

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EMPLOYMENT AND
ECONOMIC DEVELOPMENT

In the Matter of the Proposed Rules of the
Department of Employment & Economic
Development Relating to Unemployment
Insurance; Modifying Appeals, Employer
Records, and Workers Status Provisions,
Minnesota Rules Chapters 3310 and 3315

**ORDER ON REVIEW
OF DUAL NOTICE**

This matter came before Administrative Law Judge LauraSue Schlatter upon the request of the Minnesota Department of Employment and Economic Development (DEED) for a legal review under Minn. R. 1400.2080 of the Dual Notice of Hearing in the above-captioned proceeding. The request for legal review was filed with the Office of Administrative Hearings on February 3, 2014.

On February 4, 2014, DEED submitted a revised Dual Notice of Hearing. The revisions changed the location of the proposed hearing and amended the signature line on the Order for Hearing. This Order is based on the Dual Notice as amended on February 4, 2014.

The Administrative Law Judge has a number of recommendations for corrections and changes to the text of the Dual Notice of Hearing, which are discussed in the Memorandum accompanying this Order. In addition, the Administrative Law Judge strongly recommends that DEED develop and implement an Additional Notice Plan as required by Minn. Stat. § 14.22 and described in the accompanying Memorandum. Failure to do so will likely result in a finding of a procedural defect when the Administrative Law Judge performs the required review pursuant to Minn. Stat. § 14.15 or 14.26.

Based upon a review of the written submissions by the Department,

IT IS HEREBY ORDERED THAT:

The Dual Notice is **APPROVED**.

Dated: February 4, 2014

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

Recommended Changes to Text

Throughout the text of the Dual Notice, DEED uses variations of the phrase “the Department will hold a hearing.”¹ The Administrative Law Judge recommends changing this language because the Office of Administrative Hearings and the Administrative Law Judge, not the Department, convene and preside over the hearing. DEED could correct this error either by replacing the language with phrases such as “The Administrative Law Judge will hold a hearing” or “a hearing will be held.”

On page one, the first sentence of the paragraph titled “Subject of Rules and Statutory Authority” contains bracketed text from what appears to be a form. The Administrative Law Judge recommends that the bracketed text be removed from the Dual Notice. In addition, the Administrative Law Judge notes that the opening sentence of that paragraph is incomplete. With the bracketed text deleted, the opening sentence will state “The proposed rules are about.” The Administrative Law Judge strongly recommends that DEED insert a brief description of the subject of the rules, for example:

The proposed rules are about unemployment insurance appeals, employer records, and worker status provisions. The amendments and repeal of various rules are designed to achieve consistency between the rules and relevant governing statutes, to update the rules in light of the Department’s expanded use of its online system and telephone hearings, to offer guidance to participants in the hearing process, and to simplify the rules and alleviate burdensome requirements.

Additional Notice Plan

Minnesota Statutes sections 14.22 and 14.225 require, in addition to publishing proposed rules and a Dual Notice of Intent to Adopt Rules in the State Register and mailing the proposed rules and Notice to the agency’s rulemaking mailing list, that the agency must also “make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.”² Minnesota Statutes section 14.23 requires that the agency describe its “efforts to provide additional notification . . . or . . . explain why these efforts were not made” in its Statement of Need and Reasonableness (SONAR).

¹ *In the Matter of the Proposed Rules of the DEED Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Workers Status Provisions*, OAH Docket 80-1200-31264, *Proposed Dual Notice*, p. 1: Introduction, line 6, “Department will hold a public hearing,” line 8, “if it will hold the hearing” *Dual Notice*, p. 2: Request for a Hearing, li. 2, “Department hold a hearing,” , li. 7, “it must hold a hearing.” Withdrawal of Requests, li. 2, “the Department will hold a public hearing” Notice of Hearing, li. 3, “The Department will hold the hearing. . . .” *Dual Notice*, p. 3: Hearing Procedure, li. 1, “If the Department holds a hearing”

² Minn. Stat. § 14.22.

In the Notice section of its Statement of Need and Reasonableness submitted with the Proposed Dual Notice, DEED stated that its Request for Comments was published in the State Register on August 5, 2013.³ DEED also said that, on August 6, 2013, it mailed the Request for Comments “to all persons on the Department’s rulemaking list” and “provided electronic copies to the individuals who requested electronic notice.”⁴ DEED explained that the Request for Comments was published on the Department’s website and provided the appropriate “url” link.⁵ In the same paragraph, DEED included a statement regarding the proposed amendments’ lack of impact on farming operations. Nowhere in the Notice paragraph, or anywhere else in the SONAR, did DEED explain how it intends to fulfill the additional notice plan requirements or why it did not intend to make such efforts.

The rules of the Office of Administrative Hearings (OAH) permit an agency to ask OAH for prior approval of the additional notice plan before publishing the request for comments or the notice of proposed rules.⁶ Once the additional notice plan is approved, the approval is final and the agency can proceed with the rulemaking knowing that an inadequate notice plan will not require the agency to return to the early rulemaking stages. This optional prior approval procedure is frequently used by agencies and boards. In this case, DEED did not seek prior approval of its additional notice plan under the rule.

