

mail

12/21/2015

Legislative Reference Library
645 State Office Building
100 Constitution Avenue
St. Paul, Minnesota 55155

Re: Proposed Rules Governing the Procedures of Investigations, Hearings, and Appeals of Unfair Labor Practices Under Minnesota Statutes, §179A. Revisor's ID Number R-04345.

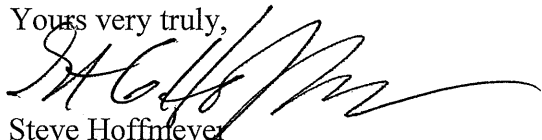
Dear Librarian:

The Minnesota Public Employment Relations Board intends to adopt rules governing the Procedures of Investigations, Hearings, and Appeals of Unfair Labor Practices Under Minnesota Statutes, §179A. We plan to publish a Dual Notice of Intent to Adopt Rules in the December 28th State Register.

The Board has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, the Department is sending the Library an electronic copy of the Statement of Need and Reasonableness at the same time we are mailing our Notice of Intent to Adopt Rules.

If you have questions, please contact me at (651) 325-6210.

Yours very truly,



Steve Hoffmeyer
Interim General Counsel/Executive Director
Public Employment Relations Board

Enclosure: Statement of Need and Reasonableness

Minnesota Public Employment Relations Board

DUAL NOTICE: Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing Are Received; Revisor's ID Number R-04345

Possible Adoption of Rules Governing the Procedures of Investigations, Hearings, and Appeals of Unfair Labor Practices Under Minnesota Statutes, 179A.

Introduction. The Minnesota Public Employment Relations Board (PERB) intends to adopt rules without a public hearing following the procedures in the rules of the Office of Administrative Hearings, *Minnesota Rules*, parts 1400.2300 to 1400.2310, and the Administrative Procedure Act, *Minnesota Statutes*, sections 14.22 to 14.28. **If, however, 25 or more persons submit a written request for a hearing on the rules by 4:30 p.m. on January 28th the PERB will hold a public hearing in the boardroom in the PERB's offices at 1380 Energy Lane, Suite #1, St. Paul, Minnesota 55110, starting at 1:30 p.m. on Monday, February 22nd.** To find out whether the PERB will adopt the rules without a hearing or if it will hold the hearing, you should contact the agency contact person after January 28th and before February 22nd.

Agency Contact Person. Submit any comments or questions on the rules or written requests for a public hearing to the agency contact person. The agency contact person is:

Steve Hoffmeyer at PERB, 1380 Energy Lane, Suite #1, St. Paul, Minnesota 55110-5253, (651) 325-6210, Steven.Hoffmeyer@state.mn.us

Subject of Rules and Statutory Authority. The proposed rules are about how the PERB will conduct investigations, charge processing, hearings, and appeals held in accordance with the Public Employment Labor Relations Act, *Minnesota Statutes*, 179A. The statutory authority to adopt the rules is *Minnesota Statutes*, section 179A.041. A copy of the proposed rules is published in the *State Register*, of December 28, 2015. The rules are also available on the PERB's website at <http://mn.gov/admin/bms/>.

Comments. You have until 4:30 p.m. on Thursday, January 28th, 2016, to submit written comment in support of or in opposition to the proposed rules or any part or subpart of the rules. Your comment must be in writing and received by the agency contact person by the due date. Comment is encouraged. Your comments should identify the portion of the proposed rules addressed, the reason for the comment, and any change proposed. You are encouraged to propose any change that you desire. Any comments that you have about the legality of the proposed rules must also be made during this comment period.

Request for a Hearing. In addition to submitting comments, you may also request that the PERB hold a hearing on the rules. You must make your request for a public hearing in writing, which the agency contact person must receive by 4:30 p.m. on Thursday, January 28th,

2016. You must include your name and address in your written request. In addition, you must identify the portion of the proposed rules that you object to or state that you oppose the entire set of rules. Any request that does not comply with these requirements is not valid and the agency cannot count it when determining whether it must hold a public hearing. You are also encouraged to state the reason for the request and any changes you want made to the proposed rules.

Withdrawal of Requests. If 25 or more persons submit a valid written request for a hearing, the PERB will hold a public hearing unless a sufficient number of persons withdraw their requests in writing. If enough requests for hearing are withdrawn to reduce the number below 25, the agency must give written notice of this to all persons who requested a hearing, explain the actions the agency took to effect the withdrawal, and ask for written comments on this action. If a public hearing is required, the agency will follow the procedures in *Minnesota Statutes*, sections 14.131 to 14.20.

Alternative Format/Accommodation. Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make such a request or if you need an accommodation to make this hearing accessible, please contact the agency contact person at the address or telephone number listed above.

Modifications. The PERB might modify the proposed rules, either as a result of public comment or as a result of the rule hearing process. It must support modifications by data and views submitted to the agency or presented at the hearing. The adopted rules may not be substantially different than these proposed rules unless the PERB follows the procedure under *Minnesota Rules*, part 1400.2110. If the proposed rules affect you in any way, the PERB encourages you to participate in the rulemaking process.

Cancellation of Hearing. The PERB will cancel the hearing scheduled for Monday, February 22nd, if the agency does not receive requests for a hearing from 25 or more persons. If you requested a public hearing, the agency will notify you before the scheduled hearing whether the hearing will be held. You may also call the agency contact person at (651) 325-6210 after January 28th, 2016, to find out whether the hearing will be held. On the scheduled day, you may check for whether the hearing will be held by calling (651) 325-6210 or going on-line at <http://mn.gov/admin/bms/>.

Notice of Hearing. If 25 or more persons submit valid written requests for a public hearing on the rules, the PERB will hold a hearing following the procedures in *Minnesota Statutes*, sections 14.131 to 14.20. The PERB will hold the hearing on the date and at the time and place listed above. The hearing will continue until all interested persons have been heard. Administrative Law Judge Cochran is assigned to conduct the hearing. Judge Cochran's Legal Assistant Denise Collins can be reached at the Office of Administrative Hearings, 600 North Robert Street, P.O. Box 64620, Saint Paul, Minnesota 55164-0620, telephone 651-361-7900 and FAX 651-539-0310 or denise.collins@state.mn.us.

Hearing Procedure. If the PERB holds a hearing, you and all interested or affected persons, including representatives of associations or other interested groups, will have an opportunity to participate. You may present your views either orally at the hearing or in writing

at any time before the hearing record closes. All evidence presented should relate to the proposed rules. You may also submit written material to the Administrative Law Judge to be recorded in the hearing record for five working days after the public hearing ends. At the hearing the Administrative Law Judge may order that this five-day comment period is extended for a longer period but not more than 20 calendar days. Following the comment period, there is a five-working-day rebuttal period when the agency and any interested person may respond in writing to any new information submitted. No one may submit additional evidence during the five-day rebuttal period. The Office of Administrative Hearings must receive all comments and responses submitted to the Administrative Law Judge no later than 4:30 p.m. on the due date. All comments or responses received will be available for review at the Office of Administrative Hearings. This rule hearing procedure is governed by *Minnesota Rules*, parts 1400.2000 to 1400.2240, and *Minnesota Statutes*, sections 14.131 to 14.20. You may direct questions about the procedure to the Administrative Law Judge.

