

**From:** [Flotten, David](#)  
**To:** [\\*DHS Public Comments MNSure](#)  
**Subject:** MNSure Appeals Proposed Rules  
**Date:** Monday, July 22, 2013 4:23:50 PM

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Proposed 7700.0101 Supb. 8 defines a “person” entitled to file an appeal as an individual or small business employer. But the entity who would want to file an appeal under Proposed 7700.0105 Subp. 1. A. (6) (determination by MNSure that employer does not provide minimum coverage or such coverage is not affordable) is a *large employer* – only large employers are subject to the Employer Share Responsibility Assessment which is the reason for filing an appeal under 7700.0105 Subp. 1.A.6.

Proposed 7700.0101 Supb. 8 should be expanded accordingly.



**David Flotten, JD, SPHR**

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**From:** [Sue Abderholden](#)  
**To:** [\\*DHS Public Comments MNSure](#)  
**Subject:** MNSure Appeals Proposed Rules  
**Date:** Saturday, August 03, 2013 11:40:06 AM

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On behalf of the National Alliance on Mental Illness of Minnesota, I am submitting the following comments:

- 1) 6.22 – because we have had problems in the past, please clarify that an illness includes a physical or mental illness, the symptoms of which could prevent someone from being able to attend the hearing.
- 2) 10.1 – will this section permit someone to bring a friend or family member along for support at a hearing? They may not be a duly authorized representative (and there isn't a definition for a duly authorized representative)
- 3) 11.2 – again, please ensure that this will include a mental illness, or a mental health crisis

Thank you for the opportunity to submit comments.

Sue Abderholden, MPH  
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**From:** [Duronslet, Alison](#)  
**To:** [\\*DHS Public Comments MNsure](#)  
**Subject:** MNsure Appeals Proposed Rules  
**Date:** Monday, August 12, 2013 8:56:56 AM

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With regards to the Proposed Rulemaking on Appeals, I submit the following comments:

**Comment: In Eligibility Subpart 1 below, you reference the scenario where an applicable large employer has the right to appeal when a determination is received stating a premium tax credit was granted to an employee due to the employer's plan not being affordable or providing minimum coverage, however, in 7700.0101 DEFINITIONS Person Subpart 8, the employer as described above is not listed. Is a large employer still considered a "party" to the appeal even though not listed as a person under subpart 8? If not, is there a need to add a separate definition for applicable large employers?**

**Subpart 1. Eligibility.**

(6) in response to a notice under 78 Fed. Reg. 4712 (proposed January 3.25 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(h)), 3.26 a determination that an employer does not provide minimum coverage through an employer-sponsored plan or that the employer does provide coverage but is not affordable 4.2 coverage with respect to an employee; and

**Subp. 8. Person.** "Person" means an individual or small business employer who, on 2.15 behalf of themselves, their household, or their small business, is appealing, disputing, or 2.16 challenging an action, a decision, or a failure to act, by MNsure or an agency in the human 2.17 services system. When a person involved in a proceeding under this chapter is represented 2.18 by an attorney or by an authorized representative, person also means the person's attorney 2.19 or authorized representative. Any notice sent to the person involved in the hearing must 2.20 also be sent to the person's attorney or authorized representative.

**Comment: In Filing an appeal request, subpart 2, defining the deadline as "after business hours" is vague and may lead to many unnecessary disputes over timeliness of appeal. Using midnight ET would be easier for all to abide by and easier for MNsure to track. It is also a successful deadline in other like processes such as the appealing of unemployment insurance determinations.**

**Subp. 2. Filing an appeal request.**

5.14 E. For appeal requests submitted after business hours through the Internet or by  
5.15 telephone, the date of official receipt is the next business day.

**Comment: In Orders of the MNsure board or its delegate, subpart 17, “participants” should be further defined as first and last name of applicant, SSN, employer name and FEIN (if applicable) so that parties can be easily identified and there is no additional administrative burden placed on parties to determine who the order is referencing.**

**Subp. 17. Orders of the MNsure board or its delegate.**

15.6

D. The decision shall contain at least the following:

15.19 (1) a listing of the date and place of the appeal hearing and the participants  
15.20 at the appeal hearing;

Thank you-

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Minnesota Hospital Association

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August 12, 2013

Ms. Jessica M. Kennedy  
MNSure  
81 East Seventh Street  
Suite 300  
St. Paul, MN 55101-2211

Sent via email to [publicfeedback@mnsure.org](mailto:publicfeedback@mnsure.org)

**RE: Proposed Exempt Permanent Rules Relating to MNSure Appeals**

Dear Ms. Kennedy:

On behalf of the Minnesota Hospital Association (MHA) and our members, which include 144 hospitals and their health systems serving patients and communities throughout Minnesota, I am pleased to offer the following comments, suggestions and concerns regarding MNSure's Proposed Rules Relating to MNSure Appeals (Proposed Rule).

A consistent, core value in MHA's strategic plan, health reform principles and policy initiatives has been the pursuit of health coverage for all Minnesotans. As we look forward to the launch of MNSure and the coinciding reforms to health coverage available in Minnesota, MHA wants to ensure that our residents receive the benefits of state public programs and federal subsidies that will be available through MNSure. To further this goal, MNSure should design its appeals system in a manner that prioritizes preventing the harms resulting from a mistaken denial of coverage over the interest in avoiding the costs resulting from a mistaken granting of coverage or subsidies.

Our comments follow the sequential order of the Proposed Rule.

Proposed Rule 7700.0105, subp. 2.A (3) and 2.B

MHA is pleased that the Proposed Rule recognizes the importance of allowing people to submit appeals via the Internet since that is the vehicle through which many residents will interact with MNSure. However, MHA suggests that the MNSure revise the Proposed Rule to include more specificity regarding the method(s) someone could use to file an appeal via the Internet.

For example, it is unexpected that MNSure intends to allow someone to file an appeal by writing a Twitter message or posting a complaint on her FaceBook page. Yet, without further definition, both of these acts could be construed as filing an appeal "by Internet."

Specifically, MHA suggests that MNsure explicitly allow a person to file an appeal via email, either as a separate filing method or as one of the Internet-based methods. We also suggest that MNsure clarify that a person can file an appeal via the Internet using a form or tool available on MNsure's Web site.

Likewise, subpart 2.B of this provision of the Proposed Rule should be amended to require MNsure's Web site to include an easily accessible appeal form or tool for a person to submit a completed form through MNsure's Web site.

Proposed Rule 7700.0105, subp. 2.C

As drafted, the Proposed Rule would require dismissal of an appeal that is submitted after 90 days. Because the vast majority of individuals attempting to enroll in coverage through MNsure will be lower income Minnesotans, the timeframe for submitting an appeal should be extended to 120 or 180 days. Or, in the alternative, an appeal filed after 90 days should be dismissed only if the delay beyond 90 days substantially impacted the government.

Except in narrow circumstances, the Proposed Rule would not allow an appealing party to receive benefits before or during the appeal. Thus, allowing for a longer period for filing an appeal would not materially affect the state's financial interests. On the other hand, providing lower income residents with more time to obtain legal counsel or navigate the complexities and challenges of submitting an appeal *pro se* will decrease the likelihood of someone being wrongfully denied benefits. MNsure should be more concerned with ensuring that the correct decision is reached and, if not, correcting any mistakes than it is in getting to a cut-off date when a decision – regardless of its merits – is deemed final.

If, over time, MNsure demonstrates that a longer period for submitting appeals proves to be unduly burdensome, results in some kind of injustice or is unnecessary, it may pursue amending the Rule. At the outset, however, MHA encourages MNsure to design its appeals rules in a manner that favors getting to the correct outcome, even if it takes longer, rather than getting to any outcome in less time.

Proposed Rule 7700.0105, subp. 2.E

This provision's grammatical structure lends it to different interpretations and, therefore, should be clarified. As written, the provision could mean that requests submitted after business hours through the Internet will be considered submitted the next business day, and *all* requests submitted by telephone, regardless of whether they are submitted after business hours, will be considered submitted the next business day.

MHA suggests that the provision is rewritten to say "The date of official receipt of appeals requests submitted after business hours, whether filed through the Internet or by telephone, is the next business day."

Proposed Rule 7700.0105, subp. 9

The Proposed Rule states that the appeal record in a case proceeding to judicial review “will be public unless a protective order is issued.” MHA suggests that MNsure revise the Proposed Rule to clarify whether MNsure will issue such protective orders or, in fact, the appeal record will be public unless the court of jurisdiction issues a protective order.

Proposed Rule 7700.0105, subp. 11

The Proposed Rule states that an appellant may be represented by “an attorney or a duly authorized representative.” MHA believes that MNsure should further define or describe who constitutes a “duly authorized representative.” It is unclear whether any individual “duly authorized” by the person being represented can represent the individual – e.g., a neighbor, someone with power of attorney, an employer, a broker, a navigator or in-person assister – or whether the act of “duly authorizing” someone to represent an individual in a MNsure appeal hearing must be someone in an official position, such as a parent or guardian, or designated by some official entity such as a district court in the case of a guardian ad litem.

Likewise, MHA suggests that MNsure explain or define the process required to identify someone as a duly authorized representative of another. Will MNsure require the filing of documentation, prior notice, or other procedural steps to effectuate or recognize the representative relationship?

Proposed Rule 7700.0105, subp. 12.A (4)

According to the Proposed Rule, the death of an appellant terminates his/her appeal. MHA respectfully urges MNsure to reconsider this policy and, instead, allow an appeal to proceed if the appellant received health care services that would have been covered had the eligibility or other appealed decision(s) been made in favor of the appellant.

It is foreseeable that an individual with a life-threatening condition will be wrongfully denied eligibility for coverage and then die with an appeal pending a final decision. During the time between the initial denial and the appellant’s death, it is entirely possible that the appellant received numerous health care services from providers who, if the original decision had been made correctly, would have been reimbursed in accordance with the appellant’s coverage. If the appeal terminates when the appellant dies, those services that should have been covered by a state public program or subsidized commercial plan will remain unreimbursed. This inappropriately places the costs of MNsure’s erroneous eligibility decisions on the backs of providers or the decedent’s heirs, and imposes an unnecessary and artificial urgency to the appeals process in the case of a terminally ill appellant.

Moreover, the Proposed Rule would create an unintended and unjust incentive for the State – either through MNsure, Managed Care Organization contractors or the Department of Human Services – to deny eligibility, especially for individuals with pre-existing or life-threatening conditions, and force people into an appeals process to increase the chances of escaping the costs

of end-of-life care. The Affordable Care Act and its policy shift to prohibit pre-existing condition exclusions for commercial plans will be distorted and undermined if MNsure's appeals rules create implicit incentives for the government to delay or deny coverage based on those same pre-existing conditions.

Accordingly, MHA urges MNsure to revise the Proposed Rule to allow an appeal to continue when there are outstanding medical expenses that would have been covered if the initial determination of eligibility had been in the appellant's favor.

Proposed Rule 7700.0105, subp. 15

The Proposed Rule would unfairly distinguish between certain appellants who meet very limited criteria and, therefore, are entitled to maintain benefits during the appeal period, and all other appellants who receive no benefits during the appeal period or retroactively regardless of whether their appeals succeed.

As drafted, this policy would effectively reward the government for wrongfully denying eligibility or coverage for someone. Instead, MHA believes it is necessary for MNsure to adopt a process that eliminates any advantage or financial benefit for mistaken, unjustified or inappropriate denials of eligibility or coverage. Thus, the rule should require awards of retroactive benefits to the date of the overturned denial of eligibility or coverage. This policy would make the successful appellant "whole" and would protect against the perception that the State or MNsure benefits when individuals are wrongfully denied coverage.

Proposed Rule 7700.0105, subp. 17.F

As drafted, the Proposed Rule would bestow unfettered discretion to the MNsure board or its delegate to "refuse to accept the decision" of an appeals examiner. The Proposed Rule would not place any limitations on this authority, enumerate any criteria that the MNsure board or its delegate must consider, or provide any standard(s) of review that the MNsure board or its delegate must apply.

By contrast, the immediately preceding provision of the Proposed Rule explicitly confines the appeals examiner's recommended decision. It states that an appeals examiner's recommended decision "must be based exclusively on the testimony and evidence presented at the appeal hearing, legal arguments presented, and the appeals examiner's research and knowledge of the law." Proposed Rule 7700.0105, subp. 17.E.

Yet, this recommended decision can later be rejected for any reason, a bad reason, or no reason at all without any regard for the appellate record, the testimony and evidence in the case, legal arguments presented, etc.

It is a long-standing and fundamental doctrine in both the civil and criminal justice systems that decisions by a lower court are reviewed on appeal in accordance with a particular standard of review. These standards of review help ensure that decisions and recommendations at one level of the legal process are accorded an appropriate level of deference on appeal.

For some decisions, such as findings of fact, the appeals court abides by the lower court's decision unless, in rare circumstances, there was an abuse of discretion or clear error made. This high standard is set because the lower court is significantly better suited to determine issues of fact because the judge or jury directly observed witness testimony, viewed the evidence admitted, and weighed the credibility in a way that cannot be replicated in an appeal record.

For other decisions, such as purely legal issues, the appellate court affords the lower court almost no deference because the higher court's capacity to analyze the questions of law at issue are intended to supersede those of the lower court if there was any misinterpretation of the law.

An appellate process in which a decision maker can simply refuse to accept the recommended decision of the authority charged with receiving and reviewing the evidence and testimony without any limits on its discretion or basis for decision making is destined for problems. Such a process leads to inconsistent, arbitrary and capricious decisions; an erosion of the public's perception that the board is credible and neutral; and the view among the parties in appeals that further judicial review is likely because decisions by the board are easily subject to attack as baseless, politically motivated, influenced by outside or excluded information, or biased for any number of reasons.

These concerns are further exacerbated by the possibility that the MNsure board would delegate its decision-making authority. Consequently, all of the hazards described above are compounded if the power to refuse a recommended decision rests with one person or a small group of individuals operating outside of public view.

In short, MHA believes that the credibility of the appeals process and the MNsure board's role as an objective, neutral decision maker necessitate that the appeals process includes a standard(s) of review, constraints on discretion, or other enumerated bases upon which an appeals examiner's recommended decision can be rejected by the MNsure board or its delegate.

MHA appreciates the opportunity to provide these comments and suggestions. Although we hope and expect that appeals are uncommon, a well-designed and implemented appeals process is critical for building the perception that MNsure, state public programs and new opportunities for commercial coverage are fairly administered, and uphold the public's trust in Minnesota's commitment to open and unbiased government. If you have any questions or concerns, please feel free to contact me anytime.

Sincerely,



Matthew L. Anderson, J.D.  
Vice President, Strategic/Regulatory Affairs

UCare Contact: Peg Hersch 612.676.3679 phersch@ucare.org		
Proposed Rule Cite	Description of Issue or Question	Suggested Revision/Comment
7700.0101	"MNsured Appeals Office" is used in 7700.0105, subp. 10 (and 7700.0105, subp. 4, item A), but isn't defined.	Please define.
7700.0101, subp. 6 (MNsured Board or board)	Line 2.7 includes "and regardless of whether it is followed by the phrase or its delegate."	Please clarify what the quoted language means.
7700.0105	Subparts don't follow logical order	Suggest they are reordered from start to finish of a hearing. For example, subps. 13 (prehearing conferences) and 16 (commencement and conduct of hearing) would be closer to the beginning, whereas subp. 10 (appeals summary) would be closer to the end and come after information on prehearing conferences and conduct of hearings.
7700.01015, subp. 4, item A (Rescheduling)	A copy of the request to reschedule a hearing is provided to the other party. By whom? Within what timeline? If the person making the request does that by telephone or in person (i.e., orally), how does a copy of the request get to the other party?	Please clarify/provide answers to identified questions.
7700.01015, subp. 9 (Data practices)	Much information packed in this one subpart, making subpart difficult to read and interpret.	Please distinguish, by items, the differences between appeals proceeding to the judicial review, as distinguished from proceeding to a HHS process. There is much information in this subpart, and items will make this easier to read.
7700.0105, subp. 10 (Appeal summary)	Line 9.21 - the person involved in the appeal hearing "should" (but is not required to?) be provided appropriate information about the procedures for the appeal hearing and an adequate opportunity to prepare."	Not sure why this is permissive. Suggest " <b>shall</b> " in place of "should".
7700.0105, subp. 13 (Prehearing conferences)	Line 11.16 - What happens if the person involved in the appeal, or their representative, does not participate in a prehearing conference?	Please clarify what happens and the consequences.



