

NO. A11-1307

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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BUILDERS COMMONWEALTH, INC.

RELATOR,

v.

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

RESPONDENT.

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RELATOR'S REPLY BRIEF, ADDENDUM, AND 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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## STATEMENT OF FACTS

### The issue is whether members of the worker cooperative Builders Commonwealth are distinct from employees and independent contractors.

In its response, the Department of Employment and Economic Development (“DEED”) repeatedly misstates the issue that was decided by the ULJ and which is raised in this appeal, beginning with its statement of the “Legal Issue.” (Resp. p.2) It is *not* whether Builders’ members are employees or independent contractors—one or the other. The issue is “whether the workers [i.e. the members] are employees or independent contractors *or members of a cooperative which are not considered employees for purposes of the Minnesota unemployment insurance law.*” (2011 T.26, Reply App-4)

### Builders’ members are engaged in cabinetry, furniture making, custom woodworking, sales, architectural design, and financial management.

In citing Builders’ Membership Agreement regarding Builders’ purpose, DEED’s statement lacks candor. DEED has omitted certain words which show that Builders’ members are engaged in a “joint venture” in construction *as well as* “cabinetry” and “custom woodworking.” (Resp. p.3) This misrepresentation of Builders’ projects is essential to DEED’s argument that all of Builders’ members are engaged in performing construction and improvement services and are therefore “employees” because they have not obtained an Independent Contractor Exemption Certificate (ICEC) under Section 181.723. The first point that members agree to in the Membership Agreement, and which DEED cites but misrepresents (Resp. p.3), is the following:

All members are engaged, through the cooperative, *in a joint venture* and mutual effort on a cooperative basis in the construction, maintenance,

renovation and repair of buildings and other structures, the *construction of custom cabinetry and other woodworking projects*.

(Mem. Agmt. ¶1, Reply App-1) Further establishing that the members are engaged in a type of joint venture is the third point of the agreement:

All members share the losses as well as the revenues of the association on a prorata basis according to work contributed and that the work value of members may, but need not be equal.

(Mem. Agmt. ¶3) As a joint venture, the members share in the revenues *and* losses.

DEED's statements regarding the members' activities also lack candor and fairness. DEED states that "all of whom [all 30 members] perform building construction or improvement services." (Resp. p.2) This is *not* true. Builders' vice-president (elected by the members), project manager, and sales coordinator is Arno Kahn. (2011 T.29) Kahn testified that Builders' members perform field work (construction and improvement) and also shop work (case work (i.e. cabinetry), furniture, and trim); design; and financial, administrative, and sales functions. (2011 T.44, 46-47, Reply App-13-16) He testified that some of the shop work is for Builders' projects, and the shop members install that cabinetry, and that a large percentage is for other companies. (2011 T.46-47) DEED cites Kahn's testimony regarding construction and omits his testimony from the same page regarding case work (cabinetry), furniture, and trim. (Resp. p.4 (citing 2011 T.46))

**Builders' members do *not* have supervisors.**

DEED misrepresents important testimony relevant to one of the two most

important factors that determine whether a person is an employee (i.e. control<sup>1</sup>), when it describes the role of a project coordinator. DEED omits the fact that the testimony it cites stated that the project coordinator ensures that work done by *subcontractors* is done in a workmanlike fashion and makes it appear that the members are supervised. DEED states the following: “Each job has a project coordinator, who is responsible for ensuring that Builders Commonwealth fulfills its contractual obligation to customers, and that the work is done in a workmanlike fashion.” (Resp. p.4 (citing 2011 T.38)) This is false. ***DEED omits the fact that the testimony was about the work done by subcontractors—not members.*** The testimony from Builders’ member Arno Kahn was the following: “Q. And you stated that the project coordinator does *not* supervise but he coordinates. And what does he do in terms of coordination. A....the person who’s the project coordinator is the interface with an owner. *They coordinate subcontractors* coming on the site, *make sure their work is done in a workmanlike fashion* and interact with myself and one of our partners who typically is the architect for the project, one of our *members* pardon me.” (2011 T.38, Reply App-9) Moments earlier Kahn had emphasized that the coordinators do *not* supervise. (2011 T.37, Reply App-8)

