

Exhibit A

1.1 **Department of Employment and Economic Development**

1.2 **Proposed Permanent Rules Relating to Unemployment Insurance; Modifying**
1.3 **Appeals, Employer Records, and Worker Status Provisions**

1.4 **3310.2901 SCOPE AND PURPOSE.**

1.5 Parts 3310.2901 to 3310.2924 establish procedures for hearings conducted by
1.6 unemployment law judges ~~on the appeal~~ following:

1.7 A. appeals of department determinations ~~pertaining to eligibility or~~
1.8 ~~ineligibility for unemployment benefits, charges to employers' accounts and tax rate~~
1.9 ~~assignments, determinations on an employer's liability to pay taxes, determinations on~~
1.10 ~~fraudulent payment of unemployment benefits, and all other appeals that are decided by~~
1.11 ~~unemployment law judges either by law or rule; or~~

1.12 B. referrals for direct hearing under Minnesota Statutes, section 268.101,
1.13 subdivision 3a.

1.14 **3310.2902 DEFINITIONS.**

1.15 Subpart 1. **Scope.** For purposes of parts 3310.2901 to 3310.2924, the terms defined
1.16 in this part have the meanings given them.

1.17 Subp. 2. [See repealer.]

1.18 Subp. 3. [Repealed, 33 SR 999]

1.19 Subp. 4. **Department.** "Department" means the Department of Employment and
1.20 Economic Development.

1.21 Subp. 4a. **Hearing.** "Hearing" means the de novo due process evidentiary hearing
1.22 authorized under Minnesota Statutes, section 268.105, subdivision 1.

1.23 Subp. 5. **Party.** "Party" means any ~~unemployment benefits~~ applicant or employer
1.24 whose legal rights, duties, or privileges will be directly determined in a hearing.

2.1 **3310.2905 NOTICE OF ~~APPEAL~~ HEARING.**

2.2 Subpart 1. [Repealed, L 2004 c 206 s 53]

2.3 Subp. 2. **Information Notice.** The chief unemployment law judge must send a
2.4 notice of hearing, by mail or electronic transmission, to each party at least ten calendar
2.5 days before the scheduled date of hearing unless notice is waived by the parties. The
2.6 notice must state the time, date, method by which the hearing will be conducted, and
2.7 issues to be considered at the hearing. If the issue to be considered at the hearing involves
2.8 ineligibility for unemployment benefits because of a separation from employment, the
2.9 notice must explain that the parties should be prepared to discuss all incidents that arose
2.10 during the course of the employment that led to the separation. The notice of appeal
2.11 hearing must also include materials that provide the following information:

2.12 A. ~~a statement that a hearing will be scheduled promptly, and that the parties~~
2.13 ~~should begin to prepare for the purpose of the hearing;~~ is to take sworn testimony and
2.14 other evidence on the issues involved, that the hearing is the only procedure available
2.15 under the law at which a party may present evidence, and that further appeals consist of a
2.16 review of the evidence submitted at the hearing;

2.17 B. a statement of the parties' right to represent themselves or to be represented
2.18 by an attorney or other duly authorized representative;

2.19 C. a brief description of the procedure to be followed at the hearing-, including
2.20 the role of the unemployment law judge;

2.21 D. a statement that the parties should ~~bring to the hearing all documents, records,~~
2.22 ~~and~~ arrange in advance for the participation of witnesses they need to support their position;

2.23 E. a statement that a party may request find out the name of the other parties'
2.24 attorney or other representative and names of the witnesses and documents that another

3.1 the other party intends to bring to have testify at the hearing, and an explanation of the
3.2 process for making the request;

3.3 F. a statement that subpoenas may be available to compel the attendanee
3.4 participation of witnesses or the production of documents, and an explanation of the
3.5 process for requesting a subpoena;

3.6 G. a statement that documents contained in the department's records, and
3.7 documents submitted by the parties that will be introduced at the hearing as possible
3.8 exhibits are available upon request, and an explanation of the process for making the
3.9 request. will be sent to the parties in advance of the hearing;

3.10 H. ~~If a decision issued under Minnesota Statutes, section 268.105, subdivision~~
3.11 ~~1, paragraph (c), could result in an applicant being overpaid unemployment benefits, the~~
3.12 ~~notice must contain the following statement:~~

3.13 ~~"You have a statement that even if the applicant already received unemployment~~
3.14 ~~benefits on your benefit account., it is important for you to attend this hearing even if~~
3.15 ~~you are back to work and not receiving unemployment benefits now to participate~~
3.16 ~~in the hearing, because if you lose the appeal, you the applicant is held ineligible,~~
3.17 ~~the applicant will not be able to receive further unemployment benefits and you the~~
3.18 ~~applicant will have to pay back all the unemployment benefits you have already~~
3.19 ~~received. These unemployment benefits are called overpaid unemployment benefits~~
3.20 ~~and they could be deducted from your state income tax refund, rent credit refund, or~~
3.21 ~~from a future benefit account.";~~

3.22 I. a statement that the unemployment law judge will determine the facts
3.23 based upon a preponderance of the evidence along with the statutory definition of
3.24 "preponderance of the evidence";

4.1 J. a statement that a party who fails to participate in the hearing will not be
4.2 allowed a rehearing unless the party can show good cause for failing to participate, along
4.3 with the statutory definition of "good cause"; and

4.4 K. a statement that an applicant, if unemployed, must file weekly continued
4.5 requests for unemployment benefits while the appeal is pending.

4.6 **3310.2908 RESCHEDULING AND CONTINUANCES.**

4.7 Subpart 1. Rescheduling. Requests to reschedule a hearing must be addressed to
4.8 the ~~appeals office~~ chief unemployment law judge in advance of the regularly scheduled
4.9 hearing date. The request may be made in person, by telephone or other electronic
4.10 transmission, or in writing by mail. ~~Unless a determination is made by the appeals~~
4.11 ~~office that a request to reschedule a hearing is made for the purposes of delay,~~ A hearing
4.12 must be rescheduled by the ~~appeals office~~ based on a party's need for additional time to
4.13 obtain necessary evidence or to obtain representation or adequately prepare, ~~inability to~~
4.14 ~~be present at the regularly scheduled time due to illness, other judicial or quasi-judicial~~
4.15 ~~proceedings that have previously been scheduled,~~ or other compelling reasons beyond the
4.16 control of the party that prevent attendance participation at the originally scheduled time.
4.17 A hearing may be rescheduled only once by each party except in the case of an emergency.
4.18 If requested by the ~~appeals office~~, a written statement by mail or electronic transmission
4.19 confirming the reasons for requesting that the case be rescheduled must be provided to the
4.20 ~~appeals office by the requesting party~~ chief unemployment law judge.

4.21 ~~Unless a determination is made by the unemployment law judge that a request to~~
4.22 ~~reschedule a hearing is made for the purpose of delay, a judge who has been assigned a~~
4.23 ~~case for hearing must reschedule a hearing at the request of a party provided grounds~~
4.24 ~~for rescheduling have been established. The failure of subpoenaed witnesses to appear~~
4.25 ~~at the hearing or the failure to produce subpoenaed documents may constitute grounds~~

5.1 ~~for rescheduling. The ten-calendar-day notice requirement for hearings does not apply~~
5.2 ~~to rescheduled hearings.~~

5.3 Subp. 2. Continuances. If a request for rescheduling is made because of the
5.4 unavailability of a witness or the need to obtain documents, the unemployment law judge
5.5 may direct that the hearing take place as scheduled. After obtaining the testimony and
5.6 other evidence then available, the unemployment law judge must determine whether
5.7 the hearing should be continued to obtain the testimony of the unavailable witness or
5.8 the unavailable documents. The ten-calendar-day notice requirement for hearings does
5.9 not apply to continued hearings.

5.10 The unemployment law judge has the discretion to continue a hearing if the judge
5.11 determines that additional evidence is necessary for a proper result.

5.12 **3310.2910 NOTICE OF HEARING; CONSOLIDATION OF ISSUES AND NEW**
5.13 **ISSUES.**

5.14 ~~The notice of hearing must be mailed to each party at the last known address at least~~
5.15 ~~ten days before the scheduled date of hearing unless notice is waived by the parties. The~~
5.16 ~~notice must state the time, date, and place of the hearing, the name of the unemployment~~
5.17 ~~law judge who will hear the case, the issues to be considered at the hearing, and must~~
5.18 ~~contain the information required by part 3310.2905, subpart 2, items B to H. If the issue~~
5.19 ~~to be considered at the hearing involves ineligibility for unemployment benefits because~~
5.20 ~~of a separation from employment, the notice must explain that the parties should be~~
5.21 ~~prepared to discuss all incidents that arose during the course of the employment that led~~
5.22 ~~to the separation. The parties must also be advised of their right to represent themselves~~
5.23 ~~or to be represented by an attorney or other duly authorized representative. Upon the~~
5.24 ~~motion request of a party to a hearing or on the unemployment law judge's motion, the~~
5.25 ~~unemployment law judge may consolidate for hearing issues involving the same parties~~
5.26 ~~and. The unemployment law judge may take testimony and render a decision on issues not~~
5.27 ~~listed on the notice of hearing if each party is so notified on the record at the hearing, is~~

6.1 advised of the right to object, and does not object on the record. If a party objects, the
 6.2 unemployment law judge must:

6.3 A. continue the hearing to allow the party to prepare for consideration of the
 6.4 issue; or

6.5 B. direct the department to address the issue and send to the parties a
 6.6 determination by mail or electronic transmission.

6.7 **3310.2911 INTERPRETERS.**

6.8 The ~~department~~ chief unemployment law judge must provide an interpreter, when
 6.9 necessary, upon the request of a party. The requesting party must notify the ~~appeals~~
 6.10 ~~office~~ chief unemployment law judge at least ~~seven~~ five calendar days before the date of
 6.11 the hearing that an interpreter is required. ~~If no request is made,~~ The unemployment
 6.12 law judge must continue any hearing where a witness or ~~principal party in interest is a~~
 6.13 ~~disabled person so that~~ needs an interpreter ~~can be appointed in order to be understood or~~
 6.14 to understand the proceedings.

6.15 All notices and other ~~documents distributed~~ written materials sent to parties and
 6.16 ~~witnesses by the appeals office~~ must be prepared in easily understood English.

6.17 A written statement in English, Spanish, ~~Laotian,~~ Vietnamese, ~~Cambodian,~~ Somali,
 6.18 and Hmong which states that the accompanying documents are important, and that if the
 6.19 reader does not understand the documents, the reader should seek immediate assistance,
 6.20 must accompany all notices and written ~~documents distributed by the appeals office to the~~
 6.21 ~~party whenever the office has reason to believe the primary language of the party is one of~~
 6.22 ~~those previously listed other than English~~ materials sent to the parties.

6.23 **3310.2912 EXHIBITS IN TELEPHONE CONFERENCE HEARINGS.**

6.24 Upon receipt of the notice of a ~~telephone conference~~ hearing, and no later than
 6.25 five calendar days before the scheduled ~~time~~ date of hearing, parties may submit to the
 6.26 ~~department~~ chief unemployment law judge, by electronic transmission or mail, any

7.1 documents ~~they wish~~ a party would like to offer as exhibits at the hearing. Copies of
7.2 the documents submitted by the parties, as well as all documents that are contained in
7.3 the department's records that will be introduced as exhibits, must be mailed, or sent by
7.4 electronic transmission, to all parties or the parties' representative by the ~~appeals office~~
7.5 chief unemployment law judge in advance of the hearing.

7.6 If a party ~~moves~~ requests to introduce additional documents during the course of the
7.7 hearing, and the unemployment law judge rules that the documents should be admitted
7.8 into evidence, the ~~moving~~ requesting party must send, by electronic transmission or mail,
7.9 copies of the documents to the unemployment law judge and the ~~opposing~~ other party. The
7.10 record must be left open for sufficient time for the submission of a written ~~objection and~~
7.11 ~~for~~ response to the documents. The response may be ~~in writing~~ sent by mail or electronic
7.12 transmission ~~or~~. The unemployment law judge may, when appropriate, reconvene the
7.13 ~~telephone conference~~ hearing to obtain a response or permit cross-examination regarding
7.14 the late filed exhibits.

7.15 **3310.2913 ACCESS TO DATA.**

7.16 The parties to a hearing must be allowed reasonable access to department data
7.17 necessary to represent themselves ~~properly in proceedings under parts 3310.2901 to~~
7.18 ~~3310.2924~~ the hearing. Access to data ~~under parts 3310.2901 to 3310.2924~~ must be
7.19 consistent with ~~Minnesota Statutes, chapter 13; Minnesota Statutes, section 268.19; and~~
7.20 ~~other~~ all laws relating to data practices. ~~Upon oral or written request by a party or the~~
7.21 ~~party's representative, the appeals office must provide copies of documents that are in the~~
7.22 ~~department's records that will be introduced as exhibits. The copies~~ data must be provided
7.23 by the chief unemployment law judge at no cost and, ~~upon request, must be mailed or sent~~
7.24 by electronic transmission to the party or the party's representative.

8.1 **3310.2914 SUBPOENAS AND DISCOVERY.**

8.2 Subpart 1. **Subpoenas.** The unemployment law judge may issue subpoenas are
8.3 ~~available to a party~~ to compel the attendance of witnesses, the production of documents
8.4 or other exhibits, upon a showing of necessity by the requesting party applying for
8.5 ~~subpoenas. Requests for issuance of subpoenas may be obtained by calling or writing~~
8.6 ~~the appeals office~~ must be made to the chief unemployment law judge, by electronic
8.7 transmission or mail, sufficiently in advance of the scheduled hearing to allow for the
8.8 service of the subpoenas. The requesting party must identify the person or documents to
8.9 be subpoenaed, the subject matter of the evidence requested, and their necessity. A request
8.10 for a subpoena may be denied if the testimony or documents sought would be irrelevant,
8.11 immaterial, or unduly cumulative or repetitious. ~~A request for a subpoena may be renewed~~
8.12 ~~when a party finds an additional basis or need for evidence.~~

8.13 ~~If a party whose request for a subpoena has been denied may request at the time of~~
8.14 ~~the hearing that,~~ the unemployment law judge ~~who conducts~~ must reconsider the request
8.15 during the hearing issue the subpoena and determine whether the request was properly
8.16 denied. If the unemployment law judge ~~grants~~ determines that the request for a subpoena
8.17 was not properly denied, the unemployment law judge ~~may adjourn~~ must continue the
8.18 hearing to allow a sufficient time for service of and compliance with the subpoena.

