

8.7 SANCTIONS FOR FAILURE TO MAKE DISCOVERY

The rules of the OAH authorize the ALJ to impose a variety of sanctions for failure to comply with a discovery order. With the exceptions of a direct contempt penalty and the award of expenses, an ALJ may employ sanctions parallel to those available to a district court.¹ In *Caucus Distributors, Inc. v. Commissioner of Commerce*,² the court of appeals affirmed an order by an ALJ in a contested case precluding a party from defending portions of the complaint as a sanction for failure to provide ordered discovery. Available sanctions include the exclusion of the testimony of undisclosed witnesses,³ constructive admissions,⁴ the exclusion of specific claims, defenses, and designated matters in evidence,⁵ and a recommendation for default.⁶ In a number of decisions, the Minnesota courts have held that more extreme discovery sanctions, including default, are only appropriate when there is a willful failure to comply with a discovery order which results in prejudice to the opposing party that cannot otherwise be remedied.⁷ A continuance, where possible, is the preferred remedy for surprise resulting from failure to make discovery.⁸

The Minnesota Supreme Court, in *First National Bank of Shakopee v. Department of Commerce*,⁹ upheld the authority of a hearing examiner to preclude an undisclosed witness from testifying in a contested case proceeding even though the administrative agency lacked express statutory authority to impose discovery sanctions. The court virtually equated the authority of a hearing officer to impose evidentiary sanctions with that of the district court:

In *Fritz v. Arnold Manufacturing Co.*, Minn., 232 N.W.2d 782 (1975), we considered a failure to disclose a witness in pretrial answers to interrogatories pursuant to Rule 33, Rules of Civil Procedure. We restated our position that we have vested the trial courts with wide discretion in not allowing undisclosed witness to testify. We believe that the same discretion should be accorded administrative proceedings.¹⁰

¹ See MINN. R. CIV. P. 37.

² 422 N.W.2d 264, 268-69 (Minn. Ct. App. 1988).

³ MINN. R. 1400.6700, subp. 1D (2013).

⁴ *Id.* 1400.6700, subp. 3A, .6800.

⁵ *Id.* 1400.6700, subp. 3B.

⁶ *Id.* 1400.6000.

⁷ See *Chicago Greatwestern Office Condo. Ass'n v. Brooks*, 427 N.W.2d 728, 730-32 (Minn. Ct. App. 1988); *Petrich v. Dyke*, 419 N.W.2d 833, 835 (Minn. Ct. App. 1988); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 108-09 (Minn. Ct. App. 1987); *VanHercke v. Eastvold*, 405 N.W.2d 902, 905-06 (Minn. Ct. App. 1987); *Kraushaar v. Austin Med. Clinic, P.A.*, 393 N.W.2d 217, 221-22 (Minn. Ct. App. 1986); *Riewe v. Arnesen*, 381 N.W.2d 448, 457 (Minn. Ct. App. 1986).

⁸ See *Krech v. Erdman*, 305 Minn. 215, 217, 233 N.W.2d 555, 557 (1975); *Pomrenke v. Comm'r of Commerce*, 677 N.W.2d 85, 93 (Minn. Ct. App. 2004); *Prechtel v. Gonse*, 396 N.W.2d 837, 840 (Minn. Ct. App. 1986); *Kraushaar*, 393 N.W.2d at 221-23; *Whitney v. Buttrick*, 376 N.W.2d 274, 279 (Minn. Ct. App. 1985); *Quill v. Trans World Airlines*, 361 N.W.2d 438, 445 (Minn. Ct. App. 1985); *N. Messenger, Inc. v. Airport Couriers, Inc.*, 359 N.W.2d 302, 305 (Minn. Ct. App. 1984).

⁹ 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976).