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August 12, 2013

MNsure  
Attention: Jessica M. Kennedy  
81 East Seventh Street, Suite 300  
Saint Paul, MN 55101-2211

RE: MNsure Appeals Proposed Rules

Dear Ms. Kennedy:

Thank you for the opportunity to submit comments regarding the proposed rule relating to MNsure appeals. The Department of Commerce (“Commerce”) is strongly committed to supporting MNsure’s implementation efforts and recognizes the importance of outlining a clear review process for consumer issues related to purchasing health coverage through the new marketplace. We have included below our suggestions for improving this process as described in the proposed rule.

#### **7700.0101 Definitions**

As you know, our goal is to maintain consumers’ abilities to pursue questions, complaints and appeals about insurance coverage through the Department of Commerce, when appropriate. However, we recognize that the functions of MNsure necessitate a separate process to ensure the appropriate and timely handling of issues directly related to eligibility through the MNsure marketplace.

First, we recommend that definitions be added to clarify the intent of the terms “eligibility determination” and “individual eligibility” throughout the proposed rule. Although section 7700.0105 outlines when MNsure appeals are available, this section and other sections of the rule would benefit from these definitions to ensure the terms are not confused.

Additionally, the current definition of “Agency” is unclear in regard to whether it is inclusive of state regulatory agencies that receive funding or perform other functions under interagency agreement with MNsure. This potentially has the effect of applying the subsequent processes outlined in the rule to processes that would otherwise be governed or under the jurisdiction of a regulator. We do not understand this definition to be intended to include regulatory agencies (the Department of Commerce or the Department of Health) and would appreciate clarification on this point.

## **7700.0105 MNsure Eligibility Appeals**

### **Subpart 1.**

Overall, we appreciate MNsure's collaboration with Commerce to delineate the appeal function of MNsure and how this interacts with the consumer investigations we (and other agencies) perform. We believe that additional clarity under Subpart 1 A (1) would help to better reflect the agreed-upon function of MNsure in reviewing eligibility appeals. Specifically, after "eligibility" on line 3.2, insert the following: "to purchase a Qualified Health Plan through MNsure". Additionally, on line 3.3 and 3.4, delete "including eligibility to purchase a qualified health plan".

Similarly, we understand that MNsure appeals related to the Small Business Health Options Plan (SHOP) should be limited to a review of the eligibility of employers or employees to use MNsure to purchase coverage. Therefore, we request that on line 3.10, after "eligibility", insert "to purchase coverage for qualified employees through" and on line 3.12, after "eligibility", insert "to enroll in coverage through".

In this same section, we would note that it is unclear in paragraph (4) what is a "determination of individual eligibility for an exemption", as it does not state from what the exemption may be made. We also believe paragraph (6), line 3.26 should refer to "minimum essential coverage" rather than "minimum coverage".

### **Subpart 2.**

We would suggest additional clarity in section D. paragraph (7), which refers to redetermination appeals. It is not clear to what a "redetermination" refers or what is meant by "the appellant intends to continue benefits at the same rate". If this is meant to refer to redetermination of advance premium tax credit or cost-sharing reduction levels it would be useful to specify in the language of the rule, instead of referring to these as "benefits", which often indicates the benefits of a particular health plan.

In section E., "after business hours" is ambiguous, and consumers would benefit from a specific timeframe or hour noted in the rule.

### **Subpart 3.**

We appreciate your emphasis of a fair, impartial process wherein the appeals examiner cannot have ex parte contact with an agency, person or witness in a hearing appeal, and that no agency can interfere or attempt to influence the decision recommendation on appeals. What restrictions will be placed on ex parte communications with the Board, since the Board will make the final decision on appeals?

### **Subpart 15.**

Similar to the previous comments on Subpart 2, the reference to the "status of benefits" throughout this subpart is vague and may be misleading. We would request that you clarify this subpart.

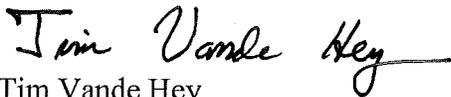
MNsure  
August 12, 2013  
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Finally, as consumers will continue to have the ability to pursue a regulatory investigation or complaint, where allowed under statute, we believe a statement as follows would reinforce this:

*Nothing in these rules limits or supersedes the ability of the Commissioners of Commerce and Health to conduct investigations or facilitate appeals as authorized by laws administered by the Departments of Commerce and Health.*

Again, we appreciate the opportunity to comment. The Department of Commerce looks forward to continuing to collaborate with MNsure to ensure consumers have the information and resources necessary to purchase insurance coverage in the new marketplace.

Sincerely,



Tim Vande Hey  
Deputy Commissioner, Insurance Division  
Minnesota Department of Commerce

**COMMENTS FROM HENNEPIN COUNTY HUMAN SERVICES AND PUBLIC  
HEALTH DEPARTMENT ON PROPOSED EXEMPT PERMANENT RULES  
RELATING TO MNSURE APPEALS**

Rule 7700.0105 MNsure Eligibility Appeals

Subpart 1. B. Comment: The section referencing medical assistance appeal hearings under Minn. Stat. 256.045 and 256.0451 should be moved to Subpart 1.A.(7), so that medical assistance hearings are all under one heading. As it is set forth in the proposed rule, it can be confused with the MNsure hearing process.

Subpart 2.A. Comment: This section should be amended to read, “ A person may file an appeal request *with the MNsure Board* in one of the following ways:” in order to provide clarity.

Subpart 2.C. Comment: The reference to medical assistance appeals should be placed in a separate section, or added to Subpart 1.A.(7). This would provide appellants with the information that medical assistance appeals will continue to follow the process under Minn. Stat. 256.045 and 256.0451, including the time limitations for filing an appeal.

Subpart 2.E. Comment: Definition is needed as to “business hours” and whether the reference is meant for MNsure’s business hours.

Subpart 4.D. Comment: The second sentence of this section should be rephrased to reflect, “*If a request is made to reschedule a hearing*, a written statement confirming the reasons for the rescheduling request must be provided to the appeals office by the requesting party.

Subpart 6.A. Comment: An edit is needed to provide clarity to the section. The terms, *the scheduling of a standard appeal, or the timing of a standard appeal*, may add the meaning intended by the section.

Subpart 6.C. and D. Comment: The federal regulations for these sections should be added.

Subpart 9. Comment: Further definition is needed as to who will be allowed access to data during the appeal process. The proposed rule refers to “certain other government officials...”.

Subpart 15. Comment: Additional information should be added to reflect that an affirmation of the original determination may result in an overpayment for which the appellant will be responsible to pay.

**From:** [Spicer, Ann](#)  
**To:** [\\*DHS Public Comments MNSure](#)  
**Subject:** MNSure Appeals Proposed Rules  
**Date:** Monday, August 12, 2013 3:23:38 PM

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I write regarding the video conferencing aspect of the appeals process. Currently, there is 1 location for video conferencing Social Security appeal hearings in Minnesota's First Congressional District in Mankato. I would like to suggest sharing the cost of video conferencing between MNSure and Social Security to improve access and cost savings for both programs. Thank you. Ann

**Ann Spicer, Constituent Advocate**  
**Congressman Tim Walz**  
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**MID-MINNESOTA LEGAL AID**  
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August 12, 2013

Ms. Jessica M. Kennedy  
Appeals Manager & Lead Counsel  
MNSure  
81 E. 7th Street, Suite 300  
Saint Paul MN 55101-2211

Re: *Proposed Exempt Permanent Rules Relating to MNSure Appeals*

Dear Ms. Kennedy:

The Legal Services Advocacy Project (LSAP) respectfully submits the comments below regarding the *Proposed Exempt Permanent Rules Relating to MNSure Appeals*, published in the State Register on July 22, 2013. LSAP is a statewide division of Mid-Minnesota Legal Aid, representing the seven regional legal services programs and low-income Minnesotans statewide and providing legislative and administrative advocacy on behalf of the programs and clients.

LSAP respectfully urges MNSure to make the changes recommended below when it promulgates the *Final Exempt Permanent Rules Relating to MNSure Appeals*. LSAP appreciates the opportunity to offer these comments.

Sincerely,

Ron Elwood  
Supervising Attorney

# Legal Services Advocacy Project Comments

## *Proposed Exempt Permanent Rules Relating to MNsure Appeals*

### Introduction

By publication in the State Register of June 22, 2013, MNsure issued a notice of the issuance of and request for comments on new rules relating to MNsure appeals (Proposed Appeals Rules).<sup>1</sup> Strong and fair appeal rights, and adequate appeal procedures, are essential to satisfy MNsure's due process obligations. They are particularly important to Legal Aid's clients, most if not all of whom will be accessing Medical Assistance, MinnesotaCare, or insurance subsidized by federal tax credits through MNsure.

The Legal Services Advocacy Project (LSAP) is a statewide division of Mid-Minnesota Legal Aid, representing the seven regional legal services programs and low-income Minnesotans statewide and providing legislative and administrative advocacy on behalf of the programs and clients.

LSAP respectfully submits the comments below on the Proposed Appeals Rules. They comments convey questions that need to be addressed and urge amendments that should be included in the *Final Exempt Permanent Rules Relating to MNsure Appeals* (Final Appeals Rules). LSAP's silence in these comments on any section, subpart, or item indicates that LSAP is either supportive or neutral.

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<sup>1</sup> Request for Comments on *Proposed Exempt Permanent Rules Relating to MNsure Appeals*, 38 SR 77, 111 (July 22, 2013).

## Key Areas of Concern

### **I. A Bifurcated and Potentially Confusing Process Proposed**

Confusion exists under the Proposed Appeals Rules as to how MNsure will handle appeals of denial of any financial assistance – whether for a public program (e.g., Medical Assistance) or public subsidies (i.e., federal tax credits). The Proposed Appeals Rules appear to set up a bifurcated process: one hearing for public programs and one for tax credit and other appeals.

LSAP is concerned that a separate process for appeals – insofar as they concern tax credit determinations – would violate the proposed federal rules on appeals issued January 22, 2013 (Proposed Federal Rules). The Proposed Federal Rules demand that appeals of tax credit determinations be treated in the same manner as Medical Assistance appeals. They provide:

If an individual has been denied eligibility for Medicaid by the agency or other entity authorized... to make such determination, the agency must treat an appeal to the Exchange appeals entity of a determination of eligibility for advanced payments of the premium tax credit or cost-sharing reduction, as a request for a hearing, under [the Medical Assistance] section.<sup>2</sup>

LSAP urges the Final Appeals Rules make clear a single hearing process will be used. A single process can accommodate the need to provide any additional statutory rights that may accompany Medical Assistance or MinnesotaCare appeals.<sup>3</sup>

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<sup>2</sup> 78 Fed. Reg. 4594, 4683 (January 22, 2013) (to be codified at 42 C.F.R. § 431.221(e)).

<sup>3</sup> See LSAP Comments on Proposed Exempt Permanent Rules Relating to MNsure Appeals, *infra*, Page 6, for recommendations on specific language changes in the Proposed Appeals Rules to address this concern about a bifurcated hearing process.

## II. The Omission of MinnesotaCare

Disturbingly, there is not a single reference to MinnesotaCare throughout the Proposed Appeals Rules. The silence is troubling, since appeals of Medical Assistance determinations are addressed<sup>4</sup> and, under Minnesota law, MinnesotaCare appeals are handled pursuant to the process and procedures outlined for Medical Assistance appeals.<sup>5</sup> Further, under a federal waiver, MinnesotaCare must continue as is in 2014 until it transitions into a Basic Health Plan in 2015.<sup>6</sup>

MinnesotaCare is an integral part of the continuum of financial assistance for lower income Minnesotans. MNSure will be the entity that: (1) accepts MinnesotaCare applications; (2) determines eligibility; and (3) determines the amount of the enrollee's monthly premium. Those who are displeased with MNSure's action or inaction regarding these decisions have a right to an administrative appeal. As currently contemplated, since MinnesotaCare appeals are governed by Medical Assistance appeals procedures, those individuals would have to raise their claim under a separate appeal filed directly with the Department of Human Services (DHS) pursuant to Minn. Stat. § 256.045. It is questionable what authority the DHS appeals office would have over MNSure staff for an appeal filed directly with DHS as opposed to an appeal resulting from a delegation of authority by the MNSure board.

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<sup>4</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 1 A. (7) (Lines 4.3 to 4.5).

<sup>5</sup> Minn. Stat. § 256L.10 ((providing that an applicant for or enrollee of MinnesotaCare has the right to appeal the determination according to section of Minnesota law – Minn. Stat. § 256B.045 -- governing Medical Assistance appeals).

<sup>6</sup> 2013 Minn. Laws, ch. 108, art. 1, sec. 3 (to be codified at Minn. Stat. § 256B.01, subd. 35) (requiring the Minnesota Department of Human Services to seek federal approval and any necessary waivers to operate a Basic Health Plan for persons with incomes up to 275% of the federal poverty guidelines beginning on January 1, 2015).

As mentioned, the Proposed Federal Rules provide that appeals of tax credit determinations are treated as appeals of Medical Assistance.<sup>7</sup> Given that MinnesotaCare is the intermediate program for people whose income is above the Medical Assistance limit but below the premium tax credit standard, eligibility for MinnesotaCare should be included in that determination on the appropriate level of financial assistance available. To carve this program out of the MNsure appeal structure creates unnecessary confusion and duplicate appeals – and worse, carries the potential for contradictory administrative appeal decisions. It simply makes no sense to remove MinnesotaCare from what is intended to be an integrated process.

To the extent that the omission of MinnesotaCare was based on the federal government’s delay in issuing guidance on whether to treat Basic Health Plans like Qualified Health Plans or like Medicaid, the omission is unnecessary. The Proposed Appeals Rules deal with both Qualified Health Plan eligibility and Medical Assistance eligibility. MinnesotaCare can and should be incorporated into the appeal structure regardless of the federal government’s final decision.

Not only must the Final Appeal Rules correct this serious omission, but also they must expressly recognize that other appeal rights exist for both Medical Assistance and MinnesotaCare. Therefore, Section 7700.0105, Subpart 1 A. of the Proposed Appeals Rules should be amended to read:

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<sup>7</sup> 78 Fed. Reg. 4594, *supra* note 2.

