

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
RULES UNDER
MINN. STAT. § 14.26**

The Minnesota Bureau of Mediation Services (Bureau) seeks review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26 (2020). On March 15, 2022, the Bureau submitted the documents that must be filed under Minn. Stat. § 14.26, and Minn. R. 1400.2310 (2021), to the Office of Administrative Hearings. The Bureau supplemented the record¹ at the request of the Administrative Law Judge on March 28, 2022, and the record closed on that day. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

IT IS HEREBY DETERMINED:

1. The Bureau has the statutory authority to adopt the rules pursuant to Minn. Stat. §§ 179.02, subds. 3, 4; 179.82, subd. 2; 179A.04, subd. 3(a)(6), (8); 179A.16, subd. 7; and 626.892, subd. 10(a) (2020).
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, chapter 14 (2020), and Minnesota Rules, chapter 1400 (2021).
3. Except as to the rules that are disapproved, the record demonstrates the rules are needed and reasonable.

IT IS HEREBY ORDERED THAT:

1. The proposed amendments to the following rule parts are **DISAPPROVED**:
 - A. Minn. R. 5500.2200 A; and
 - B. Minn. R. 5500.2220, subp. 1.

¹ See Exhibits (Exs.) G1 through G3.

2. Except as to the proposed rule parts that are disapproved, and listed immediately above, the rules are **APPROVED**.

Dated: March 31, 2022


LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

Pursuant to Minn. Stat. § 14.26, the Bureau submitted these rules to the Administrative Law Judge for review as to legality. The Bureau received only one request for a public hearing, so the rules were adopted without a public hearing pursuant to Minn. R. 1400.2300 (2021). The Administrative Law Judge has carefully examined all public comments submitted in this proceeding. To the extent any public comment is not discussed in this report, the Administrative Law Judge generally concurs with the Bureau's written response to that comment, including approving the Bureau's proposed changes, if applicable. Because several of the rules are disapproved, the written reasons for the disapproval are submitted to the Chief Administrative Law Judge for review pursuant to Minn. R. 1400.2300, subp. 6.

I. Disapproved Rules

A. Applicable Standards

Minnesota Rules part 1400.2100 identifies several types of circumstances under which a rule must be disapproved by the Administrative Law Judge. These circumstances include:

- (1) The rule was not adopted in compliance with the procedural requirements of Minn. Stat. ch. 14 or other law or rule, unless the judge decides that the error was harmless and should be disregarded;
- (2) The rule is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;
- (3) The rule is substantially different from the proposed rule and the agency did not follow the procedures of Minn. R. 1400.2110;
- (4) The rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law;
- (5) The rule is unconstitutional or illegal;
- (6) The rule improperly delegates the agency's powers to another agency, person, or group;

(7) The rule is not a “rule” as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or

(8) The rule is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written responses to the notice show that the withdrawal is not consistent with Minn. Stat. § 14.001, clauses (2), (4), and (5).²

Two of the rule parts presented for review contain substantive defects, as addressed below.

B. Minn. R. 5500.2200 A

1. Applicability of rules to grievance arbitration and peace officer grievance arbitration

Judge Stephen D. Swanson, who is a peace officer grievance arbitrator, submitted a number of comments in this proceeding. Judge Swanson’s most overarching concern was the extent to which the rules govern grievance arbitration in general, and peace officer grievance arbitration in particular. Minn. Stat. § 626.892, subd. 7, explicitly makes the following rules applicable to peace officer grievance arbitrators, to the extent consistent with the statute:

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

However, Minn. Stat. § 626.892, subd. 12(c), states:

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.

These two subdivisions of section 626.892 leave open the question of which provisions apply to peace officer grievance arbitration. The question is further complicated because, as part of this rulemaking, the Bureau repealed Rule 5530.1000, one of the three rule parts applicable to peace officer grievance arbitration.³ The Bureau moved most of Part 5530.1000 into Parts 5500.2200 through 5500.2850.⁴

² Minn. R. 1400.2100.

³ Minn. Stat. § 626.892, subd. 12(c).

