

STATE OF MINNESOTA
COURT OF APPEALS

Re Unemployment Insurance Tax of:

ENTERPRISE COMMUNICATIONS, INC.,

Relator

REPLY BRIEF

COURT OF APPEALS #:

v.

A05 - 2513

Commissioner of Employment & Economic
Development,

Respondent

DEPARTMENT OF EMPLOYMENT
& ECONOMIC DEVELOPMENT
1090 05

DATE OF DECISION: Dec. 1, 2005

**Brief of Relator in Reply to DEED's
Response Brief**

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The governing statutes are Minn. Stat. § 268.069, subd. 2 [making DEED responsible for its own enforcement errors regardless of employee or employer involvement]; § 268.047, subd. 2(8) [saying benefits overpaid cannot lawfully be used in calculating a new tax rate]; § 268.18, subd 1 [requiring a prompt DEED determination of overpayment when the unequivocal facts and unequivocal law demand it]; and last, though most important, § 268.085, subd. 16(b) [requiring that

laid off workers wishing to remain eligible during their benefit year as “actively seeking suitable employment,” must resolicit past employers from whom they were laid off, to see if there is available work]. § 268.085, subd. 16(b) imposes an affirmative, mandatory duty, to act in a particular way or be ineligible.

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For not having contacted ECI, in any fashion whatsoever, Garrison was ineligible as a matter of law, to receive the benefit payments she was given by DEED.²

¹ By statute ECI preponderates as a matter of law. Minn. Stat. § 268. 03, subd. 2, requires weighing evidence. Not only was there no evidence weighing against ECI’s proof about Garrison; DEED refused ECI’s request to subpoena Garrison and any DEED staff who arguably *might* have been capable of controverting ECI’s proof.

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the hearing and post-hearing affidavits of Hendriksen, ECI's owner, are properly "of record" under DEED's cited authority (see excerpts of each, appended to this brief).

In our case, ECI, to forestall reversible error, raised its ineligibility contention prior to, at, and after ULJ Anderson's tax hearing (and it was the entire issue at that hearing, with "pre-benefit year" disqualification matters already resolved in a different, earlier proceeding). In our case oral and affidavit testimony from hearing is entirely sufficient for this court to grant ECI relief without remand. In *Worthington Tractor* a remand was needed only because the issue remanded was raised after, not during or before a hearing. Nothing in *Worthington Tractor* suggests that court intended to excuse DEED from its duty to follow the law and be responsible by statute (§ 268.069, subd. 2) for proper administration of the law "regardless of the level of interest or participation of the employer." The *Worthington Tractor* court instead held DEED must face actual issues raised, without delay. In this way the case is consistent with precedent ECI cites, and favors ECI's position. *Worthington Tractor* is distinguishable only because a remand was necessary whereas in our situation the record justifies a complete reversal, as a matter of law, without remand. Other cases DEED cited are wholly inapposite. Each deals with disqualification issues arising prior to the start of a benefit year – the exact thing the Peterson court disposed of already. Extracting cash from a citizen was never at issue in DEED's cited cases. Not one case cited by DEED involved a taxation question or even a question of DEED, as adversary of an applicant, attempting to gain a repayment.

Regarding statutes, DEED gives cursory attention, response p.7-8, to two of the four key statutes: § 268.047, subd. 2(8), and § 268.18, subd. 1; but then misstates the law while ignoring the other statutes; § 268.069, subd. 2, and § 268.085, subd. 16(b). DEED seems to imply in briefing, but does not say so outright, that it can totally frustrate the intent of the legislature by declining to follow a statute; i.e., DEED wholly ignores § 268.085, subd. 16(b) as if it never existed and has consistently and willfully ignored that § 268.18, subd. 1 requires an immediate determination upon DEED receiving notice of facts constituting overpayment. The language of that statute is indisputable – a determination must be made "as soon as the overpayment is discovered." The legislature left no room for neglect or willful inaction.