The agency requests that any person submitting written views or data to the Administrative Law Judge before the hearing or during the comment or rebuttal period also submit a copy of the written views or data to the agency contact person at the address stated above.

Statement of Need and Reasonableness. The statement of need and reasonableness summarizes the justification for the proposed rules, including a description of who will be affected by the proposed rules and an estimate of the probable cost of the proposed rules. It is now available from the agency contact person. You may review or obtain copies for the cost of reproduction by contacting the agency contact person. It is also available on the PERB's website at <http://mn.gov/admin/bms/>.

Lobbyist Registration. *Minnesota Statutes*, chapter 10A, requires each lobbyist to register with the State Campaign Finance and Public Disclosure Board. Ask any questions about this requirement of the Campaign Finance and Public Disclosure Board at: Suite #190, Centennial Building, 658 Cedar Street, St. Paul, Minnesota 55155, telephone (651) 539-1180 or 1-800-657-3889.

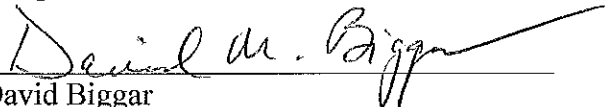
Adoption Procedure if No Hearing. If no hearing is required, the PERB may adopt the rules after the end of the comment period. The PERB will submit the rules and supporting documents to the Office of Administrative Hearings for a legal review. You may ask to be notified of the date the rules are submitted to the office. If you want either to receive notice of this, to receive a copy of the adopted rules, or to register with the agency to receive notice of future rule proceedings, submit your request to the agency contact person listed above.

Adoption Procedure after a Hearing. If a hearing is held, after the close of the hearing record, the Administrative Law Judge will issue a report on the proposed rules. You may ask to be notified of the date that the Administrative Law Judge's report will become available, and can make this request at the hearing or in writing to the Administrative Law Judge. You may also ask to be notified of the date that the agency adopts the rules and the rules are filed with the Secretary of State by requesting this at the hearing or by writing to the agency contact person stated above.

Order. I order that the rulemaking hearing be held at the date, time, and location listed above.

December 18, 2015

Date



David Biggar
Chair, Public Employment Relations Board

1.1 **Public Employment Relations Board**

1.2 **Proposed Permanent Rules Relating to Public Employees; Unfair Labor Practices**

1.3 **7325.0010 PURPOSE AND CONSTRUCTION.**

1.4 This chapter is established to comply with and administer the provisions of Minnesota
1.5 Statutes, chapter 179A and section 179.35, and shall be liberally construed to effectuate
1.6 their purposes.

1.7 **7325.0020 DEFINITIONS.**

1.8 Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in
1.9 this part.

1.10 Subp. 2. **Board.** "Board" means the governing body of the Public Employment
1.11 Relations Board.

1.12 Subp. 3. **Charged party.** "Charged party" means a party charged with an unfair
1.13 labor practice charge.

1.14 Subp. 4. **Charging party.** "Charging party" means a party alleging an unfair labor
1.15 practice charge.

1.16 Subp. 5. **Charge or unfair labor practice charge.** "Charge" or "unfair labor
1.17 practice (ULP) charge" means a statement filed with the board in which a person alleges
1.18 that another person or entity has committed an unfair labor practice.

1.19 Subp. 6. **Days.** "Days" means a calendar day unless it is stated as "working days."

1.20 Subp. 7. **Legal holiday.** "Legal holiday" has the meaning given in Minnesota
1.21 Statutes, section 645.44, subdivision 5.

1.22 Subp. 8. **Public Employment Relations Board or PERB.** "Public Employment
1.23 Relations Board" or "PERB" means the board established under Minnesota Statutes,
1.24 section 179A.041.

2.1 Subp. 9. **Respondent.** "Respondent" means a party subject to an unfair labor
2.2 practice complaint.

2.3 Subp. 10. **Working day.** "Working day" means a day which is not a Saturday,
2.4 Sunday, or legal holiday.

2.5 **7325.0100 FILING AND SERVICE GENERALLY.**

2.6 Subpart 1. **Filing.** For the purposes of this chapter:

2.7 A. Filing is accomplished by in-person delivery to the board before 4:30 p.m.
2.8 on a working day, first class United States mail with postage prepaid, facsimile, or as an
2.9 attachment to an e-mail.

2.10 B. Anything filed with the board, unless otherwise specifically directed by the
2.11 board, a hearing officer, or the general counsel, must also be served on all other parties.

2.12 C. A filing by United States mail is deemed filed on the date of its postmark. A
2.13 filing occurring on a Saturday, Sunday, or legal holiday is deemed to be filed on the next
2.14 succeeding day which is not a Saturday, Sunday, or legal holiday.

2.15 Subp. 2. **Service.** For the purposes of this chapter, service is accomplished by
2.16 in-person delivery, first class United States mail with postage prepaid, facsimile, or as an
2.17 attachment to an e-mail. If service is by United States mail it shall be effective on the date
2.18 of its postmark. A party served by United States mail shall have three additional days for
2.19 responding or taking other action from the date of service. If service is by facsimile
2.20 or e-mail and it is accomplished after 4:30 p.m. local Minnesota time, then the parties
2.21 served shall have one additional day added to any prescribed period for responding or
2.22 taking other action from the date of service.

2.23 **FILING AND INVESTIGATION**

3.1 **7325.0110 FILING, SUPPORTING, AND RESPONDING TO A CHARGE.**

3.2 Subpart 1. Charge form. A party must file a charge in writing using the form
3.3 provided by the board.

3.4 Subp. 2. Form information. The charge form must include the following
3.5 information:

3.6 A. the name, address, and telephone number of the party filing the charge;

3.7 B. the name, address, and telephone number of the agent or attorney
3.8 representing the charging party;

3.9 C. the name, address, and telephone number of the charged party;

3.10 D. the name, address, and telephone number of the agent or attorney
3.11 representing the charged party, if known;

3.12 E. a clear and concise statement of each charge of an unfair labor practice
3.13 including the dates, times, and places of the alleged unfair labor practice and the name of
3.14 the person, entity, or both that allegedly committed the unfair labor practice;

3.15 F. the specific section of the law, either Minnesota Statutes, section 179.11,
3.16 179.12, or 179A.13, alleged to have been violated;

3.17 G. the specific remedy being sought for each unfair labor practice alleged; and

3.18 H. a statement that the charging party has served a complete copy of the charge
3.19 on each party named as a charged party.

3.20 Subp. 3. Obtaining a charge form. Unfair labor practice charge forms may be
3.21 obtained from the board in person or on the board's official Web site.

3.22 Subp. 4. Serving a form on charged party. The charging party shall serve a
3.23 complete copy of the charge or amended charge on each party named as a charged party.

4.1 Subp. 5. **Receipt of a charge.** Upon receipt of a charge, the charge must be docketed,
4.2 assigned a case number, and served on the parties by the board or its designee.

4.3 Subp. 6. **Submission of evidence.** The charging party must submit evidence in
4.4 support of each alleged unfair labor practice as well as any documents that support its
4.5 position to the assigned investigator. This submission must be provided within seven days
4.6 of the date the charge or amended charge is filed, unless an extension is granted for good
4.7 cause. The assigned investigator may request the charging party to submit additional
4.8 evidence to support its charge when the assigned investigator determines additional
4.9 evidence is necessary to evaluate the charge.

