

# Chapter 20. Rulemaking with a Hearing

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## 20.1 Introduction

Rulemaking in Minnesota has been described by one commentator as being “unnecessarily complicated, cumbersome, costly, and time consuming.”<sup>1</sup> Others have identified procedures similar to Minnesota law as “designed to insure that rulemaking determinations are democratic as well as technocratic.”<sup>2</sup> Subjective opinions aside, formal procedures governing rulemaking with a hearing before an administrative law judge (ALJ) with the Minnesota Office of Administrative Hearings (OAH) are well established. The public's opportunity to be heard during rulemaking has a clear basis in statute and procedural rules.

Proposals to substitute more informal rulemaking procedures similar to the Model State Administrative Procedure Act have been introduced but have never been enacted in Minnesota.<sup>3</sup> Amendments to the Minnesota Administrative Procedure Act (APA) in 1982 and 1984 streamlined the rulemaking process and authorized rulemaking without a hearing while retaining other formal public participation procedures in most instances. More recently, amendments to the APA have added additional regulatory analysis for the agency to include in the Statement of Need and Reasonableness (SONAR) and a requirement that the agencies seek additional methods of notifying affected persons regarding the proposed rule.<sup>4</sup> Further amendments to the rules of the OAH governing rulemaking were adopted in 1985, 1996, and 2001.<sup>5</sup>

The Minnesota process of rulemaking with a hearing is one in which an agency proposes a rule in its entirety before the hearing. The hearing process becomes an opportunity to test the rule as proposed and is not generally a forum in which facts are gathered to create the rule. At the hearing, the department may defend and support its proposal but is willing to listen and accept other proposals from those commenting on the proposed rules. A hearing supports the goal of transparency and community participation in the formal rulemaking process and provides a venue for affected parties to come forth and provide feedback, both in support and in opposition to the proposed rule, and gives the agency an opportunity to listen to feedback

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<sup>1</sup> Carl A. Auerbach, *Administrative Rulemaking in Minnesota*, 63 Minn. L. Rev. 151, 152 (1979).

<sup>2</sup> Arthur Earl Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I: General Provisions, Access to Agency Law and Policy, Rulemaking and Review of Rules*, 34 Ad. L. Rev. 1, 7 (1982).

<sup>3</sup> S.F. 2467 (2013-14); H.F. 2724 (2013-14); H.F. 830 (1995-96); H.F. 1899 (1993-94); H.F. 783 (1985-86).

<sup>4</sup> Minn. Stat. § 14.131 (2009 & 2012).

<sup>5</sup> Adopted Permanent Rules Governing Rulemaking Procedure, Contested Case and Revenue Recapture Act Hearings, and Awards of Expenses and Attorneys Fees to Prevailing Parties, 26 Minn. Reg. 391 (Sept. 17, 2001); Adopted Permanent Rules Governing Rule Adoption Proceedings, 20 Minn. Reg. 2058 (January 29, 1996); Adopted Rules Relating to Rulemaking Procedures of the Office of Administrative Hearings; and Adopted Rules Relating to Contested Case Hearings, 9 Minn. Reg. 2276 (April 8, 1985).

and consider other rule proposals. Any agency that wishes to control the time and money spent on the rulemaking process will, therefore, treat the period before the rule is proposed as one in which the agency actively seeks information and feedback from and negotiates with persons affected by the proposed rule. Agencies usually have been in contact with affected parties through task forces, stakeholder groups or by soliciting comments before the hearing from expert reviewers as well as any affected parties. Through this process agencies and affected parties have an opportunity to become aware of the controversial issues and either try to resolve them early in the process or go to hearing with the remaining unresolved issues. This chapter will address adopting rules with a public hearing, which is initiated by publishing a Notice of Intent to Adopt Rules with a Hearing or by a request of 25 persons in response to a Notice of Intent to Adopt Rules Without a Hearing. Agencies may also adopt rules with a public hearing after publishing a Dual Notice of Intent to Adopt Rules. The procedures for adopting rules using a “dual notice” are discussed fully in chapter 19 and will only be briefly mentioned in this chapter.