And the bottom-line issue is: What are the tax consequences of the undisputed fact that Garrison never contacted ECI *despite* § 268.085, subd 16(b) saying she should have?⁴

Governing cases are: *Juster Bros. v. Christgau*, 7 N.W.2d. 501 (Minn. 1943); *Schulte v. Transport Unlimited, Inc.*, 354 N.W.2d 830 (Minn. 1984); *Neeland. v. Clerarwater Mem. Hosp.*, 257 N.W.2d 366 (Minn. 1977); and *Mower County Bd. v. Trustees*, 136 N.W.2d 671, 676 (Minn. 1965).⁵

⁴ This is a tax case. Payments to an ineligible recipient are overpayments and overpaid amounts, by statute, are not to be part of a tax recalculation. The resolicitation-eligibility duty required that Garrison conform to the statute or be ineligible, hence, specifically, ECI's tax defense is that this omission resulted in overpayment and § 268.047, subd. 2(8) unequivocally excludes overpaid amounts.

Despite DEED briefing rhetoric, this is a timely appeal of a tax and nothing else. If ECI had not been timely, DEED would not have scheduled and held the Anderson hearing. The Court must now determine the tax consequences of Garrison's breach of eligibility law. It is an issue wholly separate from disqualification arising from events prior to the beginning of a benefit year. There is no other issue, currently, but the tax. DEED waived any legitimate right to argue for a remand by not briefing or even showing up at hearing before ULJ Anderson. DEED also is estopped by its inequitable refusal to subpoena Garrison to testify about dealings between her and DEED; i.e., the agency actively suppressed facts at its fact-finding hearing stage, and now briefs *Worthington Tractor* as suggesting a remand. DEED ignored its own rule on subpoena issuance as well as cases cited in ECI's initial brief and in briefing to the agency (see Opening brief, at fn.1, and p.25-26).

⁵ Initial ECI briefing fully analyzed these cases and will not be repeated. *See*, opening brief; p. 22-25. *Juster Bros.* is the key case. It is a taxation case that has stood for over half a century as sound law. It says ECI is entitled to reasonable due process in perfecting and presenting its defense, and this has not happened. Access to needed witnesses was forestalled and a DEED duty to immediately make a § 268.18 determination was willfully ignored, and is still being stonewalled. Two of the other key cases; *Neeland* and *Mower County* apply here, saying it would be chaos for courts to allow such manipulative administrative practices. Agencies cannot pick and choose statutes they like or dislike, they must scrupulously follow

DEED's brief is full of irrelevancies, false facts, and non-sequiturs. For example, at p.11-12 it suggests there was acrimony between ECI and Garrison, with no basis in fact to make this assertion, and it suggests Garrison is entitled to closure.

ECI, however is entitled to a fair tax, which is all it seeks, and a fair tax would have proper exceptions applied; not administratively ignored.

Also, it is offensive to suggest Garrison's position is hostile to ECI's or that ECI's wishing to be taxed properly is inimical to Garrison having closure. Minn. Stat. § 268.067(a) exists for exactly the situation where DEED does not want to deny an applicant closure, as it argues, while still according an employer the due process due under *Juster Bros.* Simply compromise the tax increase effort as a step in the best interest of the State of Minnesota, and be done with it; giving Garrison closure. Last ¶, DEED brief, p.10, notes, "Garrison is not a party to this case." That fits § 268.067(a), precisely. Yet, DEED briefing fails to explore that option.

Moreover, if this Court grants ECI the relief it seeks, relief from a wrongful tax, ECI does not care a whit whether or not DEED pursues Garrison for overpaid amounts. That is between Garrison and an agency claiming now that Garrison needs closure. Presumably DEED would then not pursue Garrison; and ECI will be fully happy and satisfied, if that results. ECI only contests its taxes.

all of the law. *Schulte* demonstrates why ECI should have the tax relief it seeks and be excused from further proceedings, if any, between DEED and Garrison. Garrison may have a sound and valid defense against DEED, based on *Schulte* and the quality of notice Garrison received from DEED (without any privity of ECI to such past matters). Garrison's equitable defenses against DEED should not involve a tax or other risk to ECI; § 268.069, subd. 2.

