Chapter 11. The Contested Case Hearing

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11.1 Level of Formality

Contested case hearings in Minnesota span a wide range of formality, complexity, and subject matters. Contested case proceedings used to set utility rates may last several months, have many parties who are individually represented by counsel, and involve dozens of witnesses and hundreds of exhibits. Contested case hearings in more typical matters, including license revocation and or citation appeals, are only one to two hours on average and the licensee is often unrepresented.

Complex, lengthy cases with several parties may be as formal as a court trial without a jury. Short contested cases, especially those involving unrepresented parties, are conducted in a more informal manner. The Office of Administrative Hearings (OAH) has several hearing rooms at its St. Paul and Duluth offices, but also conducts hearings at other locations throughout the state. Since 2000 the APA has authorized an agency to initiate an arbitration proceeding before an administrative law judge (ALJ) under Minnesota arbitration law if all parties agree to arbitration.[1]

11.2 Hearing Procedure

11.2.1 The Order of Proceeding in General

Most contested cases are conducted like an informal trial before a judge without a jury. The basic hearing protocol is set out in an OAH rule.[2] After convening the hearing, the ALJ states the basic procedural rules. Any stipulations or agreements are then entered into the record. The parties may make an opening statement, after which the party with the burden of proof begins the presentation of evidence through witnesses or documents. Cross-examination is conducted by adverse parties.

The Administrative Procedure Act (APA) sets out specific rights of a party in a contested case hearing, including the right to present evidence and argument with respect to the relevant issues.[3] Each party has the right of cross-examination of witnesses and the right to submit rebuttal evidence.[4] Any party may be represented by an attorney or by a non-attorney unless this constitutes the unauthorized practice of law.[5] There is no statutory authority that permits

[1] Minn. Stat. § 14.57(b) (2014).

[2] Minn. R. 1400.7800 (2013).

[3] Minn. Stat. § 14.58 (2014); *Thompson v. County of Hennepin*, 660 N.W.2d 157, 160-61 (Minn. Ct. App. 2003) (holding right to present evidence includes the right to present a defense through subpoenaed witnesses).

[4] Minn. Stat. § 14.60, subd. 3 (2014).

[5] Minn. R. 1400.5800 (2013).

the appointment of an attorney when a party cannot afford one. Federal cases have held that the appointment of counsel for indigent parties in administrative proceedings is not required by the sixth amendment or the due process clause.[6]

Depositions are sometimes admitted into evidence,[7] although there may be due process limitations on this practice where a party was not present at the taking of the deposition.[8] Written evidence is sometimes substituted for direct oral testimony. When this is permitted, the written testimony is prefiled with the ALJ and served on all parties.[9] This practice is most commonly used for opinion testimony where the demeanor of the witness may contribute little to the assessment of the evidence. It is often used in contested case hearings involving utility rate requests.

The agency may play different roles depending on the nature of the hearing. For example, in public utilities commission hearings, where the utility and public interest groups are represented by private practitioners and state agency staff are represented by the attorney general, the agency acts in a neutral capacity. The state agency may also be a party to the contested case proceeding, as in the case of a license revocation. In these circumstances, the agency staff, represented by the attorney general, will "prosecute" the case. Although contested case hearings must, under the APA, be conducted by an ALJ assigned by the OAH,[10] in some cases the agency head may attend all, or a portion, of the hearing. This is more common in the case of commissions or citizen boards. Where the agency is not a party, the agency head may, in the discretion of the ALJ, engage in the examination of witnesses.[11] In practice, this rarely happens.

After all parties have had an opportunity to present evidence, final oral argument may be made. The ALJ may order the final argument to be in written form. This is often done in lengthy hearings or when a brief is necessary to fully discuss legal issues presented. Special procedural rules have been adopted to govern Revenue Recapture Act or other simple hearings.[12]

11.2.2 Public Hearings

As a general rule, contested case hearings under the Minnesota APA are open to the public. Although the Act does not require public hearings, the contested case rules require open hearings unless they are otherwise permitted or required to be closed.[13] Agency rules and federal or state laws governing particular types of contested cases may also address the issue.

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[6] *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Tyson v. N.Y.C. Hous. Auth.*, 369 F. Supp. 513, 521 (S.D.N.Y. 1974).

[7] Minn. R. 1400.6900 (2013).

[8] *Cooper v. Chrysler Corp.*, 125 Mich. App. 811, 818-19, 336 N.W.2d 877, 880 (1983).

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

[10] Minn. Stat. § 14.50 (2014).

[11] Minn. R. 1400.7900 (2013).

[12] *Id.* 1400.8505-.8612.

[13] *Id.* 1400.7800.

Some statutes require public contested case hearings[14] or suggest that they be open to the public.[15] Others require closed hearings or permit them to be closed at the request of a party.[16] As a general rule, quasi-judicial proceedings outside the scope of the contested case rules will also be required to be open to the public. In the absence of a specific statutory provision permitting a closed hearing or one requiring a public hearing, such as the Minnesota Open Meeting Law,[17] public hearings are normally considered to be required in quasi-judicial proceedings.

