Chapter 14. The Agency Decision

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14.1 Exceptions to the Administrative Law Judges' Report and Argument to the Agency Before Final Decision

The Administrative Procedure Act (APA) provides that all parties adversely affected by a report of an administrative law judge (ALJ) may "file exceptions and present argument to a majority of the officials who are to render the decision."[1] The agency cannot make its final decision until the ALJ's report has been made available to the parties for ten days and an opportunity to file exceptions and to present argument has been afforded the parties.[2] An agency's failure to respond to a request for an opportunity to file exceptions and present argument may violate due process.[3] Individual agencies' procedural rules and statutes may contain additional procedures and requirements for filing exceptions and presenting argument.[4]

The APA does not specify that oral argument to the decision makers is required. Since courts, particularly appellate courts, often decide cases without oral argument, it must be assumed that no oral argument is constitutionally required. Either written or oral argument satisfies due process.[5] The contested case rules of individual agencies may provide for oral argument,[6] or the agency may exercise its discretion to allow oral argument in particular cases. Failure by agency staff to file exceptions to the recommended decision of the ALJ does not prevent the agency from issuing findings different than those contained in the recommended decision.[7] A party's failure to object to an ALJ's discovery ruling in exceptions does not preclude that party from raising the discovery issue on judicial review.[8]

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[1] Minn. Stat. § 14.61, subd. 1 (2014). Commissioners may delegate authority to file and present argument as a party adversely affected to other officers in the agency. *Id.* § 15.06, subd. 6.

[2] *Id.* § 14.61, subd. 1.

[3] *In re Haugen*, 278 N.W.2d 75, 79-80 (Minn. 1979).

[4] *See, e.g., In re Labor Law Violation of Chafoulias Mgmt. Co.*, 572 N.W.2d 326, 332 (Minn. Ct. App. 1997) (finding Commissioner's failure to promulgate procedural rules for filing exceptions did not violate due process where Commissioner rejected relator's exceptions on substantive, not procedural, grounds); Minn. R. 7829.2700 (2013) (governing public utilities commission procedure following ALJ reports).

[5] *R.R. & Warehouse Comm'n v. Chi. & Nw. Ry.*, 256 Minn. 227, 235, 98 N.W.2d 60, 66 (1959) (dictum). *See generally* 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 9.5 (5th ed. 2014). *But see In re Minn. Pub. Utils. Comm'n*, 417 N.W.2d 274, 283 (Minn. Ct. App. 1987); *In re Determining the Natural Ordinary High Water Level of Lake Pulaski*, 384 N.W.2d 510, 515 (Minn. Ct. App. 1986).

[6] *See, e.g.*, Minn. R. 7829.2700, subp. 3 (2013) (granting parties opportunity for oral argument before the public utilities commission following ALJ's report).

[7] *In re Hutchinson*, 440 N.W.2d 171, 175 (Minn. Ct. App. 1989).

[8] *Surf & Sand Nursing Home v. Dep't of Human Servs.*, 422 N.W.2d 513, 519-20 (Minn. Ct. App. 1989).

14.2 Agency Review of the Record Before Decision

When the ALJ issues his or her recommended decision,[9] the ALJ certifies the official record to the agency.[10] Upon receipt of the record, the agency conducts its own quasi-judicial determination of the contested case. In reaching its decision, the agency must rely solely on the record. Both statute[11] and due process[12] require that the agency decisionmaker consider only factual information or evidence that is part of the record.

