OAH 68-9010-33057
Revisor R-4345

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Minnesota Public Employment Relations Board Governing the Investigation, Hearing, and Appeal Procedures of Charges of Unfair Labor Practices under Minn. Stat. ch. 179A

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2014). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby **CONCURS** in with all disapprovals contained in the Report of the Administrative Law Judge dated April 20, 2016.

The Chief Administrative Law Judge **CONCURS** that the following proposed rules are **DISAPPROVED:**

Proposed Rule Part 7325.0100: Filing and Service Generally
Proposed Rule Part 7325.0110, Subp. 6: Submission of Evidence
Proposed Rule Part 7325.0110, Subp. 7: Submission of a Response
Proposed Rule Part 7325.0270: Protective Orders
Proposed Rule Part 7325.0300: Consolidation
Proposed Rule Part 7325.0320, Subp. 1: Digital Transcription

The changes necessary for approval of the disapproved rules are identified in the Administrative Law Judge's Report.

If the Public Employment Relations Board elects not to correct the defects associated with the proposed rules, the Board must submit the proposed rules 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. § 14.15, subd. 4.

Dated: May 2, 2016

TAMMY L. PUST
Chief Administrative Law Judge

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In the Matter of the Proposed Rules of the Minnesota Public Employment Relations Board Governing the Investigation, Hearing, and Appeal Procedures of Charges of Unfair Labor Practices under Minn. Stat. ch. 179A

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Jeanne M. Cochran for a rulemaking hearing on February 22, 2016. The public hearing was held in the Boardroom of the Public Employment Relations Board's offices in Saint Paul, Minnesota.

The Public Employment Relations Board (PERB or the Board) was created by the Minnesota Legislature in 2014.[1] Beginning on July 1, 2016, PERB will have legal authority to investigate, hear, and resolve unfair labor practice charges and complaints in the public sector.[2] PERB proposes to adopt rules governing the investigation, hearing, and appeal procedures of charges and complaints of unfair labor practices brought under Minn. Stat. ch. 179A.

The hearing on the proposed rules and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[3] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules. The rulemaking process includes a requirement for a public hearing when 25 or more persons request one or when ordered by the agency.[4]

The hearing on PERB's proposed rules was conducted so as to permit PERB representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

State law requires PERB to establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially

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[1] 2014 Minn. Laws ch. 211, §§ 5, 10-11, as amended by 2015 Minn. Laws, 1st Spec. Sess., ch. 1, art. 7, § 1.
[2] *Id.*
[3] *See,* Minn. Stat. §§ 14.131-.20 (2014).
[4] *See,* Minn. Stat. § 14.25 (2014).

published in the *State Register* are within the scope of the matter that was originally announced.[5] PERB must also demonstrate that it has complied with all applicable procedural requirements and that the proposed rules are otherwise lawful.[6]

At the public hearing, PERB was represented by Steven Hoffmeyer, PERB Interim General Counsel and Executive Director. PERB's hearing panel included David Biggar, Chair of PERB. Also present for PERB was Laura Cooper, an alternate Board member.[7]

Approximately 23 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Five members of the public made statements or asked questions during the hearing.[8]

PERB received approximately 35 comments on the proposed rules prior to the hearing.[9] After the close of the hearing, the Administrative Law Judge kept the rulemaking record open until March 14, 2016 to permit interested persons and PERB to submit written comments.[10] Two written comments were received from members of the public after the hearing.[11] Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and PERB an opportunity to reply to earlier-submitted comments.[12] Only PERB submitted reply comments.[13]

The hearing record closed for all purposes on March 21, 2016.

SUMMARY OF CONCLUSION

PERB has established it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable, with the exception of the following proposed rules: 7325.0100; 7325.0110, subp. 6; 7325.0110, subp. 7; 7325.0270; 7325.0300; and 7325.0320, subp. 1.

Based upon all of the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

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[5] Minn. Stat. §§ 14.05, .131, .23, .25 (2014).
[6] Minn. Stat. §§ 14.05, .131, .23; Minn. R. 1400.2100, .2240 (2015).
[7] Hearing Transcript (Hrg. Tr.) at 2, 13, 18 (Feb. 22, 2016).
[8] Hearing Register, at 1–3; Hrg. Tr. at 3.
[9] Exhibit (Ex.) K (Public comments received prior to the February 22, 2106 hearing).
[10] *See* Minn. Stat. § 14.15, subd. 1; Hrg. Tr. at 8.
[11] Comment of Brandon Fitzsimmons (e-filed March 3, 2016); Comment of Hennepin County Association of Paramedics and EMTs (filed March 9, 2016).
[12] *See* Minn. Stat. § 14.15, subd. 1; Hrg. Tr. at 9.
[13] PERB Rebuttal Comments (filed March 21, 2016).

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. The Public Employment Labor Relations Act (PELRA) is designed to "promote orderly and constructive relationships between all public employers and their employees."[14]

2. Since 1971, state law has prohibited public employers and public employees from engaging in specified unfair labor practices.[15]

3. Historically, claims alleging an unfair labor practice under PELRA have been brought in state district court.[16]

4. The 2014 Legislature established PERB and amended PELRA to provide that claims involving unfair labor practices would be heard through an administrative hearing process conducted before PERB rather than by bringing a lawsuit in district court.[17]

5. Beginning on July 1, 2016, any person or organization aggrieved by an unfair labor practice as specified by PELRA may file "an unfair labor practice charge with [PERB]."[18]

6. PERB is required to "promptly conduct" an investigation of a filed charge. After conducting an investigation, PERB issues a complaint to the charged party unless PERB finds that the charge "has no reasonable basis in law or fact."[19] PERB then is required to serve the complaint along with a notice of hearing upon the party who is the subject of the charge. The notice of hearing must set a hearing before a "qualified hearing officer designated by the board" not less than five days nor more than 20 days after service of the complaint.[20] The party who is the subject of the complaint has the right to file an answer and to appear at the hearing and to give testimony.[21]

7. If the hearing officer determines that a preponderance of the evidence in the record shows that the named party has engaged in or is engaging in an unfair labor practice, the hearing officer is to issue a recommended decision and order.[22] The recommended decision and order shall require the party to cease and desist from the unfair labor practice, and may order other relief including but not limited to reinstatement,

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[14] Minn. Stat. § 179A.01. The terms "public employers" and "public employees" are defined in Minn. Stat. § 179A.03, subds. 14, 15.
[15] Minn. Stat. § 179.68 (1971); Ex. L (Statement of David Biggar, PERB Chair).
[16] Minn. Stat. § 179.68 (1971); Ex. C at 1 (Statement of Need and Reasonableness (SONAR)); Ex. L.
[17] 2014 Minn. Laws ch. 211, §§ 5, 10; Ex. L.
[18] 2014 Minn. Laws ch. 211, §§ 5, 10, as amended by 2015 Minn. Laws, 1st Spec. Sess., ch. 1, art. 7, § 1; Minn. Stat. § 179A.13 (2015).
[19] Minn. Stat. § 179A.13, subd. 1(b).
[20] *Id.*
[21] *Id.*
[22] Minn. Stat. § 179A.13, subd. 1(i).

and back pay.[23] If a preponderance of the evidence does not show an unfair labor practice, then the hearing officer shall issue an order and recommendation dismissing the complaint.[24]

8. Parties may file exceptions to the hearing officer's recommended decision and order with PERB within 30 days of service of the recommended decision and order.[25]

9. Where a party files exceptions within the time period prescribed, PERB is required to review the recommended decision and order and issue a final order. PERB may adopt "all, part, or none of the recommended decision and order, depending on the extent to which it is consistent with the record and applicable laws."[26]

10. If no party files exceptions, PERB may review the recommended decision and order on its own motion and issue a final order.[27] If PERB elects not to review a recommended decision and order where no party files exceptions, the recommended decision and order becomes final.[28]

11. As part of the 2014 law, the legislature required PERB to adopt rules governing the administrative review process for resolving unfair labor practice charges.[29]

12. PERB developed the proposed rules to carry out this directive.[30]

13. In drafting the rules, PERB considered PELRA's goal to "promote orderly and constructive relationships between all public employers and their employees." PERB also sought to balance the statutory mandates to "promptly conduct an investigation of a charge" and "promptly issue a complaint," with the basic concepts of due process such as allowing parties adequate time to respond. In addition, PERB stated that it took into account the need for uniformity of process, flexibility, fairness, equality, notice, efficiency, cost effectiveness, openness of proceedings, privacy of parties involved, and common acceptance.[31]

II. Rulemaking Authority

14. PERB cites Minn. Stat. § 179A.04, subds. 4 and 7, as its source of statutory authority for the proposed rules.[32] Minn. Stat. § 179A.04, subd. 4, requires PERB to adopt rules "governing its procedure." Minn. Stat. § 179A.04, subd. 7, requires PERB to adopt rules "governing the presentation of issues and the taking of appeals" under PELRA.

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[23] *Id.*
[24] *Id.*, subd. 1(j).
[25] *Id.*, subd. 1(k).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] 2014 Minn. Laws ch. 211, § 5 (codified at Minn. Stat. § 79A.041, subds. 4, 7).
[30] Ex. C at 1 (SONAR).
[31] *Id.* at 2; Ex. L.
[32] Ex. C at 3 (SONAR).

15. In addition, Minn. Stat. § 179A.04, subd. 5 provides that PERB "shall have the powers and authority required for the board to take the actions assigned to the board under section 179A.13."

16. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing the investigation, hearing, and appeal procedures of charges and complaints of unfair labor practices brought under Minn. Stat. ch. 179A. To the extent that a particular rule exceeds PERB's grant of statutory authority or is inconsistent with Minn. Stat. ch. 179A, that issue is addressed in the rule-by-rule analysis below.

III. Procedural Requirements of Chapter 14

17. The Minnesota Administrative Procedure Act and the rules of the Office of Administrative Hearings set forth certain procedural requirements that are to be followed during agency rulemaking. PERB's compliance with those requirements is discussed below.

18. On October 12, 2015, PERB published a Request for Comments in the *State Register* on its possible adoption of "rules governing its procedures and standards for resolution of unfair labor practices under [PELRA]."[33]

19. On December 9, 2015, PERB filed with the Office of Administrative Hearings a copy of its Dual Notice of Intent to Adopt Rules (Dual Notice). The Board also filed a copy of the proposed rules and a draft of the Statement of Need and Reasonableness (SONAR), and requested approval of its Additional Notice Plan.

20. The Dual Notice provided that PERB intended to adopt rules governing the procedures for investigations, hearings, and appeals of unfair labor practices under Minn. Stat. ch. 179.[34] The Dual Notice specified that PERB intended to adopt the rules without a public hearing unless 25 or more persons requested a hearing by January 28, 2016 at 4:30 p.m.[35] The Dual Notice also stated that if 25 or more persons submitted a written request for a hearing by the deadline, PERB would hold a hearing on February 22, 2016, at its offices.[36]

21. In addition, the Dual Notice specified that a copy of the proposed rules would be available in the December 28, 2015 *State Register* and also provided a link to the proposed rules on PERB's website. The Dual Notice indicated that PERB would accept written comments on the proposed rules until January 28, 2016.[37]

22. The Additional Notice Plan included notification to: public employees through member organizations; public employers through member organizations and

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[33] 40 *State Register* 434 (Oct. 12, 2015); Ex. A.
[34] Ex. F (Dual Notice).
[35] *Id.*
[36] *Id.*
[37] *Id.*

other entities; the State Bureau of Mediation Services; the Minnesota State Bar Labor and Employment Law sections; and 2,300 individuals and organizations involved in labor law in Minnesota.[38]

23. On December 15, 2015, Administrative Law Judge Jeanne M. Cochran issued an order approving the Additional Notice Plan and conditionally approving the Dual Notice. The order provided that the Dual Notice was approved contingent upon the addition of language required by Minn. R. 1400.2080, subp. 2(G) (2015), stating that persons may request to be placed on the Board's mailing list to receive notice of future rule proceedings.[39]

24. On December 21, 2015, PERB sent a copy of the Dual Notice and a link to the proposed rules to all persons and associations who had registered their names with PERB for the purpose of receiving such notices.[40]

25. On December 21, 2015, PERB also provided notice of the Dual Notice in accordance with the approved Additional Notice Plan.[41]

26. On that same date, PERB sent an electronic copy of the SONAR to the Legislative Reference Library to meet the requirements set forth in Minn. Stat. §§ 14.131 and 14.23.[42]

27. Also on December 21, 2015, PERB sent an electronic a copy of the Dual Notice and the SONAR to the Legislative Coordinating Commission and to the chairs and ranking minority party members of specified legislative policy and budget committees to meet the requirements of Minn. Stat. § 14.116 (2014).[43]

28. On December 28, 2015, the Dual Notice and proposed rules were published in the *State Register*.[44]

29. The Dual Notice that was mailed on December 21, 2015 and published on December 28, 2015 included the language required by the Administrative Law Judge's December 15, 2015 order specifying that persons may register with PERB to receive notice of future PERB rule proceedings.[45]

30. Numerous comments were received after publication of the Dual Notice and the proposed rules. More than 25 persons submitted a written request for a hearing on the proposed rules by the deadline, January 28, 2016 at 4:30 p.m.[46]

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[38] Ex. E (Order on Review of Additional Notice Plan).
[39] *Id.*
[40] Ex. G (Certificate of Mailing the Dual Notice to the Rulemaking List).
[41] Ex. H.
[42] Ex. I.
[43] Ex. J.
[44] 40 *State Register* 720 (Dec. 28, 2015).
[45] Ex. F.
[46] Ex. K (Public comments and requests for a hearing received by January 28, 2016).