Although the sixth amendment requires public criminal trials, it does not require that civil trials or quasi-judicial administrative proceedings be open to the public. However, the right to public contested case hearings has a strong constitutional basis and is recognized as a part of our judicial heritage. In *Morgan v. United States*,[18] the United States Supreme Court recognized the historic basis for making contested case proceedings public. In that case, Justice Hughes, speaking for the Court, said:

> The vest [sic] expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirement of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'[19]

Nine years later, the Supreme Court stated that a trial is a public event and that what transpires in the courtroom is public property. These general statements have been alluded to or applied in a variety of quasi-judicial proceedings and show that the right to public hearings has a strong constitutional basis and is desirable in order to prevent both secret oppression and favoritism.

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[14] *See, e.g.*, Minn. Stat. § 182.664, subd. 3 (2014) (governing contested cases under Minnesota Occupational Safety and Health Act open to public).

[15] Some statutes provide that any person may appear at a hearing, suggesting that hearings are open to the public. *See, e.g., id.* § 47.54 (regarding protests to bank applications for detached facilities); *see also id.* §§ 72A.22, .25 (intervention by any person in contested case hearings regarding unfair competition and unfair or deceptive insurance acts or practices), 116B.09 (intervention in administrative hearings by any person who is residing in state asserting environmental impairment or pollution), 182.661, subd. 3 (employee intervention in occupational safety and health hearings).

[16] *See, e.g.*, *id.* §§ 122A.40, subd. 14 (hearings on teacher dismissal public or private at teacher's option), 147.01, subd. 4 (hearings pertaining to doctors confidential); *see also* Michael Spake, *Public Access to Physician and Attorney Disciplinary Proceedings,* 21 J. NAT'L ASS'N. ADMIN. L. JUDGES 289 (Fall 2001); *infra* note 30 (discussing option available to some parties to make hearings open or closed to the public).

[17] Minn. Stat. §§ 13D.01-.07 (2014).

[18] 304 U.S. 1 (1938).

[19] *Id.* at 14-15.

The Minnesota Supreme Court cited the *Morgan* decision with approval in describing the requirements of a quasi-judicial administrative hearing.[20] In a later decision, the court made it clear that the first amendment rights of the public, as well as the due process rights of the parties, may require public hearings.[21] Other courts have faced the issue more directly. A federal district court held that an ALJ abused his discretion when he banned all members of the public except members of the press from a deportation hearing of an ex-Nazi.[22] The court held that an open, public hearing is a fundamental principle of fair play inherent in our judicial system and that agencies acting in a quasi-judicial capacity must act in accordance with "cherished judicial traditions and principles."[23] The court recognized that the public's presence may be limited to protect the morals of the young, to protect the confidentiality of information or its source, or to protect a witness or a party but held that the least restrictive limitation must be imposed in each case.

Similarly, the circuit court for the District of Columbia held that an open hearing is a fundamental requirement of due process and is required whenever an agency is proposing an action affecting an individual's legal rights.[24] Even though the regulation applicable to discharge hearings in that case required a closed hearing, the court held that a public hearing was required where the employee to be discharged waived his right to a closed hearing. Other courts have reached the same result, holding that secret proceedings are repugnant to our system[25] and that all types of judicial proceedings are presumptively open to the public.[26]

11.2.2(1) Waiver

A party may waive his or her right to a private hearing[27] and may waive his or her right to a public hearing, but the general rule is that a party may not compel a private hearing.[28] However, this general rule may be modified by applicable statutes and rules that give specified parties the option to make hearings open or closed to the public.[29]

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[20] *Juster Bros. v. Christgau*, 214 Minn. 108, 119-20, 7 N.W.2d 501, 507-08 (1943); *see also State v. Duluth M. & I. R. Ry.*, 246 Minn. 383, 75 N.W.2d 398, 409 (1956).

[21] *Minneapolis Star & Tribune Co. v. Kanmeyer*, 341 N.W.2d 550, 555-56 (Minn. 1983) (holding that public has first amendment right to attend pretrial criminal proceedings that can be limited only to preserve fairness); *see also In re Rahr*, 632 N.W.2d 572, 576 (Minn. 2001) (noting that there is a strong presumption in favor of a public trial in denying a writ of prohibition against the tax court after the tax court had denied a motion to close a trial).

[22] *Pechter v. Lyons*, 441 F. Supp. 115, 119-20 (S.D.N.Y. 1977).

[23] *Id*. at 119.

[24] *Fitzgerald v. Hampton*, 467 F.2d 755, 769 (D.C. Cir. 1972).

[25] *Adams v. Marshall*, 212 Kan. 595, 601, 512 P.2d 365, 371 (1963) (civil service hearing).

[26] *First Corp. v. Clyne*, 50 N.Y.2d 707, 715, 409 N.E.2d 876, 878-79, 431 N.Y.S.2d 400, 403 (1980).

[27] *Fitzgerald,* 467 F.2d at 767.

