MINNESOTA
OFFICE OF
ADMINISTRATIVE
HEARINGS

Contributing to the Value of Minnesota's Central Panel System

Jenny Starr
Chief Administrative Law Judge

Judges McKenzie and Meyer

Administrative Law Judge
Megan J. McKenzie

Administrative Law Judge
Joseph C. Meyer

Congratulations!

Administrative Law Judge
James E. LaFave

- Retiring December 5
- Joined OAH as a contract Administrative Law Judge in 2005
- Full-time judge since 2012

Our agenda

1. Historical value of central panels
2. Adding value to Minnesota's central panel

Our mission

We render **justice** through **fair**, **timely**, and **impartial** administrative **hearings** and high-quality dispute resolution services.

Our values

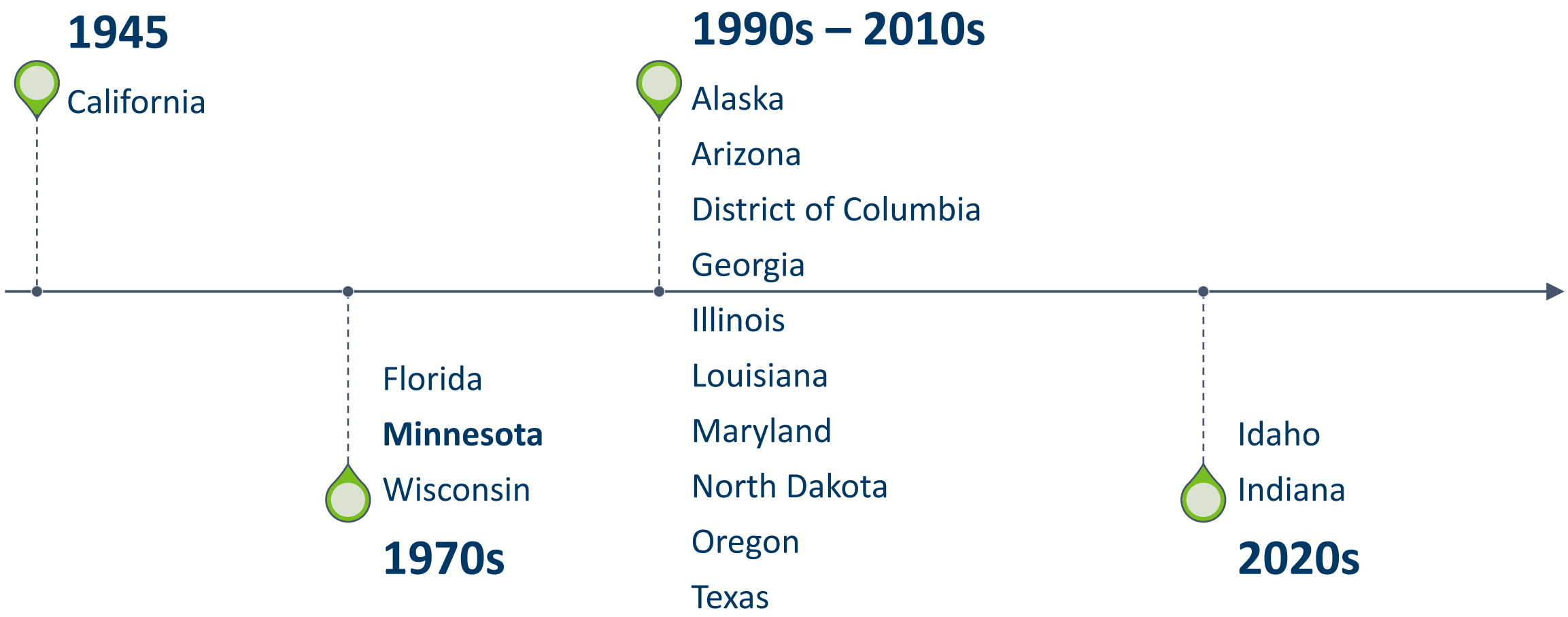
VALUE	DESCRIPTION
VOICE	We ensure the opportunity for each person to express their own viewpoint.
NEUTRALITY	We apply the laws and rules consistently and fairly.
RESPECT	We treat everyone with courtesy and dignity.
TRUST	We make unbiased and transparent decisions.
UNDERSTANDING	We communicate in plain language.
HELPFULNESS	We provide quality services.

Our work is significant

"'[E]verywhere a citizen turns—to apply for a life-sustaining public benefit, to obtain a license, to respond to a complaint—it is [administrative law] that governs the way in which their contact with state government will be carried out'"

Idaho v. Coeur d'Alene Tribe, 117 S.Ct. 2028, 2037 (1997) (quoting Idaho State Attorney General).

We are not alone



Each panel is unique

Created by unique pressures

Legislative action or executive order

Broad or narrow jurisdiction

Mandatory or voluntary use

Decisions as final orders or recommendations

All have a shared purpose

To ensure a

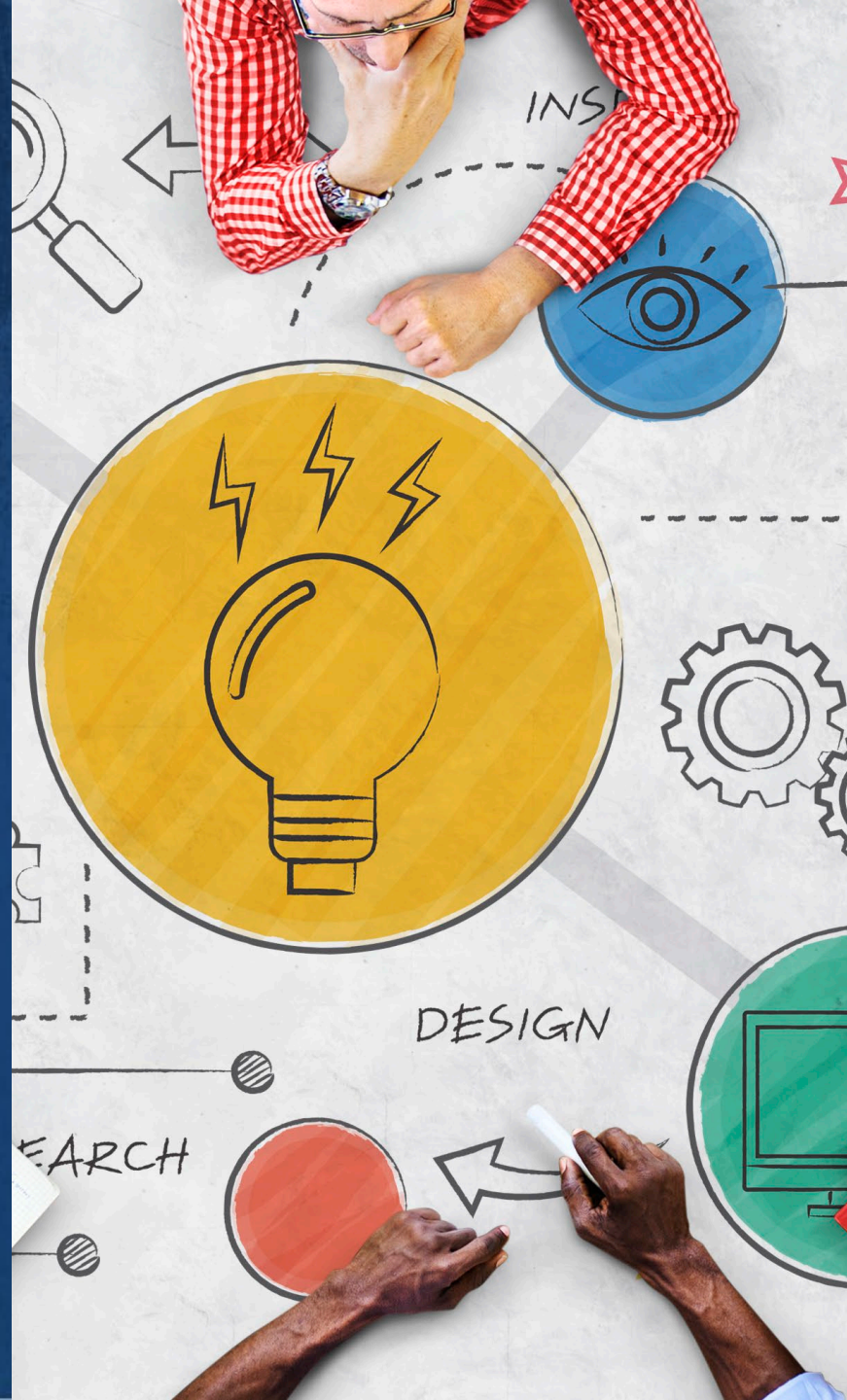
- high-quality,
- effective,
- efficient,
- and independent administrative judiciary.

