

Procedural Defects Analysis

Procedural Defects: The Minnesota Administrative Procedures Act (APA) establishes procedures that agencies must follow in adopting rules. If procedural requirements are not followed, that is, if rules are procedurally defective, they may be disapproved by the ALJ or Chief ALJ when reviewed.

According to state law, there are several circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge (Minn. Rules, Part 1400.2100, Item A). A proposed rule is defective when it:

- (a) is not adopted in compliance with the procedural requirements of state law, unless the judge finds that the error was harmless in nature and should be disregarded;
- (b) is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule;
- (c) is substantially different than the rule as originally proposed and the agency did not comply with required procedures;
- (d) grants undue discretion to the agency, is unconstitutional¹ or illegal;²
- (e) improperly delegates the agency's powers to another entity; or
- (f) falls outside of the statutory definition of a "rule."³

A procedural defect can be considered a harmless error under Minn. Stat. § 14.15, subd. 5 and § 14.26, subd. 3 (d), if: "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

¹ In order to meet constitutional requirements, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, e.g., *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

² See, Minn. Stat. §§ 14.05, 14.51 (2010); Minn. R. 1400.2100 (2009).

³ See, Minn. Stat. § 14.02 (2010); Minn. R. 1400.2100 (2009).

Defect & Example	APA requirement	Recommendation
<p>Failure to submit SONAR to Legislative Reference Library at the same time as NOIA mailed (to agency's rulemaking list)</p> <p>Dept. of Education: Mihalchick/Lindstrom – Approval <i>Academic Standards in Science, Minnesota Rules, Chapter 3501</i></p>	<p>Agency must send a copy of the SONAR to the Legislative Reference Library when notice to adopting rules/notice of hearing/dual notice is mailed</p> <p><i>Minn. Stat. § 14.131 & 14.23; Minn. Rules, part 1400.2070, subpart 3</i></p>	<p>-Make SONAR available (publish on agency website, mail on request) to ensure that opportunities are available to all persons/entities to participate meaningfully in rulemaking</p>
<p>Comment period length not in compliance</p> <p>Dept. of Health: Schlatter/Lipman – partly disapproved <i>Baskets of Care, Minnesota Rules, Chapter 4765</i> <i>3/16/10</i></p>	<p>The end date of the comment period must be at least 30 days after the date of publication of the NOIA without a public hearing/dual notice</p> <p><i>Minn. Rules, part 1400.2080, subpart 3(B)</i></p>	<p>-Review Minn. Rules, part 1400.2030 on counting time -If in doubt, err on the side of a generous comment period -Demonstrate good faith effort to do extensive outreach to parties/persons that may be impacted by rules and provides opportunities for public participation -If possible, extend the comment period and communicate/publicize the extension</p>
<p>Inadequate notification of proposed rules to persons who may be significantly impacted</p> <p>Board of Chiropractic Examiners: Lipman/Lindstrom – Disapproved <i>Licensing Reinstatement, Minnesota Rules, Chapter 2500</i> <i>11/17/2009</i></p>	<p>...The agency must also “make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication</p> <p><i>Minn. Stat. § 14.14, subd. 1(a)</i></p>	<p>- Budget resources and time to identify all parties/persons who may be significantly impacted by the proposed rules, and appropriate outreach/engagement strategies, before embarking on rulemaking -Consider seeking prior approval on the additional notice plan before publishing Request for Comments to avoid having to revert to earlier rulemaking steps or disapprovals -Per APA, include explanation in SONAR as to why outreach efforts were not made</p>

Defect & Example	APA requirement	Recommendation
<p>Failure to include any or all of the SONAR requirements as noted in Minn. Stat. § 14.131, such as</p> <ul style="list-style-type: none"> -Description of classes of persons probably affected by proposed rules -Probable costs of compliance with proposed rules -Consultation with Commissioner of Finance (MMB) on fiscal impact of proposed rules <p>Minnesota Board of School Administrators: Lipman/Lindstrom: Disapproved Educational Administrative Licensure 8.13.2008</p>	<p>APA identifies requirements that must be included in each SONAR</p> <p><i>Minn. Stat. § 14.131</i></p>	<ul style="list-style-type: none"> -Begin research on some of these requirements when in rule development stage. -You will need to supplement the SONAR with these requirements for the rules to be approved. -If unsure about how to go about this section, consult a previous SONARs -SONAR writing is time-intensive. Account for analysis of each requirement into the overall rulemaking timeline
<p>Lack of explicit rationale for the proposal of new and the deletion of obsolete rules</p> <p>Minnesota Racing Commission: Kathleen D. Sheehy/Maria Lindstrom – Partly Disapproved Horse Racing, Minn. Rules, Chapter 7876, 7877, 7879, 7883, 7884, 7890, and 7891 11.16.2010</p>	<p>Statement of need and reasonableness required</p> <p><i>Minn. Stat. § 14.23</i> <i>Minn. Rules, part 1400.2070</i></p>	<ul style="list-style-type: none"> -Review Minn. Rules, part 1400.2070 on SONAR writing requirements
<p>Failure to wait at least 60 days between publication of RFC and the NOIA</p> <p>State Boxing Commission: Sheehy/Lindstrom</p>	<p><i>Minn. Stat. § 14.101, subd. 4</i></p>	<ul style="list-style-type: none"> -Track all timelines -For good cause, consider seeking a reduction in time to 30 days to publish NOIA
<p>Failure to provide NOIA to legislators</p> <p>Board of Chiropractic Examiners: ALJ Barbara Neilson – Approved in part, Disapproved in part. Rules relating to Chiropractic Prepay Plans</p> <p>Rule Hearing Reports - May 2011</p>	<p><i>Minn. Stat. § 14.116</i></p>	<ul style="list-style-type: none"> -Identify relevant legislators/ committee chairs before embarking on rulemaking

1400.2100 STANDARDS OF REVIEW.

A rule must be disapproved by the judge or chief judge if the rule:

A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

B. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;

D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;

E. is unconstitutional or illegal;

F. improperly delegates the agency's powers to another agency, person, or group;

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; or

H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5).

14.15 [ADMINISTRATIVE LAW JUDGE'S REPORT], **Subd. 5**[Harmless errors], and **14.26** [ADOPTION OF PROPOSED RULE; SUBMISSION TO ADMINISTRATIVE LAW JUDGE], **Subd. 3**[Review], **paragraph (d)**, both provide the same language:

The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds:

(1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or

(2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.