4.10 Subp. 7. **Submission of a response.** The charged party must submit a response to
4.11 each alleged unfair labor practice in the charge as well as any evidence that supports its
4.12 position to the assigned investigator. This submission must be provided within 14 days
4.13 of the date the charge or amended charge is served by the board, unless an extension is
4.14 granted by the assigned investigator. The assigned investigator may request the charged
4.15 party to submit additional evidence when the assigned investigator determines additional
4.16 evidence is necessary to evaluate the charge.

4.17 **7325.0120 MEDIATION.**

4.18 Whenever it would advance the possibility of a mutual resolution, the board or its
4.19 designee shall:

4.20 A. work with the commissioner of mediation services to assign a mediator; and

4.21 B. undertake an effort to conciliate or recommend mediation with the assigned
4.22 Bureau of Mediation Services mediator.

4.23 **7325.0130 INVESTIGATION.**

4.24 Subpart 1. **Informal conferences.** A designated board staff member may conduct
4.25 an informal conference or conferences during the course of the investigation to clarify

5.1 issues or to explore voluntary resolution. The board staff member holding the settlement
5.2 conference must not disclose or discuss any settlement discussions with the board or any
5.3 hearing officer who may be assigned to hear the case.

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

5.7 **7325.0140 AMENDING OR WITHDRAWING CHARGE.**

5.8 The charging party may amend or withdraw a charge at any time prior to the issuance
5.9 of a complaint or notice of dismissal.

5.10 **7325.0150 DISMISSAL OF CHARGES.**

5.11 Subpart 1. **Dismissal.** If, at any time, the board determines that the charge has no
5.12 reasonable basis in law or fact, the board must dismiss the charge.

5.13 Subp. 2. **Notification.** If the board dismisses the charge, it must provide written
5.14 notification to all parties to the case. The charging party may request that the Minnesota
5.15 Court of Appeals review the board's decision in accordance with Minnesota Statutes,
5.16 section 179A.052.

5.17 **HEARINGS**

5.18 **7325.0200 COMPLAINT.**

5.19 The board shall issue and process ULP complaints in accordance with Minnesota
5.20 Statutes, section 179A.13.

5.21 **7325.0210 ANSWER.**

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

6.1 **7325.0220 SCOPE OF HEARING.**

6.2 The hearing must address the issues in the complaint or amended complaint. Evidence
6.3 need not be presented with regard to facts stipulated by the parties.

6.4 **7325.0230 BURDEN OF PROOF.**

6.5 The charging party has the burden of proving the unfair labor practice allegation in
6.6 the complaint by a preponderance of the evidence under Minnesota Statutes, section
6.7 179A.13, subdivision 1, paragraph (g). The respondent may present evidence in support
6.8 of the respondent's defense. A party asserting an affirmative defense has the burden of
6.9 proving it by a preponderance of the evidence.

6.10 **7325.0240 HEARING OFFICER DUTIES.**

6.11 The hearing officer shall:

6.12 A. regulate the proceedings of the case and the conduct of the parties during
6.13 the proceedings;

6.14 B. receive testimony and evidence;

6.15 C. rule on requests for continuances;

6.16 D. sequester witnesses;

6.17 E. issue subpoenas and rule upon motions to revoke subpoenas;

6.18 F. rule on objections, motions, and questions of procedure;

6.19 G. authorize the submission of briefs and set the time for their filing;

6.20 H. hear closing arguments; and

6.21 I. render and serve the recommended decision and order to the board and
6.22 the parties to the proceeding under Minnesota Statutes, section 179A.13, subdivision
6.23 1, paragraphs (i) and (j).

7.1 **7325.0250 PREHEARING CONFERENCES.**

7.2 Subpart 1. **Conference.** The hearing officer assigned to the case shall schedule
7.3 a prehearing conference, at which the parties may be required to submit prehearing
7.4 information, if it would promote a fair and efficient process.

7.5 Subp. 2. **Prehearing information.** Prehearing information includes a detailed
7.6 written statement of the issues, a list of witnesses and the nature of their testimony, and all
7.7 other information the hearing officer requests.

7.8 Subp. 3. **Holding conferences.** Prehearing conferences may be held in person, by
7.9 telephone, or by other electronic means.

7.10 Subp. 4. **Record.** The hearing officer shall enter any stipulations reached into the
7.11 record.

7.12 **7325.0260 SUBPOENAS.**

7.13 The party requesting a subpoena shall submit a request to the hearing officer or the
7.14 board if no hearing officer has been assigned and serve copies on all other parties.

7.15 **7325.0270 PROTECTIVE ORDERS.**

7.16 Subpart 1. **Issuing protective orders.** The hearing officer, or the board or its
7.17 designee if no hearing officer has been assigned, shall issue protective orders, including
7.18 orders to control the disclosure and use of private, sensitive, or protected data.

7.19 Subp. 2. **Closing a hearing.** The hearing officer may close a portion or portions of
7.20 the hearing only to the extent necessary to protect private, sensitive, or protected data.

7.21 **7325.0280 TESTIMONY.**

7.22 A party may present evidence and witnesses, rebuttal testimony, and argument on
7.23 the issues, and to cross-examine witnesses under Minnesota Statutes, section 179A.13,
7.24 subdivision 1, paragraph (b). A party may be a witness or may present witnesses at the
7.25 hearing. Oral testimony must be under oath or affirmation.

8.1 **7325.0290 CONTINUANCES.**

8.2 The charging party or respondent may request a continuance or postponement of a
8.3 hearing. If the hearing officer is unavailable to consider the request, the request must be
8.4 directed to the board. The hearing officer must consider the following in determining
8.5 whether to grant the request:

8.6 A. whether there is mutual agreement among the parties to the request;

8.7 B. whether the moving party can substantiate cause for the request; and

8.8 C. whether the rights of a party will be substantially affected if the request
8.9 is denied.

8.10 **7325.0300 CONSOLIDATION.**

8.11 The board must consolidate one or more hearings if it determines that consolidation
8.12 will serve the purposes of this chapter.

8.13 **7325.0310 INTERVENTION.**

8.14 Subpart 1. Requests to intervene. Interested parties who wish to intervene in the
8.15 hearing shall direct requests to the hearing officer, or to the board if no hearing officer has
8.16 been assigned, with copies to all other parties.

8.17 Subp. 2. Form of requests. A request to intervene shall be in writing and shall state
8.18 the grounds for the intervention.

8.19 Subp. 3. Allowing interventions. The decision by the hearing officer or board to
8.20 allow intervention shall be based upon the interests of the intervenor and shall consider
8.21 objections, if any, raised by the parties, whether those interests will be adequately
8.22 protected by the existing parties, and the timeliness of the intervenor's request.

8.23 **7325.0320 RECORD.**

8.24 Subpart 1. Digital transcription. The board shall provide a digital transcription of
8.25 the hearing to the parties.

9.1 Subp. 2. **Matters in dispute.** The hearing officer shall inquire into all matters in
9.2 dispute, and shall obtain a full and complete record by evidentiary hearing or stipulation.

