

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
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Our File No. 814

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 5-11-82
DATE FOR REVIEW 5-21-82
DATE DUE 5-31-82

Adopted w/a hearing ✓
Adopted w/o hearing
Temporary rule

Approved 6-1-82 Disapproved Returned to Agency 6-2-82

Resubmitted Due
Approved Disapproved Returned to Agency

Date filed w/Secretary of State 6-2-82 Revisor approved / disapproved

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✓ Rule as Adopted

✓ Rule as Proposed

✓ Order Adopting ✓ 4.22.82 Date Amended Order/Add. F of F 5.5.82
combined with F of F.

✓ Notice of Intent to Solicit Outside Opinion SR. 12/15/80

✓ Order for rulemaking
10.30.81 date of Hearing

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
✓ Sufficiency

✓ Affidavit of Mailing Notices or rulemaking
9.21.81 At least 30 days prior to hearing/~~adoption~~

✓ Mailing list Certificate

✓ Publication in State Register
9.28.81 At least 30/~~20~~ days prior to hearing/~~adoption~~

✓ Hearing Examiner's Report

✓ Chief Hearing Examiner's Report(s)
✓ 1.17.82 Approving H.E.'s Report Disapproving Agency action ✓ 5.5.82
✓ 5.5.82 Approving agency action

✓ Agency's Findings of Fact combined with Order Adopting
Additional F. of F, combined with Amended Order

N/A LCRAR Report or agency Affidavit

N/A Certificate of Board's Resolution Adopting Rules

N/A Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

N/A Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

✓ Affidavit of Mailing Notice of Submission to Attorney General

✓ Notice of Submission to the Attorney General

✓ Comments addressed to this office

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : ROLF MIDDLETON
Commissioner of Economic Security

DATE: 6/1/82

ATTN : MICHAEL FRATTO, Supervisor

FROM : TED A. MARTINEZ
Special Assistant
Attorney General

PHONE: 296-4692

SUBJECT: In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes (8 MCAR §§ 4.3001-4.3999)

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Please note that they have not been filed with the State Register. This must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of stamps of the Attorney General and Secretary of State;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages to the rules in the approved set.

If you have any questions in this regard, please contact me.

TAM:drw
Encs.

cc: Ms. Kathy Burek
Mr. Duane Harves

.3001 .3002

AG copy.

Department of Economic Security

Adopted Rules Governing the Unemployment Insurance Program Relating to Payment of Benefits and Collection of Employer Taxes

Rules as Adopted

Chapter One: General Definitions

8 MCAR S 4.3000 Definitions. For the purpose of chapters one, two and three the following terms have the meanings given them.

A. Commissioner. "Commissioner" means the Commissioner of the Department of Economic Security or his duly authorized representative.

B. Department. "Department" means the Minnesota Department of Economic Security.

C. Unemployment office. "Unemployment office" means a location where the department offers unemployment insurance claim services.

Chapter Two: Benefits

8 MCAR S 4.3001 Applicability. Rules 8 MCAR SS 4.3001-4.3011 apply to determinations of a claimant's eligibility for regular benefits as defined in Minn. Stat. S 268.071, subd. 1, clause (7) and to extended benefits pursuant to Minn. Stat. ~~SS 268.03-268.24~~ S 268.071, subds. 1-6.

FofF ① ① 9

8 MCAR S 4.3002 Definitions. For the purposes of 8 MCAR SS 4.3001-4.3011 the following terms have the meanings given them.

A. Credit week. "Credit week" means any week within the base period for which wages in the required amount have been paid or were due and payable but not paid for performing services or for vacation periods. Except for vacation payments, those payments which are wages as defined in Minn. Stat. S 268.04, subd. 25 or department rules but for which the individual performs no services within the calendar week shall not be used to establish a credit week.

B. Labor market area. "Labor market area" means the geographic area in which the claimant can reasonably be expected

to seek and find employment. In determining the labor market area, the commuting patterns of persons with the same or similar occupations residing in the claimant's locality shall be considered. HE 12

C. Seasonal worker. "Seasonal worker" means a claimant whose employer customarily suspends or significantly curtails operations for regularly recurring periods or whose usual occupation cannot be performed for any employer in the labor market area because climatic conditions prohibit performance of the normal duties of the occupation.

8 MCAR S 4.3003 Able to work.

A. Generally. A ~~claimant~~ To be able to work a claimant must have the physical and mental ability to perform the usual duties of his customary occupation or the usual duties of other work for which he is ~~reasonably~~ fitted by training, experience or capability and which is gainful employment engaged in by others as a means of livelihood ~~as an employee under conditions ordinarily existing during a normal work week~~. The burden of establishing ability to work is on the claimant, but there will be no presumption that a claimant is not able to work. HE 13

B. Particular situations. In determining whether a claimant is able to work the department will consider the facts and circumstances of the claimant's particular situation. The determination shall be made by applying the criteria listed in ~~1.-4.~~ 1. and 2. HE 13

1. Medical evidence. Where doubt exists as to the claimant's ability to work the department ~~may~~ shall HE 16 require him to furnish medical evidence of his ability to work. Failure of the claimant to furnish requested medical evidence ~~may~~ shall HE 16 result in a suspension or a denial of benefits.