There is no vendetta against Garrison. This is purely a tax case. As just noted, ECI is happy if Garrison has closure, so long as ECI taxes are fairly reckoned. Yet, DEED (p.12) uses emotion-laden “again (and again, and again, and again)” rhetoric, and mentions “years” having passed. Yet DEED cites *Worthington Tractor*, which says an employer deserves justice but says nothing about limiting when an employer should properly raise tax issues.⁶

Moreover, § 268.051, subd. 6, does say when and how tax issues are to be raised. ECI notes, it has complied with each and every timing provision of that statute; despite DEED foot-dragging. DEED concedes this by never mentioning the statute or even suggesting ECI failed to comply. *Cf. fn.4, supra, p.5.*

What DEED’s argument reduces to is that full compliance with statutes, in this instance the tax statutes; §§ 268.047 and 268.051; is not to DEED’s liking and DEED is somehow to be judicially recognized as entitled to prevail on hand-waving arguments that distill to wanting to not be held to comply with the part of Ch. 268 statutory law the agency does not like. This is false. *Neeland and Mower County* say just the opposite. And, § 268.069, subd. 2 says that, “The commissioner has the responsibility for the proper payment of unemployment benefits regardless of the

⁶ Also, *Worthington Tractor* suggests a remand, which, under DEED argument, is yet more time spent on fixing a tax problem that ECI agrees should not have languished administratively as long as it has. However, in ECI’s original briefing, p.29, et seq., ECI patiently explained that District Court writs are unavailable to accelerate the judicial process. As a matter of law ECI was compelled to exhaust administrative remedies and has patiently done so despite DEED foot-dragging. ECI will live with that problem of law, even while not liking it. ECI notes that if DEED displayed ECI’s regard for complying with statutes it does not like, we would not be here.

level of interest or participation by an applicant or an employer in any determination or appeal.”⁷

DEED’s “we worry over closure for Garrison” argument is entirely a red herring. DEED foot-dragging and stonewalling caused delay. If the law had been duly followed by this agency no tax issue would have arisen; i.e., if DEED had given Garrison timely notice of her reemployment solicitation duty, then she would have ignored it at her peril. ECI has no idea why this course of action was not followed. It involved DEED and Garrison, only. Not ECI.

Most importantly, DEED’s brief misstates the reach and intent of this Court’s earlier “Peterson opinion” in arguing that the Peterson panel disposed of statutory argument under statutes it never even mentioned, as if that panel, of this Court, had laxly failed to mention statutes it was about to construe. That opinion carefully said that under a particular statute the applicant only has a duty to respond to employer offers during a benefit year. But it did not construe the statute (268.085, subd. 16(b)) saying the applicant, in addition to the duty to respond also has an affirmative duty to initiate contact by seeking work with the ex-employer when there’s been a layoff. That is the nub of DEED’s entire error; concluding (for real or contrived reasons) that a lack of offers from ECI was the only relevant fact; and that reemployment solicitation by Garrison was not also required.

⁷ Curiously, ECI knows of no statute saying DNR, PCA, or other agencies have to be responsible for complying with their governing law; i.e., the legislature in its wisdom appears to have singled out only DEED for such express attention and the legislature, presumably, felt it had cause for expressly saying what DEED’s job is and that DEED is to be held responsible for properly doing its job.

In summary, ECI argues that Garrison was absolutely ineligible, as a matter of law under § 268.085, subd. 16(b) (for failing to meet the mandatory duty on all laid off applicants, to seek reemployment with the past employer after the layoff occurred); and that Judge Peterson wrote nothing about or against that argument.

DEED's brief confuses ineligibility under § 268.085, subd. 16(b) with some already decided matters not at issue in ECI's present tax challenge, specifically issues under § 268.095, subd. 8 and 11 (since recodified). That latter statute is what Judge Peterson correctly read as saying if there are offers the employee must honor them but that no duty is triggered *under that statute* if offers are lacking. That recodified statute is irrelevant to what a laid off applicant must nonetheless affirmatively do in the absence of offers. Minn. Stat. § 268.085, subd. 16(b) governs then, and is unequivocal.

Hence, DEED's brief wholly ignored the core of ECI's argument, as well as the core of Judge Peterson's careful opinion drafting.⁸

Again in summary, the Garrison ineligibility is important because it triggers the taxing exception, which triggers the duty to act promptly and fairly about

⁸ DEED's main briefing error was to dismiss the importance of separate consequences of layoff; i.e., having one they liked and one they dislike. Previously, DEED willingly accepted the Peterson court's determination that as a statutory consequence of a layoff (on Jan. 29, 2004), that Garrison was not disqualified for declining offered suitable work after the layoff but before filing for benefits (and beginning a benefit year Feb. 15, 2004). And now, after DEED accepted that favorable consequence of layoff, it will not even acknowledge that ECI has an entitlement to relief under a separate and different but equally compelling statutory consequence of a layoff, under a different statute; § 268.085, subd. 16(b).

