

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY**

Shirley I. Chase, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

**ORDER ON RESPONDENT'S MOTION
TO DISMISS/MOTION FOR SUMMARY
DISPOSITION**

v.

Diamond Brands, Inc.,

Respondent.

This matter is before Administrative Law Judge Steve Mihalchick on the Motion to Dismiss of Respondent. Respondent filed its motion to dismiss on November 4, 2002. Complainant filed its memorandum in opposition to Respondent's motion on November 26, 2002. Oral argument on the motion was heard on December 5, 2002 at the Office of Administrative Hearings. The Administrative Law Judge ordered letter briefs from both parties due within one week of the oral argument. The record closed on December 16, 2002.

Richard L. Varco, Jr., and Omar A. Syed, Assistant Attorneys General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2122, appeared on behalf of the Department. Laura J. Schacht, Attorney at Law, Johnson, Killen & Seiler, P.A., 230 West Superior Street, Suite 800, Duluth, Minnesota 55802, appeared for Respondent, Diamond Brands, Inc.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED:

Respondent's Motion to Dismiss is DENIED.

Dated this 8th day of January, 2003.

S/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Factual Background

David Melde (“Melde”) was employed by Diamond Brands, Inc.^[1] for approximately five years, most recently as a lathe operator under a collective bargaining agreement.^[2] Sometime in late December 1999, Melde won a local union election and took over as union president, inheriting some OSHA issues regarding Diamond Brands.^[3]

In December 1999, Melde authorized the filing of a safety and health complaint with the Department’s OSHA Division against Diamond Brands.^[4] In February 2000, Melde participated in the closing conference of the OSHA inspection on site at the Diamond Brands plant.^[5] On March 15, 2000, the OSHA Division issued a citation and penalty to Diamond Brands based upon the safety and health complaint.^[6] On March 23, 2000, Melde received a three-day suspension for smoking in a non-smoking area.

On April 28, 2000, Melde filed a complaint with the Minnesota Pollution Control Agency (MPCA) alleging hazardous waste problems at the Diamond Brands plant.^[7] On May 2, 2000, Melde alleged problems with the water quality at the plant.^[8] The MPCA immediately inspected the Diamond Brands’ plant upon receipt of these complaints.^[9] On May 5, 2000, two management personnel claimed they witnessed Melde engaging in horseplay with another employee, which resulted in Melde’s termination on or about May 10, 2000.^[10] The day following his termination Melde filed a charge of discrimination against Diamond Brands pursuant to Minn. Stat. § 182.669, subd. 1, alleging that he was terminated in retaliation for his involvement with the OSHA complaints. In November 2000, the OSHA Division found probable cause regarding Melde’s allegations.^[11] At some point following his termination, Melde sought arbitration under the collective bargaining agreement to consider his termination. On or about January 25, 2001, the arbitrator examined the terms of the collective bargaining agreement’s disciplinary process and upheld Melde’s termination.^[12]

On March 27, 2001, the Office of the Attorney General received the investigative file in this matter.^[13] On December 17, 2001, counsel for the Department contacted counsel for Respondent to indicate its intent to pursue Melde’s claim under the Occupational Safety and Health Act (“the Act”).^[14] Subsequent telephone contact occurred between counsel regarding Diamond Brand’s filing for bankruptcy. Diamond Brands was served with the Complaint on August 29, 2002.

Diamond Brands has moved to dismiss claiming that the charge is precluded on the basis of 1) insufficiency of service of process, 2) the statute of limitations, 3) the doctrine of laches, 4) the doctrine of collateral estoppel, and 5) the doctrine of arbitration and award.

Motion to Dismiss/Motion for Summary Disposition

As an initial matter, the Administrative Law Judge finds that Respondent's motion, although labeled a motion to dismiss, is more appropriately treated as one for summary disposition. When matters outside the pleadings are presented for consideration, the motion must be reviewed under a summary judgment standard.^[15] In this case, Respondent has attached to its motion an affidavit and supporting documentation. Accordingly, the Administrative Law Judge will review this matter as a motion for summary disposition.