Consistent with this requirement, decisionmakers may not decide cases on the basis of information acquired from ex parte contacts. Due process, in particular, generally forbids such contacts as inconsistent with the fundamental premises inherent in our concept of adversary hearings.[13] Ex parte contacts with an agency decision maker may be regarded as fraud on the agency.[14] But not all such contacts result in a due process violation.[15] The issue is whether the contact has created a risk of actual bias.[16] An ex parte contact has been found to not violate due process where those objecting to the contact had the opportunity to confront, cross-examine, or argue concerning the information received by the adjudicator in the contact.[17] A clandestine ex parte contact not made part of the record would afford the objector no such opportunity.[18]

The agency can take notice of facts of which judicial notice could be taken and also of general, technical, and scientific facts within its specialized knowledge, provided that before or during the hearing, parties have been given notice and an opportunity to contest any such facts.[19] In evaluating the evidence in the record, however, the agency may utilize its experience, technical competence, and specialized knowledge.[20]

The ALJ's report is not ordinarily binding on the agency.[21] It is, however, entitled to some credence. Determinations of the credibility of witnesses by the ALJ are, for example, entitled to

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[9] Minn. Stat. § 14.50 (2014) (providing that ALJ's report contain findings of fact, conclusions of law, and recommendation on action to be taken by agency).

[10] *Id.* § 14.58.

[11] *Id.* §§ 14.60, subd. 2, .62.

[12] *See Hosking v. Metro. House Movers Corp.*, 272 Minn. 390, 397, 138 N.W.2d 404, 409 (1965) (dictum); *Hunter v. Zenith Dredge Co.*, 220 Minn. 318, 325-28, 19 N.W.2d 795, 799-800 (1945).

[13] *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981); *Camero v. United States*, 375 F.2d 777, 780-81 (Ct. Cl. 1967) (opining that due process forbids adversary to proceeding from communicating privately with decision maker); *see Doe v. Hampton*, 566 F.2d 265, 276-77 (D.C. Cir. 1977) (dictum); *see also Hard Times Café v. City of Minneapolis*, 625 N.W.2d 165, 174 (Minn. Ct. App. 2001) (finding substantial evidence of procedural irregularities where city council members considered evidence outside the record and transferring the case to district court to take testimony); Minn. R. Prof. Conduct 3.5(g) (forbidding ex parte communications).

[14] *In re Minn. Pub. Utils. Comm'n*, 417 N.W.2d 274, 280-83 (Minn. Ct. App. 1987).

[15] *Simer v. Rios*, 661 F.2d 655, 679 (7th Cir. 1981).

[16] *See Barlau v. City of Northfield*, 568 F. Supp. 181, 187 (D. Minn. 1983).

[17] *Simer*, 661 F.2d at 679; *Barlau*, 568 F. Supp. at 186-87.

[18] *Barlau*, 568 F. Supp. at 186; *see supra* text accompanying note 16 (discussing *Barlau*); *see also Simer*, 661 F.2d at 680-81.

[19] Minn. Stat. § 14.60, subd. 4 (2014); *see also* § 10.4 in this volume.

[20] Minn. Stat. § 14.60, subd. 4 (2014); *see Kollmorgen v. Bd. of Med. Exam'rs*, 416 N.W.2d 485, 487-88 (Minn. Ct. App. 1987).

[21] *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984) (stating that relationship between agency and ALJ differs in regard to findings of fact from that between appellate court

some weight.[22] On the other hand, inferences and conclusions drawn from the facts by the ALJ may be given less weight.[23] Moreover, it is within the particular expertise of the agency to evaluate the weight to be given expert testimony.[24] An agency might, for example, focus on certain witnesses' testimony, and give one witness's testimony more weight.[25] In fact, the agency decision maker owes no deference to the agency's own expert witnesses.[26] While the ALJ's report is part of the record for the agency's consideration,[27] it is only one part of the record and is usually only a recommendation to the agency.[28] Agency officials render the final decision under the APA.[29] The agency must conduct its own review of the record and reach its own independent determination of all issues, whether legal or factual. It may not rubber-stamp the findings and conclusion of the ALJ.[30]

The agency may make its own findings differing from those of the ALJ as long as the agency's findings are supported by substantial evidence in the record. It is not restricted to reviewing the findings of the ALJ and changing them only when they are not supported by

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and lower court); *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326-27 (Minn. 1983) (dictum); *In re 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). An agency may, however, delegate final decisionmaking authority to an ALJ. Minn. Stat. § 14.57(a) (2014).

