

# Stuck in Stop and Go: Getting to the End of a Rulemaking

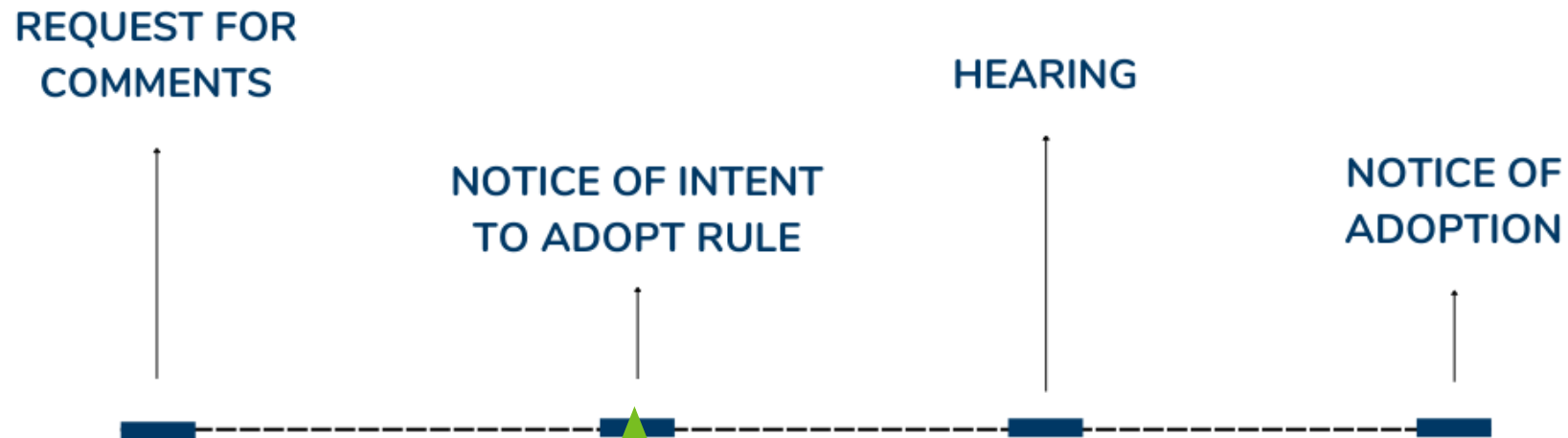
- Michelle Hersh Vaught, Professional Educator Licensing Standards Board (PELSB)
- Ian Lewenstein, Bureau of Mediation Services and Department of Corrections
- Vanessa Vogl, Rulemaking Attorney, Department of Human Services