Summary disposition is the administrative equivalent to summary judgment.^[16] Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.^[17] A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.^[18] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.^[19]

The moving party must demonstrate that no genuine issues of material fact exist.^[20] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.^[21] It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.^[22] When considering a motion for summary judgment, the Judge must view the facts in the light most favorable to the non-moving party.^[23] All doubts and factual inferences must be resolved against the moving party.^[24] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.^[25]

Service of Process

At the oral argument of this motion, the parties informed the Administrative Law Judge that an agreement had been reached on this issue. The Complaint was reserved on Respondent, curing the service defect.

Statute of Limitations

Respondent asserts that the two-year statute of limitations bars the Department's claim that Respondent discriminatorily terminated Melde, and that Minn. Stat. § 182.669 bars the Department's claim that Respondent discriminatorily issued the March 2000 smoking violation.

“A statute of limitation is based on the proposition that it is inequitable for a [party] to assert a claim after a reasonable lapse of time, during which the [opposing party] believes no claim exists.”^[26] The general purpose of the limitation is freedom from stale claims.^[27]

Minn. Stat. §541.07 (1) and (5) mandate a two-year statute of limitation for actions involving libel, slander, assault, battery, false imprisonment, or other tort, resulting in personal injury, as well as for wage claims. Minn. Stat. §541.05 (2) prescribes a six-year statute of limitations on actions involving a liability created by statute, other than those arising upon a penalty . . . or where a shorter period is provided by §541.07.

The Minnesota Court of Appeals, in the case of *Wage and Hour Violations of Holly Inn, Inc.*,^[28] held that the two-year statute of limitations was inapplicable to administrative proceedings, stating that such proceedings are not “actions” according to the meaning of Minn. Stat. §541.07. The Court acknowledged *Strizich v. Zenith Furnace Co.*,^[29] which stated that the statute of limitations is applicable to proceedings that are “analogous in their nature” to court actions, but instead relied on the holding of *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*^[30] where the Minnesota Supreme Court held to the definition of “action” as “any proceeding in any court of this state” pursuant to Minn. Stat. § 645.45(2).^[31] The *Holly Inn* Court agreed with the common-law definition of “action” as “the prosecution in a court of justice of some demand or assertion of right by one person against another.”^[32]

It follows in this instance that the Department’s administrative claim against Respondent is not an “action” to which any statute of limitations applies, and the claim cannot be dismissed on this basis.

If a statute of limitations must be applied, the Administrative Law Judge relies on the holding in *Johnson v. County of Anoka*,^[33] where the Minnesota Court of Appeals held that the six-year statute of limitations was applicable in administrative proceedings under the Veterans Preference Act. Johnson, an honorably discharged veteran, challenged his termination without notice of his veterans preference rights approximately nine years later. The Veterans Preference Act, silent as to a statute of limitations, imposes liability on an employer in the event that certain procedures are not followed. The Court found that because the rights in the Act were statutorily based, the six-year limitation of Minn. Stat. §541.05 (2) applied, barring Johnson’s claim. The Court did not discuss the *Holly Inn* decision.

As to the smoking violation, Minn. Stat. § 182.669 requires an employee alleging discrimination based upon his exercise of rights under the Act to file a complaint with the Department within 30 days after the alleged discrimination occurred. The smoking citation was issued on March 23, 2000. Melde did not dispute the smoking citation, so no complaint regarding that incident was ever filed. Melde did not file a complaint with the Department until May 11, 2000, the day following his termination. The charge

regarding the smoking citation did not fall within the 30-day statute of limitations imposed by Minn. Stat. § 182.669. Nonetheless, the Administrative Law Judge has the discretion, at the time of hearing, to admit all probative evidence,^[34] and consequently, the Department may present evidence of the smoking violation at the hearing.

Doctrine of Laches

Respondent also argues that the doctrine of laches precludes this claim from going forward.

