RESUBMISSION

Two defects were found in the bureau’s proposed rules.¹ 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.

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 2020.²

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.³ 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.

Except for the selection procedure, peace-officer discipline-grievance arbitrations are held the same as all other arbitrations under the Public Employment Labor Relations Act—nothing under the applicable statutory section (626.892) says otherwise. The headnote for the section reads “Peace Officer Grievance Arbitration Selection Procedure.”⁴ The section references the selection procedure multiple times, making clear that the legislative focus was on the selection procedure.⁵

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¹ Order on Review of Rules (March 31, 2022) at 1.
² Minn. Stat. § 626.892, subd. 10(a): “The commissioner may adopt rules establishing training requirements consistent with this subdivision.” The only rulemaking authority granted to the bureau under the act was this permissive authority. The statutorily mandated training requirements are unique to the new roster; the bureau's proposed rule part states that the statutory training requirements apply only to the new roster, in accordance with the statute: “This part applies only to a roster member under Minnesota Statutes, section 626.892.” Proposed Minn. R. 5530.0810, subpart 1.
³ Minn. Stat. § 626.892, subd. 11.
⁴ Minn. Stat. § 626.892 (emphasis added).
⁵ See id., subs. 2, 11, 12.
The last subdivision then clarifies that except for the selection procedure, the bureau’s rules apply to the new arbitration roster:

The arbitrator selection procedure for peace officer grievance arbitrations established under this section supersedes any inconsistent provisions in chapter 179A or 572B or in Minnesota Rules, chapters 5500 to 5530 and 7315 to 7325. Other arbitration requirements in those chapters remain in full force and effect for peace officer grievance arbitrations, except as provided in this section or to the extent inconsistent with this section.6

C. The legislature unambiguously states which rule provisions apply.

The bureau finds the legislature's language unambiguous: The legislature has stated that the selection procedure for peace-officer discipline-grievance arbitrations supersedes the bureau’s existing arbitration selection procedures. Other statutory and rule requirements remain in effect.

Because the legislature already stated which rule provisions apply, that which the legislature explicitly stated need not be explicitly stated in rule as well. But in revising its rules under chapter 5530, the bureau added—for clarity—a statement that the chapter didn’t apply to the new roster, except as provided under section 626.892. The bureau, as many other agencies commonly do, chose to cross-reference to the statute. This amendment kept with the current format of part 5530.0100, which states which statutory sections apply and don’t apply to the bureau’s arbitration rosters.

D. Is cross-referencing to statute not a rule or is it unconstitutionally vague?

In most rules, one encounters some of the following phrases:

- Except as otherwise provided by Minnesota Statutes, . . .
- Unless otherwise provided by law, . . .
- In the manner and form prescribed by statute.
- Subject to applicable law, . . .
- The X requirement applies, if applicable under Minnesota Statutes, section X.

But now it’s unclear whether or when agencies can continue to use these phrases because the phrases could be considered not rules or unconstitutionally vague.

Generally, OAH has broadly interpreted the definition of a rule as the definition relates to making the law specific.7 For example, throughout rules, agencies commonly cross-reference to statute;8 these cross-references are seen in definition sections: “Dementia” has the meaning given in Minnesota Statutes, section 144G.08, subdivision 16.99 Or in introduction parts: “This chapter

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6 Id., subd. 12(c) (emphasis added).
7 Rules haven’t been considered rules if they aren’t enforceable or don’t have prospective effect. This occurs when agencies put examples in rules; use may, should, or encouraged; and draft similar language in which a party doesn’t know if something will or will not happen.
8 A simple online search on the revisor’s website shows 4,350 rule parts that cross-reference to statute.
9 Minn. R. 4659.0020, subp. 13.
establishes the criteria and procedures for regulating assisted living facilities and assisted living facilities with dementia care and must be read in conjunction with Minnesota Statutes, chapter 144G.”10 Now, arguably, this type of language—including cross-references—cannot be considered rules.