~~2. Medical separation from work. A claimant who was separated from employment due to his own serious illness must demonstrate his ability to perform other work to be deemed able to work.~~ HE 17-18

~~3. No presumption of inability to work. There will be no presumption a claimant is not able to work.~~ HE 13

.3004

~~4.~~ 2. Ability to work part-time only. Normally a claimant is required to be able to work and available for full-time work for all shifts which are customary for his occupation. However, a claimant whose physical or mental condition restricts his availability to part-time work or to a particular shift ~~will~~ shall be deemed able to work if there ~~is a reasonable possibility of obtaining work within these restrictions~~ are jobs in his labor market area consistent with the limitations or such jobs can be expected to arise within a reasonable period of time.

HE 19

see FoF 19

8 MCAR S 4.3004 Available for work.

A. Generally. Except as provided in 8 MCAR S 4.3003 B.2., a claimant is considered available for work only if he is ready and willing to accept full-time suitable ~~employment~~ work. There must be no restrictions, either self-imposed or created by circumstances, which prevent accepting ~~employment~~ full-time work. A restriction does not prevent accepting ~~employment~~ full-time work if there are ~~good~~ favorable prospects for obtaining ~~employment~~ full-time work within the restrictions within a reasonable period of time.

HE 19

HE 21

HE 22

B. Absence from labor market area. A claimant who is absent from his labor market area for personal reasons is presumed to be not available for work. ~~However, an absence of two days or less from his labor market area due to a family emergency or for other compelling personal reasons does not make him unavailable for these days~~ This presumption is rebuttable.

HE 24

HE 23

C. Alien status. A claimant who is an alien must present proof that he is authorized under ~~federal~~ law to work in the United States to be available for work.

HE 25 + FoF 25

D. Change of residence. A claimant who ~~has moved permanently~~ moves to an area where his chances of securing work are materially lessened ~~and who does not make a diligent~~ shall expand his work search, expand his availability to other occupations, and accept the prevailing wages, hours and other conditions of work ~~is not~~ available ~~for work~~ in the labor market to which he moves.

HE 26

E. Claimant cannot be contacted. Unless good cause exists for the failure to be reachable by the department HE 27 a claimant who cannot be reached after reasonable efforts by the department for referral to possible employment HE 27 is not available for work.

F. Failure to report. A claimant who fails without good cause to report as directed to ~~an unemployment office or to~~ a job service office of the Department of Economic Security is not available for work. The department may presume that a claimant who fails without good cause to report as directed to an unemployment office to discuss his eligibility for benefits is not available for the days that he fails to report. A claimant who fails to report as directed to an unemployment office to discuss his eligibility for benefits for a prior period will be determined eligible or ineligible for the prior period based solely on the facts available to the office if the claimant has made no effort within 14 days to report to the office to establish eligibility. HE 28

G. Incarcerated. A claimant who is incarcerated and who is unable to accept employment under a work release program is not available for work.

H. Labor market area. A claimant must offer his services unequivocally to the labor market area to be available for work.

I. Length of unemployment. As a claimant's duration of unemployment lengthens, prospects for obtaining employment in the customary occupation or other work in a reasonable time may change. Therefore, work that is unsuitable at one point in time may become suitable at another point. To be available for work, a claimant must be ready and willing to accept different work which becomes suitable as his prospects for customary work change. Thus, he may be required to broaden the geographic area in which he will accept work, seek and accept employment on a different shift, accept counseling for possible retraining or change in occupation, or seek and accept employment and the prevailing wages in a new occupation. HE 30

J. Seasonal worker. A seasonal worker who is not willing to accept suitable work in other occupations during the off season

.3005

is not available for work.

K. Self-employment. A claimant is not available for work if he is self-employed and no longer seeking other suitable work ~~as an employee because of his being self-employed~~ or if he is planning to ~~be~~ become self-employed and ~~he is devoting time and effort to his self-employment so that he cannot accept work during customary hours for his occupation or other suitable work~~ will not accept other suitable work. HE 31

L. Time or shift restriction. Except as provided in 8 MCAR S 4.3003 B.2., a claimant who imposes restrictions on the hours of the day or days of the week which he is willing to work which are not normal for his usual occupation or other suitable work is not available for work. A claimant who imposes restrictions on the hours of the day or days of the week which he is willing to seek work which prevent him from meeting the work search requirements of the department is not available for work. HE 19

M. Transportation. A claimant to be available for work must have transportation from his residence to his labor market area.

N. Union membership. A claimant who is seeking work only through his union is not available for work unless he is in an occupation or trade where it is customary that substantially all the hiring in that locality is done through his union. He must submit evidence, when required by the department, that he is a union member in good standing, is registered with the union for work and is in compliance with other union rules.

