Chapter 5. Notice of Hearing

Original Author: George Beck
Revised 2014 by George Beck

5.1 Reasonable Notice Required

The Administrative Procedure Act (APA) specifically requires reasonable notice to be given to all parties before a contested case hearing.[1] In addition, constitutional due process requires that a party be afforded notice of the claims to be litigated, as well as an opportunity to present evidence on the issues to be determined.[2] A party is entitled to notice that will provide a reasonable opportunity to prepare for the hearing.[3] The governing due process standard is whether the notice was reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and an opportunity to present their objections.[4] A failure to advise a party of statutorily mandated rights may be a denial of due process.[5] However, the notice need not always repeat the statutory rights verbatim.[6] Individual state agency statutes or rules may set out notice requirements beyond those prescribed by the APA.[7]

It is the duty of the assigned Administrative Law Judge (ALJ) to "conduct only hearings for which proper notice has been given."[8] The failure of an agency to follow the statutory notice requirements may render the agency's action void.[9] Although the APA prescribes that certain information be included in the notice of the contested case given the parties, it requires no particular form for the notice. However, the rules of the Office of Administrative Hearings (OAH) require that the notice take the form of a notice of and order for hearing.[10] The OAH website contains recommended forms for initiating an APA hearing as well as forms for non-APA political subdivision administrative hearings.[11]

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[1] Minn. Stat. § 14.58 (2014).

[2] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12 (1978); *Glen Paul Court Neighborhood Ass'n v. Paster*, 437 N.W.2d 52, 56 (Minn. 1989) (holding that administrative convenience does not outweigh right of property owners to statutorily mandated notice in zoning case); *State v. Duluth M. & I R. Ry.*, 246 Minn. 383, 400, 75 N.W.2d 398, 410 (1956); *In re Holasek*, 436 N.W.2d 483, 487 (Minn. Ct. App. 1989); *see also* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 6.4 (3d ed. 1991).

[3] *Anderson v. Moberg Rodlund Sheet Metal Co.*, 316 N.W.2d 286, 288 (Minn. 1982); *Le Clair v. Comm'r of Pub. Safety*, 416 N.W.2d 209, 211-12 (Minn. Ct. App. 1987).

[4] *Turner v. Comm'r of Revenue*, 840 N.W.2d 205, 209-10 (Minn. 2013); *In re Emmanuel Nursing Home*, 411 N.W.2d 511, 516-17 (Minn. Ct. App. 1987).

[5] *Cent. Care Ctr. v. Wynia*, 448 N.W.2d 880, 882-83 (Minn. Ct. App. 1989).

[6] *In re Discharge of Peterson*, 472 N.W.2d 687, 690 (Minn. Ct. App. 1991).

[7] *See, e.g.*, Minn. Stat. § 46.24, subd. 1 (2014) (permitting a minimum notice period of ten days for a hearing on a cease and desist order served on a state bank).

[8] *Id.* § 14.50(2).

[9] *Furniture Capital Truck Lines v. Mich. Pub. Serv. Comm'n*, 340 Mich. 173, 180, 65 N.W.2d 303, 308 (1954); *State ex rel. Canam Metals, Ltd. v. Dep't of Commerce*, 196 Minn. 222, 226, 264 N.W. 789, 791 (1936).

[10] Minn. R. 1400.5600 (2013).

[11] www.mn.gov/oah

5.2 Contents of the Notice and Order for Hearing

5.2.1 Time, Date, and Place of Hearing

According to the APA, the time and place of the hearing must be set out in the notice given to the parties.[12] The OAH rules contain the same requirement.[13] The agency itself initially sets the time, date, and place of the hearing, but the ALJ assigned to the case may advise the agency on the location and time the hearing should be held to allow for participation by all affected interests.[14] Some agencies are required by statute to conduct their administrative contested case hearings in the county where the respondent resides or has its principal place of business.[15] A party who objects to the location of the hearing as set out in the notice may file a motion with the ALJ to change the venue of the hearing.[16]

5.2.2 Notice of Parties Affected and Issues Involved

Generally, the agency must name each party in its notice of and order for hearing, as well as serve each party a copy of the notice.[17] The notice must alert the parties who are to be affected by the proposed agency action. A notice served on approximately 150 municipalities and individuals, without specifically naming any, does not comply with the APA, since the sheer number of parties notified would distract a particular party from immediate concern over its individual status.[18]

The notice must state the issues involved in the contested case proceeding.[19] If the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they should be fully stated as soon as practicable. An opportunity must be afforded all parties to present evidence and arguments with respect to the issues stated.[20] Some agencies follow the practice of setting out the issues in a document separate from, but served with, the notice of and order for hearing and described as a "statement of charges" or an otherwise named and attached exhibit.

