Chapter 8. Discovery

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8.1 Introduction

The hallmark of modern pretrial procedure in judicial proceedings has been the elimination of pleadings as the source of preparatory information with the focus shifting to pretrial discovery.[1] The primary purpose of discovery is to eliminate the element of surprise at trial or hearing by permitting a party to obtain in advance all relevant factual information necessary to the proper preparation of that party's case.[2] In addition, discovery helps to focus the issues actually in controversy, identifies admissible evidence, and assists in the preparation at various stages of the case.[3]

Generally, however, the same considerations of total prehearing disclosure have not been fully applied to administrative contested case hearings. Although virtually any relevant, nonprivileged information may be discovered as a matter of right in a judicial proceeding, the same full pretrial disclosure is generally not available in administrative contested case hearings. A number of reasons have been offered for the limitations on discovery in administrative cases. Among these are that the administrative process is supposed to be speedy and discovery will impede it, that discovery will unnecessarily complicate proceedings, and that discovery will provide an instrument of harassment.[4] Consistent with the practice of most states, the prehearing discovery available in a Minnesota contested case proceeding may be limited, and its parameters are within the sound discretion of the administrative law judge.

The rules of the Minnesota Office of Administrative Hearings (OAH)[5] govern the availability of prehearing discovery in a statutorily defined contested case proceeding.[6] These rules supersede the rules of an individual agency to the extent of any inconsistency.[7] Under the OAH rules, limited discovery is available as a matter of right.[8] Discretionary discovery potentially equal to that obtainable under the rules of civil procedure is available within the

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[1] *See* Minn. R. Civ. P. 26-37. For a discussion of the change to notice pleading and pretrial discovery and the reason therefor, see 6 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 26APP.05 (2015).

[2] *Sandberg v. Comm'r of Revenue*, 383 N.W.2d 277, 281-82 (Minn. 1986*); Gebhard v. Niedzwiecki*, 265 Minn. 471, 476, 122 N.W.2d 110, 114 (1963); *Jeppesen v. Swanson*, 243 Minn. 547, 560, 68 N.W.2d 649, 656-57 (1955); *see also Buysse v. Baumann-Furrie & Co.*, 428 N.W.2d 419, 425-26 (Minn. Ct. App. 1988) (stating that the rules encourage broad discovery practices, subject to limitations contained in Minn. R. Civ. P. 26.02), *rev'd on other grounds*, 448 N.W.2d 865 (Minn. 1989).

[3] *See, e.g., United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

[4] *See* David Melnick, Paul Little & Minot Tripp, *Discovery Prior to Administrative Adjudications - A Statutory Proposal,* 52 Cal. L. Rev. 823 (1964).

[5] Minn. R. 1400.6700 (2013).

[6] Minn. Stat. § 14.02, subd. 3 (2014).

[7] *Id.* § 14.51.

[8] *See* Minn. R. 1400.6700-.6800 (2013)

sound discretion of the administrative law judge (ALJ).[9] In *In re Parkway Manor Healthcare Center,* the court reviewed a discovery order of an administrative law judge made in a contested case proceeding.[10] Without specific analysis, it equated discovery available under Minnesota Rules part 1400.6700, subpart 2, with that authorized under Rule 26.02(a) of the Minnesota Rules of Civil Procedure.[11] The limitations on discretionary discovery contained in Minnesota Rules part 1400.6700, subpart 2, however, are typical of administrative discovery provisions. The Model Administrative Procedure Act makes the availability of discovery discretionary with the hearing officer.[12] This chapter will consider the availability of discovery in an administrative contested case proceeding, the forms of discovery available, the methods of obtaining discovery, and the sanctions that may be imposed for failure to make discovery.

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.[13] 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.[14]

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.[15] 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.[16]

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.[17] Although certain federal administrative agencies have specific authority to

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[9] *Id*. 1400.6700, subp. 2.

[10] 448 N.W.2d 116, 118 (Minn. Ct. App. 1989).

[11] *Id*.

[12] MODEL STATE ADMIN. PROCEDURE ACT § 411(f) (2010).