O. Wage restriction. A claimant who has demanded wages exceeding those customary in his labor market area for the type of work he is seeking is not available for work.

8 MCAR S 4.3005 Actively seeking work.

A. Generally. A claimant must make reasonable, diligent efforts to actively seek suitable work for each week for which he files a claim. Reasonable, diligent efforts are those that a person in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area. A claimant who fails to make reasonable, diligent efforts to actively seek suitable work HE 33

or who limits the search to positions that are not available or are above his training, experience and qualifications is not actively seeking suitable work. HE 33

B. Scope of work search. A claimant is not actively seeking work if he has not sought suitable work in accordance with HE 33 specific and reasonable instructions of the department. The claimant may be required to do any or all of the following to establish that he is actively seeking suitable work: HE 33

1. Register with the department's job service and report to the department's job service office when such reports are a required part of an active work search and may improve his opportunities of finding work; HE 29

2. Register with his union hiring or placement facility and meet the union requirements concerning dispatch to a job;

3. Register with a placement facility of his professional organization;

4. Register with a placement facility of a school, college, or university;

5. Apply for employment with former employers; however, claimants may refuse to reapply for work with employers if the claimant previously terminated employment with the same employer with a good cause attributable to the employer and the conditions constituting good cause for the prior quit continue to exist and will affect the claimant upon reemployment; HE 34

6. Make application with employers who may reasonably be expected to have suitable openings;

7. Make applications or take examinations for suitable HE 33 openings in the civil service of a governmental unit;

8. Respond to want ads for suitable work; or

9. Perform any other reasonable action which the department finds to constitute an effective means of seeking work suitable to the claimant.

C. Number of contacts. The number of employer contacts required to be considered actively seeking employment varies. In determining adequacy of work search in terms of the number of contacts required the department will consider the employment

opportunities as well as the qualifications of the claimant and normal practices and methods of seeking work.

D. Type of work sought. ~~A claimant will generally be allowed to seek work in his usual trade or occupation before being required to seek other types of work that may be suitable. The length of time allowed to seek work at his usual trade or occupation will be governed by the availability of that work in the labor market area where he is seeking work. A claimant will be required to seek work outside his customary occupation if one of the following conditions prevails.~~ HE 35

~~1. There are available openings outside the claimant's customary occupation and there are few workers unemployed in the locality for whom these openings would be more suitable than for the claimant;~~

~~2. The claimant's prospects of securing work in his customary occupation are not as favorable as his prospects of securing work outside his customary occupation; or~~

~~3. Work which exists outside the claimant's customary occupation is suitable for the claimant.~~ A claimant will be allowed to limit his work search to work in his usual or customary trade or occupation if he has favorable prospects of returning to work in his usual trade or occupation within a reasonable period of time under 8 MCAR S 4.3007 J. The length of time allowed to a claimant to limit his work search to work in his usual trade or occupation will be governed by the availability of that work in the labor market area where he is seeking work. When the claimant does not have favorable prospects, he shall be available for other suitable work under guidelines in 8 MCAR S 4.3006 E. HE 36-41

E. Permanent and temporary work. Except as provided in 8 MCAR S 4.3006 C., claimants are required to actively seek suitable permanent work. ~~However, a claimant who is on a temporary layoff and who has a verifiable assurance of return to work may limit his search for employment to temporary work.~~ HE 43

F. Seasonal workers. A claimant who is seasonally unemployed is not relieved of the responsibility to actively

seek work.

G. Incarcerated worker. A claimant who is incarcerated and who is unable to seek work is not actively seeking work.

H. Filing and reporting only. If due to economic conditions within the labor market area the department finds that for a particular occupation or class of claimants the existence of suitable job openings other than those listed with a union hiring hall, professional organization or similar placement facility or the department are so few that any effort to search for openings would be fruitless to the claimant and burdensome to employers, then registering with and maintaining the requirements for referral by the hiring hall or placement facility or the department shall constitute an active search for employment.

8 MCAR S 4.3006 Suitable work.

A. Applicability. Rules 8 MCAR SS 4.3006-4.3008 shall be used in determining if an individual ~~failed~~ is disqualified from receiving regular benefits by failing to apply for or accept suitable work or suitable reemployment without good cause.

B. Policy. The suitable work provisions of Minn. Stat. SS 268.03-268.24 and 8 MCAR SS 4.3006-4.3008 shall be administered so as to promote the department's dual responsibilities of ensuring that benefits are paid to only those persons who are involuntarily unemployed through no fault of their own and, as promptly as possible, matching workers with jobs which best utilize their skills, knowledges, and abilities. Toward this end, "suitable work" is to be interpreted to recognize a worker's skills and abilities but not to provide a haven for those who do not wish to work.