## 20.2 Initiation of Rulemaking with a Hearing

Before any formal rulemaking hearing on proposed rules comes before an ALJ, several prehearing opportunities to participate by the public and affected parties exist. These opportunities include solicitation of outside opinion by publication of the Request for Comments by the agency on a subject matter of possible rulemaking<sup>6</sup> and possible input into preparation of the required SONAR.<sup>7</sup>

The structure of the APA encourages negotiations with agency staff and decisionmakers over rulemaking issues before a proposed rule is published in the *State Register*. Throughout the formal rulemaking process the agency seeks to obtain proposals and comments on the rules from affected parties. An agency may do this formally by establishing a task force or a stakeholder advisory group, consulting with expert reviewers, holding townhall meetings in relevant geographic locations or informally by directly contacting affected parties or their representatives or the affected parties may directly contact the agency with their feedback.<sup>8</sup>

Generally, rulemaking with a hearing before an ALJ may occur in one of two ways: 1) A hearing may be initiated by the agency; or 2) a hearing may be required due to the receipt of the necessary number of hearing requests.

### 20.2.1 Rulemaking with a Hearing Initiated by an Agency

The rulemaking agency must make the strategic decision whether to publish its rule with a notice of hearing, notice of no hearing or a dual notice. This decision is one that is entirely in the discretion of the agency.<sup>9</sup> Practical agency considerations in convening a hearing would include: the scope and number of possible objections and objectors; the type and scope of

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<sup>6</sup> Minn. Stat. § 14.101 (2014); *see* § 17.1.4.

<sup>7</sup> Minn. Stat. §§ 14.131, .23 (2014); Minn. R. 1400.2070 (2013); *see* § 17.2.

<sup>8</sup> *See* § 17.1.3.

<sup>9</sup> *See* Minn. Stat. § 14.14, .22 (2014); *see also* Model State Admin. Procedure Act § 3-104 (1981).

possible controversies; the urgency of the need for rules; the likelihood of challenge to or subsequent judicial review of the rules or of the application of the rules; the costs of rulemaking with a hearing; and other relevant reasons.

## 20.2.2 Triggering Rulemaking Hearing by Request of Twenty-five Persons

Even if the agency decides to publish a notice of intent to adopt without a public hearing, a hearing may be required due to the request of interested persons. A written request by twenty-five or more persons submitted to the agency during the thirty days allowed for comment on a rule proposed for adoption without a hearing requires the agency to publish a notice of hearing employing the procedures set forth for the initiation of rulemaking with a hearing.<sup>10</sup>

To save time and expense, the agency may publish a dual notice of intent to adopt rules. A dual notice provides that a hearing will not be held unless twenty-five or more persons request a hearing.<sup>11</sup> If twenty-five or more affected parties request a hearing, the hearing time, date, and place are already published in the dual notice and the agency does not have to publish an additional notice of hearing.<sup>12</sup> In order for a hearing request to be valid, the written request must include: (1) the name and address of the person or entity requesting a hearing; and (2) the portion or portions of the rule that the person or entity objects to or a statement that the person or entity objects to the rule in its entirety.<sup>13</sup> Whether or not a hearing request meets these requirements and is valid is up to the rulemaking agency.

## 20.3 Procedures for a Rulemaking Hearing before an Administrative Law Judge

The procedural requirements for rulemaking with a hearing before an ALJ are set forth in sections 14.131 through 14.20 of the Minnesota Statutes and in the rules adopted by the Minnesota OAH.<sup>14</sup> These requirements have not generated much case law, and preenforcement judicial review of agency rules is limited.<sup>15</sup> An absence of codification or annotation of agency or OAH precedent also makes comparative review of rulemaking proceedings difficult.

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<sup>10</sup> Minn. Stat. § 14.25, subd. 1 (2014).

<sup>11</sup> *Id.* § 14.22, subd. 2.

<sup>12</sup> *See* § 19.3.

<sup>13</sup> Minn. Stat. § 14.25, subd. 1 (2014).

<sup>14</sup> Minn. R. 1400.2000-.2240 (2013).

<sup>15</sup> *See generally Handle With Care, Inc. v. Dep't of Human Servs.*, 406 N.W.2d 518, 520-23 (Minn. 1987) (determining whether statutory preconditions for rulemaking existed); *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 240-41, 244-46 (Minn. 1984) (stating that judicial review of a preenforcement challenge to a rule's validity "is on the record made in the rulemaking proceeding" and holding that a portion of the rule challenged was "defective and invalid").

## 20.3.1 Appointment of Administrative Law Judge and Filing of Jurisdictional Documents

Prior to publishing the rules in the *State Register*, the agency must submit its notice of hearing or dual notice and other documents to the OAH for the assignment of an ALJ and to schedule a hearing date.<sup>16</sup> The agency is required to file with the chief ALJ, certain documents including: the proposed rules with certification of approval by the revisor of statutes in regard to form; a draft or final copy of the SONAR; and a proposed notice of hearing or dual notice containing the time, date, and place of the hearing.<sup>17</sup> The notice of hearing or dual notice is reviewed at this time, and the ALJ may suggest changes or additions. The ALJ is also required to advise the agency about the time and location of the hearing.<sup>18</sup> These documents are available for public inspection at the OAH. They are also available from the agency.