[13] Minn. Stat. § 14.51 (2014).

[14] *See id*.

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

[16] *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 Distribs. 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).

[17] 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

provide for discovery,[18] 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.[19] The authority of the OAH to adopt a prehearing discovery rule is likely to be upheld by a reviewing court if challenged.[20]

8.3 Requirement of a Contested Case under the Administrative Procedure Act

The discovery rule, Minnesota Rules part 1400.6700, applies only to a contested case proceeding, as defined by statute, that is required to be heard by the OAH.[21] The OAH also conducts hearings for local units of government that do not arise under the Minnesota APA.[22] Since such hearings are not contested case proceedings under the Minnesota APA, the rules of the OAH, including the rule authorizing prehearing discovery, have no literal application. These hearings are governed procedurally by the statute, ordinance, or rule providing for the hearing and any rules adopted by the local governmental unit regarding the conduct of the hearing. In the absence of a provision in statute or rule for prehearing discovery, none may be provided by or required of an agency.[23] In *Bahr v. City of Litchfield*, the court held that the APA is inapplicable to the actions of a local police civil service commission because it is not an agency with "statewide jurisdiction."[24] The lack of pretrial discovery in such hearings has been held not to deny due process.[25]

Minnesota Rules part 1400.6700 does not apply to discovery in a rulemaking proceeding. Since the statute relied on for authority to adopt a prehearing discovery rule applies to hearings generally without differentiating between contested case and rulemaking

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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).

[18] *See, e.g.*, 49 U.S.C. § 46104 (2012).

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

[20] *See id.; see also* Minn. Stat. § 14.51 (2014).

[21] Minn. Stat. § 14.02, subd. 3 (2014), excludes from the definition of a contested case the hearings held by the department of corrections relating to the discipline or transfer of inmates or inmate management. Minnesota Statutes, section 14.03, subdivision 2 (2014), exempts specified hearings from the contested case procedures of the Minnesota APA. Finally, by specific statutory exemption, a number of hearings conducted by state agencies are, likewise, exempt from the Minnesota APA. For a more complete discussion of the statutory definition of a contested case, see chapter 4 § 1.

[22] Minn. Stat. § 14.55 (2014).

[23] *See Waller v. Powers Dep't Store*, 343 N.W.2d 655, 657 (Minn. 1984); *Pa. Human Relations Comm'n v. St. Joe Minerals Corp. Zinc Smelting Div.*, 24 Pa. Commw. 455, 459-60, 357 A.2d 233, 236 (1976), *aff'd,* 476 Pa. 302, 382 A.2d 731 (1978).

[24] 420 N.W.2d 604, 606 (Minn. 1988); *see* MINN. STAT. § 14.02, subd. 2 (2014).

[25] For a discussion of the availability of discovery as a requirement of due process, see § 8.6.

proceedings, it would authorize adoption of a discovery rule for rulemaking.[26] Other states have explicitly authorized discovery in rulemaking proceedings.[27] To date, Minnesota has not.

8.4 Discovery Available as a Matter of Right

Discovery as a matter of right in a contested case extends to the names and addresses of witnesses, relevant written or recorded statements made by a party or a witness, all written exhibits to be introduced at hearing, and requests for admissions.[28] The duty to disclose the names of witnesses is a continuing obligation.[29] Minnesota Rules 1400.6700, subpart 1, relating to the discovery of written or recorded statements made by a party or witness on behalf of a party, is analogous to rule 26.02(d) of the Minnesota Rules of Civil Procedure. That rule includes a detailed definition of a statement previously made.[30] Disclosure as a matter of right applies to all recorded statements of parties and witnesses, unless privileged.[31] Under part 1400.6700, subpart 1(C), exhibits do not need to be produced until one week prior to the hearing.