⁴ Once the rules are approved, the Bureau intends to re-number the arbitration language in chapter 5500 and the independent-review language in chapter 7315 to move all of those proceedings into 5510, which is the chapter that currently governs proceedings involving matters of representation and fair share fee challenges under the Public Employment Labor Relations Act (PELRA). Ex. D. at 65 (SONAR).

Judge Swanson proposed an amendment that would have listed the rule parts within chapter 5530 that he believes are applicable to the roster of arbitrators.⁵ He recommended that the “Bureau should be required in this rule making proceeding to identify and specifically list the parts of Chapters 5500 to 5530 and 7315 to 7325 that apply to peace officer grievance arbitrators and arbitrations.”⁶

The Bureau responded that it agrees with Judge Swanson that rule provisions apply to the extent they are consistent with the statute. The Bureau declined to perform the task Judge Swanson asked of it, stating:

[T]he bureau has no directive to list every rule part in its six rule chapters that apply to peace-officer arbitrators (arguably, the bureau would list which parts do *not* apply). The bureau could list every rule part that applies to peace-officer arbitrators, and, indeed, did consider listing every rule part that applied. Yet the bureau finds that this list would clutter its rule—especially since some requirements are not easy to parse and list—and also introduce a risk that the bureau misses a requirement. Instead, the bureau finds it reasonable to reference the statute, especially since the selection procedure is the main difference between the bureau’s rosters. For now, the bureau opts to defer to the legislature and clarify questions from peace-officer arbitrators and the public when needed.⁷

The Bureau’s decision to sidestep the process of carefully reviewing its rules and stating which rules it determines apply to peace officer grievance arbitrators and arbitrations creates a defect in the rule. Minn. Stat. § 14.02, subd. 4, defines a rule as “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.” By declining to specify which rules apply to arbitrators and arbitrations under Minn. Stat. § 626.892, the Bureau is creating a rule that is not a “rule,” in violation of Minn. R. 1400.2100 G, and that is unconstitutionally vague, in violation of Minn. R. 1400.2100 E.

A rule that declines to define which portions of it will apply to what kinds of proceeding is not a statement of general applicability implemented to make specific the law administered by the agency. Agencies may set formal policy either through the agency legislative process, rulemaking; or on a case-by-case basis, known as an adjudicative process. In Minnesota, the agency adjudicative process is generally a contested case proceeding.⁸ Parties coming to the Bureau seeking an arbitrator for grievance arbitration do not have a right to a contested case proceeding or any other adjudicative process if they disagree with the Bureau’s decision about which rules apply to the grievance arbitration. There is no mechanism for the Bureau to formulate its policy

⁵ Ex. J at 4 (Swanson letter).

⁶ Swanson letter at 6. This rulemaking does not include chapter 7325.

⁷ Ex. J1 at 7.

⁸ Minnesota Administrative Procedure (2014), <https://mitchellhamline.edu/minnesota-administrative-procedure/?s=adjudicative+rulemaking>. *Bunge Corp. v. Comm’r of Revenue*, 305. N.W. 2d 779 (Minn. 1981).

through an adjudicative process, or to offer redress for the parties. Therefore, the Bureau cannot rely on case-by-case adjudication to implement the legislature's instructions.

Without specifying which rules do (or do not) apply to which kinds of proceedings, parties will not be able to predict what will be permitted or prohibited in their arbitration. That uncertainty creates a rule that is unconstitutionally vague. "A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."⁹ The Bureau's plan to answer queries about the applicability of its rules to a particular type of arbitration on a case-by-case basis will invite inconsistent, even arbitrary responses. Members of the public and arbitrators may get different answers to the same questions depending on who they speak to at the Bureau on any given day. Similarly, arbitrators may choose to interpret the rules for themselves, resulting in different arbitrators following differing arbitration procedures. For example, Judge Swanson believes it is inappropriate in a binding arbitration for the arbitrator to reconsider an award on the grounds set forth at Part 5500.2800. Other arbitrators may disagree. Without the Bureau, with its expertise, clarifying which rules apply to which proceedings, a hodgepodge of processes may occur, with parties uncertain about what they will likely be facing. This uncertainty, along with the potential for inconsistent procedures, is especially concerning with regard to peace officers who are statutorily required to engage in binding arbitration with no choice of arbitrator.