[22] *See First Nat'l Bank v. Dep't of Commerce*, 310 Minn. 127, 134, 245 N.W.2d 861, 865 (Minn. 1976); *Saif Food Mkt. 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 observing that the court defers to agency credibility determinations); In re Friedenson, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998) (finding that board, in deviating from the ALJ's findings of fact and conclusions of law, "did not reject the ALJ's credibility assessments, but rather occasionally disagreed with inferences or conclusions based on testimony").

[23] *City of Moorhead*, 343 N.W.2d at 846-47 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (hearing examiner's report part of record under Taft-Hartley Act)).

[24] *In re Hutchinson*, 440 N.W.2d 171, 177 (Minn. Ct. App. 1989).

[25] *Petition of N. States Power Gas Util.*, 519 N.W.2d 921, 926 (Minn. Ct. App. 1994) (citing *Minn. Power & Light Co. v. Minn. Pub. Util. Comm'n*, 342 N.W.2d 324, 330 (Minn. 1983)).

[26] *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). *But see Hurrle v. Cnty. of Sherburne*, 594 N.W.2d 246, 251 (Minn. Ct. App. 1999) (reiterating that decisionmaking entity may not reject expert testimony without adequate reasons).

[27] *City of Moorhead*, 343 N.W.2d at 847; *Big Fish Lake Sportsmen's Club v. Water Res. Bd.*, 400 N.W.2d 416, 421 (Minn. Ct. App. 1987).

[28] *City of Moorhead*, 343 N.W.2d at 847; *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326-27 (Minn. 1983) (dictum). There are several exceptions created by statute where the agency is bound by the ALJ's findings and conclusions. *E.g.*, Minn. Stat. §§ 182.661, subd. 3 (OSHA citations), .669 (OSHA discrimination cases), 244.052, subd. 6 (sex offender notice), 363A.29, subds. 3, 7 (human rights cases) (2014).

[29] *Excess Surplus of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 278 (agency decisionmaker owes no deference to the recommendations of the ALJ); *City of Moorhead*, 343 N.W.2d at 846; *In re Application of the Grand Rapids Pub. Utils. Comm'n*, 731 N.W.2d 866, 870 (Minn. Ct. App. 2007) (stating the commission need not defer to ALJ's findings, conclusions, or recommendation).

[30] *See Urban Council on Mobility v. Minn. Dep't of Natural Res.*, 289 N.W.2d 729, 736 (Minn. 1980); *PEER v. Minn. Envt'l. Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978); *Brinks v. Minn. Pub. Utils. Comm'n*, 355 N.W.2d 446 (Minn. Ct. App. 1984).

substantial evidence.[31] In addition, an agency is not bound to adopt stipulations of fact and may look to other evidence in the record.[32] An agency, however, may not base its decision on evidence outside the record even where that evidence was part of the record in a previous contested case.[33]

Since 2000, the APA has required an agency that rejects or modifies a finding of fact, conclusion, or recommendation of an ALJ to state the reasons for each rejection or modification.[34] Before this amendment, case law had encouraged an agency to state its reasons for changing an ALJ recommended decision. If the agency rejects an ALJ's recommendations, the "better practice" is for the agency to articulate its reasons for doing so.[35] An agency's rejection of an ALJ's findings, or its significant departure from them, without any comment or explanation suggests that the agency exercised its will rather than its judgment.[36]

What constitutes a review of the record by the agency adequate to ensure that the agency is deciding independently and is not rubber-stamping the report of the ALJ is determined on a case-by-case basis. A ten-hour review by an agency head of a voluminous record, in which the agency head (1) reviewed the entire transcript, reading verbatim the areas of testimony he felt were of substance or in dispute, (2) examined every exhibit, and (3) received a four- or five-hour briefing from his staff reviewing the evidence and the arguments of the parties, has been held sufficient.[37] Where two of three decision makers acting as a commission had read the entire record before the hearing examiner and the third had read one-half of the record and all had considered the written and oral objections of the parties before decision, the review of the record was sufficient.[38] And where all of the agency decision makers had heard oral arguments, read briefs and appendices and the recommended decision of the ALJ but only one member and the advising assistant attorney general had read the whole transcript, the review of the record was consistent with due process.[39]