The equitable doctrine of laches operates to prevent delay in asserting a right where the pursuit of that right would be at the expense of and prejudice to the opposing party.^[35] The general consideration is whether “there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others” that the requested relief is inequitable.^[36] The following four elements form the test as to whether the defense is appropriate: 1) Availability of the defense as determined by the nature of the action, 2) the reasons for the delay, 3) prejudice, and 4) policy considerations.^[37] Ultimately, the doctrine of laches is used to promote a peaceful society by discouraging stale claims.^[38]

In re Barlow^[39] expanded the availability of the defense to all statutory suits due to the elimination of the distinction between law and equity, with the exception of actions governed by an express statute. Laches is available in this instance because Minn. Stat. §182.669 does not expressly set a statute of limitations on discrimination claims.

The Department delayed the service of the Complaint for a number of reasons. After Melde chose to challenge his termination through the arbitration process, the Department awaited the outcome of that proceeding because a positive outcome for Melde may have affected the Department’s decision to proceed with its claim under the Act. When Melde did not prevail, the Department renewed its investigation, initially commenced in November of 2000 when it found merit in Melde’s charge. Between the Department’s receipt of the file and its service of the Complaint, the Department proceeded to examine further the merits and strategy of the case as well as engage in discussions with Respondent’s counsel regarding Respondent’s pending bankruptcy filing and the potential for settlement of the matter under the Act. Though the Department could have acted more swiftly in pursuing this matter, it in no way abandoned this case. The Department’s delay in serving the Complaint was not unreasonable.

Respondent has attempted to show that its bankruptcy filing and the previous arbitration make any further proceeding of this matter prejudicial as a waste of both financial and time management resources. However, the Department is entitled to pursue this matter despite the bankruptcy filing,^[40] whether or not Respondent has an ability to pay damages. Respondent has not shown with sufficient clarity why the timing of the service of the Complaint has prejudiced it to such a degree that the matter

should be dismissed. Any prejudice to Respondent is not so great as to make the pursuit of this matter inequitable.

While the policy consideration of preventing stale claims is a strong one, this claim was never stagnant or abandoned. The Department kept Respondent informed as to its position regarding the issues with enough frequency so that Respondent was on notice that the matter was still “alive.” Moreover, the OSHA Act governs situations such as this, and the matter should be allowed to go forward to a determination of whether Melde’s rights were violated under the Act. The doctrine of laches does not apply in this instance and the case shall go forward.

Collateral Estoppel

Respondent also argues that the Arbitrator’s decision to uphold Melde’s termination collaterally estops the Department from pursuing this charge.

Collateral estoppel prevents identical parties or those in privity with them from relitigating identical issues in a subsequent, distinct proceeding.^[41] The doctrine is flexible and should not be applied if it would be an injustice to the person against whom it is applied.^[42] The doctrine may be applied to agency decisions if all of the following five factors are met:

- 1) the issue to be precluded must be identical to the issue in the prior adjudication;
- 2) the issue must have been necessary to the prior adjudication and properly before the prior decision-maker;
- 3) the prior adjudication must be a final judgment on the merits;
- 4) the estopped party was a party or in privity with a party to the prior adjudication; and
- 5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.^[43]

Furthermore, collateral estoppel should not be applied rigidly to administrative proceedings and should be qualified or rejected “when [its] application would contravene an overriding public policy.”^[44] *AFSCME Council 96 v. Arrowhead Regional Corrections Board* held that a publicly employed veteran terminated with notice of his veteran’s preference rights had a right to both a veteran’s preference hearing and to arbitration. The Court relied both on statutory and public policy reasons as support for its position “[d]espite the equivalence of the two hearing procedures.”^[45] While the Court recognized the need to “streamline dismissal procedures,” it could not do so “in the face of statutorily granted rights.” The Court declined to apply the principles of res judicata and collateral estoppel to either of those proceedings on the question of whether there was “just cause” for the termination. Justice Simonett, concurring specially, noted that while the reduction of duplicative proceedings is an important goal, it is ultimately the legislature that must remedy that problem, not the courts.