Ideally, the department could match job seekers with jobs in their usual occupation with wages, hours, and other conditions of work identical to those previously enjoyed. As a practical matter economic conditions may prohibit this ideal and so a reasonable alternative must be developed. Any reasonable alternative should be based on the policy that it is best for employers, workers and society as a whole to maximize use of

existing skills and abilities for the largest number of workers possible under the existing economic conditions, temporary or permanent, of the labor market area.

C. Suitable work. In general, suitable work is available work in the claimant's labor market area which is reasonably related to a claimant's qualifications. In determining whether a particular job is suitable, the department shall consider the degree of risk involved to the claimant's health, safety, and morals; the claimant's physical fitness; the claimant's prior training and experience; the claimant's length of unemployment and prospects of securing local work in his customary occupation; and the distance of the work from the claimant's residence.

D. Unsuitable work. Work is not suitable under any of the following conditions:

1. if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

2. if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

3. if, as a condition of being employed, the individual would be required to join a union or to resign from or refrain from joining any bona fide labor organization; or

4. if the individual is in training with the approval of the commissioner.

~~C.~~ E. General. ~~The~~ In determining what is suitable work, the department shall give primary ~~guidelines for determining suitable work must give~~ consideration to the temporary or permanent nature of the ~~unemployment~~ claimant's separation from employment and whether ~~it be temporary or permanent and the~~ he has favorable prospects of ~~the individual~~ finding work in his usual or ~~related occupations~~ customary occupation within a reasonable period of time. ~~The specific statutory interpretations of~~ Rules 8 MCAR SS 4.3007-4.3008 shall also be considered in light of the following general guidelines:

1. For persons who have a verifiable assurance of work ~~in~~

~~the near future~~ within six weeks, suitable work ~~consists of~~ is limited to available, temporary work in their usual ~~or a related~~ trade or occupation or substantially equivalent employment in the labor market area;

2. For persons with a verifiable assurance of work in ~~the~~ more ~~distant future~~ than six weeks, suitable work ~~is~~ includes available, temporary work under 1. or other temporary work in a related trade or occupation for which the claimant is ~~reasonably~~ suited by virtue of his education, training, work experience or ability ~~and which is a reasonable departure from his usual occupation~~;

3. For seasonal workers suitable work ~~is~~ includes temporary work under 2. ~~in their usual occupation or a related occupation which provides conditions of employment approximating their past employment; however,~~ Other employment is suitable if it meets the following conditions:

a. There are available openings in a lower skilled or paid occupation; and

~~b. There are few, if any, unemployed workers for whom these openings would be more suitable,~~

~~c. The opening is one for which the claimant is reasonably fitted by virtue of his being able to perform the work, and~~

~~d.~~ b. The work pays a wage equaling at least 150 percent of the claimant's weekly benefit amount.

4. For persons without a verifiable assurance of work, suitable work is permanent work in their usual or ~~related occupations~~ substantially equivalent employment which provides wages and conditions of employment approximating those of their past employment if their prospects of finding the work are favorable. If prospects are unfavorable, work at lower skill or wage levels is suitable if there are few, if any, workers unemployed in the locality for whom these openings would be more suitable than for the claimant, the claimant is reasonably suited for the work by virtue of education, training, work experience or ability and the work offered is a reasonable

.3007

departure from his usual occupation.

~~In general, "near future" as used in 1. means six weeks or less and "more distant future" as used in 2. means more than six weeks.~~ FoF ① 55

"Verifiable assurance" means an assurance that can be confirmed by claimant or employer information or independent department knowledge of the situation. HE 47

Paragraph 2. may be applied only when the claimant does not have favorable prospects for finding work in his usual trade or occupation or substantially equivalent employment.

8 MCAR S 4.3007 Statutory terms interpreted.

A. ~~Generally~~ Applicability. The terms and phrases used in Minn. Stat. S 268.09, subd. 2 as ~~guidelines for determining suitability of work~~ shall have the meanings and explanations given in B.-R. FoF ① 56

B. To apply. "To apply" means that the claimant must comply with all necessary application processes, beginning with the notice to appear for the interview with the job service and including actually calling at the place of business of the prospective employer when so advised by the department.

C. Failure to apply. "Failure to apply" includes any willful action or neglect which demonstrates a lack of good faith in applying for employment.

D. Failure to accept. "Failure to accept" ~~may consist~~ consists of a direct statement of refusal by the claimant or the claimant's failure to take reasonable steps to accept ~~the job~~ suitable work after it has been offered to him. HE 58 HE 58

E. Available, suitable work. "Available, suitable work" means that there is a definite job or vacancy to apply for or accept. Work is not available to the claimant when the employer finds the claimant unqualified for the position.

F. Of which he was advised. "Of which he was advised" means that a claimant was made aware of a job by the department and offered an opportunity to apply for it. Although the employer's name need not be provided to the claimant unless he accepts the referral, the job must be described in sufficient detail so the

claimant is aware of the terms and conditions of employment.

