014). For a discussion of the application of the statutory standard on appeal, see ch. 15.

54 For representative cases involving appeal of the final agency decision as securing review of an interlocutory discovery order, see Transit Homes v. Mayo, 241 So.2d 387, 389 (Fla. 1970); First Nat'l Bank v. Dep't of Commerce, 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976); *In re* Nieman v. Axelrod, 79 A.D.2d 764, 764-65, 434 N.Y.S.2d 817, 818-19 (N.Y. App. Div. 1980); Gregg v. Or. Racing Comm'n, 38 Or. App. 19, 26-27, 588 P.2d 1290, 1294-95 (1979).

55 For representative cases in which an appellate court has found the standard to be satisfied, see McClelland v. Andrus, 606 F.2d 1278, 1289-90 (D.C. Cir. 1979); *Transit Homes,* 241 So.2d at 389; Russo v. Governor of N.J., 22 N.J. 156, 174-75, 123 A.2d 482, 493 (1956); *Nieman,* 79 A.D.2d at 764-65.

56 359 N.W.2d 302, 304-05 (Minn. Ct. App. 1984).