## **This presentation will cover:**

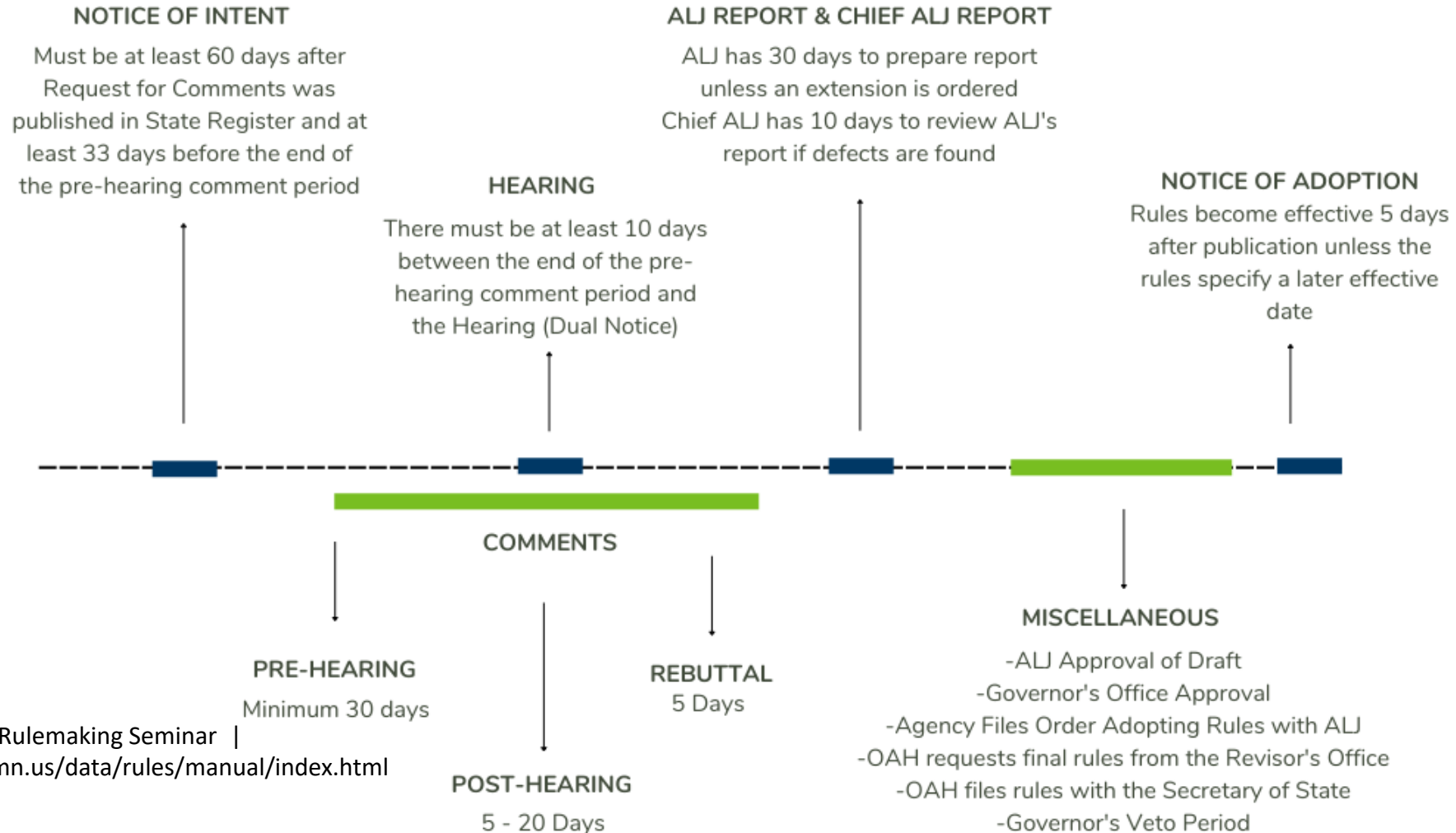
- How to respond to comments after you publish your *Notice to Adopt Rules*
- When to communicate with the Governor's Office
- When to provide required “notices” and recommendations for additional communication strategies
- How to “cure” a defect

# Key Rulemaking Steps

## KEY RULEMAKING STEPS



# Final Steps



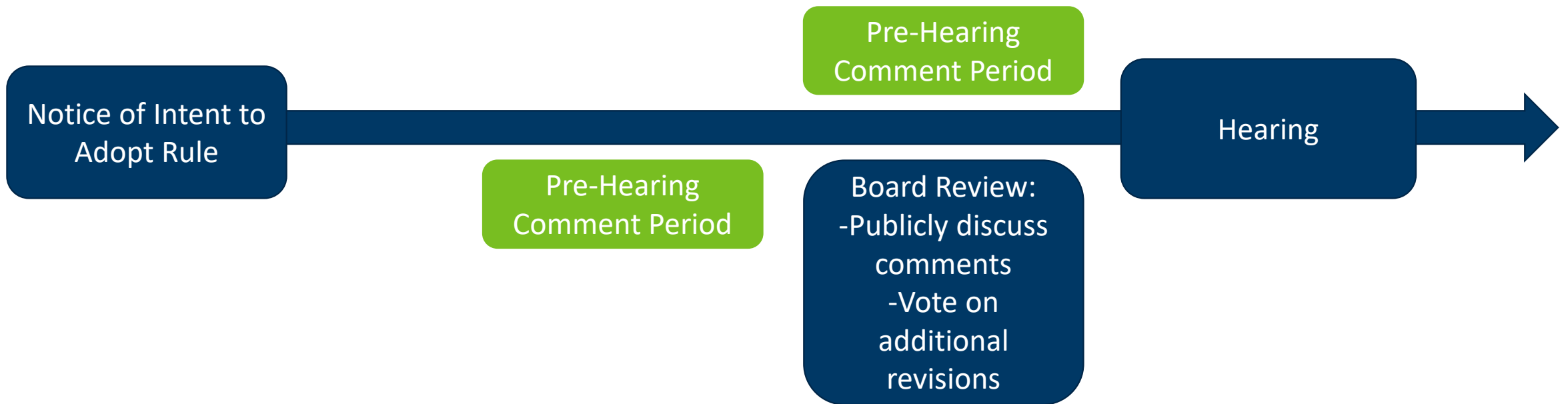
## When to do so?

