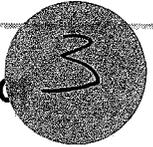


A13-871

Henry H Rubin, Relator  
Vs.  
Winona State University, Respondent  
Department of Employment & Economic Development, Respondent

Brief filed by Relator  
Court of Appeals  
Trial Court Case #30848565



This brief is submitted in two parts. The first part (Part A) briefly states the substance of this appeal. The second part (Part B) organizes all the evidence that has been provided in this case within an annotated timeline so as to present to Appellate Court Judges the evidence-based details supporting my appeal.

### Part A

The substance of my appeal follows:

- **Background**
  - Within the MNSCU system, the position of Dean is considered to be a “major policy-making or advisory position in the unclassified service under Minn. Stat. §268.035, subd. 20 (15)” and is, consequently, noncovered for purposes of unemployment benefits.
  - I held the position of Dean at Winona State University (a MNSCU institution) from June 6, 2010 to May 28, 2011, and was not eligible for unemployment benefits during that period.
  - From May 29 – December 3, 2012 I held the position of Senior Research Associate, a position that is not noncovered thereby making me eligible for unemployment benefits.
- **Request/Approval of Reassignment from the Position of Dean**
  - *In May 2012, I requested reassignment from the position of Dean* [May 6, 2012: Rubin memo to WSU President Ramaley] *and was reassigned from that position* [May 15, 2012: Ramaley letter to Rubin] *into the position of Senior Research Associate, effective May 28, 2012* [May 25, 2012: interim President Gores letter to Rubin] *in explicit correspondence from the retiring and interim University Presidents.*
- **Not Involuntary Termination**
  - Employer’s testimony and the ULJ’s decision are not accurate and not substantiated by any evidence when they claim my reassignment to the position of Senior Research Associate was somehow related to “a notice of involuntary termination” (see ULJ Cimafranca’s Notice of Decision and Order of Affirmation). There is no document of which I am aware related to the request, approval or terms of my reassignment from the position of Dean to the position of Senior Research Associate which references the language of “involuntary termination” or which can reasonably be said to serve as a notice of involuntary termination. The correspondence cited above between me and retiring President Ramaley and interim President Gores provide an explicit trail of evidence that I requested and was reassigned from the position of Dean to the position of Senior Research Associate. I simply was not involuntarily terminated. A contention that my assumption of the position of Senior Research Associate was tied to an involuntary termination defies the documented evidence.
- **On May 28, 2012, I vacated the position of Dean**

- An all-campus announcement was sent out by the Provost announcing my request for reassignment, my new role as Senior Research Associate in the MNSCU system offices, and the appointment of an Acting Dean to take over all public and internal functions of the position effective May 29, 2012.
- I vacated my office on the Winona State University campus. I ceased having any authorities or benefits of that position.
- I ceased attending any meetings, events or conversations related to that position and ceased playing any role whatsoever related to decision-making in or about Winona State University.
- My name was removed from the University directory and website.
- In every conceivable way, I ceased being the Dean in the eyes of the public, external accreditors and funders, policymakers, campus administrators, campus faculty, students, and me. In all manners, after May 28, 2012 the University treated me as a former Dean up until I applied for unemployment benefits.
- **On May 29, 2012 (through December 3, 2012) I assumed the position of Senior Research Associate**
  - The position of Senior Research Associate was in every way separate, apart and unrelated to my prior service as Dean.
  - The position was located in the MNSCU system offices in St. Paul where I was assigned an office. I relocated to that office in St. Paul, reported to MNSCU administrative staff in St. Paul, and worked under their supervision on projects (related to research, writing and professional development) in St. Paul where my position was universally understood to be - and characterized as - Senior Research Associate.
  - I provided no function, no service, and no advice at Winona State University at all related to the role of a dean. I played no role as *a major policy-maker or advisor* at the University or in MNSCU and no one construed me to be in any position to do so.
  - Winona State University agreed to pay me the same salary I had received as Dean for the duration of my service as Senior Research Associate.
- **The position of Senior Research Associate is a covered position**
  - There has been no claim made or evidence provided by the employer or cited by the ULJ that the position of Senior Research Associate is a noncovered position (precluding me from unemployment benefits).
    - The position of Senior Research Associate is not listed as a noncovered major policy-making or advisory position in the unclassified service in Minn. Stat. §268.035, subd. 20 (15).
    - The employer cites no case law that supports the claim that my service in the position of Senior Research Associate should be noncovered. In point of fact, in every Appellate Court case cited by employer, the relator *clearly* continued to be employed and functioning in his/her *original noncovered position*. This does not describe the facts of my situation.
    - If one were to acknowledge that I served as Senior Research Associate then one would have to agree that I became eligible to receive unemployment benefits. Consequently, while both employer and the ULJ acknowledge that I served as Senior Research Associate, both either deny or ignore that I held the position of Senior Research Associate or contend that my service in this position was associated with a nonexistent notice of involuntary termination.