9.3 Subp. 3. **Record contents.** The hearing officer shall obtain the following to
9.4 constitute a full and complete record of the proceedings:

9.5 A. all pleadings, motions, and orders;

9.6 B. evidence received;

9.7 C. offers of proof, objections, and rulings on objections;

9.8 D. all memoranda or data submitted by any party in connection with the case; and

9.9 E. a digital transcript of the hearing.

9.10 Subp. 4. **Transfer of records.** Upon issuance of the hearing officer's recommended
9.11 decision and order, the hearing officer shall transfer the record of the proceeding to the
9.12 board.

9.13 APPEALS AND REVIEW

9.14 7325.0400 EXCEPTIONS.

9.15 Subpart 1. **Appeals from decisions of the commissioner.** Appeals from decisions of
9.16 the commissioner of the Bureau of Mediation Services under Minnesota Statutes, section
9.17 179A.12, subdivision 11, regarding unfair labor practices found to occur in the course
9.18 of a representation election are subject to review by the board in the same manner as
9.19 recommended decisions and orders of board hearing officers.

9.20 Subp. 2. **Number of copies.** Whenever this part requires a document to be submitted
9.21 to the board, four paper copies and an electronic copy must be submitted to the board and
9.22 the document must be served upon all other parties to the proceeding.

9.23 Subp. 3. **Content of statement of exceptions.** A party filing exceptions or
9.24 cross-exceptions under Minnesota Statutes, section 179A.13, subdivision 1, paragraph (k),

10.1 must specifically identify in its statement of exceptions the portions of the hearing officer's
10.2 decision and order to which each exception is made and the grounds for each exception.

10.3 Subp. 4. **Brief supporting exceptions.** The party filing exceptions or
10.4 cross-exceptions must submit with the statement of its exceptions a brief supporting its
10.5 exceptions. The brief shall reference any exhibits, offers of proof, or the identity of any
10.6 witnesses whose testimony supports its exceptions or cross-exceptions.

10.7 Subp. 5. **Request for oral argument.** A request to present oral argument to the
10.8 board must be filed with the statement of exceptions or cross-exceptions. The board
10.9 shall grant a request for oral argument if it finds oral argument would be helpful to its
10.10 decision-making process.

10.11 Subp. 6. **Response to exceptions.** Within 15 days of service of the excepting party's
10.12 exceptions, all nonexcepting parties to the hearing must file with the board and serve
10.13 upon all other nonexcepting parties their responses to the excepting party's exceptions,
10.14 any cross-exceptions they wish to submit, their brief, and any request for oral argument
10.15 before the board.

10.16 Subp. 7. **Response content.** All responses to exceptions and any cross-exceptions
10.17 must state with specificity the portions of the hearing officer's decision to which responses
10.18 to exceptions or cross-exceptions are directed and the grounds for each response to an
10.19 exception and the grounds for any cross-exceptions.

10.20 Subp. 8. **Responses to cross-exceptions.** Within 15 days of service of any
10.21 cross-exceptions, all nonexcepting parties may submit to the board and serve upon all
10.22 other nonexcepting parties a response to any cross-exceptions filed stating their position
10.23 with regard to the cross-exceptions. Any response to cross-exceptions shall reference any
10.24 exhibits, offers of proof, or the identity of any witnesses whose testimony supports its
10.25 position.

11.1 Subp. 9. Request to file an amicus brief. A person or entity seeking to submit an
11.2 amicus brief to the board must submit to the board a request to file an amicus brief within ten
11.3 days of the first filing of exceptions in any pending matter. A request to the board to submit
11.4 an amicus brief must include identification of the person or entity seeking to file the amicus
11.5 brief, reasons for wishing to file the amicus brief, and any requests for an oral argument.

11.6 Subp. 10. Granting an amicus brief request. If the board grants the request to
11.7 submit the amicus brief, it shall state in its order the deadline for submission of the brief
11.8 and whether the amicus will be permitted to present an oral argument.

11.9 Subp. 11. Invitation of amicus briefs. The board may invite the submission of
11.10 amicus briefs on any pending matter if it finds receipt of arguments of other persons or
11.11 entities would be helpful in its decision-making process. If the board invites the submission
11.12 of amicus briefs, it shall state in its order the deadline for the submission of briefs and
11.13 whether the invited amicus will be permitted to present an oral argument. Oral argument
11.14 must be permitted if it would be helpful to the board in its decision-making process.

11.15 **7325.0410 PROCEEDINGS BEFORE THE BOARD.**

11.16 Subpart 1. Board initiated review of recommended decision and order. The
11.17 board may, in the absence of the submission of any exceptions, review a recommended
11.18 decision and order on its own motion when:

11.19 A. the board believes the hearing officer's recommended decision and order
11.20 may be inconsistent with the law or the facts;

11.21 B. a board decision on the case would assist the public by clarifying the law
11.22 on a particular issue; or

11.23 C. persons or entities not parties to the case may be adversely affected in the
11.24 absence of board review of the recommended decision and order.

12.1 Subp. 2. Notice of intent to review. If the board decides to review a recommended
12.2 order and decision on its own motion, it shall prepare a notice of intent to review
12.3 specifying the grounds for such review and serve the notice of intent to review on all
12.4 parties to the case no later than 45 days following the date on which the hearing officer's
12.5 decision and order was served upon the parties to the case.

12.6 Subp. 3. Submissions in response to board's intent to review. The board's order
12.7 deciding to review shall afford all parties the opportunity to submit briefs within 30 days
12.8 of its notice of intent to review. Parties desiring to present oral argument regarding the
12.9 matters identified in the board's notice of intent to review must submit a request for oral
12.10 argument within 30 days of service of the board's notice of intent to review.

12.11 Subp. 4. Means of obtaining evidence. If the board requires the submission of
12.12 additional evidence under Minnesota Statutes, section 179A.041, subdivision 7, the board
12.13 must obtain the evidence using the following means:

12.14 A. presentation of evidence in documentary form;

12.15 B. remand to a hearing officer for the presentation of evidence; or

12.16 C. an evidentiary hearing conducted by the board.

Office of the Revisor of Statutes

Administrative Rules



TITLE: Proposed Permanent Rules Relating to Public Employees; Unfair Labor Practices

AGENCY: Public Employment Relations Board

MINNESOTA RULES: Chapter 7325

The attached rules are approved for
publication in the State Register

Sheree Speer

Sheree Speer
Senior Assistant Revisor

Minnesota Public Employment Relations Board

STATEMENT OF NEED AND REASONABLENESS

**Proposed Rules Governing Unfair Labor Practice Disputes Before the Public
Employment Relations Board, Minnesota Rules, § 7325;
Revisor's ID Number R-04345**

INTRODUCTION

The Minnesota Public Employment Relations Board (PERB) was created by the Legislature in 2014 to investigate, hear, and resolve unfair labor practice charges and complaints in the public sector. Prior to creation of the PERB, parties pursuing or defending unfair labor practice charges in the public sector had to proceed in litigation in state district court.

The PERB has three members. One member represents public employees and is appointed by the governor; one member represents public employers and is also appointed by the governor; the third represents the public at large and is appointed by the other two members. The board selects one of its members to serve as chair. Alternate members are appointed in the same fashion and serve only in the case of a member having a conflict of interest.