- 1) The issue to be precluded must be identical to the issue in the prior adjudication

- The issue before the Arbitrator was whether Melde's termination for alleged horseplay was an appropriate application of the progressive discipline policy set forth in the collective bargaining agreement, and if not, what remedy should be granted to Melde.

The issue currently before the Administrative Law Judge is whether Respondent violated Minn. Stat. §§ 182.654, subd. 9 and 182.669, which make it unlawful for Respondent to discriminate against Melde for exercising his rights under the Act. The Arbitrator did not previously decide this issue, and the Administrative Law Judge's determination of this issue requires examination of a different area of the law. Therefore, the issue here is not identical to that decided in the prior adjudication and this factor is not met.

- 2) The issue must have been necessary to the prior adjudication and properly before the prior decision-maker

- It was unnecessary for the Arbitrator to consider the issue of whether Respondent violated Minn. Stat. §§ 182.654, subd. 9, and 182.669 in making his determination as to whether Respondent had violated the terms of the collective bargaining agreement by engaging in horseplay. The Arbitrator found that Melde had engaged in horseplay and that his termination was in accordance with the terms of the union agreement. His decision makes no mention of the Act^[46] and therefore no determination as to whether Respondent's termination of Melde was a reprisal under the Act. The Administrative Law Judge must decide whether Melde's OSHA activities were a "substantial causative factor" in his termination,^[47] and such determination is not precluded by the Arbitrator's finding that Melde engaged in horseplay.

The Arbitrator, as well as the parties, was silent on the OSHA issues raised by the Department. The provisions of the collective bargaining agreement formed the parameters of what the Arbitrator had authority to consider,^[48] and make it clear that any analysis of the Act was unnecessary to that decision.

- 3) The prior adjudication must be a final judgment on the merits

- While arbitration decisions are generally considered final judgments on the merits,^[49] the commissioner, in deciding whether probable cause exists, may only accept the results of another proceeding as a final determination if it was "fair, impartial, and valid."^[50] This Administrative Law Judge must also apply that standard and has concerns regarding statements made by the Arbitrator in his decision. The Arbitrator cites his past experience as a union activist and graduate coursework in industrial

sociology before making the bold statement that “dispositive weight can seldom be accorded the response of a bargaining unit employee that he/she saw nothing incriminating regarding charges against a co-worker, much less a local union president.”^[51] He then goes on to state that any seasoned arbitrator would effectively discount the employees’ testimony in favor of the testimony of the plant managers. He makes no mention of the pressures faced by plant managers to deal with “problem” or “troublemaker” employees and to protect their own careers. Certainly workers sometimes lie, but so do managers and executives. The Administrative Law Judge is concerned that these blanket statements cast a biased tone over the Arbitrator’s decision and will not accept it as a final determination on the merits.

Furthermore, any final judgment that may have resulted from the arbitration is on the issue of Respondent’s application of the progressive discipline policy in terminating Melde and if the collective bargaining agreement was violated in that process. As stated above, this issue differs from whether Respondent violated the Act by terminating Melde in retaliation for raising OSHA complaints against Respondent. Consequently, there has been no final judgment on the merits of the issue at hand.

- 4) The estopped party was a party or in privity with a party to the prior adjudication

Since the Department was not a party to the arbitration, the analysis must focus on whether the Department was in privity with Melde so as to be estopped from proceeding with this claim.