**Builders is governed by its members.**

DEED’s description of the interest each member has in Builders is false and misrepresents the governance of Builders. DEED’s statement that each member owns “an equal share of the cooperative” (Resp. p.3 (citing 2011 T.32-33)) is *not* true and implies

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<sup>1</sup> Minn.R. 3315.0555, subpt. 1.A (“right or lack of the right to control the means and manner of performance”).

that Builders is merely a worker-owned corporation. DEED omits from the testimony it cites the facts that the members have equal *voting* rights in the cooperative and *unequal equity* in the cooperative. (2011 T.32-33, Reply App-5-6) Each member owns one share of *voting* stock. (2011 T.32) This is significant. Members do not own shares of stock in the cooperative. Members acquire “equity” in the cooperative, which is an account with a monetary balance. (See, e.g., “Account Detail Report,” Reply App-36) The “equity” that each member owns in the cooperative is not the same. (2011 T.33) The more time and skill a member contributes to the cooperative over the years, the more equity they acquire. (2011 T.33) What is the same is that each member has equal voting power (one share of voting stock) in governing the cooperative.

DEED’s statements describing the personnel committee and the patronage dividends lack fairness and candor when DEED states that the committee “assigns each member an hourly rate of pay, and members are paid that rate.” (Resp. p.4 (citing 2011 T.37-38)) Mr. Kahn’s testimony, in fact, was that the personnel committee reviews member performance based on input from other members and calculates “advance rates” (not an hourly rate of pay), and—significantly—that the personnel committee is comprised of two members, who are elected by the membership. (2011 T.37, 43) The record also contains the testimony of Mr. Kahn from 1991, when he was a member of the management committee, in which he testified that the personnel committee reviews and calculates advance rates for *all* members—including himself. (1991 T.30, 54, Reply App-23, 25) He described the process as follows:

We have a *personnel committee made up and elected by the members* that engages in the ongoing review of the skills and productivity of the membership. And this includes all members. And the relative value of the labor units that the members put in is adjusted by that committee and they, of course, solicit information from the other members. It's basically a *consensual process* where the member who's being reviewed and the other members relative to each other try to determine a fair rate relative to the skills and the capabilities of the other members. *That distribution is taken into our total earnings.... And at the end of the year, we divide all those labor units out and determine a patronage distribution for all the members.*

(1991 T.34 Reply App-24) In 2011, Mr. Kahn also testified that the personnel committee determines the advance rate for every member (which would include himself) (2011 T.37, Reply App-8) and testified that nothing of substance has changed as to Builders' operation since the 1991 decision (2011 T. 42, Reply App-11).

DEED is also incorrect in stating that members must comply with the policies and guidelines manual. (Resp. p.5 (citing 2011 T.43)) The testimony cited by DEED does *not* say that members must comply with the policies and guidelines manual. (See 2011 T.43, Reply App-12) Rather, Mr. Kahn testified that the *bylaws* are a contract adopted by the members and defining their rights. (2011 T.43) Builders' 2005 *bylaws* are reproduced in the 2009 policies and guidelines manual as the first twenty-six sections. However, the manual's "Introduction" clarifies that the bylaws are a contract, and that the policies and guidelines are *not*. (Reply App-26) Paragraph B is captioned "Members Manual is Not a Contract." (*Id.*) The "Introduction" further clarifies that the purpose of the manual is to "communicate to new Members the policies and guidelines that the Members, and their representatives on the board of directors and committees [who are members elected by the

membership] have developed and to serve as a reference for all Members.” (Reply App-26) Another example of DEED omitting words is the omission of the words “if possible” from the policy that members request time off two weeks in advance. (Resp. p.5 (citing §30.00)) (See Reply App-28)

Members agree to comply with the articles of incorporation and bylaws—not the policies and guidelines manual. The Membership Agreement states that “I hereby agree to bound by and to comply with the provisions of the Articles of Incorporation and the Bylaws of the association ....” (Mem. Agmt. p.1, Reply App-1) Builders’ members must comply with the articles and bylaws because they are the governing documents of the cooperative association—just as partners must comply with a partnership agreement. Cf. Minn. Stat. §323A.0103(a) (“relations among the partners and between the partners and the partnership are governed by the partnership agreement”)