G. Risk involved to his health and safety. Work is not suitable for a claimant if the employment presents a risk to his health or physical condition which is not usually customary to that occupation. Extra hazardous work shall not be suitable work unless the claimant has training or experience in that occupation. When a claimant has a demonstrated fear of performing a particular employment that employment shall not be suitable employment. A claimant's loss of ability to avoid previously accepted hazards must be considered.

H. His physical fitness. To determine suitability of work in terms of the claimant's physical fitness the department shall consider the type of work the claimant has most recently performed, any existing physical conditions, whether the work requires any ~~strenuous~~ HE 58 physical ability the claimant does not possess, and other factors affecting his physical ability to perform the work. If the claimant's physical condition prevents him from doing the work the work is unsuitable. Medical evidence may be required to support the claimant's statement that the work offered is not suitable because of the claimant's physical condition.

I. Prior training and experience. Work that requires a skill or particular training which the claimant does not already possess may be unsuitable. However, if the claimant lacks the skills and training needed to perform offered work, that work may be suitable if as part of the job the claimant is provided with the training necessary to develop the work skills needed or if the time and effort required to develop the skills is minimal.

J. Prospects of securing work in his customary trade or occupation. If the prospects of a claimant finding work in his usual trade or occupation are unfavorable, then work in other occupations may be suitable work if the general conditions of 8 MCAR S 4.3006 are satisfied. In determining whether a claimant's prospects in a reasonable period of time are favorable or unfavorable, the department shall consider the following factors: HE 42

1. Whether the claimant's particular skill or trade is not in demand because of protracted economic conditions, technological changes or other reasons;

2. The number of unemployed persons seeking employment in the claimant's customary trade or occupation compared to the number of positions available;

3. The extent of the claimant's training and experience in his customary trade or occupation compared to the training and experience of other individuals seeking similar work if openings are limited;

4. The extent to which the claimant has investigated or exhausted the prospects available in his labor market area;

5. The length of time normally required to find work in the claimant's usual trade or occupation;

6. The prospects of work in his customary trade or occupation compared to the prospects of other suitable work;

7. The claimant's verifiable assurances of work.

HE 42

K. Distance of the available work from his residence. To determine suitability in terms of distance, all factors must be considered, including distance, proximity to transportation, cost of transportation, type of transportation, transportation schedules and time required for transportation. This determination is made not only in comparison to the claimant's most recent job but also in relation to that which is customary in his occupation. If it is customary in the claimant's occupation to relocate or change job sites, regardless of distance, then the work requiring relocation is suitable. ~~To determine the suitability of work located outside the locality of the claimant's residence, the factors to be considered are the claimant's prospects for equally steady work in his home area, the duration of his unemployment, the remuneration offered as related to the cost of transportation, and the distance to the place of employment.~~

appears to be deleted in response to HE 42

L. Wages. The wages offered must approximate the prevailing wage for the work to be suitable. To determine suitability of work in terms of wages the total earnings must be considered.

These include the wage rate, hours of work, method of payment, overtime practices, bonuses, incentive payments and fringe benefits. When the offered work is at a rate of pay lower than the claimant's former rate consideration must be given to the length of the claimant's unemployment and the proportion of difference in the rates. The importance of the difference between the wages offered and the previous rate decreases as the period of unemployment increases. Work which may not be suitable because of lower wages during the early weeks of the claimant's unemployment may become suitable for him as his duration of unemployment lengthens and it becomes evident that prospects are remote for obtaining work in line with prior wages. A wage that is below the person's previous wage may be suitable if it is not substantially less favorable than that prevailing for similar work in the community.

M. Hours. To determine suitability of work in terms of hours, the arrangement of hours in addition to the total number of hours are to be considered. An offer to work on a second, third, rotating or split shift is suitable work if ~~workers are generally hired on these shifts~~ it is customary in the trade or occupation in the labor market area. However, the shifts are always suitable for individuals who customarily work for employers who use several shifts.

HE "58" F&F ⊙ 58

N. Other conditions of work. The suitability of the work ~~may~~ shall be determined by considering the provisions of the employment agreement, whether express or implied, including the physical conditions under which the work is done pursuant to the agreement. The term "other conditions of work" includes but is not limited to provisions for work rules, safety rules, sanitation, heat, light, and ventilation.

HE "58"

O. Substantially less favorable to the individual. Whether provisions of the work offered are substantially less favorable to the individual can be determined only by comparison of the conditions of the work offered to those prevailing for similar work in the local labor market area. The conditions of work offered are not compared to the previous work of the

individual. Both the extent of the difference as well as its effect on the worker shall be considered. If the work offered has differences of no substantial consequence for the worker, it will not be considered to be substantially less favorable. If the wages offered are more than ten percent below the prevailing rate of pay or less than the applicable federal or state minimum wage for the type of work being considered, it will be considered to be substantially less favorable than that prevailing for similar work in the locality.

P. Prevailing. Prevailing wages, hours and other conditions of work are those which are offered to those who commence employment in similar work in the locality.