31. On February 22, 2016, a hearing on the proposed rules was held in St. Paul at PERB's offices as noticed. During the hearing, PERB filed copies of the following documents as required by Minn. R. 1400.2220 (2015):

- Request for Comments as published in the *State Register* on October 12, 2015;[47]
- Proposed rules, dated November 24, 2015, including the Revisor's approval;[48]
- Statement of Need and Reasonableness, dated November 22, 2015;[49]
- Transmittal letter and letter from Minnesota Management and Budget (MMB) showing PERB consulted with MMB;[50]
- Office of Administrative Hearings' Order on Review of Additional Notice Plan and Dual Notice.[51]
- Dual Notice dated December 18, 2015 and a copy of the December 28, 2015 *State Register* where the Dual Notice is published;[52]
- Certificate of Mailing the Dual Notice to the Rulemaking List and Certificate of Accuracy as to Mailing List;[53]
- Certificate of Giving Additional Notice under the Additional Notice Plan and a copy of a news release issued by PERB notifying the public of availability of the draft rules and related information;[54]
- Certificate of Mailing the SONAR to the Legislative Reference Library;[55]
- Certificate of Sending the Dual Notice and SONAR to Legislators and the Legislative Coordinating Commission;[56]
- Copies of written comments, submissions, and requests for a public hearing received during the comment period;[57]

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[47] Ex. A.
[48] Ex. B.
[49] Ex. C.
[50] Ex. D.
[51] Ex. E.
[52] Ex. F.
[53] Ex. G.
[54] Ex. H.
[55] Ex. I.
[56] Ex. J.
[57] Ex. K.

- Statement of David Biggar, Chair of PERB, and PERB's proposed changes to the rules in response to comments received during the public comment period;[58] and

- Copies of selected sections of Minn. Stat. ch. 179A.[59]

A. Additional Notice Requirements

32. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

33. In the SONAR, PERB indicated that it published a Request for Comments in the *State Register* on October 12, 2015. In addition, PERB specified that its Additional Notice Plan included:

- Notices and copy of proposed rules and SONAR sent to the Governor's office;

- Notices and copy of proposed rules sent to the chairs and ranking minority members of the legislative committees that oversee PERB;

- Notices and copy of proposed rules posted to the PERB's website;

- News releases with link to proposed rules sent electronically to a list of 2,300 people or organizations involved in labor law in Minnesota including those who have signed up to received PERB rulemaking information;

- News releases with link to proposed rules sent to newspaper, radio, television, magazine and electronic news organizations located throughout the state of Minnesota;

- Notice and a link to the proposed rules sent to Minnesota public employees as represented by the following unions, newsletters, trade papers, and other organizations:

    - Education Minnesota
    - Minnesota Public Employees Association
    - American Federation of State, County and Municipal Employees, Councils 5 & 65
    - Minnesota Association of Professions Employees
    - Middle Management Association
    - Minnesota School Employees Association

[58] Ex. L.
[59] Ex. M.

- Minnesota Teamsters Public and Law Enforcement Employees Union Local No. 320
- Minnesota Association of Secondary School Principals
- Minnesota Elementary Schools Principals Association
- Union Advocate, Minneapolis Labor Review, and Workday Minnesota"

- Notice and a link to the proposed rules sent to public employees either individually, or as represented through the following organizations:

  - Association of Minnesota Counties
  - City of Minneapolis
  - City of St. Paul
  - League of Minnesota Cities
  - Metropolitan Council
  - Minnesota Public Employer Labor Relations Association
  - Minnesota Association of Townships
  - Minnesota Hospital Association
  - Minnesota School Board Association
  - Minnesota State Colleges and Universities Association
  - State of Minnesota
  - University of Minnesota
  - Cities Bulletin
  - Minnesota *Counties*

- Notice and a link to the proposed rules sent to other entities involved in public employment proceedings in the state of Minnesota as represented through the following organizations:

  - State of Minnesota Bureau of Mediation Services
  - Minnesota State Bar Labor and Employment Law Section[60]

34. As noted above, PERB submitted its Additional Notice Plan for approval with the Office of Administrative Hearings and that plan was approved by an order dated December 15, 2015.[61] PERB then provided notice in accordance with the steps outlined in the SONAR and the Additional Notice Plan.[62]

35. The Administrative Law Judge finds that PERB has fulfilled its additional notice requirements.

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[60] Ex. C at 6-7 (SONAR).
[61] Ex. E (Order on Review of Additional Notice Plan and Dual Notice).
[62] Ex. H.

B. Notice Practice

1. Notice to Stakeholders

36. On December 21, 2015, PERB sent a copy of the Dual Notice to its official rulemaking list maintained under Minn. Stat. § 14.14, and to stakeholders identified in its Additional Notice Plan.[63]

37. The comment period on the proposed rules expired at 4:30 p.m. on January 28, 2016.[64]

38. The Administrative Law Judge concludes that PERB fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6 (2015), to mail the Dual Notice "at least 33 days before the end of the comment period …" as December 21, 2015 is more than 33 days before January 28, 2016.

2. Notice to Legislators

39. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.

40. On December 21, 2015, PERB sent a copy of the Dual Notice and the SONAR to specified legislators as required by Minn. Stat. § 14.116.[65]

41. The Administrative Law Judge concludes that PERB fulfilled its responsibilities to send the Dual Notice to legislators as required by Minn. Stat. § 14.116.

3. Notice to Legislative Reference Library

42. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

43. On December 21, 2015, PERB sent a copy of the SONAR to the Legislative Reference Library.[66]

44. The Administrative Law Judge concludes that PERB filled its responsibilities as required by Minn. Stat. § 14.23 to "send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt [was] mailed."[67]

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[63] Exs. G-H.
[64] Ex. F.
[65] Ex. J.
[66] Ex. I.
[67] Minn. Stat. § 14.23.

C. Impact on Farming Operations

45. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

46. The proposed rules do not impose restrictions, or have an impact on, farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.

D. Statutory Requirements for the SONAR

1. Eight Statutory Factors

47. The Administrative Procedure Act obliges an agency adopting rules to address certain factors in its SONAR,[68] including:

- a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

- the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

- a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

- a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

- the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

- the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

[68] Minn. Stat. § 14.131.

- an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

- an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

2. PERB's Analysis of the Eight Factors

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

48. PERB anticipates that the following classes of persons will be affected by the proposed rules:

- Public employers;
- Public employees;
- Public sector labor organizations that represent public employees;
- Charitable hospitals included within the definition of "public employer";[69]
- Employees of charitable hospitals involved in unfair labor practices;
- Attorneys representing clients before PERB; and
- Consultants representing clients before PERB.[70]

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

49. PERB notes that its jurisdiction over unfair labor practice complaints does not commence until July 1, 2016 and it has no history to draw upon to estimate the number of hearings PERB will conduct. Nevertheless, PERB estimates that it will handle approximately 30 hearings per year and each hearing will cost approximately $8,000, the majority of which will be for hearing officer costs. PERB believes that the PERB hearing process will be less costly than the past practice of filing a case in state district court. As a result, PERB expects that there may be an increase in the number of charges brought but the overall costs incurred by the state should not change significantly. Finally, PERB states that "whatever costs the state incurs in deciding unfair labor claims will be the result of the statute that directs PERB to hear these charges rather than the result of these rules, which only define procedures to accomplish the legislatively-mandated task."[71]

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[69] *See* Minn. Stat. § 179A.03, subd. 15.
[70] Ex. C at 3 (SONAR).
[71] *Id.* at 4.

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

50. PERB does not believe that there are less costly or less intrusive methods for achieving the purpose of the proposed rules. PERB notes that the rules mainly fill in details to the new framework established by the legislature for handling unfair labor practice claims. PERB notes that the significant features of the process, such as hiring hearing officers, keeping of the record, discovery, evidence and appellate procedures, are all required by statute.[72]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

51. PERB has not identified any alternative methods for achieving the purpose of the proposed rules. PERB considered requiring mediation or arbitration as alternatives to the proposed rules but determined that neither was a viable option. PERB noted that mediation is a voluntary process and cannot assure an outcome in any particular case. With regard to arbitration, PERB stated that it does not have statutory authority to mandate arbitration.[73]

(e) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

52. PERB states that the rules are procedural in nature and largely govern PERB's internal operations. PERB notes that there are no filing fees for filing an unfair labor practice charge with PERB. PERB states that any costs incurred by the affected parties would be the same, if not less, than would have been incurred in court. PERB states that one exception may be the cost of traveling to appear before the Board. PERB notes, however, that it would be considerably more expensive and time consuming for PERB to travel throughout the state hearing appeals.[74]

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[72] *Id.*
[73] *Id.* PERB also considered having Administrative Law Judges conduct the hearings but decided instead to select its own hearing officers pursuant to a Request for Proposals. PERB Rebuttal Comments at 18.
[74] *Id.* at 5.

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

53. If the proposed rules are not adopted, unfair labor practice charges will still be filed with PERB beginning on July 1, 2016 pursuant to Minn. Stat. § 179A.13. PERB believes that without the proposed rules, unfair labor practice complaints will not be handled efficiently. PERB also notes that without the proposed rules, the process will not be well-defined. According to PERB, a lack of rules governing proceedings before PERB could undermine the ability of parties to effectively present their evidence and arguments.[75]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

54. PERB states that federal law does not regulate labor relations of state or local government employees. PERB also notes that the National Labor Relations Board (NLRB) is a similar agency regulating the private sector and that the Federal Labor Relations Authority has authority over federal employees, but there is no direct analog to PERB at the federal level.[76]

(h) Assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

55. PERB notes that the proposed rules cover legal topics that are not addressed by federal law or other Minnesota state laws. Therefore, this consideration is not applicable to the proposed rules.[77]

(i) Summary of eight-factor analysis

56. The Administrative Law Judge finds that PERB has adequately considered the potential alternatives and probable costs associated with the proposed rules and has otherwise complied with the eight-factor analysis required by Minn. Stat. § 14.131.

3. Performance–Based Regulation

57. The Administrative Procedure Act requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based

[75] *Id.*
[76] *Id.*
[77] *Id.*

regulatory systems.[78] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives, and provides maximum flexibility for the regulated party and the agency in meeting those goals.[79]

58. PERB states that the "proposed rules have incorporated best practices in hearings and established necessary procedures without imposing any unnecessary duties or burdens to those participating in unfair labor practice proceedings."[80]

59. The proposed rules provide flexibility to the extent practicable. For example, with regard to service of documents, the proposed rules include four different methods of service rather than prescribing a single method. The Administrative Law Judge finds PERB has met the requirements set forth in Minn. Stat. § 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

4. Consultation with the Commissioner of Minnesota Management and Budget

60. As required by Minn. Stat. § 14.131, by letter dated December 17, 2015, the Executive Budget Officer of MMB responded to a request by PERB to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed PERB's proposed rules and concluded that the rules "will not impose a significant cost on local governments."[81]

61. The Administrative Law Judge finds that PERB has met the requirements set forth in Minn. Stat. § 14.131 for assessing the fiscal impact on units of local government.