No jurisdiction that has adopted a central panel has returned to its previous practice.

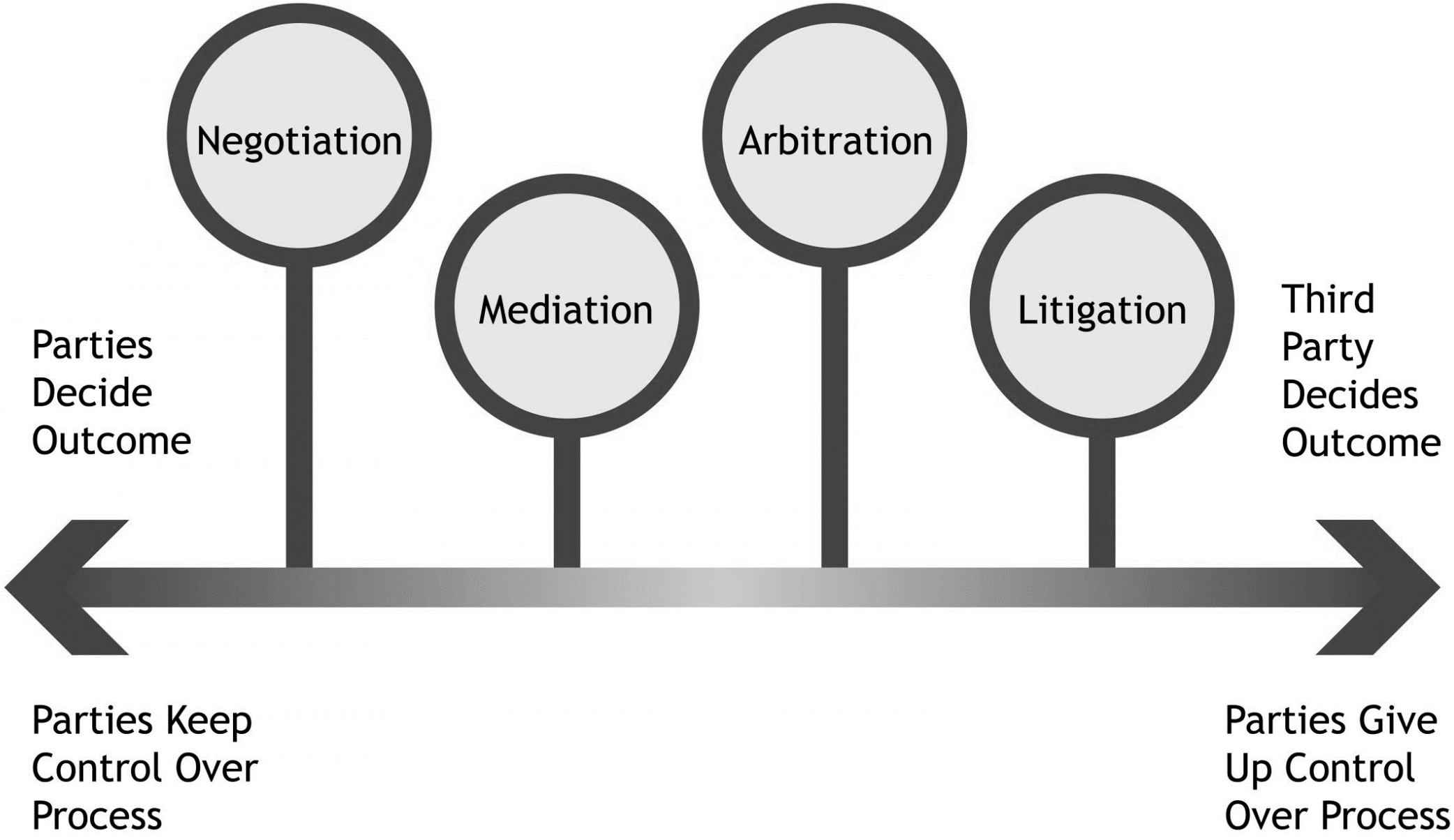
Legislation is regularly introduced to both:

- expand the central panel's jurisdiction, and
- move final decision-making authority to the central panel.

What can we do to add value to Minnesota’s central panel?



It’s not about winning


Negotiation
Mediation
Arbitration
Litigation
Parties Decide Outcome
Third Party Decides Outcome
Parties Keep Control Over Process
Parties Give Up Control Over Process

It’s about a better result

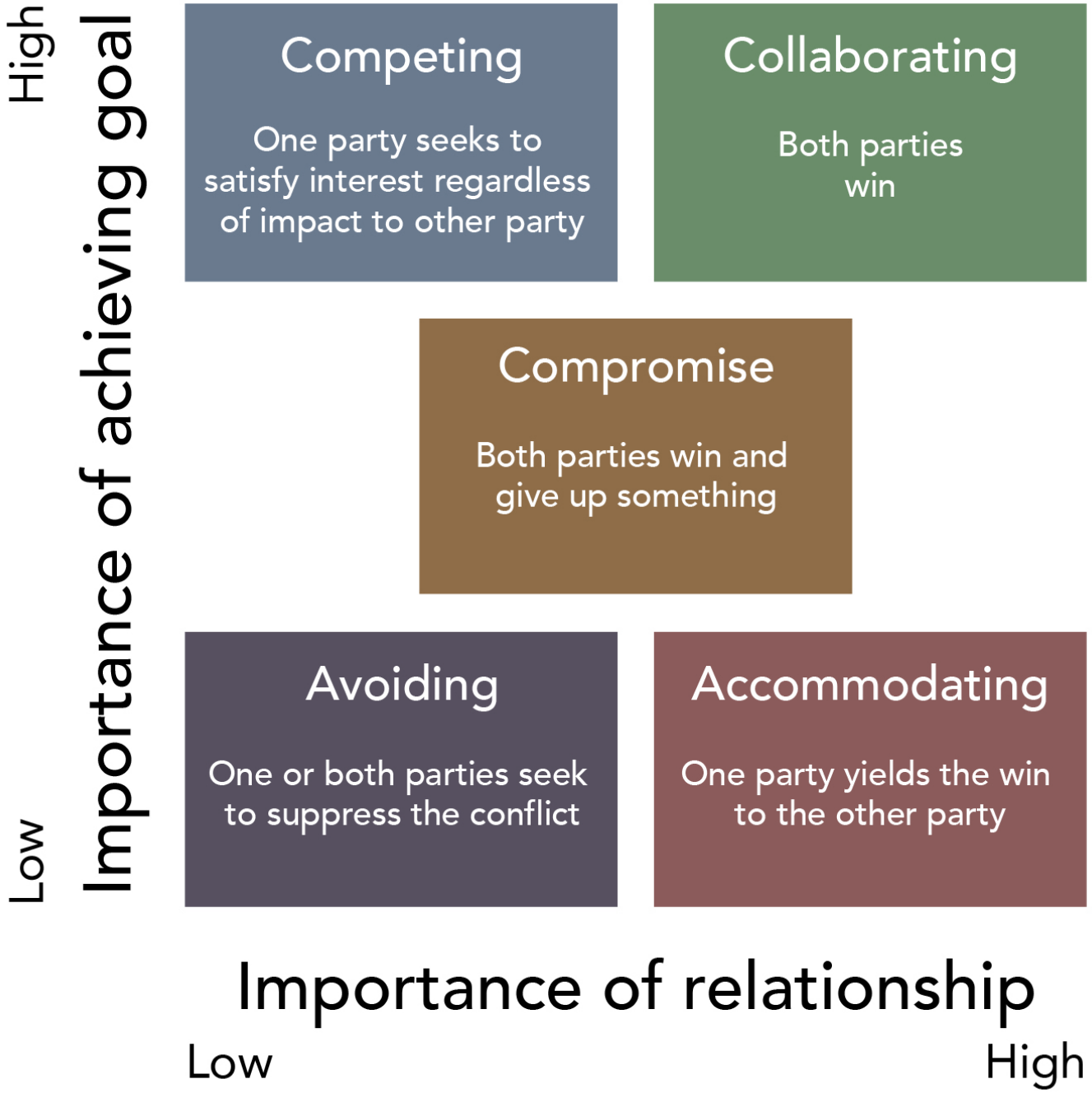
Minn. Stat. § 14.001: The purposes of the APA are to:

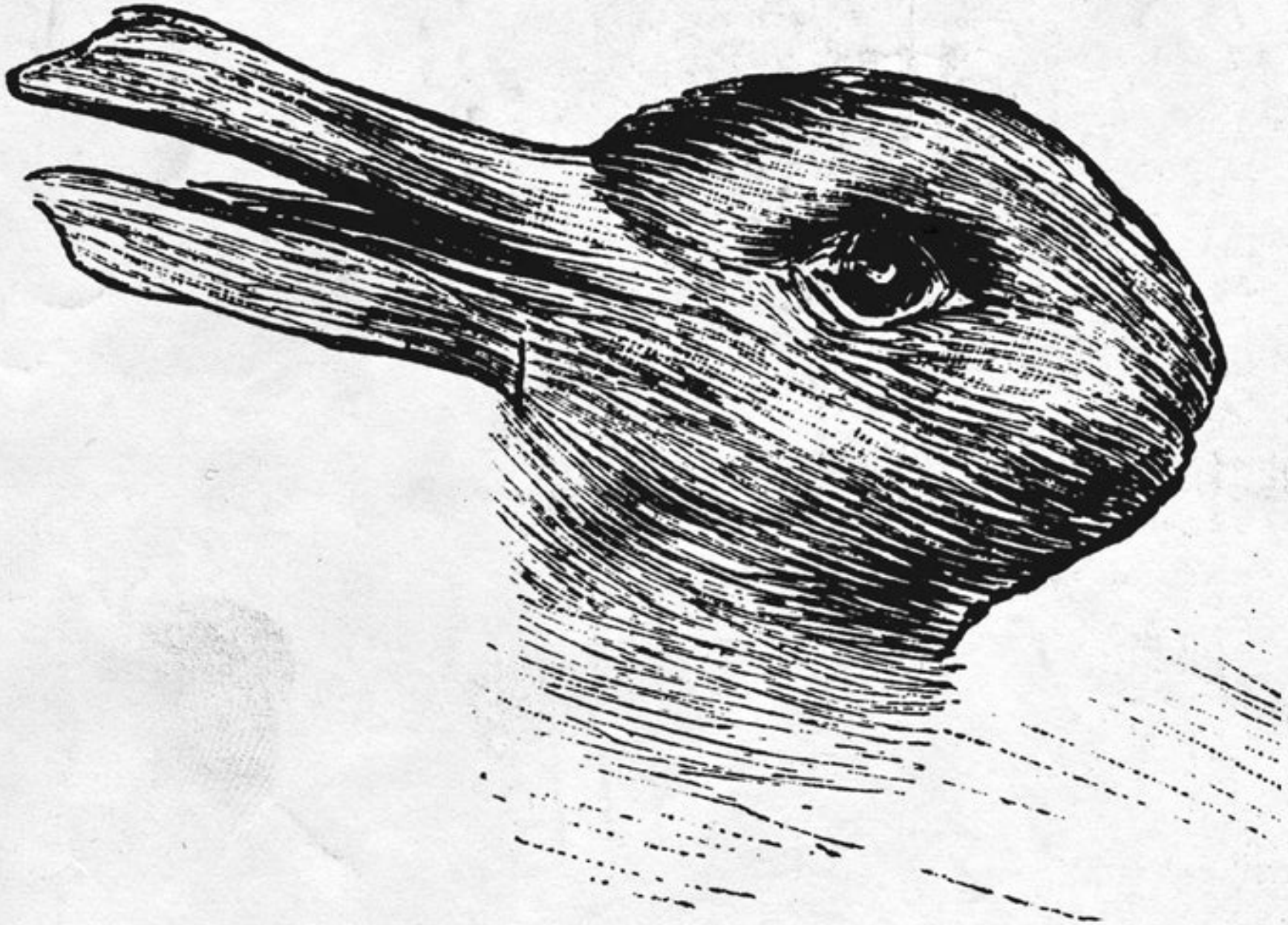
. . .

(5) to **increase** the **fairness** of agencies in their conduct of contested case proceedings; and

(6) to **simplify the process of judicial review** of agency action as well as **increase** its **ease** and **availability**.

In accomplishing its objectives, the intention of this chapter is to strike a fair balance between these purposes and the need for efficient, economical, and effective government administration. The chapter is not meant to alter the substantive rights of any person or agency. Its impact is limited to procedural rights with the **expectation that better substantive results** will be achieved in the everyday conduct of state government by improving the process by which those results are attained.


High
Importance of achieving goal
Low
Competing
One party seeks to satisfy interest regardless of impact to other party
Collaborating
Both parties win
Compromise
Both parties win and give up something
Avoiding
One or both parties seek to suppress the conflict
Accommodating
One party yields the win to the other party
Importance of relationship
Low
High



Write for people first

“

[1] Deletions are noted by striking through existing language; the modified language is bolded and underlined. The content of footnotes provided in the ALJ’s Report are incorporated herein by reference, unless modified.

”

[3] It is important to note that this order is narrowly applied and is based solely on SP1's provision of false and misleading information. If Appellant can demonstrate that SP1 is no longer a controlling individual and, instead, a qualified individual has been selected for the role of SP1 would have performed, that may suffice, under Minn. Stat. § 245.08, subd. 5a(b), as "new information which constitutes a substantial change in the conditions that caused a previous denial."

“

Please call Brady Helpful at 651-231-2500. We need to know that you have found a new person to be the Controller of your business. We need to know that Mary is no longer involved. With that new information, we will allow you to open a new application for your business license.

”

“This contested case represents a rare instance where, pursuant to Minnesota Statutes, section 14.62, subdivision 2a, the Commissioner has decided that the Administrative Law Judge’s Report will serve as the final agency decision in this matter.”

“I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.”

— **Maya Angelou**


RESPECT
RESPECT

Engage with OAH

Stay connected

GovDelivery

Keep in touch:

Send your questions and feedback by replying to our emails

ALJ and Commissioner conference before Commissioner makes final decision

OAH hosts quarterly open houses with state agencies

Continue to send OAH your agency's final decision

OAH trains all administrative adjudicators and appeals officers throughout state government

Look to each other to solve problems

2024 OAH technical bill

- In January, OAH will propose a technical bill
- Technical bills **correct outdated or obsolete language** in Minnesota statutes
- **Do not** change existing policy or the effect of the Minnesota statutes or rules
- Limited to Minnesota statutes that directly affect OAH's work, such as Minn. Stat. ch. 14, 176, 211A, and 211B.

Suggestions needed!

Scan or go to:
tinyurl.com/technical-bill

Metro Gang Strike Task Force

Problem

Metro Gang Strike Task Force members seized money and property, and, in some instances, took the property for personal use and financial gain.

Legislative Solution

Contested claims heard by ALJs in lieu of “special master.”

NEWS

How did the Metro Gang Strike Force lose its way? Lawmakers hope to find answers

Our vision

OAH is an **energetic**, **responsive**, and **respected** service provider to Minnesotans, state and local governments, and the workers' compensation system.

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HEARINGS

Thank you!