The Bureau can cure this defect by reviewing Chapters 5500 to 5530 and 7315¹⁰ and listing the rule parts that apply to peace officer grievance arbitration. Alternatively, the list may be rule parts that do not apply such arbitration.

Chapter 7315 only covers independent reviews under Minn. Stat. § 179A.25 (2020). Nonetheless, the chapter must be included in the review because the Bureau proposes to move that entire chapter into chapter 5510, the same chapter to which the Bureau plans to shift arbitration procedures. An amendment to Minn. R. 5500.2200¹¹ that will cure the defect is listed at the end of paragraph 2 of this section, below.

- A. Except as provided in Item B, parts 5500.2200 to 5500.2850 apply to all arbitration proceedings under bureau rules as provided under Minnesota Statutes, subject to all applicable provisions of the law.
- B. Parts _____ do not apply to peace officer grievance arbitration under Minn. Stat. § 626.892; or

⁹ *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

¹⁰ As numbered in the November 22, 2022, RD4677 version.

¹¹ Beginning at line 14.17. Judge Swanson would have placed this or similar language in Part 5530, and made it applicable to the roster of arbitrators. The Bureau could cure the defect by following Judge Swanson's approach. The Administrative Law Judge suggests placing the language at Part 5500.2200 because it deals with arbitration proceedings, and more logically fits there.

Only parts _____ apply to peace officer grievance arbitration under Minn. Stat. § 626.892. No other rules in parts 5500.2200 to 5500.2850 apply to peace officer grievance arbitration.

C. Unless the context

2. Incorporation of appeal hearings under Minn. Stat. § 43A.33

Minnesota Management and Budget (MMB) submitted comments regarding three provisions in the proposed rules that failed to incorporate appeal hearings under Minn. Stat. § 43A.33. That section provides permanent classified public employees not covered by a collective bargaining plan a right to appeal certain employment actions taken against them. In these hearings, MMB represents the employee's appointing authority. The appeal is directed to the Bureau, which provides the parties with a list of potential arbitrators, and the rules governing the appeal process.¹²

MMB expressed concern that the proposed language at 5500.2200 A did not refer to section 43A.33, particularly because proceedings under that part are consistently referred to as "appeals" not "arbitrations," and the employees involved are not covered by PELRA.¹³ The Administrative Law Judge views this as an error of law, because the appeals are distinct under section 43A.33 and must be distinguished from arbitrations under PELRA in the rule. However, the Bureau agreed that this concern was reasonable. The Bureau suggested that, rather than specifically referring to appeals under section 43A.33, it would include a reference to "other proceedings before an arbitrator as provided under statute." This broader language corrects the error identified by MMB and allows for other proceedings to be included in the future without a rule change.

Incorporating the amendment suggested by the Bureau to address MMB's concern with the amendment to cure the defect caused by the failure to list rule parts that apply (or do not apply) to peace officer arbitration results in the following amendment to Part 5500.2200:¹⁴

A. Except as provided in Item B, parts 5500.2200 to 5500.2850 apply to:

- (1) all arbitration proceedings under bureau rules as provided under Minnesota Statutes, subject to all applicable provisions of the law;
and
- (2) other proceedings before an arbitrator as provided under statute.

B. The following do not apply to peace officer grievance arbitration under Minn. Stat. § 626.892:

¹² Minn. Stat. § 43A.33, subd. 3(d) (2020). Ex. J (MMB letter) at 2.

¹³ MMB letter at 3.

¹⁴ Beginning at line 14.17.

[or]

Only the following apply to peace officer grievance arbitration under Minn. Stat. § 626.892:

No other rules in parts 5500.2200 to 5500.2850 apply to peace officer grievance arbitration.

C. Unless the context

These changes are needed and reasonable, would cure the identified defects, and would not be substantially different from the rules as proposed.¹⁵

C. Minn. R. 5500.2220, subp. 1: defining “timely”

Judge Swanson commented that the arbitration hearing should be scheduled to occur no more than 90 days after the panel is appointed. He pointed out that according to the rules as proposed, an arbitrator has an obligation to ensure that a “fair and timely hearing” is conducted,¹⁶ but he asserted that the word “timely” is vague.