The OAH rule is consistent with the principle that a defending party in an administrative proceeding instituted by an agency is entitled to examine and receive any prior statement of a government witness who has testified in the proceeding.[32] This rule, known as the *Jencks* rule, originated in *Jencks v. United States.*[33] In *Jencks,* the Supreme Court held that a defendant in a criminal proceeding was entitled to all previous written reports made by the witness in the government's possession and all recorded oral reports having a bearing on the witness's testimony at the trial. Minnesota has adopted the *Jencks* rule.[34] Although the rule originated in a criminal context, it has been applied generally to administrative proceedings.[35]

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[26] *See* Minn. Stat. § 14.51 (2014).

[27] *See, e.g.*, COLO. REV. STAT. ANN. § 24-4-103(13) (West 2013).

[28] Minn. R. 1400.6700, subp. 1, .6800 (2013).

[29] *Id.* 1400.6700, subp. 1*; see VanHercke v. Eastvold*, 405 N.W.2d 902, 905 (Minn. Ct. App. 1987) (stating that there is a continuing duty to disclose the names of witnesses in a civil court case).

[30] Minn. R. Civ. P. 26.02(d).

[31] *See Wiggin v. Apple Valley Med. Clinic, Ltd.*, 459 N.W.2d 918, 919-20 (Minn. 1990); *Leer v. Chi., Milwaukee, St. Paul & P. Ry. Co.*, 308 N.W.2d 305, 307 (Minn. 1981); *Ossenfort v. Associated Milk Producers*, Inc., 254 N.W.2d 672, 681 (Minn. 1977); *Larson v. Indep. Sch. Dist. No. 314*, 305 Minn. 358, 359, 233 N.W.2d 744, 746 (1975).

[32] *See Communist Party of the U.S. v. Subversive Activities Control Bd.*, 254 F.2d 314, 328 (D.C. Cir. 1958).

[33] 353 U.S. 657 (1957).

[34] *State v. Thompson*, 273 Minn. 1, 31-32, 139 N.W.2d 490, 512 (1966).

[35] *Great Lakes Airlines v. CAB*, 291 F.2d 354, 364 (9th Cir. 1961). Administrative rules limiting the application of the *Jencks* rule to the disclosure of a witness's pretrial statement only after that witness has testified and only for the purpose of cross-examination have been upheld. *P.S.C. Res., Inc. v. NLRB*, 576 F.2d 380, 387 (1st Cir. 1978). Moreover, the rule does not apply to statements by potential witnesses who do not appear at the hearing. *Moore v. Admin'r, Veterans Admin.*, 475 F.2d 1283, 1286 (D.C. Cir. 1973). The rule has general application to prior written statements and recorded oral reports in the government's possession and is not limited to the files of the particular agency involved. *Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 753-54 (9th Cir. 1964).

Several courts have suggested that in contested case proceedings involving the denial or revocation of a government benefit, license, or entitlement, the agency may be required to go beyond *Jencks* and disclose to the party any exculpatory information in its possession.[36] Such statements, however, have been made in the context of a right to discovery, and not in a context of voluntary disclosure without an attempt at discovery.[37] In *Brock v. Roadway Express, Inc.,* the Supreme Court addressed what procedures the Department of Labor must provide before it orders reinstatement of an employee it determined was terminated for reporting his employer's violation of safety rules. [38] A five-Justice majority held that in addition to other prereinstatement procedural requirements, the agency must give the employer notice of all individuals interviewed during the investigation and copies of their statements.[39]

Minnesota Rules part 1400.6700, subpart 1(D) (2013), authorizes the ALJ to impose sanctions for a party's failure to provide timely discovery available as a matter of right, including the exclusions of the testimony of undisclosed witnesses. Minnesota courts have consistently held that the sanction of exclusion of evidence is to be used only as a last resort where the failure to provide discovery is willful, and prejudice to the opposing party can be avoided by no other practical means.[40] A continuance of the proceedings to allow the opposing party to prepare to meet the evidence is the preferred course of action.[41] In *Northern Messenger, Inc. v. Airport Couriers,* the court held that the exclusion of the testimony of undisclosed witnesses by the hearing examiner in a contested case proceeding was inappropriate where the failure to make timely disclosure was not willful and a continuance would have avoided any prejudice to the opposing party. [42]