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[31] *City of Moorhead*, 343 N.W.2d at 847; *In re Friedenson*, 574 N.W.2d 463, 467 (Minn. Ct. App. 1998); *BAL, Inc. v. City of St. Paul*, 469 N.W.2d 341, 343 (Minn. Ct. App. 1991) (stating that city council may reject or modify ALJ's findings); *In re Hutchinson*, 440 N.W.2d 171, 175 (Minn. Ct. App. 1989). *But see In re Lidberg*, 529 N.W.2d 376, 381 (Minn. Ct. App. 1995) (holding commissioner in error for rejecting ALJ's conclusion after adopting ALJ's findings).

[32] *In re N. States Power Co.*, 440 N.W.2d 138, 140 (Minn. Ct. App. 1989).

[33] *Id*.

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

[35] *City of Moorhead*, 343 N.W.2d at 847; *In re Hutchinson*, 440 N.W.2d at 176 (finding appellate court's review more critical where conclusions differ from ALJ's); *In re Perron*, 437 N.W.2d 92, 96 (Minn. Ct. App. 1989); *Dep't of Human Servs. v. Muriel Humphrey Residences*, 436 N.W.2d 110, 117 (Minn. Ct. App. 1989).

[36] *In re Revocation of the Family Child Care License of 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 the record supported revocation); *In re Sentry Ins. Payback Program*, 447 N.W.2d 454, 460 (Minn. Ct. App. 1989); *In re Orr*, 396 N.W.2d 657, 662 (Minn. Ct. App. 1986); *Five Star Trucking, Inc. 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, 471 (Minn. Ct. App. 1984).

[37] *Urban Council on Mobility v. Minn. Dep't of Natural Res.*, 289 N.W.2d 729, 736 (Minn. 1980).

[38] *In re Lecy*, 304 N.W.2d 894, 898-99 (Minn. 1981).

[39] *In re Hutchinson*, 440 N.W.2d at 176; *see also Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332, 339-40 (Minn. Ct. App. 1999) (upholding agency decision although only five of the seventeen members of the Board of Water and Soil Resources heard oral argument or read the briefs, because the statute specifically

An agency decision maker may consult agency staff in arriving at a decision.[40] Due process may, however, prevent the decision maker from consulting an agency staff member involved in the investigation of the case if, under the circumstances, the consultation would result in biasing the decision maker.[41] Statutes governing the health-related and non-health-related licensing boards prevent a board member consulted during an investigation from voting on the decision in the case but allow the member to participate at the hearing.[42] The Minnesota Court of Appeals has commented that review of the agency's draft order before issuance by the attorney who represented the agency in the hearing as an advocate is objectionable, as it creates an appearance of possible prejudice and a risk of biasing the agency.[43]

If the agency decision maker is a group of persons, such as a board or commission, the Minnesota open meeting law[44] may sometimes apply. The open meeting law does not, however, require that decision makers who have independently reviewed the record and deliberated individually have a collegial discussion.[45] The individuals need not orally discuss in public a decision on which they have reached independent judgments.[46]

14.3 The Agency Decision

The agency's final decision must be in writing.[47] The APA requires that it contain findings of fact and conclusions on all material issues.[48] Whether a particular fact is so material to the proceeding as to require a finding will likely be judged by whether a court could, without that

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requires that appeals on wetland replacement plans must be heard by the five-member dispute resolution committee of the Board).

[40] *See Urban Council on Mobility*, 289 N.W.2d at 736 (upholding agency decision where agency staff provided four- or five-hour briefing to agency head); *In re Otter Tail Power Co.*, 417 N.W.2d 677, 680 (Minn. Ct. App. 1988) (finding agency staff and counsel acted as advisors, making suggestions and recommendations and informing the agency of possibilities based upon their knowledge and expertise).