## 20.3.2 Publication and Other Notice

The APA<sup>19</sup> and OAH rules<sup>20</sup> govern the notice of hearing. Notice must be published in the *State Register*. Notice of the rulemaking procedure is also required to be sent to persons who have registered to be on the agency's list to receive such notices.<sup>21</sup> Agencies must also make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.<sup>22</sup> The proposed rules will, in most cases, also be required to be published in the *State Register*. The chief administrative law judge may authorize an agency to omit the text of a proposed rule from publication in the *State Register* in certain circumstances if the publication would be unduly cumbersome, expensive, or otherwise inexpedient.<sup>23</sup>

The notice of hearing contains either the text of the proposed rule or a description of the nature and effect of the proposed rule and an announcement of the availability of a free copy from the rulemaking agency.<sup>24</sup> Many agencies also publish their proposed rules at their website on the internet. The notice invites public comment on the proposed rule for a thirty-day period. The notice also notes the possibility of modification of the proposed rules as a result of the comments received. The public is notified that a SONAR, which contains the agency's justifications for the proposed rules, is available from the agency. The agency may also give notice of the hearing in the dual notice and inform affected parties that they may

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<sup>16</sup> See Minn. Stat. § 14.14, subd. 2a (2014); Minn. R. 1400.2020, subp. 1, .2080, subp. 5 (2013).

<sup>17</sup> Minn. R. 1400.2080, subps. 4, 5 (2013)

<sup>18</sup> Minn. Stat. § 14.50 (2014); Minn. R. 1400.2080, subp. 5 (2013)

<sup>19</sup> Minn. Stat. § 14.14, subd. 1a (2014).

<sup>20</sup> Minn. R. 1400.2080 (2013).

<sup>21</sup> Minn. Stat. § 14.14, subd. 1a, .22 (2014) (each agency maintains its own rulemaking mailing list and includes a list of names and addresses of all persons registered with the agency to receive these notices).

<sup>22</sup> Minn. Stat. § 14.14, subd. 1a (2014); see also *id.* § 14.116 (providing for notice to legislature); Minn. R. 1400.2060 (2013) (allowing for an agency to receive prior approval of its plan regarding "additional notice" from the Office of Administrative Hearings).

<sup>23</sup> Minn. Stat. § 14.14, subd. 1a(b) (2014).

<sup>24</sup> *Id.* § 14.14, subd. 1a.

submit a request for a hearing and how affected persons can submit such a request.<sup>25</sup> The time, date and place of the hearing and procedure on how to participate in the hearing process are also contained in the notice. The OAH has adopted rules for the form and content of the notice of hearing.<sup>26</sup>

## 20.4 Nature of the Hearing

In addition to the mandated procedures, the rulemaking hearing is adapted by the ALJ, after consultation with the agency and interested parties, to the problems arising out of the rules proposed, the subject matter sought to be regulated, the requirements of law, and the interests of nonagency participants. In most instances, the hearing involves accepting the agency's documents as exhibits, hearing statements from agency staff and attendees in the form of oral or written testimony and answering questions. On a few occasions, a proceeding has evolved into something very much like a trial at which witnesses are examined. The participants at the hearing are the agency and its legal counsel, the ALJ, and interested persons.

### 20.4.1 Participants

#### 20.4.1(1) The Agency

At the hearing, staff members active in drafting the rule and the statement of need and reasonableness usually speak for the agency. In more complex rulemakings, the agency may also offer expert witnesses to support and expand on the conclusions of the agency. The agency may be represented by agency leadership, program staff with expertise in the rulemaking area, agency rulemaking staff, or a representative from the attorney general's office. Agency representatives at the hearing may advise staff on developing the record and may ask questions on behalf of the agency of other participants making comments on the proposed rule.

#### 20.4.1(2) The Administrative Law Judge

Pursuant to statute, the chief ALJ assigns the ALJ who will conduct the hearing.<sup>27</sup> ALJs are not subject to any automatic disqualification, as is the case with judicial branch judges. Rather, by the terms of the rules of the OAH, ALJs may be disqualified only for cause.<sup>28</sup>

The ALJ is an active participant in many rulemaking proceedings. His or her first obligation is to manage the hearing and to create an accurate record. The ALJ must also ensure that all persons involved in the rule hearing are treated fairly and impartially.<sup>29</sup> More substantively, however, the ALJ independently examines the entire record and the language of

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<sup>25</sup> Minn. R. 1400.2080, .2540 (2013).