Insofar as the rule requires the disclosure of witness lists, it goes beyond the requirements of the Minnesota Rules of Civil Procedure.[43] The corresponding federal rule of civil procedure, however, requires parties to disclose witness lists at least 30 days before trial unless otherwise directed by the court.[44]

The rule requiring the disclosure of all recorded statements made by a party or a witness on behalf of a party appears absolute on its face. However, the ALJ must recognize all privileges available at law.[45] Hence, a privileged recorded statement would not be discoverable as a matter of right. Such recognized privileges as attorney work product, governmental

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[36] *See, e.g., Wegmann v. Dep't of Registration & Educ.*, 61 Ill. App. 3d 352, 356, 377 N.E.2d 1297, 1301 (1978). *See generally Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[37] *See Wegmann*, 61 Ill. App. 3d at 356, 377 N.E.2d at 1301; *Shiveley v. Stewart*, 65 Cal. 2d 475, 479-83, 421 P.2d 65 (1966).

[38] 481 U.S. 252, 264-68 (1987).

[39] *Id*.; *see* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 9.5, at 58-61 (3d. ed. 1994).

[40] *See, e.g., Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986); *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977).

[41] *See Krech v. Erdman*, 305 Minn. 215, 217-18, 233 N.W.2d 555, 557 (1975); *Prechtel v. Gonse*, 396 N.W.2d 837, 840 (Minn. Ct. App. 1986); *Kraushaar v. Austin Med. Clinic, P.A.*, 393 N.W.2d 217, 221-24 (Minn. Ct. App. 1986); *Whitney v. Buttrick*, 376 N.W.2d 274, 278-79 (Minn. Ct. App. 1985).

[42] 359 N.W.2d 302, 305 (Minn. Ct. App. 1984).

[43] *Cf.* Minn. R. Civ. P. 26.02.

[44] FED. R. CIV. P. 26(a)(3); *see* 6 MOORE'S FEDERAL PRACTICE §§ 26.24[3] (Matthew Bender 3d ed. 2015).

[45] Minn. R. 1400.6700, subp. 2 (2013).

investigatory information, and the public officer exemption may prevent the disclosure of recorded statements even under the broad language of the rule.[46]

A party has a right to serve on another party a written request for admissions.[47] The subject matter of the request may relate to the truth of relevant facts or opinions, or the application of law to relevant facts or opinions, including the authenticity of any document.[48] The request must be served at least 15 days before the hearing, and a written response is due within ten days of the receipt of the request.[49] Failure to provide a timely response or objection will result in the subject matter of the request being deemed admitted unless there was a justifiable excuse for failing to respond.[50] Rule 1400.6800 is analogous to rule 36.01 of the Minnesota Rules of Civil Procedure. It does not, however, carry the same potential monetary sanction for a failure to admit as does the court rule.[51]

The availability of discovery as a matter of right may be affected by the type or subject matter of the hearing. Additional discovery available as a matter of right may be provided for by statute in particular contested case proceedings.[52] If the contested case proceeding is governed by the rules of the OAH applicable to the Revenue Recapture Act,[53] only the names and addresses of witnesses are available as a matter of right.[54] A contested case proceeding may be governed by the Revenue Recapture Act rules as required by statute.[55]

The rules of the OAH for hearings on the siting of power lines and electrical generating plants[56] make no specific provision for pretrial discovery or the availability of information as a matter of right before hearing. There is, however, a specific reference in the rule to the authority of the ALJ to rule on discovery motions made before such hearings.[57] Therefore, by necessary implication, the general discovery rule, Minnesota Rules part 1400.6700, applies to hearings for the siting of power lines and electrical generating plants.

A party seeking discovery available as a matter of right may obtain discovery from an opposing party directly, without any prior application to or order from the ALJ.[58] If discovery

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[46] For a discussion of privilege as limiting pretrial discovery, see ch. 9.

[47] Minn. R. 1400.6800 (2013).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See* Minn. R. Civ. P. 37.03.

