

To Gunnar Johnson, Gary Anderson
From Kathryn Hoffman, Interim Legal Director, MCEA
Date 9/7/16
RE: Contested Case Hearing for PolyMet

In response to concerns raised about the right of the DNR to hold a contested case hearing prior to making a final determination on a permit to mine, I offer the following thoughts:

An agency has the discretion to grant or deny a contested case hearing, and courts will defer to that determination as long as a party is not illegally denied a contested case hearing.

Generally, where an agency rule does not entitle a party to a contested case hearing, it is squarely within the agency's discretion to decide whether to hold one. *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 666 (Minn. 1984); *Walter Auto Sales Inc. v. Best Buy Co., Inc.*, 2002 172025 (Minn. Ct. App., February 25, 2002 ("Rather, review of an agency's refusal to hold a contested case hearing on a permit application requires us to give the agency wide discretion to determine whether the permit challenger has met its burden to show that a contested case hearing is warranted.") While these challenges ordinarily arise after an agency has *refused* to hold a contested case hearing, , there is no reason to think that the courts would afford any less deference to the agency's decision in a challenge to an agency decision to *hold* a contested case hearing.

The language of the Minnesota Administrative Procedures Act, which governs contested case hearings, is not inconsistent with this reading. For instance, the statement that "An agency shall initiate a contested case proceeding when one is required by law," Minn. Stat. § 14.57, addresses only situations where a contested case hearing is mandatory; it does not dictate agency procedure where a contested case hearing is discretionary.

In addition, some agencies are exempted from MAPA, but DNR is not one of them. Minn. Stat. § 14.03.

Thus, even if there is no *requirement* that the agency hold a contested case hearing on a permit to mine, DNR has the discretion to do so, and any challenges to its discretion are likely to be upheld.

The language of the Permit to Mine rules allow DNR the discretion to hold a contested case hearing prior to the Commissioner's determination on the permit.

The permit to mine provision (Minn. R. 6132.4000) is not a model of drafting clarity, but it does not limit the agency's discretion on when or whether to hold a contested case hearing. Subpart 3 requires only that if a hearing is held, it be initiated no more than 30 days after the last date of opportunity to object. Otherwise, it leaves the determination of holding a contested case hearing in the agency's discretion.

One concern may be that under 6132.4000, the *Commissioner* rather than an ALJ holds the hearing. Minn. R. 6132.4000, subp. 3. However, under MAPA, a contested case hearing before an ALJ is considered a hearing before the agency, and thus before the Commissioner. See Minn. Stat. § 14.03,

subp. 2. While the Administrative Law Judge presides over a contested case hearing, it is still considered a DNR hearing under MAPA and would meet the requirements of the Permit to Mine rule.

Another concern may be logistical in nature. DNR may interpret subp. 3 of Minn. R. 6132.4000 as requiring a *public* hearing (i.e. an opportunity for public comment, rather than a contested case hearing) simply because it would be very hard to have a contested case hearing “no more than 30 days after the last date of opportunity to object,” as required by the provision. Minn. R. 6132.4000, subp. 3(B)(1). See also 93.481, subp. 2 (stating that a “public hearing” shall be held in the locality of the proposed operation within 30 days of receipt of objections by certain parties).

Nevertheless, the permit to mine rules clearly contemplate a contested case hearing somewhere in the process. Minn. R. 6132.5000 (stating that procedures under MAPA “apply to a contested case hearing under parts 6132.0100 to 6132.5300,” which is inclusive of 6132.4000). Moreover, 6132.4000, subp. 3 mentions, as a basis for holding a hearing, an objection that “raises a material issue of fact...and there is a reasonable basis underlying the issue of fact such that holding a hearing would allow the presentation or introduction of relevant information that would aid the commissioner in resolving the issues and in making a final determination on the issuance of the permit to mine.” Minn. Stat. 6132.4000, subp. 2(C)(3). Traditionally, contested case hearings are held to resolve issues of material fact, as opposed to questions of law. *See, e.g.*, Minn. R. 7000.1900, subp. 1 (describing a “material issue of fact in dispute concerning the matter pending” as the criteria for the MPCA Board or Commissioner to hold a contested case hearing). The value of typical public hearings, where individual parties have a very limited time to speak (and often many do not have the opportunity to speak at all), and where no testimony is presented and no evidence submitted, simply do not meet the purpose of the regulation (“the presentation or introduction of relevant information that would aid the Commissioner in resolving the issues.”)

Furthermore, the other criteria for holding a hearing include denial of the permit or the addition of provisions that were not included in the application. Although in some cases the public may object to denial of a permit, it is hard to imagine that this provision was not included for the sake of the permit applicant. This is a standard, typical situation calling for a contested case hearing; indeed, without an impartial presiding officer such as an ALJ, the opportunity to provide evidence and testimony, and the opportunity to question DNR experts, it is hard to see the value of the provision.

The DNR may feel that holding a contested case hearing within 30 days is unworkable, and frankly I agree. It may be simply that the underlying statute is old; at the time it was promulgated, it may well have been possible to hold a hearing within that time frame. The expanding complexity of permitting cannot change the nature of rights that have been granted to permit applicants or the affected public. Instead, according to precedent it seems that as long as the DNR strives to stay as close to the time frame as possible, it has leeway to take the time needed to meet the intent of the statutes and regulations. *See Matter of Eigenheer*, 453 NW 2d 359 (Minn. Ct. App. 1990).

Minnesota Statute 93.50, states that: “Any person aggrieved by any order, ruling, or decision of the commissioner may appeal such order, ruling, or decision in the manner provided in chapter 14.” Chapter

14 is the entirety of MAPA, and governs contested case hearings; on that basis the DNR may believe that the time for a contested case hearing is as an “appeal” from the final permit decision made by the Commissioner. However, in light of Rule 6132.4000 subpart 3 as discussed above this is not the best interpretation of the statute.

A better (and equally obvious) interpretation of Minnesota Statute 93.50 is that it provides the right to *judicial* review following a contested case hearing, as described in chapter 14. Statute 14.63 states that “any person aggrieved by a final decision in a contested case is entitled to judicial review of the decision under the provisions of sections 14.63 to 14.68.” In other words, while an appeal “in the manner provided in chapter 14” could be a contested case hearing, it could also be an appeal from the final result of the contested case hearing. The latter interpretation provides room for a contested case hearing before a final permit decision is made, which in turn allows for the type of input into permit decisions that seems to be contemplated by Rule 6132.4000 subpart 3.

Thus, there are multiple routes to the desired outcome for DNR. They could interpret 6132.4000, subp. 3 as governing a contested case hearing, and refer the matter to an ALJ to hold a prehearing within 30 days. They could continue to interpret the hearing referred to in subp. 3 as a public hearing, but the Commissioner could make a determination at that public meeting as to whether a contested case hearing is required. A contested case hearing would be particularly appropriate when the issue raised was one of material fact, as described in 6132.4000, subp. 2. Both interpretations are consistent with Chapter 6132 and MAPA, and would allow the Commissioner to hold a contested case hearing prior to .