The PERB appoints hearing officers to hear unfair labor practice allegations. Upon appeal, it reviews unfair labor practice decisions in the public sector, those involving charitable hospitals and those of the Commissioner of the Minnesota Bureau of Mediation Services. The PERB replaces a judicial process that required that allegations of unfair labor practices be brought in a lawsuit in Minnesota State District Court. The PERB's jurisdiction over unfair labor practices and the unfair labor practice decisions of the Commissioner commences on July 1, 2016.

The legislature also mandated that the PERB adopt rules to govern its procedure, including the presentation of issues and taking of appeals before it. These rules govern the procedures and operations before the PERB to resolve unfair labor practice cases within the PERB's jurisdiction. The rules proposed here are all procedural in nature and the details are either specifically mandated by state statute or reflect practices common to the resolution of labor disputes by administrative agencies and the arbitration process.

Summary of the Need and Reasonableness of the Rules

These rules were developed by the board to implement the statutory duties of the PERB and were drafted with the goals and mandates of the Legislature in mind. The board also sought to further the stated goal of the Public Employment Labor Relations Act "to promote orderly and constructive relationships between all public employers and their employees." Minn. Stat. §

179A.01. Central to the development of the rules was also the concept of common acceptance - the goal of creating procedures that most people would find familiar from other settings.

While drafting these rules, the board balanced the interests of all parties in many different areas. The board balanced the statutory mandates to “promptly conduct an investigation of a charge” and to “promptly issue a complaint”, Minn. Stat. § 179A.13, subd. 1(b), with basic concepts of due process, such as allowing parties adequate time to respond. An effort was made to balance flexibility of the process with uniformity and equality, to allow for tailoring of the process in unique circumstances, while maintaining predictability and fairness for the parties involved. In addition, the need for openness of the proceedings was balanced with the privacy of the parties involved, to protect the rights of the parties, and keep the public informed. Cost effectiveness and efficiency were balanced with due process considerations such as the opportunity to be heard and providing notice to the parties affected. Through careful balancing of these considerations during the rulemaking process, the board has created procedures that further the statutory goals and mandates placed on it by the Legislature, and bring about the best possible outcome in unfair labor practice proceedings.

Principles that guided the drafting of these rules:

- Implement the statutory duties of the PERB
- Balance the PERB’s statutory mandate to “promptly conduct an investigation of a charge” and to “promptly issue a complaint” and to then conduct hearings within twenty days, Minn. Stat. § 179A.13, subd. 1(b), with basic concepts of due process such as allowing parties adequate time in which to respond.
- Common acceptance
- Public Employment Labor Relations Act (PELRA) “to promote orderly and constructive relationships between all public employers and their employees.” Minn. Stat. § 179A.01.
- Uniformity of process
- Flexibility
- Fairness
- Equality
- Notice
- Efficiency
- Due process (opportunity to be heard)
- Cost effectiveness
- Privacy
- Openness

ALTERNATIVE FORMAT

Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make a request, contact Steve Hoffmeyer at Public Employment Relations Board, 1380 Energy Lane, Suite Two, St. Paul, MN 55108, phone: (651)325-6210, fax: 651-643-3013.

STATUTORY AUTHORITY

Minnesota Statutes, § 179A.041 subd. 4, requires the PERB to adopt rules governing its procedure, and Minnesota Statutes, § 179A.041 subd. 7 requires the PERB to adopt rules governing procedures and standards for hearing appeals under the Public Employment Labor Relations Act, Minnesota Statutes, Chapter 179A. Both of these rulemaking provisions were enacted as amendments to Chapter 179A, in H.F. # 3014, Laws of Minnesota 2014, chapter 211. This chapter became effective on July 1, 2014. The board's jurisdiction over unfair labor charges and decisions of the Commissioner regarding unfair labor practices commences July 1, 2016, in accordance with Laws 2015, First Special Session, Chapter 1, Article 7, Section 1.

Under these statutes, the PERB has the necessary statutory authority to adopt the proposed rules.

REGULATORY ANALYSIS

“(1) 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 classes of affected persons are:

- Public employers involved in charges of unfair labor practices
- Public employees involved in charges of unfair labor practices
- Public sector labor organizations that represent public employees involved in charges of unfair labor practices
- Charitable hospitals involved in charges of unfair labor practices
- Employees of charitable hospitals involved in charges of unfair labor practices
- Attorneys representing clients before the PERB
- Consultants representing clients before the PERB

“(2) 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”

The PERB does not believe there are any probable costs to the PERB or any other agency caused by the implementation and enforcement of the proposed rules outside the costs associated

with rulemaking in general. These rules are procedural in nature, and do not create any new costs for the state.

Because the PERB's jurisdiction does not commence until July 1, 2016 and there is no agency history to draw upon, it is very difficult to estimate the number of hearings the PERB will conduct. Nevertheless, the PERB's best estimate is that roughly thirty hearings may take place each year. Additionally, the PERB estimates that hearings themselves will cost roughly \$8,000 each, primarily for hiring hearing officers. However, the previous method of filing charges of unfair labor practices, through the Minnesota State District Court, was more expensive and time consuming. It is therefore reasonable to expect that there may be an increase in the number of charges brought, but the overall costs incurred by the state should not change significantly.

In any case, 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.

“(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule”

The purpose of the rules is to establish procedures to process unfair labor practice cases in a timely and efficient manner. However, these rules create very little new procedures, but mainly fill in details to a main framework for handling cases created by the legislature. 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 (Minn. Stat. 179A.13 subd.1).

The board was not able to arrive at any less costly or less intrusive methods for achieving the purpose of the proposed rule.

“(4) 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 PERB has not identified any alternative methods for achieving the purpose of the proposed rules. Some options discussed were to require mediation or arbitration. Mediation is voluntary and cannot force outcomes. The PERB has no explicit statutory authority to mandate arbitration.

“(5) 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 PERB has not identified any probable costs of complying with the proposed rules. The rules are procedural and largely govern the PERB's internal operation. There are no filing fees or any other charges required by proposed procedures. Moreover, any costs incurred by affected parties would be the same, if not less, than would have been incurred in court. One exception may be the cost of traveling to appear before the board. It would, however, be considerably more expensive and time consuming for the board to travel throughout the state hearing appeals. Finally, it must be pointed out again that any costs incurred by parties appearing before the PERB result from the statute, not these proposed rules.

“(6) 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”

If these rules are not adopted, the PERB will still need to allow charges to be filed. However, the likelihood of investigations being done efficiently and effectively will be much lower. These rules will allow the board to hear unfair labor practice cases efficiently and timely. Without these rules, the affected parties would also not know what to expect during an unfair labor practice investigation, undermining their ability to best present their position on factual and legal issues.

“(7) 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”

Federal Law does not regulate labor relations of state or local government employees. The National Labor Relations Board is a similar agency regulating the private sector, and the Federal Labor Relations Authority concerns employees of the federal government, but there is no direct analog to the PERB at the federal level.

“(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule. . . . ‘[C]umulative effect’ means the impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.”

The proposed rules cover areas that are not addressed by federal law or other Minnesota state laws. Therefore, this consideration is not applicable.

PERFORMANCE-BASED RULES

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards

that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

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.

ADDITIONAL NOTICE

Minnesota Rules, part 1400.2060, subpart 2, item A requires that the PERB describe its proposed Additional Notice Plan and explain why it believes its Additional Notice Plan complies with Minnesota Statutes § 14.101, i.e., why the Additional Notice Plan constitutes good faith efforts to seek information by other methods designed to reach persons or classes of persons who might be significantly affected by these rules.