**Builders does not have the right to discharge a member.**

The bylaws provide that a member who violates the bylaws may be expelled from the cooperative association by a 2/3 vote of all members. This is analogous to the right of partners to expel another partner pursuant to the terms of a partnership agreement. Cf., e.g., Minn. Stat. §323A.0601(3) (“A partner is dissociated from a partnership upon the occurrence of any of the following events:...the partner’s expulsion pursuant to the partnership agreement”). This is not a right to discharge. DEED’s statements of fact regarding the process by which a member may be expelled from the membership are false and misleading. DEED states that “Members can be removed from the cooperative

without cause by a 2/3 majority vote, and Builders Commonwealth incurs no liability for such removal.” (Resp. p.6 (citing §20.04 & T.42))

Article IX of the 2005 Bylaws (reproduced as section 20 in the 2009 policies and guidelines manual) states in section 4 that “[a]ny Member who knowingly, intentionally, or repeatedly *violates a provision of these Bylaws*, including failing to patronize the Cooperative, may be required by the Board, pursuant to a vote by the Members as set forth below, to surrender membership in the Cooperative.” (Bylaws, Art. IX, §4, Reply App-27) Note that it is a violation of the “bylaws,” which is a contract between the members, and not the policies and guidelines. After one year of membership, it requires a 2/3 vote of *all* members to expel another member—not merely a 2/3 majority vote. (*Id.*) A member’s rights in the process are contained in the bylaws—they are contractual rights and there would be liability for a violation of those rights.

**Builders does *not* lay off members.**

DEED’s statements regarding layoffs lack fairness and candor by citing a provision in the policies and guidelines while ignoring testimony that no member has ever been laid off. DEED misrepresents the facts by stating that the “manual also requires managers to give ‘as much notice as possible’ before laying off members” (Resp. p.6 (citing §31.00)), and thus implies that Builders lays off members. The truth is that Builders does *not* lay off members and never has. (2011 T.38, Reply App-9) DEED has taken a one-sentence provision from the policies and guidelines manual (see §31.01, Reply App-29) and has ignored the sworn testimony of Mr. Kahn (a member since 1978)

that Builders has *never* laid off a member and does *not* lay off members. (2011 T.38)

When asked by the ULJ “[h]ave any of your members ever been laid off?” Mr. Kahn answered, “No, we don’t have a layoff.” (2011 T.38) The manual contains a section numbered 31.01 (which is *not* in the bylaws), which contains only one sentence, stating that “[t]he appropriate Manager will give as much notice as possible before any layoff to the affected Members.” (§31.00, Reply App-29) The reality is that Builders has *never* laid off a member. (2011 T.38) During the appeal to the ULJ, Builders argued that for the years 2007 - 2010, when Builders’ actual revenues were less than anticipated, ***not one member applied for unemployment benefits, and DEED never disputed this fact.***

Builders remains incredulous that DEED wishes to increase its liabilities by determining that members are employees.

**Members are not reimbursed for tools or mileage.**

DEED’s statement that members are “reimbursed for job-related expenses, including lodging, traveling, food allowance, and pre-negotiated per diems” is erroneous. (Resp. p.4 (citing policy §36.30 & T.36-37)) Members are provided with lodging and a food allowance when a project is more than 60 miles away. (2011 T.37, Reply App-8) It is *not* true that members are reimbursed for “traveling” expenses, and there was no testimony and no provision in Section 36.30 that they receive a per diem in addition to a food allowance. Section 36.30 does *not* say members are reimbursed for traveling expenses—only lodging and a per diem (obviously for food). (§36.30, Reply App-30) Mr. Kahn testified that members drive their own vehicles, including when working more than

60 miles out of town, and are *not* reimbursed for mileage. (2011 T.37) When working more than 60 miles out of town, they only receive a food allowance and lodging. (2011 T.37) Members provide their own tools. (2011 T.47, Reply App-16) Members in the carpentry area have safety and training meetings, without receiving any payment for the time spent in the meetings. (2011 T.41, Reply App-10) DEED's general statement that "members are reimbursed for job-related expenses" was apparently calculated to show another "essential" factor in determining if a person is an employee: "furnishing of materials and tools." (Minn.R. 3315.0555, subpt.1.B) The truth is, the members are *not* generally reimbursed for job-related expenses—and in particular, although members drive their own vehicles to out-of-town projects, they are *not* reimbursed for mileage and are *not* reimbursed for tools.