## Subpart 1. Eligibility.

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- (6) in response to a notice under 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(h)), a determination that an employer does not provide minimum coverage through an employer-sponsored plan or that the employer does provide coverage but is not affordable coverage with respect to an employee; ~~and~~
- (7) ~~medical assistance determinations of eligibility; and, level of benefits, services, or claims, or determinations that any such claim was not acted upon with reasonable promptness.~~<sup>8</sup>
- (8) MinnesotaCare Program determinations of eligibility and initial premium amounts.
  - B. ~~With the exception of the appeals described in item A, subitem (7), appeals are subject to the hearing processes in this part. The appeals described in item A, subitem (7), are subject to the hearing processes detailed at Minnesota Statutes, sections 256.045 and 256.0451. Nothing in these rules should be construed to supersede, abridge, or in any way limit the appeal rights of appellants contesting issues covered or not covered under these rules that are available under applicable federal or state statute or rule, including but not limited to Medical Assistance and MinnesotaCare appeal rights as found in Minnesota Statutes sections 256.045, 256.0451, and 256L.10, and Minnesota Rules, Parts 9505.0130, 9505.5105, 9505.0545, and 9506.0070.~~

### III. Continuity of Benefits During Appeal

Under the Proposed Appeals Rules, a conflict exists regarding whether or not appellants are automatically entitled to receipt of benefits during the pendency of an appeal. One provision of the Proposed Appeals Rules sets forth an “opt-in” approach, requiring the appellant to indicate whether s/he “intends to continue benefits at the same rate as before

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<sup>8</sup> LSAP has additional concerns about the manner in which the Proposed Appeals Rules treat the issues that will be subject to appeal. See LSAP’s Comments, *infra*, Pages 7-9, for an analysis and recommendations on language to address this concern.

until the appeal decision.”<sup>9</sup> Later, the Proposed Appeals Rules set forth an “opt-out” approach, providing that, “[i]n appeals involving a redetermination of a person's eligibility for a certain benefit, the person shall continue to receive those benefits for which the person was previously determined eligible pending appeal, unless the person specifically requests not to continue to receive that benefit pending appeal.”<sup>10</sup>

LSAP argues that this conflict should be resolved in favor of the opt-out approach, as required by Proposed Federal Rules, which provide that persons appealing a decisions made by MNsure are continued to be considered eligible during the pendency of the appeal.<sup>11</sup>

#### **IV. Scope of the Hearings**

Though much of the language and focus of the Proposed Appeals Rules suggest the sole matter at issue in an appeal is eligibility, the Proposed Appeals Rules also generously allow appeals of issues well beyond eligibility. For instance, in the subpart governing the commencement and conduct of the hearing, the Proposed Appeals Rules provide, in pertinent part:

In cases involving medical issues such as a diagnosis, a physician's report, or a review team's decision, the appeals examiner shall consider whether it is necessary to have a medical assessment other than that of the individual making the original decision included in the record of the appeal.<sup>12</sup>

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<sup>9</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 2 D. (7) (Lines 5.12 to 5.13).

<sup>10</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 15 (Lines 12.21 to 12.24).

<sup>11</sup> 78 Fed. Reg. 4594, 4721 (January 22, 2013) (to be codified at 45 C.F.R. § 155.525(a)).

<sup>12</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 16 E. (Lines 14.16 to 14.20).

In addition, for Medical Assistance determinations, the Proposed Appeals Rules provide for appeals of “level of benefits, services, or claims, or determinations that any such claim was not acted upon with reasonable promptness.”<sup>13</sup> Further, the Proposed Appeals Rules provide for appeals of a determination that an employer does not provide minimum or sufficiently affordable coverage through an employer-sponsored plan.<sup>14</sup>

The confusion as to exactly what “eligibility” means manifests itself as well in the Definitions section of the Proposed Appeals Rules. For instance, an “Agency” is defined as the entity that “made the *eligibility* determination being contested...”<sup>15</sup> “Appeal record” is defined as “*eligibility* records.”<sup>16</sup>

Consequently, exactly what the scope of the MNsure hearings on appeal is -- specifically whether determinations will extend beyond mere eligibility for a particular insurance program or product -- is difficult if not impossible to discern. This confusion should be resolved in the Final Appeals Rules by adding definitions of appeal and eligibility to read:

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<sup>13</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 1 A. (7) (Lines 4.3 to 4.5).

<sup>14</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 1 A. (6) (Lines 3.24.to 4.2).

<sup>15</sup> Proposed Appeals Rules, Section 7700.0101, Subp. 2 (Lines 1.12 to 1.13) (emphasis added).

<sup>16</sup> Proposed Appeals Rules, Section 7700.0101, Subp. 3 (Line 1.18) (emphasis added).

## Section 7700.0101: DEFINITIONS

Subp. (X). **Appeal.** “Appeal” means a challenge to or dispute of: (1) an initial determination or redetermination of eligibility for Medical Assistance, MinnesotaCare, federal tax subsidies, or any other program or product offered through MNSure; (2) an action, a decision, or the failure to act by MNSure or an agency; (3) any specific act or decision enumerated under Minnesota Rules, section 7700.0105, subpart 1 A; and (4) any other claims involving applications for programs and products offered through MNSure.

Subp. (X). **Eligibility.** “Eligibility” means entitlement to coverage under any program or product offered through MNSure and includes determinations concerning terms, conditions, subsidies, or premiums related to a program or product offered through MNSure.

### V. Judicial Review

The Administrative Review under Subpart 19 of the Proposed Appeals Rules provides that an appellant disagreeing with a decision an order of the MNSure board may, where permitted under federal rules, appeal for review to the United States Department of Health and Human Services.<sup>17</sup> While the Proposed Appeals Rules address the administrative review that may be applicable, they are silent on the subject of judicial review.

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<sup>17</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 19 (Lines 17.8 to 17.13).

LSAP urges MNSure to consider adopting the procedure contained in the Medical Assistance and MinnesotaCare appeals statute that provides for the right of an appellant to judicial review of an agency decision.<sup>18</sup> Alternatively, LSAP contends that the Proposed Appeals Rules be amended to adopt the language contained in the Proposed Federal Rules that state: “An appellant may seek judicial review to the extent it is available by law.”<sup>19</sup>

Therefore, the Proposed Appeals Rules after Line 17.13 should be amended by adding a new subpart to read:

**7700.0105 MNSURE ELIGIBILITY APPEALS.**

*Alternative 1:*

Subp. 20.     **Judicial Review.**   An appellant has the right to judicial review of an agency decision. The decision must advise the parties of the right to judicial review.

*Alternative 2:*

Subp. 20.     **Judicial Review.**   An appellant may seek judicial review to the extent it is available by law.

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<sup>18</sup> See Minn. Stat. §§ 256.0451, subd. 22(b) (requiring the decision on the appeal to include “written notice of the right to appeal to district court”); and 256.0451, subd. 24(c) (requiring that the written decision on reconsideration advise the parties of “the right to seek judicial review”).

<sup>19</sup> 78 Fed. Reg. 4594, 4719 (January 22, 2013) (to be codified at 45 C.F.R. § 155.505(g)).

## Comments by Section

**I. Section 7700.0101: DEFINITIONS**  
**Section 7700.0105: MNSURE ELIGIBILITY APPEALS**

The Proposed Federal Rules define “*de novo review*” to mean “a review of an appeal without deference to prior decisions in the case.”<sup>20</sup> The Proposed Appeals Rules should contain this fundamental guidepost to give clear direction to Appeals Examiners and parties alike as to the standard of review under which an appeal will be decided. Therefore, the Definitions section of Proposed Appeals Rules should be amended at Line 2.5 to add a new subpart to read:

**Subp. (X) . De novo review. “De novo review” means a review of an appeal without deference to prior decisions in the case.**

For consistency, the MNSure Eligibility Appeals section should be amended at Line 14.3 to read:

**Subp. 17. Commencement and conduct of hearing.**

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- C. The appeal hearing shall be a de novo review and shall address the correctness and legality of the agency's action and shall not be limited simply to a review of the propriety of the agency's action. The ~~person involved~~ appellant may raise and present evidence on all legal claims or defenses arising under state or federal law as a basis for the appeal ~~appealing or disputing an agency action~~, excluding any constitutional claims that are beyond the jurisdiction of the appeal hearing. The appeals examiner may take official notice of adjudicative facts.

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<sup>20</sup> 78 Fed. Reg. 4594, 4719 (January 22, 2013) (to be codified at 45 C.F.R. § 155.500).

## II. Section 7700.0101: DEFINITIONS

### A. Amendments to Existing Definitions

#### 1. *Subpart 2: Agency*

The definition provides that an agency is an entity that “lawfully” made the eligibility determination. LSAP queries why the word “lawfully” is included. The assumedly unintentional presumption from the inclusion of that word is that either an “unlawful” agency making a determination or an agency making an unlawful determination is not subject to appeal. This term should be deleted.

Therefore, the Proposed Appeals Rules should be amended at Line 1.12 to read:

Subp. 2. **Agency.** "Agency" means the entity that ~~lawfully~~ made the eligibility determination being contested, ~~which Agency~~ includes MNsure, the Department of Human Services, and the county human services agency, and, where applicable, any entity involved under a contract, subcontract, grant, or subgrant with MNsure, the Department of Human Services, or with a county agency, that provides or operates programs or services in which appeals are governed.

#### 2. *Subpart 3: Appeal Record*

The hearing record should consist of all relevant records pertaining to the contested Issue, not limited to eligibility records. Therefore, the Proposed Appeals Rules should be amended at Line 1.18 to read:

Subp. 3. **Appeal record.** "Appeal record" means all relevant ~~eligibility records~~ pertaining to the contested issue, including eligibility records, the appeal decision, all papers and requests filed in the proceeding, and if a hearing is held, the recording of the hearing testimony or an official report containing the substance of what happened at the hearing and any exhibits introduced at the hearing.

3. *Subpart 6: MNsure Board*

A typographical or grammatical error in this definition clouds the apparent intent to define the board as the board or its delegate. The Proposed Appeals Rules should be amended at Line 2.7 to read:

Subp. 6. **MNsure board or board.** "MNsure board" or "board" means the entity established in Minnesota Statutes, chapter 62V, as a board under Minnesota Statutes, section 15.012, and ~~regardless of whether it is followed by the phrase or its delegate~~ should be understood to include any individual or entity to whom the board has delegated a specific power or authority either directly or through an interagency agreement when that individual or entity is exercising the delegation.

4. *Subpart 8: Person*

This definition conflates the persons other than the appellant who may be involved in an appeal or the appeal process with the appellant. To resolve this confusion, the Final Appeals Rules should contain: (1) a new definition of "appellant" should be created to refer to either the individual (natural person) or entity (e.g., an employer) who is the subject of the determination and appeal;<sup>21</sup> and (2) an amended definition of "person" to mean someone other than the appellant involved in an appeals proceeding.

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<sup>21</sup> See LSAP Comments, *infra*, Page 15, for recommendations on defining "appellant."

Further, the definition inappropriately contains the substantive requirement that “[a]ny notice sent to the person involved in the hearing must also be sent to the person's attorney or authorized representative.”<sup>22</sup> The requirement of notice to attorneys and authorized representatives should be moved to Section 7700.0105, Subpart 3: Notices and Communications.<sup>23</sup>

The definition of “person” should be amended at Line 2.14 to read:

Subp. 8. **Person.** "Person" means ~~an individual or small business employer who, on behalf of themselves, their household, or their small business, is appealing, disputing, or challenging an action, a decision, or a failure to act, by MNsure or an agency in the human services system. When a person involved in a proceeding under this chapter is represented by an attorney or by an authorized representative, person also means the person's attorney or authorized representative. Any notice sent to the person involved in the hearing must also be sent to the person's attorney or authorized representative~~ a natural person.

## B. New Definitions

### 1. *Appellant*

The Proposed Appeals Rules do not contain a definition of “appellant” but use this term at Lines 5.12, 7.22, 8.3, 8.5, 10.3, 10.21, and 10.23. Further, the terms “appellant” and “person” are used interchangeably and inconsistently. Therefore, the Proposed Appeals Rules should be amended to include a definition of “appellant” and, throughout the Proposed Final Rules, the term “appellant” should replace the term “person” wherever the intended meaning of “person” is “appellant.”

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<sup>22</sup> Proposed Appeals Rules, Section 7700.0101, Subp. 8 (Lines 2.19 to 2.20).

<sup>23</sup> See LSAP Comments on Proposed Exempt Permanent Rules Relating to MNsure Appeals, *infra*, Page 19, for a recommendation to amend the Notices and Communications subpart accordingly.

Subp. (X). **Appellant.** “Appellant” means the person or small business employer submitting an appeal. Appellant includes the appellant’s attorney or authorized representative. An appellant who is not a business owner may file an appeal on behalf of his or her own behalf or on behalf of the appellant’s household.

## 2. *Business Hours*

The Proposed Appeals Rules accommodate filings of appeals after business hours, providing that “the date of official receipt is the next business day.”<sup>24</sup> LSAP notes that neither business hours nor business day is defined in the Proposed Appeals Rules.

LSAP urges MNSure to define these terms in the Final Appeals Rules. LSAP offers no suggestion for defining “business hours,” but recommends that “business day” be defined by amending the Final Appeals Rules at Line 2.1 to read:

Subp. (X). **Business Day.** “Business day” means any day other than a Saturday, Sunday, or legal holiday as defined in Minnesota Statutes, section 645.44.<sup>25</sup>

### III. **7700.0105: MNSURE ELIGIBILITY APPEALS**

#### A. Subpart 1: Eligibility

The Proposed Federal Rules provide that the Exchange or the entity handling appeals for the Exchange “[m]ay assist the applicant or enrollee in making the appeal....”<sup>26</sup> The same provision should be included in the Final Appeals Rules. Therefore, a new item should be added to Subpart 1 after Line 4.9 to read:

C. **The agency may assist the applicant or enrollee in making the appeal.**

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<sup>24</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 2 E. (Lines 5.14 to 5.15).

<sup>25</sup> See, e.g., Minn. Stat. § 325G.23, subd. 9 (defining “business day” in statutes governing club contracts).

<sup>26</sup> 78 Fed. Reg. 4594, 4720 (January 22, 2013) (to be codified at 45 C.F.R. 155.520).

B. Subpart 2: Filing an Appeal Request<sup>27</sup>

1. *Subpart 2 C.: Filing Deadlines*

The reference in Section 2 C. of the Proposed Appeals Rules to the Medical Assistance appeal period is incomplete and therefore misleading. The Proposed Appeals Rules provide that “MNSure appeals pertaining to the medical assistance program and regulated by Minnesota Statutes, sections 256.045 and 256.0451, are subject to the 30-day filing deadlines provided therein.”<sup>28</sup> The Proposed Appeals Rules correctly identify the initial 30-day filing deadline, but fail to reference the additional 60 day extension (to the same 90 days provided for MNSure appeals) for “good cause for failing to request a hearing within 30 days.”<sup>29</sup>

These conflicting time frames will surely cause confusion among appellants. This confusion also speaks to the vital importance of clear, concise, and readable notices when the issue of appeal timelines has been resolved. In addition, the language setting forth the filing deadlines is confusing and inconsistent with the language on Line 5.14 referring to requests for appeals.

Finally, LSAP further observes that there is no provision in the Proposed Appeals Rules governing official date of receipt if the deadline for filing the appeals falls on a Saturday, Sunday, or legal holiday.

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<sup>27</sup> LSAP also has concerns about language inconsistencies, one of which is the use of “appeal” and “appeal request.” See LSAP Comments, *infra*, Pages 20 for a proposed amendment, and Page 30 for a recommendation, to resolve this inconsistency.

<sup>28</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 2 C. (Lines 4.18 to 4.24).

<sup>29</sup> Minn. R. 9505.0130, Subp. 2.

The Final Appeals Rules should be amended at Line 4.18 to read:

- C. An appeal must be received by MNSure within 90 days from the date of the notice of the determination was received by the appellant. The date on which the notice of the determination is received means five days after the date on the notice, unless the ~~person~~ appellant demonstrates that ~~they~~ he or she did not receive the notice within the five-day period. An appeal received more than 90 days from the receipt of eligibility notice will be dismissed. If the deadline for filing an appeal falls on a Saturday, Sunday, or legal holiday, the filing date is the next regular business day. MNSure appeals pertaining to the medical assistance program and the MinnesotaCare Program, and regulated by Minnesota Statutes, sections 256.045 and 256.0451, which are governed under Minnesota Statutes, sections 256.045, 256.0451, and 256L.10, and Minnesota Rules, part 9505.0130, subpart 2, are subject to the 30-day filing deadlines and the ability to delay to 90 days upon a showing of good cause for failing to request a hearing within 30 days provided therein.