8.19 The unemployment law judge may issue a subpoena on the judge's own motion.

8.20 Subp. 2. **Discovery.** Each party, within three ~~working~~ calendar days following
8.21 ~~demand request~~ by another party, must disclose the name of the party's attorney or other
8.22 representative and the names of all witnesses the party intends to ~~call~~ have testify at the
8.23 hearing ~~and identify any written documents that the party intends to introduce at the~~
8.24 ~~hearing.~~ The ~~demand request~~ and the response may be made by mail or by telephone
8.25 electronic transmission. ~~The demanding party must be permitted to inspect any identified~~
8.26 ~~documents at a mutually agreeable time and location prior to the hearing if a demand to~~
8.27 ~~inspect is made at least three working days before the hearing. Unless otherwise agreed,~~

9.1 ~~the demanding party must be permitted to reproduce copies of any identified documents~~
 9.2 ~~only when reproduction is possible without removing them from a party's possession. Any~~
 9.3 ~~witnesses unknown at the time of the disclosure request must be disclosed as soon as they~~
 9.4 ~~become known. If a party fails to comply with the disclosure requirements of this subpart,~~
 9.5 ~~the unemployment law judge must may, upon request notice by the demanding requesting~~
 9.6 ~~party, consider rescheduling continue the hearing under part 3310.2908.~~

9.7 **3310.2915 DISQUALIFICATION OF UNEMPLOYMENT LAW JUDGE.**

9.8 An unemployment law judge must ~~remove himself or herself~~ request to be removed
 9.9 from any case by the chief unemployment law judge where the judge believes that
 9.10 presiding over the case would create the appearance of impropriety. ~~No~~ The chief
 9.11 unemployment law judge may hear must remove an unemployment law judge from any
 9.12 case where any of the parties to the appeal are related to the judge ~~by blood or marriage or~~
 9.13 have a personal relationship with the judge. ~~A~~ The chief unemployment law judge must
 9.14 not hear remove an unemployment law judge from any case if the judge has a financial
 9.15 or personal interest in the outcome. ~~A judge having knowledge of such a relationship or~~
 9.16 interest must immediately remove himself or herself from the case.

9.17 Any party may ~~move for~~ request the removal of ~~a~~ an unemployment law judge by
 9.18 written application of the party together with a submitting to the chief unemployment law
 9.19 judge, by mail or electronic transmission, a written statement of the basis for removal.
 9.20 ~~Upon the motion of the party,~~ The chief unemployment law judge must decide the fitness
 9.21 of the unemployment law judge to hear the particular case.

9.22 **3310.2916 REPRESENTATION BEFORE UNEMPLOYMENT LAW JUDGE.**

9.23 ~~Any individual may personally appear in any proceeding~~ In a hearing before an
 9.24 unemployment law judge ~~and,~~ a party may be represented by an attorney or a duly
 9.25 authorized representative. ~~Any partnership may be represented by any of its members, an~~
 9.26 ~~attorney, or other duly authorized representative. Any corporation or association may be~~

10.1 ~~represented by an officer, an attorney, or other duly authorized representative. Except for~~
10.2 ~~an attorney-at-law, no person may charge an applicant a fee of any kind.~~

10.3 An unemployment law judge may refuse to allow any a person to represent others
10.4 ~~in any proceeding before an unemployment law judge~~ a hearing if that person ~~is~~ acts
10.5 ~~in an unethical in conduct or intentionally and manner or repeatedly fails to observe~~
10.6 ~~the provisions of the law or rules relative to the proceedings or follow~~ the instructions
10.7 of the unemployment law judge.

10.8 **3310.2917 PUBLIC ACCESS TO HEARINGS AND RECORDING OF HEARINGS.**

10.9 Subpart 1. Public access. ~~Appeal Hearings are public hearings. If a member of the~~
10.10 ~~public requests to listen in on a hearing conducted by telephone conference, or requests~~
10.11 ~~to sit in on a hearing conducted in person, the unemployment law judge must make the~~
10.12 ~~appropriate accommodation. An unemployment law judge may exclude nonessential~~
10.13 ~~persons~~ a member of the public only when necessary ~~due to physical space limitations or~~
10.14 ~~to maintain decorum. Upon the judge's motion or upon the motion of a party, a judge may~~
10.15 ~~sequester witnesses due to space limitations or to avoid prejudice or collusion.~~

10.16 Subp. 2. Recording. The unemployment law judge must make a recording of all
10.17 testimony that is the official record. No other voice recordings or pictures may be made
10.18 ~~in the hearing room of any party, attorney, representative, or witness involved in the~~
10.19 ~~hearing while~~ during the hearing ~~is in session.~~

10.20 **3310.2920 ADMINISTRATION OF OATH OR AFFIRMATION.**

10.21 An unemployment law judge has authority to administer oaths and affirmations.
10.22 Before testifying, every witness is required to declare to testify truthfully, by oath or
10.23 affirmation. ~~The mode of administering an oath is as practiced in this state. Minnesota~~
10.24 Statutes, sections 358.07 and 358.08, provide the form of the oath or affirmation is as set
10.25 ~~forth in Minnesota Statutes, sections 358.07 and 358.08.~~

11.1 **3310.2921 CONDUCT OF HEARING.**

11.2 The chief unemployment law judge has discretion regarding the method by which the
11.3 hearing is conducted. The hearing must be conducted by an unemployment law judge as an
11.4 evidence-gathering inquiry, without regard to a burden of proof. The order of presentation
11.5 of evidence is determined by the unemployment law judge. ~~The judge must inform the~~
11.6 ~~parties of the statutory provisions on burdens of proof before the taking of testimony.~~

11.7 Each party may present and examine witnesses and offer their own documents or other
11.8 exhibits. ~~To the extent permitted by Minnesota Statutes, section 268.19, and other laws~~
11.9 ~~pertaining to the protection of data, a party must be provided with a copy of any document~~
11.10 ~~or exhibit accepted into evidence upon the request of the party.~~ Opposing Parties have
11.11 the right to examine witnesses, object to exhibits and testimony, and cross-examine the
11.12 other party's witnesses. The unemployment law judge should must assist ~~unrepresented~~
11.13 all parties in the presentation of evidence. The unemployment law judge must rule upon
11.14 evidentiary objections on the record. The unemployment law judge must permit rebuttal
11.15 testimony. Parties have the right to make closing statements. Closing statements may
11.16 include comments based upon the evidence and arguments of law. The unemployment
11.17 law judge may limit repetitious testimony and arguments.

11.18 The unemployment law judge must exercise control over the hearing procedure in
11.19 a manner that protects the parties' rights to a fair hearing, including the sequestration of
11.20 witnesses to avoid prejudice or collusion. The unemployment law judge must ensure that
11.21 all relevant facts are clearly and fully developed. The unemployment law judge may, on
11.22 the judge's own motion, obtain testimony and other evidence from department employees
11.23 and any other person the judge believes will assist the judge in reaching a proper result.

11.24 Before taking testimony, the unemployment law judge must inform the parties of
11.25 the following:

11.26 A. that the purpose of the hearing is to take testimony and other evidence on
11.27 the issues;

- 12.1 B. that the hearing is the only opportunity available to the parties to present
12.2 testimony and other evidence on the issues involved;
- 12.3 C. an explanation of how the hearing will be conducted, including the role and
12.4 obligations of the unemployment law judge;
- 12.5 D. that the parties have the right to request that the hearing be continued so that
12.6 additional witnesses and documents can be presented, by subpoena if necessary;
- 12.7 E. that the facts will be determined upon a preponderance of the evidence, along
12.8 with the statutory definition of "preponderance of the evidence";
- 12.9 F. the statutory provision on burden of proof;
- 12.10 G. that certain government agencies may have access to the information
12.11 provided at the hearing if allowed by statute and that the information provided may be
12.12 disclosed under a district court order; and
- 12.13 H. that after the hearing is over, the unemployment law judge will issue a
12.14 written decision, which will be sent to the parties by mail or electronic transmission.

12.15 **3310.2922 RECEIPT OF EVIDENCE.**

12.16 Only evidence received into the record of any hearing may be considered by the
12.17 unemployment law judge. The parties may stipulate to the existence of any fact or the
12.18 authenticity of any exhibit.

12.19 All competent, relevant, and material evidence, including records and documents in
12.20 the possession of the parties that are offered into evidence, are part of the hearing record.
12.21 ~~A~~ An unemployment law judge may receive any evidence that possesses probative value,
12.22 including hearsay, if it is the type of evidence on which reasonable, prudent persons
12.23 are accustomed to rely in the conduct of their serious affairs. ~~A~~ An unemployment law
12.24 judge may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly
12.25 repetitive. ~~A~~ An unemployment law judge is not bound by statutory and common law

13.1 rules of evidence. The rules of evidence may be used as a guide in a ~~determination of~~
 13.2 determining the quality ~~and priority~~ of evidence offered. ~~A~~ An unemployment law judge
 13.3 may draw adverse inferences from the refusal of a ~~party or~~ witness to testify on the basis
 13.4 of any privilege. ~~A~~ An unemployment law judge may only use reliable, probative, and
 13.5 substantial evidence as a basis for decision.

13.6 **3310.2923 OFFICIAL NOTICE.**

13.7 An unemployment law judge may take official notice of ~~adjudicative facts and~~
 13.8 matters of common knowledge and may take notice of facts within the judge's specialized
 13.9 knowledge in the field of unemployment insurance. Any fact officially noticed must
 13.10 be ~~noticed~~ so stated on the record ~~in the decision~~ during the hearing. Parties must be
 13.11 ~~notified of any facts officially noticed by the judge and must be~~ given an opportunity to
 13.12 contest the noticed facts.

13.13 ~~A judge may officially note any facts that are subject to judicial notice in the courts~~
 13.14 ~~of Minnesota.~~

13.15 **3310.2924 EX PARTE COMMUNICATIONS.**

13.16 Private communication between an unemployment law judge assigned to ~~an appeal~~
 13.17 conduct the hearing and one ~~or more~~ of the parties ~~to an appeal~~, in the absence of the other
 13.18 ~~parties to the appeal party~~, is forbidden if it relates to the substance of the matter at issue.
 13.19 Private communication is to be avoided even when it does not relate to the subject matter
 13.20 of the ~~appeal~~ hearing if it would create the appearance of impropriety.

13.21 **3315.0555 DETERMINING WORKER STATUS.**

13.22 Subpart 1. **Essential factors.** When determining whether an individual is an
 13.23 employee or an independent contractor, five essential factors must be considered and
 13.24 weighed within a particular set of circumstances. ~~Of~~ The five essential factors to be
 13.25 considered, ~~the two most important are those:~~

14.1 A. ~~that indicate the right or the lack of the right to control the means and~~
14.2 ~~manner of performance; and~~

14.3 B. the right to discharge the worker without incurring liability. ~~Other essential~~
14.4 ~~factors to be considered and weighed within the overall relationship are;~~

14.5 C. the mode of payment;

14.6 D. furnishing of materials and tools; and

14.7 E. control over the premises where the services are performed.

14.8 The two most important essential factors are items A and B.

14.9 Other factors, ~~including some~~ not specifically identified in this part, may be
14.10 considered if a determination is inconclusive when applying the essential factors, ~~and.~~

14.11 The degree of their importance may vary depending upon the occupation or work situation
14.12 being considered and why the factor is present in the particular situation.

14.13 Subp. 2. [Repealed, L 2012 c 201 art 3 s 16]

14.14 Subp. 3. [Repealed, L 2012 c 201 art 3 s 16]

14.15 Subp. 4. [Repealed, L 2012 c 201 art 3 s 16]

14.16 Subp. 5. [Repealed, L 2004 c 206 s 53]

14.17 **3315.1001 SCOPE.**

14.18 Parts 3315.1001 and 3315.1010 clarify an employer's duty with regard to records ~~and~~
14.19 ~~reports~~ as required under Minnesota Statutes, ~~chapter 268~~ section 268.186.

14.20 **3315.1010 RECORDS.**

14.21 Subpart 1. **Record keeping.** Each employer must establish, maintain, and preserve
14.22 records with respect to individuals performing ~~personal~~ services for it, ~~including~~
14.23 ~~individuals who perform or assist in performing the work of any employee of the employer~~
14.24 ~~if the employer had actual or constructive knowledge that the work was being performed.~~

15.1 The records must be preserved for a period of not less than ~~eight~~ four years after the in
15.2 addition to the current calendar year in which the compensation for the services was paid
15.3 or payable, and. The records must show for each individual the following:

15.4 A. name;

15.5 B. Social Security number;

15.6 C. days and the number of hours each day in which the individual performed
15.7 ~~personal~~ services;

15.8 D. location where services were performed;

15.9 E. wages paid and wages due but not paid for ~~personal services, showing~~
15.10 ~~separately;~~

15.11 (1) ~~money wages, excluding special payments;~~

15.12 (2) ~~wages paid and wages due but not paid, in any medium other than~~
15.13 ~~money, excluding special payments;~~

15.14 (3) ~~special payments such as bonuses, gifts, and prizes, showing separately~~
15.15 ~~money payments, other special payments, and the character of the payments; and~~

15.16 (4) ~~tips and gratuities paid to an employee by a customer and accounted for~~
15.17 ~~by the employee to the employer as defined in part 3315.0211, subparts 1 and 2;~~

15.18 F. ~~rate and base unit of pay;~~

15.19 G. amounts paid as allowances or reimbursement for travel or other activity
15.20 ~~pertaining to the furtherance of the employer's business which were not included as wages.~~

15.21 The account records must show each item of expense incurred during each pay period
15.22 or calendar month; and

15.23 ~~H. the date of separation and the reason, in detail, for the termination;~~

15.24 ~~I. H.~~ H. the complete resident address of the employee;

16.1 J. ~~for each pay period:~~

16.2 (1) ~~the beginning and ending dates of the period;~~

16.3 (2) ~~the total amount of wages paid and wages due but not paid for personal~~
16.4 ~~services performed; and~~

16.5 (3) ~~the date of payment; and~~

16.6 K. ~~for each calendar month or, if less, the established pay period of the~~
16.7 ~~employer, the hours spent performing services in employment and the hours spent~~
16.8 ~~performing noncovered employment, by each employee for which the provisions of~~
16.9 ~~Minnesota Statutes, section 268.035, subdivision 15, paragraph (a), clause (5), apply.~~

16.10 Subp. 2. **Instate and outstate.** For services performed within and without both in
16.11 Minnesota and outside Minnesota the records required by subpart 1 must include:

16.12 A. ~~the city or county and state in which the employer maintains a base of~~
16.13 ~~operations, as defined in Minnesota Statutes, section 268.035, subdivision 12, clause~~
16.14 ~~(1); used by the individual;~~

16.15 B. ~~the city or county and state from which the services are directed and~~
16.16 ~~controlled, if the employer does not have a base of operations in the states in which an~~
16.17 ~~individual performs services; and~~

16.18 C. a list of the states in which the individual performs services, other than
16.19 temporary or incidental services, and the dates services were performed at in each location
16.20 state.

16.21 Subp. 3. **Covered and uncovered noncovered employment.** For services
16.22 performed in both covered employment and noncovered employment within a pay period
16.23 the records required by subpart 1 must include the hours spent performing services in
16.24 covered employment and the hours spent performing noncovered employment.