**Advances are paid on each member's anticipated annual patronage distribution.**

DEED's description of the money that members receive is not fair and candid. The money paid during the year is not merely "considered an advance," with members receiving "additional profit" in profitable years or deductions from their pay advances in unprofitable years. (Resp. p.4) All money that the members receive is a patronage dividend based on their contribution to the cooperative's projects, and is reported to the IRS on 1099-PATR - Taxable Distributions Received from Cooperatives. (2011 T.52, Reply App-17) These are *not* treated as wages by the IRS (reported on a W-2), and they are *not* reported on a 1099-MISC as payments to an independent contractor.

To provide members with money throughout the year, members receive advances

against their annual patronage dividend. The advances are designated as loans in the Membership Agreement and carried as assets (because they are loans) on the cooperative's books (see Reply App-37). The Membership Agreement states that "Advances of money...shall constitute advance payments of my share of the association revenues, in the nature of loans, and as a set-off against my share of the association earnings. Any balance due me will be paid to me as a patronage dividend after the close of said fiscal year ... In the event that said advances during any fiscal year shall exceed the share of the association revenues to which I [am] entitled, I agree that I will repay such excess to the association ...." (Mem. Agmt. ¶5, Reply App-1) If the member's advances were less than the member's final calculated annual patronage dividend, the member is due more money. If the member's advances were more, the member has a balance owed on the loan. If a member does not pay the entire balance owed at the end of the fiscal year, they may pay over time by having an amount deducted from future advances. (2011 T.52, Reply App-17) If a member leaves Builders before repaying the loan, the amount is deducted from the member's equity account. (2011 T.54, Reply App-19) If the account is insufficient, Builders can and has sued former members in conciliation court and obtained judgments for the balance owed. (Court Docs., App-29)

### **ARGUMENT**

#### **Minnesota's Cooperatives Chapter 308A distinguishes members from employees.**

Minnesota Statutes Chapter 308A governs cooperatives. Not one reference to an "employee" in Chapter 308A suggests that a member of a cooperative is an employee of

the cooperative. DEED argues that Chapter 308A makes several references to “potential cooperative employees.” (Resp. p.11 (citing Minn. Stat. §§308A.205, subd. 7, & .945)) Of the three sections in Chapter 308A found to contain the word “employee,” two of them are *not* referring to employees of the cooperative<sup>2</sup>. Only Section 308A.945 refers to employees of a cooperative, and it clearly distinguishes between members of the cooperative and employees of the cooperative.<sup>3</sup> Section 308A.945 specifies the priority for distribution of assets on dissolution of a cooperative, with “employees” receiving preference over “members.” Section 308A.945 shows that the legislature distinguishes between the “employees” of a cooperative and the “members” of a cooperative.

Tisdell v. ValAdCo, the only case cited by DEED in support of its argument that “at least one Minnesota case makes reference to cooperative employees” (Resp. p.11), in fact further establishes that members of a cooperative are distinguishable from employees of a cooperative. See 2002 WL 31368336, *unpublished* (Minn. App. 2002). Tisdell involved three “members” of an agricultural cooperative who sued the officers, directors, and “employees” of the cooperative. Id. at \*3. The case refers to the plaintiffs as investors in the cooperative and quotes an agreement between the plaintiffs and the cooperative, in

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<sup>2</sup> “A ...corporation is ...subject to a \$500 civil penalty to be paid to the aggrieved cooperative ... if the ... corporation’s officers or employees....” Minn. Stat. §308A.205, subd. 7(a). A telecom cooperative “director may not be a provider of services to the cooperative or an employee of the provider.” Minn. Stat. §309A.210, subd. 4.