- During the Notice of Intent to Adopt comment period
- After the Notice of Intent to Adopt comment period
- Ahead of the hearing
- At the hearing
- After the hearing/rebuttal

# Responding to Comments as a Board

## Consideration: Timing of Pre-Hearing Comment Period

### Option 1: Pre-Hearing Comment Period Immediately Before Hearing



### Option 2: Pre-Hearing Comment Period at least 30 days before Hearing (if not longer)

## When to send it?

- Hearing
  1. After the hearing and rules have been approved, with a draft Order
- No Hearing
  1. After comment period, before submission to OAH for review, with a draft order
  2. If substantive changes after OAH review (ALJ substantive recommendations or other modifications by agency)

## Notice of Submission of Rules to OAH

- Minn. Stat. 14.26 and Minn. R. 1400.2080, subp. 3, item K
- Only if no hearing, and if requested
- Option to request must be included in Notice of Intent to Adopt
- Best practice- consider reminding those who submitted comments or requested a hearing that they can request to be notified when rules are submitted, or better yet, just notify everyone even if they don't request it



# Notice of Rule Adoption and Filing with the Secretary of State

- Minn. Stat. 14.16 and Minn. R. 1400.2080, subp. 4, item G
- Only if hearing, and if requested
- Option to request must be included in Notice of Intent to Adopt
- Best practice: consider notifying those who submitted comments or requested a hearing, even if they did not request notification

## Providing regular updates

### How:

- Website
- GovDelivery
- Board meetings
- Staff meetings

### Considerations:

- Plain language
- Transparency (process, next steps, etc.)
- Implementation guidance



### Notice of Filing Rules with Secretary of State

Adoption of Proposed Amendments to the Rules of the Minnesota State Board of Professional Educator Licensing and Standards, Minnesota Rules, chapter 8705; Proposed Amendments to Minnesota Rules, chapter 8705.0200, subparts 2, 7, and 9; 8705.0300, subparts 1, 3, 4, and 5; 8705.1200; 8705.2200, subpart 1; 8705.2400

Revisor's ID Number 4576

OAH docket number 8-9021-35856

To: All Interested Persons

This letter is to inform you that the Executive Director of the Professional Educator Licensing and Standards Board signed the Order of Adoption on August 16, 2022. The Office of Administrative Hearings is filing this matter today, March 5, 2021.

Please note that there are still several steps that must take place before the rules become effective:

1. The Secretary of State will send a copy of the rules to the Governor.
2. The Revisor of Statutes will prepare an official copy of the rules to be published in the State Register.
3. The Governor may veto the rules. The Governor's veto must be received by the Secretary of State and the State Register.
4. If the Governor does not veto the rules, the rules will be published in the State Register.



### R-4576 Updates

#### Chief ALJ approves proposed rules

On February 8, 2021, the Chief Administrative Law Judge issued the proposed rules governing teacher preparation (see [Draft 9](#)).

#### Next Steps

Please note, there are several steps that must take place before the rules become effective, including:

1. The Board must adopt the rules and authorize the Executive Director to file the rules with the State Register.
  2. The Office of Administrative Hearings must file the rules with the State Register.
  3. The Secretary of State must send a copy of the rules to the Governor, triggering a 14-day veto period.
  4. The Board must publish the Notice of Adoption in the State Register.
- PELSB will circulate notices when the Office of Administrative Law Judge issues the proposed rules with the Secretary of State and when the Board publishes the Notice of Adoption in the State Register.

If you have questions about this rulemaking project or next steps, please visit [PELSB's rulemaking webpage](#) or contact [Michelle Hersh Vaught](#).

**MINNESOTA PROFESSIONAL EDUCATOR LICENSING AND STANDARDS BOARD**

Aspiring Educators | Current Educators | Districts | Preparation Providers | Board | Contact Us | License Lookup

Home > Board > Rulemaking > Licensing and Academic Standards (R 4615)

### Licensing and Academic Standards (R 4615)

PELSB is proposing amendments to Minnesota Rules, chapter 8710. Chapter 8710 contains the state's licensure rules for teachers, including the requirements to obtain and renew teaching licenses and permissions. Additionally, chapter 8710 contains the required pedagogical standards ("Standards of Effective Practice") for teachers and license-specific standards.

To receive notices about rulemaking efforts, including upcoming stakeholder meetings, please subscribe to our [Rulemaking email list](#).

**Hearing & Comment Periods**

PELSB held a virtual rules hearing on the proposed rule changes on Wednesday, August 24, 2022. Administrative Law Judge James Mortenson was the presiding judge. You can watch a [recording](#) of the rules hearing or review a [transcript](#).

**OAH Docket Number**

The OAH docket number for this matter is OAH Docket Number 5-9021-36362.

