

STATE OF MINNESOTA
COURT OF APPEALS

Re Unemployment Insurance Tax of:

ENTERPRISE COMMUNICATIONS, INC.,

Relator

v.

BRIEF OF RELATOR

COURT OF APPEALS #:

A05 - 2513

Commissioner of Employment & Economic
Development,

Respondent

DEPARTMENT OF EMPLOYMENT
& ECONOMIC DEVELOPMENT
1090 05

DATE OF DECISION: Dec. 1, 2005

Relator's Opening Brief

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TO: The Court of Appeals of the State of Minnesota

AND TO: Respondent Commissioner

ISSUE

RELATOR ASSERTS ENTITLEMENT TO SAFE HARBOR RELIEF FROM AN UNEMPLOYMENT INSURANCE TAX RAISE: Enterprise Communications, Inc. (ECI) challenges a tax increase by the Commissioner (DEED). ECI contends DEED overpaid benefits to an individual ineligible to receive them, and that DEED's remedy at law is to recover overpayments, not to tax ECI more. ECI claims the safe harbor exception of Minn. Stat. § 268.047, subd. 2(8) applies; that DEED inaction under Minn. Stat. § 268.18 cannot forestall this; and that staff's motive for inaction on the § 268.18 determination is adversarial, i.e., aimed at taxing more of ECI's money.

ECI contends the applicant's ineligibility arose strictly as a matter of law. A statutory applicant's duty under Minn. Stat. § 268.085, subd. 16(b) was unmet and DEED failed or chose not to enforce that duty (for the applicant to reasonably seek reemployment with ECI during her benefit year, after being laid off).

DEED bears all responsibility for policing proper applicant behavior:

The commissioner has the responsibility for the *proper payment* of unemployment benefits *regardless* of the level of interest or participation by an applicant or an employer in any determination or appeal.

Minn. Stat. § 268.069, subd. 2 [emphasis added].

The applicant's reemployment solicitation duty was mandatory.

First, Minn. Stat. § 268.085, subd. 1(4) requires an applicant to be "actively seeking suitable employment" to stay eligible. *Id.* subd. 16(a) defines:

Subd. 16. **Actively seeking suitable employment defined.** (a) "Actively seeking suitable employment" means those reasonable, diligent efforts an individual in similar circumstances would make if *genuinely* interested in obtaining suitable employment [...]

The case of a laid-off employee is a special situation. "Shall" is used:

(b) To be considered "actively seeking suitable employment" an applicant *shall*, when reasonable, *contact those employers from whom the applicant was laid off due to lack of work and request suitable employment.*

Id. subd. 16(b) [emphasis added]. There are no exceptions to this duty. ECI had work continuously available. Moreover, the ex-employee, Garrison, had a duty to report her noncompliant status, although she, in fact, may not have known of either her reemployment solicitation duty or the consequent extent of the reporting duty imposed upon her, at law.

DEED, when it first held a layoff involved, for no good reason simply neglected to tell Garrison, or ECI, about the existence or reach of the job solicitation duty.¹

¹ That opening neglect was never remedied. It occurred in a DEED hearing, April 19, 2004, where Hendriksen, owner of ECI, and Garrison were both *pro se*. Had the staff adjudicator at that hearing been alert to her duty to help *pro se* parties “to recognized and interpret the parties claims,” and “assure that all relevant facts are clearly and fully developed,” the fact that a layoff determination has consequences might have been communicated with further error avoided via such clear notice; *see, e.g., Ntamere v. DecisionOne Corp.*, 673 N.W.2d 179, 180 (Minn. App. 2003); *Thompson v. Hennepin County*, 660 N.W.2d 157, 161 (Minn. App. 2003); *Miller v. Int'l. Express Corp.*, 459 N.W.2d 616, 618 (Minn. App. 1993); Minn. R. 3310.2921. Breach of the duty to report one’s status leads to ineligibility under two related subsections; Minn. Stat. § 268.085, subd. 2(4); and § 268.101, subd. 1, second ¶. These cross-reference each other. Together they require that to remain eligible an applicant must, “provide all information necessary to determine the applicant’s eligibility for unemployment benefits.” M.S. § 268.085, subd. 1(c) sets a biweekly reporting frequency. Although either nonsolicitation or failure to report will lead to ineligibility, the difference is if further proceedings result. Garrison could falsely testify she solicited ECI work. However, her reporting record is preserved history, a paper trail neither she nor DEED can alter. This is why ECI sought access to the DEED’s records. DEED withheld access. DEED refused ECI’s request to subpoena Garrison for the tax hearing. DEED denied ECI subpoena access to staff testimony (some on staff know of Garrison dealings, others know of specifics of DEED enforcement history and policy re § 268.085, subd. 16(b)). No DEED staff attended the tax hearing. DEED filed no briefing, and appears to have made all argument *ex parte*, to its staff adjudicator. No Garrison reporting papers were put of record by DEED. The Court can infer evidence withheld is unfavorable. Had Garrison met reemployment solicitation duties (and so reported) there would be no cause for DEED to withhold that. Probably DEED *never* gave sufficient notice to Garrison about her duties so that she innocently failed to even appear to want to pursue available work at ECI, and likewise failed to report to DEED about her status with ECI. Probably Garrison’s unwillingness to commute would have caused her to decline to solicit ECI reemployment, but she then would have affirmatively chosen ineligibility, of record. ECI lacks cause to presume whether there was or was not fraud. That is speculative without DEED releasing documents it holds. Testimony is of record about admissions against DEED’s interest made orally by the staff person responsible for overpayment enforcement, saying DEED knew all along of but never complied with Minn. Stat. § 268.085, subd. 16(b). Based on her suggestion, ECI’s owner verified that DEED’s dial-and-file applicant reporting system bears this out, with no questions about reemployment solicitation.

Safe harbor entitlement attaches to prevent DEED calculating and imposing a new tax rate based on overpaid amounts, Minn. Stat. § 268.047, subd. 2(8). ECI contends all money paid Garrison was overpayment because she *never* sought reemployment at any time over the 26 consecutive weeks she was paid.

Minn. Stat. § 268.18, subd. 1 (for non-fraud overpayment) requires:

The commissioner *shall, as soon as the overpayment is discovered, determine* the [restitution] amount due [...]

[emphasis added]. The duty is nondiscretionary and the time frame is immediate.

DEED “discovered” overpayment facts months ago, when ECI reported them to DEED in August 2005. ECI reported promptly, as soon as it discovered § 268.085, subd. 16(b) exists. DEED still declines to make the required §268.18, subd. 1, determination. DEED has not responded to ECI letters seeking action.

ECI contends the Court can make the missing determination *de novo*, as a matter of law based on the uncontroverted record. Otherwise, ECI has rights to a tax exception, but no power to remedy DEED inaction. If the Court holds as a matter of law that all amounts were overpaid, as ECI contends, then §268.047, subd. 2(8) must govern and ECI’s tax rate should not have changed.

FACTS

THE UNDERLYING EMPLOYER - EMPLOYEE SITUATION: Case history entails key *res judicata* facts, and law of the case. Dispute is entirely over tax-related statutory consequences arising as a matter of law, from *res judicata* and law of the case (when the latter is properly interpreted).