<sup>3</sup> The “assets of the cooperative ... shall be applied in the following order of priority... claims, including the value of all compensation paid in a medium other than money, proved and allowed to employees for services performed...Remainder to members. After payment of the expenses of receivership and claims of creditors are proved, the remaining assets, ... may be distributed to the members....” Minn. Stat. §308A.945, subs. 3 & 4.

which the cooperative agreed to pay the “Member” for corn deliveries. Id.

DEED boldly states—*with no citation to any Minnesota case or decision*—that “Minnesota, and many other states, have found that cooperative members can also be employees of their cooperative.” (Resp. p.13) Nor does DEED cite any decision from another state in support of its argument—other than those discussed in Relator’s brief. (Resp. p.11) As shown in Relator’s brief, an Oregon case<sup>4</sup> and a Wisconsin administrative decision<sup>5</sup> have considered whether members are employees of the cooperative for purposes of unemployment insurance. The conclusion that they were employees was based on those states’ definitions of “wages,” which, unlike Minnesota’s, did not exclude advances that are designated as loans at the time paid. Compare Minn. Stat. §268.035, subd. 29(e) and Ore. Stat. §657.105(1) & Wisc. Stat. §108.02(26).

Further, the worker cooperatives in Surata and Isthmus differ significantly from Builders in that there is no mention that the payments made by those cooperatives, although based on anticipated annual income, were advances designated as loans that members were required to pay back. This fact also distinguishes Builders’ members from those in Goldberg v. Whitaker House Co-op., where management determined how much the members were paid, and there was no requirement that excess revenues be distributed to the members or that the members pay back any money if there was a loss. 366 U.S. 28, 30 (1961). DEED also relies on the fact that a cooperative is a separate legal entity from

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<sup>4</sup> Employment Division v. Surata Soy Foods Inc., 662 P.2d 810 (Ore. App. 1983).

<sup>5</sup> Isthmus Eng. & Mfrg. Coop., S9600250MD (Wisc. L&I Com’n 1998) (available at <http://dwd.wisconsin.gov/lirc/ucdecsns/201.htm>).

its individual members. (Resp. p.10 (citing Schuler v. Mescheke, 435 N.W.2d 156, 162 (Minn. App. 1989).) The Schuler court considered whether there was an attorney-client relationship between an attorney and individual members, when the attorney had been hired by the cooperative and his letters had always been addressed to the cooperative and not individual members. It did *not* consider whether the members were employees.

**Members of a Minnesota cooperative who are not paid “wages” are not employees.**

Builders appealed the determination of employer status and unemployment insurance taxes on its patronage dividends for the years 2006-2010 (plus penalties). (See Determination, Reply App-34) Because the advances paid to Builders’ members are not “wages,” there can be no unemployment insurance taxes on account of those advances. See Minn. Stat. §268.035, subd. 25 (“‘Taxes’ means the money payments required by the Minnesota Unemployment Insurance Law to be paid into the trust fund by an employer on account of paying wages to employees in covered employment.”).

DEED is mistaken in arguing that whether “wages” are paid is unrelated to the issue of whether members are employees. (See Resp. p.13) Section 268.035 provides that “‘Employee’ means: (1) every individual who is performing or has performed services for an employer in employment”; an “‘Employer’ means any person that has had one or more employees...” and “‘Employment’ means service performed by: (1) an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor....” Minn. Stat. §268.035, subs. 13, 14, 15. For persons not covered by a specific statute (such as Section 181.723), Rule 3315.0555, adopted by the