5. Cost to Small Businesses and Small Cities under Minn. Stat. § 14.127 (2014)

62. Minn. Stat. § 14.127, subd. 1, requires the Board to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[82]

63. In the SONAR, PERB determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed $25,000 for any small business or small city. PERB noted that the rules will not apply to small businesses.

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[78] Minn. Stat. § 14.131.
[79] Minn. Stat. § 14.002 (2014).
[80] Ex. C at 6.
[81] Ex. D
[82] Minn. Stat. § 14.127, subds. 1, 2 (2014).

With regard to small cities, PERB stated that its determination was based on its estimate of the probable costs for parties to a PERB proceeding to comply with the rules.[83]

64. The Administrative Law Judge finds that PERB has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

6. Adoption or Amendment of Local Ordinances

65. Under Minn. Stat. § 14.128 (2014), the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[84]

66. PERB concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules because the proposed rules do not require any action by local governments to implement the proposed rules.[85]

67. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

68. The Administrative Law Judge must determine whether:

- the agency has statutory authority to adopt the rule;
- the rule is unconstitutional or otherwise illegal;
- the agency has complied with the rule adoption procedures;
- the proposed rule grants undue discretion to government officials;
- the rule constitutes an undue delegation of authority to another entity; and
- the proposed language meets the definition of a rule.[86]

69. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[87] "legislative facts" including general and well-established

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[83] Ex. C at 8.
[84] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2, 3.
[85] Ex. C at 8.
[86] *See* Minn. R. 1400.2100.
[87] *See Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

principles, that are not related to the specifics of a particular case, but which guide the development of law and policy,[88] and the agency's interpretation of related statutes.[89]

70. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[90] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[91]

71. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[92] While reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[93]

72. Because both PERB and the Administrative Law Judge suggest changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

> the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;
>
> the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing, and the comments submitted in response to the notice; and
>
> the notice . . . provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

73. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

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[88] *See United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[89] *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[90] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[91] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).
[92] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[93] *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests";

whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice…"; and

whether "the effects of the rule differ from the effects of the proposed rule contained in the notice …."[94]

V. Rule-By-Rule Analysis

74. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators disputed the reasonableness of the Board's regulatory choice or otherwise require closer examination.

75. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

76. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Minn. R. 7325.0020, Subpart 3 – "Charged Party."

77. The proposed rule defines "Charged party" as "a party charged with an unfair labor practice charge."

78. The Minnesota State Colleges and Universities (MnSCU) suggested that the definition of "charged party" be revised to address the distinction between an "employer" as defined in Minn. Stat. § 179A.13, subd. 2 and "employees" as defined in Minn. Stat. § 179A.13, subd. 3. According to MnSCU, Minn. Stat. § 179A.13, subd. 2, prohibits only "public employers" and their "representatives" and "agents" from engaging in the listed unfair labor practices and does not extend the prohibition to individuals in their non-representative, non-agent capacity. Minn. Stat. § 179A.13, subd. 3, on the other hand, prohibits "employee organizations, their agents or representatives, and public employees" from engaging in listed unfair labor practices. In MnSCU's view, the inclusion of the word "employee" in Minn. Stat. § 179A.13, subd. 3, suggests that individual employees may be charged with engaging in unfair labor practices.[95]

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[94] Minn. Stat. § 14.05, subd. 2.
[95] Ex. K (MnSCU Comments (January 27, 2016)).

79. In response, PERB noted that the proposed rules do not define who can be charged with an unfair labor practice because the PELRA provides the relevant standard. As a result, PERB declined to make the suggested change to Minn. R. 7325.0020, subpart 3, which defines "charged party." PERB also declined to make a similar change to Minn. R. 7325.0020, subpart 4, which defines "charging party."[96]

80. The Administrative Law Judge finds that PERB has provided a rational basis for its decision not to make the modifications suggested by MnSCU.

B. Minn. R. 7325.0020, Subpart 5 – "Charge or unfair labor practice charge."

81. The proposed rule defines "[c]harge" or "unfair labor practice (UPL) charge" as "a statement filed with the board in which a person alleges that another person or entity has committed an unfair labor practice."

1. Charges filed by employers and other organizations

82. MMB and MnSCU both commented that the proposed definition is not consistent with PELRA because both persons and organizations are authorized to file charges under Minn. Stat. § 179A.13.[97] MMB and MnSCU recommended that the definition be revised to reflect that either a person or an organization can file an unfair labor practice charge.[98] MMB also recommended that the term "entity" in subpart 5 be changed to "organization," the term used in Minn. Stat. § 179A.13.[99]

83. In its response, PERB agreed with MMB and MnSCU that the definition of "charge" or "unfair labor practice charge" should be amended to reflect that Minn. Stat. § 179A.13 authorizes "[a]ny employee, employer, employer or employer organization, exclusive representative, or any other person or organization aggrieved by an unfair labor practice as defined by this section" to file an unfair labor practice charge. PERB proposes to revise the definition in subpart 5 by adding phrase "<u>or entity</u>," which it maintains will cover "all non-persons who may file a charge." The revised definition would read as follows:

> Subp. 5. **Charge or unfair labor practice charge.** "Charge" or "unfair labor practice (UPL) charge" means a statement filed with the board in which a person <u>or entity</u> alleges that another person or entity has committed an unfair labor practice.[100]

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[96] PERB Rebuttal Comments at 2 (March 21, 2016).
[97] Ex. K (MMB Comments; MnSCU Comments).
[98] *Id.*
[99] *Id.* (MnSCU Comments).
[100] PERB Rebuttal Comments at 2.

84. The revision recommended by PERB is consistent with Minn. Stat. § 179A.13, is needed and reasonable, and would not constitute a substantial change from the rule as originally proposed.

2. Reference to PERB charge form in the definition of "charge"

85. MnSCU also recommended that the definition of "charge" in proposed rule 7325.0020, subpart 5, reference the charge form described in proposed rule 7325.0110 and that the definition of "charge" exclude "claims that are not reduced to writing."[101]

86. In response, PERB explained that proposed rule 7325.0110 already requires that the charging party use the PERB charge form. PERB also emphasized that it is "inappropriate for a definition to include substantive requirements."[102] On that basis, PERB declined to adopt MnSCU's recommendation to amend the definition of "charge" to reference proposed rule 7325.0110 and to exclude claims that are not reduced to writing.[103]

87. The Administrative Law Judge finds that PERB's decision not to make the modifications suggested by MnSCU discussed in paragraph 85 above is reasonable.

C. Minn. R. 7325.0020 – Additional Definitions Proposed By MnSCU

88. MnSCU suggested that Minn. R. 7355.0020 be revised to add definitions for the following terms: "aggrieved party"; "complaint"; "exception"; and "preponderance of the evidence."[104]

89. In response, PERB stated that Minn. Stat. § 179A.13, subd. 1(a), uses the term "aggrieved" and that term is sufficiently clear. Similarly, PERB indicated that the phrase "preponderance of the evidence" is also clear. With regard to "exception," PERB indicated that Minn. Stat. § 179A.13, subd. 1(k), uses the phrase "exceptions" and proposed rule 7325.0400, subpart 3, explains sufficiently what is required in an "exception" filed with the Board after a hearing. For these reasons, PERB declined MnSCU's request to add definitions of these terms.[105]

90. PERB agreed, however, with MnSCU's suggestion that a definition of "complaint" should be added. PERB noted that adding such a definition would differentiate a complaint from a charge.[106]

91. PERB suggested adding the following language and renumbering the subsequent subparts accordingly:

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[101] Ex. K (MMB Comments).
[102] PERB Rebuttal Comments at 2.
[103] *Id.*
[104] Ex. K (MnSCU Comments).
[105] PERB Rebuttal Comments at 3.
[106] *Id.*

Subp. 6. **Complaint**. "A complaint is a document issued by the board alleging that a person or entity has committed one or more unfair labor practices."

92. The addition of a new subpart 6 to proposed rule 7325.0020 to define the term "complaint" as proposed by PERB is needed and reasonable, and would not be a substantial change from the rule as originally proposed. PERB's decision not to add definitions for the other terms is likewise reasonable.

D. Minn. R. 7325.0100 - Filing And Service Generally.

93. Minn. R. 7325.0100 governs the filing and service of documents in proceedings before PERB.

94. As proposed by PERB, Minn. R. 7325.0100, subpart 1, provides in relevant part that "filing is accomplished by in-person delivery to the board before 4:30 p.m. on a working day, first class United States mail with postage prepaid, facsimile, or as an attachment to an e-mail."

95. Similarly, proposed Minn. R. 7325.0100, subpart 2, provides in relevant part that "service is accomplished by in-person delivery, first class United States mail with postage prepaid, facsimile, or as an attachment to an e-mail."

96. Several groups commented on the language allowing filing and service by e-mail, and also provided comments suggesting that the rules specify the person or persons to be served within an organization.

97. The League of Minnesota Cities, Association of Minnesota Counties, Minnesota School Board Association, Minnesota Association of Townships, Metro Cities, Coalition of Greater Minnesota Cities, and the Minnesota Inter-County Association (collectively, the League) filed joint comments in which they stated that filing and service by e-mail should not be permitted because e-mail can be unreliable. The League noted that "e-mail sometimes disappear into junk folders or get locked down behind fire walls." The League recommended that electronic filing and service "only be permitted if and when the PERB establishes a web-based filing and service system like state and federal courts, Minnesota Office of Administrative Hearings, and the National Labor Relations Board (NLRB)."[107]

98. The Coalition of Greater Minnesota Cities (CGMC) provided its own comments, in addition to joining in the League comments. In its comments, CGMC reiterated its view that service and filing by e-mail is unreliable without a web-based system in place. In addition, CGMC voiced concern that the proposed rules do not specify

[107] Ex. K (Joint Comments of the League of Minnesota Cities, et. al., on Possible Adoption of Rules Governing the Procedures and Investigations, Hearings, and Appeals under Unfair Labor Practices under Minnesota Statues 197A (January 26, 2016)) (League Comments).

the appropriate individual to be served when a public employer is being served.[108] CGMC noted that in the past, cities have experienced problems with individuals failing to serve a labor contract grievance on the appropriate City representative.[109] CGMC suggested that PERB adopt a rule similar to Minn. R. Civ. P. 4.03, governing personal service, to ensure that the appropriate individual within an organization is served with the unfair labor practice charge form and other documents.[110]

99. MnSCU also raised concerns about service by e-mail. MnSCU noted that an individual or organization may have multiple e-mail accounts, some of which are less frequently used or checked. MnSCU questioned whether simply sending an e-mail to any one of these accounts without confirmation of receipt can constitute service under the proposed rule. To assure that a public employer has actual and timely notice of a charge, MnSCU recommended that service on a public employer, its agents, and representatives be limited to personal service or service by certified mail to the public employer's commissioner or chief executive officer.[111] MnSCU also recommended that the rule be amended to require filing of an affidavit of service.[112]

100. MMB stated that it shares MnSCU's concern regarding service and filing by e-mail. MMB noted that large organizations such as state agencies have "many thousands of employees with email addresses, yet the proposed rules do not specify to whom a message filing a UPL charge should be directed."[113] MMB agreed with MnSCU's recommended changes for service on a public employer.[114]

101. In response, PERB noted that the proposed rule is intended to provide for cost-effective and efficient methods of service and filing. PERB also stated that "[e]mail is widely used in the legal system and is sufficiently reliable. The requirement that PERB serve the charged party with the charge provides an additional safeguard."[115] On this basis, PERB decided to retain the language in the proposed rule that allows for service and filing of documents as an attachment to an e-mail.[116]

102. The Administrative Law Judge appreciates PERB's interest in trying to provide for efficient and cost effective methods of filing and service. However, the

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[108] Ex. N (Written Testimony of Coalition of Greater Minnesota Cities by Shaunna Johnson, City Administrator of Waite Park (February 16, 2016)). Shaunna Johnson also provided oral comments at the hearing on February 22, 2016, which restated many of the points in her written testimony. For ease of reference, this report cites to Ex. N rather than the hearing transcript for Ms. Johnson's comments on behalf of CGMC.