The idea of privity has not been strictly defined, but it stands for the proposition that certain non-parties may be so connected to a case that the outcome should also determine their interests.^[52] Those in privity would include those who control an action although not parties to it, those whose interests are represented by a party to the action, and successors in interest to those having derivative claims.^[53] “Privity exists where the record demonstrates controlling participation and active self-interest in the [case].”^[54] Control of a case is demonstrated by having an “effective choice as to the legal theories to be advanced on behalf of the party” and by having control over the opportunity to obtain review.^[55] Privity is decided on a case by case basis, with the basic requirement being that the estopped party’s interests have been sufficiently represented in the first action so that collateral estoppel is not inequitable.^[56]

The Department was not a party to the arbitration, and therefore did not, and could not appear at the arbitration. Melde was represented by union counsel at the arbitration. The Department did not control Melde’s choice of pursuing arbitration. Furthermore, counsel for the Department did not even receive the investigative file in this matter until approximately two months after the arbitration decision was served, and consequently could not have controlled the arbitration proceeding as to the legal theories presented by Melde and his union counsel.

Conversely, Melde did not represent the interests of the Department at the arbitration. As stated above, the issues presented to and examined by the Arbitrator were different than those that the Department aims to advance and protect under the Act. And while it is true that the Department's interests would have been advanced in an indirect manner if the arbitrator had ruled in favor of Melde, the fact remains that the Department acts independently in achieving its goals of preventing retaliation under the Act^[57] and neither the Department nor Melde had control over whether the other pursued the matter.

Finally, in the instant case, Melde is not named as a party. His name does not even appear on the caption. This matter involves the Department in pursuit of its own interests against Respondent.

- 5) The estopped party was given a full and fair opportunity to be heard on the adjudicated issue

- As stated in the preceding paragraphs, the Department was not a party to and did not appear at the arbitration. Thus, the Department was not able to present evidence or testimony in support of its position that Melde was retaliated against in violation of the Act.

The Department advocates strongly for the public interest and the ability of employees protected under the OSHA Act to report suspected OSHA violations without fear of retaliation. The Department found probable cause to pursue Melde's charge against Respondent, and it should be allowed a full and fair opportunity to present its case. Minn. Stat. § 182.669 specifically provides that the Department may pursue claims of discrimination relating to the Act. Nowhere in the Act is there a prohibition on pursuing claims that have already been arbitrated. Moreover, the enforcement of the penalties and remedies listed in the Act are in the best interest of the public and increase the public's trust in its system of justice. As discussed in *AFSCME Council 96*, here, too, is an instance where statutorily granted rights and public policy factors support allowing the Department's complaint to go forward in addition to Melde's arbitration, and collateral estoppel should not be applied.

Doctrine of Arbitration and Award

Respondent presented no support for this doctrine and essentially agreed that this issue was subsumed in its collateral estoppel arguments.