[28] *Singer v. United States*, 380 U.S. 24, 35 (1965); *Hughes v. FTC,* 63 F.2d 362, 388 (D.C. Cir. 1933) (hearing on charge of false advertising).

[29] Such an option is accorded to a variety of parties involved in contested cases and other quasi-judicial administrative proceedings. *See, e.g.*, Minn. Stat. §§ 46.30 (option to agency head in certain banking cases), 122A.41, subd. 9 (giving that option to teachers in certain discharge proceedings), 121A.47, subd. 5 (pupil expulsion hearings) (2014); *see also* 34 C.F.R. § 300.508(b)(2) (2012) (hearings regarding disabled child's special education program).

11.2.2(2) Exceptions and Limitations

Although there is a constitutional basis for public hearings and a public policy favoring them, public hearings are not always required. Thus, while the courts uphold rules requiring public investigatory proceedings,[30] they do not generally require such proceedings to be open to the public.[31]

In addition to statutes or rules that provide for closed hearings or that give certain parties the right to determine whether or not the hearings will be open, the ALJ has authority to limit and restrict public attendance. It is usually held that courts have inherent power to limit attendance to prevent overcrowding, disorder, witness intimidation, and the corruption of young children's morals.[32] The administrative hearing officer has similar powers and may limit attendance to preserve order and decorum[33] or to exclude persons having no interest in the proceeding if their presence is intimidating or discomforting to a party.[34] Likewise, the judge may always sequester witnesses.[35] However, the limitations imposed must always be the least restrictive necessary.[36]

Under the Minnesota APA, the ALJ may conduct a closed hearing to discuss information that is not public and may issue protective orders and seal all or part of the hearing record.[37] This provision permits compliance with the requirements of the Minnesota Government Data Practices Act[38] and other statutes requiring confidentiality.

Under Minnesota Rules part 1400.5600, subpart 2(M) (2013), the notice of and order for hearing must contain a statement advising parties that if not public data is admitted into evidence, it may become public unless a party objects and asks for relief under Minnesota Statutes, section 14.60, subdivision 2. Since the reports and decisions of ALJs are circulated among state agencies and generally available for public inspection, and since the official records of contested case hearings are also available for public inspection, parties must take steps to protect not public data pertaining to them from being disclosed. If privileged information may

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[30] *FCC v. Schreiber*, 381 U.S. 279, 295-96 (1965). Since 2000, ALJs have been subject to the Code of Judicial Conduct that also has provisions regulating video coverage of court proceedings under a modification to Canon 3A(7).

[31] *Hannah v. Larche*, 363 U.S. 420, 443-44 (1960); *Woolley v. United States*, 97 F.2d 258, 262 (9th Cir. 1938).

[32] *See, e.g., Cohen v. Everett City Council*, 82 Wash. 2d 385, 388, 535 P.2d 801, 803 (1975).

[33] *Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567, 571-73 (4th Cir. 1975); *Zanders v. La. State Bd. of Educ.*, 281 F. Supp. 747, 768 (W.D. La 1968); *Moore v. Student Affairs Comm.*, 284 F. Supp. 725, 731 (M.D. Ala. 1968); *Swars v. Council of Vallejo*, 33 Cal. 2d 867, 873, 206 P.2d 355, 359 (1949); *Klein v. Bd. of Fire & Police Comm'rs*, 23 Ill. App. 3d 201, 208, 318 N.E.2d 726, 731 (1974); *Oliver v. Postel*, 30 N.Y.2d 171, 179, 282 N.E.2d 306, 309, 331 N.Y.S.2d 407, 412 (1972).

[34] *Carr v. State Bd. of Pharmacy*, 48 Pa. Commw. 330, 334, 409 A.2d 941, 944 (1980).

[35] *NLRB v. Hale Mfg. Co.*, 570 F.2d 705, 711 (8th Cir. 1978). The power to sequester witnesses in contested cases is specifically authorized by Minn. R. 1400.7200 (2013).

[36] *Pechter v. Lyons*, 441 F. Supp. 115, 119-20 (S.D.N.Y. 1977).

[37] Minn. Stat. § 14.60, subd. 2 (2014). These powers are in addition to those specified in Minn. R. 1400.6700, subp. 4 (2013), which authorizes the issuance of protective orders in discovery.