- Neither the employer nor ULJ cite any rule to establish that a person once hired into a noncovered position must continue to be noncovered in any position he/she subsequently holds. Instead, and despite ample evidence to the contrary, employer's testimony and the ULJ's decisions ignore my assignment to a covered position and assert that I continued to serve in the noncovered position of Dean until December 3, 2012.
- **No evidence that I continued as Dean**
  - Employer produced no evidence to support the claim that I held the position of Dean after May 28, 2012. Nor did employer provide any document, communication or evidence of any sort promulgated from that date through my departure on December 3, 2012 that characterized me as Dean after May 28, 2012. It was not until February 27, 2013 (three months after I left employment in Minnesota) that employer first characterized me as having held the position of Dean after May 28, 2012 in testimony provided during the Appeals Hearing before ULJ Cimafranca. There is no evidence that I continued to hold the position of Dean while I held the position of Senior Research Associate. There is evidence that employer failed to take required steps to ensure my eligibility for unemployment benefits.

**Summary & Refutation of Opposing Arguments.** The substance of my appeal is straightforward and fully supported by the evidence of this case. On the other hand, employer and the ULJ posit:

- Rubin was hired into the noncovered position of Dean on June 6, 2010
- Employer "**ended Rubin's assignment as the Dean**" effective May 28, 2012 (CLJ Cimafranca's Notice of Decision)
- From May 29 – December 3, 2012 Rubin served in the position of Senior Research Associate (ULJ Cimafranca's Notice of Decision)
- Nonetheless, **Rubin continued to serve as the Dean of College after his reassignment** (ULJ Cimafranca's Order of Affirmation) and, therefore, continued to be noncovered.

They contend that I continued to hold the position of Dean after my reassignment, but offer no evidence that I did so. No document exists in the record that shows me as having a connection to the title, position, responsibilities, etc. of Dean between May 29 – December 3, 2012. To the contrary, there is substantial evidence – including correspondence to and from the Presidents, to the faculty, to funders and accreditors, etc. – corroborating and characterizing my connections to the title, position, responsibilities, etc. of Dean as ending on May 28, 2012.

They argue that I continued to hold the position of Dean as a function of a three-month notification associated with my involuntarily termination as required under the Administrators' Personnel Plan. In fact, ULJ Cimafranca affirmed that "On May 28, 2012, Connie Gores, the interim president of Winona University (sic), ended Rubin's assignment as the Dean of College of Education ..." and he proceeded to attribute it "to a notice of involuntary termination." No "notice of involuntary termination" exists. No evidence has been provided to support the contention that I was involuntarily terminated. Simply stated, I was not involuntarily terminated. Substantial evidence has been provided to illustrate that I requested and was granted reassignment from the position of Dean into the different position of Senior Research Associate.

They argue that because I continued to function under the Administrators' Personnel Plan I must have continued to be a dean. There is no evidence that I should have continued to serve under the Administrators' Plan. I am not

aware of any evidence that my continuation under the Administrators' Plan was considered, discussed or agreed upon as a part of my reassignment. There is no evidence that, following a President's reassignment of an employee from a position covered by the Administrators' Plan, that employee must continue to be covered by the Administrators' Plan irrespective of what position or responsibilities he/she assumes. It is, however, evident that if employer had processed my reassignment properly so as to move me from the Administrators' Personnel Plan to that of a bargaining unit, this case would not exist.

