



MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

600 North Robert Street
Saint Paul, Minnesota 55101

Mailing Address:
P.O. Box 64620
St. Paul, Minnesota 55164-0620

May 13, 2014

Voice: (651) 361-7900
TTY: (651) 361-7878
Fax: (651) 361-7936

Katrina I. Gulstad
Unemployment Law Judge
Minnesota Department of Employment and
Economic Development
332 Minnesota St Ste E200
Saint Paul, MN 55101

**Re: *In the Matter of the Proposed Rules of the DEED Relating to
Unemployment Insurance; Modifying Appeals, Employer
Records, and Workers Status Provisions***
OAH 80-1200-31264; Revisor R-4207

Dear Ms. Gulstad:

Enclosed please find the Report of the Chief Administrative Law Judge in the above-entitled matter and the Report of Administrative Law Judge LauraSue Schlatter. The Department may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval.

If the Agency chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Department must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any further questions, please contact Denise Collins at 651-361-7875.

Sincerely,

A handwritten signature in black ink that reads "LauraSue Schlatter/rs".

LauraSue Schlatter
Administrative Law Judge

Enclosure

cc: Office of the Governor
Office of the Attorney General
Office of the Revisor of Statutes (paul.marinac@revisor.mn.gov)
Legislative Coordinating Commission (jamie.hyland@lcc.leg.mn)



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Representative Michael V. Nelson
Chair
Committee on Government Operations
565 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Senator Sandra L. Pappas
Chair
State and Local Government Committee
120 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1606

**Re: In the Matter of the Proposed Rules of the DEED Relating to
Unemployment Insurance; Modifying Appeals, Employer
Records, and Workers Status Provisions
OAH 80-1200-31264; Revisor R-4207**

Dear Representative Nelson and Senator Pappas:

Pursuant to Minn. Stat. § 14.26, the Office of Administrative Hearings is required to send to the legislative policy committees with primary jurisdiction over state governmental operations a copy of the statement of reasons for disapproval of agency rules. Enclosed please find the Report of the Chief Administrative Law Judge and Administrative Law Judge LauraSue Schlatter's Report on review of rules and memorandum for the above-referenced rules.

Under Minnesota law, the Department may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval. If the Department does not wish to follow the suggested actions of the Chief Administrative Law Judge to correct the defects found, the Department may follow the process outlined in Minn. Stat. § 14.26, subd. 3(c).

Sincerely,

s/Denise S. Collins

DENISE S. COLLINS
Legal Assistant
Telephone: 651-361-7875

Enclosure

cc: Katrina I. Gulstad, Minnesota Department of Employment and Economic
Development

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.

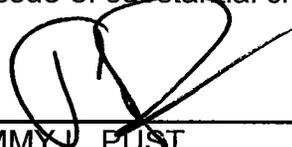
In order to correct the defect enumerated by the Administrative Law Judge with regard to proposed rule 3310.2917, the agency shall modify the rule and follow the procedure for adopting substantially different rules. The procedure for adopting substantially different rules is set out in Minn. Rule 1400.2110.

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 I: Item I 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.