[41] *Urban Council on Mobility*, 289 N.W.2d at 736 ("The nature of the administrative process is such that a division of the agency may properly act as an advocate where the ultimate decision is made by the agency head. So long as the decision-maker remains unbiased, the combination of functions by an agency does not conflict with the dictates of due process."). *See generally Withrow v. Larkin*, 421 U.S. 35, 46-55 (1975) (finding combination of adjudicative and investigative functions in an agency does not constitute a due process violation except where, against a presumption of administrative regularity, a showing of disqualifiable bias such that a neutral decisionmaker is not presiding has been made).

[42] Minn. Stat. § 214.10, subd. 2 (2014).

[43] *See Richview Nursing Home v. Minn. Dep't of Pub. Welfare*, 354 N.W.2d 445, 460 (Minn. Ct. App. 1984).

[44] Minn. Stat. § 13D (2014). The open meeting law is not applicable to agencies, boards, or commissions when they are exercising quasi-judicial powers involving disciplinary proceedings. *Id.* § 13D.01, subd. 2.

[45] *In re Lecy*, 304 N.W.2d 894, 899 (Minn. 1981).

[46] *Id.*

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

[48] *Id.*; *Carter v. Olmsted Cnty. Hous. & Redev. Auth.*, 574 N.W.2d 725, 730 (Minn. Ct. App. 1998) (a decision not supported by proper findings is considered "prima facie arbitrary"). Even if the APA did not require such findings, it has been held that due process would require them. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis. 2d 646, 660-61, 275 N.W.2d 668, 676 (1979).

finding, conduct a judicial review of the decision.[49] The agency should state with clarity and completeness the facts and conclusions essential to its decision so that the reviewing court can determine if the facts found justify the action taken by the agency.[50] For example, an agency's findings consisting of a reference to certain pages in the transcript would be insufficient.[51] There is no hard-and-fast APA or due process rule concerning how detailed and particular findings should be.[52] There is rather a "zone of propriety" between the extremes of mere conclusion and undue particularity.[53] Whether a particular set of findings are adequate will depend on whether they enable the court on review to ascertain the facts on which the agency made its decision.

The APA requires that the agency decision contain findings of fact and conclusions on all material issues[54] but does not require a memorandum, opinion, or other statement of the agency's rationale in reaching its decision, or that the reasons or basis for the order be otherwise specified.[55] Due process does not require that the decision be accompanied by a written memorandum discussing each of the objections parties may have raised during the proceeding.[56] Nor does due process require the agency to discuss the weight given any part of the evidence.[57] The agency is not required to discuss the mental processes by which it reached its conclusion.[58] If there are no formal findings of fact and conclusions, due process may, at

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[49] *See PEER v. Minn. Envt'l. Quality Council*, 266 N.W.2d 858, 871-72 (Minn. 1978); *Bryan v. Cmty. State Bank*, 285 Minn. 226, 232, 172 N.W.2d 771, 775 (1969). Even in a situation where the APA does not require written findings, the Minnesota Court of Appeals has required them. *See Reserve Mining Co. v. Minn. Pollution Control Agency*, 364 N.W.2d 411, 414 (Minn. Ct. App. 1985) (holding agency decision to include disputed term in discharge permit proceeding to be arbitrary and capricious, because no written findings and reasons were prepared and agency had no opportunity to seek contested case status of the matter); *In re Nw. Bell Tel. Co.*, 374 N.W.2d 758, 762-63 (Minn. Ct. App. 1985), *rev'd in part*, 386 N.W.2d 723 (Minn. 1986).

[50] *Bryan*, 285 Minn. at 233, 172 N.W.2d at 775-76; *Morey v. Sch. Bd. of Indep. Sch. Dist. No. 492*, 271 Minn. 445, 450, 136 N.W.2d 105, 108 (1965); *Carter*, 574 N.W.2d at 729.

[51] *Morey*, 271 Minn. at 450, 136 N.W.2d at 108.