[38] Minn. Stat. § 13.01-.99 (2014). Under section 13.03, subdivision 4, of the act, the classification of data as public, private, or confidential may change if the agency is required to produce that data in an administrative proceeding. *See also* ch. 14.

be revealed in a contested case proceeding, it has been held that a closed hearing may be required.[39]

11.2.2(3) Cameras and Similar Coverage

Under the contested case rules, cameras, including television and still cameras, as well as mechanical recording devices such as radio microphones and tape recorders, may be operated during a contested case hearing only if prior approval is obtained from the ALJ.[40] Any such coverage is subject to limitations imposed by the judge to preserve decorum and to protect confidential information. The news media, which most frequently attempts to cover contested cases with cameras and recording equipment, does not have a special privilege to observe or report on administrative proceedings. The news media's right of access to public proceedings is no different than the general public's right of access.[41]

11.2.2(4) The Hearing Record

In addition to the generally recognized right to public trials and hearings, there is a common law presumption that court files and records are open to the public and may only be sealed for compelling state interests. Thus, transcripts and settlement agreements pertaining to a case are public documents and may not generally be sealed.[42] In *Minneapolis Star & Tribune Co. v. Schumacher*,[43] the Minnesota Supreme Court held that there is no recognized constitutional right to examine settlement documents or transcripts of settlement discussions sealed by the court in a civil case. However, the court stated that there is a common law right to examine settlement documents. Therefore, when an order sealing settlement documents is challenged, the trial court is required to balance a party's privacy interests against the common law presumption in favor of public access.

The use of initials in the place of names merely to protect the parties from embarrassment has been discouraged.[44] But the use of initials or pseudonyms is commonly authorized to protect juveniles, crime victims, or vulnerable adults. For example, in *Resident v. Noot*,[45] the Minnesota Supreme Court used initials to protect the identity of a nursing home resident and her daughter who challenged an agency regulation. Under Minnesota Rules part 1400.5500(O) (2013), the ALJ may grant a request to use initials for proper names in the

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[39] *Ark. State Med. Bd. v. Leonard*, 267 Ark. 61, 63, 590 S.W.2d 849, 851 (1979).

[40] Minn. R. 1400.8000 (2013).

[41] *Saxby v. Wash. Post Co.*, 417 U.S. 843, 849-50 (1974); *Tribune Review Publ'g Co. v. Thomas*, 254 F.2d 883, 884 (3d Cir. 1958); *Minneapolis Star & Tribune Co. v. State*, 282 Minn. 86, 90, 163 N.W.2d 46, 48 (1968).

[42] *Cohen v. Everett City Council*, 82 Wash. 2d 385, 389, 535 P.2d 801, 803-04 (1975) (transcript of municipal hearing to revoke sauna license); *see also Miami Herald Publ'g Co. v. Collazo*, 329 So. 2d 333, 338 (Fla. Dist. Ct. App. 1976) (terms of settlement agreement cannot be sealed even if disclosure could affect other pending litigation); *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 553-54, 334 N.W.2d 252, 260 (1983) (holding record of disciplinary proceeding made part of court record cannot be sealed).

[43] 392 N.W.2d 197 (Minn. 1986).

[44] *Leaon v. Wash. Cnty.*, 397 N.W.2d 867, 871 (Minn. 1986) (finding a person whose identity is known is not a proper "John Doe"); *Stern v. Stern*, 66 N.J. 340, 343 n.1, 331 A.2d 257, 259 n.1 (1975).

[45] 305 N.W.2d 311, 312 (Minn. 1981).

hearing record and in the findings of fact, conclusions, and recommendation or order. This authorization was added to the contested case rules especially to protect juveniles and crime victims. In addition, other agency rules permit the use of pseudonyms to protect parties' identities. Minnesota Rules part 1205.1600, subpart 3 (2013), authorizes the use of pseudonyms in contested cases challenging the accuracy of government data on individuals under the Minnesota Government Data Practices Act. Of course, initials may be used when a party's identity is unknown as long as that party's rights are not prejudiced.[46]

An employee's right to a public hearing before an agency includes the right to have a court reporter present, at the employee's expense, to make his or her own record of a discharge proceeding.[47] Where such a right is recognized, it may be limited to quasi-judicial, rather than investigatory, proceedings and is always subject to statutory requirements for secrecy or confidentiality.[48]

The APA favors audio-recording of contested case hearings except when the chief ALJ determines that the use of a stenographer or court reporter is more appropriate.[49] A party requesting a court reporter must pay the reporter's appearance fee and the cost of preparation of a transcript. Court reporters are selected from a list of court reporters under contract to the state of Minnesota. The OAH will prepare transcripts from audio-recordings on request and on payment of a transcript fee. Audio-recording of hearings has been held to be a proper means of recording a hearing unless a party can show substantial prejudice.[50] The recordings of contested case hearings are retained by the OAH for a period of several years whether or not a transcript is prepared.

11.3 Role of the Administrative Law Judge

Since 1976, Minnesota has had an independent Office of Administrative Hearings that employs Administrative Law Judges to conduct contested case hearings for other state agencies. ALJs are experienced attorneys who are hired under civil service requirements. The ALJ is responsible for maintaining an orderly proceeding, which is a component of a fair hearing.[51] A number of cases have listed the essential elements of a fair administrative hearing, usually including: the right to be heard; the right to the production of witnesses and documents; the taking of evidence; the examination and cross-examination of witnesses; the right to present argument; and a decision on the merits.[52]

The ALJ is directed by the APA to conduct all hearings in a fair and impartial manner.[53] An agency decision may be vacated and a rehearing required if the ALJ expresses an opinion on

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[46] *Johnson v. Udall*, 292 F.Supp. 738, 751 (C.D. Cal. 1968).