¹⁰ *Id.*

In contested cases under the Minnesota Human Rights Act,¹¹ the ALJ also has statutory authority to impose sanctions for intentional and frivolous delay.¹² The statute has been interpreted by the chief ALJ to authorize the adoption of appropriate rules regarding sanctions during both the investigatory and hearing stages.¹³ Intentional and frivolous delay might include failure to make ordered discovery in a timely fashion. In addition to the sanctions available in other contested cases, in human rights proceedings indirect monetary penalties may be imposed.¹⁴

Sanctions may be imposed only against a party who refuses to make discovery or a person under the direction, supervision, or control of the party. A party may not be sanctioned for the failure of an unrelated person to make discovery.¹⁵ However, contempt sanctions against a nonparty, at least where a subpoena has issued, may be available in a district court.¹⁶

An order compelling discovery should contain both a date certain for compliance and a statement of potential sanctions for noncompliance.¹⁷ The absence of either element in the order may prevent the imposition of sanctions having a substantial impact on the ability of a party to defend or prosecute an action.¹⁸ Moreover, when the sanction proposed is a recommendation for default, actual prejudice to an opposing party from violation of the order must be shown.¹⁹

Although the imposition of discovery sanctions has been authorized in a variety of circumstances, due process limits the degree to which a defendant may be subject to such sanctions. A defendant may, however, be prohibited from presenting evidence and cross-examining adverse witnesses for failure to provide discovery on the basis of a valid assertion of Fifth Amendment rights.²⁰ The privilege against self-incrimination must be balanced against the policy supporting discovery rules and the public interest in preventing an unfair advantage to one party.²¹

A difference between the discovery sanctions available to an ALJ and those available to a court of general jurisdiction is that the ALJ lacks authority to impose a contempt

¹¹ MINN. STAT. §§ 363A.01-.44 (2014).

¹² *Id.* § 363A.28, subd. 6(i).

¹³ MINN. R. 1400.7050 (2013).

¹⁴ *Id.*, subp. 1(G), 2(E), (F).

¹⁵ See *S. Ry. Co. v. Templar*, 463 F.2d 967, 972 (10th Cir. 1972); *B.F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411, 415 (5th Cir. 1964); *Fong Sik Leung v. Dulles*, 226 F.2d 74, 78 (9th Cir. 1955); *Foreign Credit Corp. v. Aetna Cas. & Sur. Co.*, 276 F. Supp. 791, 794 (S.D.N.Y. 1967).

¹⁶ See MINN. STAT. §§ 14.51, 588.02 (2014); MINN. R. 1400.7000 (2013); MINN. R. CIV. P. 37.02(b).

¹⁷ *Jadwin v. City of Dayton*, 379 N.W.2d 194, 196 (Minn. Ct. App. 1985); see also *Beal v. Reinertson*, 298 Minn. 542, 544, 215 N.W.2d 57, 58 (1974); *Bio-Line v. Wilfley*, 365 N.W.2d 338, 340-41 (Minn. Ct. App. 1985).

¹⁸ See *Jadwin*, 379 N.W.2d at 197; *Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn. Ct. App. 1985).

¹⁹ See *Jadwin*, 379 N.W.2d at 197; *Housing & Redev. Auth. v. Kotlar*, 352 N.W.2d 497, 500 (Minn. Ct. App. 1984).

²⁰ *In re Welfare of J.W.*, 391 N.W.2d 791, 795 (Minn. 1986); see *Hennepin Cnty. v. Brinkman*, 378 N.W.2d 790, 795 (Minn. 1985).

²¹ *Parker v. Hennepin Cnty. Dist. Court*, 285 N.W.2d 81, 83 (Minn. 1979).

sanction.²² When the discovery mandated by the ALJ results in the issuance of a subpoena, however, the jurisdiction of the district court may be sought in aid of its enforcement.²³ Refusal to obey an administrative subpoena for discovery when directed to do so by the district court may result in a citation for contempt.²⁴

²² *City of Chi. v. FPC*, 385 F.2d 629, 642 (D.C. Cir. 1967); *Shasta Minerals & Chem. Co. v. SEC*, 328 F.2d 285, 286 (10th Cir. 1964); *State v. Balistreri*, 55 Wis. 2d 513, 519-20, 201 N.W.2d 18, 22 (1972).

²³ MINN. STAT. § 14.51 (2014).

²⁴ *Id.* § 588.02; *see also* MINN. R. CIV. P. 37.02(b).