Briefly, law of the case is: Based on events prior to Feb. 15, 2004, ECI's former employee, Garrison, was laid off from employment on Jan. 28, 2004 and was held not to be disqualified at the start of her benefit year, from receiving benefits. ²

At the start, Judge Peterson summarized the Court's **ECI I** issue, and holding:

Relator Enterprise Communications, Inc., (ECI) seeks review of the commissioner's representative's decision that respondent Nancy D.

² ECI had argued (and lost) that Garrison was disqualified for a quit days *after* Jan. 28, 2004 (on Feb. 3, 2004). Law of the case was set by this Court in Appeal No. A04-1554 (**ECI I**). It became final when appeal was exhausted (*rev. den.*, Sept. 20, 2005; until then the quit-vs-layoff issue remained hotly contested with DEED wanting layoff and ECI wanting a quit). DEED happily benefits by the **ECI I** court making layoff the key factual grounding on which law of the case rests. ECI is upset by this because DEED disingenuously ignored, totally, ECI's argument that a legal burden attaches to that benefit. ECI has consistently pointed out that DEED prevailed, but then wanted to disadvantage ECI, tax-wise, by not following clear law that arose and applied *solely* as a consequence of DEED's prevailing, re layoff.

DETAIL: The unpublished Court of Appeals **ECI I** opinion was authored by Judge Randy Peterson and issued July 5, 2005 (*see*, Relator's Appendix, p.A-1, *et seq.*). This certiorari is **ECI II**. Two days after **ECI I** appeal rights were exhausted, on Sept. 22, 2005, DEED issued its key **ECI II** decision (that ECI should be taxed as staff proposed). DEED forced an **ECI II** tax hearing *prior* to exhaustion of final appeal, and against ECI's request for a stay. ECI raised layoff-related contentions at hearing. Nevertheless, ECI's right to assert an exception springing into being as a consequence of layoff only vested (ripened) upon exhaustion of appeal (i.e., ECI accepting layoff absent exhaustion of appeal was out of the question). Once discretionary review was declined, layoff was *res judicata*.

DETAIL: **ECI I** was DEED No. 5714 04, heard by Unemployment Law Judge (ULJ) Margaret Manderfeld, April 19, 2004 (and transcribed). DEED's **ECI I** decision of July, 26, 2004, quoted *infra*, was by Commissioner's Representative Charles Green. **ECI II** was DEED No. 1090 05, heard Aug. 16, 2005, by ULJ Clarence Anderson (and transcribed). Under procedure effective July 1, 2005, final review was by Anderson. His final **ECI II** decision of Dec. 1, 2005, affirmed *in toto* his Sept. 22, 2005 decision (which contained the substantive DEED decision-making for **ECI II**, and is quoted *infra*, instead of the item saying only, "The findings of fact and decision issued on September 22, 2005 is affirmed.").

Garrison was qualified to receive unemployment benefits because she was laid off due to lack of work and any offers of employment were made before Garrison's benefit year began [on Feb. 15, 2004]. We affirm.

RES JUDICATA: *Res judicata*, per the Peterson opinion, include:

Garrison was employed as a part-time consultant by ECI, a technical services company, from September 1997 through January 28, 2004. Throughout Garrison's employment, she worked for a single client, Imation. In December 2003, Garrison learned that her contract with Imation would not be renewed. About the middle of January 2004, Garrison had a discussion with ECI's owner, Terry Hendriksen, about other possible assignments for her. Garrison told Hendriksen that she would be interested in an assignment that was comparable to the Imation position in terms of hours and pay rate and within a reasonable commuting distance. Garrison testified that Hendriksen said there were no other assignments available at that time but there might be some office work she could do.

When Garrison spoke to Hendriksen on January 29, 2004, the day after her assignment with Imation ended, Hendriksen said that ECI did not have any work for her at that time, and asked her to wait to file a claim for unemployment benefits to give ECI a chance to find her other work. Garrison spoke to Hendriksen on February 3, 2004, and he told her about two possible job opportunities. Garrison was not interested in the jobs because of their locations. The next day, Garrison sent Hendriksen an e-mail asking for more information about one of the jobs, but it had already been filled. ECI did not offer Garrison any other work. Garrison established an unemployment benefit account with an effective date of February 15, 2004.

[quotes are from the beginning of the Peterson opinion, Appendix p. A-2 to A-3].

LAW OF THE CASE: Judge Peterson followed the above with the rationale of the Court's decision (excerpted in necessary detail, because of ULJ Anderson's misreading and mishandling of what Judge Peterson said, meant, and did *not* say):

Whether a person quit or was discharged from employment is a question of fact. "[...] A layoff due to lack of work shall be considered a discharge." Minn. Stat. § 268.095, subd. 5(a) (2002).

The commissioner's representative *found*:

The evidence in the present record shows that [Garrison's] job assignment ended on January 28, 2004. At that time, the employer did not offer [Garrison] any other work. [Hendriksen] asked [Garrison] not to file for unemployment benefits in order to give the employer an opportunity to find other employment for her. We therefore conclude that [Garrison] was laid off due to a lack of work on January 28, 2004.

These *findings* are reasonably supported by the evidence in the record.

Citing Garrison's testimony that she believed that she was still employed on January 29 and that she severed the employment relationship on February 3 because ECI did not offer a new assignment within what she considered to be a reasonable commuting distance, ECI argues that Garrison was not discharged on January 28. [...] But Minn. Stat. § 268.095, subd. 5(a), expressly states that "[a] layoff due to a lack of work shall be considered a discharge," and evidence in the record reasonably supports the commissioner's representative's *finding* that Garrison "was laid off due to a lack of work on January 28, 2004."

[...]

The commissioner's representative *found* that Garrison refused to accept an offer of employment on February 3, 2004, but because Garrison's benefit year did not begin until February 15, 2004, the disqualification under Minn. Stat. § 268.095, subd. 8(a), for failing to accept an offer of employment, does not apply. *We agree*. [...] When a statute is unambiguous, this court may not construe or interpret the statute, but rather must give effect to the plain meaning of the statutory language. *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986).

[...]

ECI argues that the February 3 offer was an offer of suitable employment and that Garrison unreasonably limited the distance she was willing to commute. But because the offer of employment *was not made during Garrison's benefit year*, it is *irrelevant* whether the employment offered was suitable employment.

[*Id.*, p. A-4 to A-7, emphasis added]. A pre - Feb. 15, 2004, timeframe is at issue.