A Request for Comments was published in State Register, Volume 40, Number 15 on October 12, 2015. In addition, the PERB Notice Plan consists of the following:

1. Notices and copy of proposed rules and SONAR sent to the Governor's office;
2. Notices and copy of proposed rules sent to the chairs and ranking minority members of the legislative committees that oversee PERB;
3. Notices and copy of proposed rules posted to the PERB's website;
4. 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 receive PERB rulemaking information;
5. News releases with link to proposed rules sent to newspaper, radio, television, magazine and electronic news organizations located throughout the state of Minnesota;
6. 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 Labor and Congress of Industrial Organizations
 - American Federation of State, County and Municipal Employees, Councils 5 & 65
 - Minnesota Association of Professional Employees
 - Middle Management Association
 - Minnesota School Employees Association
 - Minnesota Teamsters Public and Law Enforcement Employees Union Local No. 320
 - Minnesota Association of Secondary School Principals
 - Minnesota Elementary School Principals Association
 - Union Advocate, Minneapolis Labor Review, and Workday Minnesota

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

- Association of Minnesota Counties
- City of Minneapolis
- City of Saint 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

8. 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

The PERB believes its Additional Notice Plan complies with the statute because it is a good faith effort to give notice to the class of people likely to be affected by the rulemaking. The primary classes of people affected by the proposed rulemaking are entities charged with unfair labor practices, those individuals or organizations that are bringing the charge before PERB, and the attorneys or other representatives of the involved parties. The above methods are the PERB's best attempt to notify these entities. The PERB is made up of members who represent both public employees and public employers, and are uniquely qualified to identify entities that need to be notified. In addition, PERB was supplied with a mailing list from the Bureau of Mediation Services, a state agency with a similar constituency. This list contains email contacts at many smaller unions, employee associations, and employer associations that are not listed above. The press release, publication on the PERB's website, and publication in the State Register are PERB's best efforts to reach anyone not included in the above notifications.

The Notice Plan did not include notifying the Commissioner of Agriculture because the rules do not affect farming operations per Minnesota Statutes § 14.111.

CONSULTATION WITH MMB ON LOCAL GOVERNMENT IMPACT

As required by Minnesota Statutes, section 14.131, the board will consult with Minnesota Management and Budget (MMB). We will do this by sending MMB copies of the documents that we send to the Governor's Office for review and approval on the same day we send them to the Governor's office. We will do this before the board's publishing the Notice of Intent to Adopt. The documents will include: the Governor's Office Proposed Rule and SONAR Form; the proposed rules; and the SONAR. The board will submit a copy of the cover correspondence and

any response received from Minnesota Management and Budget to OAH at any hearing or with the documents it submits for ALJ review.

DETERMINATION ABOUT RULES REQUIRING LOCAL IMPLEMENTATION

As required by Minnesota Statutes, section 14.128, subdivision 1, the board has considered whether these proposed rules will require a local government to adopt or amend any ordinance or other regulation to comply with these rules. The board has determined that they do not because local governments are not required to take any action to implement or comply with any of the rules proposed.

COST OF COMPLYING FOR SMALL BUSINESS OR CITY

Agency Determination of Cost

As required by Minnesota Statutes, section 14.127, the board has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city. The board has 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.

The PERB has made this determination based on the probable costs of complying with the proposed rule, as described in the Regulatory Analysis section of this SONAR on pages 2-3. These rules will not affect small businesses in any way.

LIST OF WITNESSES

If these rules go to a public hearing, the Department anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Mr. David Biggar will testify in support of the need for and reasonableness of the rules.
2. Mr. Steven Hoffmeyer will testify in support of the need for and reasonableness of the rules.

RULE-BY-RULE ANALYSIS

7325.0010 PURPOSE AND CONSTRUCTION.

This rule declares that the purpose of all the PERB-promulgated rules is to implement the statutory duties of the PERB. Statements of purpose like this are common in the rules of various agencies. E.g., Minn. Rule 1205.0100, subp. 2 (Department of Administration-Data Practices Act); Minn. Rule 1415.0100 (Workers' Compensation litigation rules); Minn. Rule 5500.0200

(proceedings before the Commissioner of the Bureau of Mediation Services (BMS)); Minn. Rule 5500.0700 (BMS private sector proceedings).

7325.0020 DEFINITIONS.

This section of rules define basic terms used throughout regarding PERB's procedures for filing a charge, investigations, hearings, and appeals. These rules are patterned after Minn. Stat. § 645.15-.151 (computation of time, delivery and service); Minn. Rule 5220.0107 (Department of Labor & Industry rules for filing, service and counting of days); and Minn. R. Civ. Proc. 5.02, 5.05 and 6.05 (district court rules on filing, service and additional days in which to respond)).

These rules will affect when the parties receive various notices and the time in which parties may respond. In promulgating these rules, the board has balanced the PERB's statutory mandate to "promptly conduct an investigation of a charge" and to "promptly issue a complaint" and to then conduct hearings within twenty days, Minn. Stat. § 179A.13, subd. 1(b), with basic concepts of due process such as allowing parties adequate time in which to respond.

7325.0200 FILING, SUPPORTING, AND RESPONDING TO A CHARGE.

The mandatory use of a PERB-provided charge form will provide uniformity to the charge process and provide charged parties with notice. The mandated charge form will help ensure that ULP charges filed provide the information necessary for an assigned investigator to begin an investigation. The information required on the form is necessary for the investigator to identify and contact all parties to a charge and begin the investigation process. Requiring identification of each charge of an unfair labor practice, the specific subdivisions of the law allegedly violated, and the specific remedy being sought is necessary to inform the charged parties of the basis for the charge so that they may prepare evidence and a response. Service of charges and amended charges on all other parties by the charging party is fundamental to due process and necessary so that all parties may be informed of a charge filed with the PERB and so that they may prepare evidence and a response. The PERB will docket and assign a case number to all cases so that it can uniformly track charges and maintain organized records of pending and closed cases. An assigned case number will also provide the board and the parties with a uniform system by which to refer to a case. Charge forms will be available in person at the office of the Public Employment Relations Board and on the website to provide wide access. Charge forms may be filed in person, by mail, by facsimile, and by electronic mail to provide easy access to the PERB. The seven-day deadline for a charging party to provide supporting evidence to the investigator is designed to expedite the investigatory process while, at the same time, affording the parties a reasonable time to prepare and submit their evidence. The fourteen-day deadline for a charged party to provide supporting evidence to the assigned investigator is designed to expedite the investigatory process while, at the same time, affording the parties a reasonable time to prepare and submit evidence and responses.

7325.0120 MEDIATION

The rule permits the board to pursue mediation or conciliation of a charge or amended charge. This is consistent with the purpose of the Public Employment Labor Relations Act (PELRA) to “to promote orderly and constructive relationships between all public employers and their employees.” Minn. Stat. § 179A.01.