[109] *Id.*

[110] Comment of Brandon Fitzsimmons, Flaherty & Hood, on behalf of CGMC (e-filed March 3, 2016).

[111] Ex. K (MnSCU Comments).

[112] *Id.*

[113] *Id.* (MMB Comments).

[114] *Id.*

[115] PERB Rebuttal Comments at 3. Under proposed rule 7325.0110, subparts 4-5, the charging party is required to serve the charge on each charged party, and PERB also serves the charge on each party after the charge form is docketed and assigned a case number.

[116] PERB Rebuttal Comments at 3. PERB also suggested adding language stating that "A filing by email is deemed filed on the date it is sent." *Id.* at 4.

Administrative Law Judge concludes that the proposed language allowing service and filing "as an attachment to an e-mail" is defective because PERB has failed to demonstrate the need for and reasonableness of this proposed method of filing and service. PERB's assertion that electronic mail is "sufficiently reliable" has not been established by an affirmative presentation of facts. Similarly, PERB's statement that "[e]mail is widely used in the legal system" does not demonstrate that its proposal to allow service and filing of documents "as an attachment to an e-mail" is reasonable. As the commenters noted, when electronic service and filing is utilized in other legal proceedings, such as in state and federal courts, it is through a web-based system. PERB has not identified any legal proceedings where service and filing by e-mail is allowed in absence of a web-based system. Nor has PERB responded to the League's legitimate concerns that the recipient may not receive the e-mail because e-mail can be stopped by a "fire wall" or end up in a spam folder.[117] For these reasons, PERB has failed to provide sufficient facts to show its proposal to allow filing and service "as an attachment to an e-mail" is reasonable, resulting in that portion of the rule being defective.[118]

103. To cure the defect, PERB could delete the language regarding filing and service "as an attachment to an e-mail" in subparts 1 and 2 of proposed rule 7325.0100. Alternatively, PERB could amend the language to provide that filing and service can be made "as an attachment to an e-mail <u>with the express, prior written consent of the recipient who has provided an email address for that purpose.</u>" Such language would establish a basis to conclude that e-mail service and filing is sufficiently reliable. Presumably, with prior notice and agreement, the recipient would know to look for the e-mail and could contact the sender if there was a problem with the timely service or filing.

104. With regard to MnSCU's recommendation that the proposed rule be amended to require the filing of an affidavit of service, PERB responded that such a revision is unnecessary because proposed rule 7325.0110, subpart 2(H) "requires that the charge form contain a statement that the charging party has served the charge upon the charged party."[119]

105. While reasonable minds could differ on whether an affidavit of service should be required, it is not the role of the Administrative Law Judge to determine which policy alternative represents the "best" approach. This would invade the policy-making discretion of the agency. Rather, the question is whether the choice made by the agency is one that a rational person could have made.[120] The Administrative Law Judge concludes PERB has shown that there is a rational basis for PERB's decision not to require an affidavit of service.

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[117] *See Minnesota Environmental Sciences and Economic Review Board, et al. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97, 101 (Minn. Ct. App. 2015) (holding that the Minnesota Administrative Procedure Act includes an implicit requirement that an agency provide a meaningful response to comments made on proposed rules).
[118] *See Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[119] PERB Rebuttal Comments at 4 (citing proposed rule 7325.0110, subp. 2(H)).
[120] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

106. PERB also responded to suggestions by CGMC, MnSCU, and MMB that the rules be revised to specify a particular person or persons to be served where service is upon a public employer. PERB indicated that proposed Minn. R. 7325.0110 requires the charging party to file and serve a "charge form" and the charge form must include the name, address and telephone number of the charged party and the charged party's agent or attorney if known.[121] PERB also noted that the Board or its designee will be serving the charge on the charged party again after it is docketed.[122] Finally, PERB stated that use of Minn. R. Civ. P. 4.03, as suggested by CGMC, is not appropriate in a proceeding before PERB because an unfair labor practice charge may be filed by an unrepresented person.[123]

107. The Administrative Law Judge concludes that PERB's decision not to incorporate the personal service requirements of Minn. R. Civ. P. 4.03 or otherwise specify a particular person at a public employer to be served does not constitute a defect. As noted above, it is not the Administrative Law Judge's role to identify the best policy approach. PERB has provided an adequate explanation for its policy choice and demonstrated that its choice is rational. As discussed in more detail in paragraph 118, the Administrative Law Judge recommends a technical amendment to proposed Minn. R. 7325.0110 to clarify the information included on the charging form regarding who was served with the charge.

108. In addition, MnSCU and MMB suggested that the rules be amended to acknowledge that under the Minnesota Government Data Practices Act (MGDPA), an employer may be required to redact copies of documents that are served on the other named parties to the proceeding.[124]

109. In response, PERB explained that it is not PERB's role to identify the legal responsibilities of public employers under the MGDPA in its procedural rules.[125]

110. While the Administrative Law Judge recognizes the reasons for the revisions suggested by MnSCU and MMB, the Administrative Law Judge concludes that PERB has provided an adequate basis for its decision not to include a new provision in the rule specifying that a public employer may redact documents consistent with the MGDPA.

111. In summary, PERB has demonstrated that proposed rule 7325.0100, governing filing and service, is needed and reasonable except for the language providing for filing and service "as an attachment to an e-mail." Revisions by PERB to cure this defect as recommended above are needed and reasonable, and would not result in a substantial change from the rule as originally proposed.

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[121] PERB Rebuttal Comments at 4; proposed rule 7325.0110, subp. 2.
[122] PERB Rebuttal Comments at 4; proposed rule 7325.0110, subp. 5.
[123] PERB Rebuttal Comments at 4.
[124] Ex. K (MnSCU Comments; MMB Comments).
[125] PERB Rebuttal Comments at 7.

112. Finally, the Administrative Law Judge recommends a technical revision to subpart 1(B). As proposed, Subpart 1(B) provides: "Anything filed with the board, unless otherwise specifically directed by the board, a hearing officer, or the general counsel, must also be served on all other parties." The Administrative Law Judge recommends that PERB add "in writing" after the word "directed" to clarify that any such direction from the board, a hearing officer, or the general counsel must be in writing. The proposed revision would not result in a substantial change from the rule as originally proposed.

E. Minn. R. 7325.0110, Subpart 2 – Form Information.

113. Proposed Minn. R. 7325.0110, subpart 2, sets forth the information that is required to be included in a charge form filed with PERB and served on the charged party to initiate an unfair labor practice proceeding before PERB.

114. As proposed, the rule reads:

> Subp. 2. **Form information.** The charge form must include the following information:
>
> A. the name, address, and telephone number of the party filing the charge;
> B. the name, address, and telephone number of the agent or attorney representing the charging party;
> C. the name, address, and telephone number of the charged party;
> D. the name, address, and telephone number of the agent or attorney representing the charged party, if known;
> E. a clear and concise statement of each charge of an unfair labor practice including the dates, times, and places of the alleged unfair labor practice and the name of the person, entity, or both that allegedly committed the unfair labor practice;
> F. the specific section of the law, either Minnesota Statutes, section 179.11, 179.12, or 179A.13, alleged to have been violated;
> G. the specific remedy being sought for each unfair labor practice alleged; and
> H. a statement that the charging party has served a complete copy of the charge on each party named as a charged party.

115. PERB proposed the mandatory use of a designated charge form to: promote uniformity; provide notice to the charged party; and help ensure the charging party provides the necessary information for an investigator to begin an investigation.[126]

[126] Ex. C. at 9 (SONAR).

116. MnSCU commented that the current wording of Item F is grammatically incorrect and the word "either" in Item F should be deleted because it refers to three sections of law, not two.[127]

117. PERB agreed with MnSCU's suggestion and has proposed revising subpart 2(F) to delete the reference to the word "either" so that the item would read as follows:

> F. the specific section of law~~, either~~ (Minnesota Statutes, section 179.11, 179.12, or 179A.13)~~,~~ alleged to have been violated;[128]

118. The recommended revision to Item F of proposed Minn. R. 7325.0110, subpart 2, is needed and reasonable, and would not result in a substantial change from the rule as originally proposed.

119. In addition, while Item H is needed and reasonable, the Administrative Law Judge recommends a technical revision to Item H to clarify the information to be provided by the charging party. The Administrative Law Judge recommends that Item H be revised as follows:

> H. a statement that the charged party has served a complete copy of the charge on each party named as a charged party, <u>including: the name of the person served for each charged party; the method of service used for each charged party; and the date of service for each charged party.</u>

120. This proposed revision will further PERB's intent to provide for timely and efficient handling of unfair labor practice charges. It ensures that PERB and the charged party are easily able to identify the individual served where the charged party is an organization, how service was made, and the date of service. This proposed revision would not result in a substantial change from the rule as originally proposed.

121. Finally, several commenters recommended that the charge form include a declaration that the person filing the charge has read the charge form and that the information provided is true to the best of the person's knowledge and belief. These commenters suggested that such a declaration would promote accountability.[129]

122. PERB agreed with the suggestion and has proposed adding a new item, Item I, in subpart 2 of Minn. R. 7325.0110. The new Item I would read:

> <u>I. a signature acknowledging that the charging party has read the charge and that the statements in the charge are true to the best of the charging party's knowledge and belief.</u>

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[127] Ex. K (MnSCU Comments).
[128] PERB Rebuttal Comments at 4.
[129] Ex. K (League Comments); Ex. N (CGMC Comments).

123. This proposed revision to add Item I is needed and reasonable, and would not result in a substantial change from the rule as originally proposed.

F. Minn. R. 7325.0110, Subpart 6 – Submission of Evidence.

124. Proposed rule 7325.0110, subpart 6, provides that:

> The charging party must submit evidence in support of each alleged unfair labor practice as well as any documents that support its position to the assigned investigator. This submission must be provided within seven days of the date the charge or amended charge is filed, unless an extension is granted for good cause. The assigned investigator may request the charging party to submit additional evidence to support its charge when the assigned investigator determines additional evidence is necessary to evaluate the charge.

125. PERB proposed this rule to provide the investigator with necessary information from the charging party in a timely manner. PERB stated that it balanced the needs for an expedited process with the need for parties to have a reasonable time to prepare and submit their evidence.[130]

1. Extensions for good cause

126. MnSCU and the League commented that the proposed rule does not define the term "good cause." These organizations stated that clarification is needed as to the meaning of the phrase and as to who makes the determination of whether good cause exists.[131]

127. In response, PERB stated that the Board believes the rule is clear that "good cause" is determined by the assigned investigator based on the circumstances of a particular case. PERB added that a definition of "good cause" is not necessary because that phrase is commonly used as the "standard for judicial action in dozens of provisions without thinking it necessary to define the term." PERB noted that both the Federal Rules of Civil Procedure and the Minnesota Rules of Civil Procedure use the term "good cause" without defining the term.[132]

128. The Administrative Law Judge agrees with PERB that the lack of a definition of "good cause" does not constitute a defect. The phrase "good cause" has a common understanding, and it may not be possible to specifically identify all the different circumstances that could constitute good cause for granting an extension for the time to provide information to the investigator.

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[130] Ex. C at 9 (SONAR).
[131] Ex. K (MnSCU Comments; League Comments).
[132] PERB Rebuttal Comments at 5-6.

129. The Administrative Law Judge agrees with MnSCU and the League, however, that subpart 6 is vague as to who makes the good cause determination – the Board or the investigator. While PERB noted in its response to comments that the determination is made by the investigator, the rule as drafted does not specify who makes the determination. As a result, subpart 6 is defective because it is unduly vague.

130. To cure this defect, the Administrative Law Judge recommends that PERB revise Minn. R. 7325.0110, subp. 6, to specify that the "extension is granted by the investigator." The Administrative Law Judge also recommends, as a technical amendment, adding the word "shown" after "good cause." If these recommendations are adopted by PERB, subpart 6 would be revised as follows:

> [t]he charging party must submit evidence in support of each alleged unfair labor practice as well as any documents that support its position to the assigned investigator. This submission must be provided within seven days of the date the charge or amended charge is filed, unless an extension is granted by the investigator for good cause shown. The assigned investigator may request the charging party to submit additional evidence to support its charge when the assigned investigator determines additional evidence is necessary to evaluate the charge.

131. The proposed modifications set forth in the paragraph above are needed and reasonable, and would not render the rule substantially different from the rule as originally proposed for adoption.