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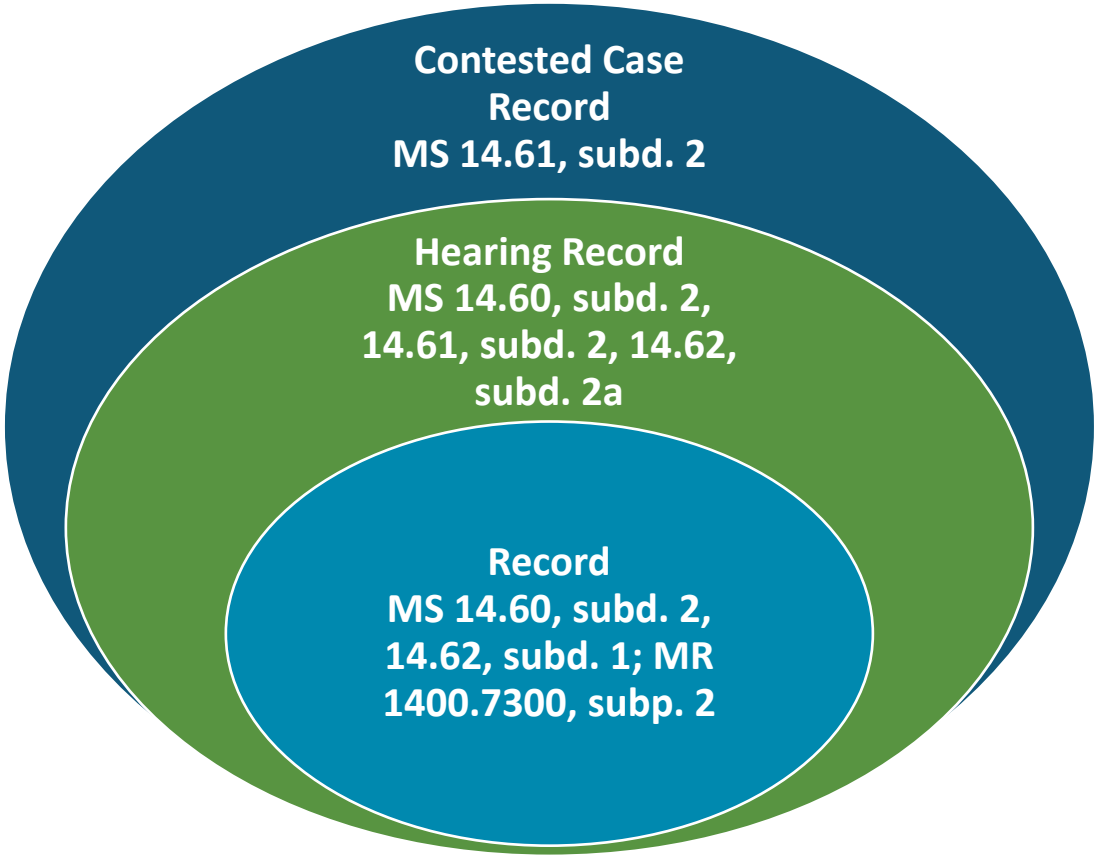
The Record After The Evidentiary Hearing

October 13, 2023

The Record



Record: No factual information or evidence shall be considered in the determination of the case unless it is part of the record. Minn. Stat. § 14.60, subd. 2.

- The "record" closes upon receipt of the final written memorandum, transcript, if any, or late filed exhibits which the parties and the judge have agreed should be received into the record, whichever occurs latest. Minn. R. 1400.7800, subp. J.

Contested Case Record: The contested case record must close upon the filing of any exceptions to the report and presentation of argument. Minn. Stat. § 14.61, subd. 2.

In re Appl. of N. States Power Co. (Minn. App. 1989)

Prairie Island Nuclear Generating Plant, Units 1 and 2

Photo courtesy of Nuclear Management Co. and Nuclear Regulatory Commission

In re Appl. of N. States Power Co. (Minn. App. 1989)

In re Appl. of N. States Power Co., 440 N.W.2d 138, 140 (Minn. App. 1989) – the Commission was not bound by the parties' settlement. However, the Commission erred by relying on evidence that should have been made part of the record before it was relied upon.

- The Minnesota Administrative Procedure Act (Minn. Stat. § 14.60, subd. 2) limits agencies to considering factual information made part of the record during the contested case proceeding. *Id.*
- Although the Commission could take official notice of documents in a prior case, the parties were entitled to an opportunity to contest the officially noticed facts. *Id.* at 141.

Morgan v. United States, 304 U.S. 1 (1938)

Kansas City Stockyards, 1941

Source: Agricultural Communications Office of the Texas Agricultural Extension Service

Morgan v. United States, 304 U.S. 1 (1938)

Morgan v. United States, 304 U.S. 1, 18-19 (1938) – Parties are deprived of a fair hearing where parties lack notice of, or opportunity to respond to, another's claims.

- "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Id.* at 18.
- "The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Id.* at 20.
- Agencies must act in accordance with basic concepts of fair play. *Id.* at 22.

In re Blue Cross & Blue Shield of Minn. (Minn. 2001)

Minn. AG Hubert Humphrey III,
BCBS CEO Andy Czajkowski

In re Blue Cross & Blue Shield of Minn. (Minn. 2001)

In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota, 624 N.W.2d 264, 281–82 (Minn. 2001) – Evidence outside the record cannot be considered by the final agency decision-maker without taking official notice.

- Before taking official notice, the agency must notify the parties in writing and provide them an opportunity to respond. *Id.* (citing Minn. Stat. § 14.60, subd. 4).
- Although the record contained information relating to existing health promotion programs, the agency decision-maker did not cite it, relying on extra-record evidence instead. *Id.* at 282.

Hard Times Cafe v. City of Mpls. (Minn. App. 2001)

Hard Times Cafe, Minneapolis (July 2013)

Photo by: Erin Thomas Wilson

Hard Times Cafe v. City of Mpls. (Minn. App. 2001)

Hard Times Cafe, Inc. v. City of Minneapolis, 625 N.W.2d 165, 174 (Minn. Ct. App. 2001) – The consideration of evidence outside the record, deviations from the agency's procedures, and an absence of findings justifying the agency decision warrants transfer to a district court (pursuant to Minn. Stat. § 14.68) to determine whether the agency was improperly influenced.

- "[T]he council organized a caucus . . . [where] outside witnesses were brought in and information was presented regarding the volume of 911 calls made concerning the Hard Times Cafe. No evidence concerning 911 calls had been presented to the ALJ." *Id.* at 174.
- "The contents of [a contemporaneous staff e-mail] suggest both that council members made up their minds before the license revocation process was completed, and that members promoted the consideration of information that was not presented to the ALJ." *Id.*

In re Midwest Oil of Minn., LLC (Minn. App. 2007)

Photo by: Mike Mozart

In re Midwest Oil of Minn., LLC (Minn. App. 2007)

In re Midwest Oil of Minnesota, LLC, No. A06-1731, 2007 WL 2245818, at *3 (Minn. Ct. App. Aug. 1, 2007) – No new evidence may be submitted after the evidentiary record closes with the submission of any written memoranda and late-filed exhibits that all parties and the ALJ have agreed to accept.

- "We agree with the deputy commissioner that the statute and the applicable rules prohibit the introduction of new evidence after the evidentiary record closes." *Id.*
- "The documents in the binder are . . . evidence. And because the parties and the ALJ did not agree to accept this evidence, it is inadmissible. *See* Minn. R. 1400.7800, subp. J. Consequently, we conclude that the deputy commissioner's decision not to consider the documents was not arbitrary or capricious."

Takeaways

Due process and basic fairness require that parties must have adequate notice of the claims made, evidence relied upon in support of those claims, and a meaningful opportunity to respond. *Morgan v. United States*, 304 U.S. at 18-19; *In re Appl. of N. States Power Co.*, 440 N.W.2d at 140; *Anderson v. Moberg Rodlund Sheet Metal Co.*, 316 N.W.2d 286, 289 (Minn. 1982).

Photo by: versageek

“Showing Your Work”

Photo by: Chad Davis

- Appellate courts will only consider and base their decisions on the papers, exhibits, and transcripts of any testimony received into evidence by the body whose decision is to be reviewed. *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977); Minn. R. Civ. App. P. 110.01; 115.04, subd. 1.

- To meet the substantial-evidence standard, an agency must “adequately explained how it derived its conclusion” and that “conclusion [must be] reasonable on the basis of the record.” *In re PolyMet Mining, Inc.*, 965 N.W.2d 1, 8 (Minn. Ct. App. 2021), *rev. denied* (Minn. Sept. 29, 2021).

Possible Consequences

Even if initially successful, offering or relying on extra-record evidence creates significant appellate risks. For example:

- *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999) (ordering county to issue permit for hog feedlot facility it had previously denied to respondent landowner because remanding would reward the county's actions and legal strategy).
- *Hurrle v. Cnty. of Sherburne ex rel. Bd. of Comm'rs*, 594 N.W.2d 246, 252 (Minn. Ct. App. 1999) (ordering county to approve preliminary plat application).
- *In re Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project*, 993 N.W.2d 627, 653–654 (Minn. 2023) (remanding the matter to the agency because procedural irregularities rendered the permitting decision arbitrary and capricious, and may have prejudiced appellants).

Stipulation

The record closes upon receipt of the final written memorandum, transcript, if any, or late filed exhibits ***which the parties and the judge have agreed*** should be received into the record, whichever occurs latest. Minn. R. 1400.7800, subp. J.

Photo by: Keila Trejo

Official Notice

Minn. Stat. § 14.60, subd. 4 – Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

- *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 892 (Minn. Ct. App. 1988) (citing *Ohio Bell Tele. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 301 (1937)) – Official notice of general matters of common knowledge may properly be taken. However, official notice cannot constitutionally be used as a substitute for adjudicating specific facts and thereby dispensing with a hearing.