2. *Subpart 2 D.: Availability of and Information Required on Forms*

LSAP has a number of concerns about and recommended amendments to this subpart.

a. *MNSure Identifier*

The Proposed Appeals Rules require an appellant to submit the MNSure identifier. This requirement will likely pose a barrier for an appellant to obtain an appeal.<sup>30</sup> It is unlikely that an appellant will know his or her MNSure identifier. Further, asking the appellant to provide this information is burdensome and unnecessary, since the provision of name, address, and date of birth should be sufficient and easily enable the system (rather than the appellant) to find the appellant's MNSure identifier.

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<sup>30</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 2 D. (2) (Line 5.5).

*b. Requirement to Identify Programs Involved in the Appeal*

The Proposed Appeals Rules require the appellant to list the programs involved in the appeal.<sup>31</sup> This requirement is inconsistent with the Proposed Federal Rules, which specifically state that an appeal of eligibility for tax credits is also an appeal of a denial of Medicaid.<sup>32</sup> An appellant who believes that he or she is entitled to more financial help in obtaining coverage should not be expected or required to indicate whether that help should come in the form of additional tax credits, MinnesotaCare eligibility or Medical Assistance eligibility. This subitem should be deleted.

*c. Continuity of Benefits*

As noted above, LSAP contends that the Proposed Appeals Rules should mirror the Proposed Federal Rules and provide that persons appealing a decision should maintain eligibility and continue to receive benefits during the pendency of the appeal.

*d. Mandatory Use of Form*

Currently, an aggrieved Medical Assistance recipient may submit an appeal without the necessity of using a prescribed form. The Proposed Appeals Rules are unclear whether an appeal will be accepted if the required information is provided, but not on the form specified. LSAP urges that the Final Appeals Rules provide that an appeal will be accepted even if not submitted on the form.

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<sup>31</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 2 D. (5) (Line 5.9).

<sup>32</sup> 78 Fed. Reg. 4594, *supra* note 2.

Based on the foregoing, the Proposed Appeals Rules should be amended at Line 5.1 to read:

- D. ~~Appeal request~~ forms will be available ~~to persons~~ through the Internet, by in-person request, by a request by mail, and by telephone. An appeal ~~request~~ must contain all of the following information:
- (1) name;
  - (2) ~~MNsure~~ identifier;
  - ~~(3)~~ date of birth;
  - ~~(4)~~ (3) address, including either an e-mail address, if available, or a mailing or physical address; and
  - ~~(5)~~ ~~MNsure programs involved in the appeal, for which a list must be provided on the appeal request form;~~
  - ~~(6)~~ (4) reason for the appeal; and
  - ~~(7)~~ ~~in appeals of redeterminations, whether he appellant intends to continue benefits at the same rate as before until the appeal decision.~~

Appeals shall be accepted even if not submitted on the form.

C. Subpart 3: Notices and Communications

The Proposed Appeals Rules state that the parties to the appeal have the right to “an acknowledgement of appeal request and scheduling order.”<sup>33</sup> The Proposed Federal Rules are more specific about the elements of the acknowledgement.<sup>34</sup> The state regulations should include the same language, which includes notification of the continuity of benefits and the possibility of reconciliation.

Further, as noted above, the definition of “Person” inappropriately contains the substantive requirement that “[a]ny notice sent to the person involved in the hearing must also be sent to the person's attorney or authorized representative.”<sup>35</sup> This requirement should be

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<sup>33</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 3 A. (1) (Lines 5.17 to 5.19).

<sup>34</sup> 78 Fed. Reg. 4594, 4720 (January 22, 2013) (to be codified at 45 C.F.R. § 155.520(d)).

<sup>35</sup> Proposed Appeals Rules, Section 7700.0101, Subp. 8 (Lines 2.19 to 2.20).

contained in this subpart. In addition, the provisions on ex parte communications should be amended by replacing “person” with “party.”

Therefore, the Proposed Appeals Rules should be amended at Line 5.19 to read:

**Subp. 3. Notices and communications.**

- A. The parties to an appeal have the right to the following timely notices and communications:
  - (1) acknowledgement of appeal ~~request~~ and scheduling order, including Information regarding the appellant’s eligibility pending appeal and an explanation that any advance payments of the premium tax credit paid on behalf of the tax filer pending appeal are subject to reconciliation; and
  - (2) the decision and order of the MNsure board.
- B. Any notice sent to the appellant must also be sent to the appellant's attorney or authorized representative.
- C. An appeals examiner shall not have ex parte contact on substantive issues with the agency, ~~or with any person~~ the appellant, or any witness in ~~a hearing an~~ appeal. No agency employee shall review, interfere with, change, or attempt to influence the recommended decision of the appeals examiner in any ~~hearing~~ appeal, except through the procedures allowed herein. The limitations in this subpart do not affect the board's authority to review or make final decisions.
- D. Subpart 4: Rescheduling

The Proposed Appeals Rules accommodate the need to assure interpretation and translation services, where necessary, are provided.<sup>36</sup> The Proposed Appeals Rules should be amended after line 6.22 to add: “where an interpreter or translator, or services necessary to accommodate a person with a disability, are needed but not available.”

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<sup>36</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 7 (Lines 8.10 to 8.14).

E. Subpart 5: Telephone, Videoconference, or In-Person Hearing

Item C of this subpart grants an appellant the right to a telephone, videoconference, or in-person hearing only at the discretion of hearing officer.<sup>37</sup> LSAP submits that this item creates an imbalance – unduly disadvantageous to consumers -- between the rights of appellants to obtain a full and fair hearing and the desire for administrative efficiency. An appellant should be given an unrestricted right to a hearing. An in-person hearing should be held if an appellant asserts that holding a telephone or videoconference would impair the appellant’s ability to fully participate in the hearing. Further, a desk hearing should be conducted only with the consent of the appellant. Therefore, the Proposed Appeals Rules should be amended at Line 7.14 to read:

**Subp. 5. Telephone, videoconference, or in-person hearing.**

- A. An appellant has a right to a hearing. A hearing may be conducted by telephone, videoconference, or in person. An in-person appeals hearing will only be held at the discretion of the appeals examiner, or if the ~~person appellant~~ asserts that ~~either the person or a witness has a physical or mental disability that would impair the person's~~ holding a hearing via telephone or videoconference would impair the appellant’s ability to fully participate in a hearing held by interactive video technology. To have the hearing conducted by videoconference or in person, a person must make a specific request for that type of hearing.
- B. When an in-person hearing is granted, the appeals examiner shall conduct the hearing in the county where the person involved resides, unless an alternate location is mutually agreed upon before the hearing.

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<sup>37</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 5 C. (Lines 7.14 to 7.18)..

- C. Where federal law or regulation does not require a telephone, videoconference, or in-person hearing and allows for a review of documentary evidence through a desk review, a telephone, videoconference, or in-person hearing will be provided unless the person agrees to a desk review ~~when the appeals examiner determines that such a hearing would materially assist in resolving the issues presented by the appeal.~~

F. Subpart 7: Interpreter and Translation Services

LSAP supports the provision of necessary interpreter and translation services at no cost to the appellant. However, the language providing for these services is flawed in two ways. First, it fails to embrace the broader language contained in the Proposed Federal Rules for persons with limited English proficiency and persons with disabilities. Second, it fails to place sufficient responsibility on the appeals examiner to ensure the decision is not skewed against an appellant because of a lack of understanding. The Final Appeals Rules should do both.

Regarding the omission of language acknowledging the rights of persons with limited English proficiency or disabilities, LSAP notes that the Proposed Federal Rules require the state Medicaid “hearing system” to be “accessible to persons who are limited English proficient and persons who have disabilities...”<sup>38</sup> The Proposed Appeals Rules should provide the same.

With respect to ensuring fair hearings for those with interpreter and translation needs, LSAP argues that appeals examiners should not be allowed to passively wait for appellants – who are likely unfamiliar with and often intimidated by administrative and judicial-like proceedings – to request services that will ensure they are equal participants in the process. Rather, examiners should have an affirmative duty to inquire whether the appellant requires the services – as is already required under Minnesota statute governing Medicaid and

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<sup>38</sup> 78 Fed. Reg. 4594, 4682 (January 22, 2013) (to be codified at 42 C.F.R. § 431.205(e)).

MinnesotaCare appeals.<sup>39</sup> Further, appeals examiners should honor requests from appellants for these services.

Therefore, the Proposed Appeals Rules should be amended at Line 8.10 to read:

Subp. 7. **Interpreter and translation services; accessibility.** ~~Any necessary interpreter or translation services must be provided at no cost upon request by a person or at the discretion of the appeals examiner.~~

- A. Hearings must be accessible to appellants who have limited English proficiency, appellants who require interpreter and translation services, and appellants with disabilities. The appeals referee has a duty to inquire whether any person involved in the hearing for e services of an interpreter or translator or special requirements to accommodate a disability in order to participate in or to understand the hearing process.
- B. Necessary interpreter or translation services must be provided at no charge to the person involved in the hearing.
- D. If an appellant requests interpreter or translation services or special requirements to accommodate a disability or it appears to the appeals examiner that necessary interpreter or translation services are needed but not available for the scheduled hearing, the hearing shall be rescheduled to the next available date when the appropriate services can be provided.

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<sup>39</sup> Minn. Stat. § 256.0451, subd. 12.

G. Subpart 8: Access to Data

LSAP suggests, for clarity, Subpart 8 A. be amended at Line 8.16 to read:

**Subp. 8. Access to data.**

- A. Subject to the requirements of all applicable state and federal laws regarding privacy, confidentiality, disclosure, and personally identifiable information, the persons and agencies involved in an appeals hearing must be allowed to access the appeal record upon request at a convenient place and time before and during the appeals hearing. The appeal record copies must be provided at no cost and, upon request, must be mailed or sent by electronic transmission to the party or the party's representative.

H. Subpart 9: Data Practices

LSAP finds two significant flaws in this section. First, data is not defined. Second, the term data seems to be inaccurately conflated with evidence and testimony. In addition, LSAP questions why the subpart refers only to individuals and not to small business employers.

These matters should be addressed in the Final Appeals Rules.

I. Subpart 12: Dismissals

The Proposed Appeals Rules provide that a dismissal may be vacated for good cause involving an appellant and enumerate circumstances constituting good cause.<sup>40</sup> However, the Proposed Appeals Rules are silent on – and thus impliedly do not allow a request to vacate for good cause circumstances involving – witnesses. The Proposed Appeals Rules should be amended at Line 10.23 to read:

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<sup>40</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 12 C. (Lines 10.23 to 11.12).

Subp. 12. **Dismissals.**

- C. The appeals ~~entity~~ examiner may vacate a dismissal if the appellant makes a written request within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated. Good cause can be shown when there is:
- (1) a death or serious illness in the person's family;
  - (2) a personal injury or illness that reasonably prevents ~~the person~~ an appellant or witness from attending the hearing;
  - (3) an emergency, crisis, or unforeseen event that reasonably prevents the person from attending the hearing;
  - (4) an obligation or responsibility of the ~~person~~ appellant or witness which a reasonable person, in the conduct of one's affairs, could reasonably determine takes precedence over attending the hearing;
  - (5) lack of or failure to receive timely notice of the hearing in the preferred language of the appellant ~~person involved in the hearing~~; or
  - (6) excusable neglect, excusable inadvertence, excusable mistake, or other good cause as determined by the appeals examiner.

J. Subpart 13: Prehearing Conference

Under existing law, prehearing conferences for Medical Assistance and MinnesotaCare may be conducted not only in person and by telephone, but also in writing. LSAP sees no reason why the Final Appeals Rules should not include all three options.

Therefore, the Proposed Appeals Rules should be amended at Line 11.19 to read:

**Subp. 13. Prehearing conferences.**

- A. The appeals examiner, at the examiner's discretion, prior to an appeal hearing may hold a prehearing conference to further the interests of justice or efficiency. The person involved in the appeal, or that person's representative, must participate in any prehearing conference held. A person involved in an appeal hearing or the agency may request a prehearing conference. The prehearing conference may be conducted by telephone, in writing, or in person. The prehearing conference may address the following:
- (1) disputes regarding access to files, evidence, subpoenas, or testimony;
  - (2) the time required for the hearing or any need for expedited procedures or decision;
  - (3) identification or clarification of legal or other issues that may arise at the hearing;
  - (4) identification of and possible agreement to factual issues; and
  - (5) scheduling and any other matter that will aid in the proper and fair functioning of the hearing.

J. Subpart 16: Commencement and Conduct of Hearing

A significant omission in the Proposed Appeals Rules is the failure to address the right of an appellant to request a subpoena. This right is guaranteed for Medical Assistance and MinnesotaCare appeals under state law.<sup>41</sup> This right should be accorded to all appellants.

Further, subitem B requires an agency designee to present the case and provides that the designee have sufficient time to prepare the case and cross-examine witnesses. This same right, however, is not accorded appellants in this subitem. That omission should be corrected.

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<sup>41</sup> See Minn. Stat. § 256.0451, subd. 8 (providing that a party may request a subpoena for a witness, for evidence, or for both upon a showing of “the need for the subpoena and the general relevance to the issues involved”).

Therefore, the Proposed Appeals Rules should be amended as follows:

1. *Amendments to Subpart 16, Subitems A and B*

Subp. 16. **Commencement and conduct of hearing.**

- A. The appeals examiner shall begin each hearing by describing the process to be followed in the hearing, including the swearing in of witnesses, how testimony and evidence are presented, the rights of the parties to request subpoenas, the order of examining and cross-examining witnesses, and the opportunity for an opening statement and a closing statement. The appeals examiner shall identify for the ~~participants~~ parties the issues to be addressed at the hearing and shall explain to the ~~participants~~ parties the burden of proof that applies to the ~~person involved~~ appellant and the agency. The appeals examiner shall confirm, prior to proceeding with the hearing, that the ~~state agency~~ appeal summary, if prepared, has been properly completed and provided to the ~~person involved in the hearing~~ parties, and that the ~~person has~~ parties have been provided documents and an opportunity to review the case file, as provided in this part.
- B. The appeals examiner shall act in a fair and impartial manner at all times. At the beginning of the appeal hearing, the agency must designate one person as a representative who shall be responsible for presenting the agency's evidence and questioning any witnesses. The appeals examiner shall make sure that ~~the person and the agency~~ both the designee and the appellant are provided sufficient time to present testimony and evidence, to confront and cross-examine all adverse witnesses, and to make any relevant statement at the hearing. All testimony in the hearing will be taken under oath or affirmation. The appeals examiner shall make reasonable efforts to explain the appeal hearing process to ~~persons who are not represented~~ unrepresented appellants and shall ensure that the hearing is conducted fairly and efficiently. Upon the reasonable request of the ~~person or the agency involved~~ appellant or agency or at the discretion of the appeals examiner, the appeals examiner shall direct witnesses to remain outside the hearing room, except during individual testimony, when the appeals examiner determines that such action is appropriate to ensure a fair and impartial hearing. The appeals examiner shall not terminate the hearing before affording

the ~~person~~ appellant and the agency a complete opportunity to submit all admissible evidence and reasonable opportunity for oral or written statement. In the event that an appeal hearing extends beyond the time allotted, the appeal hearing shall be continued from day to day until completion. Appeal hearings that have been continued shall be timely scheduled to minimize delay in the disposition of the appeal.

2. *New Item in Subpart 16.*

Subp. 16. **Commencement and conduct of hearing.**

G. A party may request a subpoena for a witness, for evidence or for both. A reasonable number of subpoenas shall be issued to require the attendance and the testimony of witnesses, and the production of evidence relating to any issue of fact in the appeal hearing. The request for a subpoena must show a need for the subpoena and the general relevance to the issues involved. A written petition to vacate or modify a subpoena may be submitted to the appeals examiner, who shall resolve the petition in the prehearing conference involving all parties and shall make a written decision. A subpoena may be vacated or modified if the appeals examiner determines that the testimony or evidence sought does not relate with reasonable directness to the issues of the appeals hearing; that the subpoena is reasonable, over broad, or oppressive; that the evidence sought is repetitious or cumulative; or that the subpoena has not been served reasonably in advance of the time when the appeal hearing will be held.