[52] *Id*. In the case of a county decision on a plat application, the court of appeals observed that an entity need not necessarily prepare formal findings of fact, but it must, at a minimum, have reasons for its decision recorded or reduced to writing, and in more than just a conclusory fashion. *Hurrle v. Cnty. of Sherburne*, 594 N.W.2d 246, 249 (Minn. Ct. App. 1999).

[53] *Morey*, 271 Minn. at 450, 136 N.W.2d at 108*; State v. Tri-State Tel. & Tel. Co.*, 204 Minn. 516, 524, 284 N.W. 294, 301 (1939).

[54] *See* Minn. Stat. § 14.62, subd. 1 (2014).

[55] The Minnesota APA contrasts, in this respect, with the federal APA, which requires that all decisions include a statement of the "findings and conclusions, *and the reasons or basis therefor*, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3) (2012) (emphasis added).

[56] *In re Lecy*, 304 N.W.2d 894, 899 (Minn. 1981).

[57] *See Tri-State Tel. & Tel. Co.*, 240 Minn. at 524, 284 N.W. at 301; *see also Lecy*, 304 N.W.2d at 899.

[58] *Tri-State Tel. & Tel. Co.*, 204 Minn. at 524, 284 N.W. at 301; *see also Lecy*, 304 N.W.2d at 899.

least in some circumstances, require a statement of reasons for the determination and the evidence relied on.[59] This assures that the decision is based on the record.[60]

The APA specifies that if an agency does not modify or reject an ALJ's recommended decision within 90 days of the close of the record, then the ALJ's recommended decision becomes final.[61] The record closes upon the filing of exceptions to the ALJ report and the presentation of argument, or upon the expiration of the deadline for doing so.[62] Apart from the APA, the statutes relating to particular agencies may contain decision deadlines.[63]

The agency must serve a copy of the agency's decision and any order on each party and on the ALJ.[64] The agency order may include an award of costs against an unsuccessful contested

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[59] *See PBGC v. LTV Corp.*, 496 U.S. 633, 655-56 (1990) (finding determination by the agency was lawfully made by informal adjudication, governed by federal APA in 5 U.S.C. § 555(e), which does not require findings or reasons to support decision, because courts cannot require an agency to use procedures greater than those required by statute or by due process); *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (finding minimum due process requirements for justifying deprivation of prisoner's good time and placement in solitary confinement include a written statement of evidence and reasons, though formal findings are unnecessary); *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972) (finding minimum due process requirements for parole revocation include written statement about evidence relied on and reasons for revocation, although no formal findings are necessary); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (finding minimum due process requirements for termination of AFDC payments, although not necessitating formal findings, include statement of reasons and evidence relied on).

Some commentators have questioned, however, whether "findings" requirements are constitutionally required at all and have suggested that due process requires them only in special circumstances. Clearly, courts do not make findings in all cases. *See* 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 8.5 (5th ed. 2010). *But see Cole v. Metro. Council HRA*, 686 N.W.2d 334, 338 (Minn. Ct. App. 2004) (noting that, under federal regulations, a recipient of assistance is entitled to a written decision that briefly states the reasons for the determination; although the findings were somewhat vague, they were sufficient to permit meaningful appellate review).

[60] *See Goldberg*, 397 U.S. at 271.

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

[62] *Id.* § 14.61, subd. 2.

[63] *See, e.g.*, *id.* §§ 216B.16, subd. 2 (public utilities commission - gas and electric); 237.075, subd. 2 (public utilities commission - telephone) (2014); *see also Henry v. Minn. Pub. Utils. Comm'n*, 392 N.W.2d 209, 213-14 (Minn. 1986) (finding 10-month time limit on telephone rate decisions of the Minnesota Public Utilities Commission is a limit upon the time within which rates may be suspended and not a temporal limit on the commission's jurisdiction that would operate to divest the commission of jurisdiction over the proceeding upon the expiration of 10 months); *In re Eigenheer*, 453 N.W.2d 349, 354-55 (Minn. Ct. App. 1990) (finding Commissioner's order issued after statutory 60 days from hearing was not void where statute is directive and not mandatory).