- 17.1 **REPEALER.** Minnesota Rules, parts 3310.2902, subpart 2; 3310.2919; 3315.0200,
- 17.2 subpart 1; 3315.0203; 3315.0211; 3315.0212, subparts 2 and 3; 3315.0213; 3315.0801;
- 17.3 3315.0805; 3315.0810; 3315.0815; 3315.0820; 3315.0825; 3315.0830; 3315.0835;
- 17.4 3315.0840; 3315.0845; 3315.0901; and 3315.0905, are repealed.

Office of the Revisor of Statutes

Administrative Rules



TITLE: Proposed Permanent Rules Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions

AGENCY: Department of Employment and Economic Development

MINNESOTA RULES: Chapters 3310 and 3315

The attached rules are approved for
publication in the State Register

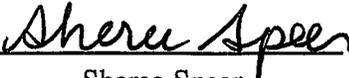

Sheree Speer
Senior Assistant Revisor

Exhibit B

1.1 **Department of Employment and Economic Development**

1.2 **Adopted Permanent Rules Relating to Unemployment Insurance; Modifying**
1.3 **Appeals, Employer Records, and Worker Status Provisions**

1.4 **3310.2901 SCOPE AND PURPOSE.**

1.5 Parts 3310.2901 to 3310.2924 establish procedures for hearings conducted by
1.6 unemployment law judges following:

1.7 A. appeals of all department determinations including determinations on benefit
1.8 accounts, eligibility or ineligibility for unemployment benefits, employers' tax rate, an
1.9 employer's liability to pay taxes, and fraudulent payment of unemployment benefits; or

1.10 B. referrals for direct hearing under Minnesota Statutes, section 268.101,
1.11 subdivision 3a.

1.12 **3310.2902 DEFINITIONS.**

1.13 Subpart 1. **Scope.** For purposes of parts 3310.2901 to 3310.2924, the terms defined
1.14 in this part have the meanings given them.

1.15 Subp. 2. [See repealer.]

1.16 Subp. 3. [Repealed, 33 SR 999]

1.17 Subp. 3a. **Applicant.** "Applicant" means an individual who has filed an application
1.18 for unemployment benefits and has established or is pursuing the establishment of a
1.19 benefit account.

1.20 Subp. 4. **Department.** "Department" means the Department of Employment and
1.21 Economic Development.

1.22 Subp. 4a. **Electronic transmission.** "Electronic transmission" means a
1.23 communication that is sent online, by telephone, or by facsimile.

1.24 Subp. 4a 4b. **Hearing.** "Hearing" means the de novo due process evidentiary hearing
1.25 authorized under Minnesota Statutes, section 268.105, subdivision 1.

2.1 Subp. 5. **Party.** "Party" means any applicant or employer whose legal rights, duties,
2.2 or privileges will be directly determined in a hearing.

2.3 **3310.2905 NOTICE OF HEARING.**

2.4 Subpart 1. [Repealed, L 2004 c 206 s 53]

2.5 Subp. 2. **Notice.** The chief unemployment law judge must send a notice of hearing,
2.6 by mail or electronic transmission, to each party at least ten calendar days before the
2.7 scheduled date of hearing unless notice is waived by the parties. The notice must state the
2.8 time, date, method by which the hearing will be conducted, and issues to be considered
2.9 at the hearing. If the issue to be considered at the hearing involves ineligibility for
2.10 unemployment benefits because of a separation from employment, the notice must explain
2.11 that the parties should be prepared to discuss all incidents that arose during the course
2.12 of the employment that led to the separation. The notice of hearing must also include
2.13 materials that provide the following information:

2.14 A. a statement that the purpose of the hearing is to take sworn testimony and
2.15 other evidence on the issues involved, that the hearing is the only procedure available
2.16 under the law at which a party may present evidence, and that further appeals consist of a
2.17 review of the evidence submitted at the hearing;

2.18 B. a statement of the parties' right to represent themselves or to be represented
2.19 by an attorney or other ~~duly~~ authorized representative;

2.20 C. a brief description of the procedure to be followed at the hearing, including
2.21 the role of the unemployment law judge;

2.22 D. a statement that the parties should arrange in advance for the participation of
2.23 witnesses they need to support their position;

3.1 E. a statement that a party may find out the name of the other parties' attorney or
 3.2 other representative and names of the witnesses that the other party intends to have testify
 3.3 at the hearing, and an explanation of the process for making the request;

3.4 F. a statement that subpoenas may be available to compel the participation of
 3.5 witnesses or the production of documents, and an explanation of the process for requesting
 3.6 a subpoena;

3.7 G. a statement that documents contained in the department's records, and
 3.8 documents submitted by the parties that will be introduced at the hearing as possible
 3.9 exhibits will be sent to the parties in advance of the hearing;

3.10 H. a statement that even if the applicant already received unemployment
 3.11 benefits, it is important to participate in the hearing, because if the applicant is held
 3.12 ineligible, the applicant will not be able to receive further benefits and the applicant will
 3.13 have to pay back the benefits already received;

3.14 I. a statement that the unemployment law judge will determine the facts
 3.15 based upon a preponderance of the evidence along with the statutory definition of
 3.16 "preponderance of the evidence";

3.17 J. a statement that a party who fails to participate in the hearing will not be
 3.18 allowed a rehearing unless the party can show good cause for failing to participate, along
 3.19 with the statutory definition of "good cause"; and

3.20 K. a statement that an applicant, if unemployed, must file weekly continued
 3.21 requests for unemployment benefits while the appeal is pending.

3.22 **3310.2908 RESCHEDULING AND CONTINUANCES.**

3.23 Subpart 1. **Rescheduling.** Requests to reschedule a hearing must be addressed to
 3.24 the chief unemployment law judge in advance of the regularly scheduled hearing date.
 3.25 The request may be made in person, by telephone or other electronic transmission, or

4.1 by mail. A hearing must be rescheduled based on a party's need for additional time to
4.2 obtain necessary evidence or to obtain representation or adequately prepare, inability to
4.3 participate due to illness, or other compelling reasons beyond the control of the party that
4.4 prevent participation at the originally scheduled time. A hearing may be rescheduled only
4.5 once by each party except in the case of an emergency. If requested, a written statement
4.6 by mail or electronic transmission confirming the reasons for requesting that the case be
4.7 rescheduled must be provided to the chief unemployment law judge.

4.8 The ten-calendar-day notice requirement for hearings does not apply to rescheduled
4.9 hearings.

4.10 Subp. 2. **Continuances.** If a request for rescheduling is made because of the
4.11 unavailability of a witness or the need to obtain documents, the unemployment law judge
4.12 may direct that the hearing take place as scheduled. After obtaining the testimony and
4.13 other evidence then available, the unemployment law judge must determine whether
4.14 the hearing should be continued to obtain the testimony of the unavailable witness or
4.15 the unavailable documents. The ten-calendar-day notice requirement for hearings does
4.16 not apply to continued hearings.

4.17 The unemployment law judge has the discretion to continue a hearing if the judge
4.18 determines that additional evidence is necessary for a proper result.

4.19 **3310.2910 CONSOLIDATION OF ISSUES AND NEW ISSUES.**

4.20 Upon the request of a party or on the unemployment law judge's motion, the judge
4.21 may consolidate for hearing issues involving the same parties. The unemployment law
4.22 judge may take testimony and render a decision on issues not listed on the notice of
4.23 hearing if each party is notified on the record, is advised of the right to object, and does
4.24 not object. If a party objects, the unemployment law judge must:

4.25 A. continue the hearing to allow the party to prepare for consideration of the
4.26 issue; or

5.1 B. direct the department to address the issue and send to the parties a
5.2 determination by mail or electronic transmission.

5.3 **3310.2911 INTERPRETERS.**

5.4 The chief unemployment law judge must provide an interpreter, when necessary,
5.5 upon the request of a party. The requesting party must notify the chief unemployment
5.6 law judge at least five calendar days before the date of the hearing that an interpreter is
5.7 required. The unemployment law judge must continue any hearing where a witness or
5.8 party needs an interpreter in order to be understood or to understand the proceedings.

5.9 All notices and other written materials sent to parties must be prepared in easily
5.10 understood English.

5.11 A written statement in English, Spanish, Vietnamese, Somali, and Hmong which
5.12 states that the accompanying documents are important, and that if the reader does not
5.13 understand the documents, the reader should seek immediate assistance, must accompany
5.14 all notices and written materials sent to the parties.

5.15 **3310.2912 EXHIBITS IN HEARINGS.**

5.16 Upon receipt of the notice of hearing, and no later than five calendar days before the
5.17 scheduled date of hearing, parties may submit to the chief unemployment law judge, by
5.18 electronic transmission or mail, any documents a party would like to offer as exhibits at
5.19 the hearing. Copies of the documents submitted by the parties, as well as all documents
5.20 that are contained in the department's records that will be introduced as exhibits, must be
5.21 mailed, or sent by electronic transmission, to all parties or the parties' representative by
5.22 the chief unemployment law judge in advance of the hearing.

5.23 If a party requests to introduce additional documents during the course of the hearing,
5.24 and the unemployment law judge rules that the documents should be admitted into
5.25 evidence, the requesting party must send, by electronic transmission or mail, copies of
5.26 the documents to the unemployment law judge and the other party. The record must be
5.27 left open for sufficient time for the submission of a written response to the documents.

6.1 The response may be sent by mail or electronic transmission. The unemployment law
6.2 judge may, when appropriate, reconvene the hearing to obtain a response or permit
6.3 cross-examination regarding the late filed exhibits.

6.4 **3310.2913 ACCESS TO DATA.**

6.5 The parties to a hearing must be allowed reasonable access to department data
6.6 necessary to represent themselves in the hearing. Access to data must be consistent with
6.7 all laws relating to data practices. The data must be provided by the chief unemployment
6.8 law judge at no cost and mailed or sent by electronic transmission to the party or the
6.9 party's representative.

6.10 **3310.2914 SUBPOENAS AND DISCOVERY.**

6.11 Subpart 1. **Subpoenas.** The unemployment law judge may issue subpoenas to
6.12 compel the attendance of witnesses, the production of documents or other exhibits, upon
6.13 a showing of necessity by the requesting party. Requests for issuance of subpoenas
6.14 must be made to the chief unemployment law judge, by electronic transmission or mail,
6.15 sufficiently in advance of the scheduled hearing to allow for the service of the subpoenas.
6.16 The requesting party must identify the person or documents to be subpoenaed, the subject
6.17 matter of the evidence requested, and their necessity. A request for a subpoena may be
6.18 denied if the testimony or documents sought would be irrelevant, immaterial, or unduly
6.19 cumulative or repetitious.

6.20 If a request for a subpoena has been denied, the unemployment law judge must
6.21 reconsider the request during the hearing and determine whether the request was properly
6.22 denied. If the unemployment law judge determines that the request for a subpoena was
6.23 not properly denied, the judge must continue the hearing to allow for service of and
6.24 compliance with the subpoena.

6.25 The unemployment law judge may issue a subpoena on the judge's own motion.

7.1 Subp. 2. **Discovery.** Each party, within three calendar days following request by
7.2 another party, must disclose the name of the party's attorney or other representative and
7.3 the names of all witnesses the party intends to have testify at the hearing. The request
7.4 and the response may be made by mail or by electronic transmission. Any witnesses
7.5 unknown at the time of the request must be disclosed as soon as they become known. If a
7.6 party fails to comply with the disclosure requirements, the unemployment law judge may,
7.7 upon notice by the requesting party, continue the hearing.

7.8 **3310.2915 DISQUALIFICATION OF UNEMPLOYMENT LAW JUDGE.**

7.9 An unemployment law judge must request to be removed from any case by the chief
7.10 unemployment law judge where the judge believes that presiding over the case would
7.11 create the appearance of impropriety. The chief unemployment law judge must remove an
7.12 unemployment law judge from any case where any of the parties to the appeal are related
7.13 to the judge or have a personal relationship with the judge. The chief unemployment law
7.14 judge must remove an unemployment law judge from any case if the judge has a financial
7.15 or personal interest in the outcome.

7.16 Any party may request the removal of an unemployment law judge by submitting to
7.17 the chief unemployment law judge, by mail or electronic transmission, a written statement
7.18 of the basis for removal. The chief unemployment law judge must decide the fitness of
7.19 the unemployment law judge to hear the particular case.

7.20 **3310.2916 REPRESENTATION BEFORE UNEMPLOYMENT LAW JUDGE.**

7.21 In a hearing before an unemployment law judge, a party may be represented by an
7.22 attorney or ~~a~~ duly an authorized representative. Except for an attorney-at-law, no person
7.23 may charge an applicant a fee of any kind.

7.24 An unemployment law judge may refuse to allow a person to represent others in
7.25 a hearing if that person acts in an unethical manner or repeatedly fails to follow the
7.26 instructions of the judge.

8.1 **3310.2917 PUBLIC ACCESS TO HEARINGS AND RECORDING OF HEARINGS.**

8.2 Subpart 1. **Public access.** Hearings are public. If a member of the public requests
8.3 to listen in on a hearing conducted by telephone conference, or requests to sit in on a
8.4 hearing conducted in person, the unemployment law judge must make the appropriate
8.5 accommodation. An unemployment law judge may exclude a member of the public only
8.6 when necessary to maintain decorum.

8.7 Subp. 2. **Recording.** The unemployment law judge must make a recording of all
8.8 testimony that is the official record. No other voice recordings or pictures may be made of
8.9 any party, representative, or witness during the hearing.

8.10 **3310.2920 ADMINISTRATION OF OATH OR AFFIRMATION.**

8.11 An unemployment law judge has authority to administer oaths and affirmations.
8.12 Before testifying, every witness is required to declare to testify truthfully, by oath or
8.13 affirmation. Minnesota Statutes, sections 358.07 and 358.08, provide the form of the
8.14 oath or affirmation.

8.15 **3310.2921 CONDUCT OF HEARING.**

8.16 The chief unemployment law judge has discretion regarding the method by which
8.17 the hearing is conducted. The hearing must be conducted by an unemployment law judge
8.18 as an evidence-gathering inquiry, without regard to a burden of proof. The order of
8.19 presentation of evidence is determined by the unemployment law judge.

8.20 Each party may present and examine witnesses and offer their own documents
8.21 or other exhibits. Parties have the right to examine witnesses, object to exhibits and
8.22 testimony, and cross-examine the other party's witnesses. The unemployment law judge
8.23 must assist all parties in the presentation of evidence. The unemployment law judge
8.24 must rule upon evidentiary objections on the record. The unemployment law judge must
8.25 permit rebuttal testimony. Parties have the right to make closing statements. Closing

9.1 statements may include comments based upon the evidence and arguments of law. The
9.2 unemployment law judge may limit repetitious testimony and arguments.