<sup>26</sup> *Id.* 1400.2530 ().

<sup>27</sup> Minn. Stat. § 14.14, subd. 2a (2014).

<sup>28</sup> Minn. R. 1400.2020, subps. 2,3 (2013).

<sup>29</sup> Minn. Stat. §§ 14.14, subd. 2a, .50 (2014).

the proposed rules to determine if the agency has shown, among other things, the rules to be needed and reasonable. In effect, the agency must meet a limited burden of proof about its rules that is independent of the strength of any opposition presented.<sup>30</sup>

The agency is not required to demonstrate on judicial review that its rules are supported by “substantial evidence.”<sup>31</sup> Rather, the rules must meet the more general legislative standard that they not be arbitrary and capricious.<sup>32</sup> In making this analysis, a reviewing court will make a “searching and careful” inquiry of the record to ensure that the agency action has a rational basis.<sup>33</sup> It is the agency's responsibility to explain the evidence on which it is relying and how the evidence connects rationally with the agency's choice of action to be taken.<sup>34</sup>

The ALJ's final obligation is the preparation of a report with findings and conclusions on each section of the rules proposed by the agency. The report examines compliance with procedural requirements, compliance with substantive requirements of law, and whether the agency has shown the need for and reasonableness of the proposed rules. The report may examine the rationale offered by the agency. The report may also criticize the rule, offer alternative language, or recommend deletion or changes in the rule as proposed.<sup>35</sup> Finally, the report will determine whether the changes or modifications offered by the agency after the published notice, or proposed by the ALJ, are “substantially different” than the rules as proposed.<sup>36</sup>

In addition to testing the rule for need and reasonableness, the ALJ's report must examine the relation of the rule to the particular statutory grant on which the rule is based to see if the agency has statutory authority for the rule. The agency and the courts may properly rely on the legislative history of the statute in rationalizing the need and reasonableness of the rule.<sup>37</sup>

### 20.4.1(3) “Interested Persons”

In addition to the agency and the ALJ, “interested persons”<sup>38</sup> may participate in the hearing process. The notice of hearing includes the reminder that persons seeking to affect the rule are subject to lobbying reporting requirements of the campaign finance and public disclosure board.<sup>39</sup>

Interested persons who participate may include businesses or persons affected by the new rule, their lobbyists, attorneys, and expert witnesses. The participation of interested persons may range from the submission of written comments to a complete presentation of witnesses and argument, legal and factual, on the proposed rule.

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<sup>30</sup> See *Manufactured Housing Inst. v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984) ; see also § 22.2.1.

<sup>31</sup> *Petterson*, 347 N.W.2d at 244.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Minn. Stat. §§ 14.15, .50 (2014); Minn. R. 1400.2240 (2013).

<sup>36</sup> Minn. Stat. § 14.15, subd. 3 (2014); see § 22.3.

<sup>37</sup> See *Petterson*, 347 N.W.2d at 242; see also chapter 22.

<sup>38</sup> Minn. Stat. § 14.14, subd. 2a (2014).

<sup>39</sup> Minn. R. 1400.2080, subp. 4(H)i(2013).

## 20.4.2 Hearing Procedure and Questioning of Witnesses and Participants<sup>40</sup>

At the commencement of the hearing, the ALJ will provide an oral explanation of the process to be followed.<sup>41</sup> The hearing is usually tape-recorded, although in some cases a court reporter may be employed. In any event, a transcript can be prepared if the agency desires one or if there is to be appellate consideration of the rulemaking. The agency then submits for the record the jurisdictional documents that demonstrate the agency's compliance with the APA's procedural rulemaking requirements.<sup>42</sup>

Under Minnesota Rule 1400.2220, the agency submission into the hearing record includes: the Request for Comments published in the *State Register*;<sup>43</sup> a petition for rulemaking if the rule was proposed in response to it;<sup>44</sup> the proposed rule, including the revisor's approval; the SONAR;<sup>45</sup> the notice of intent to adopt rules as mailed and as published in the *State Register*;<sup>46</sup> a copy of the document authorizing the omission of the publication of text from the *State Register*, if applicable;<sup>47</sup> the certificate of mailing the notice of intent to adopt rules and certificate of mailing list; the certificate of additional notice, if given; the certificate showing that the SONAR was sent to the legislative reference library;<sup>48</sup> written comments and submissions on the proposed rules; and other documents or evidence required to show compliance with any other law or rule.<sup>49</sup>