Remand?

In re Surveillance & Integrity Rev. Appeals by Trinity Home Health Care Servs., No. A22-0183, 2022 WL 6272045, at *5 (Minn. Ct. App. Oct. 10, 2022) – An agency's authority carries the implicit authority to correct erroneous decisions, including by remanding to an ALJ for a correct application of law.

- Implicit in Minn. Stat. § 14.62, subd. 2a ("the [ALJ's] report or order . . . constitutes the final decision . . . unless the agency modifies or rejects it ") is the right to remand the case.
- An administrative agency has a "well-established right to reopen, rehear, and redetermine the matter even after a determination has been made." *Id*. (*quoting State ex rel. Turnbladh v. Dist. Ct.*, 107 N.W.2d 307, 312 (Minn. 1960)).

Remand?

In re Surveillance & Integrity Rev. Appeals by Trinity Home Health Care Servs., No. A22-0183, at *15-16, 18 (Minn. Oct. 11, 2023) – the Court rejected the agency's use of remand in this case.

- The Court noted that the agency had authority to issue the same decision after the first report as it did after the second. *Id.* at *15 n.10.
- The decision is only a few days old. Its impact on future proceedings is uncertain.

Photo by: Casey Eisenreich

Correction or Modification

Minn. R. App. P. 110.05 – If anything material to either party is omitted from the record by error or accident or is misstated in it, . . . either before or after the record is transmitted to the appellate court, or the appellate court, on motion by a party or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be approved and transmitted.

- *W. World Ins. Co. v. Anothen, Inc.*, 391 N.W.2d 70, 72–73 (Minn. Ct. App. 1986) – Rule 110.05 is limited to correction of the record so that it accurately reflects anything of material value that was omitted from the record by error or accident or is misstated in it.

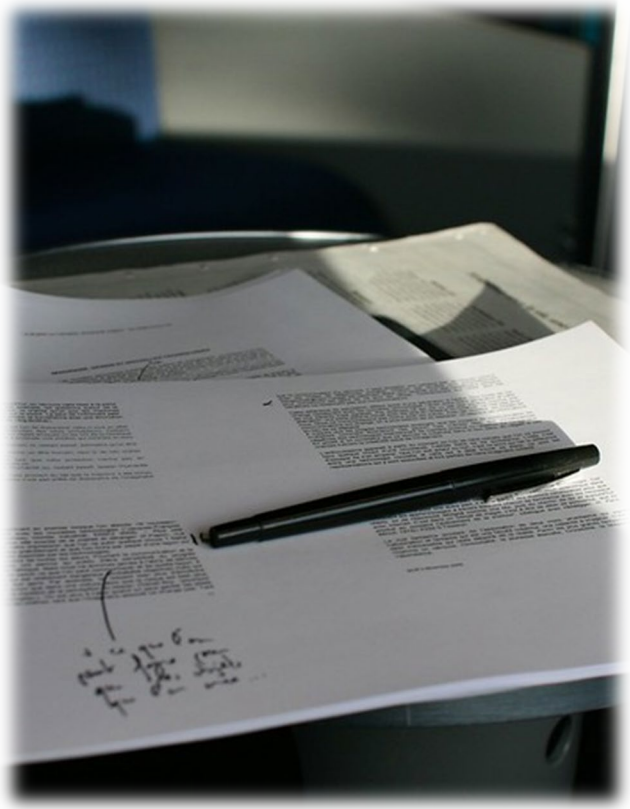


Photo by: Nicolas Nova

Questions or Comments

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PRE-ENFORCEMENT CHALLENGES TO ADMINISTRATIVE RULES

ALLEN COOK BARR, ASSISTANT ATTORNEY GENERAL

OCTOBER 13, 2023

View Slides: https://cle.allenbarr.com

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RULES ABOUT RULES?!
(Part Deux)

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October 13, 2023

The Golden Rules About Rules:

I. Rules about rules are not universal.

II. There are three types of rules.

III. Rules are not meant to be broken.

IV. Rule interpretation is subject to de novo review.

V. Unadopted rules are unenforceable.

VI. Unadopted rules have two potential lifelines.

VII. Agencies may make case-by-case determinations.

VIII. Agencies may take "litigation positions."

IX. Adopted rules may be varied.

~~X. Rules can be challenged.~~

X. *The rules are subject to change.*

What is a "rule"?

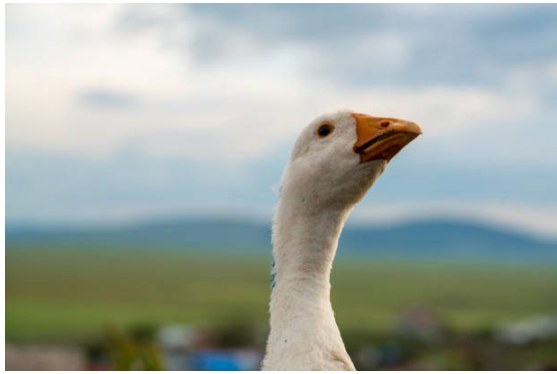
"'Rule' means every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4 (2022) (emphasis added).

In addition to formally adopted rules, potential rules may include emails, letters, strategies, internal guidelines, bulletins, manuals, policy statements, FAQs, directives, or instructions.

I. Rules about rules are not universal.

By statute, the Minnesota Administrative Procedure Act (MAPA) and its corresponding rulemaking procedures do not apply to:

- Agencies directly in the legislative or judicial branches;
- Emergency powers in sections 12.31-.37, including peacetime emergencies;
- Department of Military Affairs;
- Comprehensive Health Association in section 62E.10; or
- the Regents of the University of Minnesota.



Minn. Stat. § 14.03, subd. 1 (2022)

(*Much like the MGDPA*, s*auce for the goose is not sauce for the gander*).

Other "non-rules":

The term "rule" does not include every agency action of general applicability and future effect:

- Rules concerning the internal management of agencies that do not directly affect publicly available rights/procedures;
- Application deadlines on forms;
- Procedures for data sharing among state agencies;
- Opinions of the Attorney General; and
- Other specific industry standards developed by Departments of Labor and Industry, Education, Revenue, Commerce, and Human Services.

Minn. Stat. § 14.03, subd. 3(a)-(b).

II. There are three types of rules.

1. Legislative/Substantive: Rules adopted pursuant to specific statutory authority and that have the force and effect of law. *Cable Comm'n Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 667 (Minn. 1984).

2. Procedural: Rules that set forth the nature and requirements of all formal and informal procedures of an agency when the procedures directly affect the rights of the public. Minn. Stat. § 14.06(a) (2022).

3. Interpretive: Rules that make specific the laws enforced or administered by an agency, including interpretations of ambiguous statutes and regulations. *St. Otto's Home v. Minn. Dept. of Human Servs.*, 437 N.W.2d 35 (1989).

More on interpretive rules:

Initially, interpretive rules were not mentioned in the APA.

In 1979, the Minnesota Supreme Court held that interpretive rules were "mere statements of agency policy" and did not hold the force and effect of law:

> Although we agree with the trial court's determination that [the agency] was not delegated the power to make legislative rules, *we must reverse the order invalidating the rules on the ground that they may be permitted to stand as interpretative rules without the force and effect of law.*

Minnesota-Dakotas Retail Hardware Ass'n v. State, 279 N.W.2d 360 (Minn. 1979) (emphasis added).

More on interpretive rules:

- In 1981, the legislature amended MAPA to declare that interpretive rules have the force and effect of law. 1981 Minn. Laws. ch. 109, § 1; *see also* Minn. Stat. § 14.38, subd. 1 (2022).

- Interpretive rules are synonymous with interpretative rules.

- Spoiler Alert: Unadopted interpretive rules are disfavored as a matter of public policy because they involve no stakeholder input or the formal procedures (*i.e.,* unelected bureaucrat in back room creating the administrative state).

- Unadopted interpretive rules are generally unenforceable. *See infra* Rule V.

III. Rules are not meant to be broken.

Properly adopted substantive, procedural, and interpretive rules all have the force and effect of law. Minn. Stat. § 14.38, subd. 1.

Agencies should follow their own rules:

"The agency must either follow its own regulations or amend them in accordance with statutory rule-making procedures." *Swenson v. Dep't of Pub. Welfare*, 329 N.W.2d 320, 324 (Minn. 1983) (county board violated a rule by reducing level of mandatory services from that recommended by individual service plans formulated under the rule).

But "broken" rules shouldn't be enforced.