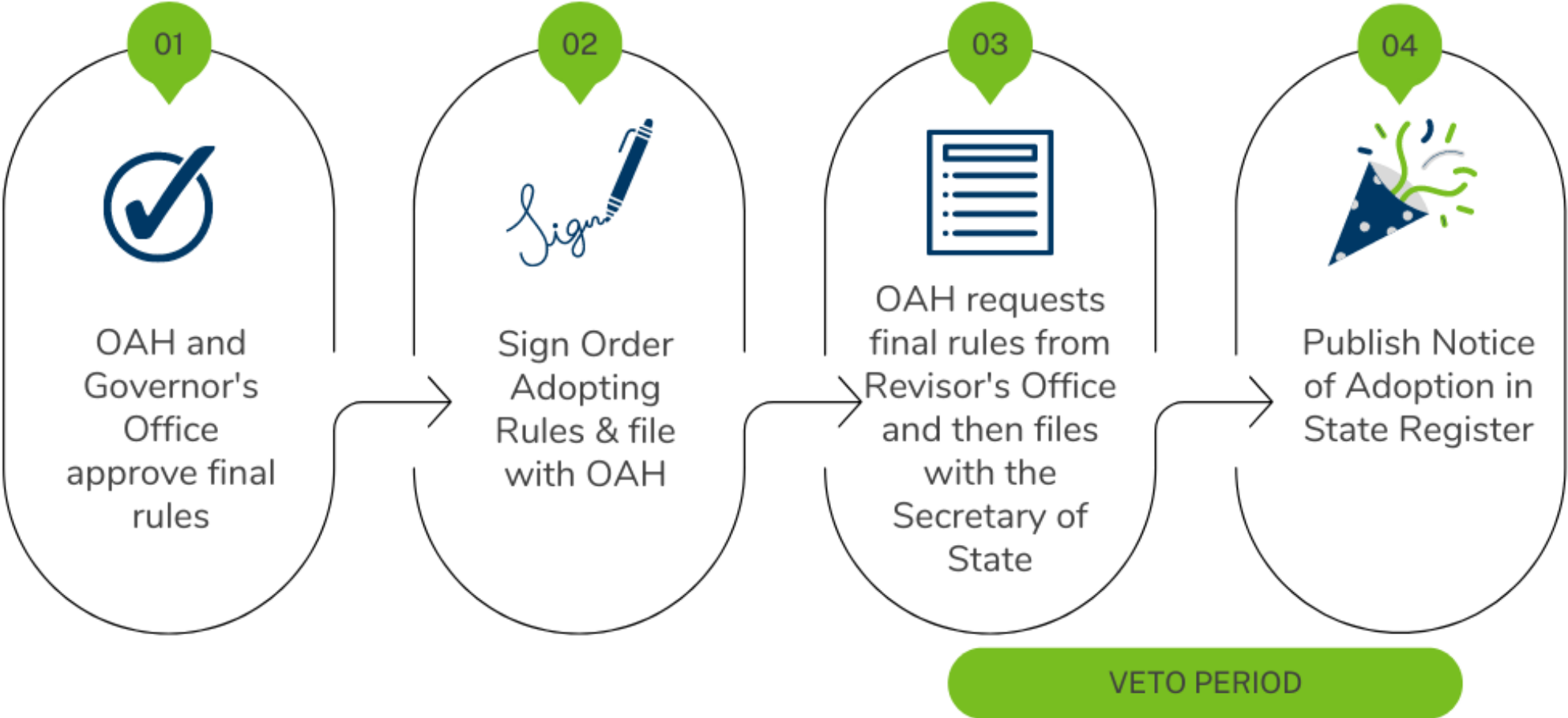
**Hearing Exhibits**

- Exhibit A: [The Request for Comments \(as published in the State Register on September 23, 2019\)](#)
- Exhibit B: [Not included - a petition for rulemaking](#)
- Exhibit C1: [A draft of the proposed rule changes \(dated Dec. 16, 2021\)](#)
- Exhibit C2: [The Revisor's certificate of approval](#)
- Exhibit D: [The Statement of Need and Reasonableness \(SONAR\)](#)
- Exhibit E1: [The Notice of Hearing \(as mailed on May 2, 2022\)](#)
- Exhibit E2: [The Notice of Hearing \(as published in the State Register on May 2, 2022\)](#)
- Exhibit F: [Not included - a letter from the Chief Administrative Law Judge authorizing the Board to omit the text of the proposed rules from the Notice of Intent to Adopt Rules published in the State Register](#)
- Exhibit G1: [Certificate of Mailing the Notice of Intent to Adopt Rules](#)
- Exhibit G2: [Certificate of Accuracy of the Mailing List](#)
- Exhibit H: [Certificate of Additional Notice](#)
- Exhibit I: [Certificate documentation that the Board sent a copy of the SONAR to the Legislative Reference Library \(LRL\)](#)
- Exhibit J: [All written comment and submission on the proposed rule changes that the Board received during the comment period](#)
- Exhibit K: [Other documents to demonstrate compliance with other laws and rules \(See below\)](#)
- Exhibit K1: [Board resolution authorizing rulemaking \(adopted on Sept. 14, 2018, revised on Dec. 14, 2018, and June 14, 2019\)](#)
- Exhibit K2: [Notice to Close Comment Period \(as published in the State Register on May 3, 2021\)](#)
- Exhibit K3: [Certificate of Notifying Legislators of Publication of Notice of Intent to Adopt Rule](#)
- Exhibit K4: [Consultation with Minnesota Management and Budget \(MMB\)](#)
- Exhibit L: [Response to Pre-Hearing Comments](#)
- Exhibit M1: [A draft of proposed rule changes \(dated August 16, 2022\)](#)
- Exhibit M2: [Revisions adopted by the Board on July 23, 2022 and included in the rule draft dated August 16, 2022](#)