Next, the agency proceeds to demonstrate its substantive case. The APA requires the agency to make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rule at the hearing and to fulfill any relevant substantive or procedural requirements of law or rule.<sup>50</sup> The agency may rely on facts presented by others to support its proposed rule.<sup>51</sup> In general, the agency's case is contained in the statement of need and reasonableness. In effect, the statement of need and reasonableness is the text of the evidence and argument that the agency submits for review by the public and examination by the ALJ. In many instances, the agency's only submission at the hearing will be this document. The agency may, however, present additional oral evidence.<sup>52</sup> OAH rules provide that an agency may rely on its statement of need and reasonableness as its affirmative presentation at the hearing.<sup>53</sup> The agency is required to have copies of the proposed rules and the SONAR at the

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<sup>40</sup> See Minn. Stat. § 14.14, subd. 2a (2014).

<sup>41</sup> Minn. R. 1400.2210, subp. 2 (2013).

<sup>42</sup> See Minn. Stat. §§ 14.14, subd. 2a, .365 (2014); Minn. R. 1400.2200-.2220 (2013).

<sup>43</sup> Minn. Stat. § 14.101, subd. 1 (2014).

<sup>44</sup> *Id.* § 14.09.

<sup>45</sup> *Id.* § 14.131.

<sup>46</sup> *Id.* § 14.14, subd. 1a(a).

<sup>47</sup> *Id.* § 14.14, subd. 1a(b).

<sup>48</sup> *Id.* § 14.131.

<sup>49</sup> See chapter 9 (discussing state agency procedures in adopting rules with a public hearing).

<sup>50</sup> Minn. Stat. § 14.14, subd. 2 (2014).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* § 14.14, subd. 2a (); Minn. R. 1400.2210, subp. 3 (2013).

<sup>53</sup> Minn. R. 1400.2200, subp. 3 (2013).

hearing.<sup>54</sup> However, agency personnel familiar with the rules must still attend the hearing.<sup>55</sup> If the agency presents testimony or evidence that was not summarized in its statement, a continuance of the hearing is possible.<sup>56</sup>

Members of the public and interested persons who appear need not submit in advance any documents outlining the objections, criticism, or support they intend to offer to the rule. At the time of the hearing, their testimony and/or their written statement may be submitted.<sup>57</sup> There is no prehearing registration requirement for persons intending to speak at the hearing. Persons attending may indicate on a registration sheet at the hearing if they wish to speak or to be notified of either the date of issuance of the ALJ's report or the date of the filing of the rules with the secretary of state.<sup>58</sup>

During the hearing, the ALJ is required to allow questioning of agency representatives, of witnesses, and of interested persons making oral statements.<sup>59</sup> At most rule hearings, the questioning process is informal. If trial-type facts must be resolved in order to determine the reasonableness of the rule, the hearing may increasingly resemble a trial-type proceeding in which the witnesses are cross-examined by interested persons and/or their attorneys. The form of the examination of witnesses is within the discretion of the ALJ, but the available trial-type legal models tend to govern as the hearings become more adversarial.<sup>60</sup> Questioning on the purpose or intended operation of a rule is always allowed.<sup>61</sup> Questioning will be allowed for other purposes, such as to test the validity of data supporting the rule, if it is material to the evaluation or formulation of the proposed rule.<sup>62</sup>

### 20.4.3 The Rulemaking Record and Ex Parte Communications

The goal of both the agency and the ALJ is to build a careful record that will explain the basis of the rule.<sup>63</sup> The agency should attempt to address all material issues raised by interested

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<sup>54</sup> *Id.*, subp. 2 ().

<sup>55</sup> *Id.*, subp. 4.

<sup>56</sup> *Id.* 1400.2210, subp. 3.

<sup>57</sup> Minn. Stat. § 14.14, subd. 2a (2014); Minn. R. 1400.2210, subp. 5 (2013).

<sup>58</sup> Minn. R. 1400.2210, subp. 1 (2013).

<sup>59</sup> Minn. Stat. § 14.14, subd. 2a (2014); Minn. R. 1400.2210, subp. 4 (2013).