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- ^[1] Diamond Brands, Inc., located in Cloquet, MN, manufactures matches, toothpicks, ice cream sticks and other wood products.
- ^[2] Diamond Brands' Memorandum of Law in Support of its Motion to Dismiss, p. 2.
- ^[3] Affidavit of Laura J. Schacht, Ex. D at p. 325.
- ^[4] Complaint ¶ 10.
- ^[5] Complaint ¶ 12.
- ^[6] Complaint ¶ 14.
- ^[7] Complaint ¶ 17.
- ^[8] Complaint ¶ 18.
- ^[9] Complaint ¶ 20.
- ^[10] Diamond Brands' Memorandum of Law in Support of its Motion to Dismiss, pp. 2-3.
- ^[11] Diamond Brands' Memorandum of Law in Support of its Motion to Dismiss, p. 5.
- ^[12] Affidavit of Laura J. Schacht, Ex. I.
- ^[13] Memorandum in Opposition to Respondent's Motion to Dismiss, p. 9.
- ^[14] Diamond Brands' Memorandum of Law in Support of its Motion to Dismiss, p. 5; Memorandum in Opposition to Respondent's Motion to Dismiss, p. 9.
- ^[15] *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 184-85 (Minn. 1999); *Cummings v. Koehnen*, 556 N.W.2d 586, 588 (Minn. App. 1996); Minn. R. Civ. P. 12 and 56.
- ^[16] Minn. R. 5500(K) (2002).
- ^[17] Minn. R. Civ. P. 56.03 and Minn. R. 5500 (K) (2002).
- ^[18] *Highland Chateau v. Minnesota Dept. of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984), *rev. denied* (Minn. February 6, 1985).
- ^[19] Minn. R. 1400.6600.
- ^[20] *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).
- ^[21] *Highland Chateau*, 356 N.W.2d at 808.
- ^[22] Minn. R. Civ. P. 56.05.
- ^[23] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
- ^[24] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
- ^[25] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).
- ^[26] *Karels v. American Family Mut. Ins., Co.*, 371 N.W.2d 617, 619 (Minn. App. 1985).
- ^[27] *Bartlett v. Miller & Schroeder Muns., Inc.*, 355 N.W.2d 435, 439 (Minn. App. 1984).
- ^[28] 386 N.W.2d 305 (Minn. App. 1986).
- ^[29] 176 Minn. 554, 223 N.W. 926 (1929).
- ^[30] 300 Minn. 149, 218 N.W.2d 751 (1974).
- ^[31] See *also Spira v. American Standard Insurance Co.*, 361 N.W.2d 454 (Minn. App. 1985).
- ^[32] *Holly Inn*, 386 N.W.2d at 308, quoting *Muirhead v. Johnson*, 232 Minn. 408, 46 N.W.2d 502 (1951).
- ^[33] 536 N.W.2d 336 (Minn. App. 1995).
- ^[34] Minn. R. 1400.7300, subp. 1.
- ^[35] *Aronovitch v. Levy*, 238 Minn. 237, 241, 56 N.W.2d 570, 574 (1953).
- ^[36] *Fetsch v. Holm*, 236 Minn. 158, 163, 52 N.W.2d 113, 115 (1952).
- ^[37] *M.A.D. v. P.R.*, 277 N.W.2d 27, 29 (Minn. 1979).
- ^[38] *Id.*
- ^[39] 152 Minn. 249, 188 N.W. 282 (1922).
- ^[40] 11 U.S.C. § 362(b)(4).
- ^[41] *Northwestern Nat'l Life Ins. Co. v. County of Hennepin*, 572 N.W.2d 51 (Minn. 1998).
- ^[42] *Falgren v. Minnesota Board of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996).
- ^[43] *Id.*
- ^[44] *AFSCME Council 96 v. Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295, 299 (Minn. 1984); *Wangen v. Commissioner of Public Safety*, 437 N.W.2d 120, 123 (Minn. App. 1989) (noting that fundamental differences between court decisions and agency decisions may diminish the applicability of collateral estoppel to administrative agencies).

^[45] Id. at 298-99. The Court cited veterans' interest in job security in public employment, the criminal penalty associated with violation of the Act, statutory protections offered by the Act and not by arbitration, and the goals of orderly, speedy and inexpensive dispute resolution as some of the public policy and statutory reasons supporting its decision.

^[46] Affidavit of Laura J. Schacht, Ex. I.

^[47] Minn. R. 5210.0300.

^[48] Minn. Stat. § 182.669 limits the consideration of OSHA discrimination issues to an Administrative Law Judge or District Court.

^[49] Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 651 (Minn. 1990).

^[50] Minn. R. 5210.0330.

^[51] Affidavit of Laura J. Schacht, Ex. I, p. 13.

^[52] Brunsoman v. Seltz, 414 N.W.2d 547, 550 (Minn. App. 1988).

^[53] Margo-Kraft Distributors, Inc. v. Minneapolis Gas Company, 294 Minn. 274, 278, 200 N.W.2d 45, 48-49 (1972), quoting Restatement, Judgments, § 83.

^[54] Brunsoman, 414 M.W.2d at 550.

^[55] Bogenholm v. House, 388 N.W.2d 402, 406 (Minn. App. 1986).

^[56] Miller v. Northwestern National Insurance Co., 354 N.W.2d 58, 61-62 (Minn. App. 1984).

^[57] Minn. R. 5210.0340, subp. 4.