9.3 The unemployment law judge must exercise control over the hearing procedure in
9.4 a manner that protects the parties' rights to a fair hearing, including the sequestration of
9.5 witnesses to avoid prejudice or collusion. The unemployment law judge must ensure that
9.6 all relevant facts are clearly and fully developed. The unemployment law judge may, on
9.7 the judge's own motion, obtain testimony and other evidence from department employees
9.8 and any other person the judge believes will assist the judge in reaching a proper result.

9.9 Before taking testimony, the unemployment law judge must inform the parties of
9.10 the following:

9.11 A. that the purpose of the hearing is to take testimony and other evidence on
9.12 the issues;

9.13 B. that the hearing is the only opportunity available to the parties to present
9.14 testimony and other evidence on the issues involved;

9.15 C. an explanation of how the hearing will be conducted, including the role and
9.16 obligations of the unemployment law judge;

9.17 D. that the parties have the right to request that the hearing be continued so that
9.18 additional witnesses and documents can be presented, by subpoena if necessary;

9.19 E. that the facts will be determined upon a preponderance of the evidence, along
9.20 with the statutory definition of "preponderance of the evidence";

9.21 F. the statutory provision on burden of proof;

9.22 G. that certain government agencies may have access to the information
9.23 provided at the hearing if allowed by statute and that the information provided may be
9.24 disclosed under a district court order; and

10.1 H. that after the hearing is over, the unemployment law judge will issue a
10.2 written decision, which will be sent to the parties by mail or electronic transmission.

10.3 **3310.2922 RECEIPT OF EVIDENCE.**

10.4 Only evidence received into the record of any hearing may be considered by the
10.5 unemployment law judge. The parties may stipulate to the existence of any fact or the
10.6 authenticity of any exhibit.

10.7 All competent, relevant, and material evidence, including records and documents in
10.8 the possession of the parties that are offered into evidence, are part of the hearing record.
10.9 An unemployment law judge may receive any evidence that possesses probative value,
10.10 including hearsay, if it is the type of evidence on which reasonable, prudent persons are
10.11 accustomed to rely in the conduct of their serious affairs. An unemployment law judge
10.12 may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.
10.13 An unemployment law judge is not bound by statutory and common law rules of evidence.
10.14 The rules of evidence may be used as a guide in determining the quality of evidence
10.15 offered. An unemployment law judge may draw adverse inferences from the refusal of a
10.16 witness to testify on the basis of any privilege. An unemployment law judge may only use
10.17 reliable, probative, and substantial evidence as a basis for decision.

10.18 **3310.2923 OFFICIAL NOTICE.**

10.19 An unemployment law judge may take official notice of matters of common
10.20 knowledge and may take notice of facts within the judge's specialized knowledge in the
10.21 field of unemployment insurance. Any fact officially noticed must be so stated on the
10.22 record during the hearing. Parties must be given an opportunity to contest the noticed facts.

10.23 **3310.2924 EX PARTE COMMUNICATIONS.**

10.24 Private communication between an unemployment law judge assigned to conduct
10.25 the hearing and one of the parties, in the absence of the other party, is forbidden if it
10.26 relates to the substance of the matter at issue. Private communication is to be avoided

11.1 even when it does not relate to the subject matter of the hearing if it would create the
11.2 appearance of impropriety.

11.3 **3315.0555 DETERMINING WORKER STATUS.**

11.4 Subpart 1. **Essential Factors.** When determining whether an individual is an
11.5 employee or an independent contractor, five essential factors must be considered and
11.6 weighed within a particular set of circumstances. The five essential factors to be
11.7 considered are:

11.8 A. the right or the lack of the right to control the means and manner of
11.9 performance;

11.10 B. the right to discharge the worker without incurring liability;

11.11 C. the mode of payment;

11.12 D. furnishing of materials and tools; and

11.13 E. control over the premises where the services are performed.

11.14 The two most important essential factors are items A and B.

11.15 Other factors, not specifically identified in this part, may be considered if a
11.16 determination the outcome is inconclusive when applying the essential factors in items A
11.17 to E. The degree of their importance may vary depending upon the occupation or work
11.18 situation being considered and why the factor is present in the particular situation.

11.19 Subp. 2. [Repealed, L 2012 c 201 art 3 s 16]

11.20 Subp. 3. [Repealed, L 2012 c 201 art 3 s 16]

11.21 Subp. 4. [Repealed, L 2012 c 201 art 3 s 16]

11.22 Subp. 5. [Repealed, L 2004 c 206 s 53]

12.1 **3315.1001 SCOPE.**

12.2 Parts 3315.1001 and 3315.1010 clarify an employer's duty with regard to records as
12.3 required under Minnesota Statutes, section 268.186.

12.4 **3315.1010 RECORDS.**

12.5 Subpart 1. **Record keeping.** Each employer must establish, maintain, and preserve
12.6 records with respect to individuals performing services for it. The records must be
12.7 preserved for a period of not less than four years in addition to the current calendar year.
12.8 The records must show for each individual the following:

12.9 A. name;

12.10 B. Social Security number;

12.11 C. days and the number of hours each day in which the individual performed
12.12 services;

12.13 D. location where services were performed;

12.14 E. wages paid and wages due but not paid for services;

12.15 F. rate of pay;

12.16 G. amounts paid as allowances or reimbursement for travel or other activity
12.17 which were not included as wages. The records must show each item of expense incurred
12.18 during each pay period or calendar month; and

12.19 H. the complete resident address.

12.20 Subp. 2. **Instate and outstate.** For services performed both in Minnesota and
12.21 outside Minnesota the records required by subpart 1 must include:

12.22 A. the state in which the employer maintains a base of operations used by
12.23 the individual;

12.24 B. the state from which the services are directed and controlled; and

13.1 C. a list of the states in which the individual performs services, other than
13.2 temporary or incidental services, and the dates services were performed in each state.

13.3 Subp. 3. **Covered and noncovered employment.** For services performed in both
13.4 covered employment and noncovered employment within a pay period the records
13.5 required by subpart 1 must include the hours spent performing services in covered
13.6 employment and the hours spent performing noncovered employment.

13.7 **REPEALER.** Minnesota Rules, parts 3310.2902, subpart 2; 3310.2919; 3315.0200,
13.8 subpart 1; 3315.0203; 3315.0211; 3315.0212, subparts 2 and 3; 3315.0213; 3315.0801;
13.9 3315.0805; 3315.0810; 3315.0815; 3315.0820; 3315.0825; 3315.0830; 3315.0835;
13.10 3315.0840; 3315.0845; 3315.0901; and 3315.0905, are repealed.

Exhibit C

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendment
to and Repeal of Rules of the Minnesota
Department of Employment and Economic
Development Relating to Unemployment
Insurance; Modifying Appeals, Employer
Records, and Worker Status Provisions;
Minnesota Rules parts 3310 and 3315

**REPORT OF THE CHIEF
ADMINISTRATIVE LAW JUDGE**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.26, subd. 3. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves in all respects the Order on Review of Rules Under Minn. Stat § 14.26, of the Administrative Law Judge, dated May 5, 2014.

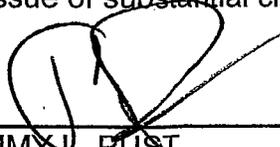
In order to correct the defect enumerated by the Administrative Law Judge with regard to proposed rule 3310.2917, the agency shall modify the rule and follow the procedure for adopting substantially different rules. The procedure for adopting substantially different rules is set out in Minn. Rule 1400.2110.

In order to correct all other the defects enumerated by the Administrative Law Judge in the attached Report, the agency shall make changes to the rule to address the defects noted. If the agency chooses not to correct one or more of the defects enumerated by the Administrative Law Judge, the agency shall submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4.

In addition to the procedures required by Minn. Rule 1400.2110, if the agency chooses to take the action recommended by the Administrative Law Judge, it shall submit to the Chief Administrative Law Judge a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Order Adopting Rules. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantially different.

Should the agency make changes in the rules other than those recommended by the Administrative Law Judge, it shall also submit the complete record to the Chief Administrative Law Judge for a review on the issue of substantial change.

Dated: May 12, 2014



TAMMY L. PUST
Chief Administrative Law Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT

In the Matter of the Proposed Amendment
to and Repeal of Rules of the Minnesota
Department of Employment and Economic
Development Relating to Unemployment
Insurance; Modifying Appeals, Employer
Records, and Worker Status Provisions;
Minnesota Rules parts 3310 and
3315

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Department of Employment and Economic Development (Department or DEED) is seeking review and approval of the above-entitled rules, which were adopted by the Department without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On April 21, 2014, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Department under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED as follows:

1. The following rules or parts thereof are not approved:
Minn. R.3310.2914, Subpart 2;
Minn. R. 3310.2915;
Minn. R. 3310.2916; and
Minn. R. 3310.2917, Subpart 1.

All other rules or parts thereof are approved.

2. Pursuant to Minnesota Statutes section 14.26, subdivision 3(b), and Minnesota Rules part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: May 5, 2014


LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

The Department has submitted these rules to the Administrative Law Judge (ALJ) for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies that the ALJ must approve or disapprove the rules as to their legality and form. In conducting the review, the ALJ must consider the issue of whether the agency has the authority to adopt the rules; whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.

The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.¹ These circumstances include situations in which a rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law; a rule was not adopted in compliance with procedural requirements, unless the Judge finds that the error was harmless in nature and should be disregarded; a rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; a rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; a rule is unconstitutional² or illegal; a rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

These standards guide the determinations set forth below.

I. Statutory Authority

The authority of the Commissioner of the Department of Employment and Economic Development under Minn. Stat. § 268.105, subd. 1(b) authorizing it to adopt rules "on evidentiary hearings" can be traced back to the original enactment of the

¹ Minn. R. 1400.2100 (2011).

² In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

state's economic security law in 1936, which provided that "the conduct of hearings and appeals shall be in accordance with the rules prescribed by the commission for determining the rights of the parties."³ The statute, including the wording of the rulemaking authority, has been amended over the years. Nonetheless, the Department's authority to promulgate rules governing its hearings has remained substantially the same since its original enactment.

The Department's statutory authority regarding its rules governing employer records and certain other definitional rules is set forth in Minn. Stat. § 116J.035, subd. 2, which is the Commissioner's general rulemaking authority. Minnesota Statutes section 268.186(a) requires employers to keep records consistent with rules adopted by the Commissioner. This statutory authority originated in 1984.⁴

Minnesota Statutes section 14.125 requires that an agency publish a notice to adopt rules within 18 months of the effective date of the law authorizing the adoption of the rules, unless the authorization predates January 1, 1996. None of the cited sources of statutory authority for this rulemaking proceeding have been enacted or amended since January 1, 1996. Therefore, the Administrative Law Judge concludes the Department has the necessary statutory authority to amend and repeal the rules as proposed in this proceeding.

II. Harmless Procedural Defects

A. Failure to Include Additional Notice Plan in Statement of Need and Reasonableness

Minnesota Statutes, section 14.131 requires an agency adopting rules to include in its Statement of Need and Reasonableness (SONAR) a description of the efforts the agency will make to provide additional notice as required by Minn. Stat. § 14.14, subd. 1a. The Additional Notice Plan, as it is commonly called, must be used to notify "persons or classes of persons who may be significantly affected by the rule being proposed . . ." in addition to persons who have registered with the agency to receive notice of rulemaking proceedings. Section 14.14, subdivision 1a, requires the agency to give notice of its Intent to Adopt Rules.

In this case, the Department failed to address its Additional Notice Plan in the SONAR. The only mention in the SONAR of notice the Department gave or intended to give was notice of its Request for Comment, which is not the notice required by sections 14.131 and 14.14, subdivision 1a.⁵ The Administrative Law Judge alerted the Department to this issue in her Order approving its Notice of Intent to Adopt Rules, and recommended an Additional Notice Plan for the Department to implement. Thereafter,

³ 1936 Minn. Laws, ch. 2, § 8.

⁴ 1984 Minn. Laws, ch. 604, § 1.

⁵ SONAR at 5.

the Department implemented the Administrative Law Judge's recommended Additional Notice Plan.⁶

Minnesota Statutes section 14.26, subdivision 3(d)(2), allows the Administrative Law Judge to disregard a procedural error or defect on a finding that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The Administrative Law Judge finds that the Department cured its error by implementing the recommended Additional Notice Plan and that the original failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. Therefore, the Administrative Law Judge finds that this was a harmless procedural error.

B. Failure to Address Performance-Based Regulatory Requirement

Section 14.131 of the Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals. The SONAR does not include the description required by Minn. Stat. § 14.131.

Notwithstanding the lack of a description, the Administrative Law Judge finds that the proposed rules meet the objectives of performance-based rulemaking.⁷ To the extent possible, the proposed rules are expressed in terms of desired results instead of the specific means for achieving those results. They avoid the incorporation of specifications of particular methods or materials. For example, the rules allow parties a variety of options, including U.S. mail, e-mail, fax and telephone, to contact the Department and one another during the hearing process. Similarly, the section on Conduct of Hearing requires an unemployment compensation law judge to provide information on a list of topics before conducting the hearing. The rule lists the topics but is not prescriptive as to the specific language the judge must use.

The Administrative Law Judge concludes that the Department's failure to "describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems" did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. This omission was a harmless error under Minn. Stat. § 14.26, subd. 3(d)(1).

⁶ See Exhibits (Exs.) G and H (combined exhibit).

⁷ See Minn. Stat. § 14.002.

III. Defects Requiring Revisions of the Proposed Rules

A. Minn. R. 3310.2914 – Subpoenas and Discovery Subpart 2 – Discovery

As adopted, the final sentence of subpart 2 states, "If a party fails to comply with the disclosure requirements, the unemployment law judge may, upon notice by the requesting party, continue the hearing." A rule is impermissibly vague if it is so indefinite that one must guess at its meaning.⁸ The language of this proposed rule is so unclear that it is impermissibly vague. It is not clear whom the Department intends the requesting party to notify, or what notice the requesting party is expected to provide. Furthermore, the rule could be read to imply that the requesting party's notice is the trigger that determines whether a hearing may be continued. That would be an impermissible delegation of the Commissioner's authority. The unemployment law judge, not the party, should be the one to determine whether a continuance is appropriate.

To correct this defect, the Administrative Law Judge suggests that the language of the rule be revised as follows: "If a party fails to comply with the disclosure requirements, the unemployment law judge may, upon notice to the parties ~~by the requesting party~~, continue the hearing." In the alternative, the language could be revised to state: "If a party fails to comply with the disclosure requirements, the requesting party may ask the unemployment law judge to continue the hearing. The unemployment law judge shall determine whether to grant the request for continuance in accordance with part 3310.2908, subpart 2."

