

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed  
Permanent Rules Relating to the  
Minnesota Labor Relations Act and the  
Public Employment Labor Relations Act

**ORDER ON REVIEW OF  
RESUBMITTED RULES UNDER  
MINN. STAT. § 14.26, SUBD. 3 AND  
MINN. R. 1400.2300, SUBP. 8**

This matter came on for review by the Chief Administrative Law Judge pursuant to Minn. Stat. 14.26, subd. 3 (2020) and Minn. R. 1400.2300, subp. 8 (2021). This rulemaking concerns the proposed rules of the Bureau of Mediation Services (Bureau).

Administrative Law Judge LauraSue Schlatter disapproved portions of the rules in an Order on Review of Rules dated March 31, 2022.<sup>1</sup> The Chief Administrative Law Judge concurred with the determinations of the Administrative Law Judge by Order dated April 5, 2022.<sup>2</sup>

On May 2, 2022, the Bureau resubmitted the proposed rule and requested the Chief Administrative Law Judge review and approve its modifications. The modifications do not incorporate Administrative Law Judge Schlatter's recommended changes.

The Chief Administrative Law Judge finds that one of the defects identified in the Administrative Law Judge's March 31, 2022, Order has been corrected. As to that change, the Chief Judge finds that the Bureau's proposed modifications do not render the final proposed rules substantially different from those published in the *State Register* on December 20, 2021.<sup>3</sup>

However, for the reasons explained in the attached Memorandum, the Chief Administrative Law Judge finds that the proposed repeal of Minn. R. 5530.1000 is not authorized.

Based upon a review of the modifications made by the Bureau as presented in its May 2, 2022, submissions and the rulemaking record, the Chief Administrative Law Judge issues the following:

**ORDER**

1. The following rules are **APPROVED** as to legality, subject to the modifications set forth in Exhibit L2 of the Bureau's May 2, 2022, filing:

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<sup>1</sup> Order on Review of Rules under Minn. Stat. § 14.26 (March 31, 2022).

<sup>2</sup> Order of Chief Administrative Law Judge on Review of Rules under Minn. Stat. § 14.26 (Apr. 5, 2022).

<sup>3</sup> See Minn. Stat. § 14.05, subd. 2(b)(2) (2020).

- 5500.2200, item A;
  - 5530.0100, items A and B;
  - 5530.0900, subp. 6(D); and,
  - 5530.1200, subp. 3.
2. The following proposed rule parts and rule repeal are **DISAPPROVED:**
- Repeal of Rule 5530.1000.
3. The remaining proposed rules are **APPROVED** as to legality, as modified by the Bureau in Exhibit L1 of the Bureau's May 2, 2022, filing.
4. The approved changes to the proposed rule parts do not render them substantially different than the rules as originally proposed.
5. If the Bureau elects not to correct the defects associated with the proposed rules, the Bureau must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.26, subd. 3(c).
6. If the Bureau chooses to make changes to correct the defects noted above, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the order adopting the rules, and the Revisor's-approved rules showing the Bureau's changes. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: May 9, 2022



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JENNY STARR  
Chief Administrative Law Judge

### MEMORANDUM

Upon resubmission, there are two key issues in this rulemaking matter: (1) whether the timeliness requirements set forth in the revised rule draft set forth a lawful rule and (2) whether the Bureau has the authority to repeal Minn. R. 5530.1000. Each of these issues is addressed in turn below.

## I. Timeliness Requirements for Arbitration Hearings

In its resubmission, the Bureau concedes that when read in isolation a regulatory requirement to conduct a “timely hearing” does not provide much guidance to either arbitrators or other stakeholders.

The Bureau proposes two cures: (1) linking its timeliness requirements to the performance standards for arbitrators in Minn. R. 5530.1200, subp. 3; and (2) adding a new section, 5530.0900, subp. 6(D), that would read as follows:

D. When a roster member is selected, assigned, or appointed, the roster member must offer the parties at least three dates on which the roster member is available to hear the case. The three dates must be within 90 calendar days of the arbitrator’s selection, assignment, or appointment. Nothing in this item requires the parties to hold a hearing within a period that is inconsistent with their needs.