- Agencies have a certain amount of prosecutorial discretion when to take an enforcement action and whether to enforce its adopted rules.

- If a rule is obsolete, unlawful, or unconstitutional, an agency should not seek to enforce it.

- Agencies must annually review rules and develop plans to repeal obsolete, unnecessary, or duplicative rules. Minn. Stat. § 14.05, subd. 5 (2022).

But don't conflate rules with precedent . . .

An agency must generally conform to its prior norms and decisions or, if it departs from its prior norms and decisions, it must set forth a reasoned analysis for the departure that is not arbitrary and capricious.

In re 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils., 768 N.W.2d 112, 120 (Minn. 2009).

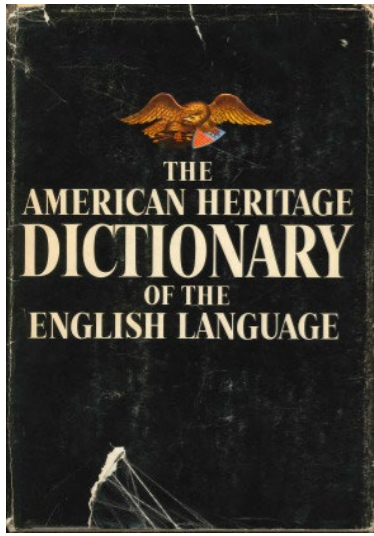
IV. Rule interpretation is subject to de novo review.

"The interpretation of an administrative regulation presents a question of law that we review de novo." *J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 5 (Minn. 2016).

"Like statutes, administrative regulations are governed by general rules of construction." *White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 8 (Minn. 1982).

Buy a dictionary!

In re Restorff, 932 N.W.2d 12, 21 (Minn. 2019) (using *The American Heritage Dictionary of the English Language* (5th ed. 2011) to define "provide for" and "supervision").



When the rule or statute does not define a word, "look to dictionary definitions to determine the plain meaning."

Word definitions cannot be imported from other statutes or rules.

De novo review . . .

What about agency deference?!

Chevron deference may soon be gone.

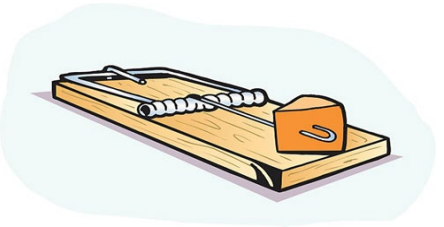
SCOTUS is currently reviewing *Chevron* deference (i.e., courts should defer to an agency's reasonable interpretation of an ambiguous statute), with a decision expected in 2024. *Loper Bright Enters. v. Raimondo*, No. 22-451. For better or worse, Justice Ketanji Brown Jackson has recused herself from the case.

Late last year, the Ohio Supreme Court held that its state courts are <u>never</u> required to defer to administrative agencies' interpretations of the law. *TWISM Enters., LLC v. State Bd. of Reg'n*, __ N.E.2d __, 2022 WL 17981386 (Ohio. Dec. 29, 2022).

Deference in Minnesota . . . a trap?

Minnesota courts generally do not defer to an agency's interpretation when the regulation is clear and capable of understanding; however, an agency's interpretation of an "ambiguous" regulation "will generally be upheld if it is reasonable." *St. Otto's Home*, 437 N.W.2d at 40 ('89).

- Part I: Discussed deference standards and declined to defer because the agency's interpretations were "unreasonable under the circumstances."
- Part II : Found that the agency's definitions were also invalid interpretative rules because MAPA adoption procedures weren't followed.
- Dicta: The Court noted that an agency's *correct* interpretation of a statute or rule may be an unadopted, unenforceable rule. *Id.* at 44.



V. Unadopted rules are unenforceable.

Rules must be adopted to be enforceable:

"Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations." Minn. Stat. § 14.05, subd. 1 (2022).

Persons may raise unadopted rulemaking as a defense to an agency's action or by proactively filing a petition at OAH pursuant to Minn. Stat. § 14.381.

These challenges hinge on an intensive review of both the facts and the law.

Typical factors reviewed for unlawful rule adoption:

So much depends upon . . .

- ✓ Issue of social and political importance?
- ✓ Degree of variance from the plain language of law and/or regulatory scheme?
- ✓ Ambiguous law (i.e., more than one reasonable interpretation)?
- ✓ Applied universally/prospectively (versus case-by-case/retrospectively)?
- ✓ Historically inconsistent applications by agency?
- ✓ Newer interpretation by agency?
- ✓ Inequities and unfairness?

Challenges to unadopted (or unpromulgated) rules in court:

Commissioner of Public Welfare issued policy bulletin authorizing counties to pay for certain abortions under Medicaid program. *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977).

County improperly relied on Aid to Families With Dependent Children manual to deny applications for emergency assistance. *Wenzel v. Meeker Cty. Welfare Bd.*, 346 N.W.2d 680 (Minn. Ct. App. 1984).

DNR denied permit application under an unadopted moratorium on harbor development in Mille Lacs Lake. *In re Orr*, 396 N.W.2d 657 (Minn. Ct. App. 1986).

Challenges to unadopted (or unpromulgated) rules in court:

MPCA listed parent corporations as parties to their subsidiary corporations' permit applications. *In re Hibbing Taconite Co.*, 431 N.W.2d 885 (Minn. Ct. App. 1988).

DHS interpreted Minnesota's medical assistance rate-setting rules to determine that nursing homes were not "hospital-attached nursing homes." *St. Otto's Home,* 437 N.W.2d 35 ('89).

DOT improperly included "general addendum" on contract bid request that interpreted statute. *Sa-ag v. Minn. Dep't Transp.*, 447 N.W.2d 1 (Minn. Ct. App. 1989).

Challenges to unadopted (or unpromulgated) rules in court:

Petroleum Board improperly denied application for clean-up reimbursement by claiming costs were also covered by insurance. *In re Application of Crown Coco, Inc.*, 458 N.W.2d 132 (Minn. Ct. App. 1990).

DHS incorrectly considered unadopted program manual to determine that a county could not recover alleged overpayment of medical-assistance benefits from recipient. *Matejcek v. Rice Cty. Social Servs.*, No. A17-0897, 2018 WL 1569843 (Minn. Ct. App. Apr. 2, 2018).

Reviewing unadopted rules at OAH:

Since 2001, any person who believes an agency is enforcing an unadopted rule may petition OAH for an order to cease its enforcement. Minn. Stat. § 14.381.

- The petition must be supported by affidavit and served upon the agency.
- The agency shall respond in writing within ten working days.
- The ALJ may order oral argument, but only if necessary to a decision.
- The ALJ must direct the agency to cease enforcement of an unadopted rule.
- The ALJ's decision may be appealed (in perpetuity) under sections 14.44-.45.
- The agency is generally liable for all OAH costs, but if agency prevails it may recover "all or a portion of" costs unless the petitioner was IFP, raised a good faith argument, or would suffer a hardship.

Unadopted rule petitions at OAH:

In re Minn. Dep't of Commerce Policy Pronouncement & Guidance Document, OAH No. 1-1004-15233, Order (Jan. 15, 2003): Ordering Commerce to cease and desist from enforcing "guidelines" related to complying with newly enacted statute.

In re Campaign Fin. & Pub. Disclosure Bd., OAH No. 11-4450-16542, Order (June 30, 2005): Ordering board to cease enforcement of unadopted rule requiring that contested case proceedings be held before the board instead of an ALJ.

Unadopted rule petitions at OAH:

In re Minn. Pipe Trades Ass'n, OAH No. 12-1900-19739, Order (Jan. 3, 2006): Ordering DLI to cease enforcing document entitled "Interim Approval for Air Admittance Valve as an Alternate Fixture, Appurtenance, Material or Method."

In re Online Lenders Alliance, OAH No. 8-1000-20038, Order (Nov. 26, 2008): Ordering Commerce to cease enforcement of a policy announcement regulating out-of-state payday lenders.

Unadopted rule proceedings at OAH:

In re Minnesota Board of Dentistry, OAH No. 8-0902-31449, Order (June 18, 2014): Holding that Board of Dentistry improperly enforced an informally-developed policy on course accreditation.

In re Property Cas. Insurers Ass'n of America, Inc., OAH No. 8-1000-33787, Order (Dec. 7, 2016): Ordering Commerce to cease and desist from requiring insurers to respond to a multi-state diversity survey.