Either of these alternatives would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

B. Minn. R. 3310.2915 – Disqualification of Unemployment Law Judge

The rule as adopted sets forth circumstances under which the chief unemployment law judge must remove an unemployment law judge from presiding over a particular case. The second sentence of the proposed rule states: "The chief unemployment law judge must remove an unemployment law judge from any case where any of the parties to the appeal are related to the judge *or have a personal relationship with the judge.*"⁹ Neither the rule nor the Department's statutory provisions define "personal relationship." A rule is impermissibly vague if the reader cannot tell what is expected of him when he reads the rule.¹⁰ This language is impermissibly vague. It does not tell the reader how it will, or should, be applied. Does a "personal relationship" encompass the judge's close friends and former business partners? Does

⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

⁹ Ex. L, Part 3310.2915 as adopted (3/31/14) at lines 7.11-7.13 (emphasis added).

¹⁰ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed*, 106 S. Ct. 375 (1985).

it extend to the judge's child's teacher? What about the judge's child's favorite former teacher? Is the judge's neighbor included in the scope of the rule? How well acquainted must the judge be with her neighbor for it to be considered a "personal relationship" for purposes of the rule?

One possible cure to the defect would be for the Department to look to the Code of Judicial Conduct for guidance.¹¹ Rule 2.11(A)(2) provides a standard for a judge to disqualify himself or herself from a particular proceeding. The Administrative Law Judge recommends that the Department replace the sentence quoted above with the following:

The chief unemployment law judge must remove an unemployment law judge from any case where the unemployment law judge knows that the judge, the judge's spouse, a person with whom the judge has an intimate relationship, a member of the judge's household, or a person within the third degree of relationship to any of them,¹² or the spouse or person in an intimate relationship with such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer or representative in the proceeding;
- (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness to the proceeding.

This change would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

C. Minn. R. 3310.2916 – Representation Before Unemployment Law Judge

The rule as adopted amends existing language regarding who can appear on behalf of a party in an unemployment compensation hearing. As part of its amendment of this rule part, the Department deleted the first sentence, which read, "Any individual may personally appear in any proceeding." The opening sentence of the rule as adopted says: "In a hearing before an unemployment law judge, a party may be represented by an attorney or an authorized representative." There is no language replacing the deleted language regarding an individual personally appearing.

¹¹ The Administrative Law Judge recognizes that unemployment law judges are not required by statute to follow the Code of Judicial Conduct. Nonetheless, the Code's language is useful in this context, and the Department can choose to include it in this rule.

¹² The "Terminology" section of the Code of Judicial Conduct defines "third degree of relationship" to include great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew and niece.

In the SONAR, the Department asserts that the rule is reasonable “because it provides the same representation requirements for all parties.”¹³ Deleting the sentence does not achieve that goal. The rule does not permit an individual to represent himself or herself. An entity, however, can represent itself through an authorized representative. Removing the authorization for self-representation puts individuals at a disadvantage. Because it prevents individuals from representing themselves, the rule as adopted is not needed or reasonable.¹⁴

Furthermore, the change as adopted violates Minn. Stat. § 268.105, subd. 6(a) which states “[i]n any proceeding . . . an applicant or involved employer *may* be represented by any agent.”¹⁵ While it is not stated explicitly, the corollary to this statutory authorization is that an applicant or involved employer may appear on her own behalf.

An “applicant” is defined at Minn. Stat. § 268.035, subd. 2a, as “an individual who has filed an application for unemployment benefits. . . .” Section 268.035, subdivision 21 defines “person” as, among other things, “an individual *or* any type of organization or entity. . . .”¹⁶ Without the sentence allowing an individual, as opposed to an entity, to represent herself, the Department’s proposed rule violates the assumption underlying section 268.105, subdivision 6(a) that an individual may represent himself.

The Administrative Law Judge recommends the Department restore the first sentence of part 3310.2916, which it deleted from the adopted rule, to permit the same representation for all parties. The Department may wish to incorporate stylistic changes to make this language consistent with other stylistic changes in the rules: “Any individual may personally appear in any hearing proceeding.”

This change would correct the defect, would be needed and reasonable, and would not constitute a substantial change from the rules as proposed.

D. Minn. R. 3310.2917 – Public Access to Hearings and Recordings of Hearings
Subpart 1 – Public access

The Department amended the existing rule in part as follows:

Appeal-Hearings are public hearings. If a member of the public requests to listen in on a hearing conducted by telephone conference, or requests to sit in on a hearing conducted in person, the unemployment law judge must make the appropriate accommodation. An unemployment law judge may exclude nonessential persons a member of the public only when necessary due to physical space limitations or to maintain decorum.

¹³SONAR at 18.

¹⁴ See Minn. R. 1400.2100.B.

¹⁵ Emphasis added. See Minn. R. 1400.2100.E.

¹⁶ Emphasis added.

The amendments to this subpart violate Minn. Stat. § 268.19 which make “data gathered from any person under the administration of the Minnesota Unemployment Insurance Law” private data on individuals or nonpublic data not on individuals pursuant to the Minnesota Government Data Practices Act.¹⁷ The data may not be disclosed, except pursuant to limited statutory exceptions or a district court order. An unemployment compensation hearing is not among the exceptions listed permitting disclosure of the data.¹⁸ In its response to a public comment concerning subpart 2 of this rule part, the Department acknowledged that “while the hearing itself is public, under Minnesota Statutes section 268.19, the testimony given and exhibits are not.”¹⁹ The Department also asserts that its unemployment compensation hearings have been public under the rules since 1987.²⁰ Notwithstanding past practice, the Administrative Law Judge finds no authority for making the hearings public while virtually all of the content of the hearings is not public. The language requiring unemployment law judges to accommodate all requests from the public to listen or sit in on hearings where the vast majority of the content will consist of testimony and exhibits containing private data violates section 268.19. The violation is exacerbated by the language which allows an unemployment law judge to exclude a member of the public from a hearing only when necessary to maintain decorum, but not to protect the statutory privacy rights of the parties.

The only way in which this defect can be cured is to make unemployment compensation hearings not public. The Administrative Law Judge recommends that the Department replace all of subpart 1 with the following language: Public access not permitted. Hearings are not public. Only parties, their representatives and witnesses are permitted to participate in or listen to hearings. If any other person wishes to listen to or sit in on a hearing, the parties must provide their consent as required by Minn. Stat. § 13.05, subd. 4, of the Minnesota Government Data Practices Act.

This change would correct the defect, would be needed and reasonable, but would constitute a substantial change from the rules as proposed. The procedure for adopting substantially different rules is set out in Minn. R. 1400.2110.

IV. Recommended Technical Corrections

Assuming that the Department takes appropriate steps to correct the above defects, there are other language changes in the rules as a whole that the Administrative Law Judge recommends be considered to clarify or improve the readability of the proposed rules. These technical corrections are not defects in the proposed rule, but merely recommendations that the Department may adopt, if it sees fit, so as to aid in the administration of the rule.

¹⁷ See Minn. R. 1400.2100.E.

¹⁸ See Minn. Stat. § 268.19.

¹⁹ Ex. J. (K. Gulstad letter at 6 (April 3, 2014)).

²⁰ *Id.*

A. Part 3310.2902, Subpart 4b: Subpart 4b adds a new definition, defining “hearing” for the first time in the rules. The definition uses the statutory language, defining hearing as: “the de novo due process evidentiary hearing authorized under Minn. Stat. § 268.105, subd. 1.” According to the SONAR, a primary goal of the rule changes “is to offer guidance to participants in the hearing process.”²¹ The Department states that participants in over 95 percent of hearings are not represented by attorneys.²² This definition does not appear to meet the Department’s goal of offering guidance to such participants in the hearing process. Unlike some other parts of the rule, which are focused on the responsibilities of the Department, this part provides information for the participants. Yet the language fails to provide a definition that is easily understood by a non-lawyer. The Administrative Law Judge suggests that the Department define “hearing” as “the proceeding conducted by the unemployment law judge at which the parties may testify, offer the testimony of witnesses, cross-examine one another’s witnesses, and present evidence. The purpose of a hearing is so that an unemployment law judge can decide whether a department determination should be modified, affirmed or reversed, based on the testimony and evidence presented.”

B. Part 3310.2902: The Administrative Law Judge recommends that the Department add a new definition to the definitions section and that it be placed and numbered appropriately according to the Revisor’s instructions. The Administrative Law Judge recommends that the Department define “week day” as “Monday, Tuesday, Wednesday, Thursday and Friday, excluding state holidays.” The Department changed several deadline day calculations from working days to calendar days based on the rationale that people in different industries understand work days to mean different days of the week. The Administrative Law Judge acknowledges that this is a difficulty, but suggests that a possible cure is to minimize the confusion by using and defining the term “week day.” That solution will avoid switching to calculating deadlines using “calendar days” which has the effect of shortening already brief timelines.

C. Part 3310.2905, Subpart 2: Subpart 2 requires the Department to include a variety of materials with its Notice of Hearing to the parties. In its comments regarding the rules, SMRLS pointed out that the amended rules deleted language telling the parties they should “bring to the hearing all documents, [and] records” In addition, there is nothing in the Notice materials section requiring the Department to notify the parties, at that point in the process, that they will have to submit their exhibits five days before the hearing.²³ The Administrative Law Judge recommends that the Department consider amending the list of required statements in part 3310.2905, subpart 2, as follows: “a statement that the parties are required to submit their exhibits to the unemployment law judge five days before the hearing.”

D. Part 3310.2905, Subpart 2, Item 1: Item 1 requires the Department to include with the Notice of Hearing “a statement that the unemployment law judge will

²¹ SONAR at 2.

²² *Id.*

²³ Ex. J. (C. Thomas letter at 5 (March 26, 2014)).

determine the facts based upon a preponderance of the evidence along with the statutory definition of 'preponderance of the evidence'."] Minnesota Statutes section 268.035, subdivision 21b, provides a definition of "preponderance of the evidence" that may be difficult for a non-lawyer to understand. The Department should consider modifying this language to require "a statement that the unemployment law judge will determine the facts based upon a preponderance of the evidence along with an explanation that "a 'preponderance of the evidence' is enough evidence to show that it is more likely than not that the fact you are trying to prove is true."

E. Part 3310.2908, Subpart 2: Subpart 2 adds new language creating a distinction between "rescheduling," which is covered in Subpart 1 and which is the term the Department uses to refer to date changes made before a hearing is convened, and "continuances," which are changes in dates or continued hearings already in progress due to the unavailability of witnesses or documents. The final sentence of subpart 2 in the amended rule states: "The unemployment law judge has the discretion to continue a hearing if the judge determines that additional evidence is necessary for a proper result." The Administrative Law Judge notes that "a proper result" is not a recognized legal standard and suggests that the Department change the final sentence in subpart 2 to state: "The unemployment law judge has the discretion to continue a hearing if the judge determines that additional evidence is necessary to provide an adequate basis for a reasoned decision."

F. Part 3310.2911: This subpart amends the timeline for requesting an interpreter, among other things. In the SONAR, the Department explained that, with the amendment of the time requirement, it "seeks to . . . allow an extra two days for parties prior to the date of a hearing to request an interpreter."²⁴ The language of the amendment reads as follows: "The requesting party must notify the ~~appeals office~~ chief unemployment law judge at least ~~seven~~ five calendar days before the date of the hearing that an interpreter is required."

By making the change in this way, and using calendar rather than week days, the Department may not be achieving its stated goal. For parties with hearings scheduled on Thursdays or Fridays, five calendar days expires on the Saturday or Sunday before the hearing, which practicality would suggest will result in less than the stated timeframe. The Administrative Law Judge recommends that the Department consider amending this proposed rule with the following language: "The requesting party must notify the ~~appeals office~~ chief unemployment law judge at least ~~seven~~ five three calendar week days before the date of the hearing that an interpreter is required." This language provides one way to ensure all parties will have the benefit of at least two additional days that the Department is seeking, regardless of the day of the week the hearing is scheduled. This recommendation relies on the Department's acceptance of the Administrative Law Judge's recommendation at paragraph IV.B., above, to define "week day."

²⁴ SONAR at 14.

G. Part 3310.2912: Part 3310.2912 addresses introduction of exhibits in hearings. Generally, exhibits are required to be introduced in advance of the hearing. The second paragraph deals with exhibits a party wishes to introduce during the hearing:

If a party requests to introduce additional documents during the course of the hearing, and the unemployment law judge rules that the documents should be admitted into evidence, the requesting party must send, by electronic transmission or mail, copies of the documents to the unemployment law judge and the other party. The record must be left open for sufficient time for the submission of a written response to the documents. The response may be sent by mail or electronic transmission. The unemployment law judge may, when appropriate, reconvene the hearing to obtain a response or permit cross-examination regarding the late-filed exhibits.

This paragraph is confusing because it requires the party requesting to introduce additional exhibits during the hearing to mail copies to the judge and the other party if the judge rules that the documents should be admitted. The paragraph also requires that the record be left open for a response and permits the judge to reconvene the hearing if the judge finds that appropriate. The paragraph does not address how and whether the situation should be handled differently in an in-person hearing. To address these issues, the Administrative Law Judge suggests that the second paragraph of part 3310.2912 as adopted be modified to read as follows:

If a party requests to introduce additional documents during the course of the hearing, and the unemployment law judge rules that the documents should be ~~admitted into evidence~~ considered, the requesting party must send, by electronic transmission or mail, copies of the documents to the unemployment law judge and the other party. If the hearing is held in person, the requesting party must provide copies of the documents to the unemployment law judge and the other party at the time the request to introduce the documents is made. The record must be left open for sufficient time for the submission of a written response to the documents. The response may be sent by mail or electronic transmission. The unemployment law judge may, when appropriate, reconvene the hearing to obtain a response or permit cross-examination regarding the late-filed exhibits.

H. Part 3310.2914, Subpart 1: Subpart 1 addresses procedures for use of subpoenas. The final sentence provides authority for the unemployment law judge to issue a subpoena "on the judge's own motion." Throughout the rule, the Department has amended the language to delete references to a party making a "motion" to simplify the rules and make them more accessible to non-lawyers. For consistency with this approach, the Administrative Law Judge recommends that the Department change the language in this subpart to "at the judge's own initiative."

I. **Part 3310.2914, Subpart 2:** Subpart 2 governs discovery procedures. The adopted rules amended the first sentence to change the timeline for responding to a request for the name of the party's attorney and all witnesses from three working days to three calendar days. The reason for this change, as discussed in paragraph III.B., above, was that various parties to these hearings understand the words "working days" differently. In some circumstances, this language means that a request could arrive late in the afternoon on Friday and a response would be due on Monday. The Administrative Law Judge recommends that a solution to this problem is to adopt the phrase "week days" as recommended earlier in this report. The Administrative Law Judge's suggested language for this subpart is: "Each party, within three calendar week days following request by another party, must disclose. . . ."

J. **Part 3310.2921:** Part 3310.2921 governs the conduct of hearings. The first sentence of the rule as adopted stated: "The chief unemployment law judge has discretion regarding the method by which the hearing is conducted." In the SONAR, the Department explained that this means that the chief unemployment law judge has discretion to determine whether a hearing will be held in person or on the telephone.²⁵ The phrase "method by which the hearing is conducted" is not necessarily self-explanatory and adding clarifying language could alleviate this issue.