Q. Locality. Locality means the claimant's labor market area.

R. Good cause. A claimant has good cause for refusal of suitable work only when there is some necessitous and compelling reason for refusal. Good cause for refusing a job may, but need not be attributable to the employer. Good cause reasons for refusal are usually personal to the claimant and extraneous to the employment. ~~Good cause for refusal of suitable employment must be~~, and are usually of a temporary and emergency ~~in character~~ nature so as not to detach the claimant from the labor market.

? why no apply for ? HE 61

8 MCAR S 4.3008 Reemployment offer. A claimant is considered to have refused an offer of suitable reemployment from a base period employer unless the terms and conditions of the offer are substantially less favorable than the terms and conditions under which the principal part of the wage credits were earned with that employer in the claimant's base period ~~were earned with that employer~~. FofF ① 62

A refusal of reemployment shall be with good cause if the claimant had previously quit the employment for good cause attributable to the employer and the conditions which were the basis for good cause still exist.

A refusal of reemployment shall be with good cause if the claimant previously separated from that employment because of

.3009
.3010

his own serious illness and the work offered would adversely affect that illness.

8 MCAR S ~~4.009~~ 4.3009 Partial benefits exemption. 8 MCAR SS 4.3001-4.3008 shall not apply to a claimant with respect to a claim for partial unemployment benefits.

8 MCAR S 4.3010 Benefit claim procedure.

A. Purpose and scope. This rule defines claim procedure and eligibility criteria under Minn. Stat. S 268.08, subd. 1.

B. Initial claim. To file a new claim for benefits or to reactivate an inactive claim, an individual shall report in person at an unemployment office and shall there:

1. Present a valid social security account number card or other acceptable evidence of his social security number;

2. File an initial claim for benefits on a prescribed form; and

3. Register for work, except that the initial claim for benefits may also constitute the individual's registration for work if it is determined that normal registration should be waived or postponed.

The claim shall be effective on the Sunday of the calendar week in which the claim is reactivated or filed.

C. Claim acceptance form. If the unemployment office cannot provide claim service on a given day an individual shall be given a claim acceptance form to verify his attempt to file a claim on that date. If the individual presents a claim acceptance form to one of the local unemployment service offices within 14 days from the date of issuance of the claim acceptance form or when service is next provided in a part-time unemployment office, the initial claim shall be backdated as if filed in the calendar week in which the claim acceptance form was issued.

D. Part-time unemployment office. Any individual who resides in an area in which there is a part-time unemployment office may report in person at that office and file a new or reactivated claim for benefits effective as of the Sunday of the

first week of the individual's unemployment, provided that his first day of unemployment is subsequent to the last previous day that service was provided by the part-time unemployment office. No claim shall be effective more than 28 days prior to the calendar week in which the individual reports to file the claim.

E. Permitted benefit years. An initial claim for benefits shall not establish a benefit year which begins prior to the Sunday next following the end of any previous benefit year except as otherwise provided by rule or law.

F. Withdrawal of claim. An initial claim for benefits which has been filed with the department may not be withdrawn by the claimant or otherwise terminated by the department except as provided by other rule or law.

G. Continued claim. A continued claim is a certification to the completion of one or more weeks of unemployment and a request for benefit credit for that period. To establish eligibility for benefits or waiting period credit for a week or weeks of unemployment following a new or reactivated claim an individual shall continue to report in person or by mail and file continued claims as directed by the department to the office responsible for the administration of his unemployment insurance, in this or any other state.

H. Transferred claim. Any claimant filing continued claims covering more than four weeks of benefits through a single area office in this or some other state other than the area office where his initial claim or transferred claim is filed shall transfer his claim to that single office. No claimant shall be ineligible for failure to transfer his claim to another office unless, prior to the filing of a continued claim, the claimant has been directed to transfer his claim and has failed without good cause to comply.

I. Late filed claim. Any individual who fails to file a continued claim in the manner and at the time and place specified by the department may report in person or by mail and file the claim within 14 days following the date specified by the department. Waiting period credit or benefits for each week

(.3011

that was covered by the delinquent claim shall be authorized if the claimant is otherwise eligible. No credit or benefits shall be authorized for subsequent weeks which were not claimed properly.

Any individual who for good cause fails to file a continued claim in the manner and at the time and place specified by the department may file the claim in person or by mail not more than 35 days following the expiration of his benefit year. The claimant, if otherwise eligible, shall be entitled to waiting period credit or benefits for each week that good cause for failure to report is established.

J. Assistance in filing claim. The department shall make reasonable efforts to assist claimants who because of physical impairment or inability to communicate in the English language cannot provide information necessary to file benefit claims without assistance. HE63

K. Requirement to notify department of address and telephone changes. The claimant's address and telephone number on a new or reactivated claim form shall constitute the last known address and telephone number for purposes of mailing notices of determination or otherwise contacting the claimant unless a written notice of address or telephone change is received by the unemployment office where his claim is on file. Any change of address or telephone number shall constitute the last known address or telephone number for only those transactions occurring after written notice was received.