<sup>60</sup> See Carl A. Auerbach, *Administrative Rulemaking in Minnesota*, 63 Minn. L. Rev. 151, 184 (1979); see also *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council*, 435 U.S. 519, 524 (1978) (stating that “the formulation of procedures was basically to be left within the discretion of the agencies” and “cautioning reviewing courts against engrafting their own notions of proper procedures”); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W. 2d 741, 748 (Minn. Ct. App. 1989) (concluding that availability of an exhibit at a rulemaking hearing makes it a part of the record without further evidence that it was affirmatively presented by the agency); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894-95 (Minn. Ct. App. 1988) (stating that development of a record on policymaking to be done through rulemaking and applied in a contested case).

<sup>61</sup> Minn. Stat. § 14.14, subd. 2a (2014).

<sup>62</sup> *Id.*

<sup>63</sup> See *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 791 (Minn. 1989) (stating that the rulemaking record varies with the nature of the rule; some cases require a substantial evidentiary record while others may rely on “common knowledge” or “common sense”); *Manufactured Housing Inst. v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984) (stating that “in determining if the agency acted arbitrarily and



parties and by the ALJ, either by oral answers to questions or in written submissions after the close of the hearing. The record that the ALJ prepares for submission to the agency includes:

1. the jurisdictional documents submitted by the agency;
2. all written materials submitted by participants;
3. a tape recording of the hearing, or a transcript if one has been requested and prepared<sup>64</sup>;
4. all exhibits or other items of physical evidence; and
5. the report of the ALJ.

Certain ex parte contact with agency members by interested persons is allowed by the APA in the rulemaking process.<sup>65</sup> As such, the process of rulemaking is more analogous to the legislative process than to a judicial determination.<sup>66</sup> One could assert that First Amendment issues may be involved in the process of petitioning the government.

This informality is difficult to reconcile with the mandate of a formal and “exclusive” record.<sup>67</sup> In a formal hearing the agency has the obligation to create a record showing that the proposed rule is needed, reasonable, and consistent with law. The agency also has the responsibility to listen to feedback and consider proposed changes put forth from affected and interested parties. The agency need not show that no other rule could have been adopted or that no considerations outside the record have entered into its promulgation. The discretionary decisions of the agency before the rule is noticed are legislative; and the decision by the agency on whether to alter the proposed rule, either slightly or to the degree of “substantial difference,” is also legislative.

It also appears that the ALJ is not bound by any express ex parte limitations. Although the OAH has an explicit ex parte contact prohibition for contested cases,<sup>68</sup> no such rule exists for formal rulemaking. This fact must be understood, however, within the context of the obligation of the ALJ to provide a fair and impartial hearing and the existence of an “exclusive” record for purposes of judicial review.

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capriciously the court must make a ‘searching and careful’ inquiry of the record to ensure that the agency action has a rational basis”).

<sup>64</sup> An agency may be billed for a transcript of a hearing. Determine whether your agency has encumbered funds for this cost.

<sup>65</sup> See Minn. Stat. § 14.101 (2014) (advice on possible rules); see also *id.* § 14.15, subd. 2 () (requiring agency to wait five working days after receipt of ALJ report before taking any action).

<sup>66</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 386 (D.C. Cir. 1981) (discussing ex parte contact between the EPA and coal industry advocates, including a Senator).

<sup>67</sup> Minn. Stat. § 14.365 (2014).

<sup>68</sup> Minn. R. 1400.7700 (2013).

## 20.5 Post-Hearing Procedures

### 20.5.1 Post-Hearing Comments

At the close of the hearing, the record remains open for at least five working days, or, at the discretion of the ALJ, for up to twenty calendar days in order to allow the submission of additional comments by the agency and interested persons. The length of the comment period is announced at the hearing. At the close of this period, both the agency and interested persons have five working days to comment on any proposed modifications or new information submitted.<sup>69</sup> The 20-day period is now called the “comment period” and the five day period is called the “rebuttal period.”<sup>70</sup> This five-day rebuttal period is not available for the submission of new evidence.

### 20.5.2 Administrative Law Judge's Report and Chief Administrative Law Judge's Review

The ALJ must prepare a report within thirty days of the close of the record unless the chief ALJ grants an extension on the written request of the agency or the ALJ.<sup>71</sup> If the report finds a defect — in that it concludes that the agency has proposed changes to the rule that are substantial, that the rule as proposed is not needed or reasonable, or that the agency lacks statutory authority or has proposed a rule with a legal defect — then the report is submitted to the chief ALJ, who then prepares his or her own report.<sup>72</sup> If the ALJ report finds no defects, and recommends the adoption of the rule as proposed or modified, finds that the rule is needed, reasonable, and legal, and finds no changes proposed by the agency to be substantial, the report is submitted directly to the agency. The agency need not return the rule to the chief ALJ unless it makes changes to the rule other than those recommended by the ALJ. If such changes are made, the record is returned to the chief ALJ for a review on the issue of substantial difference only.<sup>73</sup> The modified rule cannot be “substantially different” than the rules proposed, unless the agency meets the OAH rule requirements for adopting a substantially different rule.<sup>74</sup> The “substantial difference” requirement is discussed further in chapter 22.