In the concluding part of the Court's analysis, an ECI contention of premature termination of cross-examination was disposed of (re what Garrison *might have admitted* about things she probably *knew*). The opinion dismissed *terminating cross* prior to such inquiry as harmless error, under the construed statute at issue:

ECI argues that it was not afforded a sufficient opportunity to cross-examine Garrison regarding her belief that she remained employed by ECI after January 28. The ULJ allowed some testimony on this point, and ECI's argument does not indicate that additional cross-examination would have elicited *relevant evidence that was not already in the record*. [...] ECI argues that additional cross-examination might have resulted in Garrison "admitt[ing] *she knew there was ongoing work near ECI's office which she could have performed even after filing for benefits, simply by phoning and saying she changed her mind and would commute*." But the disqualification conditions under Minn. Stat. § 268.095, subd. 8(a), require that the commissioner or an employer advise the applicant about suitable employment or that the applicant avoid, or fail to accept, an offer of suitable employment, and Minn. Stat. § 268.095, subd. 11, provides that subdivision 8 only applies to offers made during the applicant's benefit year. Consequently, because Garrison was not advised of suitable employment and there was no offer of suitable employment during Garrison's benefit year, Garrison's failure to inquire about employment opportunities is irrelevant.

Affirmed.

[Id, at pages A-8 to A-9].³

³ Clearly: DEED's decision under challenge before the Peterson court was decided based on an interpretation of Minn. Stat. § 268.095, subd. 8 [recodified; as § 268.085, subd. 13c, now], relating to actual offers, made before vs. during an applicant's benefit year. Garrison began a benefit year, Feb. 15, 2004. Judge Peterson wrote hypothetically, about effects, under that statute only, of offers that could have been made but were not made subsequent to the start of Garrison's benefit year. That particular statute is not at all at issue in **ECI II**. Properly so, for it was dispositively handled by **ECI I**. It would be offensive under law of the case to dispute anything about that statute, about layoff being *res judicata* now, or offers in any context, because offers are not an **ECI II** issue and never have been.

ECI's tax challenge does not dispute: the layoff determination, that Garrison qualified for benefits, or that ECI made no offers during her benefit year.

It is accepted law of the case that Garrison did not have a duty under § 268.095, subd. 8 [since recodified], to do anything without an offer from ECI. That statute deals with an applicant's responsive duty, to respond to offers.

It is not the only statute in the code. More importantly, it is not the only Ch. 268 statute creating applicant duties. Others were mentioned earlier in this brief.

ECI argues under a statute dealing with an applicant's separate but equally binding duty to affirmatively seek employment, to instigate action in a particular way, namely as precisely demanded by § 268.085, subd. 16(b).

Offer or no offer, that requirement to act is the same.

Hence, offering is irrelevant to new and unrelated issues ECI raises in **ECI II**. Yet, DEED tactically stonewalls and ignores the distinction.

The Peterson decision was 100% correct in saying what Garrison knew about work opportunities at ECI was irrelevant, as to offers, if any, made to her under the statute the Court was called upon in **ECI I** to analyze; i.e., the statute DEED's challenged decision rested on.⁴

⁴ DEED picked what it would say in its **ECI I** decision, and that was to focus on §268.095, subd. 8, as its basis for decision. ECI and the **ECI I** Court did not choose a separate focus, they each addressed the focus DEED had set. ECI contends what Garrison knew also is 100% irrelevant for tax purposes, under statutes at issue in **ECI II**. Now the question is whether work which may be considered suitable was available. The reemployment solicitation duty applies where suitable work is available. If work that can be considered suitable exists, the applicant is at risk for failing to reasonably ask about it. What she "knows," without asking, is irrelevant.

DEED stated a rationale, in its ECI I decision. ECI disagreed, and ECI responded to that issue. The ECI I Court responded when it considered arguments. Compare - Now ECI states a wholly different issue, a separate statutory rationale, and DEED declines to respond substantively. It responds with irrelevant things already decided and no longer at issue, interposed as an excuse to delay.

What Judge Peterson never wrote, and never would have intended to say and cannot sensibly be argued to have even implied in his writing, is the crux of ECI's issue - statutes he and his panel members were never called on to construe.

Actual events in the post-filing time frame have unfolded. These were not before the Peterson court. Time passed. Garrison initiated no contact with ECI.

Garrison, independent of anything she knew and might have testified about knowing earlier, could (and did) make herself ineligible (not disqualified but ineligible), through inaction. She did so when there was a statutory duty to act a certain way. That is an issue the Peterson court simply did not face.

It is today's fresh issue. Nothing yet, certainly not by DEED or the Peterson court, has been decided on the consequences of Garrison failing to seek reemployment with ECI after she filed for benefits.

DEED had a full ECI II opportunity, already, to offer this Court ULJ thinking. DEED decided not to decide. This is not ECI's fault. DEED erred.

The Peterson court never represented itself as divining all possibilities, under any and all other parts of the remainder of Minn. Stat. Ch. 268 (besides § 268.085,

subd 13c [i.e., § 268.095, subd. 8, prior to recodification]). The Peterson court did not present itself as prescient about *de novo* questions this Court faces.

Nothing in the extended detailed Peterson opinion excerpting, *supra*, or in the remaining entirety of the Peterson opinion, even remotely suggests the **ECI I** court was expressing omniscient views or construing statutes it did not identify. The Peterson court considered actual events, and their impact, from before Garrison filed for benefits on Feb. 15, 2004. It did so carefully, and at length. To dispose of an ancillary evidentiary issue, it considered the reach of a single statute; § 268.095, subd. 8 (now recodified). ECI accepts this.⁵

The bottom line is, nothing in the Peterson opinion constrains this Court's present *de novo* review of the interrelated statutory issues and arguments ECI is raising. Nothing at all. Moreover, it would take a tortured, contrived and almost wholly dishonest reading of the Peterson opinion, to suggest otherwise. Yet, ULJ Anderson wrote in denying relief in the DEED **ECI II** decision:

A determination issued on March 2, 2004 held that Garrison was disqualified due to refusing an offer of suitable employment without good

⁵ ECI concedes Garrison could not have made herself ineligible (in the way ECI now argues) at any time before she filed for benefits, i.e, during times the Peterson court ruled on. Ineligibility only relates to post-filing events. Garrison clearly had no § 268.085, subd. 16(b) reemployment solicitation duty (or attendant reporting duties) until after she filed for benefits. None of those duties take effect until during the benefit year. The statutory language is clear. And what Garrison knew post-filing, irrelevant as Judge Peterson said to the statute he construed, is equally irrelevant now, to the eligibility issue ECI is raising. Neither an applicant's knowledge nor state of mind is an element within any requirements § 268.085, subd. 16(b) imposes. The applicant must act in a specific way to remain eligible. Failing to act that way is not "actively seeking suitable employment," by statute. Such failure automatically causes ineligibility, as a matter of law.

cause on February 4, 2004. A decision of an unemployment law judge dated April 30, 2004 reversed the determination, holding that the offer was made on February 3, 2004 before Garrison established her unemployment benefit account and that under the statute, offers of employment made prior to the establishment of a benefit year could not be disqualifying. On July 26, 2004 a Representative of the Commissioner affirmed the decision of the unemployment law judge, also holding that on January 28, 2004 Garrison was discharged for reasons other than employment misconduct. On July 5, 2005 the Minnesota Court of Appeals affirmed the decision of the Representative of the Commissioner, holding inter alia that because "Garrison was not advised of suitable employment and there was no offer of suitable employment during Garrison's benefit year, Garrison's failure to inquire about employment opportunities is irrelevant." Enterprise Communications, Inc. v. Garrison (Minn. App., File No. A04-1 554, July 5, 2005). ECI appealed to the Minnesota Supreme Court, and on September 20, 2005 the Minnesota Supreme Court issued an Order denying the petition of ECJ for further review.