**Comment Periods**

Comment Period	Dates
Initial Comment Period	September 23, 2019 - June 1, 2021
Pre-Hearing Comment Period	May 2, 2022 - June 6, 2022
Post-Hearing Comment Period	August 25, 2022 - September 13, 2022
Rebuttal	September 14, 2022 - September 20, 2022

# From OAH approval to Notice of Adoption



# Final administrative steps

1. OAH and Governor's Office approve the final rules
2. Agency signs Order Adopting Rules and files with OAH
  - NOTE: Best practice: Send a note to OAH letting them know you've filed the Order. Give the Revisor's Office a heads-up after you have filed the Order with OAH.
3. OAH requests final rules from Revisor's Office
4. OAH sends rules to the Secretary of State
  - NOTE: The date OAH sends the rules to SOS is not necessarily the date of filing. SOS will notify agency of the filing date, which could be several weeks out! Best practice: Ask SOS to copy agency contact person when rules are filed.

# Final administrative steps, cont.

5. Governor's veto period starts the day SOS serves the rules on the Governor's Office
  - NOTE: This may happen several days after filing. Best practice: Ask SOS to copy agency contact person when rules are served on the Governor's Office.
6. Agency submits Notice of Adoption to the State Register for publication
  - NOTE: Make sure agency has the correct version of the rules for publication (SR, not AR or RD).

# Remember the 3 Cs

1. Calm
2. Communicate
3. Careful

# 1. Calm



# You were dinged for a defect

## ORDER

1. The findings of the Administrative Law Judge in the March 31, 2022, Order on Review of Rules are affirmed. Proposed Minn. R. 5500.2200 A, and 5500.2220, subp. 1, are **DISAPPROVED**.
2. The reasons for the disapproval of the rule and the recommended corrective changes are set forth in the March 31, 2022, Order.

Dated: April 5, 2022

A handwritten signature in black ink, appearing to be 'JS', with a long horizontal line extending to the right.

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JENNY STARR  
Chief Administrative Law Judge



# Tantrums aren't allowed



Don't panic



“You will know the good from the bad when you are calm at peace”



# Read the ALJ report

- Understand the type of defect:
  - “Normal”: vague, excessive discretion, etc.
  - Need and reasonableness
  - Procedural
- Understand the defect’s root cause
- Understand the corrective action

# Don't forget to read the technical recommendations

## II. Technical Recommendations

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

## 2. Communicate



# Notify your commissioner and other key people

- Send the ALJ report to identified people (supervisor, commissioner, etc.)
  - Summarize the defects: could be in email or short one-page summary
  - Set a time to meet to discuss; best within a day
- Establish plan and how to respond to defects:
  - Contest?
  - Accept?
  - Contest-and-tweak combo?
- Establish timeline: you have **6 months** to resubmit

# Remember who gets a copy of ALJ report

- Governor's office
- Revisor's office
- Legislative Coordinating Commission
- House and Senate Gov Ops committee chairs

\*Consider sending copy to policy adviser and revisor if you make modifications to the rule to respond to the defects.



- Advisory committee, if you used one
- Agency subject-matter experts
- The public via your website and rulemaking docket

# 3. Careful



<https://www.thebossbuilders.com/should-i-poke-the-bear/>

# Don't overshare or overdo

- Responding to the ALJ report is your agency's responsibility and, if applicable, governor's office
- No need to solicit feedback from the public
- No need to rewrite the entire rule—focus on the defects and technical recommendations

- Watch your tone
- Be respectful but forceful
- Use evidence
- Don't be afraid to challenge (but respectfully)
- Be clear
- Don't complicate things

# Possible introduction

Two defects were found in the bureau's proposed rules.<sup>1</sup> The bureau appreciates the careful review, report, and analysis. While acknowledging that the disputed language could've been written more clearly, the bureau respectfully disagrees with the analysis on the defects. In response, the bureau proposes modifying the disputed language to clarify and correct the defects, but for different reasons and not as proposed in the report.