## Part B

The annotated timeline, below, provides a point-by-point and chronological presentation of facts and an evidence-based refutation of employer's presentations and the ULJ's decisions.

Each item in the "Event" column begins with a brief description of what occurred on that date (with **highlighting** for clarification and emphasis) followed by either (a) brief exposition of details of the event or (b) factual refutation of arguments by employer or decisions by the ULJ.

Date	Event
6/06/10	I was hired by Winona State University (WSU) as Dean of the College of Education. This is a "noncovered" position (CITATION).
5/06/12	Date of <u>my memorandum to WSU President Ramaley requesting reassignment from the position of Dean of the College of Education.</u>
5/15/12	<p>Date of <u>letter from WSU President Ramaley "I ... accept your request for reassignment from the position of Dean of the College of Education ... effective May 28, 2012."</u> Emphasis is added to make clear that the President explicitly approved my <b>reassignment from the position</b>. Moreover, the President established a <b>specific date for my reassignment from the position</b>.</p> <p>Contrary to employer's current argument, President Ramaley <b>did not say or intimate that I will continue in the position but with new duties</b>. Nor did she say or intimate that this action had <b>anything to do with an involuntary termination</b>.</p>
5/25/12	<p>Date of <u>letter from WSU Interim President Gores affirming President Ramaley's agreement to reassign me from the position of Dean "... your assignment as Dean of the College of Education and the head of the professional education unit will end effective May 28, 2012"</u> and appointing me to my new position <b>"... you are reassigned to serve as Senior Research Associate ..."</b></p> <p>The interim President <b>did not say or intimate that I will continue to hold the position of Dean</b> after my assignment ends on May 28, 2012. She did not say or intimate that my <b>assignment to serve as Senior Research Associate was in any way associated with or a function of my continued service as Dean</b>. Nor did she say or intimate that this action had <b>anything to do with an involuntary termination</b>.</p> <p>This letter reassigned me from a senior administrative position to a staff position. I agreed to – and understood there to be – no terms of this reassignment other than those spelled out in the letters by President Gores and Ramaley; this includes <b>no terms limiting my eligibility for unemployment benefits</b>.</p> <p>President Gores' letter instructs me to work with the Acting Dean and the Provost from May 29-31, 2012, "...to complete the transition" and stipulates the dates of June 1, 2012 – November 30, 2012], the general responsibilities and the report lines of the position of Senior Research Associate. [This position was later extended to 12/03/12 by WSU President Olson.]</p>
5/28/12	<b>I ceased all elements of my relationship with the position of Dean of the College of Education. As of</b>