The Bureau declined to impose a 90-day time limit for scheduling the hearing. Instead, the Bureau stated that the 90-day deadline “is implied” in the bureau’s amendments to Part 5530.1200, subp. 3, requiring the commissioner to evaluate an arbitrator on whether he has offered “at least three” dates on which the arbitrator roster member is available to hear a case within ~~60~~ 90¹⁷ calendar days of the arbitrator’s roster member’s notification of selection. . .”¹⁸

The Bureau’s response to Judge Swanson that a 90-day deadline is “implied” creates a level of uncertainty that is unacceptable in rulemaking. The meaning of “timely” in Minn. R. 5500.2220, subp. 1, is no longer vague – now it is uncertain and ambiguous. It may be open to interpretation – or it may mean 90 days. The Bureau could easily have referenced the 90-day performance standard at Part 5530.1200, subp. 3 in Part 5500.2220, subp. 1, in response to Judge Swanson’s comment. Or it could have left the performance standard out of its response altogether. Having linked the word timely and the 90-day standard, saying that it is an “implied standard” for purposes of interpreting what constitutes a timely hearing deadline, the Bureau added that “peace-officer arbitrators. . . can use the 90-day standard as a guideline for what constitutes timely.”¹⁹

Because of the way in which the Bureau has linked the 90-day standard by implication and permission, but not requirement, use of the word “timely” renders Minn. R. 5500.2220, subp. 1, no longer a statement of general applicability and future effect – that is, it no longer falls within the definition of a rule under Minn. Stat. § 14.02, subd. 4

¹⁵ Minn. Stat. § 14.05, subd. 2 (2020).

¹⁶ Minn. R. 5500.2220, subp. 1. Lines 15.13-15.14.

¹⁷ Underline added. The Administrative Law Judge believes the failure to underline “90” was an error, since the “60” day standard is struck and “90” is newly added.

¹⁸ Ex. J1 at 3. Emphasis in original.

¹⁹ Ex. J1 at 3. Emphasis added.

(2020). Some arbitrators may believe that they are bound by a 90-day rule by implication, while others could believe that the 90-day implication is simply a loose guidepost; this will result in some parties being forced into hearings before they are ready while others who might want a hearing within 90 days have to wait because their arbitrators feel less constrained.

The confusion caused by this “implied” link also renders Minn. R. 5500.2220, subp. 1 unconstitutionally vague. “A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.”²⁰ A party to arbitration should be able to know as she enters the arbitration process – in some cases, binding arbitration in which she is statutorily bound to participate – whether she can rely on a 90-day deadline that is connected to the notion of a timely hearing by implication.

Use of the word “timely” in Minn. R. 5500.2220, subp. 1, is disapproved because it violates Minn. R. 1400.2100 E and G. The Administrative Law Judge recommends that the Bureau cure the defect by requiring that the hearing be held within a specific number of days. A logical place to insert such a requirement would be at Minn. R. 5500.2300, subp. 1A (li. 15.23):

immediately fix a time and place for the hearing. The hearing must be scheduled to occur within _____ calendar days following the date the panel is appointed or assigned to the dispute.

This change is needed and reasonable, would cure the identified defects, and would not be substantially different from the rule as proposed.

II. Technical Recommendations

The following are recommendations for changes to the rules which are not required, but which the Administrative Law Judge suggests for improved clarity and readability. The changes below are recommendations only and may be adopted or not, as the Bureau sees fit. All of the recommended changes below are needed and reasonable, would cure the identified concerns, and would not be substantially different from the rules as proposed.

A. Minn. R. 5500.0210, subp. 1

This subpart was added to ensure consistency with proposed filing requirements under Part 5510.0320. The Administrative Law Judge recommends that the proposed language at lines 1.18-1.19²¹ be amended as follows:

A document filed under parts 5500.0100 to 5500.1100 is effective when filed according to part 5510.0320, subpart 2.

²⁰ *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

²¹ All page and line references are to the November 22, 2021, RD4677 version of the rule.