Yet by law, an efficient cross-reference to statute—or to other law—cannot be considered unconstitutionally vague because the cross-reference incorporates the legislature’s provision by reference.11 By contrast, copying legislative language wouldn’t be considered a rule because it’s not an agency statement but rather the legislature’s statement (nor can such copying be justified as needed).12

A cross-reference directs to statute and what the legislature has already said; this doesn’t make the rule unconstitutionally vague.13

E. The bureau’s proposed language is reasonable.

1. Using a statutory cross-reference was a rational choice.

As OAH frequently writes, a rule is reasonable if it’s based on an affirmative presentation of facts and evidence that rationally connect with the agency's proposed regulatory choice. Here, the bureau's proposed regulatory choice doesn't need to be the “best,” but the proposed choice must be one that a rational person could’ve made and one that isn't arbitrary or otherwise devoid of articulated reasons.

The bureau decided that its cross-reference was a rational choice because parties to a peace-officer discipline-grievance arbitration aren’t devoid of knowing how their grievance arbitration is governed. A party reading the bureau’s cross-reference is directed to the statute, which says that except for the selection procedure under that statute,14 the bureau’s rules apply—this provision is unambiguous. Or if a party were to look up the bureau’s rules on how an arbitration proceeding is held, the party would find that the proceeding is held just like any other arbitration proceeding—this provision is also unambiguous.15

There is no “hodgepodge of processes.”16 And parties don’t face uncertainty: the only difference is how the bureau refers an arbitrator to them. No more, no less. For an arbitrator, who must—as

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10 Minn. R. 4659.0010.
11 Agencies can also incorporate by reference under Minn. Stat. § 14.07, subd. 4, but under the direction of the revisor's office, they reserve incorporations by reference to nonlaw citations such as the bureau's incorporation under Minn. R. 5530.0800, subp. 2.
12 Copying statutory language should also be minimized because it can lead to obsolete and conflicting rules. Minn. Stat. § 14.07, subd. 3(1).
13 The usual markers for a vague rule are undefined or poorly defined terms, a lack of fair warning, or language that doesn't take effect upon its own terms. None of these apply here.
14 In its rules, the bureau cross-references to statute, which details the normal, decades-old selection procedure; this selection procedure is then specified in more detail in rule. See Minn. Stat. §§ 179A.16, .21; Minn. R. 5530.0900.
15 All arbitration proceedings under bureau rules have been held the same since the 1970s, when the bureau first adopted its rules to implement PELRA. See Exhibit J1 at 5, n. 12.
16 Order on Review of Rules at 5.
directed by the statute—apply to be on the peace-officer list, the only differences involve the arbitrator’s appointment, selection, and charged fees. A reasonable person applying to be on the list would be aware of the applicable statutory requirements. The statute is clear.

Furthermore, the bureau’s reasoning underlying its choice has been borne out by practice. For example, since September 2020, 29 arbitration cases for peace-officer discipline grievances have been opened and processed. And contrary to what was written in the order, parties haven’t been prohibited from predicting what will be permitted or prohibited at the hearings. Parties follow the hearing procedure that they have followed for decades.

2. A reasonable person would understand the bureau’s rule language.

Another reason that the bureau’s choice was rational was because after reviewing its rules, the bureau decided no more specific guidance was needed to help a person be reasonably informed. The bureau didn’t decide to “sidestep the process of carefully reviewing its rules.” The bureau did carefully review its rules—look no further than its 125-page rule that seeks to adopt more-uniform and consistent procedures. The bureau doesn’t find Arbitrator Swanson’s suggested language helpful, in which 11 lines of text with multiple rule citations show what the statute already makes clear.

A rational or reasonable person can read a statute and rule together and determine where inconsistencies arise. A reasonable person would see that the bureau’s rules don’t explicitly say that an arbitrator can’t steal or discriminate against a protected class. Does the bureau need to state this? Here, like everywhere, statute prevail if there is an omission or conflict in rules.