	<p>close of business on May 28, 2012:</p> <ul style="list-style-type: none"> <li>• <b>New lines of report</b> (to personnel at MNSCU headquarters in St. Paul, not at Winona State University)</li> <li>• <b>No relationship with personnel in WSU ~ the University and the College of Education</b></li> <li>• <b>No assignments related to WSU or the College of Education</b></li> <li>• <b>Name removed from the University's online employee directory and website</b></li> <li>• <b>No workspace on campus</b> (vacated campus office; provided cubicle at MNSCU headquarters in St Paul)</li> <li>• <b>No influence or participation in decision-making, meetings or conversations related to the College or University</b> (neither budget, policy, personnel, programs, nor any other matter).</li> </ul>
5/29/12	<p><b>An Acting Dean of the College of Education was appointed by Interim President Gores.</b> Dr. Reilly assumed the position on this date, moved into the office and took over all internal and external responsibilities, authorities, etc. of the position. An Interim Dean was appointed several weeks later.</p>
6/01/12-12/03/12	<p><b>I worked in the St. Paul office of MNSCU as Senior Research Associate</b> with two MNSCU assignments:</p> <ul style="list-style-type: none"> <li>• Researcher/Writer; "Extraordinary Education" report for the Chancellor; Lynda Milne (supervisor)</li> <li>• Facilitator/Trainer; Collaboration Skills for Career &amp; Tech Ed Leaders; JoAnn Simson (supervisor)</li> </ul>
1/17/13	<p>Date I filed a <u>Request of an Audit</u> with Minnesota DEED.</p>
1/30/13	<p>Date of <u>Field Audit Review</u> ("Exhibit #4") that stipulates "<b>Applicant worked for the college as Dean, then on May 28, 2012 he was assigned to the position of Senior Research Associate from 5/29/12 through 12/3/2012.</b>" Inexplicably, without citing any specific document as evidence to the contrary, the auditor proceeded to contradict his prior stipulation of fact when he made the "determination" (page 2) that I continued to serve in the "excluded" position of Dean, which means he concluded that either (a) I was <b>not</b> "assigned to the position of Senior Research Associate from 5/29/12 through 12/3/2012" (contradicting the sequence he stipulated on page 1) or (b) he made the determination that the position of Senior Research Associate was noncovered.</p>
2/20/13	<p>Date of <u>letter from employer to ULJ Cimafranca</u> characterizing my employment as Senior Research Associate as an extension of the "<b>three months written notice of the effective date of involuntary termination</b>" per the Personnel Plan for Administrators at section 103, subdivision 3 (c).</p> <ul style="list-style-type: none"> <li>• This is an erroneous characterization on two counts: <ol style="list-style-type: none"> <li>1. I was <b>never served written notice of involuntary termination</b> (in fact, the initial and terminal dates of my contract as Senior Research Associate were established per my request and in negotiation with the WSU President and Interim President<sup>1</sup>) and</li> <li>2. I was never told (in writing or verbally) that the <b>agreement to employ me as Senior Research Associate was anything other than a separately established agreement to extend my employment</b> (not that it was owed to me, stipulated in my personnel plan, or offered as anything other than a fulfillment of the promise made by Presidents Ramaley and Gores to reassign me from the position of Dean).</li> </ol> </li> <li>• Page 2 para. 3: Employer states here and, again, in the 2/28/13 letter "... it is clear that on May 25, 2012, Interim President Gores did not terminate and rehire Applicant, but she exercised her authority to reassign him ..." per the Personnel Plan for Administrators. The Plan states: "<i>The Chancellor/president may at any time reassign an administrator to another</i></li> </ul>

<sup>1</sup> The terminal date for my employment as Dean (5/28/12) was proposed by me in my 5/06/12 memorandum requesting reassignment from that position and was agreed to by the retiring WSU President Ramaley. The 11/30/12 terminal date for my employment by the University was established by the Interim President after both President Ramaley and I had publicly announced my request for reassignment and after I had proposed a later terminal date for employment. Subsequently, the 12/03/12 terminal date was agreed to by the new President per my request for that extension.