The Administrative Law Judge recommends the Department modify the first sentence of this part as follows: "The chief unemployment law judge has discretion regarding ~~the method by which~~ whether the hearing is conducted by telephone or in person."

K. **Part 3310.2921:** The phrase "on the judge's own motion" is used in the third paragraph, third sentence of this part. For the reasons discussed at paragraph IV.H., above, the Administrative Law Judge recommends the phrase be changed to "at the judge's own initiative."

L. **Part 3310.2922:** This part addresses questions regarding receipt of evidence in hearings. The next to the last sentence in the second paragraph was amended in the proposed rules as follows: "An unemployment law judge may only draw adverse inferences from the refusal of a ~~party or~~ witness to testify on the basis of any privilege." The SONAR does not discuss the deletion of the word "party" from this sentence at all. While a party, when testifying, is also a witness, a party who refuses to testify is not a witness. Unless the Department intends that the sentence not apply to a party, the Administrative Law Judge recommends that the Department restore the words "party or" to the sentence to insure clarity.

M. **Part 3310.2923:** Part 3310.2923 amends the provision that addresses official notice. The second sentence of the adopted rule states: "Any fact officially noticed must be so stated on the record during the hearing." The Administrative Law Judge recommends that the Department modify the language as follows: "Any fact

²⁵ SONAR at 20.

officially noticed must be so stated by the unemployment law judge on the record during the hearing and in the decision."

N. Part 3310.2905, Subpart 2, Item E: The word "parties" should be spelled "party's." The reference is to the attorney of the other party.

O. Part 3310.292912: The word "representative" should be plural because it is used in the context of an instruction that documents must be sent by the chief administrative law judge to "all parties" or their representatives.

P. All Rule Parts: The Department has amended the language throughout the rule to refer to the office that handles unemployment compensation hearings as "the chief unemployment law judge" replacing the language "appeals office" it formerly used. This language is confusing and the change is not necessary. In the SONAR, the Department explains that "Department" is not a useful reference because there are many programs in addition to the unemployment insurance program within the Department.²⁶ In addition, the Department states there is no "appeals office" so any number of individuals from across the Department could receive communications from parties directed to "the Department" or the "appeals office."

The Administrative Law Judge notes that the Department's proposed solution to this problem creates additional confusion for a person reading the rules. For example, in Part 3310.2914, which deals with disqualification, the "chief unemployment law judge" is required to make the decision about disqualification of an unemployment law judge. It is unclear whether that reference is to the office or to the person. Similarly, in part 3310.2921, the first sentence states the "chief unemployment law judge has discretion regarding the method by which the hearing is conducted." Whether that language refers to the office or the person is ambiguous.

To eliminate these and similar ambiguities, and to minimize confusion to applicants, the Administrative Law Judge recommends that the Department refer to the office that handles unemployment insurance hearings as the "UI Appeals Office" in these rules.

None of these suggested modifications would make the rules substantially different from those published in the State Register on June 18, 2012.

L. S.

²⁶ SONAR at 6.

Exhibit D

05/21/14

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AR4207

1.1 **Department of Employment and Economic Development**

1.2 **Adopted Permanent Rules Relating to Unemployment Insurance; Modifying**
1.3 **Appeals, Employer Records, and Worker Status Provisions**

1.4 **3310.2901 SCOPE AND PURPOSE.**

1.5 Parts 3310.2901 to 3310.2924 establish procedures for hearings conducted by
1.6 unemployment law judges following:

1.7 A. appeals of all department determinations including determinations on benefit
1.8 accounts, eligibility or ineligibility for unemployment benefits, employers' tax rate, an
1.9 employer's liability to pay taxes, and fraudulent payment of unemployment benefits; or

1.10 B. referrals for direct hearing under Minnesota Statutes, section 268.101,
1.11 subdivision 3a.

1.12 **3310.2902 DEFINITIONS.**

1.13 Subpart 1. **Scope.** For purposes of parts 3310.2901 to 3310.2924, the terms defined
1.14 in this part have the meanings given them.

1.15 Subp. 2. [See repealer.]

1.16 Subp. 3. [Repealed, 33 SR 999]

1.17 Subp. 3a. **Applicant.** "Applicant" means an individual who has filed an application
1.18 for unemployment benefits and has established or is pursuing the establishment of a
1.19 benefit account.

1.20 Subp. 4. **Department.** "Department" means the Department of Employment and
1.21 Economic Development.

1.22 Subp. 4a. **Electronic transmission.** "Electronic transmission" means a
1.23 communication that is sent online, by telephone, or by facsimile.

1.24 Subp. 4a 4b. **Hearing.** "Hearing" means the ~~de novo due process~~ evidentiary hearing
1.25 authorized under Minnesota Statutes, section 268.105, subdivision 1.

05/21/14

REVISOR

SS/NB

AR4207

2.1 Subp. 5. **Party.** "Party" means any applicant or employer whose legal rights, duties,
2.2 or privileges will be directly determined in a hearing.

2.3 **3310.2905 NOTICE OF HEARING.**

2.4 Subpart 1. [Repealed, L 2004 c 206 s 53]

2.5 Subp. 2. **Notice.** The chief unemployment law judge must send a notice of hearing,
2.6 by mail or electronic transmission, to each party at least ten calendar days before the
2.7 scheduled date of hearing unless notice is waived by the parties. The notice must state the
2.8 time, date, method by which the hearing will be conducted, and issues to be considered
2.9 at the hearing. If the issue to be considered at the hearing involves ineligibility for
2.10 unemployment benefits because of a separation from employment, the notice must explain
2.11 that the parties should be prepared to discuss all incidents that arose during the course
2.12 of the employment that led to the separation. The notice of hearing must also include
2.13 materials that provide the following information:

2.14 A. a statement that the purpose of the hearing is to take sworn testimony and
2.15 other evidence on the issues involved, that the hearing is the only procedure available
2.16 under the law at which a party may present evidence, and that further appeals consist of a
2.17 review of the evidence submitted at the hearing;

2.18 B. a statement of the parties' right to represent themselves or to be represented
2.19 by an attorney or other duly authorized representative;

2.20 C. a brief description of the procedure to be followed at the hearing, including
2.21 the role of the unemployment law judge;

2.22 D. a statement that the parties should arrange in advance for the participation of
2.23 witnesses they need to support their position;

05/21/14

REVISOR

SS/NB

AR4207

3.1 E. a statement that a party may find out the name of the other ~~parties'~~ party's
 3.2 attorney or other representative and names of the witnesses that the other party intends to
 3.3 have testify at the hearing, and an explanation of the process for making the request;

3.4 F. a statement that subpoenas may be available to compel the participation of
 3.5 witnesses or the production of documents, and an explanation of the process for requesting
 3.6 a subpoena;

3.7 G. a statement that documents contained in the department's records, and
 3.8 documents submitted by the parties that will be introduced at the hearing as possible
 3.9 exhibits will be sent to the parties in advance of the hearing;

3.10 H. a statement that even if the applicant already received unemployment
 3.11 benefits, it is important to participate in the hearing, because if the applicant is held
 3.12 ineligible, the applicant will not be able to receive further benefits and the applicant will
 3.13 have to pay back the benefits already received;

3.14 I. a statement that the unemployment law judge will determine the facts
 3.15 based upon a preponderance of the evidence along with the statutory definition of
 3.16 "preponderance of the evidence";

3.17 J. a statement that a party who fails to participate in the hearing will not be
 3.18 allowed a rehearing unless the party can show good cause for failing to participate, along
 3.19 with the statutory definition of "good cause"; and

3.20 K. a statement that an applicant, if unemployed, must file weekly continued
 3.21 requests for unemployment benefits while the appeal is pending.

3.22 **3310.2908 RESCHEDULING AND CONTINUANCES.**

3.23 Subpart 1. **Rescheduling.** Requests to reschedule a hearing must be addressed to
 3.24 the chief unemployment law judge in advance of the regularly scheduled hearing date.
 3.25 The request may be made in person, by telephone or other electronic transmission, or

05/21/14

REVISOR

SS/NB

AR4207

4.1 by mail. A hearing must be rescheduled based on a party's need for additional time to
 4.2 obtain necessary evidence or to obtain representation or adequately prepare, inability to
 4.3 participate due to illness, or other compelling reasons beyond the control of the party that
 4.4 prevent participation at the originally scheduled time. A hearing may be rescheduled only
 4.5 once by each party except in the case of an emergency. If requested, a written statement
 4.6 by mail or electronic transmission confirming the reasons for requesting that the case be
 4.7 rescheduled must be provided to the chief unemployment law judge.

4.8 The ten-calendar-day notice requirement for hearings does not apply to rescheduled
 4.9 hearings.

4.10 Subp. 2. **Continuances.** If a request for rescheduling is made because of the
 4.11 unavailability of a witness or the need to obtain documents, the unemployment law judge
 4.12 may direct that the hearing take place as scheduled. After obtaining the testimony and
 4.13 other evidence then available, the unemployment law judge must determine whether
 4.14 the hearing should be continued to obtain the testimony of the unavailable witness or
 4.15 the unavailable documents. The ten-calendar-day notice requirement for hearings does
 4.16 not apply to continued hearings.

4.17 The unemployment law judge has the discretion to continue a hearing if the judge
 4.18 determines that additional evidence is necessary for a proper result.

4.19 **3310.2910 CONSOLIDATION OF ISSUES AND NEW ISSUES.**

4.20 Upon the request of a party or on the unemployment law judge's motion, the judge
 4.21 may consolidate for hearing issues involving the same parties. The unemployment law
 4.22 judge may take testimony and render a decision on issues not listed on the notice of
 4.23 hearing if each party is notified on the record, is advised of the right to object, and does
 4.24 not object. If a party objects, the unemployment law judge must:

- 4.25 A. continue the hearing to allow the party to prepare for consideration of the
- 4.26 issue; or

05/21/14

REVISOR

SS/NB

AR4207

5.1 B. direct the department to address the issue and send to the parties a
5.2 determination by mail or electronic transmission.

5.3 **3310.2911 INTERPRETERS.**

5.4 The chief unemployment law judge must provide an interpreter, when necessary,
5.5 upon the request of a party. The requesting party must notify the chief unemployment
5.6 law judge at least five calendar days before the date of the hearing that an interpreter is
5.7 required. The unemployment law judge must continue any hearing where a witness or
5.8 party needs an interpreter in order to be understood or to understand the proceedings.

5.9 All notices and other written materials sent to parties must be prepared in easily
5.10 understood English.

5.11 A written statement in English, Spanish, Vietnamese, Somali, and Hmong which
5.12 states that the accompanying documents are important, and that if the reader does not
5.13 understand the documents, the reader should seek immediate assistance, must accompany
5.14 all notices and written materials sent to the parties.

5.15 **3310.2912 EXHIBITS IN HEARINGS.**

5.16 Upon receipt of the notice of hearing, and no later than five calendar days before the
5.17 scheduled date of hearing, parties may submit to the chief unemployment law judge, by
5.18 electronic transmission or mail, any documents a party would like to offer as exhibits at
5.19 the hearing. Copies of the documents submitted by the parties, as well as all documents
5.20 that are contained in the department's records that will be introduced as exhibits, must
5.21 be mailed, or sent by electronic transmission, to all parties or the parties' representative
5.22 representatives by the chief unemployment law judge in advance of the hearing.

5.23 If a party requests to introduce additional documents during the course of the
5.24 hearing, and the unemployment law judge rules that the documents should be admitted
5.25 into evidence considered, the requesting party must ~~send, by electronic transmission or~~
5.26 ~~mail;~~ provide copies of the documents to the unemployment law judge and the other
5.27 party. The record must be left open for sufficient time for the submission of a written

05/21/14

REVISOR

SS/NB

AR4207

6.1 response to the documents. The response may be sent by mail or electronic transmission.
 6.2 The unemployment law judge may, when appropriate, reconvene the hearing to obtain a
 6.3 response or permit cross-examination regarding the late filed exhibits.

6.4 **3310.2913 ACCESS TO DATA.**

6.5 The parties to a hearing must be allowed reasonable access to department data
 6.6 necessary to represent themselves in the hearing. Access to data must be consistent with
 6.7 all laws relating to data practices. The data must be provided by the chief unemployment
 6.8 law judge at no cost and mailed or sent by electronic transmission to the party or the
 6.9 party's representative.

6.10 **3310.2914 SUBPOENAS AND DISCOVERY.**

6.11 Subpart 1. **Subpoenas.** The unemployment law judge may issue subpoenas to
 6.12 compel the attendance of witnesses, the production of documents or other exhibits, upon
 6.13 a showing of necessity by the requesting party. Requests for issuance of subpoenas
 6.14 must be made to the chief unemployment law judge, by electronic transmission or mail,
 6.15 sufficiently in advance of the scheduled hearing to allow for the service of the subpoenas.
 6.16 The requesting party must identify the person or documents to be subpoenaed, the subject
 6.17 matter of the evidence requested, and their necessity. A request for a subpoena may be
 6.18 denied if the testimony or documents sought would be irrelevant, immaterial, or unduly
 6.19 cumulative or repetitious.

6.20 If a request for a subpoena has been denied, the unemployment law judge must
 6.21 reconsider the request during the hearing and determine whether the request was properly
 6.22 denied. If the unemployment law judge determines that the request for a subpoena was
 6.23 not properly denied, the judge must continue the hearing to allow for service of and
 6.24 compliance with the subpoena.

6.25 The unemployment law judge may issue a subpoena ~~on the judge's own motion~~ even
 6.26 if a party has not requested one.

05/21/14

REVISOR

SS/NB

AR4207

7.1 Subp. 2. **Discovery.** Each party, within ~~three~~ five calendar days following request by
 7.2 another party, must disclose the name of the party's attorney or other representative and the
 7.3 names of all witnesses the party intends to have testify at the hearing. The request and the
 7.4 response may be made by mail or by electronic transmission. Any witnesses unknown at
 7.5 the time of the request must be disclosed as soon as they become known. If a party fails to
 7.6 comply with the disclosure requirements, the unemployment law judge may, upon notice
 7.7 ~~by the requesting party to the parties,~~ continue the hearing.

7.8 **3310.2915 DISQUALIFICATION OF UNEMPLOYMENT LAW JUDGE.**

7.9 An unemployment law judge must request to be removed from any case by the chief
 7.10 unemployment law judge where the judge believes that presiding over the case would
 7.11 create the appearance of impropriety. The chief unemployment law judge must remove an
 7.12 unemployment law judge from any case where ~~any of the parties to the appeal are related~~
 7.13 ~~to the judge or have a personal relationship with the judge~~ the unemployment law judge
 7.14 has a relationship that would disqualify the judge under Rule 2.11(A)(2) of the Judicial
 7.15 Code of Conduct, including the definitions provided in the terminology section. The chief
 7.16 unemployment law judge must remove an unemployment law judge from any case if the
 7.17 judge has a financial or personal interest in the outcome.