2. Evidence provided to the investigator

132. Several commenters suggested that evidence provided to the investigator by the charging party should be provided to the charged parties at the same time. Such a procedure would permit the charged parties to respond to the information provided.[133]

133. Similarly, Ramsey County stated that the rule is unclear as to whether evidence submitted to the investigator is a filing that requires service on the other parties to the proceeding.[134]

134. PERB responded that it is not appropriate for a government agency investigating an unfair labor practice to disclose the identity of, and information gained from, specific witnesses. In support of its position, PERB cited to the NLRB Manual. PERB also noted that the NLRB recognizes that "the conduct of complete investigations requires the ability to assure potentially vulnerable witnesses who may fear reprisal that the information they provide to the agency will be held confidential as long as possible."[135] In addition, PERB stated that the NLRB considers information contained in investigative files to be confidential and exempt from the requirements of the Freedom of Information

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[133] Ex. K (MnSCU Comments and League Comments); Ex. N (CGMC).
[134] Ex. K (Ramsey County Comments)
[135] PERB Rebuttal Comments at 6.

Act.[136] For similar reasons, PERB stated that it is important that evidence provided by the charging party be provided only to PERB, at least initially. PERB noted that if the charge is not dismissed, the proposed rules allow the charged party to obtain relevant information later in the process either by requesting a subpoena or at the pre-hearing conference.[137] For these reasons, PERB declined the request to require that the evidence provided to the investigator be served on the other parties to the proceeding.[138]

135. Reasonable minds can differ about whether information provided to the investigator by the charging party should be provided to the charged party at that same time. As noted above, an agency is legally entitled to make choices between possible approaches so long as its choice is rational.

136. The Administrative Law Judge concludes that PERB has shown an adequate rationale for its decision to require the charging party to provide evidence to the investigator within seven days of filing the charge, but not to the charged party during the investigation phase. The choice made by PERB is not arbitrary or unreasonable.

3. Form of evidence submitted

137. MnSCU also commented that the rule should address whether evidence submitted to the assigned investigator must be in the form of sworn statements (i.e., affidavits and documents supported by sworn testimony).[139]

138. In response, PERB stated that requiring sworn testimony and affidavits would be inconsistent with the legislature's intent when it created the new administrative review process for unfair labor practice claims. PERB noted that the legislature intended to "afford the parties to such cases greater accessibility, simplicity, and efficiency" and intended to allow parties to proceed unrepresented. For these reasons, PERB declined to add a requirement that evidence submitted be in the form of sworn statements as recommended by MnSCU.[140]

139. PERB has proposed, however, to revise its charge form to add a requirement that the charging party acknowledge that the statements in the charge "are true to the best of the charging party's knowledge and belief."[141]

140. The Administrative Law Judge concludes that PERB has provided an adequate explanation for its decision not to require evidence submitted to the investigator be in the form of sworn testimony and affidavits. The choice made by PERB is not arbitrary or unreasonable.

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[136] *Id.*
[137] *Id.* (citing proposed rules 7325.0110, subp. 7, .0250, subp. 2).
[138] *Id.* at 6-7.
[139] Ex. K (MnSCU Comments).
[140] PERB Rebuttal Comments at 6.
[141] *See* Finding of Fact ¶ 122.

G. Minn. R. 7325.0110, Subpart 7 – Submission of Response.

141. Proposed rule 7325.0110, subpart 7, provides that:

> The charged party must submit a response to each alleged unfair labor practice in the charge as well as any evidence that supports its position to the assigned investigator. This submission must be provided within 14 days of the date the charge or amended charge is served by the board, unless an extension is granted by the assigned investigator. The assigned investigator may request the charged party to submit additional evidence when the assigned investigator determines additional evidence is necessary to evaluate the charge.

142. PERB proposed this rule to provide the investigator with necessary information from the charged party or parties in a timely manner. It maintains that the rule balances the need for an expedited process with the need for parties to have a reasonable time to prepare and submit their evidence.[142]

1. Evidence provided to the investigator

143. Because subpart 7 is similar to subpart 6 in terms of its requirements, the commenters raised similar issues with regard to subpart 7.

144. MnSCU, CGMC, and the League suggested that information provided by the charged party be provided to the charging party at the same time it is provided to the investigator.[143]

145. PERB provided the same response for subpart 7 as it did with regard to subpart 6 on this issue.[144]

146. For the reasons discussed above, the Administrative Law Judge concludes that PERB has shown an adequate rationale for its decision to require the charged party to provide evidence to the investigator, but not to the charging party during the investigation phase. The choice made by PERB is not arbitrary or unreasonable.

2. Form of evidence submitted

147. MnSCU also commented that subpart 7 should address whether evidence submitted must be in the form of sworn statements (i.e., affidavits and documents supported by sworn testimony).[145]

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[142] Ex. C at 9 (SONAR).
[143] Ex. K (MnSCU Comments; League comments); Ex. N (CGMC Comments).
[144] PERB Rebuttal Comments at 6.
[145] Ex. K (MnSCU Comments).

148. PERB provided the same response for subpart 7 as it did with regard to subpart 6 on this issue.[146]

149. The Administrative Law Judge concludes that PERB has shown an adequate rationale for its decision not to require evidence submitted be in the form of sworn testimony and affidavits. The choice made by PERB is not arbitrary or unreasonable.

3. Extension language

150. As currently proposed, subpart 7 provides that the charged party must submit a response to the charge as well as any evidence that supports its position to the assigned investigator "within 14 days of the date the charge or amended charge is served by the board, unless an extension is granted by the assigned investigator."

151. Subpart 7 includes no standard to be applied by the investigator to determine whether to grant an extension to the charged party.

152. Subpart 6, on the other hand, provides that the investigator can grant an extension "for good cause."

153. Because subpart 7 does not specify the standard to be applied by the investigator in determining whether to grant an extension, subpart 7 is not sufficiently specific.

154. Discretionary power may be delegated to administrative officers "[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers."[147]

155. As a result, the Administrative Law Judge concludes that subpart 7 is defective. To cure this defect, the Administrative Law Judge recommends adding the "good cause" standard used in subpart 6 to subpart 7. If adopted, the proposed rule would be modified to read:

> This submission must be provided within 14 days of the date the charge or amended charge is served by the board, unless an extension is granted by the assigned investigator <u>for good cause shown</u>.

156. The proposed modification to the language of this subpart to correct the defect is needed and reasonable, and would not render the rule substantially different from the rule as originally proposed for adoption.

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[146] PERB Rebuttal Comments at 6.

[147] *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); *accord Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*, 765 N.W.2d 159, 165 (Minn. Ct. App. 2009).

H. Minn. R. 7325.0120 – Mediation.

157. Proposed rule 7325.0120 provides:

> Whenever it would advance the possibility of a mutual resolution, the board or its designee shall:
>
> A. work with the commissioner of mediation services to assign a mediator; and
>
> B. undertake an effort to conciliate or recommend meditation with the assigned Bureau of Mediation Services mediator.

158. This rule is intended to promote settlement, and further the purposes of the PELRA to promote orderly and constructive relationships between public employers and their employees.[148]

159. The League, MnSCU, and CGMC all commented that the rules should provide that investigators and hearing officers cannot also serve as mediators for the Bureau of Mediation Services (BMS) due to the need to maintain neutrality.[149]

160. In response, PERB stated that its hiring practices "are not appropriately the subject of these procedural rules." PERB also noted that the BMS and PERB are separate entities, and that PERB will respect conflict of interest best practices. For these reasons, PERB declined to revise the proposed rules to specify that its investigators and hearing officers cannot also serve as the mediator.[150]

161. While the commenters have raised valid concerns about investigators and hearing officers also serving as BMS mediators, PERB has provided an adequate basis for its decision not to revise proposed Minn. R. 7325.0120 as requested. The Administrative Law Judge, however, encourages PERB to reconsider this choice if it resubmits these rules to the Office of Administrative Hearings. Revising the rule as recommended by the commenters to expressly provide that PERB investigators and hearings officers will not also serve as BMS mediators would help to promote public confidence in this new administrative review process. This proposed revision would not result in a substantial change to the rule as proposed.

I. Minn. R. 7325.0130 – Investigation

162. As proposed, the rule governing investigations specifies that:

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[148] Ex. C at 10 (SONAR).
[149] Ex. K (League Comments; MMB Comments; MnSCU Comments); Hrg. Tr. at 29-30.
[150] PERB Rebuttal Comments at 7.

Subpart 1. **Informal conferences.** A designated board staff member may conduct an informal conference or conferences during the course of the investigation to clarify issues or to explore voluntary resolution. The board staff member holding the settlement conference must not disclose or discuss any settlement discussions with the board or any hearing officer who may be assigned to hear the case.

Subp. 2. **Withdrawal of charge.** If, after the investigation, the charge is found to have no reasonable basis in law or fact, the board must advise the charging party of this fact and give the charging party the opportunity to withdraw the charge.

163. CGMC suggested that the rule be amended to provide that investigations be completed within 30 days of a charge being filed and that failure to complete the investigation within that timeframe would result in dismissal of the charge.[151]

164. In response, PERB stated that the proposed rule does not impose a deadline for completion of the investigation, because the time necessary for an investigation will vary depending on the complexity of a particular case. PERB also indicated that it would be unfair to the charging party to dismiss the charge if the investigation takes more than 30 days. For these reasons, PERB declined to make the change requested by CGMC.[152]

165. The Administrative Law Judge finds that PERB has shown a rational basis for its decision not to revise proposed rule 7325.0130 as requested by CGMC. The choice made by PERB is not arbitrary or unreasonable.

166. The League, MMB, and MnSCU requested that PERB add language to 7325.0130, Subpart 2, to specify that if a charge is withdrawn, all supporting documentation and evidence is classified as non-public data under the MGDPA.[153] These organizations noted this treatment would be similar to how personnel data is classified when "an arbitrator sustains a grievance and reserves all aspects of any disciplinary proceeding" pursuant to Minn. Stat. § 13.43, subd. 2(b) (2014).[154]

167. PERB responded that the MGDPA will determine the classification of the data, and therefore, no revision is necessary.

168. PERB has provided an adequate explanation for its decision not to specify the classification of documents under the MDGPA after a charge is withdrawn.

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[151] Ex. N (CGMC Comments).
[152] PERB Rebuttal Comments at 8.
[153] Ex. K (MnSCU Comments; MMB Comments; League Comments).
[154] *Id.*

J. Minn. R. 7325.0150 – Dismissal of Charges.

169. The proposed rule includes the following language regarding dismissal of charges:

> Subpart 1. **Dismissal.** If, at any time, the board determines that the charge has no reasonable basis in law or fact, the board must dismiss the charge.
>
> Subp. 2. **Notification.** If the board dismisses the charge, it must provide written notification to all parties to the case. The charging party may request that the Minnesota Court of Appeals review the board's decision in accordance with Minnesota Statutes, section 179A.052.

1. Subpart 1 - Inconsistency with Rule 7325.0130

170. MnSCU, MMB, and the League all commented that Minn. R. 7325.0150, subpart 1, is inconsistent with Minn. R. 7325.0130, subpart 2. Proposed rule 7325.0150, subpart 1, requires PERB to dismiss a charge that has no reasonable basis in law or fact, whereas Part 7325.0130, subpart 2, provides that PERB will give the charging party an opportunity to withdraw a charge if the Board determines that the charge has no basis in law or fact. These organizations suggested that PERB should dismiss the charge rather than allowing the charge to be withdrawn.[155] Scott Lepak, an attorney representing public employers, agreed and stated that withdrawal of a charge is unnecessary because the charge will be dismissed by PERB if there is no basis in law and fact.[156]

171. Kathryn Engdahl, an attorney who represents union faculty at MnSCU, commented that it is reasonable to give the party who filed the charge an opportunity to withdraw the charge before there is a dismissal. She noted that the NLRB rules include such a provision.[157]

172. In response to these comments, PERB proposed to revise proposed Rule 7325.0150, subpart 1, by adding the following language so that the rule would read:

> If, at any time, the board determines that the charge has no reasonable basis in law or fact, the board must dismiss the charge <u>unless the charge is voluntarily withdrawn by the charging party.</u>

173. This proposed revision to Minn. R. 7325.0150 is needed and reasonable, and would not result in a substantial change from the rule as originally proposed.