[recitation of statutory language omitted as irrelevant to the issue in dispute; there being no mention of or quotation from Minn. Stat. § 268.047, subds. 1 or 2, nor analysis of whether DEED staff can lawfully disenfranchise an employer's right to have the exclusion from tax rate computations for overpaid amounts [per § 268.047, subd. 2(8)] emasculated by simple DEED inactivity in defiance of §268.18's requirement that there be an immediate determination made, of overpayment amounts]

The determination currently under appeal is the 2005 Unemployment Tax Rate and Workforce Enhancement Fee. ECI's basic argument is that benefits were improperly paid to Nancy Garrison and therefore benefits paid to her should not be used in computing its tax rate. Whether or not benefits were properly paid to Nancy Garrison has been decided by the Minnesota Court of Appeals, and the Minnesota Supreme Court has declined to conduct further review. The Unemployment Law Judge has no jurisdiction to reconsider that issue. ECI's other arguments are without merit and no discussion is necessary. The 2005 Tax Rate of ECI has been correctly calculated.

[DEED ECI II decision, see, p. A-13 to A-15, underlining emphasis added].

The Anderson **ECI II** decision is quoted at such length to prove its total unresponsiveness to matters ECI put at issue. ECI had a right to have those issues fairly and expeditiously determined, without excuse and without dissembling.

This Anderson effort is taking one fragment, of one sentence, at the end of a seven-and-one-half page opinion, and blowing it up out of all reasonable proportion by suppressing its entire context – ignoring the clear lead word, “consequently” that Judge Peterson quite carefully used (in the sentence Anderson quotes from) to tie his final words into being a consequence of things he had authored before that.

What ULJ Anderson did is an insult to ECI and its right to a responsive determination, an insult to this Court (by forcing a review based on such a clearly flawed and defective premise), and most clearly, an insult to the careful thought and writing Judge Peterson devoted to his opinion as well as an insult to the careful analysis that the opinion reflects, regarding deliberations among Judge Peterson and his panel colleagues of this Court prior to opinion writing by Judge Peterson.

In fairness, viewed in its best perspective the Anderson **ECI II** opinion does once say, “under the statute.” And in saying lack of jurisdiction and law of the case constrain DEED, it admit that only issues of law, not fact, are being disputed.

RES JUDICATA - FROM DEED’S ECI I DECISION: When the Peterson opinion, at ECI’s first quote (*supra*, p.5-6), said, “We affirm,” *res judicata* and law of the case (from the decision thereby affirmed), in relevant part for **ECI II**, are:

On February 3, 2004, the owner contacted the applicant by phone at approximately 5:00 p.m. *The applicant was offered two one-day assignments at that time.* [...] Therefore, [sic - *Thereafter*] the applicant

was not offered any other assignments by the employer.

The evidence in the present record shows that the applicant's job assignment ended on January 28, 2004. *At that time*, the employer did not offer the applicant any other work. [...] *We therefore conclude that the applicant was laid off due to a lack of work on January 28, 2004.*

In determining whether any employment is suitable for an applicant, the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects of securing employment in the applicant's customary occupation, and distance of the employment from the applicant's residence shall be considered.

In the present case, the evidence indicates that the employer did offer the applicant employment which may be considered suitable. However, the offer was made on February 3, 2004 which was *prior to* the applicant's filing for unemployment benefits. The applicant's benefit year did not start until February 15, 2004.

The employer did not make the applicant any definite offer of employment *prior to* her separation from employment. *The employer made an offer after her separation but prior to the applicant's benefit year.*

DEED ECI I final decision, pages A-10 to A-12 [emphasis added].

Two factors in the DEED decision expand on the reach of the Peterson opinion (as quoted *supra*, p.5-6): First, DEED declined to dispute the quality of work ECI had made available to Garrison. Nothing was even suggested by DEED in all of **ECI I** as unreasonable or unsuitable in available work ECI offered Garrison.⁶

Second, a law of the case determination by DEED was left intact by court:

Unemployment benefits paid to Ms. Garrison shall be used, under Minnesota Statutes §268.047, subdivision 1, in computing the future unemployment tax rate of Enterprise Communications, Inc.

⁶ All ECI I dispute was about the effect of timing, i.e., when ECI made its offer. DEED sentences are unambiguous, "*The applicant was offered two one-day assignments at that time. [...] In the present case, the evidence indicates that the employer did offer the applicant employment which may be considered suitable.*"

See, DEED ECI I decision at, p. A-10 to A-12. This undisturbed tax-related DEED criterion is important for ECI II. While the Peterson opinion is silent about taxation (with words: tax, taxing, taxation, etc. wholly absent), Green's decision directly references Minn. Stat. § 268.047, subd. 1 (and thereby includes so much of the remainder of § 268.047 as is relevant by implication).

Nothing was said, as law of the case, by DEED, or Judge Peterson, about precisely how, "Unemployment benefits paid to Ms. Garrison shall be used, ...".

This Court has a clean slate on that.⁷

HEARING SUBMISSIONS AND OTHER ITEMS OF RECORD: Hearing was quite confused, with DEED staff declining to even show up, and the transcript reflects this. The record transferred by DEED to the Court also reflects this confusion. Testimony by sworn affidavit was admitted, and the transcript shows affidavit exhibits that were incorporated by reference were under discussion at hearing, without qualification or comment by the ULJ, yet the large Appendix ECI

⁷ Section 268.047 is laid out like most tax legislation, first stating a general rule (the subd. 1, mentioned in the Green decision), followed by employer safe harbor exceptions separately stated and described (see, *Id.*, subd. 2 and 3, with subd. 2(8) being the item of interest to ECI and the Court in ECI II certiorari review). Implicitly, "unemployment benefits paid to Ms. Garrison shall be used," according to law, and not otherwise, i.e., with all of § 268.047 read as a whole; the general as well as the particular, taken together. And when *Id.*, subd. 2(8) says amounts overpaid are *not* part of the tax reckoning, the special controls the general. Minn. Stat. § 645.26, subd. 1 says so explicitly for "irreconcilable" parts of a statute. However, the statutory scheme of §268.047 is anything but irreconcilable. It is intentionally coherent. And it is quite precise about overpayments not being intended or even permitted, as a tax calculation factor.

prepared for Supreme Court discretionary review was an item discussed at hearing, but not transmitted by DEED. ECI shall make the best of the situation, and if necessary will rely on this item in Reply briefing, as the situation dictates. Notice of the error is given now. [*See, e.g.*, TR p.20 – 23; App A-66 to A-69].

At hearing ECI's initial focus was denial of ECI access, for purposes of hearing proof, to reporting records Garrison filed with DEED, along with DEED refusal to permit ECI's calling of DEED staff witnesses, particularly, Vicki Kramer, who submitted an unsigned and unsworn paper [DEED Hearing Ex. D-3, p. A-81] saying somebody (unidentified) had reviewed lawfulness, in some fashion, of DEED's tax reckonings, and "your tax rate was assigned in accordance with Minnesota law." No foundation detail was given and it is impossible to impeach a piece of paper by cross examining it.

