

NO. A10-423

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State of Minnesota  
**In Court of Appeals**

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Shahriar Vasseei,

*Relator,*

v.

Schmitt &amp; Sons School Buses, Inc.,

*Respondent,*

and

Department of Employment and Economic Development,

*Respondent.*


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**RELATOR SHAHRIAR VASSEEI'S REPLY BRIEF  
AND SUPPLEMENTAL APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## ARGUMENT

The contention by the Department of Employment and Economic Development (the “Department”) that the Vassei hearings were procedurally sound asks this Court to bypass the central issue on appeal: the Unemployment Law Judge (“ULJ”) exceeded his statutory authority by ordering a second evidentiary hearing and, based on evidence and testimony presented at that hearing, reversed his earlier determination that Relator Shahriar Vassei was eligible for unemployment benefits. The Department’s assertion that the ULJ undertook the second evidentiary hearing to fulfill his duty to assist unrepresented parties in the presentation of their evidence is unsupported by the record, the statutory framework for conducting evidentiary hearings, and the case law addressing the ULJ’s purported duty. Because the Department’s arguments are unavailing here, the ULJ’s decision to conduct the second evidentiary hearing must be reversed and the earlier eligibility decision should be reinstated.

### **I. THE DEPARTMENT’S FACTUAL ASSERTIONS ARE NOT SUPPORTED BY THE RECORD.**

In support of its argument that the hearings were procedurally sound, the Department alleges certain facts that are either contradicted or unsupported by the record below. This Court should not affirm the ULJ’s decision on the basis of these factual assertions.

First, the Department misstates the procedural steps that led to the second evidentiary hearing. The Department claims that “the ULJ, *on his own motion*, properly ordered an additional hearing to provide the assistance he failed to offer to an

unrepresented party during the first hearing.” (Resp. Br. at 10 (emphasis added).) This assertion is false. Counsel for Relator’s employer, Schmitt & Sons School Buses, Inc., requested reconsideration of the ULJ’s findings of fact and decision in a letter dated October 1, 2009. (R.A.<sup>1</sup> at 5.) As Relator argued in his principal brief, that letter asked the ULJ to consider additional evidence that did not include the police report of the July 31, 2009 incident. Importantly, the employer’s request did not provide any explanation why this evidence had not been presented in the earlier hearing.

Second, the Department asserts that the ULJ “recognized that he erred” by failing to assist the employer with the development of the record at the September 4, 2009 hearing. (Resp. Br. at 12.) But the record demonstrates that the ULJ provided the employer with ample opportunity to introduce the police report and other evidence into the record. (Tr. at 23, 25-6, 34, 39, 46, 52, 76.) The trigger for the second evidentiary hearing was not any purported awakening by the ULJ as to the conduct of the hearing, but a request for reconsideration by the employer. (R.A. at 9-10.) Nothing in the record supports the notion that the ULJ independently realized his “obligation to inquire further.” (Resp. Br. at 13.)

Finally, the Department alleges certain facts regarding the nature of a ULJ’s work that are not supported by the record below. (Resp. Br. at 13.) The ULJ’s “grinding schedule” notwithstanding, the record demonstrates that the ULJ (1) found that the employer did not “provide any explanation why the additional evidence was not submitted at the hearing” (R.A. at 10); (2) concluded that Minnesota Rule 3310.2921

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<sup>1</sup> R.A. refers to Relator’s Appendix that was filed in conjunction with his principal brief.

provided a basis for an additional evidentiary hearing beyond what Minn. Stat. § 268.105, subd. 2(c), provides (R.A. at 10); and (3) when the Relator challenged the basis for the additional evidentiary hearing, reversed his earlier findings, and held that the employer had shown good cause sufficient for an additional evidentiary hearing under 268.105, subd. 2(c) (R.A. at 23). Thus, the facts established by the record are not indicia of procedural soundness. Instead, the facts demonstrate that the ULJ's decision to conduct the additional hearing was unfounded and unsupported by the record, and thus an error of law that should be reversed.

**II. THE GOVERNING STATUTES AND RULES DEMONSTRATE THAT THE ULJ EXCEEDED HIS AUTHORITY TO RECONSIDER HIS INITIAL DETERMINATION.**

Throughout its brief, the Department relies on the assertion that the rules governing the conduct of an evidentiary hearing also provide an independent basis for ordering an additional evidentiary hearing. This argument relies on a misreading of the statute governing the evidentiary-hearing procedure and an expansive reading of the ULJ's duty to develop the record. Because the plain language of the relevant statute and rule do not support this contention, the Department's argument fails.

After an initial determination on issues of disqualification and eligibility, the applicant or the employer may initiate an administrative appeal. Minn. Stat. § 268.101, subd. 2(d) (2010). Administrative appeals of initial determinations are governed by Minnesota Statutes section 268.105. Subdivision 1 of section 268.105 ("Evidentiary hearing by an unemployment law judge"), states the requirements for providing notice of the de novo due process evidentiary hearing (subd. 1(a)); describes the manner in which

the ULJ shall conduct the hearing, including the requirement that the ULJ shall “ensure that all relevant facts are clearly and fully developed” (subd. 1(b)); and after the conclusion of the hearing, commands the ULJ to make findings of fact and decision (subd. 1(c)). “The unemployment law judge’s decision is final unless a request for reconsideration is filed pursuant to subdivision 2.” § 268.105, subd. 1(c).