[64] Minn. Stat. § 14.62, subd. 1 (2014). In fact, if an agency order is served upon a party's attorney, but not the party herself, the order has not been "issued" for purposes of starting the appeal period. *In re Findings of Abuse of D.F.C. v. Comm'r. of Health*, 693 N.W.2d 451, 454-55 (Minn. Ct. App. 2005) (acknowledging that under normal district court rules, service on the attorney is sufficient; but noting that some human services statutes require service on both the party *and* the attorney and finding it inconsistent to interpret the service required for the commissioner's order differently); *see also Reynolds v. Dep't of Human Servs.*, 737 N.W.2d 367 (Minn. Ct. App. 2007) (applying rules of civil procedure to informal adjudicative decision, allowing additional three days to the statutory appeal time for persons served by the agency by mail).

case litigant in favor of the agency if authorized by statute.[65] Under a statute authorizing an agency to require a licensee to pay "all costs" of the proceeding, disbursements may be taxed against the licensee; attorney fees and investigation costs of the attorney general's office may not, however, be taxed.[66] Costs recoverable by a successful contested case litigant against the agency are provided by statute.[67] They may include filing fees, subpoena fees, mileage, transcript costs, court reporter fees, expert witness fees, photocopying fees, printing costs, postage, delivery costs, and service of process fees.[68]

14.4 Rehearing and Reconsideration

The APA provides that a party seeking rehearing or reconsideration must file the request within ten days of the agency's order.[69] The APA, however, does not confer a right to rehearing or reconsideration on any party to a contested case. The statutes or rules specific to a particular agency may contain such a right.[70] Specific agency statutes or rules might contain procedural requirements for rehearing and reconsideration that would supplement those found in the APA.[71] The Office of Administrative Hearings (OAH) rules provide that any notice of and order for rehearing must be served on all parties in the same manner prescribed for the original notice and order for hearing.[72] They also provide that the rehearing must be conducted in the same manner as the original hearing.[73]

Although the APA provides no right to a rehearing, and accordingly agencies are not required to entertain requests for rehearing, agencies may exercise their discretion to do so.[74]

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[65] *See, e.g.*, Minn. Stat. §§ 150A.08, subd. 3a (costs in dental license actions), 237.075, subd. 10 (costs in PUC proceeding) (2014); *In re Wang*, 441 N.W.2d 488, 495-96 (Minn. 1989). *See generally In re Nw. Bell Tel. Co.*, 374 N.W.2d 758, 761-62 (Minn. Ct. App. 1985) (analyzing whether costs claimed by intervenor were or were not allowed by applicable public utility statute).

[66] *Wang*, 441 N.W.2d at 495-96.

[67] Minn. Stat. § 15.471, subd. 4 (2014).

[68] *Id.*; *Wang*, 441 N.W.2d at 497.

[69] *See* Minn. Stat. § 14.64 (2014). The statute provides:

> If a request for reconsideration is made within ten days after the decision and order of the agency, the 30-day period provided in section 14.63 [for a writ of certiorari for judicial review] shall not begin to run until service of the order finally disposing of the application for reconsideration.

Id.; *see also Nw. Bell Tel. Co.*, 374 N.W.2d 758, 761 (Minn. Ct. App. 1985) (noting that once a request to rehear has been made by at least one party to the proceeding, the 30-day appeal period does not begin to run as to all parties until service of the order disposing of the application).

[70] *See, e.g.*, Minn. R. 7829.3000 (2013) (public utilities commission).

[71] *See, e.g.*, *id*. 7829.3000-.3200; *Henry v. Minn. Pub. Utils. Comm'n*, 392 N.W.2d 209, 214-15 (Minn. 1986) (discussing telephone rate proceeding rehearing requirements).

[72] Minn. R. 1400.8300 (2013) (providing that ALJ may permit less than 30 days' notice prior to rehearing).