An agency may amend its notice of and order for hearing at any time before the close of the hearing, provided that the parties have a reasonable time to prepare to meet any new issues or allegations that are raised.[21] An amendment made during the hearing must be approved by the administrative law judge.[22] Amendments made during the hearing generally do not raise due process notice problems as long as the respondent understands the amendment

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[12] Minn. Stat. § 14.58 (2014).
[13] Minn. R. 1400.5600, subp. 2A (2013).
[14] Minn. Stat. § 14.50(1) (2014).
[15] *See, e.g., id.* § 363A.29, subd. 1 (requirement for discrimination cases).
[16] Minn. R. 1400.6600 (2013).
[17] *Id.* 1400.5100, subp. 7, 9.
[18] *State ex rel. Ludwig v. City of Bemidji*, 198 Minn. 27, 33-34, 212 N.W.2d 876, 880 (1973).
[19] Minn. R. 1400.5600, subp. 2(D) (2013).
[20] Minn. Stat. § 14.58 (2014).
[21] Minn. R. 1400.5600, subp. 5 (2013).
[22] *Id.*

and has an adequate opportunity to respond.[23] A continuance of the hearing may sometimes be necessary to allow a party adequate time to prepare to meet new facts or issues raised by the amendment. But when an agency changes its theory of the case after the hearing from that announced in the pleadings, its decision cannot stand and must be remanded by the reviewing court for further hearing.[24]

Due process of law guaranteed by the Fourteenth Amendment requires that the notice of hearing spell out the specific nature of the charges of misconduct against the respondent.[25] The charges need not be drawn with the specificity of a criminal complaint, however.[26] The details of specific incidents or events need not be described,[27] but sufficient facts must be presented to apprise the respondent of the grounds on which the charges are based.[28] Many agencies set out the facts alleged in detail so that they may be relied upon in the event of a default, or to allow a subsequent request for admissions to reference the facts in the pleading.

The focus of the judicial inquiry on adequacy of notice is whether the failure of the agency to disclose facts underlying its case prohibits the respondent from being able to effectively respond.[29] A landowner argued that a notice of hearing from the Department of Natural Resources was constitutionally inadequate because the only issue stated was whether prior order should be reversed, without specifically informing the landowner that reversal of the order would result in the removal of his drainage system. The Court of Appeals found the notice adequate because the landowner had participated in the prior hearing and was involved in an ongoing dispute with the DNR concerning his land. The Court of Appeals observed that a notice document need not list every possible outcome.[30]

The remedy for an insufficient statement of facts or issues in a notice of hearing is a motion for a bill of particulars or a motion for a more definite statement.[31] Greater detail about facts or issues may also be required in a prehearing statement filed by the parties later during the proceeding.[32]

Sometimes a contested case involves an appeal of a prior agency determination involving several issues. The precise issues involved may not be known to the agency at the time the notice is served, but instead may be known only to the respondent. One remedy for

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[23] *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 349-50 (1938); *Rosen v. Board of Med. Examiners*, 539 N.W.2d 345, 348 (Iowa 1995) (upholding medical licensing decision where amended notice "merely enlarged the factual basis supporting the charge"); *First Nat'l Bank v. Dep't of Commerce*, 310 Minn. 127, 130-31, 245 N.W.2d 861, 863-64 (1976).

[24] *Rodale Press v. F.T.C.*, 407 F.2d 1252, 1256-57 (D.C.Cir. 1968).

[25] *Pearl v. Bd. of Prof'l Discipline*, 44 P.3d 1162, 1169 (Idaho 2002) (finding due process was violated when medical board based decision on charges relating to standards of care not alleged in complaint); *Nolan v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 510, 518, 89 N.W.2d 317, 322 (1958).