Unadopted rule petitions at OAH:

Doe v. Minn. Bd. of Social Work, OAH No. 8-0910-35091, Order (May 7, 2018): Ordering board to stop forbidding licensees from recording investigative interviews (and rejecting that the rule was excepted as longstanding even though it was enforced for more than a decade).

In re JustUs Health, OAH No. 60-9029-36557, Order (Apr. 16, 2020): Ordering DHS to stop enforcing guidelines in a provider manual requiring all persons seeking gender-conforming surgery to be 18 years old and denying coverage for facial-gender-conforming surgery on the grounds that it was cosmetic and without considering whether it was medically necessary.

Unadopted rule petitions at OAH:

In re Am. Crystal Sugar Co., OAH No. 8-2200-37302, Order (July 22, 2021): Ordering MPCA to stop prohibiting "mixing zones" where water quality standards may be exceeded as long as toxic conditions to aquatic life are prevented.

In re Fadil Jama, OAH No. 65-0900-37648, 2021 WL 42683363 (Sept. 14, 2021): Determining that Health Department's decision to delay and modify the process for approving new home healthcare license applications was expressly authorized by Executive Order 20-32 and, moreover, rendered moot due to the end of the COVID-19 peacetime emergency and the agency's resumption of processing license applications.

Unadopted rule petitions at OAH:

In re Presbyterian Homes & Servs., OAH No. 5-0900-38062, 2022 WL 868116 (Feb. 28. 2022): Ordering Health Department to stop conditioning access to independent-informal-dispute resolution at OAH on filing information with the Health Department not required by statute.

In re Minn. Ass'n of Community Health Programs, OAH No. 23-1800-38925, 2023 WL 3028565 (Apr. 13, 2023): Dismissing association's petition because DHS's decision to withdraw from temporary federal program did not constitute a rule and agency was not enforcing anything.

Unadopted rule petitions at OAH:

In re Shakopee Mdewakanton Sioux Community, 988 N.W.2d 135 (Minn. Ct. App. 2023): Reversing ALJ's dismissal of the community's petition against the Gambling Control Board and holding:

(1) no deadline barred the community's appeal filed 2 years after ALJ's decision; and,

(2) E.D.'s emails to several vendors—9 days apart—pausing and then restarting the board's approval of electronic pull-tabs using an open-all feature were unadopted rules because the statute was ambiguous as both the board's and the community's interpretations were reasonable (i.e., not exempt under plain meaning).

The court did not resolve the ambiguity it found and, thus, the board lost even though the court agreed that its statutory interpretation was reasonable!

VI. Unadopted interpretive rules have 2 lifelines?

Courts historically cite the following two exceptions to invalidating unadopted interpretive rules:

- Does the agency's interpretation correspond with the law's plain meaning?
- Is the agency's interpretation of an ambiguous statute longstanding and reasonable?

Cable Comm'n Bd., 356 N.W.2d at 667.

In either situation, the agency is not deemed to have adopted a new rule and its interpretation is neither invalid nor have the force and effect of law. It merely effectuates other existing law.

Agency action corresponded with "plain meaning."

In re Wright County, 784 N.W.2d 398 (Minn. Ct. App. 2010):

- Court affirmed DLI's cease and desist order prohibiting Wright County from admini$tering the $tate Building Code within the limit$ of Corinna Town$hip.

- Court rejected the county's argument that DLI was enforcing an unadopted rule because its order was consistent with the plain language of the statute.

Agency action corresponded with "plain meaning."

Waste Mgmt. of Minn., Inc. v. MPCA, No. A14-0122, 2014 WL 3892576 (Minn. Ct. App. Aug. 11, 2014):

- Involved MPCA's stated "strategy" about enforcing section 473.848.
- Originated as a petition under § 14.381 and ALJ dismissed.
- COA affirmed because, while the strategy was a rule, it was consistent with and emanated from the plain language of the statute (rejecting claims of ambiguity concerning the meanings of "unless" and "until").
- "This statutory language, including its temporal requirements, is clear and consistent with the overall regulatory purpose of the statute." *Id.* at *6.

Agency action corresponded with "plain meaning."

In re Oak Hill Adult Servs., OAH No. 5-9049-35943 (Mar. 12, 2019): Dismissing petition alleging that DHS's requirement that lead agencies must manually adjust certain automatic determinations to account for changes in procedure codes was an unadopted rule because the requirement simply enforced the statute.

In re TurboChef Technologies, Inc., OAH No. 82-9000-36121, Order (Aug. 13, 2019): Determining Health Department's letter declining a waiver to install manufacturer's oven without a mandatory hood equipped with sprinklers in a nursing home was not a rule under case-by-case and plain language exceptions.

Agency action corresponded with "plain meaning."

Shire v. Harpsted, No. A19-0807, 2019 WL 7287088 (Minn. Ct. App. Dec. 30, 2019): DHS's temporary suspension of Medicaid payments to appellant based on credible allegations of fraud was authorized by the plain meaning of the statute (and notwithstanding that the agency departed from a prior internal policy that existed since 2012).

In re Valet Living, No. A20-0817, 2021 WL 772622 (Minn. Ct. App. Mar. 1, 2021): Affirming ALJ's dismissal of petition because "combustible storage" was unambiguous and the fire marshal construed it consistent with the code's plain language.

Agency action corresponded with "plain meaning."

In re Viro Health of Minn., LLC, OAH No. 82-0400-38734, 2023 WL 1824902 (Feb. 1, 2023): Dismissing medical-cannabis manufacturer's petition because Agriculture Department's guidance document was consistent with the plain meaning of federal pesticide regulations and Minnesota law.

Longstanding and reasonable exception?

???

Longstanding and reasonable?

In re PERA Salary Determination, 820 N.W.2d 563 (Minn. Ct. App. 2012):

- PERA contended that its actions were justified by the longstanding and reasonable exception.
- Court observed that the caselaw does not provide extensive guidance on applicable circumstances.
- The exception is derived from federal law, which also does not clearly describe requirements.

Longstanding and reasonable?

In re PERA Salary Determination rejected application of the exception:

- No evidence "as to exactly when PERA adopted the interpretation."
- The interpretation was "unwritten and, consequently, indefinite."
- Applied "inconsistent over time."
- An eight-year-old letter in the record was "conclusory" and "[did] not reveal the reasons for that policy."

Longstanding and reasonable?

"If we are the accept an improperly promulgated rule as valid on the ground that it is 'longstanding,' we must insist on a greater level of formality and consistency than is evident in the agency interpretation in this case."

In re PERA Determination, 820 N.W.2d at 573.

VII. Agencies may formulate policy on case-by-case basis . . .

<u>According to the Minnesota Supreme Court</u>:

"Administrative policy may be formulated by promulgating rules or on a case-by-case determination." *Bunge Corp. v. Comm'r of Revenue*, 305 N.W.2d 779, 784-85 (Minn. 1981) (holding that Revenue did not engage in rulemaking by denying a tax deduction for commissions paid by parent corporation to its subsidiary).

<u>And according to the Legislature</u>:

"An agency determination is not considered an unadopted rule when the agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis." Minn. Stat. § 14.381, subd. 1(b) (2022).

VII. Agencies may formulate policy on case-by-case basis . . .

Reserve Life Ins. Co. v. Comm'r of Commerce, 402 N.W.2d 631 (Minn. Ct. App. 1987): Commerce properly formulated policy "through a case-by-case determination" when it denied insurance applications and forms on the grounds that they were "unfair, inequitable, misleading, (and) deceptive."

L&D Trucking v. Minn. Dep't of Transp., 600 N.W.2d 734 (Minn. Ct. App. 1999): COA reversed order holding DOT in "constructive willful contempt" of a district court order enjoining DOT from enforcing unadopted rule related to prevailing-wage law because the record showed that DOT attempted to enforce the law on a case-by-case basis by applying the statute to specific facts and parties.

. . . unless they can't.

Swenson, 329 N.W.2d at 324 ('83) (questions of social and political importance, such as allocation of resources to the disabled, require participation by all stakeholders).

Dullard v. Minn. Dep't of Human Servs., 529 N.W.2d 438, 446 (Minn. Ct. App. 1995) ("Because the decision not to respect an asset assessment from another state is of broad social importance, affecting the rights of institutionalized spouses moving to Minnesota from anywhere else in this country, the case-by-case method of policy making is not appropriate.").

In re Meridian Servs., Inc., OAH No. 8-1800-33554, 2017 WL 4863691, *7, Findings of Fact, Conclusions of Law, and Recommendation (Sept. 29, 2017) (rejecting DHS' attempt in a maltreatment proceeding to develop a broad policy stance by way of case-by-case adjudication that a manufacturer's wheelchairs should not be used to transport a wheelchair-bound person in a vehicle).