overpayments. DEED would mislead the court into believing a tax risk can be imposed on an employer because of DEED negligent or willful noncompliance with law, and/or that somehow ECI forfeited its right to not be wrongly taxed by not having discovered DEED's error earlier. However, § 268.069, subd. 2, says DEED is held responsible to properly enforce the law regardless of what an employer does; and all timing provisions of § 268.051, subd. 6 were duly complied with, as the legislature requires, regardless of what DEED might argue it would have preferred, timing-wise. The timing issue also is a red herring. DEED would never have scheduled and held the Anderson hearing if there was any real, justifiable timing technicality it could hide behind, to avoid giving ECI tax relief.⁹

Finally in summary, DEED's brief fails to even acknowledge the two cases that fully control whenever this agency attempts to extract cash from an employer or employee; *Juster Bros.* and *Schulte*. *Juster Bros.* is a Supreme Court DEED taxing decision that has stood for over half a century; while *Schulte* is a published decision of this Court, which imposes a due process requirement of adequate notice. Under

⁹ The agency, as a matter of law, cannot escape duties or shift responsibilities. A statute says so, and moreover, if DEED's initial ULJ, Manderfeld, in initially determining that underlying facts reflected a layoff, had given due notice (*Schulte* notice) at hearing of the consequences of layoff – especially notice to ECI and Garrison about the applicant duty under § 268.085, subd. 16(b), all following events could have unfolded differently with ECI and Garrison duly informed of the statute and its impact upon them during the Garrison benefit year. DEED ignores this point saying, basically, that it's water under the bridge, despite it being the very genesis of problems this court now examines and despite it being DEED's duty to give due notice to parties before it. And, again, DEED cannot pick and choose whether it will ignore duties - § 268.069, subd. 2 simply does not permit that; nor do the courts, per *Neeland*; *Mower County*; and DEED's cited case, *Worthington Tractor*.

Schulte, misleading or incomplete notice is inadequate notice, as a matter of due process law. Under *Juster Bros.*, DEED cannot drag things out via unreasonable activity and decision-making and then expect the courts to approve unfair taxation. No case cited by DEED has a thing to do with taxation; or with consequences of overpayment of benefits. The closest case cited by DEED to being on point is *Worthington Tractor*, and as noted *supra* p.3-4, (and at fn.3), that case favors ECI's position, not DEED's. Beyond that one case, DEED cites cases that relate only to the situation when an employer and employee are together before the agency and the agency is not the adversary of a party opposing a taxing effort, but instead a neutral referee between ex-employer and ex-employee, in dispute.

ECI is troubled at this late stage of tax proceedings by suggestions that a remand may help, because ECI previously in its opening brief and in exhaustive briefing before the agency cited statutory and case law clearly, and in a way showing that DEED had ample opportunity in its administrative proceedings to avoid reversible error. *See*, full Appendix to ECI's opening brief. DEED instead declined sound fact-finding and wasted much time, with little to suggest a different agency attitude and result, alacrity and responsiveness to the issues, in the event of a remand.

CONCLUSION

For the foregoing reasons, ECI again contends, as it did in initial briefing, that DEED committed serious reversible error, prejudicial to ECI, and that ECI should be granted relief it requests, as a matter of law.

Relief sought by ECI is an order: striking the tax increase; ordering an immediate rebate to ECI of amounts it may have overpaid under the stricken tax alteration; determining that the position and conduct of the state was not substantially justified; and excusing ECI from further proceedings, if any, between DEED and Garrison (because all error was between DEED and Garrison, with ECI not in privity, and Garrison may have repayment defenses against DEED, per *Schulte*, if DEED gave Garrison inadequate or misleading notice about her duties and repayment exposure). Such relief is proper now, without remand, because ECI did not err at all; because a remand would be an unnecessary burden on ECI; because Minn. Stat. § 268.069, subd. 2, imposes sole responsibility on DEED for getting things right or wrong “regardless of the level of interest or participation by an employer in any determination or appeal;” and because ECI is entitled to relief as a matter of law because the statutory scheme tying together Minn. Stat. § 268.085, subd. 16(b); §268.047, subd. 2(8); and § 2368.18, does not contemplate or allow a shift of risk and consequences of DEED overpayment error onto an innocent employer, via wrongful taxation or otherwise.