# Be creative and clear

- Use headings
- Use tables for before-and-after examples of language
- Show proposed modifications but be careful that they match revisor draft
- Link rule language to page-and-line numbers

# Use headings and subheadings

## I. Applicability of bureau rules to peace-officer discipline grievances.

### *A. Legislative background.*

Most of the bureau's proposed rule is known as a housekeeping rule, according to agency rulemaking parlance. For example, the bureau updates obsolete provisions and makes style-and-form and plain-language changes. Some newly proposed language, however, stems from the permissive grant of rulemaking authority given to the bureau under the Minnesota Police Accountability Act of 2020.<sup>2</sup>

The main impetus behind the act was to create a separate roster of arbitrators to oversee only peace-officer discipline grievances. This roster is different from other bureau arbitration rosters because the parties don't select the arbitrator. Instead, the bureau rotationally assigns an arbitrator alphabetically by last name to hear a peace-officer discipline grievance.<sup>3</sup> Except for the difference in the selection procedure, an arbitrator hears a peace-officer discipline grievance the same as any other grievance heard before an arbitrator under bureau rules.

### *B. Peace-officer discipline-grievance arbitrations are the same as all other arbitrations.*

# Use before-and-after examples

While OAH has commented on existing language in agency rules, OAH has done so as technical corrections or suggested fixes, not as a cited defect that must be corrected.<sup>26</sup> In the bureau's case, the existing text was moved:

Existing (5530.1000, subpart 1)	Amended (5500.2220, subpart 1)
Arbitrators selected as a result of referral on a bureau panel must ensure that a fair, adequate, and <b>timely hearing</b> is conducted in a manner that reasonably minimizes cost and expense to the parties.	An arbitrator must ensure that a fair and <b>timely hearing</b> is conducted in a manner that minimizes cost and expense to the parties and complies with:  A. parts 5500.2200 to 5500.2850; and  B. chapter 5530.

True, the bureau moved *timely* to another chapter so that it showed up as new text, but the bureau could've done this move through a renumbering instruction or editorially. Here, the bureau was attempting to fulfill the APA's purposes of public transparency.<sup>27</sup>



# Curing a defect

Defect	Proposed rule language (Draft presented at hearing)	Proposed rule language (Attempt #1 to cure defect)	Approved rule language
<p>Proposed definition of “professional license from another state”</p>	<p>A teaching license from another state that allows the individual to be a teacher of record based on completion of a state-approved conventional, nonconventional, or alternative teacher preparation program from another state or licensure via a portfolio process in another state aligned to part 8710.0330 and Minnesota Statutes, section 122A.18, subdivision 10.</p> <p><i>Problem: Conflicts with state statute and reliance on undefined terms</i></p>	<p>A teaching license from a state other than Minnesota that allows the individual to be a teacher of record. A professional license from another state does not include:</p> <ul style="list-style-type: none"> <li>(1) a license issued requiring only passage of teacher licensure exams;</li> <li>(2) a license issued requiring only experience in a classroom;</li> <li>(3) a license issued on an emergency basis;</li> <li>(4) a substitute teaching license;</li> <li>(5) a license that does not require a successfully completed field experience in the scope and content of the license; or</li> <li>(6) a nonpublic school license.</li> </ul> <p><i>Problem: Unconstitutionally vague. Defines license by what it is not; not by what it is.</i></p>	<p>A professional teaching license issued by the responsible state agency of another state and required by the law of that state for an individual to teach in a public school, but does not include an emergency, temporary, or substitute teaching license.</p>

# Curing a defect, cont.

Defect	Proposed rule language (Draft presented at hearing)	Rule language submitted after hearing (to cure defect)
Sampling plan and extrapolation methodology	<p>The sampling plan and extrapolation shall be chosen and performed according to generally accepted statistical standards and practices, which may include guidance from the Centers for Medicare and Medicaid Services.</p> <p><i>Problem: Impermissibly vague. This language does not sufficiently describe the methods the Department will use in its sampling.</i></p>	<p>The sampling plan and extrapolation shall be chosen and performed according to guidance from the Centers for Medicare and Medicaid Services including the most recent version of the <i>Medicare Program Integrity Manual</i>.</p> <p><i>Approved as submitted.</i></p>

# Make edits stand out

## 5530.0100 APPLICATION, lines 75.11-75.24

A. This chapter applies to:

(1) the empanelment, referral, conduct, and removal of arbitrators on the commissioner-maintained roster under Minnesota Statutes, sections 179.02, subdivision 4; and 179A.04, subdivision 3, paragraph (a), clause (13); and

(2) the roster of arbitrators under Minnesota Statutes, section 626.892, except as provided under Minnesota Statutes, section 626.892, subdivisions 3 to 6 and 11.