Because DEED did not request the Administrative Law Judge’s approval of an additional notice plan, the Administrative Law Judge lacks the authority at this time to disapprove of DEED’s lack of additional notice plan. But, DEED’s failure to develop the additional notice plan raises significant concerns. This procedural error is not merely technical in nature. DEED’s failure to develop and implement an additional notice plan would deprive interested persons or entities of an opportunity to participate meaningfully in the rulemaking process.⁷

The additional notice plan requirement furthers several important purposes of the Administrative Procedure Act, including those which:

- (a) provide oversight of powers and duties delegated to administrative agencies;
- (b) increase public accountability of administrative agencies;

³ *In the Matter of the Proposed Rules of the DEED Relating to Unemployment Insurance; Modifying Appeals, Employer Records, and Workers Status Provisions*, OAH Docket 80-1200-31264, Statement of Need and Reasonableness, p. 5 (undated, filed Feb. 3, 2014).

⁴ *Id.*

⁵ Even on the website, materials regarding this rulemaking are not very easily found. While the specific url provided in the SONAR connects to the relevant web page, a person who just goes to the DEED website would have a difficult time locating the rules page, which are part of a web page titled “What-Guides-Us.” Rulemaking is four levels into the DEED website. Getting into specifics of the rule under review in this matter requires going through a total of five layers of menus. Thus, unless a person was actively looking for materials relating to this proposed rule, it would not likely be noticed by someone perusing the web site.

⁶ Minn. R. 1400.2060.

⁷ See Minn. R. 1400.2100 (A) and Minn. Stat. § 14.26, subd. 3 (d).

- (c) increase public access to governmental information; and . . .
- (d) increase public participation in the formulation of administrative rules.⁸

While the Legislature was quick to point out that these purposes do not necessarily result in separate guarantees of substantive rights for regulated parties, it was the lawmakers' collective "expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained."⁹ It is widely acknowledged that direct lines of two-way communication, between government agencies and regulated parties, benefit the agency, the regulated parties and the broader public.¹⁰

This is an opportune moment for DEED to correct what will otherwise likely be a fatal procedural flaw in this rulemaking process. In addition to providing this Dual Notice and its accompanying documentation to all of the parties who were sent the original Request for Comments, the Administrative Law Judge recommends an additional notice plan under Minn. Stat. §§ 14.22 and 14.23 with at least the following components:

1. A link on the DEED website home page to the rulemaking web page;
2. A hard copy of the Dual Notice of Hearing posted at all Minnesota Workforce Centers;
3. Dual Notice and accompanying materials sent to:
 - a. Michael E. Obermueller
Winthrop & Weinstine
225 S. 6th Street
Minneapolis, MN 55402-4629
 - b. University of Minnesota Law School
Civil Practice Clinic
190 Walter F. Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455

⁸ See, *Minnesota Statutes* § 14.001 (1), (2), (4) and (5).

⁹ See, *Minnesota Statutes* § 14.001.

¹⁰ See, *U. S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152 n. 11 (5th Cir. 1984) (There is a "widely-shared recognition that administrative agencies need direct lines to the public voice because of their distance from the elective process"); *Jewish Community Action, et al. v. Comm'r of Public Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003) ("an administrative agency needs public input to remain informed"); *accord*, U.S. Senate Report on the federal Administrative Procedure Act of 1946, S.Doc. No. 248, 79th Cong., 2d Sess. 19-20 (1946) ("Public participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interest").

- c. Hamline University School of Law
Legal Clinics
1536 Hewitt Avenue
St. Paul, MN 55104-1284
- d. William Mitchell College of Law
The Legal Practice Center
875 Summit Avenue
St. Paul, MN 55105
- e. University of St. Thomas Law School
Legal Services Clinic
Interprofessional Center
2115 Summit Avenue
St. Paul, MN 55105
- f. Minnesota Coalition for the Homeless
2233 University Avenue West
St. Paul, MN 55114
- g. Mid-Minnesota Legal Aid
430 First Avenue North, Suite 300
Minneapolis MN 55401-1780;
415 P.O. Box 1866
Willmar MN 56201; and
2324 University Avenue West, Suite 101
St. Paul, MN 55114
- h. Volunteer Lawyers Network
600 Nicollet Mall, Suite 390A
Minneapolis, MN 55402
- i. Southern Minnesota Regional Legal Services
55 5th St E #400
St Paul, MN 55101
- j. St. Cloud Legal Services
830 West St. Germain, Suite 300
St. Cloud MN 56302
- k. Minnesota Disability Law Center
430 1st Avenue N, Suite 300
Minneapolis MN 55401-1780
- l. Legal Services of Northwest Minnesota
P.O. Box 838

Moorhead, MN 56561-0838;

426 Broadway Street
Alexandria, MN 56308;

P.O. Box 1883
Bemidji, MN 56619-1883

m. Anishinabe Legal Services
411 First St NW
Cass Lake, MN 56633

L.S.