[26] *Sorbello v. City of Maplewood*, 610 S.W.2d 375, 376 (Mo. Ct. App. 1980).

[27] *Costa v. Bd. of Selectmen*, 377 Mass. 853, 860, 388 N.E.2d 696, 701 (1979).

[28] *Hughes v. Dep't of Pub. Safety*, 200 Minn. 16, 21, 273 N.W. 618, 621 (1937); *Schmidt v. Indep. Sch. Dist. No. 1*, 349 N.W.2d 563, 567 (Minn. Ct. App. 1984).

[29] *Zotos Int'l v. Kennedy*, 460 F. Supp. 268, 274 (D. D.C. 1978)

[30] *Comm'r of Natural Res. v. Nicollet Cnty. Pub. Water/Wetlands Hearing Unit*, 633 N.W.2d 25, 29-30 (Minn. Ct. App. 2001).

[31] Minn. R. 1400.6600 (2013).

[32] *Id.* 1400.6500.

this situation is a prehearing order by the ALJ requiring that prehearing statements be filed to define exactly what is at issue in the case.[33]

Within the notice for hearing, state agencies are also required by rule to set out the statutes or rules that have been allegedly violated or that control the outcome of the case.[34] This provision permits respondents to familiarize themselves with the substantive statutes or rules involved and to compare the statutes with the allegations made by the agency.

5.2.3 Notice of Statutory Authority and of the Nature of the Hearing

State agencies must include in their notice of hearing a citation to the agency's statutory authority to hold a hearing and to take the action proposed.[35] Requiring the agency to expressly set forth its statutory authority is tantamount to requiring it to note its jurisdiction. If doubt exists about an agency's legal authority, it is beneficial to consider the matter at an early point in the contested case proceeding. Jurisdiction or statutory authority may be challenged by motion to the ALJ.[36] The ALJ's recommendation about jurisdiction can be certified to the agency for a final decision if appropriate.

Fairness demands that the parties understand the nature of the hearing. Although the APA does not require a statement regarding the nature of the hearing, the problem is addressed by an OAH rule requiring the agency to provide a brief description of the nature of the hearing.[37] Other rules require the notice to state (1) the name, address, and telephone number of the ALJ; (2) citations to OAH rules, agency procedural rules, and the APA; and (3) a statement of the possible consequences if the party fails to appear at the hearing.[38] A failure to adequately communicate the interest at stake so that the party can make an informed choice about whether to appear or default is a denial of due process.[39]

In some cases, specialized statutes require that a further description of the nature of the procedure be included to allow the respondent to be sufficiently informed and permit the opportunity for a complete defense.[40] The notice must adequately advise the parties of the procedure to be followed in order to comport with constitutional requirements.[41] Some state agencies include in their notice an explanation of the role of witnesses and the use of written exhibits as well as a statement concerning the party's statutory right of cross-examination and the right to submit rebuttal evidence.[42] The notice must also advise a party of the availability of subpoenas to compel the attendance of witnesses or the production of documents.[43] Finally, the agency must advise the parties to bring to the hearing all documents or witnesses needed

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[33] *Id.*
[34] *Id.* 1400.5600, subp. 2(D).
[35] *Id.*(C).
[36] *Id.* 1400.6600.
[37] *Id.* 1400.5600, subp. 2.
[38] *Id.*
[39] *Schulte v. Transp. Unlimited*, 354 N.W.2d 830, 832-35 (Minn. 1984).
[40] *Elliot v. Weinberger*, 564 F.2d 1219, 1235-36 (9th Cir. 1977).
[41] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978).
[42] Minn. Stat. § 14.60, subd. 3 (2014).
[43] Minn. R. 1400.5600, subp. 2(I) (2013).

to support their position.[44] This requirement helps ensure that unrepresented parties arrive at the hearing prepared to proceed.