Department of Economic Security (DEED's predecessor), lists the factors to determine if a person is an employee or independent contractor. See Blue & White Taxi v. Carlson, 496 N.W.2d 826, 828 (Minn. App. 1993). One of the five "essential" factors is the "mode of payment." Minn.R. 3315.0555, subpt. 1.B. Also, Section 181.723, relied upon by DEED, provides that an individual who performs construction services is an "employee" unless they have obtained an independent contractor exemption certificate ("ICEC"). To qualify for an ICEC, Section 181.723 requires (as one of many conditions) that an individual "operates under contracts to perform *specific services for specific amounts of money....*" Minn. Stat. §181.723, subd. 5(a)(8)(iii). Prior to 2009, the factors to determine whether a worker who performed construction services was an independent contractor or an employee included the same requirement that the person "operates under contracts to perform specific services or work for specific amounts of money...." Minn. Stat. §268.035, subd. 9(3) (2006). Further, in the 1991 decision, the Department considered the advances relevant and held both that there was no employer-employee relationship between Builders and the member and that the "remuneration paid" did not constitute "wages...." (1991 Decision, Reply App-2) Whether a person is paid "wages" is relevant to whether the person is an "employee."

**Builders' advances against future patronage dividends are not wages.**

DEED's argument that Builders' advances against patronage dividends become wages at the end of the fiscal year when "members learn how much they are entitled to keep" (Resp. p.14) is not supported by the plain meaning of the statutes and would

produce an absurd result. Section 268.035, subd. 29(e) states the following:

Wages includes advances or draws against future earnings, when paid, unless the payments are designated as a loan or return of capital on the books of the employer at the time of payment.

Minn. Stat. §268.035, subd. 29(e). The statute says nothing about the advances becoming wages at a later date. “[C]ourts cannot supply that which the legislature purposely omits or inadvertently overlooks.” Wallace v. Comm’r of Taxation, 184 N.W.2d 588, 594 (Minn. 1971).

In support of its interpretation of subdivision 29(e), DEED relies on the first sentence in the definition of “wages paid” in subdivision 30. The definition states the following:

- (a) “Wages paid” means the amount of wages that have been actually paid or that have been credited to or set apart so that payment and disposition is under the control of the employee. Wage payments delayed beyond the regularly scheduled pay date are considered “wages paid” on the missed pay date. Back pay is considered “wages paid” on the date of actual payment. Any wages earned but not paid with no scheduled date of payment is considered “wages paid” on the last day of employment.
- (b) Wages paid does not include wages earned but not paid except as provided for in this subdivision.

Minn. Stat. §268.035, subd. 30. The definition of “wages paid” does *not* refer to advances or draws. The first sentence deals with what “paid” means. The plain language of the sentence does *not* say that advances that were designated as loans are considered “wages paid” when the actual amount is determined. In the next three sentences of subdivision 30, the legislature described three specific situations regarding delayed payments, back payments, and non-payment. Despite this specificity, and the exception for advance payments in the immediately preceding subdivision (29), the legislature did not include advance payments in the definition of “wages paid.”

The definition of “wages paid” is significant for reporting the “total wages paid” to an employee during a quarter and for determining the employer’s quarterly tax on “taxable wages paid” during that quarter. See Minn. Stat. §268.044 & .051. DEED’s interpretation that the advances on patronage dividends become wages at the end of the fiscal year when members learn how much they will keep would yield absurd results. It appears members would be credited with earned wages for only one quarter each year. This would make members ineligible to receive benefits because of the requirement of wages paid in at least two quarters in the first four quarters of the five quarters preceding their application. See Minn. Stat. §§268.035, subd. 4 & .07, subd. 2(a).

The advances are not against future wages. They are advances against future patronage dividends. The actual amount determined at the end of the fiscal year is reported on the IRS 1099-PATR Form, Taxable Distributions Received from Cooperatives. (2011 T.52, Reply App-17) DEED quoted only a few words from the Membership Agreement regarding the advances. (Resp. p.14) Read in its entirety, the following paragraph establishes that the payments the workers ultimately keep are not wages—they are patronage dividends:

Advances of money, or property made to me by the association out of estimated or actual revenues of the association during any fiscal accounting period of the association and before a final audit of the books and records for said period *shall constitute advance payments of my share of the association revenues*, in the nature of *loans*, and as a set-off against my share of the association earnings. Any balance due me will be paid to me as a patronage dividend after the close of said fiscal year of the association as a “Qualified Written Notice of Allocation” in accordance with the provisions of Subchapter T of the U.S. Internal Revenue Code.