With a record showing DEED staff did not care to attend its own tax hearing and with absolutely no DEED proof weighing against ECI’s uncontroverted oral and affidavit testimony about the lack of any contact initiated by Garrison with ECI during her benefit year, a remand would serve no practical purpose.

ECI diligently attempted to elicit further facts from Garrison and DEED despite DEED’s refusal of subpoenas and record access.

A remand under such circumstances would simply reward an agency for multiple procedural errors, for delay and neglect of duties, and for a disregard for the law according to clear cases and statutes ECI cites to this court and previously cited in submissions to DEED.

The record is sufficient. DEED could have built it differently but did not.

DATED this 19th day of April, 2006.

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Under judicial review provisions of §268.105, subd. 7, and consistent with *Worthington Tractor*, this Court can correct prejudicial error where appropriate, without remand.

the hearing and post-hearing affidavits of Hendriksen, ECI's owner, are properly "of record" under DEED's cited authority (see excerpts of each, appended to this brief).

In our case, ECI, to forestall reversible error, raised its ineligibility contention prior to, at, and after ULJ Anderson's tax hearing (and it was the entire issue at that hearing, with "pre-benefit year" disqualification matters already resolved in a different, earlier proceeding). In our case oral and affidavit testimony from hearing is entirely sufficient for this court to grant ECI relief without remand. In *Worthington Tractor* a remand was needed only because the issue remanded was raised after, not during or before a hearing. Nothing in *Worthington Tractor* suggests that court intended to excuse DEED from its duty to follow the law and be responsible by statute (§ 268.069, subd. 2) for proper administration of the law "regardless of the level of interest or participation of the employer." The *Worthington Tractor* court instead held DEED must face actual issues raised, without delay. In this way the case is consistent with precedent ECI cites, and favors ECI's position. *Worthington Tractor* is distinguishable only because a remand was necessary whereas in our situation the record justifies a complete reversal, as a matter of law, without remand. Other cases DEED cited are wholly inapposite. Each deals with disqualification issues arising prior to the start of a benefit year – the exact thing the Peterson court disposed of already. Extracting cash from a citizen was never at issue in DEED's cited cases. Not one case cited by DEED involved a taxation question or even a question of DEED, as adversary of an applicant, attempting to gain a repayment.

Regarding statutes, DEED gives cursory attention, response p.7-8, to two of the four key statutes: § 268.047, subd. 2(8), and § 268.18, subd. 1; but then misstates the law while ignoring the other statutes; § 268.069, subd. 2, and § 268.085, subd. 16(b). DEED seems to imply in briefing, but does not say so outright, that it can totally frustrate the intent of the legislature by declining to follow a statute; i.e., DEED wholly ignores § 268.085, subd. 16(b) as if it never existed and has consistently and willfully ignored that § 268.18, subd. 1 requires an immediate determination upon DEED receiving notice of facts constituting overpayment. The language of that statute is indisputable – a determination must be made "as soon as the overpayment is discovered." The legislature left no room for neglect or willful inaction.

And the bottom-line issue is: What are the tax consequences of the undisputed fact that Garrison never contacted ECI *despite* § 268.085, subd 16(b) saying she should have?⁴

Governing cases are: *Juster Bros. v. Christgau*, 7 N.W.2d. 591 (Minn. 1943); *Schulte v. Transport Unlimited, Inc.*, 354 N.W.2d 830 (Minn. 1984); *Neeland. v. Clerarwater Mem. Hosp.*, 257 N.W.2d 366 (Minn. 1977); and *Mower County Bd. v. Trustees*, 136 N.W.2d 671, 676 (Minn. 1965).⁵

⁴ This is a tax case. Payments to an ineligible recipient are overpayments and overpaid amounts, by statute, are not to be part of a tax recalculation. The resolicitation-eligibility duty required that Garrison conform to the statute or be ineligible, hence, specifically, ECI's tax defense is that this omission resulted in overpayment and § 268.047, subd. 2(8) unequivocally excludes overpaid amounts.