The Bureau maintains that these revisions provide for a clear regulatory minimum as to the scheduling of hearings, but one that can be adjusted by the parties as circumstances in particular cases warrant. The Bureau likewise maintains that these revisions would not make the new rules substantially different from those originally published in the *State Register*.

The Chief Administrative Law Judge agrees with the Bureau.

## II. Proposed Repeal of Minn. R. 5530.1000

Minn. Stat. § 626.892, subd. 7 (2020), makes the following rules applicable to peace officer grievance arbitrations, to the extent consistent with that statute:

- (1) Minn. R. 5530.0500 (status of arbitrators);
- (2) Minn. R. 5530.0800 (arbitrator conduct and standards); and,
- (3) Minn. R. 5530.1000 (arbitration proceedings).

Moreover, Minn. Stat. § 626.892, subd. 12(c) (2020), provides:

The arbitrator selection procedure for peace officer grievance arbitrations established under this section supersedes any inconsistent provisions in chapter 179A or 572B or in Minnesota Rules, chapter 5500 to 5530 and 7315 to 7325. Other arbitration requirements in those chapters remain in full force and effect for peace officer grievance arbitrations, except as provided in this section or to the extent inconsistent with this section.<sup>4</sup>

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<sup>4</sup> Minn. Stat. § 626.892, subd. 12(c) (emphasis added).

In her March 31, 2022, Order, the Administrative Law Judge found the Bureau's proposals defective because, among other reasons, the Bureau proposed to repeal one of the three rule parts specified as applying to peace officer arbitrations.<sup>5</sup> Further, the Administrative Law Judge urged the Bureau to specify which of its arbitration proceeding rules apply or do not apply to peace officer grievance arbitration.<sup>6</sup>

In its Resubmission, the Bureau, as is its right, declined to adopt the reasoning or suggested cure of the Administrative Law Judge.

In the view of the Chief Administrative Law Judge, however, the Bureau may not lawfully repeal a regulation that is specifically referenced in a statute as binding on the agency. The Bureau, in its own argument, identifies that the Legislature changed the selection procedure for peace officer grievance arbitrations and left all other arbitration requirements, including, specifically, the arbitration requirements contained in Rule 5530, in full force and effect. The Bureau cannot now repeal such arbitration requirements. Executive branch agencies do not have the authority to contravene a statutory provision by way of an administrative rule.<sup>7</sup>

The Bureau also cannot have it both ways, arguing both that the arbitration requirements contained in Rule 5530 remain in full force and effect as specified by the Legislature and also that the Bureau has the general rulemaking authority to recodify those same requirements without, at a minimum, promulgating an explanation in rule of where the arbitration requirements contained in Rule 5530 have gone. Such an explanation could demonstrate that the Bureau is acting within the Legislative direction that the arbitration requirements contained in Rule 5530 remain in full force and effect.

Because the legislature has acted with specificity, the Bureau may not bypass the legislature on its own.<sup>8</sup> The proposed repeal of Minn. R. 5530.1000 is **DISAPPROVED**.

**J. S.**

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<sup>5</sup> Order on Review of Rules under Minn. Stat. § 14.26 at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Scalf v. LaSalle Convalescent Home*, 481 N.W.2d 364, 366 (Minn. 1992) (finding rule limiting admissibility of medical records conflicted in part with statute); *Flores v. Dep't of Jobs & Training*, 411 N.W.2d 499, 504 (Minn. 1987) (finding rule imposing additional requirements on aliens inconsistent with statute); *Green v. Whirlpool Corp.*, 389 N.W.2d 504, 506-07 (Minn. 1986) (finding rule in conflict with statute and, accordingly, of no effect); *J.C. Penney Co. v. Comm'r of Econ. Sec.*, 353 N.W.2d 243, 246 (Minn. Ct. App. 1984) (finding regulation invalid when it conflicted with clear and unambiguous language of statute).

<sup>8</sup> *Berglund v. Comm'r of Revenue*, 877 N.W.2d 780, 784-85 (Minn. 2016) (when a "rule conflicts with a statute, the statute controls"); *Dumont v. Comm'r of Taxation*, 154 N.W.2d 196, 199 (Minn. 1967) (holding that, "if the legislature has acted in a specific area, the administrative agency may not adopt a rule in conflict with the statute").