[47] *Brown v. United States*, 377 F. Supp. 530, 539 (N.D. Tex. 1974); *accord Matt v. MacMahon*, 214 F. Supp. 20, 23 (N.D. Cal. 1963). *Contra In re Neil*, 209 F. Supp. 76, 77-78 (S.D. W. Va. 1962).

[48] *Cf. In re Lipson*, 39 Misc. 2d 778, 781, 241 N.Y.S.2d 929, 933 (1963).

[49] Minn. Stat. § 14.52 (2014).

[50] *Whalen v. Minneapolis Special Sch. Dist. No. 1*, 309 Minn. 292, 297-98, 245 N.W.2d 440, 443-44 (1976).

[51] *Goranson v. Dep't of Registration & Educ.*, 92 Ill. App. 3d 496, 501, 415 N.E.2d 1249, 1253 (1980).

[52] *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240, 247, 32 N.W.2d 574, 579 (1948).

[53] Minn. Stat. § 14.50(3) (2014); *Chanhassen Chiropractic Ctr. v. City of Chanhassen*, 663 N.W.2d 559, 562-63 (Minn. Ct. App. 2003) (whether hearing officer is impartial is a fact-specific inquiry).

the merits during the hearing, comments unfavorably on the evidence of a party, intimidates or discredits witnesses, makes rash statements showing bias, or otherwise exhibits a partisan nature.[54] An administrative order based on a hearing that was so unfair as to deprive a party of the opportunity to fairly present his or her evidence cannot stand.[55] Because the final agency decision must be based on the hearing record, an ALJ has an affirmative responsibility to assure that a full and accurate record is developed at the hearing, especially where a party is unrepresented by counsel. Accordingly, the ALJ must often protect the rights of an unrepresented party by assuring that the party's case is developed, while at the same time not engaging in advocacy activity on behalf of the unrepresented party.[56] This does not mean, however, that the ALJ is required to assume all the duties of counsel for an unrepresented party, such as the exclusion of objectionable evidence.[57]

11.4 Authority of the Administrative Law Judge

The APA directs the ALJ to conduct only those hearings for which proper notice has been given. It also authorizes the ALJ to advise an agency on the location and time of the hearing.[58] According to an OAH rule, the ALJ has a number of duties that include considering requests for subpoenas, ruling on motions, administering oaths and affirmations, granting continuances, examining witnesses, and permitting written testimony.[59] ALJs are obligated to enforce the disciplinary rules contained in the Minnesota Rules of Professional Conduct.[60] The rules apply to attorneys appearing before administrative agencies.[61] The rules use the word ”tribunal” in discussing an attorney's responsibilities. *“Tribunal”* is defined to include all courts and all other adjudicatory bodies.[62] Should counsel or any person engage in misconduct that disrupts the

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[54] *NLRB v. Phelps*, 136 F.2d 562, 567 (5th Cir. 1943); *Harris v. Bd. of Registration in Chiropody*, 343 Mass. 536, 179 N.E.2d 910, 912 (1962) (podiatry); *Jones v. State Dep't of Pub. Health & Welfare*, 354 S.W.2d 37, 40-41 (Mo. Ct. App. 1962); *see Urban Council on Mobility v. Minn. Dept. of Natural Res.*, 289 N.W.2d 729, 736 (Minn. 1980) (finding due process not violated so long as decisionmaker remains unbiased); *Buchwald v. Univ. of Minn.*, 573 N.W.2d 723, 728 (Minn. Ct. App. 1998) (finding a party in an administrative proceeding does not demonstrate bias on the part of the decisionmaker by showing only that the decisionmaker recused himself from a disciplinary proceeding against the party).

[55] *State v. Duluth, M. & I. R. Ry.*, 246 Minn. 383, 399, 75 N.W.2d 398, 410 (1956). *But cf. Staeheli v. City of St. Paul*, 732 N.W.2d 298305-06 (Minn. Ct. App. 2007) (finding hearing officer’s time limit for case presentation and rebuttal appeared arbitrary, but record did not indicate that licensee was prejudiced by the limit).

[56] *Jones v. R.R. Ret. Bd.*, 614 F.2d 151, 154 (8th Cir. 1980); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. Ct. App. 2007); *Kropiwka v. Dep’t of Indus., Labor & Human Relations*, 87 Wis. 2d 709, 721, 275 N.W.2d 881, 887 (1979).

[57] *Griswold v. Dep’t of Alcoholic Beverage Control*, 141 Cal. App. 2d 807, 810, 297 P.2d 762, 764 (1956).

[58] Minn. Stat. § 14.50(2) (2014).

[59] Minn. R. 1400.5500, .7000, subp. 1 (2013). A 2001 amendment to rule 1400.5500 (at (O)) added authority for the ALJ to set a reasonable limit on the time allowed for testimony after considering the requests of the parties.

[60] Minn. R. Prof. Conduct 3.3, 3.5.