If an agency must explain every possible conflict between its rules and statutes, the spirit of the Administrative Procedure Act is diminished, especially the idea of efficient regulation: “In accomplishing its objectives, the intention of this chapter is to strike a fair balance between these purposes and the need for efficient, economical, and effective government administration.”

The bureau isn’t declining to say which portions of its rules apply to a peace-officer discipline-grievance arbitration; the legislature has unambiguously accomplished this for the bureau. The

17 Normally, an arbitrator applies directly to the bureau to be on the bureau’s arbitration roster. But to insulate and emphasis the special focus of peace-officer discipline-grievance arbitrators, the legislature made the arbitrator’s appointment process through the secretary of state and required the commissioner to consult with the community and law-enforcement stakeholders.

18 Order on Review of Rules at 5.

19 Id. at 4. Minn. R. 5500.0100-.2100 and chapter 5505 relate to private-sector proceedings. Chapter 5510 concerns proceedings before the bureau, chapter 5520 relates to a grant program, and chapter 7315 details independent review, which is only applicable when another procedure doesn’t exist to hear the grievance (Minn. Stat. § 179A.25).

20 Minn. Stat. § 14.001. This goal has been recognized by OAH as it relates to broad and flexible rules: “The void for vagueness doctrine does not preclude the use of broad, flexible standards that require the exercise of judgment. The Minnesota Supreme Court has instructed that a rule ‘should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent.’ Stated another way, a regulation is not impermissibly vague merely because its terms could have been drafted with greater precision.” OAH 5-9005-35173, Order of the Chief Administrative Law Judge on Review of Rules (August 28, 2020) at 2 (citing various Minnesota appellate cases).
bureau is deferring to the will of the legislature, which states that “other arbitration requirements in those chapters remain in full force and effect for peace officer grievance arbitrations.”

In terms of inviting inconsistent, even arbitrary responses, the bureau again would point to the statute. Except for the selection procedure, the bureau’s rules apply the same as to any other arbitration proceeding. One could claim that every agency runs the risk of giving inconsistent or arbitrary responses to questions from the public. By what an agency relies on is what the law says. Here, the law says that the bureau’s rules apply unless otherwise provided by statute.

**F. The bureau’s proposed modification makes the statutory cross-reference clearer.**

Despite the defect being cited to part 5500.2200, the bureau declines to modify the part as suggested because as discussed, parts 5500.2200 to 5500.2850 apply to all arbitration hearings and don’t contain an exception for peace-officer discipline grievances.

The bureau’s proposed modification is in part 5530.0100, the part cited by Arbitrator Swanson and where the bureau’s initial language cross-referencing to the statute appeared. The bureau’s original proposed language, while accurate, could’ve more clearly referenced the statute. Additionally, the language should be rewritten from the negative to the positive:

<table>
<thead>
<tr>
<th>5530.0100 APPLICATION, lines 75.11-75.24</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. This chapter applies to:</td>
</tr>
<tr>
<td>(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</td>
</tr>
<tr>
<td>(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.</td>
</tr>
<tr>
<td>B. but This chapter does not apply to:</td>
</tr>
<tr>
<td>(1) the list of arbitrators maintained under Minnesota Statutes, section 179A.04, subdivision 3, paragraph (b), for teacher discharge or termination hearings; or</td>
</tr>
<tr>
<td>(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.</td>
</tr>
</tbody>
</table>

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, performance measures, independent status, and removal procedures.
II. Defining \textit{timely}.

