

1 Office of Administrative Hearings

2

3 Adopted Permanent Rules Relating to Mediation of Disputes

4 Involving Proposed Rules and Fees and Expenses in Contested

5 Cases

6

7 Rules as Adopted

8 1400.1500 MEDIATION.

9 Subpart 1. Request. A state agency may request the
10 assignment of an administrative law judge to serve as a neutral
11 party in the convening of a group of persons for the purpose of
12 mediating or negotiating a resolution to disputes relating to
13 proposed rules. The request shall be made in writing to the
14 chief administrative law judge who shall, within ten calendar
15 days following receipt of the request, notify the agency of the
16 name, address, and telephone number of the administrative law
17 judge assigned to the matter.

18 Subp. 2. Scheduling. Upon notification of the assignment,
19 the administrative law judge shall contact the agency
20 representative who made the initial request to establish a date,
21 time, and place for the first mediation session and to provide
22 assistance in ensuring compliance with all notice requirements
23 of this part. The administrative law judge assigned shall not
24 communicate, either directly or indirectly, regarding any facts
25 or issues in the mediation with any person not participating in
26 the mediation unless authorized to do so by all persons involved
27 in the mediation.

28 Subp. 3. Notice. Upon establishing the date, time, and
29 place for the first mediation session, the agency shall give
30 written notice of the session, by first class mail, to all
31 persons who have registered with the agency for the purpose of
32 receiving rulemaking notices. The same notice shall be
33 published in the State Register at least 15 calendar days prior
34 to the first mediation session.

35 Subp. 4. Subsequent sessions. If additional mediation

1 sessions are necessary, they shall be convened at a date, time,
2 and place agreeable to all persons participating. If agreement
3 on the date, time, and place of future sessions cannot be
4 reached by the participants, it shall be established by the
5 administrative law judge. Notice of any future sessions shall
6 be given orally to the participants present and in writing to
7 any persons who have indicated a desire to participate but who
8 were not present at the time the decision was made that future
9 sessions would be appropriate. Any written notice shall be
10 given by the agency by first class mail.

11 Subp. 5. Establishment of procedures and guidelines.
12 Procedures and guidelines for the mediation sessions must be
13 established at the first mediation session through agreement of
14 all participants.

15 Subp. 6. Termination. The mediation process shall
16 terminate when the agency announces its unwillingness to
17 continue mediation or when the agency and the participants sign
18 an agreement setting forth the resolution of the disputed issues.

19 Subp. 7. Involvement of mediator in subsequent
20 proceedings. The administrative law judge assigned as a
21 mediator shall not be assigned to any subsequent rulemaking
22 hearing involving the rule which has been the subject of the
23 mediation process.

24 Subp. 8. Compliance with other requirements. The fact
25 that an agreement has been reached through the mediation process
26 shall not relieve the agency from any requirements imposed on it
27 by law or rule in the subsequent adoption of the rule.

28 1400.5600 NOTICE AND ORDER FOR HEARING.

29 Subpart 1. to 6. [Unchanged.]

30 Subp. 7. Department of Human Rights hearings. After
31 receipt of a request for a hearing forwarded by the commissioner
32 of the Department of Human Rights under Minnesota Statutes,
33 section 363.071, subdivision 1a, and the assignment of a judge
34 to the case, the judge shall prepare and issue a notice of and
35 order for hearing. The notice shall incorporate the charge or

1 charges filed by the charging party and shall state that an
2 answer to the charges must be served and filed by the respondent
3 within 20 days after service of the notice.

4 1400.8401 EXPENSES AND ATTORNEY FEES.

5 Subpart 1. [Unchanged.]

6 Subp. 2. Definitions. For the purpose of this part, the
7 following terms have the meanings given them in this subpart:

8 A. and B. [Unchanged.]

9 C. "Party" means a person named or admitted as a
10 party in a contested case initiated under the provisions of
11 Minnesota Statutes, chapter 14 and as defined in Minnesota
12 Statutes, section 3.761, subdivision 6, paragraphs (a), (b), and
13 (c).

14 D. and E. [Unchanged.]

15 Subp. 3. Application. A party seeking an award of
16 expenses and attorney's fees shall, within 40 days of a final
17 disposition in the contested case, submit to the judge an
18 application that shows:

19 A. that the party is a prevailing party and is
20 eligible to receive an award under this part. The applicant
21 must show that it meets all conditions of eligibility set out in
22 Minnesota Statutes, sections 3.761 to 3.764 and this part.

23 (1) In determining who is an eligible party, the
24 judge shall consider the provisions of subpart 2, item C, and
25 the following:

26 (a) The annual revenues shall mean the
27 party's annual gross revenue.

28 (b) The annual revenue and the number of
29 employees of the applicant and all of its affiliates shall be
30 aggregated. Any person directly or indirectly controlling,
31 controlled by, or under common control with the applicant shall
32 be considered an affiliate of the applicant for purposes of this
33 part. In addition, the judge may determine that financial
34 relationships of the applicant other than those described in
35 this part constitute special circumstances that would make an

1 award unjust.

2 (c) The number of employees of an applicant
3 includes all persons who regularly perform services for
4 remuneration for the applicant under the applicant's direction
5 and control. Part-time employees shall be included on a
6 proportional basis.

7 (d) An applicant who participates in a
8 contested case on behalf of one or more other persons or
9 entities that would be ineligible is not itself eligible for an
10 award.

11 (e) An applicant who appears pro se in a
12 proceeding is ineligible for an award of attorney fees.
13 However, eligibility for other expenses is not affected by pro
14 se representation.