Subdivision 2 (“Request for reconsideration”) is equally clear on the procedure for conducting an additional evidentiary hearing. Specifically, the ULJ must order an additional evidentiary hearing if an involved party shows that the unsubmitted evidence “would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence.” § 268.105, subd. 2(c). In the face of the ULJ’s finding that the employer did not demonstrate good cause, the Department asserts that “the ULJ may also order a new hearing because he failed to assist an unrepresented party, or failed to develop the record.” (Resp. Br. at 14.) These bases, however, do not appear in the plain language of Subdivision 2.

Instead, the Department relies, as did the ULJ, on Minnesota Rules 3310.2921 (Conduct of Hearing), which provides a framework for presenting evidence, examining witnesses, and making objections during the hearing. Rule 3310.2921 does not contain any provision for reconsideration, including authorizing the ULJ to conduct an additional evidentiary hearing after issuing a final decision pursuant to Minn. Stat. § 268.105, subd. 1(c). The Department makes no attempt to square its assertion that the ULJ’s duty to develop the record continues past the issuance of a final decision, or that such duty

provides a separate basis for reconsideration over and above section 268.105, subdivision 2.

In short, the Department is attempting to expand the ULJ's statutory authority to justify the ULJ's error in ordering the second evidentiary hearing. Neither the statutes governing evidentiary hearings and requests for reconsideration nor the Rule prescribing the conduct of the evidentiary hearing provide such authority. In the absence of a statutory basis to conduct the additional evidentiary hearing the ULJ erred as a matter of law and should be reversed.

### **III. THE DEPARTMENT'S ASSERTION THAT THE ULJ HAS A CONTINUING DUTY TO DEVELOP THE RECORD IS BELIED ROUTINELY BY CONTRARY CASE LAW.**

The Department argues at length that the ULJ's duty to develop the record under Minn. R. 3310.2921 (2009) is a duty that continues beyond the hearing and beyond the issuance of a decision. The Department contends that this duty provides a separate basis for the ULJ to exercise his "inherent authority to reopen a hearing" to continue to develop the record. But as noted in the Relator's principal brief, appellate review of the ULJ's duty routinely concludes that the ULJ adequately satisfied his duty to develop the record below. *E.g., Stresnak v. Dakota Valley Oral & Maxillofacial Surgery P.A.*, No. A09-1287, 2010 WL 2265708 (Minn. Ct. App. June 8, 2010)<sup>2</sup>; *McCormick v. Hockenbergs Equip. & Supply Co.*, No. A09-1850, 2010 WL 1966196 (Minn. Ct. App. May 18, 2010); *Killion v. Betsy's Back Porch, Inc.*, Nos. A09-641, A09-1323, 2010 WL 1967224 (Minn.

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<sup>2</sup> Unpublished cases are cited for demonstrative purposes rather than precedential value. Copies of the cases are included in the Supplemental Appendix.

Ct. App. May 18, 2010); *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (2007); *Ywsfw v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (2007). In those instances where this Court has reversed because the ULJ has failed to fully develop the record, the procedural defects at issue were “so significant” that the cases were remanded. *Ntamere v. Decisionone Corp.*, 673 N.W.2d 179, 181 (Minn. Ct. App. 2003) (“[T]he reasoning of the ULJ that the subpoenas would not be enforced because ‘there isn’t any reason to stretch things out’ is not a legally sufficient reason to refuse to either continue the hearing or require compliance with the subpoenas by the employer.”); *see also Thompson v. County of Hennepin*, 660 N.W.2d 157, 160-1 (Minn. Ct. App. 2003) (failing to compel the attendance of subpoenaed witnesses was a “significant procedural defect”).

The weight of authority opposes the Department’s assertion that the ULJ was fulfilling his duty to develop the record by authorizing the second evidentiary hearing. Accordingly, the ULJ’s decision to hold the additional evidentiary hearing should be reversed.

### **CONCLUSION**

Contrary to the Department’s assertion, this Court does not need to order the Department to “pretend” that the ULJ did not conduct an unauthorized evidentiary hearing. Instead, this Court can reverse the decision of the ULJ to conduct the additional hearing. The Department makes no separate challenge to the ULJ’s Findings of Fact and Decision dated September 10, 2009, which found that Vassei’s conduct did not constitute employment misconduct. Unwinding the improperly granted additional

hearing and the evidence and testimony presented would reinstate the earlier decision. Accordingly, this Court should find that the ULJ exceeded his statutory authority by conducting the additional evidentiary hearing, vacate the findings and decision arising from that hearing, and reinstate the ULJ's former decision finding Relator Vasseei eligible for unemployment compensation benefits.

Respectfully submitted,

Dated: August 1, 2010

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