7325.0130 INVESTIGATION.

The PELRA’s purpose is “to promote orderly and constructive relationships between all public employers and their employees.” Minn. Stat. § 179A.01. Efforts to explore voluntary resolution to unfair labor practice charges in an informal conference will advance the stated purpose of PELRA. Protecting the content of settlement discussions from the board and hearing officers preserves the integrity of the hearing process. If the board determines that there was no reasonable basis in law or fact for the charge, it will advise the charging party and provide it an opportunity to withdraw the charge. This promotes the orderly and constructive relationship between public employers and their employees, consistent with PELRA. Allowing the charging party to withdraw a charge achieves the goal of efficiency.

7325.0140 AMENDING OR WITHDRAWING CHARGE.

The proposed rule allows the charging party to amend a charge prior to the issuance of a complaint or notice of dismissal. Allowing the charging party to amend a charge, rather than file an additional new charge, achieves the goal of efficiency. Amendments to a charge are limited to prior to the issuance of a complaint because procedurally, once the board issues a complaint, the complaint must be amended rather than the charge. Similarly, a dismissed charge cannot be procedurally amended. This proposed rule provides the greatest flexibility to the charging party to control its charge within the limits of the statutory procedure.

The proposed rule allows the charging party to withdraw a charge prior to issuance of a complaint or notice of dismissal. Allowing the charging party to withdraw a charge achieves the goal of efficiency. It furthers the purposes of PELRA to allow withdrawal prior to the issuance of a complaint or notice of dismissal. Procedurally, once the board issues a complaint, a withdrawal of a charge will not be sufficient to resolve the complaint. Similarly, a dismissed charge cannot be procedurally withdrawn. This proposed rule provides the greatest flexibility to the charging party to control its charge within the limits of the statutory procedure.

7325.0150 DISMISSAL OF CHARGES.

This rule addresses PERB’s statutory standards and procedures for dismissing a charge and the charging party’s rights to appeal a dismissal. Minn. Stat. § 179A.052, 179A.13, subd. 1(b).

7325.0200 COMPLAINT.

This section of rules addresses PERB's statutory standards and its procedures for issuing a complaint and noticing a hearing. See Minn. Stat. § 179A.13, subd. 1(b). In promulgating these rules, the statutory goal of promptness was balanced against basic concepts of due process. See SONAR for Section II Definitions above.

7325.0210 ANSWER.

The statute provides that a respondent has "the right to file an answer to the complaint or amended complaint prior to the hearing." Minn. Stat § 179A.13, subd. 1(b). The complaint and answer should help frame, and sometimes perhaps narrow, the issues in dispute. Accordingly, the hearing officer should have them prior to the start of the hearing. The PERB arrived at the proposed rule to ensure that a hearing officer would have time to review the pleadings beforehand and that the proceeding would take place promptly, while still providing a respondent adequate time to prepare an answer. Respondents, to be sure, will have been served with a charge and participated in an investigation prior to the board issuing a complaint. Thus respondents will already be familiar with the factual allegations and likely the legal theories involved, and this will enable them to prepare an answer much faster than if a complaint were the first notice of the issues.

7325.0220 SCOPE OF HEARING.

To provide due process to the parties, the proposed rule requires that all issues set forth in the complaint or amended complaint will be addressed at the hearing. One of the fundamental components of due process is the opportunity to be heard. The opportunity to be heard includes the chance to appear before a presiding body to present evidence and argument on all issues before a decision is made. Therefore, the failure to address all issues set forth in the complaint or amended complaint results in the denial of due process. The proposed rule also provides there is no need to provide evidence to establish the existence of facts stipulated by the parties. The proposed rule allows the parties to dispense with the need to prove uncontested factual issues. The evidentiary device will simplify and expedite the hearing process. The use of stipulated facts, without the need to provide further evidence, is common practice in courts and other tribunals.

7325.0230 BURDEN OF PROOF.

The proposed rule requires the charging party to prove an unfair labor practice charge by a preponderance of the evidence. Minn. Stat. § 179A.13, subd. 1(g). The proposed rule also provides that the respondent may present evidence in support of its defenses(s). Further, the rule requires that any party asserting an affirmative defense has the burden of proving it by a preponderance of the evidence. It is commonly accepted by courts and tribunals that the burden

of proof generally resides with the charging party. Allowing the respondent to present evidence in support of its defense is necessary for due process. By employing the same standard of proof for both parties, the proof obligation is equal for the charging party and the respondent. This was the favored approach by the drafter because using the same burden of proof is perceived as more fundamentally fair than requiring a higher or different burden for the respondent than the charging party. There was no contemplation by the drafters of any other burden of proof on the charging party because the standard as proposed was provided in the authorizing legislation.

7325.0230 HEARING OFFICER DUTIES.

In order to fulfill the purpose of the statute, the hearing officer must have broad authority in conducting a hearing. This authority is necessary so that the hearing is thorough, efficient and fair. The hearing officer must have authority to administer oaths and affirmations and issue subpoenas so that parties may present relevant evidence at the hearing. The hearing officer must have the ability to rule on objections, motions, and questions of procedure so that the hearing is not delayed while those matters are decided. The board considered giving the parties authority to determine whether briefs would be submitted and to set the time for their filing, and whether witnesses would be sequestered, but determined that doing so could cause unnecessary disruptions if the parties could not agree on those matters.

7325.0240 PRE-HEARING CONFERENCES.

The rule allows for a pre-hearing conference because such conferences may expedite the hearing process and encourage resolution. Expediting the hearing process is a cost-effective method to narrow the scope of the hearing and potentially the cost of the hearing. The board contemplated the requirement of pre-hearing conferences but decided that a requirement may frustrate the purposes of the Act by burdening the parties with unnecessary costs for attorney fees, delaying the hearing, complicating the issues, or permitting harassment of the parties and/or their witnesses.

7325.0250 SUBPOENAS.

The rule puts the burden of requesting a subpoena and subsequent service of it on the requesting party. Such a requirement serves the interests of fairness, expediency, and cost effectiveness.

7325.0260 PROTECTIVE ORDERS.

The proposed rule allows either the hearing officer or the board or its designee to issue protective orders. The proposed rule also permits the hearing office to close a portion(s) of the hearing, but only to the extent necessary to protect private, non-public, or confidential data. This rule is necessary since hearings will be public meetings and findings will be public documents. The underlying subject matter of unfair labor practice charges may include information that is

private, non-public, or confidential as defined in the Minnesota Government Data Practices Act, Minn. Stat. § 13.01, or other applicable law. The hearing officer must protect any such information offered as evidence at a hearing or cited in documents.

7325.0270 TESTIMONY.

The proposed rule provides that all parties have the right to present evidence and witnesses, rebuttal testimony, and argument on the issues and to cross-examine witnesses. The rule has no limitation on who can be a witness, or which party can present witnesses. This unfettered right to present one's case in one's own fashion is the hallmark of the right to be heard. Limitations would unduly restrict the parties in presenting their case. The proposed rule is consistent with the statute. The rule also requires that all oral testimony be made under oath or affirmation. This ensures that testimony is true and accurate.

7325.0280 CONTINUANCES.

The proposed rule permits either party to request a continuance or postponement of a hearing and requires the hearing officer to rule on the request. The rule is intended to allow the hearing officer to manage the hearing by balancing fairness and efficiency. Consideration was given to requiring the hearing officer to grant the request whenever there was mutual agreement between the parties to the request. It was determined, however, that mutual agreement may not always serve the public interest and the legislature's desire for efficient resolution.