B. Minn. R. 5500.0300 D

This subpart lists the requirements for a petition for mediation. Items B and D mirror one another, except that item D fails to include the adverse party's agent. The Administrative Law Judge recommends that the proposed language at lines 2.5-2.6 be amended as follows:

the name, address, e-mail address, and telephone number of the adverse party's agent or attorney, if known;

C. Minn. R. 5500.2300, subp. 1 and 5530.0900, subp. 6

This rule part deals with hearing arrangements. Judge Swanson had several suggestions for subpart 1.²² He suggested that the language at lines 15.22-15.23 requiring the arbitration panel to fix a time and place for the hearing should require the panel to consult with the parties before doing so.

The Bureau responded by proposing the following amendments to the proposed language at 15.22-15.23:

When a panel of arbitrators has been selected, assigned, or appointed, the panel must ~~immediately fix a time and place for the~~ schedule a hearing according to part 5530.0900, subpart 6, or as otherwise provided under statute.²³

In response to Judge Swanson's comments, the Bureau proposes to add a new Item C to Part 5530.0900:

After the commissioner assigns or appoints an arbitrator according to this part or statute, the parties must work with the arbitrator to schedule a hearing and then notify the commissioner of the hearing date.

The Administrative Law Judge agrees that the Bureau's proposed changes are needed and reasonable.

²² Swanson letter at 1 (public comments).

²³ Ex. J1 at 4 (Bureau's Responses to Public Comments). Part 5530.0900, subp. 6, as proposed in this rulemaking, states:

- A. When the parties select one or more roster members according to this part, they must notify the roster members and work with the roster members to schedule the hearing.
- B. Once the hearing has been scheduled, the party that requested the panel must notify the commissioner of the: (1) roster members selected; (2) date the selection was made; and (3) date of the hearing.

However, Judge Swanson noted that the problem is aggravated because there is no requirement for the parties to reschedule hearings in consultation with the arbitrator.²⁴ The disincentive for parties to cancel or reschedule a hearing is Part 5530.0800, subp. 7, which permits an arbitrator to impose a cancellation fee if one or both parties cancel a hearing with less than 21 calendar days' notice.²⁵ Judge Swanson suggested that the parties be required to promptly consult with the panel to select a new, timely hearing date if the parties want to postpone the hearing.

The Bureau found Judge Swanson's suggestion reasonable, but declined to add his suggested language nonetheless, "because no language exists on rescheduling for the general roster and usually a postponed hearing means that the parties have settled. The bureau has had no issues with parties not consulting with an arbitrator to reschedule a hearing."²⁶

The Administrative Law Judge recommends that the Bureau adopt, at least in concept, Judge Swanson's suggestion. Requiring parties to consult with the arbitrator before cancelling or rescheduling a hearing is reasonable, and applicable for the general roster as well as the peace officer grievance roster. Such a requirement is common sense – and ordinary courteous behavior. The Bureau's statement that "usually a postponed hearing means that the parties have settled" is unsupported. Furthermore, it is troubling to read the Bureau's statement that the "bureau has had no issues with parties not consulting with an arbitrator to reschedule a hearing" in the face of Judge Swanson's description of a case he handled in just the past year where rescheduling problems recurred over a period of about eight months.

The Administrative Law Judge recommends the following language be added to the language the Bureau has proposed at Part 5530.0900:

After the commissioner assigns or appoints an arbitrator according to this part or statute, the parties must work with the arbitrator to schedule a hearing and then notify the commissioner of the hearing date. The parties must consult with the arbitrator before rescheduling a hearing. The consultation is for scheduling purposes only. The arbitrator's consent is not required for the parties to cancel a hearing. The parties must inform the arbitrator within 5 days of settlement if they settle the matter before a hearing. If the settlement occurs less than 7 working days before the hearing, the parties must inform the arbitrator 48 hours before the hearing, or immediately upon settlement.