[61] *Lavin v. Civil Serv. Comm'n*, 18 Ill. App. 3d 982, 991, 310 N.E.2d 858, 865 (1974); *Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment*, 44 N.C. App. 539, 543, 261 S.E.2d 520, 521 (1980).

[62] Minn. R. Prof. Conduct 1.0(n).

hearing, the ALJ has authority to exclude the offender in order to maintain an orderly proceeding.[63] In 2001 the office of administrative hearings announced that it would apply the Professional Aspirations, adopted by the Minnesota Supreme Court on January 11, 2001, to contested case hearings conducted by the office.

The ALJ has authority to regulate the manner and form of the testimony of witnesses. The judge has wide discretion in not allowing undisclosed witnesses to testify at the hearing.[64] Where testimony would merely be cumulative or irrelevant, the judge may limit the number of witnesses.[65] Conversely, the judge has discretion to permit a witness to testify even though his name was not on a prehearing list of proposed witnesses.[66] Generally, the ALJ should permit counsel to question witnesses in their own way so that they may develop their case.[67] Cross-examination may be restricted, however, in the sound discretion of the ALJ, and a ruling restricting cross-examination is reversed only for an abuse of discretion.[68] The ALJ may cross-examine witnesses called by any party in order to clarify the testimony.[69]

At the request of a party or on his or her own motion, the ALJ may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.[70] It is generally held that the ALJ should sequester witnesses when requested unless a party can put forth ample justification for the witness to hear other testimony.[71] The ALJ has wide latitude in all phases of the conduct of the hearing, including rulings on the reception of evidence.[72] However, an ALJ's creation of prejudice to a party by excluding competent and material evidence may be a denial of due process that requires a remand for rehearing.[73] When a party or witness is not fluent in English or has a speech, hearing, or other communication limitation, the ALJ may direct the appointment of an interpreter by the agency for which the hearing is being conducted.[74]

11.5 The Administrative Law Judge's Recommended Decision

After the hearing and the filing of written briefs, if any, the ALJ must prepare a recommended decision that contains findings of fact, conclusions of law, and a

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[63] Minn. R. 1400.8000, subp. 2 (2013).

[64] *First Nat'l Bank v. Dep't of Commerce*, 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976).

[65] *Byrd v. Campbell*, 591 F.2d 326, 329 (5th Cir. 1979).

[66] *S. Colo. Prestress Co. v. Occupational Safety & Health Review Comm'n*, 586 F.2d 1342, 1349 (10th Cir. 1978).

[67] *NLRB v. Air Flow Sheet Metal, Inc.*, 396 F.2d 506, 508 (7th Cir. 1968).

[68] *Brennen v. Occupational Safety & Health Review Comm'n*, 491 F.2d 1340, 1345 (2d Cir. 1974); NLRB v. Bryan Mfg. Co., 196 F.2d 477, 478 (7th Cir. 1952).

[69] *NLRB v. Int'l Bhd. of Elec. Workers*, 432 F.2d 965, 968 (8th Cir. 1970); Minn. R. 1400.5500(H) (2013).

[70] Minn. R. 1400.7200 (2013).

[71] *NLRB v. Hale Mfg. Co.*, 570 F.2d 705, 711 (8th Cir. 1978).

[72] *Fairbank v. Hardin*, 429 F.2d 264, 267 (9th Cir. 1970) (holding party may seek agency review of unfavorable evidentiary or procedural ruling through filing of post-hearing exception with agency).

[73] *NLRB v. Burns*, 207 F.2d 434, 436-37 (8th Cir. 1953).

[74] Minn. Stat. §§ 546.42-.44 (2014); *see also Kropiwka v. Dep't of Indus., Labor & Human Relations*, 87 Wis. 2d 709, 718, 275 N.W.2d 881, 888 (1979); Minn. R. 1400.5500(N) (authorizing appointment of an interpreter).

recommendation. With several important exceptions,[75] the ALJ's report is a recommendation only. However, the recommended decision of the ALJ becomes final if the agency fails to act within 90 days of the close of the record. When the agency fails to act within 90 days on a licensing case, the agency must return the record of the proceeding to the ALJ for consideration of disciplinary action.[76] The final decision is made by the agency after the receipt of the ALJ's report and is based on a consideration of the entire record.

The findings of fact and conclusions of law must be stated with clarity and completeness, and the findings of fact must be specific.[77] Specific findings are those that are definite and detailed so as to disclose the basis of the recommendation or order and permit an intelligent review.[78] A summarization of the testimony will not constitute specific findings of fact.[79] The ALJ is expected to find which facts are true. The report must also state the reasons for the conclusions of law and recommendation.[80] The reasons are often set out in a memorandum that explains why the ALJ credited or relied on certain evidence and relates the facts to the law or policy involved.[81]

Under federal law, the requirements regarding specific findings are even more demanding. In 1993, the United States District Court for the District of Minnesota held:

> To be legally sufficient, the ALJ must make an express credibility determination, must set forth the inconsistencies in the record which have led to the rejection of the Plaintiff's testimony, must demonstrate that all relevant evidence was considered and evaluated, and must detail the reasons for discrediting pertinent testimony. These requirements are not suggestive guidelines, but are mandates, which impose affirmative duties upon the deliberative process of the ALJs.[82]