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[155] Ex. K (MnSCU Comments; MMB Comments; League Comments).
[156] Hrg. Tr. at 43.
[157] *Id.* at 53.

2. Subpart 1 - Dismissal based on procedural error

174. The League and CGMC also recommended that the rule be revised to allow PERB to dismiss charges that do not comply with applicable procedural requirements.[158] Scott Lepak, an attorney representing public employers, supported this recommendation.[159]

175. In response, PERB stated that Minn. Stat. § 179A.13, subd. 1(b), sets forth the standard for dismissal. That statute provides that a charge shall be dismissed if "the charge has no reasonable basis in law or fact." Accordingly, PERB declined to make the suggested revision regarding dismissal based on a procedural error.[160]

176. The Administrative Law Judge finds that PERB has provided a rational basis for its decision not to revise proposed rule 7325.0150 as requested by the League and CGMC. The choice made by PERB is not arbitrary or unreasonable.

3. Subpart 2 - Notification

177. MnSCU noted there is no timeframe specified for PERB to notify the parties that it has dismissed a charge.[161]

178. In response, PERB stated that letters dismissing charges will be sent simultaneously to all parties as soon as practicable. PERB also noted that the time limit for filing an appeal under Minn. Stat. § 179A.051 does not start to run until the dismissal letter is mailed. For these reasons, PERB decided not to include a provision requiring that PERB notify the parties of a dismissal within five working days of the decision.[162]

179. The Administrative Law Judge finds PERB has provided a rational basis for its decision not to specify a timeframe for notification and its decision is not arbitrary or unreasonable.

180. In addition, MnSCU noted the language in Subpart 2 which provides that a "charging party" may seek review of the dismissal by the Court of Appeals pursuant to Minn. Stat. § 179A.052 is inconsistent with the language of that statute. Minn. Stat. § 179A.052 authorizes any party, not just the charging party, to file an appeal. In addition, the right to seek appellate review pursuant to Minn. Stat. § 179A.052 is not limited to dismissals but applies to other PERB decisions as well.[163] MnSCU recommended that PERB add a new section under the heading "Appeals and Review" notifying the parties that they can seek review of a decision of PERB at the Minnesota Court of Appeals in accordance with Minn. Stat. § 179A.052.[164]

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[158] Ex. K (League Comments); Ex. N (CGMC Comments).
[159] Hrg. Tr. at 40, 43.
[160] PERB Rebuttal Comments at 9.
[161] Ex. K (MnSCU Comment).
[162] PERB Rebuttal Comments at 10-11.
[163] Ex. K (MnSCU Comments).
[164] *Id.*

181. PERB agreed that the language of Subpart 2 is confusing as written. To clarify the rule, PERB proposed to delete the last sentence of Subpart 2. PERB stated that the deletion is appropriate because appeal rights of parties are set forth in Minn. Stat. § 179A.052.

182. PERB's proposed revision is as follows: "Subp. 2 Notification. If the board dismisses the charge, it must provide written notification to all parties to the case. ~~The charging party may request that the Minnesota Court of Appeals review the board's decision in accordance with Minnesota Statutes, section 179A.052.~~"

183. PERB's proposed revision to Subpart 2 is needed and reasonable, and would not result in a substantial change from the rule as originally proposed.

184. While the deletion of this language from Subpart 2 is necessary and reasonable, the Administrative Law Judge recommends a technical amendment to help inform parties of their rights of appeal under Minn. Stat. § 179A.052. The Administrative Law Judge recommends that PERB revise the proposed rules to include a new section under "Appeals and Review," as suggested by MnSCU, notifying the parties that they can seek review of a decision by PERB at the Court of Appeals in accordance with Minn. Stat. § 179A.052. The proposed revision would not result in a substantial change from the rules as originally proposed.

K. Minn. R. 7325.0210 – Answer.

185. As proposed by PERB, Rule 7325.0210 reads:

> The respondent has the right to file an answer to the complaint or amended complaint with the board and serve copies on all parties within seven days after service of the complaint or amended complaint or three days prior to the hearing, whichever is sooner.

186. A number of groups representing public employers commented that they believe the time for filing of an answer is too short.[165] MMB and MnSCU recommended that the rule be changed to allow 14 days to file an answer.[166] The League recommended that the rule be revised to allow 7 days from the date the complaint or amended complaint is issued to file a response.[167]

187. PERB responded that Minn. Stat. § 179A.13 requires PERB to hold the hearings within five to 20 days of the issuance of the complaint. According to PERB, the time period specified in the proposed rule is needed to meet the timeframe specified in the statute.[168]

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[165] *Id.* (League Comments; MnSCU Comments; MMB Comments; Ramsey County Comments).
[166] *Id.* (MnSCU Comments; MMB Comments).
[167] *Id.* (League Comments).
[168] PERB Rebuttal Comments at 11.

188. The Administrative Law Judge finds that choice made by PERB regarding the time for providing an answer has a rational basis, and is not arbitrary or unreasonable.

L. Minn. R. 7325.0240 – Hearing Officer Duties.

189. Proposed rule 7325.0240 specifies the duties of the hearing officer.

190. The League, MnSCU, and CGMC all commented that the rule should specify that mediators from the Bureau of Mediation Services (BMS) should not serve as hearing officers because they must maintain neutrality during mediation.[169]

191. In response, PERB stated that the hiring practices of PERB "are not appropriately the subject of these procedural rules." PERB also noted that the BMS and PERB are separate entities, and that PERB will respect conflict of interest best practices. For these reasons, PERB concluded that it is not necessary to revise the proposed rule to specify that the hearing officer cannot also serve as the mediator.[170]

192. While PERB has provided an adequate rationale for its decision not to revise Part 7325.0240 as requested, the Administrative Law Judge encourages PERB to reconsider its decision as noted above in paragraph 161 if it resubmits the proposed rules to the Office of Administrative Hearings.

193. In addition, MMB and MnSCU commented that, as currently written, the proposed rule would require the hearing officer to sequester witnesses. These commenters recommended that the language be revised to provide that the hearing officer "may" sequester witnesses.[171]

194. In response, PERB proposed to revise Item D to provide that the hearing officer shall "<u>rule on motions to</u> sequester witnesses."[172]

195. According to PERB, this change clarifies that the hearing officer may sequester witnesses on motions from the parties.[173]

196. PERB's proposed revision to Item D is needed and reasonable, and would not be a substantial change to the rule as originally proposed.

M. Minn. R. 7325.0250 - Prehearing Conferences.

197. This proposed rule requires the hearing officer assigned to the case to conduct a prehearing conference. The rule also specifies that the hearing officer shall enter any stipulations reached into the record.

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[169] Ex. K (League Comments; MnSCU Comments; MMB Comments).
[170] PERB Rebuttal Comments at 11.
[171] Ex. K (MMB Comments; MnSCU Comments).
[172] PERB Rebuttal Comments at 11.
[173] *Id.* at 11-12.

198. MnSCU and MMB commented that the rule should be revised to provide that the prehearing conference is not mandatory but can be held at the discretion of the hearing officer. These commenters noted that in the SONAR, PERB stated that it considered requiring prehearing conferences, but determined that such a requirement may frustrate the purposes of PELRA by burdening the parties.[174]

199. In response, PERB stated that it believes that "prehearing conferences are a valuable tool for promoting the exchange of information that allows the subsequent hearing to proceed in a more orderly and efficient manner." PERB noted that prehearing conferences can help narrow the issues, help the hearing officer understand the issues in the case, and may result in settlement. PERB believes that any inconvenience to the parties is outweighed by the benefit of such conferences. For these reasons, PERB stated that no revision is necessary or appropriate.[175]

200. While reasonable minds could differ on whether a prehearing conference should be required, it is not the role of the Administrative Law Judge to determine which policy alternative represents the "best" approach because this would invade the policy-making discretion of the agency. The Administrative Law Judge concludes that PERB has provided a rational basis for its decision to require a prehearing conference.

201. In addition, to help ensure an efficient process MnSCU requested that a new provision be added to this rule requiring the parties to make a "good faith" effort to stipulate to facts.[176]

202. PERB responded that a rule requiring a good faith effort to stipulate to facts is unnecessary because most parties will attempt to stipulate to facts in the interests of time and efficiency. PERB stated that a rule requiring a good faith effort by the parties is unlikely to result in additional stipulations.

203. PERB's decision not to add a requirement that the parties make a good faith effort to stipulate to facts is a rational choice, and is not arbitrary or capricious.

204. The Administrative Law Judge concludes that PERB has demonstrated that proposed rule 7325.0250 is needed and reasonable.

N. Minn. R. 7325.0260 – Subpoenas.

205. This rule provides: "The party requesting a subpoena shall submit a request to the hearing officer or the board if no hearing officer has been assigned and serve copies on all other parties."

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[174] Ex. K (MnSCU Comments; MMB Comments).
[175] PERB Rebuttal Comments at 12.
[176] Ex. K (MnSCU Comments).

206. The League suggested that the proposed rule be modified to provide that the subpoena shall comply with the Rules of Civil Procedure for the District Courts of Minnesota.[177]

207. PERB agreed that language should be added to the proposed rule to clarify that a subpoena must be served in accordance with the Minnesota Rules of Civil Procedure.[178]

208. PERB proposed to revise the rule as follows: "The party requesting a subpoena shall submit a subpoena request …. A subpoena must be served in the manner provided by the Rules of Civil Procedure for the District Courts of Minnesota."[179]

209. PERB's proposed revision to proposed rule 7325.0260 is needed and reasonable and would not result in a substantial change to the rule as originally proposed.

O. Minn. R. 7325.0270 - Protective Orders.

210. The proposed rule includes the following language regarding the issuance of protective orders and the closing of a hearing.

> Subpart 1. **Issuing protective orders.** The hearing officer, or the board or its designee if no hearing officer has been assigned, shall issue protective orders, including orders to control the disclosure and use of private, sensitive, or protected data.
>
> Subpart 2. **Closing a hearing.** The hearing officer may close a portion or portions of the hearing only to the extent necessary to protect private, sensitive, or protected data.

211. MMB, MnSCU, and the League commented on this proposed rule.[180] They expressed concern that PERB's use of the terms "sensitive" and "protected" are not consistent with the terminology of the MGDPA.[181] The League stated that the phrase "not public" is used by the MGDPA and should replace "private, sensitive, or protected" in the proposed rule.[182] In addition, the League and MMB commented that the rule should allow the hearing officer to issue a protective order any time after a charge is filed.[183]

212. Ramsey County commented that there should be no prohibition on disclosure of otherwise public data because transparency serves the interests of the parties and the public.[184]

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[177] *Id.* (League Comments).
[178] PERB Rebuttal Comments at 13.
[179] *Id.*
[180] Ex. K.
[181] *Id.*
[182] *Id.* (League Comments).
[183] *Id.* (League Comments; MMB Comments).
[184] *Id.* (Ramsey County Comments).

213. MMB, MnSCU, and the League proposed the following language, taken from Minn. Stat. § 13.085, subd. 4(c) (2014), for rule 7325.0270:

> If the hearing record contains information that is not public data, the judge may conduct a closed hearing to consider the information, issue necessary protective orders, and seal all or part of the hearing record, as provided in section 14.60, subdivision 2. If a party contends, and the judge concludes, that not public data could be improperly disclosed while that party is presenting its arguments, the judge shall close any portion of the hearing as necessary to prevent the disclosure.[185]

214. PERB responded to the comments regarding protective orders as follows:

> The Board considered there might be situations where protective orders should be broader than the MGDPA. Both Minnesota Uniform Arbitration Act and the Minnesota Rules of Civil Procedure allow for protection of categories of information beyond that in the MGDPA. For example, the Minnesota Uniform Arbitration Act provides: "An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure as if the controversy were the subject of a civil action in this state." Minn. Stat. § 572B.17(e). Hearing officers should have discretion to protect the interests of the parties and witnesses. No revision is necessary or appropriate.

215. Regarding the closed hearing portion of proposed rule 7325.0270, PERB stated:

> There might be situations where closing a hearing to protect information should be broader than the MGDPA. For the reasons stated above related to protective orders, hearing officers should have discretion to protect the interests of the parties and witnesses. Minnesota courts have authority to close hearings to protect confidential information. Minn. Gen. R. of Prac., Part H, Sec. 14. No revision is necessary or appropriate.