\textit{A. Is timely vague?}

The bureau’s use of \textit{timely} was deemed unconstitutionally vague.\textsuperscript{21} But now the bureau is unsure when \textit{timely} would ever be appropriate. For example, the word is suggested in a technical suggestion.\textsuperscript{22} And OAH has accepted the word in other agency rules such as in the Department of Commerce’s recent rules under RD4625\textsuperscript{23} or the Department of Health’s assisted-living rules under RD4605.\textsuperscript{24}

More important is that the word was part of existing text. Requiring an agency to fix language in existing text would be a substantial break with OAH precedent and agency rulemaking expectations. This new interpretation would also violate OAH rules: “If an agency is amending existing rules, the agency need not demonstrate the need for and reasonableness of the existing rules not affected by the proposed amendments.”\textsuperscript{25}

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.\textsuperscript{26} In the bureau’s case, the existing text was moved:

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

True, the bureau moved \textit{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.\textsuperscript{27}

When isolated by itself, \textit{timely} is vague. But the rest of the rule part says that an arbitrator must ensure that a hearing complies with parts 5500.2200 to 5500.2850 and chapter 5530. Chapter 5530

\textsuperscript{21} Order on Review of Rules at 7.
\textsuperscript{22} \textit{Id.} at 11.
\textsuperscript{23} See adopted Minn. R. 2737.0600, subp. 5; .1100, subp. 7.
\textsuperscript{24} See Minn. R. 4659.0080, subp. 1a; .0130, subp. 3(B)(2); .0180, subp. 3(C).
\textsuperscript{25} Minn. R. 1400.2070(E).
\textsuperscript{26} \textit{See, e.g.,} Judge LaFave’s order from a 2020 Racing Commission rule and his editorial suggestion: “The sole commentator in this proceeding correctly notes that the last sentence in this subpart is problematic as it may grant the Racing Commission too much discretion and may be too vague. While the language was part of the existing rules, it still should be corrected.” Order on Review of Rules (November 20, 2020) at 2.
\textsuperscript{27} Minn. Stat. § 14.001.
includes the applicable arbitration standards and conduct, performance measures, and other provisions that emphasize the meaning of *timely*. In this context, *timely* isn’t unconstitutionally vague.

**B. PELRA’s purpose.**

To better understand the bureau’s proposed amendment, look to PELRA. Enacted in 1971, PELRA strives to develop positive labor-management relations; a critical component of this is precluding lengthy and costly disputes through mediation and by encouraging parties to work toward voluntary settlements. PELRA reads in part:

(a) It is the public policy of this state and the purpose of sections 179A.01 to 179A.25 to promote orderly and constructive relationships between all public employers and their employees. This policy is subject to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety, and welfare.

(c) Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties. Adequate means must be established for minimizing them and providing for their resolution.28

The bureau repeats similar language in its rules under chapter 5530:

It is the policy of the state of Minnesota to promote orderly and constructive relationships between labor and management and to avoid unresolved disputes that can be injurious to the public as well as the parties. The use of collective bargaining procedures and binding arbitration to resolve grievances and certain interest disputes between labor and management are encouraged.29

The bureau serves the broader public, but more specifically, the bureau’s mission is to serve public employers and employees through labor-management training and mediation and by guiding parties on issues of collective-bargaining representation.

Both mediation and arbitration exist for the parties to resolve their disputes. If a dispute progresses to arbitration, a settlement is always preferred.

**C. The bureau has never prescribed a specific period for holding an arbitration hearing.**

Because arbitration—like mediation—is driven by the parties, the bureau finds that prescribing a set period for holding a hearing is antithetical to the bureau’s purpose and mission. *Fair* and *timely* is for the parties, not the arbitrator. An arbitrator oversees a dispute-resolution process, and the arbitrator’s responsibility is to “schedule time commitments in a manner consistent with the needs of the parties and the expeditious handling of disputes.”30

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28 *Id.* § 179A.01.
29 Minn. R. 5530.0200.
30 Minn. R. 5530.0800, subp. 6.
The incorporated Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (under part 5530.0800, subpart 2) only confirms that an arbitrator must serve the parties; what constitutes *timely* is up for the parties to decide, not the arbitrator:

**J. Avoidance of Delay**

1. **It is a basic professional responsibility of an arbitrator** to plan a work schedule so that present and future commitments will be fulfilled in a timely manner.

   a. When planning is upset for reasons beyond the control of the arbitrator, every reasonable effort should nevertheless be exerted to fulfill all commitments. If this is not possible, prompt notice at the arbitrator’s initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.