(Mem. Agmt. ¶5, App-1)

The advances are an attempt to provide money to the members throughout the year. The members of the cooperative could have chosen to distribute the cooperative's profits among the members once a year. Instead, to provide money to the members throughout the year, they calculate the anticipated patronage dividend and divide that amount among the members. This does not change the patronage dividends into wages. Contrary to DEED's argument, the fundamental point is *not* that the payments the members ultimately keep are wages. (Resp. p.15) The fundamental point is that the payments the members ultimately keep are "patronage dividends."

**Section 181.723 applies only to workers doing construction in the field**

DEED's argument that Section 181.723 applies to all workers performing services for construction projects is expressly contradicted by Section 181.723, subdivision 2; the Department of Labor and Industry guidelines, and proposed legislation. "Building construction and improvement services do not include ...the manufacture, supply, or sale of products, materials, or merchandise...." Minn. Stat. §181.723, subd. 2. The "ICEC [Section 181.723] *does not apply to construction sales, ..., [or] construction design, ....*" (*DLI Frequently Asked Questions*,<sup>6</sup> Reply App-31) Proposed legislation amending Section 181.723, includes this definition: "'Construction services' means *field installation of building construction materials* into new or existing public or private sector commercial or residential buildings..... Construction services do not include: (1) the manufacture,

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<sup>6</sup> Available at [www.dli.mn.gov/CCLD/ICECfaq.asp#Who\\_is\\_covered\\_by\\_this\\_law](http://www.dli.mn.gov/CCLD/ICECfaq.asp#Who_is_covered_by_this_law)

supply, or sale of products, materials, merchandise, or construction equipment; [or] (2) installation or delivery of a product by the manufacturer of the product;....” (S. 852,<sup>7</sup> Reply App-32). DEED cites no authority in support of its argument that Section 181.723 applies to architects, sales persons, and finance managers (Resp. p.19) or to members who make cabinetry, furniture, and trim or install those items.

**Collateral estoppel applies in Chapter 268 proceedings.**

DEED overlooks the express exception in Section 268.105, subdivision 5a, which says that collateral estoppel applies in Chapter 268 proceedings. The statute provides that a prior decision by an unemployment law judge is not binding “in any other forum ... *except proceedings provided for under this chapter* [268], ....” Minn. Stat. §268.105, subd. 5a. The proceedings provided for under Chapter 268 include an evidentiary hearing before an ULJ, a request for reconsideration, and judicial review by the Court of Appeals. Minn. Stat. §268.105, subds. 1, 2, & 7. The case relied upon by DEED for the general proposition that the department is not required to exercise its discretion with inflexible consistency did not consider collateral estoppel. See Pichler v. Alter Co., 240 N.W.2d 328, 329 (Minn. 1976). DEED *abuses* its discretion when it makes findings of fact that are unsupported by the evidence and when it improperly applies the law. See, e.g., Pikula v. Pikula, 374 N.W.2d 705, 710 (Minn. 1985). In Builders’ case, a decision under the same laws in 1991 in favor of Builders has been disregarded by an agency that feels that it is authorized to make repeated attempts to deny the legitimacy of a business that is

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<sup>7</sup> Available at [www.revisor.mn.gov/bin/bldbill.php?bill=S0852.1.html&session=ls87](http://www.revisor.mn.gov/bin/bldbill.php?bill=S0852.1.html&session=ls87)

lawfully organized as a worker cooperative.

**Considering Builders' "fair share" supports finding members are *not* employees.**

DEED argues that the system only functions when employers pay their "fair share" of unemployment insurance taxes, implying that Builders' should pay its fair share. (Resp. p.9) Builders' "fair share" of Minnesota's unemployment insurance taxes regarding its *members* is zero because they have received zero benefits. Builders has *never* laid off a member and does *not* lay off members. (2011 T.38) DEED offered no evidence that any member of Builders has ever claimed unemployment benefits based on their relationship with Builders. In the 1991 appeal, Builders' former member, Bruce Ripley, testified that he had been self-employed while a member of Builders and that the basis for his claim for unemployment benefits was that he had been employed by the Jamar company. (1991 T.23-25, Reply App-20-22) In 1991, the Department of Jobs and Training (now known as DEED) issued a joint decision that the advances paid to Builders' members are *not* wages and that Builders is *not* an employer subject to the Minnesota Jobs and Training law (Chapter 268). (1991 Decision, Reply App-2)