In most contested cases, the agency may issue a decision that differs from the recommendation of the ALJ.[83] The Minnesota Supreme Court has made it clear that agency decisionmakers owe no deference to the recommendations of the ALJ, to the department staff

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[75] ALJs make final decisions in human rights discrimination cases, state employee personnel cases, occupational safety and health cases, and special education cases, among others. *See* § 14.2, n.28 (discussing statutory exceptions where the agency is bound by the ALJ's findings and conclusions). Under Minn. Stat. § 14.57(a) (2014), an agency may provide that the ALJ report constitutes the final decision in the case.

[76] Minn. Stat. § 14.62, subd. 2a (2014).

[77] *People for Envtl. Enlightenment & Responsibility (PEER) v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 865, 871-72 (Minn. 1978).

[78] *Brinker Trucking Co. v. Ill. Commerce Comm'n*, 166 N.E.2d 18, 19-20 (Ill. 1960); *see State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 202, 94 N.W.2d 711, 717-18 (1959).

[79] *Minn. Power & Light Co. v. Minn. Pub. Serv. Comm'n*, 310 N.W.2d 686, 689 (Minn. 1981); *Valley & Siletz R.R. v. Flagg*, 247 P.2d 639, 652-53 (Or. 1952).

[80] *Indus. Union Dep't A.F.L.-C.I.O. v. Am. Petro. Inst.*, 448 U.S. 607, 631 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

[81] *Carter v. Olmstead Cnty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 733 (Minn. Ct. App. 1998) (concluding that hearing officer's findings of fact held insufficient where the findings fail to mention, or explain the basis for failing to credit evidence in support of party's claim).

[82] *Garthus v. Sec'y of Health & Human Servs.*, 847 F.Supp. 675, 689 (D. Minn. 1993) (citations omitted).

[83] *In re Pautz*, 295 N.W.2d 635, 637 (Minn. 1980).

or to its experts.[84] The agency head may also make findings of fact or conclusions contrary to those made by the ALJ. Although an agency is not required to articulate reasons for rejecting the findings of fact, conclusions of law, or recommendation of the ALJ, it would be good practice to do so according to the Minnesota Supreme Court.[85] An agency's failure to explain on the record its reasons for rejecting the ALJ's findings may be evidence of an arbitrary decision and may indicate the agency's desire to exercise its will, and not its judgment.[86] For example, the Minnesota Court of Appeals required an agency to explain why it rejected the ALJ's findings of fact.[87] But where the agency explains its deviation from the ALJ's findings, it does not act arbitrarily and capriciously.[88]

In a case where the ALJ's findings rest on the credibility of witnesses, the agency still has final responsibility to determine the findings of fact.[89] However, the credibility determinations of the ALJ, who actually saw the witnesses, are entitled to some weight.[90] The agency may need to show a sufficient basis to reverse the credibility findings of the ALJ.[91] On judicial review, the findings of the ALJ may bear on the determination of whether substantial evidence supports the final agency decision.[92]

In reviewing the ALJ's recommendation, the agency's decision must be based on the entire record.[93] In *In re the Rate Appeal of Sleepy Eye Care Center v. Commissioner of Human*

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[84] *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

[85] *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984); *Big Fish Lake Sportsmen's Club v. Water Res. Bd.*, 400 N.W.2d 416, 421 (Minn. Ct. App. 1987) (affirming agency may modify hearing examiner's findings and conclusions based on the entire record).

[86] *In re Orr*, 396 N.W.2d 657, 662 (Minn. Ct. App. 1986) (finding commissioner's decision arbitrary where only explanation for deviating from ALJ's findings was that the commissioner's findings more accurately reflected the record); *N. Messinger v. Airport Couriers*, 376 N.W.2d 285, 290 (Minn. Ct. App. 1985); *Five Star Trucking v. Minn. Transp. Regulation Bd.*, 370 N.W.2d 666, 670 (Minn. Ct. App. 1985); *Beaty v. Minn. Bd. of Teaching*, 354 N.W.2d 466, 472 (Minn. Ct. App. 1984).

[87] *Dep't of Human Servs. v. Muriel Humphrey Residences*, 436 N.W.2d 110, 117 (Minn. Ct. App. 1989) ("DHS should not reject a factual finding without explanation when the Commissioner is neither reaching a different conclusion based on facts in the record, nor drawing different inferences from undisputed facts. If we allow an agency to reject a factual finding in this manner, we would effectively insulate it from meaningful judicial review. We do not allow the agency to avoid judicial review here, and find that the commissioner's amended finding number . . . is not supported by substantial evidence.").

[88] *Brinks v. Minn. Pub. Utils. Comm'n*, 355 N.W.2d 446, 452 (Minn. Ct. App. 1984).

[89] *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).