[52] Minn. Stat. § 216B.30 (2014), for example, provides that in an electric or natural gas investigation or rate-making proceeding, any party is entitled to take the deposition of a witness in the same manner prescribed by law for the taking of a deposition in a civil action in the district court.

[53] MINN. R. 1400.8505-.8612 (2013).

[54] *Id.* 1400.8600.

[55] *Id.* 1400.8505 (noting that contested cases brought pursuant to the following authorities are governed by the rules pertinent to the Revenue Recapture Act: Minnesota Statutes, sections 114C.23 (environmental improvement audit), 115.076 (water pollution enforcement), 116.072, subd. 6 (expedited review of pollution control rules or orders), 144.991 (public health actions) (2014)); *see also* Minnesota Statutes, section 245A.08 (2014), noting that any contested case hearings related to human services licensure and brought pursuant to sections 245A.05, .07, subd. 3, and 245C.28, are all subject only to the Revenue Recapture Act rules.

[56] MINN. R. 1405.0200-.2700 (2013).

[57] *Id.* 1405.0400, subp. 3A.

[58] *Id.* 1400.6700, subp. 1.

available as a matter of right is resisted on an appropriate ground, such as privileged work product or the governmental investigatory file privilege, the party asserting the privilege has the burden of establishing the privilege and avoiding discovery.[59]

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.[60] 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.[61] 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.[62]

Administrative discovery practices place the burden of establishing the propriety of discovery on the party seeking disclosure rather than on the party resisting discovery.[63] 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.[64]

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

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[59] *See, e.g., State v. Lender*, 266 Minn. 561, 564, 124 N.W.2d 355, 358 (1963). For a discussion of privilege generally as limiting discovery, see ch. 9.

[60] 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).

[61] Minn. R. 1400.6700, subp. 2 (2013).

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

[63] *See* Minn. R. 1400.6700, subp. 2 (2013).

[64] *Id.* 26.02(a).

burden on any party.[65] The prefiling of a party's testimony may also be required by governing statute as a condition to initiating the contested case proceeding.[66] Discovery may also be obtained as a consequence of a prehearing conference and the resultant order.[67] The conference may be a full-scale discovery device where opposing parties exchange evidentiary exhibits and documents, discuss claims and defenses, including relevant legal authority, and identify proposed witnesses.[68] 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[69] 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.[70] 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.[71]

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.[72] 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.[73] 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.[74] 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.[75] The determination in either a judicial or administrative context will be reversed only for a clear abuse of discretion.

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[65] Minn. R. 1400.5500(L) (2013).

[66] *See, e.g.,* Minn. Stat. §§ 216B.16, subd. 1, 237.075, subd. 1 (2014).

[67] For a discussion of prehearing conferences generally, see § 7.3.

[68] 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.

[69] Minn. Stat. §§ 13.01-.90 (2014).

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

[71] Minn. Stat. § 13.39, subd. 2 (2014).

[72] Minn. R. 1400.6700, subp. 2 (2013).

[73] 422 N.W.2d 513, 520 (Minn. Ct. App. 1988).

[74] *Id*.

[75] 448 N.W.2d 116, 118 (Minn. Ct. App. 1989).

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.[76] Courts have often defined the word *necessary* as used in a discovery rule or statute to mean expedient or appropriate as opposed to indispensable.[77]

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.[78] 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.[79]

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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> (1) 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;
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> (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
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> (3) 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.[80]

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

[77] *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).

[78] *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.

[79] 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).

[80] 428 N.W.2d 419, 425-26 (Minn. Ct. App. 1988), *rev. on other grounds*, 445 N.W.2d 865 (Minn. 1989).

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.[81] The university denied the request claiming it would require a manual review of 3,100 personnel files.[82] 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.[83]

As a practical matter, the only real distinction between the discretionary discovery rule of the OAH[84] 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.[85] 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.[86] 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."[87] 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.[88] Often a reviewing court will determine whether an abuse of discretion has occurred without specifying any standard for judgment.[89]

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[81] 544 N.W.2d 32, 35, 39 (Minn. Ct. App. 1996).