5.2.4 Other Required Notice

Parties must be advised of their right to be represented by legal counsel or by some other person of their choice if not prohibited as the unauthorized practice of law.[45] The notice must also advise parties of the name of an agency official or assistant attorney general who can be contacted by the party to discuss informal disposition of the case, or to discuss discovery necessary to prepare for the hearing.[46] This provision promotes an early initiation of discovery and/or settlement discussions. The agency is also required to alerts parties to the possibility that data classified as "not public" under the Data Practices Act may be offered into evidence.[47] The Data Practices Act permits a change in the classification of data in the course of an administrative contested case.[48] The statement in the notice advises parties that an objection is necessary to prevent a change in the status of the data from private to public. The notification is intended to prevent the inadvertent and unexamined release of not public data merely because it is submitted into evidence in a contested case.

The notice must also advise parties that a notice of appearance form must be filed with the ALJ within twenty days of the date of service of the notice of and order for hearing.[49] Although most contested cases do not require the filing of an answer,[50] a party is required to file a notice of appearance form setting forth the party's intention to appear at the hearing and providing the current address and telephone number for the party or an attorney or other representative. An attorney seeking to withdraw from a case after filing a notice of appearance must promptly serve a notice of withdrawal upon all parties and the judge. If a party fails to file a notice of appearance but appears at the hearing, the ALJ has authority to grant a continuance.[51] The agency is required to serve a notice of appearance form with its notice of and order for hearing. The notice must also advise the parties that: (1) hearings are conducted in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations; (2) an accommodation to make the hearing accessible will be provided if requested; and (3) a qualified interpreter will be appointed if necessary.[52]

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[44] *Id.* (H).
[45] *Id.* (E).
[46] *Id.* (J).
[47] *Id.* (M).
[48] Minn. Stat. §§ 13.03, subd. 4, 41, subd.5 (2014).
[49] Minn. R. 1400.5600, subp. 2(K) (2013).
[50] Exceptions include proceedings before the Department of Human Rights, *see id.* 5000.1200.
[51] *Id.* 1400.5700.
[52] *Id.* 1400.5600.

5.3 Service of the Notice of and Order for Hearing

For a notice to be timely, it must provide a reasonable opportunity for the parties to prepare for the hearing.[53] For example, a two-day notice before a hearing regarding the dismissal of a teacher does not constitute due process.[54] However, a three-day written notice of a hearing for a substitute teacher alleged to have abandoned his position was found to constitute due process. According to the Minnesota Court of Appeals, the notice and opportunity to be heard must be appropriate in relation to the nature of the charges made.[55] A seven-day notice in a welfare benefits termination case was not constitutionally insufficient per se.[56] However, where the appeal period ended on a weekend, a welfare benefit recipient had until the next business day to appeal.[57] Where a pawnbroker was sent a notice of hearing about the revocation of his license by first class mail in a plain envelope ten days before the hearing, the Court of Appeals found that the notice satisfied due process even though the licensee was on vacation until just before the hearing and failed to open the letter.[58] The Court of Appeals rejected suggestions that the letter should have been sent by certified mail or marked "urgent," as well as the argument that ten days was too short of a notice period. In contrast, a notice and order of revocation was "actively misleading" and denied the petitioner due process of law based on its failure to clearly state that a petition needed to be filed 33 days from the date of mailing.[59] The failure of the Commissioner of Public Safety to provide a full seven-day notice of the effective date of a prehearing license revocation under the Minnesota implied consent law did not deny due process where the statute had no specific notice requirement and the notice was provided weeks or months after the licensees failed blood or urine tests.[60]

The APA sets no time period for service of the notice prior to the hearing. However, the notice must not be served less than thirty days before the hearing unless otherwise provided by law, unless the Chief ALJ approves a shorter time period.[61] In addition, agency statutes or rules sometimes set a shorter notice period,[62] and specify the method of service for the notice, which is commonly by first-class or certified mail.[63]

In the absence of a statutory provision, service is governed by an OAH rule defining service as either personal service or service by first class United States mail addressed to the party at his or her last known address.[64] Service by a licensed overnight express mail service is

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[53] *Fisher v. Indep. Sch. Dist. No. 118*, 298 Minn. 238, 243, 215 N.W.2d 65, 69 (1974)

[54] *Hardy v. Indep. Sch. Dist. No. 694*, 301 Minn. 373, 378, 223 N.W.2d 124, 127-28 (1974)

[55] *Forbes v. Indep. Sch. Dist. No. 196*, 358 N.W.2d 150, 153 (Minn. Ct. App. 1984).