VIII. Agencies may take "litigation positions."

In re Minn. Living Assistance, Inc., d/b/a Baywood Home Care, 934 N.W.2d 300 (Minn. 2019):

- Dealt with dispute over DLI's previously undeclared interpretation of "overtime work" in an adopted, albeit ambiguous rule.

- Court observed that two reasonable interpretations of the regulation supported DLI's position and that Baywood's proposed interpretation was unreasonable.

Litigation positions:

- The Court (4:3) held that under either of DLI's reasonable interpretations, Baywood owed its employees $1 million based on improperly calculated overtime wages.

- The Court assumed—without deciding—that DLI's position was an unadopted, interpretive rule. The Court did not directly address DLI's argument that it was engaging in case-by-case enforcement.

- The Court further observed that DLI's interpretation, insofar as it was a rule, was invalid and did not have the force and effect of law and was not entitled to deference.

Litigation positions:

"That an agency's interpretation of an ambiguous rule is recent does not preclude the agency from arguing for that interpretation; it merely means that the agency's position is a 'litigation position' that 'does not warrant deference.'"
Id. at 309.

"[T]o the extent the Department's summary disposition order is a new rule . . . it is invalid. What *is* of general applicability and future effect is our de novo interpretation of the existing, properly promulgated rules, just as our interpretations are applicable in every other type of case."
Id. at 310 (emphasis in original).

Litigation positions:

Dissent (Justices Anderson, Gildea, and Thissen):

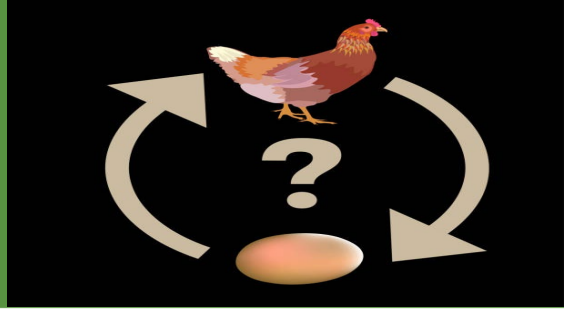
- Case-by-case discussion under *Bunge* was dicta and its concept has been strongly criticized (but no discussion of express legislative authorization under section 14.381, subd. 1(b)).

- DLI's legal basis should have been invalidated as unadopted interpretation of an ambiguous rule (i.e., agencies can't enforce ambiguous statutes and rules).

- Majority endorsed a process to allow agencies to adopt and enforce interpretive rules without following rulemaking procedures.

- Unfair to impose $1 million fine without giving Baywood notice and an opportunity to conform its behavior to an unambiguous law.

Litigation positions:



Questions that I identified in 2019 CLE and remain unanswered:

- When does an agency's "litigation position" become the improper adoption of a new rule?
- Would the outcome have been different if Baywood's proposed interpretation was also reasonable?
- Do issues relating to "litigation positions" only arise when dealing with issues of broad social importance?
- Can an ALJ recognize an agency's "litigation position" in an administrative proceeding?
- If not, will ALJ allow the parties to make a record for review like in cases involving constitutional questions?

IX. Adopted rules may be varied.

- Agencies have the express authority to vary their rules to account for a person's specific circumstances. Minn. Stat. § 14.055 (2022).

- Mandatory variance: Must be granted if the application of the rule to the person would not serve any of the purposes of the rule. *Id.*, subd. 3

- Discretionary variance: May be granted if application of the rule would (1) result in hardship or injustice, (2) would be consistent with the public interest, and (3) would not prejudice the legal or economic rights of other persons. *Id.*, subd. 4.

Limitations on Variances

Four statutory limitations on variances:

(1) the agency may attach any conditions to the granting of a variance that are needed to protect public health, safety, or the environment;

(2) a variance has prospective effect only;

(3) conditions attached to the granting of a variance are an enforceable part of the rule to which the variance applies; and

(4) the agency may not grant a variance from a statute or court order.

Minn. Stat. § 14.055, subd. 2.

Deadlines on Variances:

Unless the petitioner agrees to a later date, an agency must issue a written order granting or denying a variance petition within 60 days or it is automatically granted.

The order must contain an agency statement of the relevant facts and the reasons for the agency's action.

Minn. Stat. § 14.056 (2022)

X. The Rules are subject to change.

"Great cases like hard cases make bad law."

- Oliver Wendall Holmes, Jr.

(dissenting in *Northern Securities Co v. United States*, 193 U.S. 197 (1904)

Polymet: Substantial Evidence.

In re Northmet Project Permit to Mine Application, 959 N.W.2d 731 (Minn. Apr. 28, 2021):

- Evaluated "substantial evidence" standard of review under section 14.69, which historically has been a fairly low bar (i.e., "more than a scintilla").
- "[A] substantial-evidence analysis requires us to 'determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record.'" *Id.* at 749 (*quoting Minn. Power & Light Co. v. Minn. Pub. Utils. Comm'n,* 342 N.W.2d 324, 330 (Minn. 1983)).
- Concluded that, due to absence of agency analysis, a contested case hearing was required on the effectiveness of the proposed bentonite amendment for PolyMet's proposed tailings basin. *Id.* at 753-54.

Polymet: Substantial Evidence.

In re Polymet Mining, Inc., 965 N.W.2d 1 (Minn. Ct. App. July 19, 2021):

- Involved challenge to MPCA's decision to issue air-emissions permit to mining company for proposed copper-nickel-platinum mine.

- Citing the *Northmet* and *Minnesota Power* decisions, the court remanded after observing that "an agency decision may fail substantial-evidence review if the agency does not adequately explain the reasons for its decision *or* if the record does not support the agency's reasons for its decision." *Id.* at 9 (emphasis in original).

Polymet: Combination of Danger Signals.

In re Denial of Contested Case Hearing Requests, __ N.W.2d __, 2023 WL 4919533 (Minn. Aug. 2, 2023): Reviewed MPCA's approval of Polymet permit for proposed copper-nickel mining project.

- Procedural history included the district court conducting a section 14.68 review for irregularities in procedure before COA rendered its decision.
- Due to concerns about negative press, MPCA secured "unusual agreement" for EPA to delay comments on a draft permit during the public comment period.
- MPCA did not document in the record its request or the EPA's concerns.
- MPCA did not explain in the record how it resolved the EPA's concerns.
- The record contained "general deficiencies" regarding the MPCA's and EPA's communications on "an important, complex permitting decision."

Polymet: Combination of Danger Signals.

In re Denial of Contested Case Hearing Requests, __ N.W.2d __, 2023 WL 4919533 (Minn. Aug. 2, 2023):

- The Court adopted a broad definition of "irregularities in procedure" under section 14.68, rejecting that it must be "unlawful procedure" per section 14.69.
- The Court held that *procedural irregularities* may establish that a decision was "arbitrary and capricious" under section 14.69.
- The Court further held that the appellants only needed to establish "a possibility or probability" of prejudice under section 14.69, not "actual prejudice."
- Court remanded to MPCA to address EPA's concerns, if any, but didn't reopen public comments or otherwise afford a participatory remedy to appellants.

"A remand is not a rejection."

In re SIRS Appeals by Trinity Home Health Care Servs., No. A22-0183, __ N.W.2d __, 2023 WL 6614002 (Minn. Oct. 11, 2023):

- Reviewed whether, following an OAH evidentiary hearing, DHS had authority under MAPA to remand the case to the ALJ to "reconsider" his recommendation and "give proper weight" to certain evidence.
- Court focused on section 14.62, which provides that the ALJ's report constitutes the final decision "unless the agency modifies or rejects it."
- Court declined to accept DHS's dictionary-definition argument that "remand" was included under the definition of "reject" under those circumstances, in part, because it would allow agencies to "send the case back to the ALJ indefinitely."

"A remand is not a rejection."

In re SIRS Appeals by Trinity Home Health Care Servs., No. A22-0183, __ N.W.2d __, 2023 WL 6614002 (Minn. Oct. 11, 2023):

- Footnote 13: Observed that sorting out "policy arguments" of "why one type of remand is a rejection and another type is not" is "better left to the Legislature."

- Dissent (Justice Chutich):
  - The statute is ambiguous, the word "reject" has more than one reasonable interpretation, and the more appropriate interpretation permits a remand.
  - "Rejects" inherently includes remand.