A second DEED witness ECI wanted to testify was Carla Halloin, the staff person responsible for overpayment restitution matters, who previously had made admissions orally by phone, to Hendriksen, ECI's owner.⁸

Even a subpoena of Garrison, to have her testify about her not soliciting work at ECI was refused. [TR p.5, Ap. p. A-51]

Prehearing motions were submitted and ruled on of record [TR. 3-6, Ap. A-49 to A-52]. These were not transmitted with other record items. The transcript says

⁸ The admissions are of record, by Hendriksen's testimony of what was admitted to him against DEED's interest but, unfortunately, not by testimony from Halloin.

in places, “denied,” or less frequently, “admitted,” but without the motion items before this Court error is hard to assign and probably impossible for the Court to decisively infer. The motions are in ECI’s Appendix. [Ap. p A-33 to A-44]

Briefing submitted is in part included in the Appendix, to assure the Court ECI is not raising the § 268.085, subd. 16(b) issue for the first time on appeal.

ECI assigns error to DEED’s final decision, to not reverse, revise, reopen or “remand” the matter for supplementation or other relief. It is the final decision, in light of all that went before it, from which appeal is taken. This is so, even with a final order rendered as a *pro forma* rubber-stamp affirmation, as in this instance.

Formal remand, by the identical individual who would reconvene, admit further items, and close a remanded hearing (where nobody from DEED staff showed up the first time and where staff is unlikely to act differently on remand), is probably an unnecessary formality. However, ignoring material submitted after the intermediate decision, or erring after considering the material, is prejudicial and reversible.

Changing the final order is DEED’s last chance to avoid error. Because the ECI post-hearing materials were not acted upon in ECI’s favor, ECI assigns error to that, and, hence, those items are properly before this Court to weigh their impact as a demonstration of reversible error. The Court cannot determine whether there was error in how they were treated under ULJ self-review, without looking at them.

TRANSCRIPT: Much in the transcript can be offered for detailed assignment of error. The entire transcript is before the Court and further highlighting may be needed in Reply briefing. However, the key transcript passage showing clear and

prejudicial error, is Hendriksen testifying on personal knowledge (via reaffirming the truthfulness of statements in his testimony within the transcript of the DEED

ECI I hearing):

[A]nd if she [Garrison] wants to come back and take those opportunities there's [sic, testimony was *they're*] still there, we still have work. [...] and I don't think that her simply stating that I didn't give her the name or location is specific justification. Now if she wants to come back tomorrow and do some work there's work out there but it's the same distances that she had repeatedly refused to drive. The reason I'm pointing those out is that those statements were made in front of department's ULJ who, reminding you that it is the department's responsibility to police the continued disqualification or nondisqualification of an applicant, not the employer's after the initial hearing. And at a minimum on April 19th [2004], the applicant should have been disqualified for at least refusing offers of work or two, not having acted upon them, or three, in the worst possible scenario having failed to report them on her weekly eligibility forms that she has to fill out.

[Interruption to point out "those opportunities," the offers and "work still there" were what DEED's ECI I decision characterized as work that "can be considered suitable;" Hendriksen then continuing his testimony]

I guess perhaps my last comment is going to be regarding what I was told by Hallo ... however Carla pronounces her last name [Halloin, of DEED staff -- Hendriksen resumes, referencing the Peterson opinion] which is the, page 8 and page 9, let's see if it starts on, I guess to, my opinion is the department is attempting to read in isolation a single sentence and take it out of context. To get the full appreciation of what the opinion is really saying you have to read the entire last paragraph. But I'm going to back up into that because the very last sentence says, "Consequently because Garrison was not advised of suitable employment and there was no offer of suitable employment during Garrison's benefit year, Garrison's failure to inquire about employment opportunities is irrelevant." And the department is attempting to read that in a[n] improper way to suggest that the Court of Appeals intended to comment on matters that were not before them. There is no way that they would have intended to say that the, that offers of employment made after April 19th which were not part of their [sic, testimony was

the] briefing that they were irrelevant. It [the interpretation Halloin had mentioned] also suggests [...] that it was not the duty of Garrison to make phone calls that somehow they are transferring or attempting to transfer that to someone else, potentially ECI, when in fact under the department's theory of the case which is that it was a layoff that she has a very clear duty to call employers that were deemed to have laid her off and seek work. So it was not our duty or anyone else's duty, it was Garrison's duty *which did not occur*. That in and of itself should have disqualified her, and to read something into this [the Peterson opinion] that clearly was not intended is improper.

Transcript, p. 21-23, App. p. A-67 to A-69. While confusing disqualification and ineligibility in testifying on the truthfulness of his testimony from a year-and-one-half earlier, the nub of the entire problem was put of record by Hendriksen.

Hendriksen testified that if Garrison had sought work with ECI (per Minn. Stat. § 268.085, subd. 16(b)) the work was still there (and it was work that had gone uncontested by DEED as to suitable nature), but there had been no intervening inquiries seeking a rehiring; i.e., "that she has a very clear duty to call employers that were deemed to have laid her off and seek work. So it was not our duty or anyone else's duty, it was Garrison's Duty which did not occur."⁹

Hendriksen further testified about how Halloin, of staff, had given him a heads up about some on staff reading the final part of a sentence of the Peterson opinion falsely out of context and, curiously, precisely as ULJ Anderson wrote things up after hearing (without the aid of even a single page of briefing served on ECI).

⁹ Quote is from *supra*, p. 18. Hendriksen's testimony was that offers were made at hearing, i.e., language he used April 19, 2004, was sufficient to be an offer. Whether the Peterson court would agree is speculative, and as already noted, not an issue in **ECI II** because offering is not an element required in Minn. Stat. § 268.085, subd. 16(b). Notice is inescapable in Hendriksen's retrospective testimony, however, and is an issue, as to actions it should have raised from DEED.

All else falls into place from that key testimony. The ULJ at the April 19, 2004, hearing, the DEED staff person who first determined there was a layoff, could have handled things differently, by either passing information on to enforcement staff, or more reasonably, telling Hendriksen and Garrison at hearing that after her holding there had been a layoff, the employee then has a reemployment solicitation duty, and explaining what the duty was.

If that had been done then all possible confusion would have been forestalled.