[82] *Id.* at 39.

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

[84] Minn. R. 1400.6700, subp. 2 (2013).

[85] *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).

[86] 271 Minn. at 83, 135 N.W.2d at 46.

[87] 628 N.W.2d.620, 628 (Minn. Ct. App. 2001).

[88] 409 F.2d 631, 635 (9th Cir. 1969).

[89] *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.

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.[90] 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.[91] Decisions of the ALJ on questions of discovery are not binding on the agency's decisional authority.[92] Filing formal exceptions to the ALJ's discovery determinations is not jurisdictional to a judicial review of the propriety of his or her rulings.[93] 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."[94]

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.[95] 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.[96] The time and expense of further participation in the agency proceeding do not constitute irreparable injury.[97] In the absence of imminent and irreparable injury, neither an action exceeding the agency's jurisdiction nor a constitutional challenge will justify injunctive relief.[98]

In exceptional cases, the extraordinary writs have been used to secure an interlocutory review of the propriety of a discovery order.[99] Although that use of the extraordinary writs has

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[90] Minn. R. 1400.7600 (2013).

[91] *See* Minn. Stat. § 14.61 (2014); *see also* Minn. R. 1400.8200 (2013).

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

[93] *See id*.

[94] Minn. R. 7829.3000 (2013).

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

[96] *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).

[97] *Sheehan*, 253 Minn. at 467, 93 N.W.2d at 5.

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

[99] *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).

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.[100] 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.[101]

The extraordinary writs may be used only in exceptional cases. In *Ex Parte Fahey,*[102] 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.[103]

The Minnesota Supreme Court has similarly limited the use of the extraordinary writs to review pretrial discovery orders.[104] 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.[105] 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.[106]

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

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[100] 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).

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

[102] 332 U.S. 258 (1947).

[103] *Id*. at 259-60.

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

[105] *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).

[106] *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.

> 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").[107]

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.[108] When no questions of general interest beyond the individual proceeding have been presented, however, the court has denied discretionary review.[109]

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.[110] 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.[111] The standard of review is prescribed by statute.[112] Appeal of the final decision of the administrative agency is the most common method of securing judicial review of interlocutory discovery orders.[113] 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

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[107] 448 N.W.2d 92, 96 (Minn. 1989).

[108] *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).

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

[110] Minn. Stat. § 14.63 (2014).

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

[112] Minn. Stat. § 14.69 (2014). For a discussion of the application of the statutory standard on appeal, see ch. 15.

[113] 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).

erroneous discovery determination is a rare occurrence.[114] 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.[115]

8.6 Constitutional Right to Discovery

The majority rule is that there is no due process right to even limited discovery in an administrative proceeding.[116] In *Waller v. Powers Department Store,* the Minnesota Supreme Court adopted the majority view with only a footnote reference to concerns of due process.[117] The minority rule, originating in *Shively v. Stewart,*[118] is that fundamental fairness requires that administrative discovery be available to a person seeking to protect a vested right.[119] Following *Shively,* a limited number of courts have held that under particular circumstances, a denial of discovery would be improper.[120] The California Supreme Court's ruling in *Shively* was specifically rejected by the Minnesota Supreme Court in *Waller v. Powers Department Store.*[121]

Although full prehearing discovery is not a constitutional due process requirement, its availability is one consideration in determining whether a party to an administrative proceeding was afforded a fair and meaningful hearing.[122] Whether a denial of a particular discovery request deprives a party of a fair hearing must be determined from the totality of the circumstances, including the specificity of the charges, if any,[123] the importance of the requested information to the preparation of a defense,[124] and the equal application of neutral

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[114] 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.

[115] 359 N.W.2d 302, 304-05 (Minn. Ct. App. 1984).