K. Subpart 17: Orders of the MNSure Board

Item F of Subpart 17 provides that a “[r]efusal of the MNSure board or delegate to accept a decision must not delay the 90-day time limit to issue a decision.”<sup>42</sup> LSAP points out that the Proposed Appeals Rules are silent as to the consequence of such a delay.

Appellants should have recourse. The Final Appeals Rules should clarify that any delay does not prejudice the appellant. Therefore, the Proposed Appeals Rules should be amended to read:

Subp. 17. **Orders of the MNSure board**

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- F. The MNSure board ~~or its delegated representative~~ shall review the recommended decision and accept or refuse to accept the decision. The MNSure board ~~or delegate~~ may accept the recommended order of an appeals examiner and issue the order to the parties. ~~The MNSure board or delegate may~~ or refuse to accept the decision. Upon refusal, the MNSure board ~~or delegate~~ shall notify the parties of ~~that fact~~ the refusal, ~~and state the reasons,~~ and shall allow each party ten days to submit additional written argument on the matter. After the expiration of the ten-day period, the MNSure board ~~or delegate~~ shall issue an order on the matter to the parties. Refusal of the MNSure board ~~or delegate~~ to accept a decision must not delay the 90-day time limit to issue a decision. Any delay shall not prejudice the appellant.

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<sup>42</sup> Proposed Appeals Rules, Section 7700.0105, Subp. 17 F. (Lines 16.25 to 16.26).

## Language and Terminology Issues

Throughout the Proposed Appeals Rules, different terms are used interchangeably to assumedly mean the same thing. Additionally, the use of certain ambiguous terms and language creates confusion. Some of the inconsistencies have been addressed and recommendations for correction have been made earlier in these comments. This section of the comments identifies and suggests other amendments to make the language and terminology clear and consistent.

### A. Appeal vs. Appeal Request

These two terms are used interchangeably throughout the Proposed Appeals Rules. In the Final Appeals Rules, the word “request” should be deleted any time it is used after the word “appeal,” since the word “request” is redundant, unnecessary, and inconsistently used.

### B. “Appeals Entity”

The undefined term “appeals entity” appears on Lines 10.13, 10.19, and 10.23. Apparently, the term is intended to refer to the “appeals examiner,” which is defined. In the Final Appeals Rules, the phrase “appeals entity” should be replaced with the term “appeals examiner.”

### C. “Appeals Office”

The provision establishing procedures for requests for rescheduling requires the request to be sent to the “appeals office,” an undefined term. This reference appears on Lines 6.5, 6.11, 6.15, and 7.2. It should be replaced with “appeals examiner.”

D. Individual,” “Individuals,” “Participant,” “Participants, and “Persons”

The undefined terms “participant” or participants” are found at Lines 13.5, 13.6, 15.15, 15.19, 16.2, and 16.6. Apparently, the terms are intended to refer to a “party,” which is defined. Similarly, reference is made to “individual” at Lines 2.8, 2.10, 1.14, 3.2, 3.14, and 14.19, “individuals” at Lines 9.5 and 9.15. In the Final Appeals Rules, the terms “participant” and “participants” should be replaced with the terms “party” or “parties” as applicable.

The confusing term “Person” is used throughout the Proposed Appeals Rules to refer variously to appellants and witnesses. Where applicable, the term “Person” should be replaced with “appellant” or “witness.”

E. “State Agency”

The phrase “state agency appeal summary” appears on Line 13.7. The phrase “state agency” is not defined and is unnecessary. The phrase “state agency” should be deleted prior to the defined term “appeal summary” in the Final Appeals Rules.

F. “MNsured Board or Its Delegate”

Some form of the phrase “or its delegate” appear at: (1) Line 15.5 (the title of Subpart 17 of section 1700.0105); and (2) Lines 16.18, 16.21, 16.24, and 16.25 (Subpart 17 F.).

This phrase (or the form of it) is redundant and unnecessary, since the “MNsured board” definition at Lines 2.5 to 2.10 provides that the board includes its delagatee. All forms of the phrase “or its delegate” at Lines 15.5, 16.18, 16.21, 16.24, and 16.25 should be deleted in the Final Appeals Rules.

## Conclusion

LSAP appreciates the opportunity to submit the foregoing comments to MNsure regarding the *Proposed Exempt Permanent Rules Relating to MNsure Appeals*. LSAP urges adoption of each of the recommended amendments provided and consideration and action on each of the questions raised.

# **APPENDIX A**

Recommended Amendments to:

Proposed Exempt Permanent Rules  
Relating to MNsure Appeals

## MNsure

### Proposed Exempt Permanent Rules Relating to MNsure Appeals

#### 7700.0100 ADMINISTRATIVE REVIEW OF MNSURE ELIGIBILITY DETERMINATIONS.

Subpart 1. **Applicability.** Parts 7700.0100 to 7700.0105 govern the administration of MNsure eligibility appeals. Parts 7700.0100 to 7700.0105 must be read in conjunction with the federal Affordable Care Act, Public Law 111-148; Code of Federal Regulations, title 1.8 45, part 155; and Minnesota Statutes, chapter 62V; and sections 256.045 and 256.0451.

#### 7700.0101 DEFINITIONS.

Subpart 1. **Scope.** As used in parts 7700.0100 to 7700.0105, the terms defined in this part have the meanings given them.

Subp. 2. **Agency.** "Agency" means the entity that lawfully made the eligibility determination being contested, ~~which~~ Agency includes MNsure, the Department of Human Services, and the county human services agency, and, where applicable, any entity involved under a contract, subcontract, grant, or subgrant with MNsure, the Department of Human Services, or with a county agency, that provides or operates programs or services in which appeals are governed.

Subp. 3. **Appeal.** "Appeal" means a challenge to or dispute of: (1) an initial determination or redetermination of eligibility for Medical Assistance, MinnesotaCare, federal tax subsidies, or any other program or product offered through MNsure; (2) an action, a decision, or the failure to act by MNsure or an agency; (3) any specific act or decision enumerated under Minnesota Rules, section 7700.0105, subpart 1 A; and (4) any other claims involving applications for programs and products offered through MNsure.

Subp. 4. **Appeal record.** "Appeal record" means all relevant ~~eligibility~~ eligibility records pertaining to the contested issue, including eligibility records, the appeal decision, all papers and requests filed in the proceeding, and if a hearing is held, the recording of the hearing testimony or an official report containing the substance of what happened at the hearing and any exhibits introduced at the hearing.

Subp. 5. **Appeals examiner.** "Appeals examiner" means a person appointed to conduct hearings under this part by the MNsure board and includes human services judges of the Department of Human Services and administrative law judges of the Office of Administrative Hearings, when acting under a delegation of authority from the MNsure board or its delegate.

Subp. 6. **Appellant.** "Appellant" means the person or small business employer submitting an appeal. Appellant includes the appellant's attorney or authorized representative. An appellant who is not a business owner may file an appeal on behalf of his or her own behalf or on behalf of the appellant's household.

Subp. 7. **Business Day.** "Business day" means any day other than a Saturday, Sunday, or legal holiday as defined in Minnesota Statutes, section 645.44.

Subp. 8.            **Business Hours.**            *Note: LSAP recommends this term be defined.*

Subp. 9.            **Chief appeals examiner.**            "Chief appeals examiner" means the chief human services judge of the Department of Human Services and the chief administrative law judge of the Office of Administrative Hearings, when acting under a delegation of authority from the MNSure board or its delegate.

Subp. 10.            **De novo review.**            "De novo review" means a review of an appeal without deference to prior decisions in the case.

Subp. 11.            **Eligibility.**            "Eligibility" means entitlement to coverage under any program or product offered through MNSure and includes determinations concerning terms, conditions, subsidies, or premiums related to a program or product offered through MNSure.

Subp. 12.            **MNSure board or board.**            "MNSure board" or "board" means the entity established in Minnesota Statutes, chapter 62V, as a board under Minnesota Statutes, section 15.012, and ~~regardless of whether it is followed by the phrase or its delegate~~ should be understood to include any individual or entity to whom the board has delegated a specific power or authority either directly or through an interagency agreement when that individual or entity is exercising the delegation.

Subp. 13.            **Party or parties.**            "Party" or "parties" means the ~~persons~~ appellants and agencies that are involved in an appeal and who have the legal right to make claims and defenses, offer proof, and examine and cross-examine witnesses during the appeal.

Subp. 14.            **Person.**            "Person" means ~~an individual or small business employer who, on behalf of themselves, their household, or their small business, is appealing, disputing, or challenging an action, a decision, or a failure to act, by MNSure or an agency in the human services system. When a person involved in a proceeding under this chapter is represented by an attorney or by an authorized representative, person also means the person's attorney or authorized representative. Any notice sent to the person involved in the hearing must also be sent to the person's attorney or authorized representative~~ a natural person.

Subp. 15.            **Preponderance of the evidence.**            "Preponderance of the evidence" means, in light of the record as a whole, the evidence leads the appeals examiner to believe that the finding of fact is more likely to be true than not true.

#### **7700.0105 MNSURE ELIGIBILITY APPEALS.**

Subpart 1.            **Eligibility.**

A.            MNSure appeals are available for the following actions:

(1) initial determinations and redeterminations of individual eligibility, including eligibility in a Qualified Health Plan, eligibility for and level of Advance Premium Tax Credit, and eligibility for and level of Cost Sharing Reductions, made in accordance with 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.305(a)-(h)); 78 Fed. Reg. 4715 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section

155.330); and 78 Fed. Reg. 4721 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.535);

(2) determinations of employer eligibility in the Small Business Health Options Program under Code of Federal Regulations, title 45, section 155.715(e); (3) determinations of employer eligibility in the Small Business Health Options Program under Code of Federal Regulations, title 45, section 155.715(f); (4) determinations of individual eligibility for an exemption made in accordance with federal guidance on exemptions pursuant to section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act; (5) a failure by MNsure to provide timely notice of an eligibility determination in accordance with 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(g), 78 Fed. Reg. 4715 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.330(e)(1)(ii), 78 Fed. Reg. 4716 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.335(h)(ii), or Code of Federal Regulations, title 45, section 155.715(e)-(f));

(3) determinations of employer eligibility in the Small Business Health Options Program under Code of Federal Regulations, title 45, section 155.715(f);

(4) determinations of individual eligibility for an exemption made in accordance with federal guidance on exemptions pursuant to section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act;

(5) a failure by MNsure to provide timely notice of an eligibility determination in accordance with 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(g), 78 Fed. Reg. 4715 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.330(e)(1)(ii), 78 Fed. Reg. 4716 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.335(h)(ii), or Code of Federal Regulations, title 45, section 155.715(e)-(f)); (6) in response to a notice under 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(h)),

(6) in response to a notice under 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(h)), a determination that an employer does not provide minimum coverage through an employer-sponsored plan or that the employer does provide coverage but is not affordable coverage with respect to an employee; and

(7) ~~medical assistance determinations of eligibility; and, level of benefits, services, or claims, or determinations that any such claim was not acted upon with reasonable promptness.~~

(8) MinnesotaCare Program determinations of eligibility and initial premium amounts.

B. ~~With the exception of the appeals described in item A, subitem (7), appeals are subject to the hearing processes in this part. The appeals described in item A, subitem (7), are subject to the hearing processes detailed at Minnesota Statutes, sections 256.045 and 256.0451. Nothing in these rules should be construed to supersede, abridge, or in any way limit the appeal rights of appellants contesting issues covered or not covered under these rules that are available under applicable federal or state statute or rule, including but not limited to Medical Assistance and MinnesotaCare appeal rights as~~

found in Minnesota Statutes sections 256.045, 256.0451, and 256L.10, and Minnesota Rules, Parts 9505.0130, 9505.5105, 9505.0545, and 9506.0070.

C. The agency may assist the applicant or enrollee in making the appeal.

Subp. 2. **Filing an appeal request.**

A. ~~A person~~ An appellant may file an appeal request in one of the following ways:

- (1) by mail;
- (2) by telephone;
- (3) by Internet; and
- (4) in person.

B. MNSure must provide the necessary contact information for each method of filing an appeal with each eligibility determination and through the MNSure Web site.

C. An appeal must be received by MNSure within 90 days from the date of the notice of the determination was received by the appellant. The date on which the notice of the determination is received means five days after the date on the notice, unless the ~~person~~ appellant demonstrates that ~~they~~ he or she did not receive the notice within the five-day period. An appeal received more than 90 days from the receipt of eligibility notice will be dismissed. If the deadline for filing an appeal falls on a Saturday, Sunday, or legal holiday, the filing date is the next regular business day. MNSure appeals pertaining to the medical assistance program and the MinnesotaCare Program, and regulated by Minnesota Statutes, sections 256.045 and 256.0451, which are governed under Minnesota Statutes, sections 256.045, 256.0451, and 256L.10, and Minnesota Rules, part 9505.0130, subpart 2, are subject to the 30-day filing deadlines and the ability to delay to 90 days upon a showing of good cause for failing to request a hearing within 30 days provided therein.

D. ~~Appeal request~~ forms will be available ~~to persons~~ through the Internet, by in-person request, by a request by mail, and by telephone. An appeal ~~request~~ must contain all of the following information:

- (1) name;
- (2) ~~MNSure identifier;~~
- (3) date of birth;
- (4) (3) address, including either an e-mail address, if available, or a mailing or physical address; and
- (5) ~~MNSure programs involved in the appeal, for which a list must be provided on the appeal request form;~~
- (6) (4) reason for the appeal; and
- (7) ~~in appeals of redeterminations, whether he appellant intends~~

~~to continue benefits at the same rate as before until the appeal decision.~~

Appeals shall be accepted even if not submitted on the form.

E. For ~~appeal requests~~ appeals submitted after business hours through the Internet or by telephone, the date of official receipt is the next business day.

Subp. 3. **Notices and communications.**

A. The parties to an appeal have the right to the following timely notices and communications:

(1) acknowledgement of the appeal request and scheduling order, including information regarding the appellant's eligibility pending appeal and an explanation that any advance payments of the premium tax credit paid on behalf of the tax filer pending appeal are subject to reconciliation; and

(2) the decision and order of the MNsure board.

B. Any notice sent to the appellant must also be sent to the appellant's attorney or authorized representative.

C. An appeals examiner shall not have ex parte contact on substantive issues with the agency, ~~or with any person the appellant, or any witness person involved in a hearing~~ an appeal. No agency employee shall review, interfere with, change, or attempt to influence the recommended decision of the appeals examiner in any ~~hearing~~ appeal, except through the procedures allowed herein. The limitations in this subpart do not affect the board's authority to review or make final decisions.

Subp. 4. **Rescheduling.**

A. Requests to reschedule a hearing must be made in person, by telephone, through the Internet, or mailed and postmarked to the appeals ~~office~~ examiner at least five days in advance of the regularly scheduled hearing date. A copy of the request must also be provided to the other party. The rescheduling request may be made orally or in writing.

B. Any rescheduling of a hearing with less than five days' advance notice will be at the discretion of the appeals examiner and granted only when the rescheduling does not prejudice any party to the rescheduling.

C. Unless a determination is made by the appeals ~~office~~ examiner that a request to reschedule a hearing is made for the purpose of delay, a hearing must be rescheduled by the appeals office for good cause as determined by the appeals ~~office~~ examiner. Good cause includes the following:

- (1) to accommodate a witness;
- (2) to obtain necessary evidence, preparation, or representation;
- (3) to review, evaluate, and respond to new evidence;
- (4) to permit negotiations of resolution between the parties;
- (5) to permit the agency to reconsider;
- (6) to permit actions not previously taken;
- (7) to accommodate a conflict of previously scheduled appointments;
- (8) to accommodate illness; or

(9) where an interpreter or translator, or services necessary to accommodate a person with a disability, are needed but not available; or

(10) any other compelling reasons beyond the control of the party that prevents attendance at the originally scheduled time.