216. MnSCU, MMB, and the League have raised valid concerns regarding proposed rule 7325.0270. As a board within the executive branch, PERB is subject to the requirements of the MGDPA.[186] Pursuant to the MGDPA, all government data is public unless specifically classified by law as "not public."[187] The MGDPA "seeks to balance the rights of individuals (data subjects) to protect personal information from

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[185] Ex. K.
[186] Minn. Stat. § 13.03 (2014).
[187] Minn. Stat. § 13.01, subd. 3 (2014).

indiscriminate disclosure with the right of the public to know what the government is doing."[188] The proposed rule should reflect these MGDPA objectives.

217. In addition, proposed rule 7325.0270 is impermissibly vague. A rule is impermissibly vague if it fails to provide sufficient standards for enforcement or is so indefinite that one must guess at its meaning.[189] The proposed rule provides that the hearing officer shall issue a protective order and may close the hearing to protect "private, sensitive, or protected data," but the rule does not define these terms. As a result, it is not clear what standard will be applied to determine whether a protective order will be issued or a hearing closed. While the MGDPA defines the phrases "private data on individuals" and "protected nonpublic data," it is not clear if PERB intended to use these definitions for the terms "private" and "protected" in its proposed rule. Moreover, the MGDPA does not define "sensitive." Without greater clarity as to the applicable standard, the term "sensitive" vests unfettered discretion in PERB hearing officers. For these reasons, proposed rule 7235.0270 is disapproved.

218. To cure these defects, the Administrative Law Judge recommends that PERB use clear and unambiguous terms. For instance, PERB could reference the MGDPA definitions or replace "private" with "private data on individuals" and "protected" with "protected nonpublic data" because those terms have a clear meaning in context. Also, PERB should remove the undefined term "sensitive" from its rules.

219. In the alternative, PERB could use the language recommended by MnSCU, MMB, and the League, which comes from Minn. Stat. § 13.085, subd. 4(c), as a substitute for the proposed language.

220. The proposed revisions to cure the defects in Minn. R. 7325.0270 are needed and reasonable and would not result in a substantial change to the rule as originally proposed.

P. Minn. R. 7325.0300 - Consolidation.

221. As proposed, Minn. R. 7325.0300 provides that "[t]he board must consolidate one or more hearings if it determines that consolidation will serve the purposes of this chapter."

222. According to PERB, the proposed rule furthers the purpose of Minn. Stat. § 179A.13 to provide cost-effective and efficient proceedings for unfair labor practice claims. Further, PERB states that not allowing consolidation would frustrate the purposes of PELRA by requiring unnecessary duplicative hearings.[190]

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[188] *KSTP-TV v. Metro. Transit*, 868 N.W.2d 920, 922 (Minn. Ct. App. 2015) (quotation omitted), *review granted* (Minn. Nov. 17, 2015).
[189] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.,* 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).
[190] Ex. C at 13.

223. The League, MMB, and MnSCU commented that the standard for consolidation – "serve the purposes of this chapter" - is very general. These organizations suggested that the rule be revised to include specific criteria to determine whether to consolidate cases, such as "common questions of law or fact" as required by Minn. R. Civ. Pro. 42.01.[191] Scott Lepak, an attorney practicing in labor law, agreed.[192]

224. PERB responded that it does not believe any revision is necessary. PERB stated that the proposed language is consistent with NLRB rule 29 C.F.R. 102.33, which permits consolidation when "necessary to effectuate the purposes of the Act."

225. The Administrative Law Judge agrees with the comments that the proposed rule is unduly vague.[193] The proposed rule fails to provide an identifiable standard or standards by which the hearing officer can determine whether consolidation will serve the purposes of the PELRA. For that reason, the proposed rule is defective and is disapproved. To cure the defect, the Administrative Law Judge recommends that PERB add specific, identifiable standards to be used to determine whether consolidation will be permitted. For example, PERB could include the standard under Minn. R. Civ. P. 42.01, or PERB could add language providing for consolidation when it would be "more cost-effective and efficient for the parties involved than proceeding separately."

Q. Minn. R. 7325.0310 – Intervention.

226. The proposed rule specifies the following standards for determining whether to grant a request to intervene:

> The decision by the hearing officer or the board to allow intervention shall be based upon the interests of the intervenor and shall consider objections, if any, raised by the parties, whether those interests will be adequately protected by the existing parties, and the timeliness of the intervenor's request.

227. According to PERB, the rule is needed and reasonable because "[i]n certain cases there may be parties who have legitimate interests at stake but who are not named in the complaint or amended complaint. The rule helps to fulfill the purpose of the statute by having one hearing to resolve the matter rather than multiple hearings. This will result in less cost and time for the parties and the PERB."[194]

228. Ramsey County commented that it is concerned about the extent to which intervention by third parties is allowed.[195]

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[191] Ex. K (League, MMB, and MnSCU Comments).
[192] Hrg. Tr. at 43-44 (Lepak).
[193] *Grayned*, 408 U.S. at 108-09; *In re N.P.,* 361 N.W.2d at 394.
[194] Ex. C at 13 (SONAR).
[195] Ex. K (Ramsey County Comments).

229. In response, PERB stated that the comment is unclear. PERB noted that the proposed rule provides specific standards to apply to a request to intervene. For this reason, PERB declined to make any revision to the proposed rule.

230. PERB has adequately responded to Ramsey County's comment and has provided a rational basis for its decision not to revise its proposed rule on intervention. PERB has demonstrated the proposed rule is reasonable and needed.

R. Minn. R. 7325.0320 – Record.

231. As proposed, Minn. R. 7325.0320, subpart 1, provides that "[t]he board shall provide a digital transcript of the hearing to the parties." In its Rebuttal Comments, PERB clarified that a "digital transcript" is an audio recording.[196]

232. Minn. Stat. § 179A.13, subd. 1(f) states that "[a] full and complete record shall be kept of all proceedings before the board or designated hearing officer and shall be transcribed by a reporter appointed by the board."

233. MnSCU commented that the proposed rule language providing for a "digital transcript" of the hearing is inconsistent with the requirement of the statute for a transcript of the hearing prepared by a court reporter.[197]

234. In response, PERB indicated that it does not believe that the rule is inconsistent with the statute. PERB stated that the "statute requires the existence of a transcript" whereas the proposed rule "more generously, calls for the Board to provide the parties with a digital transcript." On this basis, PERB asserted that no revision is necessary.[198]

235. While PERB may intend the "digital transcript" to supplement the statutory requirement for a written transcript prepared by a court reporter, the rule as written does not clearly state PERB's intent. As currently drafted, the rule conflicts with Minn. Stat. § 179A.13, subd. 1(f).

236. To cure this defect, the Administrative Law Judge recommends that PERB revise Subpart 1 of Rule 7325.0320 as follows: "The board shall provide a digital transcript of the hearing to the parties. <u>The board shall also have a transcript of proceedings before the board and the hearing officer prepared by a reporter appointed by the board as required by section 179A.13, subd. 1(f).</u>" The modification suggested in this paragraph is needed and reasonable, and would not result in a substantial change to the rule as proposed.

237. The League and MnSCU raised another issue with the rule as proposed. Both organizations provided comments with regard to the cost of the "digital transcript."

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[196] PERB Rebuttal Comments at 14.
[197] Ex. K (MnSCU Comments).
[198] PERB Rebuttal Comments at 15.

These organizations noted that the rule implies that PERB will bear these costs, but suggested that PERB clarify that point in the rule.[199]

238. In response, PERB stated that its intent is to provide free "digital transcripts" to the parties, but it is uncertain whether it will be able to do so due to budget and cost concerns. For that reason, PERB maintains that no revision is necessary.[200]

239. PERB's response confirms that the rule is vague as to whether PERB or the party will be responsible for the cost of the digital transcript. To cure this defect, the Administrative Law Judge recommends that PERB decide whether it will charge the parties for the digital transcript, and add language specifying whether the transcripts will be provided "at no cost" or "at cost" consistent with the decision.

240. For the reasons stated above, Minn. R. 7325.0320, subpart 1 is disapproved. The changes proposed to Minn. R. 7325.0320 to cure the defects are needed and reasonable, and would not be result in a substantial change to the rule as originally proposed.

S. Minn. R. 7325.0400 – Exceptions.

1. Subpart 2- Paper Copies of Documents Filed.

241. Subpart 2 of Minn. R. 7325.0400 provides that when a party files exceptions and other documents under this part, the party shall submit four paper copies and an electronic copy to PERB and serve the document upon all parties to the proceeding.

242. MnSCU suggested that PERB not require four paper copies because of the costs it would impose on the parties.[201]

243. In response, PERB stated that the nature of the factual and legal arguments submitted by the parties in the review process are likely to be sufficiently complex that board members would be unable to carefully read and analyze the documents on electric devices. "For PERB to accomplish its legislatively-assigned task of revising decisions of hearing officers and those of the Commissioner of the Bureau of Mediation Services, it requires parties to cases to provide it with paper copies of materials." For these reasons, PERB concluded that no revision is necessary.

244. The Administrative Law Judge concludes that PERB has shown an adequate rationale for its decision to require the parties to file paper copies of certain documents with the Board, and has shown that Subpart 2 is needed and reasonable.

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[199] Ex. K (League Comments; MnSCU Comments).
[200] PERB Rebuttal Comments at 14-15.
[201] Ex. K (MnSCU Comments).

2. Subpart 4 – Briefs Supporting Exceptions.

245. Subpart 4 requires a party filing exceptions or cross-exceptions to file a brief supporting the exceptions. As proposed, subpart 4 does not include a page limit for the brief.

246. MnSCU and the League suggested that the rule be revised to limit the length of briefs to 35 pages except with the permission of PERB to file a longer brief.[202]

247. PERB agreed and proposed to revise Subpart 4 by adding the following sentence: "Briefs may not exceed thirty-five pages in length except with permission of the board."[203]

248. PERB noted that this proposed change mirrors the requirements of Minnesota General Rule of Practice 115.05.[204]

249. PERB's proposed revision to Subpart 4 is needed and reasonable, and would not be a substantial change to the rule as originally proposed.

3. Subparts 6 and 8 – Response to exceptions; Response to cross-exceptions.

250. Subparts 6 and 8 govern the timing, filing, and service of responses to exceptions and cross-exceptions. As drafted, Subparts 6 and 8 only require service of these documents on "nonexcepting parties."

251. PERB intended that these documents be served on all parties, not just "nonexcepting" parties.[205]

252. Recognizing this drafting error, PERB has proposed to delete the word "nonexcepting" in both subparts so that the subparts would require service on "parties" rather than just "nonexcepting" parties.[206]

253. PERB's proposed revisions to Subparts 6 and 8 are needed and reasonable, and would not result in a substantial change to the rule as originally proposed.

4. Subpart 9 – Request to File an Amicus Brief.

254. Subpart 9 provides that a request to file an amicus brief must be submitted to PERB "within ten days of the first filing of exceptions in any matter."

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[202] *Id.* (MnSCU Comments; League Comments).
[203] PERB Rebuttal Comments at 15.
[204] *Id.* at 16.
[205] Hrg. Tr. at 62-63 (David Biggar).
[206] PERB Rebuttal Comments at 16.

255. MnSCU and the League suggested PERB change the time period from ten days to 15 days for consistency with Rule 115.05 of the Minnesota Rules of Civil Appellate Procedure.[207]

256. PERB responded that a ten-day deadline is appropriate because the person submitting the request is not required to file a brief within ten days, but only the request. In PERB's view, ten days is a sufficient period of time to prepare such a request. PERB also noted that the legislature intended that proceedings before PERB be conducted on a more expedited basis than a court proceeding, and allowing more than ten days would be inconsistent with that intent.[208]

257. The Administrative Law Judge concludes that PERB has shown a rational basis for PERB's decision not to extend the timeframe for a request to file an amicus brief.

T. Minn. R. 7325.0410 – Proceedings Before The Board.

258. Subpart 1 of Minn. R. 7325.0410 governs proceedings before the Board after a hearing officer's recommended decision and order. As proposed, subpart 1 provides:

> Subpart 1. **Board initiated review of recommended decision and order**. The board may, in the absence of the submission of exceptions, review a recommended decision and order on its own motion when:
>
> A. The board believes the hearing officer's recommended decision and order may be inconsistent with the law or the facts;
>
> B. A board decision on the case would assist the public by clarifying the law on a particular issue; or
>
> C. Persons or entities not parties to the case may be adversely affected in the absence of board review of the recommended decision and order.