[116] *See Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977); *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3rd Cir. 1974); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961); *Starr v. Comm'r of Internal Revenue*, 226 F.2d 721, 722 (7th Cir. 1955); *In re Del Rio*, 400 Mich. 665, 687 n.7, 256 N.W.2d 727, 735 n.7 (1977); *Pa. Human Relations Comm'n v. St. Joe Minerals Corp. Zinc Smelting Div.*, 24 Pa. Commw. 455, 459-60, 357 A.2d 233, 236 (1976), *aff'd*, 476 Pa. 302, 382 A.2d 731 (1978).

[117] 343 N.W.2d 655, 657, n.2 (Minn. 1984).

[118] 65 Cal.2d 475, 479-80, 421 P.2d 65, 68, 55 Cal. Rptr. 217, 220 (1966).

[119] The broad language of *Shively,* regarding the need for the availability of discovery in administrative contested case proceedings, has been limited by subsequent California decisions. *See Cooper v. Bd. of Med. Exam'rs*, 49 Cal. App. 3d 931, 945, 123 Cal. Rptr. 563, 572 (1975); *Stevenson v. State Bd. of Med. Exam'rs*, 10 Cal. App. 3d 433, 439, 88 Cal. Rptr. 815, 819 (1970); *Everett v. Gorden*, 266 Cal. App. 2d 667, 672-73, 72 Cal. Rptr. 379, 382 (1968).

[120] *See McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979); *Smith v. Schlesinger*, 513 F.2d 462, 475-77 (D.C. Cir. 1975); *Hoffmann-La Roche, Inc. v. Kleindienst*, 464 F.2d 1068, 1072 (3d Cir. 1972); *Russo v. Governor*, 22 N.J. 156, 174-75, 123 A.2d 482, 493 (1956); *In re Nieman v. Axelrod*, 434 N.Y.S.2d 817, 818-19, 79 A.D.2d 764, 765 (1980); *see also In re Irving*, 600 F.2d 1027, 1035-36 (2d Cir. 1979).

[121] 343 N.W.2d at 657 n.2.

[122] *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977).

[123] *Cf. Secrest v. Dep't of Corr.*, 64 Ill. App. 3d 458, 459-60, 381 N.E.2d 367, 368 (1978); *Costa v. Bd. of Selectmen*, 377 Mass. 853, 861-62, 388 N.E.2d 696, 700-01 (1979); *Hughes v. Dep't of Pub. Safety*, 200 Minn. 16, 21-23, 273 N.W. 618, 621-22 (1937).

[124] *Nieman,* 434 N.Y.S.2d at 818-19, 79 A.D.2d at 765; *see McClelland,* 606 F.2d at 1285-86.

procedural standards. Regardless of the broad language of *Waller*,[125] in a proper case, a denial of expanded discovery when coupled with a lack of a meaningful opportunity to present a defense may deny a fair hearing and violate due process. For example, the court of appeals held that a school district denied the due process rights of a student by refusing to disclose the identities of non-testifying witnesses to a bomb scare incident, so that the student could call them as witnesses at the hearing.[126]

Under the OAH rules, the ALJ has broad discretionary powers concerning discovery. Administrative hearings vary in scope from multi-issue hearings to determine vital public questions to hearings between unrepresented parties involving a single issue of particular concern only to the litigants. Under some circumstances, limiting the application of the judicial model applicable to the district court is appropriate. A primary concern in adopting the original discovery rule[127] was to arrive at an appropriate balance between the competing interests of disclosure, expeditious hearings, and fundamental fairness.[128] Since the types of hearings that arise under the single pretrial discovery rule of the OAH vary from conciliation-court-level matters to cases analogous to the most sophisticated district court proceeding, discretion must be placed in the ALJ.[129]

In complex cases, the discretion of the ALJ may well be exercised in favor of broad discovery. Doing so would be consistent with the prevailing view that the same breadth of discovery available in a judicial proceeding should be afforded in an administrative contested case.[130] The reasoning of the commentators is based on their view of the success of discovery in judicial proceedings and their assumption that the judicial model should be applied to administrative contested cases.

Discovery is designed to narrow and clarify the issues between the parties and to eliminate surprise at trial by permitting advance knowledge of all relevant facts in order to ascertain facts that may be used to prove a claim or defense.[131] It can be argued that the same reasons that support broad discovery in a judicial forum support similar discovery rights in complex administrative proceeding.