In 2011, the ULJ appears confused about bias. It appears from statements in his decision denying Builders' request for reconsideration that he is a part of the decision by the agency. He states that "*We* fail to see why a member of the cooperative may not also be an employee of the cooperative. In this case the members seem to *us* to be both members and employees." (Decision 6-20-11 p. 5, Add-12 (emphasis added)).

**Public interest does not override the law.**

The public interest “cannot generally be used to override the plain language of a statute.” See Weston v. McWilliams & Assoc., Inc., 716 N.W.2d 634, 639 (Minn. 2006). The statute cited by DEED lists presumptions, including the public interest, to determine legislative intent. (Resp. p.7 (citing Minn. Stat. §645.17(5)). Those presumptions do *not* apply unless “the words of a statute are ambiguous” and require interpretation. Weston, 716 N.W.2d at 639 (considering Section 645.17). The “letter of the law cannot be disregarded under the pretext of pursuing the spirit.” Minn. Stat. §645.16.

Minnesota law has provided a business structure that allowed Builders’ members to operate as a cooperative for over 30 years. Today, Section 308A.705 allows the cooperative to distribute income on the basis of patronage, and does not require distribution more frequently than annually. Section 308A.201 allows the cooperative to loan money to its members. *Section 308A.945 distinguishes between employees of a cooperative and its members.* The legislature did not abolish cooperatives involved in construction when it enacted Section 181.723. The desire of Builders’ members since it was founded has been to be self-sufficient and to utilize the historic structure of worker cooperatives to support themselves. In 1991, their right *not* to participate in the paying in or the receiving of unemployment benefits by choosing a cooperative structure was affirmed by DEED’s predecessor. Builders relied on that decision. It is not in the public interest to assess five years of unemployment insurance taxes, plus penalties, against a small business that has never taken anything from the system and was relying on a

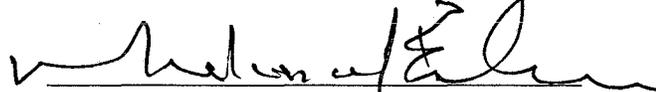
decision that said they were not subject to those taxes.

### CONCLUSION

DEED's propensity for misquoting the relevant facts and law, DEED's refusal to recognize its 1991 decision that Builders' members are not employees and its advances are not wages, and DEED's assessment of back taxes and penalties for years when Builders was operating under the 1991 decision personifies complete governmental hubris. It is an abuse of both the Respondent's and the ULJ's discretion. The decision by both the Respondent and the ULJ is arbitrary and capricious. Builders is defending themselves for the third time on the same issues with the same state agency. Builders has never made any claims on the unemployment insurance fund. This continued harassment has caused them great expense and distress. Builders therefore requests a reversal of the ULJ's 2011 decision, and further requests that Builders should be reimbursed for the attorneys fees and related expenses that they have incurred in retrying an issue that was already decided.

Dated: Dec 5, 2011

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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BUILDERS COMMONWEALTH INC.,

**CERTIFICATION OF BRIEF LENGTH**

Relator,

APPELLATE COURT CASE NUMBER:  
A11-1307

vs.

MINNESOTA DEPARTMENT OF  
EMPLOYMENT AND ECONOMIC  
DEVELOPMENT,

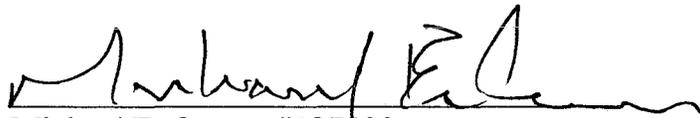
Respondent.

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional font. The length of this brief is 6,279 words. This brief was prepared using WordPerfect version 12.

Dated: December 5, 2011

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