7.18 Any party may request the removal of an unemployment law judge by submitting to
 7.19 the chief unemployment law judge, by mail or electronic transmission, a written statement
 7.20 of the basis for removal. The chief unemployment law judge must decide the fitness of
 7.21 the unemployment law judge to hear the particular case.

7.22 **3310.2916 REPRESENTATION BEFORE UNEMPLOYMENT LAW JUDGE.**

7.23 In a hearing before an unemployment law judge, a party may be self-represented
 7.24 or represented by an attorney or a duly an authorized representative. Except for an
 7.25 attorney-at-law, no person may charge an applicant a fee of any kind.

05/21/14

REVISOR

SS/NB

AR4207

8.1 An unemployment law judge may refuse to allow a person to represent others in
8.2 a hearing if that person acts in an unethical manner or repeatedly fails to follow the
8.3 instructions of the judge.

8.4 **3310.2917 PUBLIC ACCESS TO HEARINGS AND RECORDING OF HEARINGS.**

8.5 Subpart 1. **Public access not permitted.** Hearings are not public. ~~If a member of the~~
8.6 ~~public requests to listen in on a hearing conducted by telephone conference, or requests~~
8.7 ~~to sit in on a hearing conducted in person, the unemployment law judge must make the~~
8.8 ~~appropriate accommodation. An unemployment law judge may exclude a member of the~~
8.9 ~~public only when necessary to maintain decorum. Only parties, their representatives and~~
8.10 ~~witnesses, and authorized department personnel are permitted to participate in or listen to~~
8.11 ~~hearings. If any other person wishes to listen to or sit in on a hearing, the parties must~~
8.12 ~~provide their consent as required by Minnesota Statutes, section 13.05, subdivision 4.~~

8.13 Subp. 2. **Recording.** The unemployment law judge must make a recording of all
8.14 testimony that is the official record. No other voice recordings or pictures may be made of
8.15 any party, representative, or witness during the hearing.

8.16 **3310.2920 ADMINISTRATION OF OATH OR AFFIRMATION.**

8.17 An unemployment law judge has authority to administer oaths and affirmations.
8.18 Before testifying, every witness is required to declare to testify truthfully, by oath or
8.19 affirmation. Minnesota Statutes, sections 358.07 and 358.08, provide the form of the
8.20 oath or affirmation.

8.21 **3310.2921 CONDUCT OF HEARING.**

8.22 The chief unemployment law judge has discretion regarding the method by which
8.23 the hearing is conducted. The hearing must be conducted by an unemployment law judge
8.24 as an evidence-gathering inquiry, without regard to a burden of proof. The order of
8.25 presentation of evidence is determined by the unemployment law judge.

05/21/14

REVISOR

SS/NB

AR4207

9.1 Each party may present and examine witnesses and offer their own documents
 9.2 or other exhibits. Parties have the right to examine witnesses, object to exhibits and
 9.3 testimony, and cross-examine the other party's witnesses. The unemployment law judge
 9.4 must assist all parties in the presentation of evidence. The unemployment law judge
 9.5 must rule upon evidentiary objections on the record. The unemployment law judge must
 9.6 permit rebuttal testimony. Parties have the right to make closing statements. Closing
 9.7 statements may include comments based upon the evidence and arguments of law. The
 9.8 unemployment law judge may limit repetitious testimony and arguments.

9.9 The unemployment law judge must exercise control over the hearing procedure in
 9.10 a manner that protects the parties' rights to a fair hearing, including the sequestration of
 9.11 witnesses to avoid prejudice or collusion. The unemployment law judge must ensure that
 9.12 all relevant facts are clearly and fully developed. The unemployment law judge may, ~~on~~
 9.13 ~~the judge's own motion,~~ obtain testimony and other evidence from department employees
 9.14 and any other person the judge believes will assist the judge in reaching a proper result.

9.15 Before taking testimony, the unemployment law judge must inform the parties of
 9.16 the following:

9.17 A. that the purpose of the hearing is to take testimony and other evidence on
 9.18 the issues;

9.19 B. that the hearing is the only opportunity available to the parties to present
 9.20 testimony and other evidence on the issues involved;

9.21 C. an explanation of how the hearing will be conducted, including the role and
 9.22 obligations of the unemployment law judge;

9.23 D. that the parties have the right to request that the hearing be continued so that
 9.24 additional witnesses and documents can be presented, by subpoena if necessary;

9.25 E. that the facts will be determined upon a preponderance of the evidence, along
 9.26 with the statutory definition of "preponderance of the evidence";

05/21/14

REVISOR

SS/NB

AR4207

10.1 F. the statutory provision on burden of proof;

10.2 G. that certain government agencies may have access to the information
10.3 provided at the hearing if allowed by statute and that the information provided may be
10.4 disclosed under a district court order; and

10.5 H. that after the hearing is over, the unemployment law judge will issue a
10.6 written decision, which will be sent to the parties by mail or electronic transmission.

10.7 **3310.2922 RECEIPT OF EVIDENCE.**

10.8 Only evidence received into the record of any hearing may be considered by the
10.9 unemployment law judge. The parties may stipulate to the existence of any fact or the
10.10 authenticity of any exhibit.

10.11 All competent, relevant, and material evidence, including records and documents in
10.12 the possession of the parties that are offered into evidence, are part of the hearing record.
10.13 An unemployment law judge may receive any evidence that possesses probative value,
10.14 including hearsay, if it is the type of evidence on which reasonable, prudent persons are
10.15 accustomed to rely in the conduct of their serious affairs. An unemployment law judge
10.16 may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.
10.17 An unemployment law judge is not bound by statutory and common law rules of evidence.
10.18 The rules of evidence may be used as a guide in determining the quality of evidence
10.19 offered. An unemployment law judge may draw adverse inferences from the refusal of a
10.20 party or witness to testify on the basis of any privilege. An unemployment law judge may
10.21 only use reliable, probative, and substantial evidence as a basis for decision.

10.22 **3310.2923 OFFICIAL NOTICE.**

10.23 An unemployment law judge may take official notice of matters of common
10.24 knowledge and may take notice of facts within the judge's specialized knowledge in the
10.25 field of unemployment insurance. ~~Any fact officially noticed~~ The unemployment law
10.26 judge must be so stated ~~state~~ on the record ~~during the hearing.~~ Parties must be given any

05/21/14

REVISOR

SS/NB

AR4207

11.1 fact that is judicially noticed. The unemployment law judge must give the parties an
11.2 opportunity to contest the noticed facts.

11.3 **3310.2924 EX PARTE COMMUNICATIONS.**

11.4 Private communication between an unemployment law judge assigned to conduct
11.5 the hearing and one of the parties, in the absence of the other party, is forbidden if it
11.6 relates to the substance of the matter at issue. Private communication is to be avoided
11.7 even when it does not relate to the subject matter of the hearing if it would create the
11.8 appearance of impropriety.

11.9 **3315.0555 DETERMINING WORKER STATUS.**

11.10 Subpart 1. **Essential Factors.** When determining whether an individual is an
11.11 employee or an independent contractor, five ~~essential~~ factors must be considered and
11.12 weighed within a particular set of circumstances. The five ~~essential~~ factors to be
11.13 considered are:

11.14 A. the right or the lack of the right to control the means and manner of
11.15 performance;

11.16 B. the right to discharge the worker without incurring liability;

11.17 C. the mode of payment;

11.18 D. furnishing of materials and tools; and

11.19 E. control over the premises where the services are performed.

11.20 The two most important ~~essential~~ factors are items A and B.

11.21 Other factors, not specifically identified in this part, may be considered if a
11.22 determination the outcome is inconclusive when applying the ~~essential~~ factors in items A
11.23 to E. The degree of their importance may vary depending upon the occupation or work
11.24 situation being considered and why the factor is present in the particular situation.

11.25 Subp. 2. [Repealed, L 2012 c 201 art 3 s 16]

05/21/14

REVISOR

SS/NB

AR4207

12.1 Subp. 3. [Repealed, L 2012 c 201 art 3 s 16]

12.2 Subp. 4. [Repealed, L 2012 c 201 art 3 s 16]

12.3 Subp. 5. [Repealed, L 2004 c 206 s 53]

12.4 **3315.1001 SCOPE.**

12.5 Parts 3315.1001 and 3315.1010 clarify an employer's duty with regard to records as
12.6 required under Minnesota Statutes, section 268.186.

12.7 **3315.1010 RECORDS.**

12.8 Subpart 1. **Record keeping.** Each employer must establish, maintain, and preserve
12.9 records with respect to individuals performing services for it. The records must be
12.10 preserved for a period of not less than four years in addition to the current calendar year.
12.11 The records must show for each individual the following:

12.12 A. name;

12.13 B. Social Security number;

12.14 C. days and the number of hours each day in which the individual performed
12.15 services;

12.16 D. location where services were performed;

12.17 E. wages paid and wages due but not paid for services;

12.18 F. rate of pay;

12.19 G. amounts paid as allowances or reimbursement for travel or other activity
12.20 which were not included as wages. The records must show each item of expense incurred
12.21 during each pay period or calendar month; and

12.22 H. the complete resident address.

12.23 Subp. 2. **Instate and outstate.** For services performed both in Minnesota and
12.24 outside Minnesota the records required by subpart 1 must include:

05/21/14

REVISOR

SS/NB

AR4207

13.1 A. the state in which the employer maintains a base of operations used by
13.2 the individual;

13.3 B. the state from which the services are directed and controlled; and

13.4 C. a list of the states in which the individual performs services, other than
13.5 temporary or incidental services, and the dates services were performed in each state.

13.6 Subp. 3. **Covered and noncovered employment.** For services performed in both
13.7 covered employment and noncovered employment within a pay period the records
13.8 required by subpart 1 must include the hours spent performing services in covered
13.9 employment and the hours spent performing noncovered employment.

13.10 **REPEALER.** Minnesota Rules, parts 3310.2902, subpart 2; 3310.2919; 3315.0200,
13.11 subpart 1; 3315.0203; 3315.0211; 3315.0212, subparts 2 and 3; 3315.0213; 3315.0801;
13.12 3315.0805; 3315.0810; 3315.0815; 3315.0820; 3315.0825; 3315.0830; 3315.0835;
13.13 3315.0840; 3315.0845; 3315.0901; and 3315.0905, are repealed.

Exhibit E

Minnesota Department of Employment and Economic Development

ORDER ADOPTING RULES

Adoption of Permanent Rules Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions, Minnesota Rules, Parts 3310 to 3310.2924 and Parts 3315.0555 to 3315.1010; Revisor's ID Number AR4207

BACKGROUND INFORMATION

1. The rules repealed by this order are obsolete and were identified in the Department of Employment and Economic Development's annual obsolete rules report dated November 7, 2013, under Minnesota Statutes section 14.05 subd. 5.

2. The Department of Employment and Economic Development has complied with all notice and procedural requirements in Minnesota Statutes, chapter 14, Minnesota Rules, chapter 1400, and other applicable law.

3. The agency received two written comments and submissions on the rules. No persons requested a public hearing. Therefore, there are not 25 or more requests for a public hearing. The agency received zero requests for notice of submission to the Office of Administrative Hearings.

4. The Department has made the following changes to the rules between the proposed rules and the adopted rules that are reasonable, do not make the rules substantially different, and are within the scope of the matter announced in the notice of intent to adopt rules:

a. Part 3310.2901 Scope and Purpose

Charles Thomas, attorney with Southern Minnesota Regional Legal Services, submitted comments regarding the proposed amendments. Mr. Thomas requested that the Department re-insert language in the Scope and Purpose of the rules to clarify what kind of Department determinations can be appealed and result in a hearing. In consideration of this comment, Part 3310.2901A has been amended to read:

"appeals of all department determinations including determinations on benefit accounts, eligibility or ineligibility for unemployment benefits, employers' tax rate, an employer's liability to pay taxes, and fraudulent payment of unemployment benefits;"

This change does not make the rule substantially different, as it is re-inserting the more descriptive language that has been in the rules since 1987, in order to provide clarification as to the types of determinations that can be appealed and result in a hearing. This change is within the scope of the matter announced in the notice of intent to adopt rules; namely, rules relating to unemployment insurance and modifying appeals provisions.

b. Part 3310.2902 Definitions

Subp. 4a. Electronic Transmission

Mr. Thomas also requested the inclusion of the statutory definition of "applicant" and "electronic transmission" in the rules, in order to make those terms clear and reference back to the statute. In consideration of that comment, Part 3310.2902, Subp. 3a. was amended to include the statutory definition of "applicant," as follows:

"'Applicant' means an individual who has filed an application for unemployment benefits and has established or is pursuing the establishment of a benefit account."

And Part 3310.2902, Subp. 4a. was amended to include the statutory definition of "electronic transmission" as follows:

"'Electronic transmission' means a communication that is sent online, by telephone, or by facsimile."

These changes are to promote understanding of the defined terms and to be consistent with the statute. The changes do not make the rules substantially different. It is also within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

Subp. 4b. Hearing

Administrative Law Judge LauraSue Schlatter issued a report on May 13, 2014, recommending that the department amend the language in Part 3310.2902, Subp. 4b, regarding the definition of a "hearing," in order to provide a clear and understandable definition. In consideration of that recommendation, Part 3310.2902, Subp. 4b was amended to remove the terms "de novo due process" from the definition of "hearing" to remove legal terms that parties may not understand.

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

c. Part 3310.2905 Notice of Hearing

Mr. Thomas also requested a change in the language in the rules referencing a "duly authorized representative," because the rules do not state how an individual becomes a "duly authorized" representative. In order to provide clarity, and in consideration of that comment, Part 3310.2905, Subp. 2(B) was amended to remove the word "duly" from "duly authorized representative."

This change is to promote clarity of who may represent a party in a hearing and it does not make the rules substantially different. It is also within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

d. Part 3310.2905 Notice of Hearing

Administrative Law Judge Schlatter recommended that the department amend the word "parties" in Part 3310.2905, Subp. 2(E), to "party's," in order to be grammatically correct. That change has been made. This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

e. 3310.2908 Rescheduling and Continuances

Glenda Niemiec from the Minnesota Recruiting and Staffing Association Legislative Committee, and Mr. Thomas, both submitted comments on the removal of language in Part 3310.2908, Subp. 1, regarding rescheduling hearings due to a party's illness. In consideration of those comments, Part 3310.2908, Subp. 1, has been amended as follows to re-insert the language that a hearing must be rescheduled due to a party's illness:

"A hearing must be rescheduled based on a party's need for additional time to obtain necessary evidence or to obtain representation or adequately prepare, inability to participate due to illness, or other compelling reasons beyond the control of the party that prevent participation at the originally scheduled time..."

This change is reasonable, because it clarifies that a party's illness is a compelling reason that would require the hearing to be rescheduled. It does not make the rule substantially different, as the originally proposed language still included "other compelling reason," which can include illness of a party. Likewise, this change does not diminish the fair warning to persons who will be affected by the rule.

f. 3310.2912 Exhibits in Hearings

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2912 to change "representative" to "representatives" in order to be grammatically correct. That change has been made.