²⁴ Judge Swanson provided an example of a recent case. The parties canceled twice with less than 21 days' notice, requested that a hearing be scheduled for a particular month and failed to respond to Judge Swanson's reply offering a series of dates. Finally, the day before a scheduling conference was to occur (and two months after the last set of proposed hearing dates had come and gone without comment from the parties), the parties notified Judge Swanson that they had resolved the matter. This was 13 months after the matter had been assigned to Judge Swanson. Swanson letter at 1-2.

²⁵ The Bureau proposes to make the notice requirement 28 days.

²⁶ Ex. J1 at 4.

D. Part 5500.2400, subp. 1, Item B(2)

This item addresses proceedings during the hearing. The Administrative Law Judge recommends the following word change at line 17.10 to clarify the meaning of the subitem:

a party fails to appear after due timely notice of the hearing, or leaves the hearing without the panel's permission.

E. Part 5500.2400, subp. 1, Item C

This subpart concerns the order of proceedings, and Item C addresses parties offering exhibits. The Administrative Law Judge recommends the following change to remedy a clerical error:

Any party may offer exhibits. Offered exhibits accepted as evidence are part of the record.

F. Part 5500.2500, Item B

The Bureau proposes to amend the language of this item as follows:

~~The board may, however, make any independent inspection of the subject matter of panel may independently investigate the dispute, or make such inquiries or obtain such information outside of the hearings not presented at the hearing as it may deem the panel deems necessary and proper; provided, however, that the parties to the dispute shall for adjudicating the dispute. Unless waived by the party in writing, a party must be afforded an opportunity to examine any panel evidence so secured, and to introduce evidence in opposition thereto, unless the right to such examination and introduction of evidence is waived in writing. The parties shall furnish such rebutting panel evidence.~~²⁷

Judge Swanson commented that neither Item B nor Item C applies to grievance arbitrators. The basis for Judge Swanson's objection to Item B is primarily that, under the Minnesota Uniform Arbitration Act and the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes,²⁸ the independent investigation, and ex parte contact involved in Items B and C are unauthorized and violate ethical prohibitions.²⁹ The Bureau pointed out that the proceedings described in these items are not new, although they have been re-written to some extent. The Bureau emphasized that applicable statutory limitations will always prevail.³⁰ The Bureau correctly states that the Minnesota Uniform Arbitration Act does not apply to statutorily required binding arbitration.³¹

²⁷ Lines 18.19-18.26.

²⁸ Incorporated by reference in proposed Part 5530.0800, subp.2 (lines 99.21-100.3).

²⁹ Swanson letter at 3.

³⁰ Ex. J1 at 4.

³¹ See Minn. Stat. § 572B.03; *Oliver v. State Farm Fire & Cas. Ins. Co.*, 939 N.W.2d 749, 751-752 (Minn. 2020) (Uniform Arbitration Act governs "agreements to arbitrate").

Nonetheless, certain proposed amended language in Item B changes the character of the procedure the item describes, and the Administrative Law Judge recommends restoring the language in Item B, as follows:

~~The board may, however, make any independent inspection of the subject matter of panel may independently investigate, make an independent inspection relevant to the dispute, or make such inquiries or obtain such information located outside of the hearing not presented at the hearing as it may deem the panel deems necessary and proper; provided, however, that the parties to the dispute shall for adjudicating to adjudicate the dispute. Before making an independent inspection at a location outside of the hearing, the panel must provide notice and an opportunity to accompany and observe the inspection to the parties. Unless waived by the party in writing, a party must be afforded an opportunity to examine any panel evidence so secured, obtained as a result of an independent inspection, and to introduce evidence in opposition thereto, unless the right to such examination and introduction of evidence is waived in writing. The parties shall furnish such rebutting panel evidence.~~³²

By changing the original language of Item B from “independent inspection” to “independently investigate,” the Bureau altered the nature of the procedure contemplated in Item B. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes explicitly states that an arbitrator “should comply with a request of any party that the arbitrator visit a work area pertinent to the dispute prior to, during, or after a hearing.” The arbitrator may also initiate such a visit.³³ An off-site independent inspection is permitted in arbitration. This is a physical visit to a location related to the dispute to better understand the nature of the location or what might have occurred there. An independent “investigation,” however, implies the arbitrator is delving into new subject areas, independent of the facts the parties have shared with the arbitrator. The Administrative Law Judge recommends that the Bureau adopt the language for Item B above to better conform to the ethical rules and practices of arbitration.