Garrison would have been on clearer notice (beyond what Hendriksen's ECI I hearing statements provided), and could have sought and taken suitable available work, or declined it, based on willingness or unwillingness to commute; but the situation of 26 continuous weeks of money paid during a period of uninterrupted and clear statutory ineligibility would not have ensued. DEED erred.¹⁰

Hendriksen's hearing testimony, by affidavit, added more. *See*, Appendix, p. A-

¹⁰ And DEED never rectified that initial error and now disowns its very existence. DEED apparently is indirectly suggesting statutes ECI cites and argues should not exempt ECI but instead it should have its taxes raised for what, essentially, was nothing but clear, ongoing DEED and Garrison error. Besides Kramer and Halloin, as already mentioned, Manderfeld, the April 19, 2004 ECI I hearing official, was the third DEED witness ECI wished to have testify at the ECI II tax hearing. She had testimonial knowledge of whether her hearing neglect, the genesis of all problems that followed, was the result of ordinary negligence or derived from a consistent policy within DEED to minimize and/or ignore the statutory requirements of Minn. Stat. §268.085, subd. 16(b), via a ready resort to finding layoff in debatable situations with the expectation of deference on appeal, while not in parallel advancing the statutory consequences which a finding of layoff necessarily entails. Such a likelihood squares with admissions that Halloin, of staff, made orally to Hendriksen of ECI, and with the pattern of consistent, deficient notice to ECI from DEED about ineligibility matters, as demonstrated by the post-hearing affidavit Hendriksen filed to obtain in-agency relief (*see*, pages A-112 to A-154; which includes exhibits; *see*, A-97 to A-111, briefing re same).

112, *et seq.* It was submitted pre-hearing and was admitted into evidence by Anderson (curiously as an “exhibit”). It was sworn testimony DEED held in advance of hearing, for staff to attend and rebut and impeach, were that the choice and were it’s truth at all refutable. That affidavit expands on how DEED had also admitted orally that DEED had not enforced the statute, § 268.085, subd. 16(b), ever, and that DEED staff had adopted its adversarial taxing stance, while admitting against its own interests (via Carla Haloin, the staff person responsible for overpayment restitution who was mentioned in the transcript excerpt, *supra*, p 18) [See; App. A-114 to A-115.] Haloin said by phone to Hendriksen, that DEED consistently declines to enforce Minn. Stat. § 268.085, subd. 16(b). [App. *Id.*]

The statute is unchanged since 1999 [*see*, Minn. Laws 1999, Ch. 107, § 42, creating Minn. Stat. § 268.085; containing present wording for subds. 16(a) and 16(b), respectively (a) defining “actively seeking suitable employment” in general, and then (b) requiring the reemployment solicitation effort by employees who were laid off, in order for them “to be ‘actively seeking suitable employment’”].¹¹

DEED UNRESPONSIVENESS TO THE ISSUES: Appendix affidavits and exhibits largely speak for themselves in explaining ECI’s position and showing it was not obscured, but consistently presented to DEED, which turned a deaf ear.

Most offensive, in ECI’s view, is the string of one-way correspondence keeping DEED staff on notice and asking for action on the overpayments situation. Letters

¹¹ There is a clear legislative intent in legislating precisely what is required of an applicant to be “actively seeking suitable employment” in order to remain eligible for benefits, in general, and especially whenever there has been a layoff.

show Hendriksen had done all asked of him to verify Garrison's status (including filing a fraud report where he indicated he was unclear of whether fraud was involved but that noncompliance with § 268.085, subd. 16(b) was clear; *see*, Appendix, pp. A-191 to A-242, comprising 11 items, from the initial July 26, 2005 notice to DEED, into November of last year, where the stonewall became obvious).

ECI wishes it could put DEED's responses to its string of letters, on record for this Court, but there were none. Each letter went unacknowledged. Each went unanswered. No determination consistent with Minn. Stat. § 268.18's required immediacy was forthcoming, since August 2005, and no reason for inaction was ever given ECI. Unresponsiveness, mirrored in the unanswered letter sequence, and in ULJ Anderson's unwillingness to reach the merits of ECI's defense based on the flimsiest of excuse, an abusive reading of the clear Peterson opinion, is the crux of what ECI offers as reversible prejudicial error.

LAW

Statutes presented in detailing the ineligibility issue initially; *supra*, p. 1-4; are not reargued. They were referenced frequently in detailing law of the case, and in providing a context for factual items.

Case law is reasonably straightforward.

1. DEED should not have wrongly used staff *ex parte* access to the ULJ, or even created an appearance of such impropriety when in the position of being ECI's adversary. Prior *ex parte* abuse by DEED was sternly criticized when less serious in nature than allowing one adversary (even if staff) full, open, ongoing *ex*

parte access to a ULJ, in the absence of another party, without any briefing, notice, or chance to know for what contentions needed rebuttal by the employer; *Meinzer v. Buhl, 66 C & B Warehouse Dist., Inc.*, 584 N.W.2d 5 (Minn. App. 1998) (ULJ and an attorney laughing behind a relator's back, but apparently not over the merits).¹²

2. DEED cannot pick and choose some statutes to embrace (such as Minn. Stat. § 268.051 *minutiae*) and others to ignore, but must instead enforce all the law fairly; *Neeland v. Clerarwater Mem. Hosp.*, 257 N.W.2d 366 (Minn. 1977) (holding that an executive agency cannot choose among governing laws for what it will honor and ignore and that it would be “chaos” if courts were to permit that); *see, especially, Neeland*, 257 N.W.2d at 369, citing and approvingly quoting *Mower County Bd. v. Trustees*, 136 N.W.2d 671, 676 (Minn. 1965), re “public officials [... who] assail that law as an excuse for their own failure or refusal to act under a statute ...”.

Judge Peterson's clear opinion is being interposed and mischaracterized as grounds for an identical failure to act under several statutes.

Staff has not met its *Neeland* duty. Staff has not fairly enforced § 268.085,

¹² *See*, DEED's rule, Minn. R. 3310.2924, barring, “private communication” between a referee (now ULJ) and a party (staff wanting to tax) about the substance of a case “in the absence of the other parties of the appeal,” and saying a ULJ should avoid private communication even, “when it does not relate to the subject matter of the appeal if it would create the appearance of impropriety.” ULJ Anderson declined to even disclose to what extent he had *ex parte* contacts, or whether after hearing he would have such contacts, in response to ECI's direct pre-hearing motions; [Transcript, p.6; Ap. A-52; ECI Supp'l Motions, at p. A-43.]

subd. 16(b) (creating the applicant's reemployment solicitation duty); § 268.047, subd. 2(8) (providing the tax safe harbor ECI relies on via stating that overpaid amounts are not to be a factor in computing tax rates); § 268.18 (requiring an immediate DEED determination re the "overpayments" safe harbor qualification due ECI); §§ 268.085, subd. 2(4) and 268.101, subd. 1, second ¶ (applicant duty to report information pertinent to eligibility); and § 268.069, subd. 2 (DEED has sole responsibility for avoiding error regardless of applicant or employer participation)

3. ECI is entitled to a constitutionally fair hearing responsive to the points it raises in its defense; *Juster Bros. v. Christgau*, 7 N.W.2d. 591 (Minn. 1943) (DEED's predecessor could not disenfranchise employer due process rights to defend against a tax increase, and to have due notice and a basically fair hearing on substantive grounds contesting a tax).¹³

¹³ *Juster Bros.* required "substantial justice" and "a hearing in a substantial sense" where "facts and circumstances which ought to be considered must not be excluded," and where special due process concern attaches to agency extrapolations from situations in which the challenging employer was not a party and could not be bound (in *Juster Bros.* there were ongoing DEED relations between DEED and UI applicants given benefits, with the employer not privy to the dealings but with DEED seeking an increased tax from the employer); 7 N.W.2d at 507-509. The court concluded:

The requirement of due process is a constitutional one and cannot be waived or "dispensed with" either by the legislature or by an executive tribunal to which it delegates the duty of administering a law.