Despite DEED briefing rhetoric, this is a timely appeal of a tax and nothing else. If ECI had not been timely, DEED would not have scheduled and held the Anderson hearing. The Court must now determine the tax consequences of Garrison's breach of eligibility law. It is an issue wholly separate from disqualification arising from events prior to the beginning of a benefit year. There is no other issue, currently, but the tax. DEED waived any legitimate right to argue for a remand by not briefing or even showing up at hearing before ULJ Anderson. DEED also is estopped by its inequitable refusal to subpoena Garrison to testify about dealings between her and DEED; i.e., the agency actively suppressed facts at its fact-finding hearing stage, and now briefs *Worthington Tractor* as suggesting a remand. DEED ignored its own rule on subpoena issuance as well as cases cited in ECI's initial brief and in briefing to the agency (see Opening brief, at fn.1, and p.25-26).

⁵ Initial ECI briefing fully analyzed these cases and will not be repeated. *See*, opening brief; p. 22-25. *Juster Bros.* is the key case. It is a taxation case that has stood for over half a century as sound law. It says ECI is entitled to reasonable due process in perfecting and presenting its defense, and this has not happened. Access to needed witnesses was forestalled and a DEED duty to immediately make a § 268.18 determination was willfully ignored, and is still being stonewalled. Two of the other key cases; *Neeland* and *Mower County* apply here, saying it would be chaos for courts to allow such manipulative administrative practices. Agencies cannot pick and choose statutes they like or dislike, they must scrupulously follow

DEED's brief is full of irrelevancies, false facts, and non-sequiturs. For example, at p.11-12 it suggests there was acrimony between ECI and Garrison, with no basis in fact to make this assertion, and it suggests Garrison is entitled to closure.

ECI, however is entitled to a fair tax, which is all it seeks, and a fair tax would have proper exceptions applied; not administratively ignored.

Also, it is offensive to suggest Garrison's position is hostile to ECI's or that ECI's wishing to be taxed properly is inimical to Garrison having closure. Minn. Stat. § 268.067(a) exists for exactly the situation where DEED does not want to deny an applicant closure, as it argues, while still according an employer the due process due under *Juster Bros.* Simply compromise the tax increase effort as a step in the best interest of the State of Minnesota, and be done with it; giving Garrison closure. Last ¶, DEED brief, p.10, notes, "Garrison is not a party to this case." That fits § 268.067(a), precisely. Yet, DEED briefing fails to explore that option.

Moreover, if this Court grants ECI the relief it seeks, relief from a wrongful tax, ECI does not care a whit whether or not DEED pursues Garrison for overpaid amounts. That is between Garrison and an agency claiming now that Garrison needs closure. Presumably DEED would then not pursue Garrison; and ECI will be fully happy and satisfied, if that results. ECI only contests its taxes.

all of the law. *Schulte* demonstrates why ECI should have the tax relief it seeks and be excused from further proceedings, if any, between DEED and Garrison. Garrison may have a sound and valid defense against DEED, based on *Schulte* and the quality of notice Garrison received from DEED (without any privity of ECI to such past matters). Garrison's equitable defenses against DEED should not involve a tax or other risk to ECI; § 268.069, subd. 2.

There is no vendetta against Garrison. This is purely a tax case. As just noted, ECI is happy if Garrison has closure, so long as ECI taxes are fairly reckoned. Yet, DEED (p.12) uses emotion-laden “again (and again, and again, and again)” rhetoric, and mentions “years” having passed. Yet DEED cites *Worthington Tractor*, which says an employer deserves justice but says nothing about limiting when an employer should properly raise tax issues.⁶

Moreover, § 268.051, subd. 6, does say when and how tax issues are to be raised. ECI notes, it has complied with each and every timing provision of that statute; despite DEED foot-dragging. DEED concedes this by never mentioning the statute or even suggesting ECI failed to comply. *Cf. fn.4, supra, p.5.*

What DEED’s argument reduces to is that full compliance with statutes, in this instance the tax statutes; §§ 268.047 and 268.051; is not to DEED’s liking and DEED is somehow to be judicially recognized as entitled to prevail on hand-waving arguments that distill to wanting to not be held to comply with the part of Ch. 268 statutory law the agency does not like. This is false. *Neeland and Mower County* say just the opposite. And, § 268.069, subd. 2 says that, “The commissioner has the responsibility for the proper payment of unemployment benefits regardless of the