B. ~~but~~ This chapter does not apply to:

~~(1) the list of arbitrators maintained under Minnesota Statutes, section 179A.04, subdivision 3, paragraph (b), for teacher discharge or termination hearings; or~~

~~(2) the roster of arbitrators under Minnesota Statutes, section 626.892, subdivision 4, except as otherwise provided under Minnesota Statutes, section 626.892, subdivision 12.~~

Except for the selection and appointment procedure and fee schedule, the bureau's requirements on arbitrators under chapter 5530 remain the same, including an arbitrator's conduct and standards,

# Don't forget to explain edits

## 11. Part 5500.2700, lines 15.1-15.8.

Subp. 2. **Filing award.** The panel must simultaneously file with the commissioner and the parties the original findings, ~~opinion~~, and award. The findings, ~~opinion~~, and award must be filed according to part 5530.0800, subpart 9.

Subp. 3. **Resolving dispute before award is filed.** If the parties make a written agreement resolving the dispute before the panel files an award, ~~the written agreement must be simultaneously filed with~~ they must notify the panel ~~and the commissioner.~~ After being notified, the panel ~~must then file its records, without its findings or an award, with the commissioner~~ may not make an award.

**Explanation:** The first modification is needed because of the amended definition of *award*, which now includes *opinion*.

# Don't muck things up

modifications to others (Amended with Suggested Modifications), as indicated below:

## **Approved Rules – Amended as Recommended**

- [2400.2040, Subpart. 65a \(page 9\)](#)
- [2400.2703, Subpart. 1, items A and B \(page 9\)](#)
- [2400.2703, Subpart. 3, items A, B, C, F, H, I, L and M \(pages 10-16\)](#)
- [2400.2703, Subpart. 6, item B \(page 20\)](#)
- [2400.2703, Subpart. 7, items J and K \(page 24\)](#)
- [2400.2703, Subpart. 9, intro and items A, G, J, L and M \(page 25-26\)](#)

## **Approved Rules – Amended as Recommended with Suggested Modifications**

- [2400.2040, Subpart. 24b \(page 6\)](#)
- [2400.2040, Subpart. 64a “public hearing” \(page 6\)](#)
- [2400.2040, Subpart. 64b “public meeting” \(page 7\)](#)
- [2400.2703, Subpart. 3, items D, E, G and J \(pages 11-14\)](#)
- [2400.2703, Subpart. 7, item D, E, F, G AND L \(pages 21-26\)](#)
- [2400.2703, Subpart. 9, item E \(page 30\)](#)

## **Suggested Modifications Responsive to Report**

- [2400.2040, Subpart. 50b \(page 8\)](#)
- [2400.2040, Subpart. 65b \(page 9\)](#)
- [2400.2703, Subpart 10 \(page 31\)](#)

The intent of this format is to provide context around the sections of change, which may make it easier to understand the efficacy of the change within that area of the rules. The document structure is illustrated and explained in the text box below.

## **GUIDE TO THIS LETTER -- HOW RULE SUGGESTIONS ARE ORGANIZED**

Subparts and Items with suggested modifications are noted with a title before that section. The title text is slightly outset, blue, and ALL CAPS. The title identifies the subpart addressed, the type of the modification, and references the related ALJ report finding.

2400.20XX SUBP. 01 – SUGGESTED MODIFICATION  
(FINDING OF FACT XXX)

Subp. 01. Rule language that was approved or was added to this version of the rules verbatim from an ALJ text suggestion in her report, is shown in regular black text. If there is a **suggested modification of text** for consideration by the Chief ALJ, it is shown as red text **with an underline is it's added text or crossed out if it is suggested for deletion.**<sup>1</sup> A footnote indicator follows areas of suggested modification.

<sup>1</sup> The rationale for the suggested modification is explained in the footnote. The footnote is located immediately below the paragraph with the changes. It will identify the area of the ALJ report that it is responsive to, as applicable. The footnote text is differentiated from the rule text by being inset and in a smaller font.

Subp.02. The Revisor reviewed and edited these rules and the 'suggested modifications'. Revisor edits are shown in sky blue text and noted in footnotes. Only a couple of the Revisor edits are explained, the majority are self-explanatory edits that improve readability and conform with rule writing protocols.