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[125] 343 N.W.2d at 657.

[126] *In re Expulsion of E.J.W.*, 632 N.W.2d 775, 780-82 (Minn. Ct. App. 2001).

[127] 9 MCAR § 2.214 (1982).

[128] *Final Report of Hearing Examiner, In re* Proposed Amendments to the Rules of the Office of Hearing Examiners Relating to Rulemaking Procedures in Contested Cases and the Adoption of Procedures for Hearings Relating to the Routing or Siting of Large Electric Transmission Facilities, OAH File No. OHE 78-001-AK, 42-43 (1978).

[129] A rule restricting the availability of discretionary discovery in specified cases was originally proposed in the 1985 amendments to the rules of the OAH. 9 Minn. Reg. 802, 810 (Oct. 22, 1984). That portion of the amendment was withdrawn.

[130] *See, e.g.*, 2 Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 9.5, at 43 (3d ed. 1994); Adams, *State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Proceedings*, 74 N.W. L. REV. 854, 873-85 (1980).

[131] *Sandberg v. Comm'r of Revenue*, 383 N.W.2d 277, 281-82 (Minn. 1986); *Jeppesen v. Swanson*, 243 Minn. 547, 560, 68 N.W.2d 649, 656-57 (1955); 3 D. MCFARLAND & W. KEPPEL, MINNESOTA CIVIL PRACTICE § 1501, at 307-08 (1990).

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.[132] In *Caucus Distributors, Inc. v. Commissioner of Commerce,*[133] 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,[134] constructive admissions,[135] the exclusion of specific claims, defenses, and designated matters in evidence,[136] and a recommendation for default.[137] 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.[138] A continuance, where possible, is the preferred remedy for surprise resulting from failure to make discovery.[139]

The Minnesota Supreme Court, in *First National Bank of Shakopee v. Department of Commerce,*[140] 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.[141]

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[132] *See* Minn. R. Civ. P. 37.

[133] 422 N.W.2d 264, 268-69 (Minn. Ct. App. 1988).

[134] Minn. R. 1400.6700, subp. 1D (2013).

[135] *Id*. 1400.6700, subp. 3A, .6800.

[136] *Id*. 1400.6700, subp. 3B.

[137] *Id.* 1400.6000.

[138] *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).

[139] *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).

[140] 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976).

[141] *Id*.

In contested cases under the Minnesota Human Rights Act,[142] the ALJ also has statutory authority to impose sanctions for intentional and frivolous delay.[143] 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.[144] 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.[145]

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.[146] However, contempt sanctions against a nonparty, at least where a subpoena has issued, may be available in a district court.[147]

An order compelling discovery should contain both a date certain for compliance and a statement of potential sanctions for noncompliance.[148] 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.[149] Moreover, when the sanction proposed is a recommendation for default, actual prejudice to an opposing party from violation of the order must be shown.[150]

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.[151] 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.[152]

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 sanction.[153] When the discovery mandated by the ALJ results in the issuance of a subpoena, however, the

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[142] Minn. Stat. §§ 363A.01-.44 (2014).

[143] *Id*. § 363A.28, subd. 6(i).

[144] Minn. R. 1400.7050 (2013).

[145] *Id*., subp. 1(G), 2(E), (F).

[146] *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).

[147] *See* Minn. Stat. §§ 14.51, 588.02 (2014); Minn. R. 1400.7000 (2013); Minn. R. Civ. P. 37.02(b).

[148] *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).

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

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

[151] *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).

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

[153] *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. Balistrieri*, 55 Wis. 2d 513, 519-20, 201 N.W.2d 18, 22 (1972).

jurisdiction of the district court may be sought in aid of its enforcement.[154] Refusal to obey an administrative subpoena for discovery when directed to do so by the district court may result in a citation for contempt.[155]

[154] Minn. Stat. § 14.51 (2014).
[155] *Id.* § 588.02; *see also* Minn. R. Civ. P. 37.02(b).