⁶ Also, *Worthington Tractor* suggests a remand, which, under DEED argument, is yet more time spent on fixing a tax problem that ECI agrees should not have languished administratively as long as it has. However, in ECI’s original briefing, p.29, et seq., ECI patiently explained that District Court writs are unavailable to accelerate the judicial process. As a matter of law ECI was compelled to exhaust administrative remedies and has patiently done so despite DEED foot-dragging. ECI will live with that problem of law, even while not liking it. ECI notes that if DEED displayed ECI’s regard for complying with statutes it does not like, we would not be here.

level of interest or participation by an applicant or an employer in any determination or appeal.”⁷

DEED’s “we worry over closure for Garrison” argument is entirely a red herring. DEED foot-dragging and stonewalling caused delay. If the law had been duly followed by this agency no tax issue would have arisen; i.e., if DEED had given Garrison timely notice of her reemployment solicitation duty, then she would have ignored it at her peril. ECI has no idea why this course of action was not followed. It involved DEED and Garrison, only. Not ECI.

Most importantly, DEED’s brief misstates the reach and intent of this Court’s earlier “Peterson opinion” in arguing that the Peterson panel disposed of statutory argument under statutes it never even mentioned, as if that panel, of this Court, had laxly failed to mention statutes it was about to construe. That opinion carefully said that under a particular statute the applicant only has a duty to respond to employer offers during a benefit year. But it did not construe the statute (268.085, subd. 16(b)) saying the applicant, in addition to the duty to respond also has an affirmative duty to initiate contact by seeking work with the ex-employer when there’s been a layoff. That is the nub of DEED’s entire error; concluding (for real or contrived reasons) that a lack of offers from ECI was the only relevant fact; and that reemployment solicitation by Garrison was not also required.

⁷ Curiously, ECI knows of no statute saying DNR, PCA, or other agencies have to be responsible for complying with their governing law; i.e., the legislature in its wisdom appears to have singled out only DEED for such express attention and the legislature, presumably, felt it had cause for expressly saying what DEED’s job is and that DEED is to be held responsible for properly doing its job.

In summary, ECI argues that Garrison was absolutely ineligible, as a matter of law under § 268.085, subd. 16(b) (for failing to meet the mandatory duty on all laid off applicants, to seek reemployment with the past employer after the layoff occurred); and that Judge Peterson wrote nothing about or against that argument.

DEED's brief confuses ineligibility under § 268.085, subd. 16(b) with some already decided matters not at issue in ECI's present tax challenge, specifically issues under § 268.095, subd. 8 and 11 (since recodified). That latter statute is what Judge Peterson correctly read as saying if there are offers the employee must honor them but that no duty is triggered *under that statute* if offers are lacking. That recodified statute is irrelevant to what a laid off applicant must nonetheless affirmatively do in the absence of offers. Minn. Stat. § 268.085, subd. 16(b) governs then, and is unequivocal.

Hence, DEED's brief wholly ignored the core of ECI's argument, as well as the core of Judge Peterson's careful opinion drafting.⁸

Again in summary, the Garrison ineligibility is important because it triggers the taxing exception, which triggers the duty to act promptly and fairly about

⁸ DEED's main briefing error was to dismiss the importance of separate consequences of layoff; i.e., having one they liked and one they dislike. Previously, DEED willingly accepted the Peterson court's determination that as a statutory consequence of a layoff (on Jan. 29, 2004), that Garrison was not disqualified for declining offered suitable work after the layoff but before filing for benefits (and beginning a benefit year Feb. 15, 2004). And now, after DEED accepted that favorable consequence of layoff, it will not even acknowledge that ECI has an entitlement to relief under a separate and different but equally compelling statutory consequence of a layoff, under a different statute; § 268.085, subd. 16(b).

overpayments. DEED would mislead the court into believing a tax risk can be imposed on an employer because of DEED negligent or willful noncompliance with law, and/or that somehow ECI forfeited its right to not be wrongly taxed by not having discovered DEED's error earlier. However, § 268.069, subd. 2, says DEED is held responsible to properly enforce the law regardless of what an employer does; and all timing provisions of § 268.051, subd. 6 were duly complied with, as the legislature requires, regardless of what DEED might argue it would have preferred, timing-wise. The timing issue also is a red herring. DEED would never have scheduled and held the Anderson hearing if there was any real, justifiable timing technicality it could hide behind, to avoid giving ECI tax relief.⁹