[56] *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970)

[57] *Franco v. Ramsey Cnty. Cmty. Human Servs.*, 413 N.W.2d 869, 872 (Minn. Ct. App. 1987).

[58] *In re West Side Pawn*, 587 N.W.2d 521, 522-23 (Minn. Ct. App. 1998).

[59] *Plocher v. Comm'r of Pub. Safety*, 681 N.W.2d 698, 705 (Minn. Ct. App. 2004) (reversing district court's dismissal of appeal because it had been filed one day late).

[60] *Williams v. Comm'r of Pub. Safety*, 830 N.W.2d 442, 446-47 (Minn. Ct. App. 2013).

[61] Minn. R. 1400.5600, subp. 3 (2013).

[62] *See, e.g., id.* 1400.8550 (Revenue Recapture Act hearings).

[63] *See e.g.,* Minn. Stat. § 80C.22, subd. 7 (2014) (service by certified mail under the Minnesota Franchise Act).

[64] Minn. R. 1400.5550 (2013).

also authorized. An affidavit of service is not required. A certificate of service must be prepared for any type of service. It must list the name of the person accomplishing the service, but need not be signed or notarized.[65] There is a presumption that mail properly addressed and posted is duly received by the addressee.[66] Several agency licensing statutes require a licensee to keep his or her current address on file with the commissioner or board, and to advise the licensing authority of any change of address.[67] Based on this presumption, default judgment may be entered against a party who does not appear at the hearing even where the mailed notice is returned undelivered.[68] Some agency licensing statutes provide for substituted service of process on the licensing authority.[69]

In some instances, regulatory statutes specifically provide for publication of the notice of hearing either in place of, or in addition to, service on individuals. In the absence of such a statute, notice by publication would not satisfy due process requirements with respect to a person directly affected by the contested case proceeding whose name and address are easily ascertainable.[70] Service by publication is often a means of alerting nonparties to the existence of a contested case that may affect their rights. Such notice may be employed in contested cases involving applications by financial institutions for new facilities, or applications by common carriers for new privileges that may substantially affect the business interests of competitors. The "best notice practicable" is authorized to advise potential members of a class of a class action in a contested case initiated by the Department of Human Rights.[71] The adequacy of notice by publication is generally judged on a case-by-case basis.[72] For example, a statute requiring notice given only to landowners for an upcoming inventory and mapping of wetlands and public waters is constitutional.[73] Where a rule or statute requires publication of a notice of hearing in newspapers with general circulation, a failure to publish pursuant to the requirements set out in the rule or statute will be treated as a jurisdictional defect, render the notice inadequate, and require a remand of the case for rehearing.[74] Cost is not an adequate reason to refrain from publication.[75]

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[65] *Id.* 1400.5100, subp. 9.

[66] *Nemo v. Local Joint Exec. Bd. and Hotel and Rest. Employees' Local No. 556*, 227 Minn. 263, 266-67, 35 N.W.2d 337, 339-40 (1948).

[67] *See, e.g.,* Minn. Stat. § 45.0112 (2014) (Department of Commerce licensees).

[68] *But see Marsh v. Builders Bd.*, 540 Or. App. 242, 634 P.2d 803, 805 (1981) (holding undelivered notice is not reasonable if respondent is no longer licensed by the agency).

[69] Minn. Stat. § 45.028 (2014) (Commissioner of Commerce can receive service of process on commerce licensees).

[70] *Schroeder v. City of N.Y.*, 371 U.S. 208, 212-13 (1962).

[71] Minn. R. 5000.1100, subp. 3 (2013).

[72] *See, e.g., Bank of Commerce v. Bd. of Governors*, 513 F.2d 164, 166-67 (10th Cir. 1975).

[73] *In re Christenson*, 417 N.W.2d 607, 611 (Minn. 1987).

[74] *In re Wilmarth Line of the CU Project*, 299 N.W.2d 731, 735 (Minn. 1980); *Bartlett v. Joint Cnty. Sch. Comm.*, 11 Wis.2d 588, 590, 106 N.W.2d 295, 296 (1960).

[75] *Wilmarth,* 299 N.W.2d at 735.