15 (f) An applicant who appears individually as
16 a partner, officer, shareholder, member, or owner of an entity
17 eligible under the provisions of Minnesota Statutes, section
18 3.761, subdivision 6, paragraph (a), clauses (1) and (2) may
19 only assert a claim to the extent the entity which they own or
20 control can assert such claim and may not assert a claim if the
21 issues on which the applicant prevails are related primarily to
22 personal interests rather than to business interests.

23 (2) In determining whether an applicant is a
24 prevailing party, the following standards shall be applied:

25 (a) In order to be eligible for an award,
26 the applicant need not have succeeded on every issue raised but
27 must have at least been successful on the central issue or
28 received substantially the relief requested.

29 (b) An applicant which has been penalized,
30 fined, or enjoined by a final decision is not eligible for an
31 award.

32 (c) No presumption arises that the agency's
33 position was not substantially justified simply because the
34 agency did not prevail.

35 B. an itemization of the amount of fees and expenses
36 sought. This shall include full documentation of fees and

1 expenses, including the cost of any study, engineering report,
2 test, or project. The documentation shall include an affidavit
3 from each attorney, agent, or expert witness representing or
4 appearing on behalf of the applicant stating the actual time
5 expended and the rate at which fees have been computed and
6 describing the specific services performed.

7 The affidavit shall itemize in detail the services
8 performed by the date, number of hours per date, and the
9 services performed during those hours. In order to establish
10 the hourly rate, the affidavit shall state the hourly rate which
11 is billed and paid by the majority of clients during the
12 relevant time periods.

13 The documentation shall also include a description of any
14 expenses for which reimbursement is sought and a statement of
15 the amounts paid and payable by the applicant or by any other
16 person or entity for the services provided.

17 C. a statement that explains with specificity how or
18 why the position of the state agency was not substantially
19 justified. No presumption arises that the agency's position was
20 not substantially justified simply because the agency did not
21 prevail.

22 D. and E. [Unchanged.]

23 Subp. 4. Response or objection to application. The state
24 agency or any other party may respond or object to all or any
25 part of the application for expenses and fees. A response or
26 objection must be sworn to and filed with the judge within 14
27 days following the service of the application and must show:

28 A. [Unchanged.]

29 B. in detail any objections to the award requested
30 and identify the facts relied on to support the objection. If
31 the response or objection is based on any alleged facts not
32 already reflected in the record of the proceeding, the response
33 or objection shall include either a supporting affidavit or
34 affidavits or request for further proceedings under subpart 6;
35 and

36 C. a proof of service showing that all other parties

1 have been served, either personally or by first class mail, with
2 a copy of the response or objection.

3 Subp. 5. [See Repealer.]

4 Subp. 5a. Settlement. A prevailing party and the agency
5 may agree on a proposed settlement of an award before final
6 action on the application. If a settlement occurs, a
7 stipulation for settlement shall be filed with the judge
8 together with a proposed order which shall be prepared for the
9 judge's signature. Upon receipt of a stipulation for settlement
10 and proposed order, the judge shall sign the order, serve all
11 parties and the chief administrative law judge with a copy, and
12 send the original to the agency for inclusion with the record of
13 the contested case which gave rise to the application.

14 Subp. 5b. Extensions of time and further proceedings.

15 A. The judge may, on motion and for good cause shown,
16 grant extensions of time, other than for filing an application
17 for fees and expenses, after final disposition in the contested
18 case.

19 B. Ordinarily, the determination of an award will be
20 made on the basis of the written record of the underlying
21 contested case and the filings required or permitted by this
22 part. However, on the judge's own motion or on the motion of
23 any party to the underlying contested case, further filings or
24 other action can be required or permitted, such as an informal
25 conference, oral argument, additional written submissions, or an
26 evidentiary hearing. Any further action shall be allowed only
27 when necessary for a full and fair resolution of the issues
28 arising from the application and shall take place on the first
29 date available on the judge's calendar which is also agreeable
30 to all parties. A motion for further filings or other action
31 shall specifically identify the information sought on the
32 disputed issues and shall explain why the further filings or
33 other action are necessary to resolve the issues.

34 C. In the event that an evidentiary hearing is
35 required or permitted by the judge, the hearing and any related
36 filings or other action required or permitted shall be conducted

1 under the procedural rules governing conference contested cases.

2 Subp. 6. [Unchanged.]

3 Subp. 7. Decision of the administrative law judge. Within
4 30 days following the close of the record in the proceeding for
5 the award of expenses and attorney's fees, the administrative
6 law judge shall issue a written order which shall also contain
7 findings and conclusions on each of the following which are
8 relevant to the decision:

9 A. the applicant's status as a prevailing party;

10 B. the applicant's qualification as a party under
11 Minnesota Statutes, section 3.761, subdivision 6;

12 C. whether the agency's position as a party to the
13 proceeding was substantially justified;

14 D. whether special circumstances make an award unjust;

15 E. whether the applicant during the course of the
16 proceeding engaged in conduct that unduly and unreasonably
17 protracted the final resolution of the matter in controversy;
18 and

19 F. the amounts, if any, awarded for fees and other
20 expenses, explaining any difference between the amount requested
21 and the amount awarded.

22 The order shall be served on all parties and the state
23 agency. The original order and the rest of the record of the
24 proceedings shall be filed with the state agency at the time the
25 order is served.

26

27 REPEALER. Minnesota Rules, part 1400.8401, subpart 5, is
28 repealed.

29

30 EFFECTIVE DATE. These amendments shall be effective for
31 all cases pending on the effective date where an application for
32 fees and expenses has not previously been served or filed.