7 - why this addition

8 MCAR S 4.3011 Week of unemployment.

A. Scope and purpose. This rule further defines "week" as defined under Minn. Stat. S 268.04, subd. 23.

B. Week calculated, labor dispute. An individual's week of unemployment shall consist of the consecutive seven-day period beginning with the day on which registration is made effective except following the termination of a labor dispute. Following termination of a labor dispute, week of unemployment is the remainder of the calendar week in which the labor dispute ended. An individual, if otherwise eligible, shall be entitled

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to one-fifth credit for each day, excluding Saturday, following the date on which the labor dispute ended.

Chapter Three: Taxation

8 MCAR S 4.3100 Definitions.

A. Generally. Unless the context otherwise requires, terms used in 8 MCAR SS 4.3100-4.3108 shall be construed in the sense in which they are defined in Minn. Stat. SS 268.03-268.24, or in these or other rules of the department.

B. Pay period. "Pay period" means that period of time during which the wages due on any regular pay day were earned. If the period exceeds 31 days, then 31 days shall be deemed to constitute a pay period.

8 MCAR S 4.3101 Wages.

A. Purpose. This rule further defines "wages" as defined in Minn. Stat. S 268.04, subd. 25, and used in Minn. Stat. SS 268.03-268.24, 8 MCAR SS 4.3101-4.3108, interpretations, forms and other official pronouncements issued by the department.

B. Types of wages, generally. "Wages" means remuneration for services. The remuneration may take any form, be paid at various times, and be computed in various ways. Remuneration may be in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or by commission. Remuneration may be paid on an hourly, daily, weekly, monthly, annual or other basis.

C. Paid and payable wages. Wages includes remuneration payable and remuneration paid. "Remuneration payable" is wages that have been earned but that were not paid when due. "Remuneration paid" is wages that have been actually or constructively delivered to, or for the benefit of, an employee.

D. Types of wages. Wages include the monetary value of:

1. Dwelling unit rent, utilities, meals, exchange of services or other goods or services that are to compensate for an employee's services;

2. Vacation pay or payment in lieu of vacation;

3. Termination, severance, or dismissal payment or

payment in lieu of notice whether notice is required or not;

4. That portion of the payment which compensates for services rendered received in the form of an award or allowance in accordance with a contractual agreement or settlement reached through any arbitrator, regulatory agency or court;

5. Profits, sometimes referred to as dividends, other than those designated as capital gain distributions or return of capital, distributed or allocated to officers and shareholders who perform services for a corporation organized under the rules of Subchapter S of the Internal Revenue Code of 1954. The distribution or allocation of undistributed profits is reportable at the time it is received by, or credited to the account of, the officers and shareholders;

6. The value of any consideration, award, bonus or prize which accrues before separation from employment;

7. Payments for accrued sick leave when not related to a specific absence due to sickness or injury, regardless of whether or not the employer maintains a sick pay plan as defined in Minn. Stat. S 268.04, subd. 25, clause (2);

8. Idle time or standby compensation paid by an employer for a guaranteed minimum number of hours of employment per week when employees are to be available for a specific period of time and payment is made to them for idle time even if they do not render services for the minimum number of hours;

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

10. Amounts paid to corporate shareholders and or officers, although designated as loans, where repayments are not made pursuant to a payoff schedule, lack business purpose and fail to provide for the payment of reasonable interest, if the shareholders or officers perform services for the corporation for remuneration below that which would approximate reasonable compensation for services;

11. Payments made directly or indirectly to an individual to perform or assist in performing the work of any employee of

the employer provided that the employer had actual or constructive knowledge that the work was being performed;

12. Payments made for services as a caretaker. Unless there is a contract or other proof to the contrary, remuneration shall be considered as being equally received by a married couple where the employer makes payment to only one spouse, or by all tenants of a household who perform services where two or more individuals share the same dwelling and the employer makes payment to only one individual;

13. Payments made for services by a migrant family. Where services are performed by a married couple or a family and an employer makes payment to only one individual each worker shall be considered as having received an equal share of the remuneration unless there is a contract or other proof to the contrary;

14. An employer's vehicle furnished to an employee to the extent the vehicle is used for personal purposes. If the employee has use of the vehicle without charge, the amount deemed to be wages shall be $200 per month or, if for less than a calendar month, $7 for each day that the employee has use of the vehicle for personal purposes. If the employee reimburses the employer for the use of the vehicle, the amount deemed to be wages shall be determined as follows:

a. If the employee reimburses the employer at an established rate of less than 20 cents per mile for each mile of personal use, the amount deemed to be wages shall be the difference, if any, between the amount reimbursed and 20 cents per mile; or

b. If the employee reimburses the employer at an established daily, weekly or monthly rate, the amount deemed to be wages shall be the difference, if any, between the amount reimbursed and $200 per month or, if for less than a month, $7 for each day that the employee has use of the vehicle for personal purposes;

15. Amounts withheld or deducted from an employee's ~~earning~~ earnings because of a deferred compensation agreement

which an employee agrees to participate in or which is part of an employment contract. A deferred compensation agreement generally means an arrangement between the employee and the employer for the withholding or deduction of a specific amount from his earnings, to be distributed to the employee by the employer or a third person at a later time, usually in post-retirement years.