# Make sure you are amending the correct draft

05/11/22

REVISOR

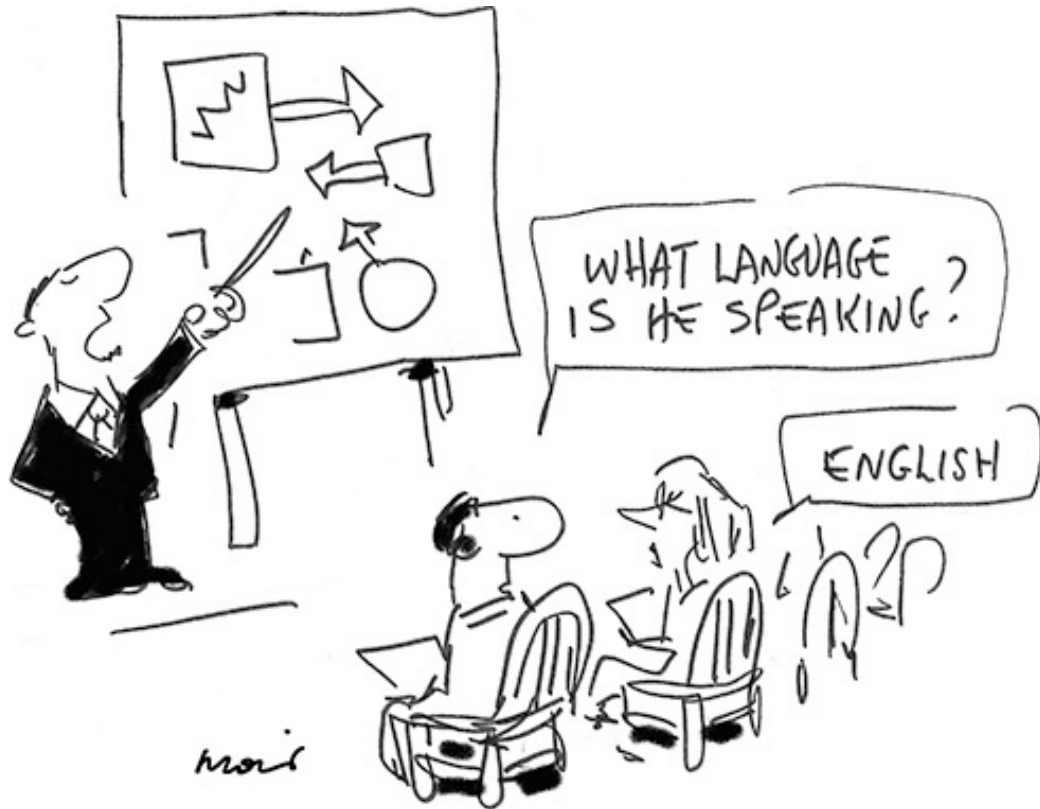
JFK/CH

AR4677

**Bureau of Mediation Services**

**Adopted Permanent Rules Relating to the Minnesota Labor Relations Act and the Public Employment Labor Relations Act**

# After your rule is approved, make sure you understand the final steps



- Look to the manual and statute and rule
- Ask IRC people
- Ask IRC in Teams



# Example of amended Governor's Office Final Form

List changes from draft rules proposal:	Several clarifying changes are being made in response to the public comments, and several clerical errors are being fixed. The changes are not substantive changes.
<u>New: ALJ Report</u>	<p>The ALJ found two defects in our proposed rule. The first defect found a statutory citation was unclear; the second defect found a problem with existing language.</p> <p>In response to the first defect, we are clarifying the statutory citation.</p> <p>For the second defect, the ALJ's proposed revision would be a monumental departure from the bureau's mission and responsibility to public employers and employees. We are providing more background information regarding the disputed issue and making some clarifying changes.</p> <p>Overall, we think the two defects reflect the ALJ's unfamiliarity with our agency and processes. Our proposed changes and explanation are attached, along with the ALJ report.</p>

# Example of amended Order Adopting Rules

3. The proposed rules have been modified, with a description and explanation for each modification attached to this order (Exhibit L1, as submitted to OAH on March 15, 2022).

These modifications are within the rule's scope and don't make the rule substantially different.

4. In response to the March 31, 2022 Order on Review of Rules and the May 9 Order on Review of Resubmitted Rules, the proposed rules have been further modified. The explanation of the changes, why they correct the defects, and why they don't result in a substantially different rule are attached as Exhibits L2 and L3, as submitted to OAH on May 2 and May 12, 2022, respectively.

If you remember the 3 Cs, you'll be fine



# Thank You!

- Michelle Hersh Vaught; Michelle.Vaught@state.mn.us; 651-539-4187
- Vanessa Vogl; vanessa.vogl@state.mn.us
- Ian Lewenstein; ian.Lewenstein@state.mn.us; 651-539-1414