7 N.W.2d at 509 [emphasis added]. The "arbitrary and erroneous" theory struck down in *Juster Bros.* was a contrived waiver claim, that the employer had per some Draconian requirement, waived right to object to a tax; where judicial support of the agency's requirement was held constitutionally unjust; see, 7 N.W. 2d at 505-507.

As a quasi-legislative body exercising only delegated taxing authority, DEED is particularly bound to follow legislation, as well as to act fairly; *Id.*

ECI was constitutionally entitled to present as thorough a defense as it could. This is true both on the reemployment solicitation duty (§ 268.085, subd. 16(b)) and attendant reporting duties Garrison had to meet to stay eligible. *Id.*

4. DEED cannot give misleading or inadequate notice when seeking a fiscal remedy from a party; and should know of and meet it's duty to give fair, non-misleading, and informative notice; *Schulte v. Transport Unlimited, Inc.*, 354 N.W.2d 830 (Minn. 1984) (reversing a DEED decision because a party from whom DEED attempted to attain a fiscal remedy (restitution of benefits from an applicant rather than a tax against an employer), had incomplete and misleading notice from DEED that disarmed full participation by the party to defend, protect, and preserve substantive rights).¹⁴

5. ACCESS TO DEED WITNESSES AND RECORDS -VS- POSSIBLE

MOOTNESS: *Ex parte* issues and the question of what degree of access is proper to DEED records and witnesses might be moot. These issues would continue to matter only if there is a remand or further DEED proceedings where ECI would

¹⁴ Much of the post-hearing Hendriksen affidavit and ECI post hearing briefing was aimed at convincing ULJ Anderson that faulty notice was yet another issue that caused ECI substantial prejudice, in that it played a part in the delay ECI experienced in discovering it had a statute in its favor because DEED led ECI to believe it could not raise issues when there had been a layoff. Also, DEED sent a series of quarterly notices with each saying, prominently at the bottom, that the recipient had to do basically nothing about the notices, except file them. See; Appendix, p. A-97 to A-154; *especially*, A-123, telling ECI a "layoff caused by lack of work ... are not reasons to raise an issue." [See, arrows, on that page.]

continue to be at risk. ECI is not arguing for remand. Remand would be better than losing entirely. But much time and expense have been involved already, since Jan. 28, 2004, to reach this point.

ECI primarily seeks a determination that DEED abdicated to this Court, by extreme inaction, the right to make a § 268.18 determination. ECI asks the Court to trigger the § 268.047, subd. 2(8) safe harbor statute and order, as a matter of law, that overpayments as determined by the Court are not be used in ECI tax calculations, and that all benefits Garrison received were overpaid so that ECI's taxes should be as they were before DEED's tax change effort.

Hendriksen testified, without controverting evidence, that Garrison failed to contact ECI seeking reemployment and hence failed to satisfy Minn. Stat. § 268.085, subd. 16(b). That should be sufficient to prevail now, decisively.

Yet ECI can prove more detail about Garrison's failure to meet duties (especially her reporting duties) via DEED records and witness testimony, and asks the Court to order that relief if the Court remands.

If the matter is not mooted, ECI notes the cases *Thompson* and *Ntamere*, cited, *supra*, *fn. 1*, *p. 3*, standing for a right to issuance of witness subpoenas, as well as standing for a DEED duty of reasonableness in resolving party hearing needs (even where a record may appear flawed or confused, as in those two cited cases). The *Thompson* and *Ntamere* courts took a practical view toward sensible, not hypertechnical, procedures. Moreover, DEED's refusal of access to documents and subpoenas is contrary to DEED's own rules, Minn R. 3310.2913 and

3310.2914; which are explicit. If the issue is not mooted, ECI requests a remand with instructions. Also, ECI argues the sincerity of DEED's position is a constitutional due process issue it should be permitted to investigate, in the event of a remand or if DEED institutes yet more proceedings, with ECI at risk.

The integrity of DEED procedures is called into question by admissions made by Halloin. It seems some on staff (Halloin at least) have evidence § 268.085, subd 16(b) has received insufficient attention and respect from DEED, as a matter of institutional bias, and a ruling faction appear to be set on stonewalling ECI and running up litigation expense (e.g., by causing this unneeded certiorari, possible further delay, and presumably any other employer raising the identical issue can expect identical attention). With or without motive at issue, ECI argues it should have had the testimony of Halloin, Manderfeld, and especially Kramer, as sought. It would be proper and make sense if each of them testified in the event of a remand. Again, denial of access to DEED records and DEED witnesses would be harmless error, *unless* the Court remands or ECI otherwise continues at risk.¹⁵

6. A somewhat preliminary but novel matter of law for which briefing is needed, is the impact of a new statutory standard of review not yet construed in

¹⁵ Hence, ECI asks the Court to either absolve ECI entirely based on the law now argued, or to order that ECI have document and witness access if it continues to face any tax change risk. ECI requests such an order if it is forced into some kind of ongoing risk, per lengthy restitution hearings that might ensue under § 268.101; where Garrison might assert defenses under *Schulte*, or otherwise, and where DEED would want to say that ECI remains at risk, tax-wise. Specifically, ECI asks the Court to order that DEED cannot hold ECI at fault and at risk if Garrison received defective notice from DEED and can prevail against restitution, per *Schulte*. To allow DEED to do that would be unjust, and contrary to § 268.069, subd. 2.

any published authority known to ECI; *see*, Minn. Laws 2005, Ch. 112, Art. 2, § 34, effective July 1, 2005.¹⁶

The governing six criteria listed in the amended § 268.105, subd. 7(d), (and in the MnAPA) are broad, with this Court to consider error substantially prejudicial to ECI (e.g., higher taxes, wrongly imposed) which is:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious

What DEED has done, through staff *ex parte* influence upon the ULJ's decision making fits criteria 3, 4, and 6 (i.e., how else would that identical

¹⁶ Just as Minn. Stat. § 268.105, subd. 2 (re, requests for reconsideration) have been changed to where a ULJ now second-guesses himself, certiorari review criteria per *Id.* subd. 7 were amended. Now, expressly: any ULJ error that is substantially prejudicial to a party's rights is entirely reviewable on certiorari; i.e., new § 268.105, subd. 7(d) tracks almost verbatim MnAPA language, stating:

(d) The Minnesota Court of Appeals *may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced* because the findings, inferences, conclusion, or decision are:

[emphasis added; six listed review criteria omitted]. The parallel opening text of Minn. Stat. § 14.69; is, "In a judicial review under sections 14.63 to 14.68, the court *may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced* [...]" (followed by the same six criteria).

fragment of a single sentence out of context it was placed in within a six-and-one-half page opinion written carefully by a judge of this Court using the word, “Consequently, ...” with care; enter two minds as cause to avoid a decision on the merits, independent of actual communication).