[73] *Id.*

[74] *Henry*, 392 N.W.2d at 214 (finding Minn. Stat. § 216A.05, subd. 5, authorized MPUC to reopen hearing on own motion to avoid cost of retrying issues); *Plunkett v. First Nat'l Bank of Austin*, 262 Minn. 231, 246 n.6, 115 N.W.2d 235, 245 n.6 (1962) (dictum); *Pfalzgraff v. Comm'r of Econ. Sec.*, 350 N.W.2d 458, 460 (Minn. Ct. App. 1984).

Where through fraud, mistake, or misconception of facts, an agency enters an order, it may, with notice to the parties, correct its order.[75] An agency has the inherent authority to correct its prior decisions.[76] An agency may also reopen its own proceeding on the ground of an implied authority to deal with fraud on the agency resulting from *ex parte* contacts with agency decision makers.[77] An agency may exercise its discretion to reconsider a matter on the ground of newly discovered evidence.[78] Rejecting an application for rehearing on such ground will not, however, constitute an abuse of discretion where the proffered evidence is merely cumulative of that already in the record and was in existence at the time of the hearing.[79] The authority of an agency to rehear or reconsider lasts until its jurisdiction is lost on the filing of an appeal from its decision.[80] A rehearing may in some circumstances be summary and not include the taking of additional evidence.[81]

The APA provides that an application for rehearing or reconsideration is not a prerequisite to judicial review of a contested case.[82] The Court of Appeals has ruled that it could consider issues not addressed by an unemployment law judge in the initial decision but raised and addressed for the first time on a motion for reconsideration.[83]

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[75] *Anchor Cas. Co. v. Bongards Co-op. Creamery Ass'n*, 253 Minn. 101, 106, 91 N.W.2d 122, 126 (1958); *see also State ex rel. Turnbladh v. Dist. Court*, 259 Minn. 228, 236, 107 N.W.2d 307, 313 (1960); *In re Minn. Pub. Utils. Comm'n*, 417 N.W.2d 274, 281-82 (Minn. Ct. App. 1987).

[76] *Minn. Pub. Utils. Comm'n*, 417 N.W.2d at 282; *see also In re Class A License Application of N. Metro Harness, Inc.*, 711 N.W.2d 129, 136 (Minn. Ct. App. 2006); *In re Authority to Provide Alt. Operator Servs. in Minn.*, 490 N.W.2d 920, 925 (Minn. Ct. App. 1992).

[77] *Minn. Pub. Utils. Comm'n*, 417 N.W.2d at 280-83.

[78] *See Stepan v. Campbell*, 228 Minn. 74, 78-79, 36 N.W.2d 401, 404 (1949).

[79] *Id*.

[80] *Anchor Cas. Co.*, 253 Minn. at 106, 91 N.W.2d at 126 (finding that case law prior to adoption of ten-day filing requirement by Minn. Stat. § 14.64 allowed petition to be filed within reasonable time; time within which appeal could be filed has been said to be reasonable; therefore, request for rehearing or reconsideration under law before § 14.64 was timely as long as time for appeal had not expired; prejudice to other interested parties was also consideration in determining timeliness of application). The agency's authority to amend its decision also expires when the appeal period has ended and no appeal has been filed. *See, e.g., Rowe v. Dep't of Emp't & Econ. Dev't*, 704 N.W.2d 191, 196 (Minn. Ct. App. 2005) (finding ULJ lacked authority to amend decision *sua sponte* because the 30-day appeal period had expired and by statute the ULJ's decision became a final decision of the Department if no appeal was filed); *cf. N. Metro Harness*, 711 N.W.2d at 135 (recognizing agency's inherent authority to reopen, rehear, and redetermine a decision if time for appeal has not yet expired).

[81] *See Henry v. Minn. Pub. Utils. Comm'n*, 392 N.W.2d 209, 215 (Minn. 1986).

[82] Minn. Stat. § 14.64 (2014).

[83] *The Work Connection, Inc. v. Bui*, 749 N.W.2d 63, 66-67 (Minn. Ct. App. 2008).