D. A hearing may be rescheduled only once except in the case of an emergency. If requested by the appeals ~~office~~ examiner, a written statement confirming the reasons for the rescheduling request must be provided to the appeals ~~office~~ examiner by the requesting party.

Subp. 5. **Telephone, videoconference, or in-person hearing.**

A. An appellant has a right to a hearing. A hearing may be conducted by telephone, videoconference, or in person. An in-person appeals hearing

will only be held at the discretion of the appeals examiner, or if the ~~person~~ appellant asserts that ~~either the person or a witness has a physical or mental disability that would impair the person's~~ holding a hearing via telephone or videoconference would impair the appellant's ability to fully participate in a hearing ~~held by interactive video technology~~. To have the hearing conducted by videoconference or in person, a person must make a specific request for that type of hearing.

- B. When an in-person hearing is granted, the appeals examiner shall conduct the hearing in the county where the person involved resides, unless an alternate location is mutually agreed upon before the hearing.
- C. Where federal law or regulation does not require a telephone, videoconference, or in-person hearing and allows for a review of documentary evidence through a desk review, a telephone, videoconference, or in-person hearing will be provided unless the person agrees to a desk review ~~when the appeals examiner determines that such a hearing would materially assist in resolving the issues presented by the appeal~~.

Subp. 6. **Emergency expedited appeals.**

A. ~~A person~~ An appellant has a right to request an emergency expedited appeal when there is an immediate need for health services because a standard appeal could seriously jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function. A ~~person~~ An appellant must specify that an emergency expedited appeal is being requested when submitting the initial appeal ~~request~~.

B. If an emergency develops during a pending appeal such that there has developed an immediate need for health services because a standard appeal could seriously jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function, an appellant may request an expedited appeal ~~may be requested from the appeals examiner~~.

C. If a request for an expedited appeal is denied, the appellant will be notified according to the process and time period required under the applicable federal regulations.

D. If a request for an expedited appeal is accepted, the ~~appeals office~~ examiner will issue a decision according to the process and time period required under the applicable federal regulations.

Subp. 7. **Interpreter and translation services; accessibility.**

- A. Hearings must be accessible to appellants who have limited English proficiency, appellants who require interpreter and translation services, and appellants with disabilities. The appeals referee has a duty to inquire whether any person involved in the hearing for e services of an interpreter or translator or special requirements to accommodate a disability in order to participate in or to understand the hearing process.
- B. Necessary interpreter or translation services must be provided at no charge to the person involved in the hearing.
- D. If an appellant requests interpreter or translation services or special requirements to accommodate a disability or it appears to the appeals examiner that necessary interpreter or translation services are needed but not available for the scheduled hearing, the hearing shall be rescheduled to the next available date when the appropriate services can be provided.

Subp. 8. **Access to data.**

A. Subject to the requirements of all applicable state and federal laws regarding privacy, confidentiality, disclosure, and personally identifiable information, ~~the persons~~ appellants, persons, and agencies involved in an appeals hearing must be allowed to access the appeal record upon request at a convenient place and time before and during the appeals hearing. ~~The copies~~ Copies of the appeal record must be provided at no cost and, upon request, must be mailed or sent by electronic transmission to the party or the party's representative.

B. A person or appellant involved in an appeals hearing may enforce the right of access to data and copies of the case file by making a request to the appeals examiner. The appeals examiner shall make an appropriate order enforcing the ~~person's~~ rights of persons and appellants under the Minnesota Government Data Practices Act, including but not limited to ordering access to files, data, and documents; continuing or rescheduling an appeal hearing to allow adequate time for access to data; or prohibiting use by the agency of files, data, or documents that have been generated, collected, stored, or disseminated in violation of the requirements of the Minnesota Government Data Practices Act, or when the documents have not been provided to the person ~~involved in the appeal~~ or appellant.

Subp. 9. **Data practices.** ~~Data on individuals~~ persons and appellants will be collected throughout the appeals process. ~~During this process, evidence and testimony will be collected for the purpose of deciding an individual's rights under Minnesota and federal law.~~ A party to an appeal is not required to supply data for an appeal. ~~However, deciding which evidence and testimony to submit may have an impact on the outcome of the appeal decision.~~ Certain other government officials may have access to information provided throughout the appeals process if this is allowed by statute or pursuant to a valid court order. When the appeal proceeds beyond the MNsure appeals process to judicial review,

the appeal record will be public unless a protective order is issued. When the appeal proceeds outside of the MNsure appeals process to the United States Department of Health and Human Services, the record will be classified according to federal law governing the collection of data on individuals.

*Note: LSAP comments that data is not defined and the term data seems to be inaccurately conflated with evidence and testimony. LSAP questions why the subpart refers only to individuals and not to small business employers. LSAP urges MNsure to address these concerns in the Final Appeals Rules.*

Subp. 10. **Appeal summary.** The agency ~~involved in an appeal~~ must prepare an appeal summary for each appeal hearing. The appeal summary shall be delivered to the ~~person who is involved in the appeal~~ party and the MNsure Appeals Office ~~appeals examiner~~ at least three working days before the date of the appeal hearing. The appeals examiner shall confirm that the appeal summary is delivered to the ~~person party involved in the appeal~~ as required under this subpart. The ~~person party involved in the appeal hearing~~ should be provided, through the appeal summary or other reasonable methods, appropriate information about the procedures for the appeal hearing and an adequate opportunity to prepare. The contents of the appeal summary must be adequate to inform the ~~person involved in the appeal~~ party of the evidence on which the agency relies and the legal basis for the agency's action or determination.

Subp. 11. **Representation during appeal.** ~~A person~~ An appellant may personally appear in any appeal hearing and may be represented by an attorney or a duly authorized representative. A partnership may be represented by any of its members, an attorney, or other duly authorized representative. A corporation or association may be represented by an officer, an attorney, or other duly authorized representative. In cases involving unrepresented ~~persons~~ appellants, the appeals examiner shall examine witnesses and receive exhibits for the purpose of identifying and developing in the appeal record relevant facts necessary for making an informed and fair decision. An unrepresented ~~person~~ appellant shall be provided an adequate opportunity to respond to testimony or other evidence presented by the agency at the appeal hearing. The appeals examiner shall ensure that an unrepresented ~~person~~ appellant has a full and reasonable opportunity at the appeal hearing to establish a record for appeal.

Subp. 12. **Dismissals.**

A. The appeals ~~entity~~ examiner must dismiss an appeal if the appellant:

- (1) withdraws the ~~appeals request~~ appeal in writing;
- (2) fails to appear at a scheduled appeal hearing or prehearing conference and good cause is not shown;
- (3) fails to submit a valid appeal ~~request~~; or
- (4) dies while the appeal is pending.

B. If an appeal is dismissed, the appeals ~~entity~~ examiner must provide timely notice to the parties, which must include the reason for dismissal, an explanation of the dismissal's effect on the appellant's eligibility, and an explanation of how the appellant may show good cause why the dismissal should be vacated.

C. The appeals ~~entity~~ examiner may vacate a dismissal if the appellant makes a written request within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated. Good cause can be shown when there is:

(1) a death or serious illness in the person's family;

(2) a personal injury or illness that reasonably prevents ~~the person~~ an appellant or witness from attending the hearing;

(3) an emergency, crisis, or unforeseen event that reasonably prevents the person from attending the hearing;

(4) an obligation or responsibility of the ~~person~~ appellant or witness which a reasonable person, in the conduct of one's affairs, could reasonably determine takes precedence over attending the hearing;

(5) lack of or failure to receive timely notice of the hearing in the preferred language of the appellant ~~person involved in the hearing~~; or

(6) excusable neglect, excusable inadvertence, excusable mistake, or other good cause as determined by the appeals examiner.

Subp. 13. **Prehearing conferences.**

A. The appeals examiner, at the examiner's discretion, prior to an appeal hearing may hold a prehearing conference to further the interests of justice or efficiency. The ~~person involved in the appeal parties, or that person's representative,~~ must participate in any prehearing conference held. A ~~person involved in an appeal hearing~~ party or the agency may request a prehearing conference. The prehearing conference may be conducted by telephone, in writing, or in person. The prehearing conference may address the following issues:

(1) disputes regarding access to files, evidence, subpoenas, or testimony;

(2) the time required for the hearing or any need for expedited procedures or decision;

(3) identification or clarification of legal or other issues that may arise at the hearing;

(4) identification of and possible agreement to factual issues; and

(5) scheduling and any other matter that will aid in the proper and fair functioning of the hearing.

B. The appeals examiner shall make a record or otherwise contemporaneously summarize the prehearing conference in writing, which shall be sent to:

(1) ~~the person involved in the hearing~~ parties; ~~and~~

(2) ~~the person's~~ party's attorney or authorized representative; ~~and~~

~~(3) the agency.~~

**Subp. 14. Disqualification of appeals examiner.**

A. ~~An~~ The chief appeals examiner shall remove an appeals examiner ~~must be removed~~ from any case where the appeals examiner believes that presiding over the case would create the appearance of unfairness or impropriety. No appeals examiner may hear any case where any of the parties to the appeal are related to the appeals examiner by blood or marriage. An appeals examiner must not hear any case if the appeals examiner has a financial or personal interest in the outcome. An appeals examiner having knowledge of such a relationship or interest must immediately be removed from the case.

B. A party may move for the removal of an appeals examiner by written application of the party together with a statement of the basis for removal. Upon the motion of the party, the chief appeals examiner must decide whether the appeals examiner may hear the particular case.

**Subp. 15. Status of benefits pending appeal.** In appeals involving a redetermination of ~~a person's~~ an appellant's eligibility for a certain benefit, the ~~person~~ appellant shall continue to receive those benefits for which the ~~person~~ appellant was previously determined eligible pending appeal, unless the ~~person~~ appellant specifically requests not to continue to receive that benefit pending appeal.

**Subp. 16. Commencement and conduct of hearing.**

A. The appeals examiner shall begin each hearing by describing the process to be followed in the hearing, including the swearing in of witnesses, how testimony and evidence are presented, the rights of the parties to request subpoenas, the order of examining and cross-examining witnesses, and the opportunity for an opening statement and a closing statement. The appeals examiner shall identify for the ~~participants~~ parties the issues to be addressed at the hearing and shall explain to the ~~participants~~ parties the burden of proof that applies to the ~~person involved~~ appellant and the agency. The appeals examiner shall confirm, prior to proceeding with the hearing, that the ~~state agency~~ appeal summary, if prepared, has been properly

completed and provided to the ~~person~~ parties involved in the hearing, and that the ~~person has~~ parties have been provided documents and an opportunity to review the case file, as provided in this part.

B. The appeals examiner shall act in a fair and impartial manner at all times. At the beginning of the appeal hearing, the agency must designate one person as a representative who shall be responsible for presenting the agency's evidence and questioning any witnesses. The appeals examiner shall make sure that ~~the person and the agency~~ both the agency and the appellant are provided sufficient time to present testimony and evidence, to confront and cross-examine all adverse witnesses, and to make any relevant statement at the hearing. All testimony in the hearing will be taken under oath or affirmation. The appeals examiner shall make reasonable efforts to explain the appeal hearing process to ~~persons who are not represented~~ unrepresented appellants and shall ensure that the hearing is conducted fairly and efficiently. Upon the reasonable request of the ~~person or the agency involved~~ appellant or agency or at the discretion of the appeals examiner, the appeals examiner shall direct witnesses to remain outside the hearing room, except during individual testimony, when the appeals examiner determines that such action is appropriate to ensure a fair and impartial hearing. The appeals examiner shall not terminate the hearing before affording the ~~person~~ appellant and the agency a complete opportunity to submit all admissible evidence and reasonable opportunity for oral or written statement. In the event that an appeal hearing extends beyond the time allotted, the appeal hearing shall be continued from day to day until completion. Appeal hearings that have been continued shall be timely scheduled to minimize delay in the disposition of the appeal.

C. The appeal hearing shall be a de novo review and shall address the correctness and legality of the agency's action and shall not be limited simply to a review of the propriety of the agency's action. The ~~person involved~~ appellant may raise and present evidence on all legal claims or defenses arising under state or federal law as a basis for the appeal ~~appealing or disputing an agency action~~, excluding any constitutional claims that are beyond the jurisdiction of the appeal hearing. The appeals examiner may take official notice of adjudicative facts.

D. The burden of persuasion is governed by specific state or federal law and regulations that apply to the subject of the hearing. Unless otherwise required by specific state or federal laws that apply to the subject of the appeal, the ~~person filing the appeal~~ appellant carries the burden to persuade the appeals examiner that a claim is true and must demonstrate such by a preponderance of the evidence.

E. The appeals examiner shall accept all evidence, except evidence privileged by law, that is commonly accepted by reasonable people in the conduct of their affairs as having probative value on the issues to be addressed at the appeal hearing. In cases involving medical issues such as a diagnosis, a physician's report, or a review team's decision, the appeals examiner shall consider whether it is necessary to have a medical assessment other than that of the individual making the original decision included in the ~~record of the appeal~~ record. When necessary, the appeals examiner shall require an additional assessment be obtained at agency expense and made part of the hearing appeal record. The appeals examiner shall ensure for all cases that the appeal record is sufficiently complete to make a fair and accurate decision.

F. The agency must present its evidence prior to or at the appeal hearing. The agency shall not be permitted to submit evidence after the hearing except by agreement at the hearing between the ~~person involved~~ appellant, the agency, and the appeals examiner. If evidence is submitted after the appeal hearing, based on an agreement, the ~~person involved~~ appellant and the agency must be allowed sufficient opportunity to respond to the evidence. When determined necessary by the

appeals examiner, the appeal record shall remain open to permit a person an appellant to submit additional evidence on the issues presented at the appeal hearing.

G. A party may request a subpoena for a witness, for evidence or for both. A reasonable number of subpoenas shall be issued to require the attendance and the testimony of witnesses, and the production of evidence relating to any issue of fact in the appeal hearing. The request for a subpoena must show a need for the subpoena and the general relevance to the issues involved. A written petition to vacate or modify a subpoena may be submitted to the appeals examiner, who shall resolve the petition in the prehearing conference involving all parties and shall make a written decision. A subpoena may be vacated or modified if the appeals examiner determines that the testimony or evidence sought does not relate with reasonable directness to the issues of the appeals hearing; that the subpoena is unreasonable, over broad, or oppressive; that the evidence sought is repetitious or cumulative; or that the subpoena has not been served reasonably in advance of the time when the appeal hearing will be held.

Subp. 17. **Orders of the MNsure board ~~or its delegate.~~**

A. A timely, written decision must be issued in every appeal. Each decision must contain a clear ruling on the issues presented in the appeal hearing and contain a ruling only on questions directly presented by the appeal and the arguments raised in the appeal.

B. A written decision must be issued within 90 days of the date the ~~person~~ involved requested the appeal appellant appealed, unless a shorter time is required by law.

C. The decision must contain both findings of fact and conclusions of law, clearly separated and identified. The findings of fact must be based on the entire appeal record. Each finding of fact made by the appeals examiner shall be supported by a preponderance of the evidence unless a different standard is required under the regulations of a particular program. The legal claims or arguments of a participant do not constitute either a finding of fact or a conclusion of law, except to the extent the appeals examiner explicitly adopts an argument as a finding of fact or conclusion of law.