2. **An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays.**

In responding to Arbitrator Swanson’s comments, the bureau’s intent was to refer him to an arbitrator’s duties under part 5530.1200, subpart 3. While the bureau’s response was inartful, the bureau was attempting to show that there is not, and never has been, an explicit requirement for when an arbitrator should hold a hearing, but that an arbitrator has always had to comply with the performance standard. This performance standard requires an arbitrator to provide the parties an opportunity for a *timely* hearing date (within 90 days), not to impose such a date.

But to make this performance standard more explicit, the bureau proposes the following modifications:

**5500.2220 ARBITRATOR’S RESPONSIBILITY, lines 11.10-11.15:**

Subpart 1. **Ensuring fair hearing.** An arbitrator must ensure that a fair and *timely* hearing is conducted in a manner that minimizes cost and expense to the parties and complies with: . . .

**5530.0900 PANEL SELECTIONS AND REFERRALS, lines 92.18-93.10:**

Subp. 6. **Scheduling.**

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

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5530.1200 PERFORMANCE MEASURES, lines 94.13-94.17:

Subp. 3. Scheduling. A lack of substantiated written complaints from parties that a roster member has failed to offer at least three dates on which the roster member is available to hear a case within 90 calendar days of the roster member's notification of selection to comply with subpart 6, item D, is evidence that the roster member is meeting the availability standards of this chapter.

Because timely seems to have been corrupted, the bureau proposes to strike it. As discussed, the bureau has several provisions in rule and statute that reinforce the importance for an arbitrator to be available to the parties. The second and third modifications explicitly state this importance.

As the second modification shows, the arbitrator’s duty is to be available to the parties. The bureau is requiring an arbitrator to offer at least three dates within 90 days of the arbitrator’s referral. This requirement is to benefit the parties, not the arbitrator. If the parties don’t want to hold a hearing within 90 days, that is their right. The third modification then cross-references to the moved requirement.

D. The bureau’s modification is reasonable and makes the performance standard more explicit.

Requiring a specific period for a hearing is unworkable for several reasons. First, arbitration is for the parties. Second, such a requirement counters the preference for a settlement over a costly and time-consuming arbitration hearing—requiring a hearing within a prescribed period would greatly discourage settlement. Third, a party, depending on the party’s job position, may have trouble finding counsel available to fairly represent the party within 90 days. And fourth, it goes against the recommendations of key stakeholders—including public employers and employees—and the bureau’s arbitration advisory committee.

The bureau's arbitration advisory committee is a statutorily permitted, standing (not ad hoc) advisory committee. The bureau finds it unreasonable that Arbitrator Swanson's wishes trump the advice and consent given by the bureau's advisory committee of three labor advocates, three management advocates, and two arbitrators from the bureau’s arbitration rosters.

Making the suggested change not only goes against the wants of the bureau's stakeholders, but the change would be so monumental as to warrant a separate rulemaking to allow proper notice and comment. This isn’t a minor change to bureau procedure, and it shouldn’t be done at this rulemaking stage.

Finally, Arbitrator Swanson and other stakeholders aren’t denied opportunities to seek changes to bureau rules. For example, a person can seek redress by petitioning the bureau, by personal appeal

32 This language was originally proposed under part 5530.1200.
to the bureau or legislature (including to the Legislative Coordinating Commission),\textsuperscript{34} or by petitioning OAH if an unadopted rule is believed to have been enforced.\textsuperscript{35}

If the bureau’s proposed modification doesn’t correct the defect, the bureau proposes withdrawing its amendment under part 5500.2220, subpart 1, and returning to the status quo under part 5530.1000, subpart 1.

The bureau’s proposed modifications are reasonable modifications that don’t make the rule substantially different—they are within the scope of the proposed rule and in response to public comments and the March 31 Order on Review.

\textsuperscript{34} Id. § 3.842.
\textsuperscript{35} Id. § 14.381.