As part of the “legal” review, the ALJ must disapprove a rule if it:

1. was not adopted in compliance with the procedural requirements of Minn. Rules, chapter 1400, Minn. Stat. chapter 14, or other law or rule;<sup>75</sup>
2. is not rationally related to the agency’s objective or the record does not

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<sup>69</sup> Minn. R. 1400.2230, subd. 2 (2013); *see also* Minn. Stat. § 14.15, subd. 1 (2014).

<sup>70</sup> Minn. Stat. § 14.15, subd. 1 (2014).

<sup>71</sup> *Id.*, subd. 2 ().

<sup>72</sup> *Id.*, subds. 3,4; Minn. R. 1400.2240, .2100 (2013).

<sup>73</sup> Minn. Stat. § 14.16, subd. 1 (2014); MINN. R. 1400.2240, .2100 (2013).

<sup>74</sup> *See* Minn. R.1400.2110 (2013).

<sup>75</sup> Minn. R.1400.2100(A) (2013) (stating further that an administrative law judge may find that a procedural error must be disregarded if it meets the criteria under Minn. Stat. § 14.15, subd. 5, or 14.26, subd. 3 (d) (2014)).

- demonstrate the need for or reasonableness of the rule;<sup>76</sup>
3. is substantially different than the proposed rule, and the agency did not follow the procedures of Minn. Rules, 1400.2110;<sup>77</sup>
  4. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;<sup>78</sup>
  5. is unconstitutional or illegal;<sup>79</sup>
  6. improperly delegates the agency's powers to another agency, person, or group;<sup>80</sup>
  7. is not a "rule" as defined in Minn. Stat. §14.02, subd. 4, or by its own terms cannot have the force and effect of law;<sup>81</sup> or
  8. is subject to the requirements of Minn. Stat. § 14.25, subd. 2, regarding withdrawal of hearing requests and the withdrawal is not consistent with Minn. Stat. § 14.001, clauses (2), (4), and (5).<sup>82</sup>

If the chief judge agrees with the adverse conclusion of the ALJ that the rule has been substantially changed or that there is a defect related to either procedural or substantive requirements, the chief judge advises both the agency and the revisor of statutes of changes that will correct the defect.<sup>83</sup> The agency is required to alter the rule consistent with the findings of the chief ALJ, or, if applicable, show that the agency has satisfied the rule requirements for the adoption of a substantially different rule, or it cannot adopt the rule.<sup>84</sup> The agency may also make a request that the chief ALJ reconsider the disapproval.<sup>85</sup> The agency also has the option of withdrawing a rule. This option is available unless the withdrawal of a rule part makes the remainder of the rule substantially different.<sup>86</sup>

If the chief ALJ determines that the rule is not needed or reasonable, however, the agency—if it still wishes to adopt the rule — submits the proposed rule to the Legislative Coordinating Commission and to the House of Representatives and Senate Policy Committees. The agency must consider the commission and committees' advice and comment on the rule, but the agency may adopt the rule even against the advice of the commission and committees. The agency may proceed to adopt the rule after 60 days even if the commission and committees has not yet provided advice and comment.<sup>87</sup>

If an agency makes a procedural error in the rulemaking process, the rule will not be disapproved if the ALJ determines that the error or corrective action to cure the error or defect

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<sup>76</sup> *Id.* (B).

<sup>77</sup> *Id.* (C).

<sup>78</sup> *Id.* (D).

<sup>79</sup> *Id.* (E).

<sup>80</sup> *Id.* (F).

<sup>81</sup> *Id.* (G).

<sup>82</sup> *Id.* (H).

<sup>83</sup> Minn. Stat. § 14.15, subd. 3 (2014); Minn. R. 1400.2240, subp. 4 (2013).

<sup>84</sup> Minn. Stat. §§ 14.15, subd. 3, .16, subd. 2 (2014).

<sup>85</sup> Minn. R. 1400.2240, subp. 4 (2013).

<sup>86</sup> *Id.*, subp. 8.

<sup>87</sup> Minn. Stat. § 14.15, subd. 4 (2014)

did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.<sup>88</sup> Therefore, if the agency makes what has been determined to be a “harmless error” in the rulemaking proceeding, the agency will not have to start the rulemaking process all over again and the ALJ will make a finding to this effect and proceed with the completion of the rulemaking process.