7325.0300 CONSOLIDATION.

The Act is designed to provide a cost-effective and efficient process to resolve charges of unfair labor practices. The rule allows consolidation to fulfill the purpose of the Act. Consolidation will save the time and money associated with multiple hearings. Not allowing consolidation would frustrate the purpose of the Act by requiring needless duplicative hearings.

7325.0310 INTERVENTION.

The rule allows the hearing officer or the board to determine whether to allow interested parties to intervene in a hearing to ensure that the issues presented in the hearing are heard and decided as efficiently as possible. In certain cases there may be parties who have legitimate interests at stake in the matter 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.

7325.0320 RECORD.

A full and complete record of the hearing is necessary in the event that an exception or appeal of the hearing officer's recommended decision and order is filed. If an exception or appeal is filed, the board or the Court must be able to review all pleadings, motions, orders, evidence, and any other documents contained in the record to make an informed decision. The rule requires that the hearing officer transfer the record of the proceedings to the board upon issuance of the recommended decision and order because the board has an obligation under the Minnesota Government Data Practices Act, § 13.01, et. seq., to collect, store, disseminate, and allow access public data generated by unfair labor practice proceedings.

7325.0400 EXCEPTIONS.

Subpart 1.

Minn. Stat. § 179A.041, subd. 6, authorizes the board to hear appeals from hearing officers in unfair labor practice cases and decisions of the Commissioner in cases concerning unfair labor practices during representation elections. It is more efficient for the agency and for public sector employers and unions to have a single set of procedural rules for the two types of appeals heard by the board. There are no differences in the two types of appeals to warrant different procedural requirements.

Subp. 2.

Documents related to appeals must be filed with the General Counsel/Executive Director, and reviewed by the three members of the board, warranting submission of four paper copies. The electronic copy is required to facilitate the PERB's ability to make documents available to the public. Service of documents on other parties is necessary so that they may be informed of all information related to their case and so that they may, in appropriate circumstances, prepare responses to other parties' documents. Requiring that all parties receive timely notice of documents submitted by another party in a pending case is fundamental to due process.

Subp. 3.

The decision of a Hearing Officer will include statements of fact, statements of law, discussion of the application of the law to the facts, and recommended remedies. The board can only fairly and efficiently make decisions on exceptions if the party objecting to the Hearing Officer's recommended decision identifies the portions of the decision that it asserts are erroneous. Requiring identification of the basis of exceptions will deter non-meritorious appeals that would delay the implementation of a valid order and impose unnecessary costs on other parties. Detailed statements of exceptions are also necessary to inform other parties of the basis of the exception so that they may respond appropriately.

Subp. 4

To make an informed decision regarding exceptions, the board must know the facts and legal arguments supporting the exceptions. The party is required to submit a brief so that the

board can receive and consider those legal arguments. In order to facilitate review, parties must identify the portions of the record that support the party's argument. Requiring specificity in briefs also discourages non-meritorious appeals that would delay the implementation of a valid order and impose unnecessary costs on other parties. Briefs with citation to the record permit opposing parties more efficiently to direct responses to those matters that actually are at issue.

Subp. 5.

While oral arguments may, in some circumstances, enhance the board's discernment process, they may be unnecessary in other cases. To make efficient use of the time of the board's members and the parties, oral arguments should not be held in cases in which parties do not believe they would be helpful to the board's decisionmaking process. The board therefore needs to be informed by the parties whether they believe oral arguments will be useful in the particular case. Advance notice of the desire to present an oral argument is necessary to facilitate scheduling oral argument time for board members and parties.

Subp. 6.

The same filing, service, and notice requirements imposed on parties filing exceptions applies to all other parties for the same reasons noted with regard to filings of excepting parties. The opportunity to file cross-exceptions is necessary because, upon receipt of another party's exceptions, other parties may realize that they also have grounds to object to the recommended decision of the hearing officer or the order of the Commissioner in a representation case proceeding. The fifteen-day deadline for filing of cross-exceptions is designed to expedite final resolution of the case while, at the same time, affording the parties a reasonable time to prepare their submissions.

Subp. 7.

The decision of a hearing officer will include statements of fact, statements of law, discussion of the application of the law to the facts, and recommended remedies. The board can only fairly and efficiently make decisions on exceptions if the party responding to the exceptions or cross-exceptions identifies the portions of the decision that support its position.

Subp. 8.

If cross-exceptions are filed, other parties should have the same opportunity to respond to the cross-exceptions, as other parties do when being served with initial exceptions. For the reasons noted above, responses to cross-exceptions, as responses to exceptions, should be stated with specificity and supported by reference to the evidentiary record. The fifteen-day deadline for filing responses to cross-exceptions is designed to expedite final resolution of the case while, at the same time, affording the parties a reasonable time to prepare their submissions. Application of the same deadline to all parties is important to assure equal treatment of parties in the appellate process.

Subp. 9, 10, and 11.

Cases pending before the board have the potential not only to resolve the dispute between the parties, but also to set precedent which may impact other government entities, government employees, and public sector unions. Other persons and entities potentially affected by the decision of the board in a pending case should have the opportunity to inform the board of the potential effects of a decision that might not be presented by direct parties to the pending dispute. The ability to consider the information and arguments of amicus will permit the board to render more informed decisions. In some cases, it will be important for the board to invite the submission of amicus briefs if persons or entities, not parties to a pending case, may otherwise be unaware of the effect the case may have on their interests or if those with perspectives critical to the board's understanding of an issue are not parties to the pending case. Prompt deadlines must be set for motions to submit amicus briefs so as not to delay resolution of the case. The board will determine, in light of the circumstances of the individual case and the need for expeditious resolution of the matter, whether an amicus brief may be filed, what its deadline will be, and whether an amicus will be permitted to participate in oral argument.

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Subp. 1, 2 and 3.

Minn. Stat. § 179A.13, subd.1(k), authorizes the board to review a recommended order "upon its own motion." The statute contemplates that there may be cases in which the parties to a case are unable or unwilling to seek review by the board, but where review would nevertheless be in the public interest. A deadline of forty-five days from the date of service of the hearing officer's decision and order is established for providing notice to the parties of the board's intent to review. A deadline is necessary so that the parties will know that, beyond that date, if no exceptions have been filed and no Notice of Intent to Review is served, the decision of the hearing officer is final in accordance with Minn. Stat. § 179A.13, subd.1(k). The forty-five-day period is necessary to permit the board sufficient time to consider whether, after the thirty-day deadline has passed for the parties to file exceptions, the board should, on its own initiative, review the recommended decision and order of the hearing officer. If the board does decide to hear a case on its own motion, this language permits the parties to participate in submitting briefs and making oral arguments to the same extent as they would if the appeal arose from a party's submission of exceptions. Simultaneous briefing is appropriate in a case in which the initiative to review arose from a decision of the board rather than from the filing of a party. The thirty-day deadline for filing of briefs is designed to expedite final resolution of the case while, at the same time, affording the parties a reasonable time to prepare their briefs.

Subp. 4.

Minn. Stat. § 179A.041, subd. 7, authorizes the board in a case pending before it on appeal to "request additional evidence when necessary or helpful." Depending upon the need for the additional information, different methods of presentation may be the most appropriate for a particular case.

CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

[Date]

David Biggar, Chair