259. The League, MMB, and MnSCU recommended that, if the Board initiates review, the Board should bear the costs of reasonable attorney's fees and any other costs that the parties incur.[209] Scott Lepak, an attorney practicing in labor law, provided similar comments.[210]

260. In response, PERB stated that Minn. Stat. § 197A.13, subd. 1(k), authorizes PERB to review the recommended decision and order of a hearing officer on its own motion if no exceptions are filed. PERB noted that the legislature did not authorize or require PERB to pay the parties' attorneys' fees and other costs when a recommended

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[207] Ex. K (MnSCU Comments; League Comments).
[208] PERB Rebuttal Comments at 16.
[209] Ex. K (League Comments; MnSCU Comments; MMB Comments); Hrg. Tr. at 47 (Irene Kao).
[210] Hrg. Tr. at 44 (Lepak).

decision and order is reviewed by PERB. PERB also indicated that the legislature has not appropriated funds for this purpose. For these reasons, PERB declined to revise the rule as requested to authorize payment of attorneys' fees and other costs where PERB reviews a hearing officer's decision on its own motion.[211]

261. PERB has a rational basis for not adding language requiring payment of the parties' attorneys' fees and costs following review of a hearing officer's recommended decision by the Board on its own motion.

262. The League, MMB, and MnSCU also commented that the language of Subpart 1(C) is very broad and could encompass a great number of cases.[212]

263. In its response, PERB agreed and proposed to amend Subpart 1 by deleting the language in Subpart 1(C). PERB noted that Minn. Stat. § 179A.13(k) provides that, in the absence of review by the Board, a hearing officer's recommended decision and order is binding only on the parties to the case. For that reason, PERB concluded that the language in Subpart 1(C) is unnecessary.

264. PERB's proposal to delete Subpart 1(C) of proposed Minn. R. 7325.0410 is needed and reasonable, and would not result in a substantial change from the rule as originally proposed.

U. Comments Regarding Filing Fees And PERB-Related Costs.

265. The League, MMB, MnSCU, and CGMC suggested that the rules be revised to require a filing fee be paid when an unfair labor practice charge is first filed. These organizations suggested a filing fee of $50, stating this amount would be non-prohibitive and would be consistent with the amount for data practices complaints filed under Minn. Stat. § 13.085.[213] CMGC suggested that a filing fee of this amount would reduce the number of charges that lack merit.[214]

266. The League, MMB, MnSCU and CGMC also recommended that the rules be amended to provide that all costs following the initial filing fee be shared equally by the parties, except for attorneys' fees. These organizations noted that this approach is consistent with state law governing grievance arbitrations as set forth in Minn. Stat. § 179A.21, subd. 2.[215]

267. The organizations stated that it is important that all parties involved in an unfair labor practice case share in the financial responsibility.[216]

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[211] PERB Rebuttal Comments at 17.
[212] Ex. K (League, MnSCU, and MMB Comments); Hrg. Tr. at 47-48 (Irene Kao).
[213] Ex. K (League Comments; MMB Comments; MnSCU Comments); Ex. N (CGMC Comments); Hrg. Tr. at 48-49 (Irene Kao).
[214] Hrg. Tr. at 28 (Shaunna Johnson).
[215] Ex. K (League Comments; MMB Comments; MnSCU Comments); Ex. N (CGMC Comments).
[216] Ex. K (MnSCU and League Comments); Ex. N (CGMC Comments).

268. Kathryn Engdahl, an attorney who represents union faculty at MnSCU and who was an early proponent of the 2014 law, provided comments opposed to the imposition of a filing fee. She stated that PERB does not have the statutory authority under PELRA to charge a filing fee. She indicated that the question of filing fees was discussed at the legislature and was rejected. She also noted that the filing fees for data practices claims and grievances, which were given as examples by the public employer groups, are authorized in statute. She reiterated that there is no such statutory authority in the PELRA amendments.[217]

269. In response to these comments, PERB noted that it does not have statutory authority to charge a filing fee or require the sharing of costs. PERB also stated that the lack of a filing fee is consistent with "the Legislature's goal of changing the [unfair labor practice] forum from district court to an administrative agency, thus allowing individuals or entities to pursue [unfair labor practice] claims more easily." In addition, PERB indicated that many Minnesota administrative procedures for asserting claims have no filing fee. PERB gave the following examples: the Human Rights Act (Minn. Stat. § 363A.28 (2014)); Occupational Health and Safety Act (Minn. Stat. §§ 182.654, 182.699 (2014)); Unemployment Compensation (Minn. Stat. § 268.105, subd. 6 (2014)); and the Veterans Preference Act (Minn. Stat. § 197.481 (2014)).[218] For these reasons, PERB declined to amend the rules to include a filing fee or cost sharing requirement.[219]

270. The Administrative Law Judge concludes that PERB has shown a rational basis for its decision not to include a new provision in the proposed rules requiring a filing fee or imposing costs on the parties.

V. Comments Regarding Qualifications of Investigators and Hearing Officers

271. Several organizations commented that the rules should be revised to address the qualifications of investigators and hearing officers.

1. Investigators

272. The League, MnSCU, and CGMC recommended that the rules be amended to require that investigators have labor employment experience and expertise, and knowledge and experience in administrative law and procedure.[220]

273. In response, PERB indicated that its hiring practices are not properly part of this rulemaking proceeding. For this reason, PERB declined to revise the rules as requested.[221]

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[217] Hrg. Tr. at 52-53 (Kathryn Engdahl).
[218] PERB Rebuttal Comments at 17-18.
[219] *Id.* at 18.
[220] Ex. K (League Comments; MnSCU Comments); Ex. N (CGMC Comments); Hrg. Tr. at 46 (Irene Kao).
[221] PERB Rebuttal Comments at 8.

274. The Administrative Law Judge concludes that PERB has provided an adequate explanation for its decision not to amend the rules to address the qualifications of investigators hired by PERB.

2. Hearing Officers

275. A number of organizations also submitted comments on the qualifications of hearing officers.

276. Minn. Stat. § 179A.013, subd. 1(d) provides that hearing officers must be licensed to practice law in the state of Minnesota, but does not specify any other qualifications for the hearing officers.

277. The League, MnSCU, and CGMC commented that in addition to the statutory requirement of being a licensed attorney, hearing officers should have: knowledge and experience in labor law, preferably in the public sector; knowledge and experience in administrative law; and demonstrated skills in legal analysis and writing. The organizations noted that these qualifications are similar to those used by PERB in its recent Request for Proposals (RFP) issued to select hearing officers. In addition, these organizations stated that it would be beneficial if hearing officers had qualifications similar to those of an arbitrator and met the standards for appointment under the BMS arbitrator roster rules, which include the ability to decide and hear complex labor relations matters in a fair and objective manner.[222]

278. Scott Lepak, an attorney who represents public sector employers, spoke in favor of the comments submitted by the League. He agreed that there is a minimum level of labor experience needed to be an effective investigator or hearing officer on an unfair labor practice case. He noted that PELRA is a highly specialized law, which is partially crafted from the federal law. He added that hearing officers will need to be familiar with this complicated area of law and the latest developments in this area. He suggested that knowledge of administrative law is secondary to the need for knowledge of PELRA and labor law.[223]

279. The Hennepin County Association of Paramedics and EMTs (HCAPE) recommended that the rules be revised to allow a party the option to request that the hearing officer be an Administrative Law Judge from the Office of Administrative Hearings. HCAPE noted that Administrative Law Judges have: training and experience in the requirements of the Administrative Procedures Act; experience conducting similar proceedings; and are free of political or economic association. In addition, according to HCAPE, Administrative Law Judges have the experience and training necessary to rule on motions, examine witnesses as necessary to ensure a complete record, and make well-reasoned decisions.[224]

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[222] Ex. K (League Comments; MnSCU Comments).
[223] Hrg. Tr. at 40-43 (Scott Lepak).
[224] Hrg. Tr. at 33-38 (Bruce P. Grostephan); Ex. O; Letter from Bruce P. Grostephan to Hon. Jeanne M. Cochran, with attachments (March 7, 2016).

280. Kathryn Engdahl, an attorney who represents union faculty at MnSCU, stated that she does not believe the rules need to address hearing officer qualifications. She indicated that she has a concern with Administrative Law Judges serving as hearing officers because they may not have labor law expertise.[225]

281. In response to these comments, PERB noted that Minn. Stat. § 179A.013 provides that hearing officers must be licensed to practice law in the state of Minnesota. PERB stated that it does not believe it needs to specify further qualifications in its rules. PERB indicated that when it issued its first RFP to hire hearing officers, it included qualifications that are similar to those requested by the public employer organizations. PERB also stated that "[w]hile the Board has great respect for [the Office of Administrative Hearings] and its [Administrative Law Judges], the Board thought the better route was to select hearing officers with a background in labor law." For these reasons, PERB decided not to revise its rules to include qualifications for hearing officers or to add a provision that would allow a party to request that the hearing officer be an Administrative Law Judge.[226]

282. PERB has shown an adequate rationale for its decision not to include qualifications of hearing officers in its rules, and for its decision not to give parties the option to request that an Administrative Law Judge serve as the hearing officer. These choices are not arbitrary or unreasonable.

W. Comments Suggesting the Addition of a Deferral Rule

283. MnSCU and MMB suggested that PERB include a provision for deferral of an unfair labor practice charge to arbitration similar to the practice before the NLRB.[227]

284. Kathryn Engdahl, an attorney who represents faculty at MnSCU and who participated in the PERB Rules Working Group, stated that the topic of deferral was discussed in the working group. She noted that the NLRB does not have a deferral rule, but addresses such issues on a case-by-case basis. She stated that the PERB working group concluded that PERB should take a similar approach.[228]

285. In its response, PERB agreed that the practice of deferral at the NLRB has been developed through case decisions and not through regulation. PERB noted that its Board members do not agree on whether PERB has the authority to adopt a deferral rule. PERB indicated that any deferral practice will be determined on a case-by-case basis rather than by rule.[229]

286. The Administrative Law Judge finds that PERB has shown a rational basis for its decision not to include a deferral rule in its proposed rules.

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[225] Hrg. Tr. at 54 (Kathryn Engdahl).
[226] PERB Rebuttal Comments at 18.
[227] Ex. K (MnSCU Comments; MMB Comments).
[228] Hrg. Tr. at 52 (Kathryn Engdahl).
[229] PERB Rebuttal Comments at 18.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. PERB gave proper notice of the hearing in this matter. PERB has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. With the exception of proposed rule 7325.0320, subpart 1, PERB has demonstrated its statutory authority to adopt the proposed rules. Proposed rule 7325.0320, subpart 1, is specifically **DISAPPROVED** because it is inconsistent with Minn. Stat. § 179A.13, subd. 1(f) and therefore exceeds PERB's statutory authority.

3. With the exception of proposed rule 7325.0100, PERB has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii). The language in proposed rule 7325.0100 allowing for filing and service "as an attachment to an e-mail" is specifically **DISAPPROVED** because PERB has failed to demonstrate the need for and reasonableness of this portion of the proposed rule.

4. In addition, proposed rules 7325.0110, subpart 6; 7325.0110, subpart 7; 7325.0270; 7325.0300; 7325.0320, subpart 1 are **DISAPPROVED** as impermissibly vague pursuant to Minn. R. 1400.2100 E.

5. The modifications to the proposed rules suggested by PERB after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

6. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

7. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 2, 3, and 4 as noted in Findings of Fact 103, 130, 155, 218, 219, 225, 236, and 239.

8. Due to Conclusions 2, 3, and 4, this Report has been submitted to the Chief Administrative Law Judge for her approval pursuant to Minn. Stat. § 14.15, subd. 3.

9. Except as specified in Conclusions 2, 3, and 4, PERB has fulfilled and complied with all other substantive requirements of law or rule applicable to this rulemaking proceeding.

10. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

11. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage PERB from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on the Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

Dated: April 20, 2016

JEANNE M. COCHRAN
Administrative Law Judge

Reported: Transcript prepared by Kirby Kennedy & Associates

NOTICE

The Public Employment Relations Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Board may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.