G. Part 5500.2500, Item C

In its proposed amendment to Part 5500.2500, Item C, the Bureau refers to evidence requested under Item B. However, by separating what was one paragraph into two items, the Bureau removed the language authorizing the panel to request evidence from Item B.

A party must provide evidence as the board may require, as far as possible and the failure to produce such evidence when required may be considered by the board in making requested under item B if the evidence is available

³² Lines 18.19-18.26.

³³ Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, R.5.D.1.

to the party. A party's failure to produce evidence under item B is a factor when the panel makes its award.³⁴

This error results in rule language that does not make sense. Judge Swanson also expressed concerns regarding ex parte contact with this proposed language. Further, the notion of this kind of investigation conflicts with the Bureau's own proposed language at Part 5500.2220 D, which states "The panel may not present the case nor examine any party's witnesses except as needed to amplify the testimony disclosed under this subpart."³⁵

The Administrative Law Judge recommends the following amendment to the proposed language to fix the error, and to clarify that the request for additional evidence will not occur in an ex parte setting:

A party must provide evidence at the request of the panel before or during the hearing, as the board may require, as far as possible and the failure to produce such evidence when required may be considered by the board in making requested under item B if the evidence is available to the party. All other parties must be provided with a copy of such request, and with a copy of any evidence provided. All other parties must have an opportunity to provide rebuttal evidence. A party's failure to produce evidence under this item B is a factor when the panel makes its award.³⁶

H. Minn. R. 5530.0800, subp. 6.B – Timelines

Judge Swanson objected to the application of the timeline rule written for interest arbitration to labor grievance arbitration based on the argument that the "arbitrator's jurisdiction is strictly limited to the application of the provisions of the parties' [collective bargaining agreement] (CBA)." He also asserted the Bureau lacks the authority to interfere with the terms of CBAs or to amend the rule to require this timeline in grievance arbitration.³⁷

The Bureau responded that it has the statutory authority to adopt rules for administering PELRA.³⁸ In addition, it cited Minn. Stat. § 179.20, subd. 2 (2020), prohibiting a labor contract provision to conflict with Minnesota statute or rules.³⁹ In order to ensure the goal of expeditiously and fairly handling labor disputes, the Bureau chose to retain the proposed amendment.

The Administrative Law Judge agrees that the Bureau has the authority to make this amendment. However, there is one addition that would add clarity to the amendment. "No law is to be construed to be retroactive unless clearly and manifestly so intended by

³⁴ Lines 19.1-19.3.

³⁵ Lines 18.5-18.6.

³⁶ Lines 19.1-19.3.

³⁷ Swanson letter at 7.

³⁸ Minn. Stat. § 179A.04, subd. 3.

³⁹ Ex. J1 at 8. Minn. Stat. § 179.20, subd. 2.

the legislature.”⁴⁰ Unless expressly made retroactive, laws are effective into the future. Parties contract in good faith, based on the laws in effect at the time they enter into a contract. Therefore, the Administrative Law Judge recommends that the Bureau add the following language to Minn. R. 5530.0800, subp. 6.B (line 101.22) as proposed:

A time limit inconsistent with this rule shall govern in an arbitration if the arbitration is based on a collective bargaining agreement entered into before the effective date of this rule.

III. Other Amendments Proposed by the Bureau

In response to public comments, the Bureau proposes to further amend the November 22, 2021, published version of the following rule parts:

- a) Part 5500.2700, subp. 3 (lines 20.8-20.13)
- b) Part 5500.2210, subp. 2 (line 15.2)
- c) Part 5500.2210, subp. 3 (line 15.5)
- d) Part 5500.2850, subp. 1 (line 22.9)

These Bureau’s changes are needed and reasonable, would cure the identified concerns, and would not be substantially different from the rules as proposed.

L. S.

⁴⁰ Minn. Stat. 645.21 (2020). *In re Individual 35W Bridge Litigation*, 806 N.W. 2d 811, 819-820 (Minn. 2011). [172713/1]