	<p><b>position within the college/university or Office of the Chancellor” (Sect. 1.03, subd. 4).</b>  Emphasis has been added to establish:</p> <ul style="list-style-type: none"> <li>○ the Plan authorizes reassignment “to another position” and <b>not only a reassignment of duties within the same position</b> and</li> <li>○ the Plan <b>does not stipulate that the other (newly assigned) position must also be noncovered.</b></li> </ul> <p>Finally, should it somehow be determined that the three months written notice rule does pertain to my continued employment in MNSCU, <b>there is nothing in the Personnel Plan for Administrators that requires that the new/reassigned position of a previously noncovered administrator must also be noncovered.</b></p>
2/27/13	<p><u>Appeals Hearing</u> with ULJ Cimafranca at which I <b>first heard</b> the University characterize me as having continued in the position of Dean of the College from May 29 – December 3, 2012.  The following <i>post hoc</i> logic and construction of the employer was presented repeatedly in the testimony of WSU Human Resources Director Reed: whereas <b>the title, duties, responsibilities and authority of the Dean were reassigned from me to other parties, “Rubin continued to serve in the position of Dean of the College.”</b></p>
2/28/12	<p>Date of <u>letter from employer to ULJ Cimafranca:</u></p> <ul style="list-style-type: none"> <li>• page 2, para. 2: “<i>The type of responsibilities assigned to the Dean of Education are exactly the type that have been found by the Court of Appeals to be dispositive ...</i>” <ul style="list-style-type: none"> <li>○ While this statement may be true, <b>in verbal testimony provided on February 27, 2013 and in written correspondence throughout this appeals process, the employer acknowledged that these responsibilities were reassigned to other parties (interim and acting deans of education, not me) beginning May 29, 2012.</b>  <b>No specific evidence has been presented by the employer or referenced by the ULJ that anything I did subsequent to my reassignment either entailed or was intended to entail (by the employer or myself) the types of responsibilities, advice, decisions, influence, etc. that would <i>dispositively</i> qualify my work as Senior Research Associate as noncovered.</b></li> </ul> </li> <li>• page 2, para. 5: “<i>In determining the question of whether an individual was in a noncovered major policy-making or advisory position in the unclassified service under Minn. Stat. §268.035, subd. 20 (15), the Minnesota Court of Appeals has consistently stated that the proper inquiry is to look at <b>why the position exists</b> rather than what a worker may have actually done on a day-to-day basis” (emphasis added). <ul style="list-style-type: none"> <li>○ This raises the question of <b>why the position of Senior Research Associate existed.</b> Evidence has been provided that I was appointed to the position of Senior Research Associate because I asked to be reassigned from the position of Dean, because President Ramaley approved my request, because the MNSCU system had projects with staffing needs relevant to my experience and skills, and because (following negotiation and conversation) Interim President Gores appointed me to staff those projects. <b>My position as Senior Research Associate in St. Paul did not exist because I was Dean in Winona; it existed because I was qualified and available to provide needed services in St. Paul.</b></li> </ul> </i></li> <li>• Throughout the employer’s letter, employer references Appellate Court decisions (attached to the letter) to support aspects of their argument that I am not eligible to receive unemployment compensation because I held a noncovered position throughout my employment. However, <b>in each referenced case, the relator had been (continued to be) employed and functioning in the position, title and responsibilities of the noncovered position to which they had originally been hired (or rehired).</b> This does not describe the facts of my situation.</li> </ul>

3/06/13

**Date of Notice of Decision by ULJ Cimafranca:**

- page 3 para. 2: “Winona State University appointed Rubin to fill the position of Dean of the college of Education ... Rubin’s appointment was effective on July 6, 2010 and was terminated on December 3, 2012.”
  - The ULJ simply does not address or refute explicit evidence that **my appointment to the position of Dean of the College of Education ended May 28, 2012:**
    - **The same President who appointed me to the position of Dean in 2010 (Ramaley) reassigned me from that position in her letter of May 15, 2012 “effective May 28, 2012.”**
    - Subsequently, the Interim President **confirmed that “your assignment as Dean of the College of Education ... will end effective May 28, 2012”** in her memorandum of May 25, 2012.
- page 3 para. 3: “Rubin’s employment with Winona State University was governed by the Minnesota State Colleges and Universities Personnel Plan for Administrators ... The president of the university under the plan had the authority to reassign Rubin or change his job duties on or after the date a notice of involuntary termination has been provided.”
  - **The Plan does not require that the reassigned position (the “new” position) must be noncovered nor that it has to bear any relevant characteristics or constraints that pertained to the original (“old”) position.** The Personnel Plan for Administrators Sect. 1.03, subd. 4 simply states: *“The Chancellor/president may at any time reassign an administrator to another position within the college/university or Office of the Chancellor.”*
  - **No “notice of involuntary termination has been provided”,** served to me or entered into my personnel file. My position as Senior Research Associate was negotiated per my written request to the President.
  - **My employment as Senior Research Associate should not have been governed by the Personnel Plan for Administrators.** Employer failed to reassign me from that Plan when I was reassigned from the position of Dean.
- page 3 para. 4: *“On May 28, 2012, Connie Gores, the interim president of Winona University (sic), ended Rubin’s assignment as the Dean of College of Education and the head of the professional education unit **due to a notice of involuntary termination**”* (emphasis added).
  - It is noteworthy that **the ULJ affirms that I ceased being Dean** on May 28, 2012 even though he attributes it (erroneously) to a notice of involuntary termination.
  - **No notice of involuntary termination has been provided,** served to me or entered into my personnel file. The first time I heard the language “notice of involuntary termination” related to my reassignment was during employer’s testimony in February 2013. **There is no document that can serve as evidence of “three (3) months written notice of the effective date of ... termination”** [as required by the Personnel Plan for Administrators Sect. 1.03, subd. 3(c)].
  - Moreover, if it is somehow construed that a written notice of involuntary termination was appropriately served, then it would be questionable as to whether Interim President Gores had authority to make any decision on the length and terms of my employment after my reassignment; see Personnel Plan for Administrators Sect. 1.03, subd. 3(c) para. 2: **“Acting and interim Chancellors and presidents do not have the authority to adopt a procedure regarding minimum notice periods.”**
- page 3 para. 5-6:  
[para. 5] **“Effective May 29, 2012, Rubin was given new job duties and responsibilities. He was assigned to perform the duties of Senior Research Associate. As the Senior Research Associate, Rubin served as a support staff for the Acting Dean, Assistant Dean and Provost**