### 20.5.3 Agency Findings and Adoption of the Rule

Once the report of the ALJ is submitted or the objections of the chief ALJ have been met, the agency may then determine independently, on the basis of the record, whether to adopt the rule. As previously stated, if the ALJ report contained no defects, and the agency only makes changes as recommended by the ALJ, the agency may proceed to adopt the rule without resubmission to the chief ALJ. If the ALJ report contained defects or the agency makes changes other than those recommended by the chief ALJ, the agency must resubmit the rule to the chief ALJ.<sup>89</sup> Upon resubmission, the agency must file with the chief judge: the proposed rule, a proposed order adopting rule and rule containing the agency’s changes and the hearing record if requested by the chief judge.<sup>90</sup> The proposed order discusses changes in the rule, the rationale supporting the changes in the rule, and it makes conclusions about the legal validity of the rule.<sup>91</sup> Failure to explain agency findings that deviate from the ALJ report is grounds for voiding a rule.<sup>92</sup>

Although the APA requires findings of fact and conclusions in contested cases,<sup>93</sup> it does not require them in rulemaking proceedings. In the order adopting rules, the agency will set forth the reasons for changes between the rule as proposed and the rule to be adopted, including discussion of relevant testimony, data, and evidence. If the agency takes exception to the findings of the ALJ, the agency should set forth the basis of the exceptions with citations to the record showing its rationale. The agency's findings must be signed by a person authorized to make the order.<sup>94</sup>

The order adopting the rules should supplement the ALJ's report if there is any question about completeness. Such detailed findings allow for review by a court, should one be sought. Finally, any subsequent changes in the text of the rule between the initial proposal and the rules as finally adopted must be approved for form by the revisor.<sup>95</sup> Often the findings and conclusions of the ALJ will be adopted by the agency in their entirety.

In rulemaking with a hearing, the agency is required to submit its notice of adoption of

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<sup>88</sup> *Id.* subd. 5.

<sup>89</sup> *Id.* § 14.16, subs. 1, 2 ; Minn. R. 1400.2240, subs. 4, 5 (2013).

<sup>90</sup> Minn. R. 1400.2240, subp. 5 (2013).

<sup>91</sup> *Id.* 1400.2090; see also *id.* 1400.2560 (form for recommended order adopting rules).

<sup>92</sup> *Manufactured Housing Inst. v. Petterson*, 347 N.W.2d 238, 245-46 (Minn. 1984); see also *Yellowbird v. M.S.P. Express*, 377 N.W.2d 490, 493 (Minn. Ct. App. 1985) (concluding, in a contested case, that “[i]n the absence of findings, [the court is] unable to determine whether substantial evidence supports the Board's findings, conclusions or decision”).

<sup>93</sup> See chapter 14.

<sup>94</sup> Minn. R. 1400.2090(G) (2013).

<sup>95</sup> Minn. Stat. §§ 14.07, subd. 2, .08(b),.20 (2014).

the rule to the *State Register* within 180 days of the date of the ALJ's report,<sup>96</sup> or the rule is withdrawn.

#### 20.5.4 Post-Adoption Procedures to Make a Rule Effective

Once the agency adopts the rule, certain steps remain before a rule is effective. Three copies of the rules as adopted must be filed with the Minnesota Secretary of State.<sup>97</sup> Notice of adoption must be published in the *State Register*.<sup>98</sup> Generally, the rule is effective five working days after publication unless a later date is specified.<sup>99</sup>

#### 20.5.5 Custody of the Rulemaking Record

The agency is the repository of the official rulemaking record for every rule adopted.<sup>100</sup> The record must be available for public inspection, and it will form the basis of the agency defense to any legal challenge to the validity of the rule. This record must be retained according to the agency's record retention schedule or policy. Generally, rulemaking records are retained permanently or as long as the rule is effective. An agency may determine how long to retain official rulemaking records. The state archives frequently determines that rulemaking records are archival in nature and can thus be transferred to the state archives for permanent retention once an agency's retention period has been satisfied, if the agency does not wish to retain the records.

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<sup>96</sup> *Id.* § 14.19.

<sup>97</sup> *Id.* § 14.16, subd. 3. In Minnesota, the Office of Administrative Hearings files the rules with the secretary of state, and the revisor is then notified to draft the Notice of Adoption for agency publication to complete the formal rulemaking process.

<sup>98</sup> *Id.* § 14.18, subd. 1.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 14.365.