[90] *In re Lecy*, 304 N.W.2d 894, 898 (Minn. 1981); *First Nat'l Bank v. Dep't of Commerce*, 310 Minn. 127, 134, 245 N.W.2d 861, 865 (1976); *Downie v. Indep. Sch. Dist. No. 141*, 367 N.W.2d 913, 916 (Minn. Ct. App. 1985); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 531 (Minn. Ct. App. 2007); *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. Ct. App. 2000).

[91] *Loomis Courier Serv. v. NLRB*, 595 F.2d 491, 499 (9th Cir. 1979); *Saif Food Market v. Dep't of Health*, 664 N.W.2d 428, 431 (Minn. Ct. App. 2003) (noting adverse credibility determination by ALJ regarding owner's testimony and observed that the court defers to agency credibility determinations); *In re Friedenson*, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998) (finding that in deviating from ALJ's findings of fact and conclusions of law, "the board did not reject the ALJ's credibility assessments, but rather occasionally disagreed with inferences or conclusions based on testimony"); *see also Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. Ct. App. 2006).

[92] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Burton v. Illinois Civil Serv. Comm'n*, 57 Ill. App. 3d 835, 842, 373 N.E.2d 765, 770 (1978); *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984).

[93] Minn. Stat. § 14.62, subd. 1 (2014).

Services,[94] the Minnesota Court of Appeals reversed a decision by the Department of Human Services and held that the commissioner acted contrary to law by excluding all the evidence presented during the contested case hearing and granting summary disposition based on only the documents submitted during desk audits and administrative appeals.[95] The court noted that the statutes and rules governing contested case proceedings allow for discovery, the presentation of evidence, and the submission of summary disposition motions. Moreover, the court found that a meaningful opportunity to introduce evidence exists only if both the ALJ and commissioner are bound to consider properly presented and relevant evidence. The court remanded the matter back to the commissioner and specifically directed him to base his decision on the entire record as it existed during the contested case proceeding.[96]

ALJs will not recommend specific disciplinary action in occupational licensing cases, such as a recommendation of a three-month suspension or a revocation, under the OAH's current policy. The basis of the policy is that the agency is better able to achieve uniformity in matters of discipline and should have the full policy-making authority in this regard. This policy has been approved by the Minnesota Court of Appeals.[97] However, if an agency fails to act on a license case within 90 days of the close of the agency record, the case is returned to the ALJ for imposition of a specific disciplinary action.[98] When the agency rejects such a specific recommendation, it has been held that due process requires the agency to explain its rationale.[99]

Finally, as a general rule, neither an ALJ nor an agency head can declare a statute or rule unconstitutional on its face in a contested case proceeding, since that power is vested in the judicial branch of government.[100] It is permissible, however, for an agency or an ALJ to determine a constitutional question in the interpretation of a statute or its application to particular facts, taking into account relevant judicial decisions.[101] Notwithstanding that the ALJ

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[94] 572 N.W.2d 766 (Minn. Ct. App. 1998).

[95] *Id*. at 771.

[96] *Id*. at 770; *see also In re the Rate Appeal of Elim Homes, Inc.*, 575 N.W.2d 845, 849 (Minn. Ct. App. 1998) (declining to adopt a doctrine of administrative-judicial comity that would require the commissioner to defer to the ALJ's legal expertise, just as courts defer to the commissioner's technical expertise).

[97] *Padilla v. Minn. Bd. of Med. Exam'rs*, 382 N.W.2d 876, 886-87 (Minn. Ct. App. 1986).

[98] Minn. Stat. § 14.62 subd. 2a (2014).

[99] *Ga. Real Estate Comm'n v. Horne*, 141 Ga. App. 226, 233-34, 233 S.E.2d 16, 20 (1977); *In re Revocation of Family Child Care License of Gail Burke*, 666 N.W.2d 724, 728 (Minn. Ct. App. 2003) (finding commissioner of human services abused his discretion in revoking a child care license where ALJ recommended less severe discipline and agency failed to explain how record supported revocation–license discipline must not exceed seriousness of violation); *CUP Foods v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. Ct. App. 2001) (finding city council's failure to explain why it rejected the suggestion of the ALJ for conditional licensure, and instead imposed a six month closure, rendered the decision arbitrary and capricious).

[100] *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (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). *But see Schultz v. Springfield Forest Prods.*, 141 Or. App. 727, 730, 951 P.2d 169, 170-71 (1997).

[101] *Smith v. Willis*, 415 So. 2d 1331, 1336 (Fla. Dist. Ct. App. 1982); *Jackson Cnty. Educ. Ass'n v. Grass Lake Cmty.*, 95 Mich. App. 635, 641, 291 N.W.2d 53, 56 (1979); *Petterssen v. Comm'r of Emp't Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975); Marykay Foy, *The Authority of an Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry*, 17 J. NAT. ASSOC. ADMIN. LAW JUDGES 173 (Spr. 1997).

may not make a declaration of unconstitutionality, any evidence relevant to unconstitutionality should be offered for purposes of creating a record.[102]

[102] *See* § 9.5 (discussing discovery related to constitutional questions).