Judge Schlatter also recommended that the department change the wording regarding the introduction of additional documents to make it more clear and understandable and to reflect that hearings may be held in person. In consideration of that comment, the following amendment was made:

"If a party requests to introduce additional documents during the course of the hearing, and the unemployment law judge rules that the documents should be considered, the requesting party must provide copies of the documents to the unemployment law judge and the other party."

These changes do not make the rules substantially different and they are within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

g. 3310.2914 Subpoenas and Discovery

Subp. 1 Subpoenas

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2914, Subp. 1, to remove the language "upon the judge's own motion," in order to promote clarity and understanding. That part has been amended to read:

"The unemployment law judge may issue a subpoena even if a party has not requested one."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

Subp. 2 Discovery

Administrative Law Judge Schlatter recommended that the department amend part 3310.2914, Subp. 2 to change the language allowing "three calendar days" to respond to a discovery request to "three week days," in order to alleviate concerns that a party receiving a discovery request on a Friday would only have until Monday to respond. In consideration of that comment, the department has amended that part to provide "five calendar days" to respond to a discovery request.

Judge Schlatter also recommended that the department amend the language about continuing the hearing upon a party's failure to comply with disclosure requirements to add clarity. In consideration of that comment, the department has made the following amendment:

"If a party fails to comply with the disclosure requirements, the unemployment law judge may, upon notice to the parties, continue the hearing."

These changes do not make the rules substantially different and they are within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

h. 3310.2915 Disqualification of Unemployment Law Judge

Administrative Law Judge Schlatter recommended that the department remove the terminology "personal relationship with the judge," from Part 3310.2915, regarding disqualification of an unemployment law judge, and use the Judicial Code of Conduct as

guidance for when an unemployment law judge may be disqualified. In consideration of that recommendation, the department has removed from part 3310.2915 the language "where any of the parties to the appeal are related to the judge or have a personal relationship with the judge" and replaced it with the following:

"The chief unemployment law judge must remove an unemployment law judge from any case where the unemployment law judge has a relationship that would disqualify the judge under Rule 2.11(A)(2) of the Judicial Code of Conduct, including the definitions provided in the terminology section."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

i. Part 3310.2916 Representation Before Unemployment Law Judge

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2916, in order to clarify that parties may represent themselves in unemployment hearings. The following change has been made in consideration of that comment:

"In a hearing before an unemployment law judge, a party may be self-represented or represented by an attorney or an authorized representative."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

Mr. Thomas also requested a change in the language in the rules referencing a "duly authorized representative," because the rules do not state how an individual becomes a "duly authorized" representative. In order to provide clarity, and in consideration of that comment, Part 3310.2916 was amended to remove the word "duly" from "duly authorized representative."

This change is to promote clarity of who may represent a party in a hearing and it does not make the rules substantially different. It is also within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

j. Part 3310.2921 Conduct of Hearing

Administrative Law Judge Schlatter recommended that the department Part 3310.2921 to remove the language "on the judge's own motion." That change has been made to make the part more clear and understandable. This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

k. Part 3310.2923 Official Notice

Administrative Law Judge Schlatter recommended that the department amend Part 3310.2923 to clarify the language regarding an unemployment law judge taking judicial notice on the record. In consideration of that recommendation, the department made the following amendment to make the part more readable:

"The unemployment law judge must state on the record any fact that is judicially noticed. The unemployment law judge must give the parties an opportunity to contest the noticed facts."

This change does not make the rules substantially different and it is within the scope of the matter announced in the notice of intent to adopt rules relating to the amendment of unemployment insurance appeal hearing rules.

l. Part 3315.0555 Determining Worker Status

Subp. 1 Factors

Subp. 1, has been amended to remove "essential" from the heading, "Essential Factors," and from the term "five essential factors" that are used to determine worker status. This change was made in order to remove unnecessary language from the rule, which does not affect the meaning of the rule. This change does not make the rule substantially different, as it still uses the terms "factors and "five factors" to describe what is considered when determining whether an individual is an employee or an independent contractor.

Subp. 1(E). was amended to change the "a determination" to "the outcome" and to remove "essential" from factors and change it to "factors in items A to E." This subpart is clarifying what is considered when the factors listed in items A to E lead to an inconclusive outcome as to a worker's status. It is not referencing a formal determination, and so the term "determination" was changed to "outcome" in order to avoid confusion with the statutory term "determination," which references official decisions made by the Department on unemployment insurance matters. "Factors in items A to E" was added in place of "essential factors," in order to clarify what factors are considered when determining worker status.

These changes clarify what was already within the scope of the matter announced in the notice of intent to adopt rules. They are reasonable in order to promote better understanding of the rule, and they do not make the rule substantially different.

5. Part 3310.2917 Public Access to Hearings and Recordings of Hearings

Administrative Law Judge Schlatter found a defect in the rules at Part 3310.2917 Public Access to Hearings and Recordings of Hearings, Subp. 1, Public Access. Judge Schlatter

found that Subp. 1 violates Minnesota Statutes, section 268.19, which makes data gathered from any person under the administration of the Minnesota Unemployment Insurance Law" private data on individuals or nonpublic data not on individuals pursuant to the Minnesota Government Data Practices Act. Judge Schlatter recommended that the only way to cure the defect is to make unemployment compensation hearings not public.

In consideration of Judge Schlatter's findings, the department made the following amendment to part 3310.2917:

"Subpart 1. Public access not permitted. Hearings are not public. Only parties, their representatives and witnesses, and authorized department personnel are permitted to participate in or listen to hearings. If any other person wishes to listen to or sit in on a hearing, the parties must provide their consent as required by Minnesota Statutes, section 13.05, subdivision 4."

The department included "authorized department personnel" in the list of individuals who may participate in or listen to hearings, because supervising unemployment law judges and other department personnel must, on occasion, listen to and review hearings for accuracy and to review the unemployment law judges' compliance with state and federal hearing requirements.

This change is needed and reasonable. This change is a substantial change from the proposed rules. The department complied with all of the requirements set forth in Minn. R. 1400.2110 for adopting substantial changes to the proposed rules.

6. The rules are needed and reasonable.

ORDER

The above-named rules, in the form published in the State Register on February 24, 2014, with the modifications as indicated in the Revisor's draft, file number AR4207, dated May 21, 2014, are adopted under my authority in Minnesota Statutes, section 268.105, subdivision 1(b); and section 116J.035, subdivision 2.

Date

Katie Clark Sieben, Commissioner
Department of Employment and Economic
Development

Exhibit F

Gulstad, Katrina (DEED)

From: Hang, Amy (GOV)
Sent: Monday, June 30, 2014 2:35 PM
To: Gulstad, Katrina (DEED)
Subject: 4207

Hi, Katrina –

The Office of the Governor has reviewed and approved the Final Form for 4207, relating to Unemployment Insurance, Modifying Appeals, Employer Records, and Worker Status Provisions.

You may now proceed with the Filing of the Order Adopting Rules.

Thank you,

Amy Hang | Policy Coordinator
Office of Governor Mark Dayton & Lt. Governor Yvonne Prettner Solon
116 Veterans Service Building
20 W 12 Street
Saint Paul, MN 55155
Office: 651-201-3420 | Cell: 651-356-4038 | Fax: 651-797-1870

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**2013 Administrative Rule
Final Rule Form**

Revisor's ID Number: 4207

Submitting Agency: Department of Employment and Economic
Development

Date: 6/10/14

Rule Contact: Katrina Gulstad

E-mail Address: katrina.gulstad@state.mn.us

Phone #: 651-259-7241

Title: (Short descriptive title)	Proposed Permanent Rules Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions
Chapter number(s):	3310, 3315
Comments/controversies received since Notice of Intent to Adopt:	<p>Two comments were received since the Notice of Intent to Adopt:</p> <ul style="list-style-type: none"> (1) Glenda Niemiec from the Minnesota Recruiting and Staffing Association Legislative Committee sought clarification on a few of the amendments. (2) Charles Thomas, attorney with Southern Minnesota Regional Legal Services, submitted comments regarding the proposed amendments. <p>On May 21, 2014, the department mailed notice to Ms. Niemiec and Mr. Thomas of a substantial change to Part 3310.2917, as proposed. The department received no comments from Ms. Niemiec or Mr. Thomas to the notice of substantial change after the 15-day comment period ended on June 9, 2014.</p>
If a hearing was requested explain why and attach ALJ Report:	No one requested a hearing.

List changes from draft rules proposal:

On May 13, 2014, Administrative Law Judge LauraSue Schlatter issued the enclosed Report. Judge Schlatter found defects in Parts 3310.2914, Subpart 2, 3310,2915, 3310.2916, and 3310.2917. The department has modified those parts to address the noted defects.

Judge Schlatter also recommended certain technical corrections to the rules. The department has adopted most of those suggestions. The suggested technical corrections that the department did not follow were in order to keep the rules consistent with the language of the current Minnesota Unemployment Insurance Law, Minnesota Statutes, section 268, which was recently amended. The changes to the rules are listed and explained in the attached proposed Order Adopting Rules.

There was one change that is substantially different from the proposed rules. Administrative Law Judge Schlatter found a defect in the rules at Part 3310.2917 Public Access to Hearings and Recordings of Hearings, Subp. 1, Public Access. Judge Schlatter found that Subp. 1 violates Minnesota Statutes, section 268.19, which makes data gathered from any person under the administration of the Minnesota Unemployment Insurance Law" private data on individuals or nonpublic data not on individuals pursuant to the Minnesota Government Data Practices Act. Judge Schlatter recommended that the only way to cure the defect is to make unemployment compensation hearings not public.

In consideration of Judge Schlatter's findings, the department made the following amendment to part 3310.2917:

"Subpart 1. Public access not permitted. Hearings are not public. Only parties, their representatives and witnesses, and authorized department personnel are permitted to participate in or listen to hearings. If any other person wishes to listen to or sit in on a hearing, the parties must provide their consent as required by Minnesota Statutes, section 13.05, subdivision 4."

The department included "authorized department personnel" in the list of individuals who may participate in or listen to hearings, because supervising unemployment law judges and other department personnel must, on occasion, listen to and review hearings for accuracy and to review the unemployment law judges' compliance with state and federal hearing requirements.

This change is needed and reasonable. This change is a substantial change from the proposed rules. The department complied with all of the requirements set forth in Minn. R. 1400.2110 for adopting substantial changes to the proposed rules.

K. Clark Seiber

Commissioner's Signature

6-12-14

Date

THIS SECTION TO BE COMPLETED BY THE GOVERNOR'S OFFICE

I have reviewed the above information and have approved this administrative rule. The Agency may formally submit this rule to the Office of Administrative Hearings for approval and filing with the Office of Secretary of State.

Governor's Policy Advisor

Date

Exhibit G-1

05/21/14

REVISOR

SS/NB

AR4207

8.1 An unemployment law judge may refuse to allow a person to represent others in
8.2 a hearing if that person acts in an unethical manner or repeatedly fails to follow the
8.3 instructions of the judge.

8.4 **3310.2917 PUBLIC ACCESS TO HEARINGS AND RECORDING OF HEARINGS.**

8.5 Subpart 1. **Public access not permitted.** Hearings are not public. ~~If a member of the~~
8.6 ~~public requests to listen in on a hearing conducted by telephone conference, or requests~~
8.7 ~~to sit in on a hearing conducted in person, the unemployment law judge must make the~~
8.8 ~~appropriate accommodation. An unemployment law judge may exclude a member of the~~
8.9 ~~public only when necessary to maintain decorum. Only parties, their representatives and~~
8.10 ~~witnesses, and authorized department personnel are permitted to participate in or listen to~~
8.11 ~~hearings. If any other person wishes to listen to or sit in on a hearing, the parties must~~
8.12 ~~provide their consent as required by Minnesota Statutes, section 13.05, subdivision 4.~~

8.13 Subp. 2. **Recording.** The unemployment law judge must make a recording of all
8.14 testimony that is the official record. No other voice recordings or pictures may be made of
8.15 any party, representative, or witness during the hearing.

8.16 **3310.2920 ADMINISTRATION OF OATH OR AFFIRMATION.**

8.17 An unemployment law judge has authority to administer oaths and affirmations.
8.18 Before testifying, every witness is required to declare to testify truthfully, by oath or
8.19 affirmation. Minnesota Statutes, sections 358.07 and 358.08, provide the form of the
8.20 oath or affirmation.

8.21 **3310.2921 CONDUCT OF HEARING.**

8.22 The chief unemployment law judge has discretion regarding the method by which
8.23 the hearing is conducted. The hearing must be conducted by an unemployment law judge
8.24 as an evidence-gathering inquiry, without regard to a burden of proof. The order of
8.25 presentation of evidence is determined by the unemployment law judge.

Exhibit G-2



Unemployment Insurance Minnesota

May 21, 2014

Charles Thomas
Southern Minnesota Regional Legal Offices
Saint Paul Central Office
55 East 5th St., Ste. 400
St. Paul, MN 55101

Re: In the Matter of the Proposed Rules of the Department of Employment & Economic Development Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions, Revisor's ID Number 4207

Dear Mr. Thomas:

On May 13, 2014, Administrative Law Judge LauraSue Schlatter issued a Report in the above-entitled matter. Judge Schlatter found a defect in Part 3310.2917, because it violates Minnesota Statutes, section 268.19, which makes "data gathered from any person under the administration of the Minnesota Unemployment Insurance Law" private data on individuals or nonpublic data not on individuals pursuant to Minnesota Statutes, section 13.05, subdivision 4 of the Minnesota Government Data Practices Act. Judge Schlatter found that the only way to cure the defect is to make unemployment compensation hearings not public.

In consideration of Judge Schlatter's findings, the department made the following amendment to part 3310.2917:

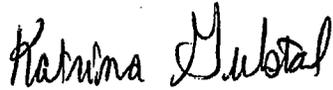
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Page 2
May 21, 2014

This letter serves as notice that Chief Administrative Law Judge Tammy Pust found that the change to Part 3310.2917 is a substantial change from the rules as proposed. You have 15 days to comment on this change. Please submit any comments to Katrina Gulstad at: 332 Minnesota Street, Ste. E200, St. Paul, MN 55101, or katrina.gulstad@state.mn.us no later than **4:30 p.m. on Monday, June 9, 2014.**

Sincerely,

A handwritten signature in cursive script that reads "Katrina Gulstad".

Katrina Gulstad
Attorney



Unemployment Insurance Minnesota

May 21, 2014

Glenda Niemiec
Doherty Staffing
7645 Metro Blvd.
Edina, MN 55439

Re: In the Matter of the Proposed Rules of the Department of Employment & Economic Development Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Worker Status Provisions, Revisor's ID Number 4207

Dear Ms. Niemiec:

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Sincerely,

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Katrina Gulstad
Attorney