**from May 29, 2012 through May 31, 2012. From June 1, 2012 through December 3, 2012, Rubin served as a content analyst, writer, and support staff under Lynda Milne, System Director for Faculty and Instructional Development (at MNSCU).**

[para. 6] *For the duration of Rubin's assignment, his position continued to be governed by the ... Personnel Plan for Administrators. His pay and benefits did not change. **Rubin's appointment as the Dean of College of Education continued through the end of his employment**" (emphasis added).*

- The **conclusion drawn in para. 6 starkly contradicts the evidence cited in para. 5.** Inexplicably, ULJ Cimafranca **describes the position I held for my last six months of employment (para. 5) and then asserts that I never held it (para. 6).** While the University's HR unit may have (inappropriately) kept me assigned to the Administrators' Personnel Plan, that did not make me a dean and **the simple assertion that I continued to serve as Dean does not make it so.** [The statement "His pay and benefits did not change" suggests that this uncontested fact had some bearing on the ULJ's determination. The ULJ cites no basis in law or logic to connect the pay and benefits I received to the conclusion that I continued to serve as the Dean of the College of Education.]
- page 4 para. 4: *"... the Minnesota Court of Appeals has held that the focus of the inquiry is on the position, the **parties' characterization of the employment relationship**, rather than the actual duties of the position ... it is irrelevant that Rubin ceased performing the job duties and responsibilities of the Dean of College of Education effective May 28, 2012. **His job duties and working title may have changed, but his position remained the same.**" (emphasis added)*
  - No evidence has been provided to contradict the fact that **it was not until after I made application for unemployment benefits that any party (retroactively) characterized my employment relationship between the dates of May 29 – December 3, 2012 as Dean of the College of Education.** This includes Winona State University which has provided no evidence promulgated between May 29 – December 3, 2012 that characterized my relationship with the University as being in the position of Dean.
  - Substantial evidence has been provided that **all parties characterized my employment relationship not as Dean but as Senior Research Associate while I served in that position from May 29 – December 3, 2012.** Indeed, the University characterized my departure from the position of Dean in a press release, in notification to accreditors and funders, in an all-campus email, by deleting my name from the University directory and website, and more.
  - For the starkly contradictory statement *"... it is irrelevant that Rubin ceased performing the job duties and responsibilities of the Dean of College of Education ... **His job duties and working title may have changed, but his position remained the same**"* to be true, the ULJ must use a **definition of "position" that does not include "job duties and responsibilities" and "working title".** But the ULJ does not cite – and the Personnel Plan for Administrators does not stipulate – a definition of "position" that would permit the ULJ's assertion to be true and would contradict the natural and logical determination that **changing job duties, responsibilities and working title does, in fact, change the position.**
  - Simply stated, **employer has not entered into evidence any document from before or during the period of my employment (prior to my filing for unemployment benefits) that characterized me as holding or continuing to hold – or stating that it was the intention of employer that I should continue to hold – the position of Dean from May 29 – December 3, 2012.**