Similarly, resting after ex parte contact on the resultant wooden and wrong reading of the Peterson opinion fits criteria, 4, 5, and 6. The stonewalling over not facing the merits of the safe harbor entitlement and the § 268.18 determination and the willful disregard for § 268.085, subd. 16(b), is error that rings all six bells, as does the overall due process report card that should be given DEED in this matter.

7. As a final point of law, consistent with the above analysis of the standard of review per the express criteria, this Court is ECI’s only outlet for relief that was wrongly denied by the agency, and which was error that caused substantial prejudicial to ECI’s rights against wrongful taxation.

ECI has had to patiently wait for this tax matter, its sole UI concern from the outset of Garrison’s termination early in 2004, to wend its way to this final opportunity for relief, nearly thirty months later.

That troubles ECI greatly, especially since other normally available relief to force a due and proper “as soon as” decision under the wording of § 268.18 are foreclosed by statute. Either it is this Court, granting relief, or else clear rights will exist for ECI and other employers, state-wide, without remedy. That is a constitutionally suspect notion, not intended in any apparent manner discernible from the multiple statutory provisions at issue. Briefly, the difficulty is:

DEED's staff's willful failure to make a simple statutorily mandated prompt determination is ECI's major source of frustration and the heart of its complaint.

Minn. Stat. § 268.18, subd. 1 (for non-fraud overpayment) requires that, "The commissioner *shall, as soon as the overpayment is discovered, determine the [restitution] amount due [...]*" [emphasis added]. Such a "determination" triggering § 268.047, subd. 2(8), was due ECI "as soon as" DEED "discovered" ECI's facts, i.e., when ECI first gave notice.

ECI called attention to DEED-Garrison non-compliance with §268.085, subd. 16(b), and non-compliance with related reporting requirements, by forwarding a memorandum to staff in August 2005, i.e., a half-year before this brief is filed and likely over a full year or more before decision.

DEED presumably keeps orderly records and could have consulted these records easily, at any time (ideally "as soon as" it got ECI's notice which is timing the statute mandates).

In under ten minutes DEED could have confirmed ECI's information. DEED possibly took that step, just to see what is there on file, but without any communicating back to ECI or any intention to allow ECI relief.

Instead, DEED initially told ECI to call a particular phone number, which ECI promptly did, and to file a fraud report on a DEED form, which ECI promptly did. Yet, ECI never argued fraud was an issue. ECI claimed applicant ineligibility *independent of motive*. Fraudulent motive is irrelevant to ECI's right to prompt relief. ECI complied with every DEED request.

Yet, nothing, subsequent to the report filing, has been done by DEED. No explanation for inaction is given. Letters ECI sends go unanswered.

Mandamus to compel DEED to act would have been fully appropriate. *But for* Minn. Stat. § 268.051, subd. 6(a) – (c), ECI could have gotten a writ. That statute, unfortunately, barred ECI “collateral attack” via mandamus/prohibition. Nor is district court filing proper under that statute “by way of claim for a credit adjustment or refund, or otherwise,” i.e., no normally available trial court remedy is available. Such “collateral attack” is barred; *Id.*, at subd. 6(a) (final sentence).¹⁷

In that statute, the legislature made mandamus-like judicial relief (e.g., forcing a “determination” to trigger the tax exception of §268.047, subd. 2(8)) as well as prohibition-like relief (e.g., barring the UI tax change altogether), available only from this Court, via § 268.105, subd. 7(d), by certiorari.

Certiorari is the sole channel of relief the legislature now provides. It is how an employer can remedy “any error in computation or assignment” of a tax rate; *Id.* at subd. 6(c). It is how an employer can get relief from any substantially prejudicial DEED activity, and it is the only way this can be done; regardless of how many of

¹⁷ *Cf.*, public employment termination law where jurisdiction also is limited to certiorari; e.g., *Willis v. County of Sherburne*, 555 N.W.2d 277 (Minn. 1996); *Shaw v. Bd. of Regents*, 594 N.W.2d 187 (Minn. App. 1999); *Dietz v. Dodge County*, 487 N.W.2d 237 (Minn. 1992). The *Dietz* court explained the statutory policy underlying legislation such as § 268.051, subd. 6(a) – (c), against collateral attack in district court “stems not from slavish adherence to hypertechnical rules,” but rather the need to evaluate “core discretionary acts on a limited scrutiny basis,” *Dietz*, 487 N.W.2d at 240-41. Whatever the policy hand-waving, ECI is finally getting a non-DEED tribunal to look at its request for tax relief, and that is good.

the six criteria of the amended § 268.105, subd. 7(d) apply and how egregiously DEED acted. Every existing or potential employer in Minnesota faces this.¹⁸

The combined question of the new standard with its six criteria imported from the APA, and the availability of one and only one channel for relief has been a frustration because ECI has been forced to wait from Jan. 2004, to date of this ECI II hearing, to have its entitlement to tax relief reviewed outside of an unsympathetic administrative setting. And that is ECI's only real concern.

In summary: The Appendix is massive, but how can you show a Court you have been forced to talk to a brick wall, without showing the bricks?

Our question is entirely one of law applied to uncontroverted facts (i.e., at hearing DEED presented no witness or document suggesting Garrison complied with §268.085, subd. 16(b) by seeking reemployment with ECI, or suggesting she reported anything at all to DEED about her ECI non-contact).

With no evidence weighing against ECI (*cf.* Minn. Stat. § 268.03, subd. 2), this Court, on this record, can make a § 268.18 determination, *de novo*. ECI, and other employers, should have a remedy to match rights that the legislature intended.

¹⁸ Moreover, prior statutory wording is irrelevant to ECI II review. This is so, first, because the § 268.105, subd. 7, amendment sets new standards. Second, § 268.051, subd. 6(b) requires that DEED redetermine a tax rate to always be compliant with current statutes. Third, ECI's right to a tax defense based on an applicant's ineligibility consequent to a layoff did not ripen and vest until ECI's ultimate loss on its quit-vs-layoff disqualification contention (Sept. 20, 2005, when discretionary review per RCAP 117 was denied). That date is after current M.S. Ch. 268 wording took effect (i.e., after July 1, 2005). Fourth, this Court's own earlier opinion affirming DEED's layoff theory was not even issued until July 5, 2005, i.e., after key statutory changes took effect. A defense should be read under the law as of the time the right to assert the defense vests.

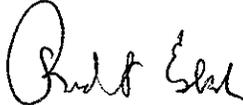
CONCLUSION

For the foregoing reasons ECI contends DEED committed serious error, prejudicial to ECI, and that ECI should be granted relief it seeks as a matter of law, specifically: a determination that under Minn. Stat. § 268.18, benefits paid by DEED to ECI's ex-employee Garrison were all overpayments because Garrison was continuously ineligible to receive benefits for never complying with her duty to solicit reemployment with ECI under Minn. Stat. § 268.085, subd. 16(b); and a determination that overpayments should not be part of any DEED recalculation of ECI's tax rate; and, consequently, an order that DEED's own final order increasing ECI's tax rate is vacated as void.

In the alternative, ECI seeks a remand for supplementation of the record, with instructions about specific supplementation the Court requires and with the proposed tax increase stayed pending remand and further order of this Court.

DATED this 7th day of March, 2006.

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