D. The decision shall contain at least the following:

(1) a listing of the date and place of the appeal hearing and the ~~participants~~ parties and persons appearing at the appeal hearing;

(2) a clear and precise statement of the issues, including the dispute ~~under consideration~~ that is the subject of the appeal and the specific points that must be resolved in order to decide the case;

(3) a listing of the material, including exhibits, records, and reports, placed into evidence at the appeal hearing, and upon which the appeal hearing decision is based;

(4) the findings of fact based upon the entire appeal hearing record. The findings of fact must be adequate to inform the ~~participants and any interested person in parties and~~ the public of the basis of the decision. If the evidence is in conflict on an issue that must be resolved, the findings of fact must state the reasoning used in resolving the conflict;

(5) conclusions of law that address the legal authority for the appeal hearing and the ruling, and which give appropriate attention to the claims of the ~~participants to~~ the appeal hearing parties;

(6) a clear and precise statement of the decision made resolving the dispute ~~under consideration in the appeal hearing that is the subject of the appeal~~; and

(7) written notice of any existing right to appeal, and of the actions required and the time limits for taking appropriate action to appeal.

E. The appeals examiner shall not independently investigate facts or otherwise rely on information not presented at the appeal hearing. The appeals examiner may not contact other agency personnel, except as provided in subpart 16. The appeals examiner's recommended decision must be based exclusively on the testimony and evidence presented at the appeal hearing, legal arguments presented, and the appeals examiner's research and knowledge of the law.

F. The MNSure board ~~or its delegated representative~~ shall review the recommended decision and accept or refuse to accept the decision. The MNSure board ~~or delegate~~ may accept the recommended order of an appeals examiner and issue the order to the parties. ~~The MNSure board or delegate may or refuse to accept the decision. Upon refusal, the MNSure board or delegate shall notify the parties of that fact the refusal, and state the reasons, and shall allow each party ten days to submit additional written argument on the matter. After the expiration of the ten-day period, the MNSure board or delegate shall issue an order on the matter to the parties. Refusal of the MNSure board or delegate to accept a decision must not delay the 90-day time limit to issue a decision. Any delay shall not prejudice the appellant.~~

Subp. 18. **Public access to hearings and decisions.** Appeal decisions must be maintained in a manner so that the public has ready access to previous decisions on particular topics, subject to appropriate procedures for safeguarding names, personal identifying information, and other data protected by applicable state and federal laws regarding privacy, confidentiality, disclosure, and personally identifiable information. Appeal hearings conducted under this part are not open to the public due to the not public classification of the information provided for inclusion in the appeal record.

Subp. 19. **Administrative review.**

A. Administrative review by the United States Department of Health and Human Services may be available for parties aggrieved by an order of the MNsure board.

B. An appeal under this part must be filed with the United States Department of Health and Human Services and MNsure according to the process and time period required under the applicable federal regulations.

Subp. 20. **Judicial Review.** An appellant has the right to judicial review of an agency decision. The decision must advise the parties of the right to judicial review.

*OR*

Subp. 20. **Judicial Review.** An appellant may seek judicial review to the extent it is available by law.

# **APPENDIX B**

## **Recommended Final Exempt Permanent Rules Relating to MNsure Appeals**

**MNsure**

**Proposed Exempt Permanent Rules Relating to MNsure Appeals**

**7700.0100 ADMINISTRATIVE REVIEW OF MNSURE ELIGIBILITY DETERMINATIONS.**

Subpart 1. **Applicability.** Parts 7700.0100 to 7700.0105 govern the administration of MNsure eligibility appeals. Parts 7700.0100 to 7700.0105 must be read in conjunction with the federal Affordable Care Act, Public Law 111-148; Code of Federal Regulations, title 1.8 45, part 155; and Minnesota Statutes, chapter 62V; and sections 256.045 and 256.0451.

#### **7700.0101 DEFINITIONS.**

Subpart 1. **Scope.** As used in parts 7700.0100 to 7700.0105, the terms defined in this part have the meanings given them.

Subp. 2. **Agency.** Agency" means the entity that lawfully made the eligibility determination being contested. Agency includes MNsure, the Department of Human Services, and the county human services agency, and, where applicable, any entity involved under a contract, subcontract, grant, or subgrant with MNsure, the Department of Human Services, or with a county agency, that provides or operates programs or services in which appeals are governed.

Subp. 3. **Appeal.** "Appeal" means a challenge to or dispute of: (1) an initial determination or redetermination of eligibility for Medical Assistance, MinnesotaCare, federal tax subsidies, or any other program or product offered through MNsure; (2) an action, a decision, or the failure to act by MNsure or an agency; (3) any specific act or decision enumerated under Minnesota Rules, section 7700.0105, subpart 1 A; and (4) any other claims involving applications for programs and products offered through MNsure.

Subp. 4. **Appeal record.** "Appeal record" means all relevant records pertaining to the contested issue, including eligibility records, the appeal decision, all papers and requests filed in the proceeding, and if a hearing is held, the recording of the hearing testimony or an official report containing the substance of what happened at the hearing and any exhibits introduced at the hearing.

Subp. 5. **Appeals examiner.** "Appeals examiner" means a person appointed to conduct hearings under this part by the MNsure board and includes human services judges of the Department of Human Services and administrative law judges of the Office of Administrative Hearings, when acting under a delegation of authority from the MNsure board or its delegate.

Subp. 6. **Appellant.** "Appellant" means the person or small business employer submitting an appeal. Appellant includes the appellant's attorney or authorized representative. An appellant who is not a business owner may file an appeal on behalf of his or her own behalf or on behalf of the appellant's household.

Subp. 7. **Business Day.** "Business day" means any day other than a Saturday, Sunday, or legal holiday as defined in Minnesota Statutes, section [645.44](#).

Subp. 8. **Business Hours.***Note: LSAP recommends this term be defined.*

Subp. 9. **Chief appeals examiner.** "Chief appeals examiner" means the chief human services judge of the Department of Human Services and the chief administrative law judge of the Office of Administrative Hearings, when acting under a delegation of authority from the MNsure board or its delegate.

Subp. 10. **De novo review.** "De novo review" means a review of an appeal without deference to prior decisions in the case.

Subp. 11. **Eligibility.** "Eligibility" means entitlement to coverage under any program or product offered through MNsure and includes determinations concerning terms, conditions, subsidies, or premiums related to a program or product offered through MNsure.

Subp. 12. **MNsure board or board.** "MNsure board" or "board" means the entity established in Minnesota Statutes, chapter 62V, as a board under Minnesota Statutes, section 15.012, and should be understood to include any individual or entity to whom the board has delegated a specific power or authority either directly or through an interagency agreement when that individual or entity is exercising the delegation.

Subp. 13. **Party or parties.** "Party" or "parties" means the appellants and agencies that are involved in an appeal and who have the legal right to make claims and defenses, offer proof, and examine and cross-examine witnesses during the appeal.

Subp. 14. **Person.** "Person" means a natural person.

Subp. 15. **Preponderance of the evidence.** "Preponderance of the evidence" means, in light of the record as a whole, the evidence leads the appeals examiner to believe that the finding of fact is more likely to be true than not true.

## **7700.0105 MNSURE ELIGIBILITY APPEALS.**

Subpart 1. **Eligibility.**

A. MNsure appeals are available for the following actions:

(1) initial determinations and redeterminations of individual eligibility, including eligibility in a Qualified Health Plan, eligibility for and level of Advance Premium Tax Credit, and eligibility for and level of Cost Sharing Reductions, made in accordance with 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.305(a)-(h)); 78 Fed. Reg. 4715 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.330); and 78 Fed. Reg. 4721 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.535);

(2) determinations of employer eligibility in the Small Business Health Options Program under Code of Federal Regulations, title 45, section 155.715(e); (3) determinations of employer eligibility in the Small Business Health Options Program under Code of Federal Regulations, title 45, section 155.715(f); (4) determinations of individual eligibility for an exemption made in accordance with

federal guidance on exemptions pursuant to section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act; (5) a failure by MNsure to provide timely notice of an eligibility determination in accordance with 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(g), 78 Fed. Reg. 4715 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.330(e)(1)(ii), 78 Fed. Reg. 4716 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.335(h)(ii), or Code of Federal Regulations, title 45, section 155.715(e)-(f));

(3) determinations of employer eligibility in the Small Business Health Options Program under Code of Federal Regulations, title 45, section 155.715(f);

(4) determinations of individual eligibility for an exemption made in accordance with federal guidance on exemptions pursuant to section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act;

(5) a failure by MNsure to provide timely notice of an eligibility determination in accordance with 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(g), 78 Fed. Reg. 4715 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.330(e)(1)(ii), 78 Fed. Reg. 4716 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.335(h)(ii), or Code of Federal Regulations, title 45, section 155.715(e)-(f)); (6) in response to a notice under 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(h)),

(6) in response to a notice under 78 Fed. Reg. 4712 (proposed January 22, 2013) (to be codified at Code of Federal Regulations, title 45, section 155.310(h)), a determination that an employer does not provide minimum coverage through an employer-sponsored plan or that the employer does provide coverage but is not affordable coverage with respect to an employee;

(7) medical assistance determinations of eligibility; and

(8) MinnesotaCare Program determinations of eligibility and initial premium amounts.

B. Nothing in these rules should be construed to supersede, abridge, or in any way limit the appeal rights of appellants contesting issues covered or not covered under these rules that are available under applicable federal or state statute or rule, including but not limited to Medical Assistance and MinnesotaCare appeal rights as found in Minnesota Statutes sections 256.045, 256.0451, and 256L.10, and Minnesota Rules, Parts 9505.0130, 9505.5105, 9505.0545, and 9506.0070.

C. The agency may assist the applicant or enrollee in making the appeal.

Subp. 2. **Filing an appeal.**

A. An appellant may file an appeal request in one of the following ways:

(1) by mail;

(2) by telephone;

(3) by Internet; and

(4) in person.

B. MNSure must provide the necessary contact information for each method of filing an appeal with each eligibility determination and through the MNSure Web site.

C. An appeal must be received by MNSure within 90 days from the date the notice of the determination was received by the appellant. The date on which the notice of the determination is received means five days after the date on the notice, unless the appellant demonstrates that he or she did not receive the notice within the five-day period. An appeal received more than 90 days from the receipt of eligibility notice will be dismissed. If the deadline for filing an appeal falls on a Saturday, Sunday, or legal holiday, the filing date is the next regular business day. MNSure appeals pertaining to the medical assistance program and the MinnesotaCare Program, which are governed under Minnesota Statutes, sections 256.045, 256.0451, and 256L.10, and Minnesota Rules, part 9505.0130, subpart 2, are subject to the 30-day filing deadlines and the ability to delay to 90 days upon a showing of good cause for failing to request a hearing within 30 days provided therein.

D. Appeal forms will be available through the Internet, by in-person request, by a request by mail, and by telephone. An appeal must contain all of the following information:

- (1) name;
- (2) date of birth;
- (3) address, including either an e-mail address, if available, or a mailing or physical address; and
- (4) reason for the appeal.

Appeals shall be accepted even if not submitted on the form.

E. For appeals submitted after business hours through the Internet or by telephone, the date of official receipt is the next business day.

Subp. 3. **Notices and communications.**

A. The parties to an appeal have the right to the following timely notices and communications:

- (1) acknowledgement of the appeal and scheduling order, including Information regarding the appellant's eligibility pending appeal and an explanation that any advance

payments of the premium tax credit paid on behalf of the tax filer pending appeal are subject to reconciliation; and

(2) the decision and order of the MNsure board.

B. Any notice sent to the appellant must also be sent to the appellant's attorney or authorized representative.

C. An appeals examiner shall not have ex parte contact on substantive issues with the agency, the appellant, or any person involved in an appeal. No agency employee shall review, interfere with, change, or attempt to influence the recommended decision of the appeals examiner in any appeal, except through the procedures allowed herein. The limitations in this subpart do not affect the board's authority to review or make final decisions.

Subp. 4. **Rescheduling.**

A. Requests to reschedule a hearing must be made in person, by telephone, through the Internet, or mailed and postmarked to the appeals examiner at least five days in advance of the regularly scheduled hearing date. A copy of the request must also be provided to the other party. The rescheduling request may be made orally or in writing.

B. Any rescheduling of a hearing with less than five days' advance notice will be at the discretion of the appeals examiner and granted only when the rescheduling does not prejudice any party to the rescheduling.

C. Unless a determination is made by the appeals examiner that a request to reschedule a hearing is made for the purpose of delay, a hearing must be rescheduled by the appeals office for good cause as determined by the appeals examiner. Good cause includes the following:

- (1) to accommodate a witness;
- (2) to obtain necessary evidence, preparation, or representation;
- (3) to review, evaluate, and respond to new evidence;
- (4) to permit negotiations of resolution between the parties;
- (5) to permit the agency to reconsider;
- (6) to permit actions not previously taken;
- (7) to accommodate a conflict of previously scheduled appointments;
- (8) to accommodate illness; or

(9) where an interpreter or translator, or services necessary to accommodate a person with a disability, are needed but not available; or

(10) any other compelling reasons beyond the control of the party that prevents attendance at the originally scheduled time.

D. A hearing may be rescheduled only once except in the case of an emergency. If requested by the appeals office examiner, a written statement confirming the reasons for the rescheduling request must be provided to the appeals examiner by the requesting party.

**Subp. 5. Telephone, videoconference, or in-person hearing.**

A. An appellant has a right to a hearing. A hearing may be conducted by telephone, videoconference, or in person. An in-person appeals hearing will only be held at the discretion of the appeals examiner, or if the appellant asserts that holding a hearing via telephone or videoconference would impair the appellant's ability to fully participate in a hearing. To have the hearing conducted by videoconference or in person, a person must make a specific request for that type of hearing.

B. When an in-person hearing is granted, the appeals examiner shall conduct the hearing in the county where the person involved resides, unless an alternate location is mutually agreed upon before the hearing.

C. Where federal law or regulation does not require a telephone, videoconference, or in-person hearing and allows for a review of documentary evidence through a desk review, a telephone, videoconference, or in-person hearing will be provided unless the person agrees to a desk review.

**Subp. 6. Emergency expedited appeals.**

A. An appellant has a right to request an emergency expedited appeal when there is an immediate need for health services because a standard appeal could seriously jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function. An appellant must specify that an emergency expedited appeal is being requested when submitting the initial appeal.

B. If an emergency develops during a pending appeal such that there has developed an immediate need for health services because a standard appeal could seriously jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function, an appellant may request an expedited appeal.

C. If a request for an expedited appeal is denied, the appellant will be notified according to the process and time period required under the applicable federal regulations.

D. If a request for an expedited appeal is accepted, the appeals examiner will issue a decision according to the process and time period required under the applicable federal regulations.

**Subp. 7. Interpreter and translation services; accessibility.** Hearings must be accessible to appellants who have limited English proficiency, appellants who require interpreter

and translation services, and appellants with disabilities. The appeals referee has a duty to inquire and to determine whether any person involved in the hearing needs the services of an interpreter or translator or special requirements to address a disability in order to participate in or to understand the hearing process. Necessary interpreter or translation services must be provided at no charge to the person involved in the hearing. If it appears to the appeals examiner that necessary interpreter or translation services are needed but not available for the scheduled hearing, the hearing shall be rescheduled to the next available date when the appropriate services can be provided.

Subp. 8. **Access to data.**

A. Subject to the requirements of all applicable state and federal laws regarding privacy, confidentiality, disclosure, and personally identifiable information, the appellants, persons, and agencies involved in an appeals hearing must be allowed to access the appeal record upon request at a convenient place and time before and during the appeals hearing. Copies of the appeal record must be provided at no cost and, upon request, must be mailed or sent by electronic transmission to the party or the party's representative.

B. A person or appellant may enforce the right of access to data and copies of the case file by making a request to the appeals examiner. The appeals examiner shall make an appropriate order enforcing the rights of persons and appellants under the Minnesota Government Data Practices Act, including but not limited to ordering access to files, data, and documents; continuing or rescheduling an appeal hearing to allow adequate time for access to data; or prohibiting use by the agency of files, data, or documents that have been generated, collected, stored, or disseminated in violation of the requirements of the Minnesota Government Data Practices Act, or when the documents have not been provided to the person or appellant.

