

## 9.5 DISCOVERY RELATED TO CONSTITUTIONAL QUESTIONS

An administrative agency and an ALJ lack authority to declare unconstitutional an agency rule or governing statute.<sup>1</sup> One court has held that since an administrative agency lacks authority to declare a rule or governing statute unconstitutional, it may not authorize discovery to establish such unconstitutionality.<sup>2</sup> Even though an administrative agency lacks authority to declare an agency rule or governing statute unconstitutional, such a claim may form the basis of an appeal of an adverse agency decision. Under such circumstances and subject to other limitations on discovery, allowing a participant in an administrative proceeding to develop the evidentiary record before the agency that will allow proper presentation of the constitutional question on appeal appears appropriate. The record on appeal is limited to evidence considered by the agency.<sup>3</sup> In *Johnson v. Elkin*,<sup>4</sup> the North Dakota Supreme Court encouraged the development of the record of evidence on constitutional questions before the administrative agency even though that agency would lack authority to decide the questions. Such a procedure would avoid the requirement of a remand to the administrative agency for the taking of additional evidence.

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<sup>1</sup> *Wronski v. Sun Oil Co.*, 108 Mich. App. 178, 187, 310 N.W.2d 321, 324 (1981); *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 369 (Minn. 1977); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993); *Holt v. Bd. of Med. Exam'rs*, 431 N.W.2d 905, 906-07 (Minn. Ct. App. 1988) (“[While] true that administrative bodies generally lack subject-matter jurisdiction to decide constitutional issues . . . constitutional claims may be asserted on appeal from an agency decision.”); *Padilla v. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986) (holding constitutional claims may be asserted on appeal from an agency decision); *First Bank v. Conred*, 350 N.W.2d 580, 585 (N.D. 1984).

<sup>2</sup> *State Dep't of Admin. Div. of Pers. v. State Dep't of Admin. Div. of Hearings*, 326 So. 2d 187, 188-89 (Fla. Dist. Ct. App. 1976).

<sup>3</sup> MINN. STAT. § 14.68 (2014).

<sup>4</sup> 263 N.W.2d 123, 127 (N.D. 1978).