Finally in summary, DEED's brief fails to even acknowledge the two cases that fully control whenever this agency attempts to extract cash from an employer or employee; *Juster Bros.* and *Schulte*. *Juster Bros.* is a Supreme Court DEED taxing decision that has stood for over half a century; while *Schulte* is a published decision of this Court, which imposes a due process requirement of adequate notice. Under

⁹ The agency, as a matter of law, cannot escape duties or shift responsibilities. A statute says so, and moreover, if DEED's initial ULJ, Manderfeld, in initially determining that underlying facts reflected a layoff, had given due notice (*Schulte* notice) at hearing of the consequences of layoff – especially notice to ECI and Garrison about the applicant duty under § 268.085, subd. 16(b), all following events could have unfolded differently with ECI and Garrison duly informed of the statute and its impact upon them during the Garrison benefit year. DEED ignores this point saying, basically, that it's water under the bridge, despite it being the very genesis of problems this court now examines and despite it being DEED's duty to give due notice to parties before it. And, again, DEED cannot pick and choose whether it will ignore duties - § 268.069, subd. 2 simply does not permit that; nor do the courts, per *Neeland*; *Mower County*; and DEED's cited case, *Worthington Tractor*.

Schulte, misleading or incomplete notice is inadequate notice, as a matter of due process law. Under *Juster Bros.*, DEED cannot drag things out via unreasonable activity and decision-making and then expect the courts to approve unfair taxation. No case cited by DEED has a thing to do with taxation; or with consequences of overpayment of benefits. The closest case cited by DEED to being on point is *Worthington Tractor*, and as noted *supra* p.3-4, (and at fn.3), that case favors ECI's position, not DEED's. Beyond that one case, DEED cites cases that relate only to the situation when an employer and employee are together before the agency and the agency is not the adversary of a party opposing a taxing effort, but instead a neutral referee between ex-employer and ex-employee, in dispute.

ECI is troubled at this late stage of tax proceedings by suggestions that a remand may help, because ECI previously in its opening brief and in exhaustive briefing before the agency cited statutory and case law clearly, and in a way showing that DEED had ample opportunity in its administrative proceedings to avoid reversible error. *See*, full Appendix to ECI's opening brief. DEED instead declined sound fact-finding and wasted much time, with little to suggest a different agency attitude and result, alacrity and responsiveness to the issues, in the event of a remand.

CONCLUSION

For the foregoing reasons, ECI again contends, as it did in initial briefing, that DEED committed serious reversible error, prejudicial to ECI, and that ECI should be granted relief it requests, as a matter of law.

Relief sought by ECI is an order: striking the tax increase; ordering an immediate rebate to ECI of amounts it may have overpaid under the stricken tax alteration; determining that the position and conduct of the state was not substantially justified; and excusing ECI from further proceedings, if any, between DEED and Garrison (because all error was between DEED and Garrison, with ECI not in privity, and Garrison may have repayment defenses against DEED, per *Schulte*, if DEED gave Garrison inadequate or misleading notice about her duties and repayment exposure). Such relief is proper now, without remand, because ECI did not err at all; because a remand would be an unnecessary burden on ECI; because Minn. Stat. § 268.069, subd. 2, imposes sole responsibility on DEED for getting things right or wrong “regardless of the level of interest or participation by an employer in any determination or appeal;” and because ECI is entitled to relief as a matter of law because the statutory scheme tying together Minn. Stat. § 268.085, subd. 16(b); §268.047, subd. 2(8); and § 2368.18, does not contemplate or allow a shift of risk and consequences of DEED overpayment error onto an innocent employer, via wrongful taxation or otherwise.

With a record showing DEED staff did not care to attend its own tax hearing and with absolutely no DEED proof weighing against ECI’s uncontroverted oral and affidavit testimony about the lack of any contact initiated by Garrison with ECI during her benefit year, a remand would serve no practical purpose.

ECI diligently attempted to elicit further facts from Garrison and DEED despite DEED’s refusal of subpoenas and record access.

A remand under such circumstances would simply reward an agency for multiple procedural errors, for delay and neglect of duties, and for a disregard for the law according to clear cases and statutes ECI cites to this court and previously cited in submissions to DEED.

The record is sufficient. DEED could have built it differently but did not.

DATED this 19th day of April, 2006.

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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) (with amendments effective July 1, 2007).