Subp. 9. **Data practices.** Data on individuals persons and appellants will be collected throughout the appeals process. A party to an appeal is not required to supply data for an appeal. Certain other government officials may have access to information provided throughout the appeals process if this is allowed by statute or pursuant to a valid court order. When the appeal proceeds beyond the MNsure appeals process to judicial review, the appeal record will be public unless a protective order is issued. When the appeal proceeds outside of the MNsure appeals process to the United States Department of Health and Human Services, the record will be classified according to federal law governing the collection of data on individuals.

*Note: LSAP comments that data is not defined and the term data seems to be inaccurately conflated with evidence and testimony. LSAP questions why the subpart refers only to individuals and not to small business employers. LSAP urges MNsure to address these concerns in the Final Appeals Rules.*

Subp. 10. **Appeal summary.** The agency must prepare an appeal summary for each appeal hearing. The appeal summary shall be delivered to the party and the MNSure appeals examiner at least three working days before the date of the appeal hearing. The appeals examiner shall confirm that the appeal summary is delivered to the party as required under this subpart. The party should be provided, through the appeal summary or other reasonable methods, appropriate information about the procedures for the appeal hearing and an adequate opportunity to prepare. The contents of the appeal summary must be adequate to inform the party of the evidence on which the agency relies and the legal basis for the agency's action or determination.

Subp. 11. **Representation during appeal.** An appellant may personally appear in any appeal hearing and may be represented by an attorney or a duly authorized representative. A partnership may be represented by any of its members, an attorney, or other duly authorized representative. A corporation or association may be represented by an officer, an attorney, or other duly authorized representative. In cases involving unrepresented appellants, the appeals examiner shall examine witnesses and receive exhibits for the purpose of identifying and developing in the appeal record relevant facts necessary for making an informed and fair decision. An unrepresented appellant shall be provided an adequate opportunity to respond to testimony or other evidence presented by the agency at the appeal hearing. The appeals examiner shall ensure that an unrepresented appellant has a full and reasonable opportunity at the appeal hearing to establish a record for appeal.

Subp. 12. **Dismissals.**

A. The appeals examiner must dismiss an appeal if the appellant:

(1) withdraws the appeal in writing;

(2) fails to appear at a scheduled appeal hearing or prehearing conference and good cause is not shown;

(3) fails to submit a valid appeal; or

(4) dies while the appeal is pending.

B. If an appeal is dismissed, the appeals examiner must provide timely notice to the parties, which must include the reason for dismissal, an explanation of the dismissal's effect on the appellant's eligibility, and an explanation of how the appellant may show good cause why the dismissal should be vacated.

C. The appeals examiner may vacate a dismissal if the appellant makes a written request within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated. Good cause can be shown when there is:

(1) a death or serious illness in the person's family;

(2) a personal injury or illness that reasonably prevents an appellant or witness from attending the hearing;

(3) an emergency, crisis, or unforeseen event that reasonably prevents the person from attending the hearing;

(4) an obligation or responsibility of the appellant or witness which a reasonable person, in the conduct of one's affairs, could reasonably determine takes precedence over attending the hearing;

(5) lack of or failure to receive timely notice of the hearing in the preferred language of the appellant; or

(6) excusable neglect, excusable inadvertence, excusable mistake, or other good cause as determined by the appeals examiner.

**Subp. 13. Prehearing conferences.**

A. The appeals examiner, at the examiner's discretion, prior to an appeal hearing may hold a prehearing conference to further the interests of justice or efficiency. The parties must participate in any prehearing conference held. A party may request a prehearing conference. The prehearing conference may be conducted by telephone, in writing, or in person. The prehearing conference may address the following issues:

(1) disputes regarding access to files, evidence, subpoenas, or testimony;

(2) the time required for the hearing or any need for expedited procedures or decision;

(3) identification or clarification of legal or other issues that may arise at the hearing;

(4) identification of and possible agreement to factual issues; and

(5) scheduling and any other matter that will aid in the proper and fair functioning of the hearing.

B. The appeals examiner shall make a record or otherwise contemporaneously summarize the prehearing conference in writing, which shall be sent to:

(1) the parties; and

(2) the party's attorney or authorized representative;~~and~~

**Subp. 14. Disqualification of appeals examiner.**

A. The chief appeals examiner shall remove an appeals examiner from any case where the appeals examiner believes that presiding over the case would create the appearance of unfairness or impropriety. No appeals examiner may hear any case where any of the parties to the appeal are related to the appeals examiner by blood or marriage. An appeals examiner must not hear any case if the appeals examiner has a financial or personal interest in the outcome. An appeals examiner having knowledge of such a relationship or interest must immediately be removed from the case.

B. A party may move for the removal of an appeals examiner by written application of the party together with a statement of the basis for removal. Upon the motion of the party, the chief appeals examiner must decide whether the appeals examiner may hear the particular case.

**Subp. 15. Status of benefits pending appeal.** In appeals involving a redetermination of an appellant's eligibility for a certain benefit, the appellant shall continue to receive those benefits for which the appellant was previously determined eligible pending appeal, unless the appellant specifically requests not to continue to receive that benefit pending appeal.

**Subp. 16. Commencement and conduct of hearing.**

A. The appeals examiner shall begin each hearing by describing the process to be followed in the hearing, including the swearing in of witnesses, how testimony and evidence are presented, the rights of the parties to request subpoenas, the order of examining and cross-examining witnesses, and the opportunity for an opening statement and a closing statement. The appeals examiner shall identify for the parties the issues to be addressed at the hearing and shall explain to the parties the burden of proof that applies to the appellant and the agency. The appeals examiner shall confirm, prior to proceeding with the hearing, that the appeal summary, if prepared, has been properly completed and provided to the parties, and that the parties have been provided documents and an opportunity to review the case file, as provided in this part.

B. The appeals examiner shall act in a fair and impartial manner at all times. At the beginning of the appeal hearing, the agency must designate one person as a representative who shall be responsible for presenting the agency's evidence and questioning any witnesses. The appeals examiner shall make sure that both the agency and the appellant are provided sufficient time to present testimony and evidence, to confront and cross-examine all adverse witnesses, and to make any relevant statement at the hearing. All testimony in the hearing will be taken under oath or affirmation. The appeals examiner shall make reasonable efforts to explain the appeal hearing process to unrepresented appellants and shall ensure that the hearing is conducted fairly and efficiently. Upon the reasonable request of the appellant or agency or at the discretion of the appeals examiner, the appeals examiner shall direct witnesses to remain outside the hearing room, except during individual testimony, when the appeals examiner determines that such action is appropriate to ensure a fair and impartial hearing. The appeals examiner shall not terminate the hearing before affording the appellant and the agency a complete opportunity to submit all admissible evidence and reasonable opportunity for oral or written

statement. In the event that an appeal hearing extends beyond the time allotted, the appeal hearing shall be continued from day to day until completion. Appeal hearings that have been continued shall be timely scheduled to minimize delay in the disposition of the appeal.

C. The appeal hearing shall be a de novo review and shall address the correctness and legality of the agency's action and shall not be limited simply to a review of the propriety of the agency's action. The appellant may raise and present evidence on all legal claims or defenses arising under state or federal law as a basis for the appeal, excluding any constitutional claims that are beyond the jurisdiction of the appeal hearing. The appeals examiner may take official notice of adjudicative facts.

D. The burden of persuasion is governed by specific state or federal law and regulations that apply to the subject of the hearing. Unless otherwise required by specific state or federal laws that apply to the subject of the appeal, the appellant carries the burden to persuade the appeals examiner that a claim is true and must demonstrate such by a preponderance of the evidence.

E. The appeals examiner shall accept all evidence, except evidence privileged by law, that is commonly accepted by reasonable people in the conduct of their affairs as having probative value on the issues to be addressed at the appeal hearing. In cases involving medical issues such as a diagnosis, a physician's report, or a review team's decision, the appeals examiner shall consider whether it is necessary to have a medical assessment other than that of the individual making the original decision included in the appeal record. When necessary, the appeals examiner shall require an additional assessment be obtained at agency expense and made part of the appeal record. The appeals examiner shall ensure for all cases that the appeal record is sufficiently complete to make a fair and accurate decision.

F. The agency must present its evidence prior to or at the appeal hearing. The agency shall not be permitted to submit evidence after the hearing except by agreement at the hearing between the appellant, the agency, and the appeals examiner. If evidence is submitted after the appeal hearing, based on an agreement, the appellant and the agency must be allowed sufficient opportunity to respond to the evidence. When determined necessary by the appeals examiner, the appeal record shall remain open to permit an appellant to submit additional evidence on the issues presented at the appeal hearing.

G. A party may request a subpoena for a witness, for evidence or for both. A reasonable number of subpoenas shall be issued to require the attendance and the testimony of witnesses, and the production of evidence relating to any issue of fact in the appeal hearing. The request for a subpoena must show a need for the subpoena and the general relevance to the issues involved. A written petition to vacate or modify a subpoena may be submitted to the appeals examiner, who shall resolve the petition in the prehearing conference involving all parties and shall make a written decision. A subpoena may be vacated or modified if the appeals examiner determines that the testimony or evidence sought does not relate with reasonable directness to the issues of the appeals

hearing; that the subpoena is unreasonable, over broad, or oppressive; that the evidence sought is repetitious or cumulative; or that the subpoena has not been served reasonably in advance of the time when the appeal hearing will be held.

Subp. 17. **Orders of the MNsure board ~~or its delegate~~.**

A. A timely, written decision must be issued in every appeal. Each decision must contain a clear ruling on the issues presented in the appeal hearing and contain a ruling only on questions directly presented by the appeal and the arguments raised in the appeal.

B. A written decision must be issued within 90 days of the date the appellant appealed, unless a shorter time is required by law.

C. The decision must contain both findings of fact and conclusions of law, clearly separated and identified. The findings of fact must be based on the entire appeal record. Each finding of fact made by the appeals examiner shall be supported by a preponderance of the evidence unless a different standard is required under the regulations of a particular program. The legal claims or arguments of a participant do not constitute either a finding of fact or a conclusion of law, except to the extent the appeals examiner explicitly adopts an argument as a finding of fact or conclusion of law.

D. The decision shall contain at least the following:

(1) a listing of the date and place of the appeal hearing and the parties and persons appearing at the appeal hearing;

(2) a clear and precise statement of the issues, including the dispute that is the subject of the appeal and the specific points that must be resolved in order to decide the case;

(3) a listing of the material, including exhibits, records, and reports, placed into evidence at the appeal hearing, and upon which the appeal hearing decision is based;

(4) the findings of fact based upon the entire appeal hearing record. The findings of fact must be adequate to inform the parties and the public of the basis of the decision. If the evidence is in conflict on an issue that must be resolved, the findings of fact must state the reasoning used in resolving the conflict;

(5) conclusions of law that address the legal authority for the appeal hearing and the ruling, and which give appropriate attention to the claims of the parties;

(6) a clear and precise statement of the decision made resolving the dispute that is the subject of the appeal; and

(7) written notice of any existing right to appeal, and of the actions required and the time limits for taking appropriate action to appeal.

E. The appeals examiner shall not independently investigate facts or otherwise rely on information not presented at the appeal hearing. The appeals examiner may not contact other agency personnel, except as provided in subpart 16. The appeals examiner's recommended decision

must be based exclusively on the testimony and evidence presented at the appeal hearing, legal arguments presented, and the appeals examiner's research and knowledge of the law.

F. The MNsure board shall review the recommended decision and accept or refuse to accept the decision. The MNsure board may accept the recommended order of an appeals examiner and issue the order to the parties or refuse to accept the decision. Upon refusal, the MNsure board shall notify the parties of the refusal, state the reasons, and allow each party ten days to submit additional written argument on the matter. After the expiration of the ten-day period, the MNsure board shall issue an order on the matter to the parties. Refusal of the MNsure board to accept a decision must not delay the 90-day time limit to issue a decision. Any delay shall not prejudice the appellant.

Subp. 18. **Public access to hearings and decisions.** Appeal decisions must be maintained in a manner so that the public has ready access to previous decisions on particular topics, subject to appropriate procedures for safeguarding names, personal identifying information, and other data protected by applicable state and federal laws regarding privacy, confidentiality, disclosure, and personally identifiable information. Appeal hearings conducted under this part are not open to the public due to the not public classification of the information provided for inclusion in the appeal record.

Subp. 19. **Administrative review.**

A. Administrative review by the United States Department of Health and Human Services may be available for parties aggrieved by an order of the MNsure board.

B. An appeal under this part must be filed with the United States Department of Health and Human Services and MNsure according to the process and time period required under the applicable federal regulations.

Subp. 20. **Judicial Review.** An appellant has the right to judicial review of an agency decision. The decision must advise the parties of the right to judicial review.

*OR*

Subp. 20. **Judicial Review.** An appellant may seek judicial review to the extent it is available by law.

August 12, 2013

MNsure Board of Directors  
81 East 7<sup>th</sup> Street, Suite 300  
Saint Paul, MN 55101-2211

**RE: Response to request for comments on proposed exempt permanent rules relating to MNsure appeals**

Attention MNsure Board,

I write to submit comments on MNsure's proposed rules relating to eligibility appeals. The primary reason for establishing an appeal process for eligibility determinations is to ensure that all persons are treated fairly and that they receive appropriate and legitimate due process. It is also important that the appeal process guarantees safeguards so that the seven-member, unelected MNsure Board does not overstep its bounds and abuse its power.

Here are my recommendations:

**7700.0105 MNSURE ELIGIBILITY APPEALS**  
**Subpart 17F Orders of the MNsure board or its delegates**

I suggest that the MNsure Board be prohibited from refusing to accept a decision from the appeals examiner. Such unilateral veto power of the appeals examiner, as provided in subpart 17 of the proposed rules, is not acceptable.

The proposed rules provide that the *MNsure board or its delegated representative shall review the recommended decision and accept or refuse to accept the decision.*

One of the main criticisms and concerns of the Minnesota Democrats' insurance exchange was that the Board was granted too many exceptions from existing laws governing the work of state agencies and dangerous unchecked authority. Allowing the MNsure Board the power to unilaterally refuse to accept an eligibility appeal decision by the appeals examiner would only serve to exacerbate those concerns.

Moreover, in subpart 17E the proposed rules provide that the *appeals examiner's recommended decision must be based exclusively on the testimony and evidence presented at the appeal hearing, legal arguments presented, and the appeals examiner's research and knowledge of the law.* If this is to be the case, on what basis can one justify granting the MNsure board the unilateral power to *refuse to accept the decision*? Such a rule will ensure that political considerations rule the day in what was supposed to be a transparent and fair process.

**7700.0105 MNSURE ELIGIBILITY APPEALS**

**Subpart 10 Appeal Summary**

I suggest that the appeal summary be delivered to the person who is involved in the appeal at least ten working days prior to the date of the appeal hearing.

The proposed rules provide that the appeal summary be delivered at least three working days before the appeal hearing.

Three days is not long enough for a person to receive an important document, such as the appeal summary, from the agency and then be expected to prepare for the hearing. A thorough appeal summary articulating the agency's legal rationale for its decision, with supporting facts and documents, should be submitted at least ten business days in advance of the hearing. This would truly give aggrieved parties, in MNSure's own language, *an adequate opportunity to prepare* for the hearing.

**7700.0105 MNSURE ELIGIBILITY APPEALS**

**Subpart 14 Disqualification of appeals examiner**

I suggest that the same disqualification and recusal procedures that apply to appeals examiners also apply to MNSure board members when considering any issue on eligibility appeals.

I thank you for consideration of these recommendations.

Sincerely,

State Representative Joe Hoppe