E. Tips and gratuities.

1. Accounted for to the employer. Tips and gratuities are accounted for to the employer in various manners or forms including ~~if~~ when they are:

a. Added to the customer's bill by the employer;

b. Added to the bill by a customer using credit for the purchase;

c. Disbursed by the employer from a tip pool; or

d. Reported to the employer in compliance with the Internal Revenue Code of 1954.

2. Paid to an employee by a customer. Tips and gratuities are considered paid to an employee by a customer if they are:

a. Received directly from the customer;

b. Distributed from a tip pool, whether controlled by the employer or employees; or

c. Received as part of a plan or system under which the person initially receiving them, whether directly from the customer or from a tip pool, distributes a portion of the tips to other employees.

Under a.-c. the tips are considered as being paid by the customer to the person ultimately receiving them.

F. Valuing non-cash remuneration.

1. Except as this rule may otherwise provide, the cash value of remuneration for personal services payable in any medium other than cash shall be:

a. The fair market value of meals or any value agreed upon between the employer and employee if it is not less than the allowance as provided in Minn. Stat. SS 177.21-177.35, the

Minnesota fair labor standards act, and rules promulgated thereunder;

b. The value of rent of a house, apartment or other lodging, furnished to an employee that would be paid by an employee for similar or equivalent accommodations, but in no event less than the allowance provided in Minn. Stat. SS 177.21-177.35 and rules promulgated thereunder; or

c. The fair market value, determined when received, of any other remuneration for services unless a higher value is agreed upon between the employer and the employee.

2. If the ~~department~~ commissioner determines that the reasonable fair market value is other than as determined by the employer ~~it may~~ he shall, after affording the employer reasonable opportunity for the submission of relevant information, determine the reasonable cash value of board, rent, housing, meals, or similar advantage.

HE 67

G. Employee equipment.

1. The wages of the operator and supplier of a truck, bulldozer, tractor or similar equipment whose remuneration includes wages for personal services as well as the cost of operating and hiring the equipment shall, in the absence of an agreement between the parties, be determined as follows:

a. The value of that part of the total remuneration received which is wages for personal services shall not be less than the prevailing wage scale for similar services by operators of equipment of the same size and type in the locality where the services are performed; or

b. If there is no prevailing wage in the locality in which the services are performed, 40 percent of the total remuneration received from the employer shall constitute wages.

2. Payments to an employee that include advances or reimbursements for use of his personal vehicle of up to 9,000 pounds gross vehicle weight in the employer's business are wages unless the amount attributable to the use of the vehicle is separately paid or stated as prescribed in H.8. and the advance or reimbursement is not unreasonable or arbitrary in which case

only the amount attributable to services performed shall be wages.

3. If the commissioner finds that the wage determination of the equipment operators or employees who use their personal vehicles in the employer's business prescribed by 1. and 2. would be unreasonable or arbitrary in ~~the~~ a particular case, then the commissioner ~~may~~ shall determine the amount of the wages of the employee involved. HF 68

H. Exempt wages. The term "wages" shall not include:

1. The value of any special discount or mark down allowed to an employee in goods purchased from or services supplied by the employer where the purchases are optional and do not constitute regular or systematic remuneration for services rendered;

2. Customary and reasonable directors' fees paid to individuals who are not otherwise employed by the corporation of which they are directors;

3. Moneys allowed to employees for reimbursement of meal expenses when employees are required to perform work after their regular hours;

4. Any payment made to or on behalf of an employee by the employer for legal or dental service plans if provided for all employees generally or for a class or classes of employees;

5. Payments for periods of sickness or injury after the end of six calendar months after the calendar month in which the employee last worked for the employer, if the payments are made by an employer who does not maintain a regular sick pay plan as defined in Minn. Stat. S 268.04, subd. 25, clause (2);

6. Compensation, reimbursement, fees, meals or other remuneration paid or provided through a court to an individual for services performed as a juror;

7. Royalties to an owner of a franchise, license, copyright, patent, oil, mineral or other right;

8. Amounts paid specifically as advances or reimbursements for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be

incurred in the business of the employer. Traveling and other reimbursed expenses must be identified either by making separate payments or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment;

9. Remuneration paid to radio and television artists which represents residual payments and ~~are~~ which is accrued subsequent to the production of musical jingles, spot announcements, radio transcriptions and film sound tracks; or

10. Any payment to or on behalf of an employee under a plan or system established by an employer, which makes provisions for his employees generally or for a class or classes of his employees for the supplementation of unemployment benefits under the written terms of an agreement, contract, trust arrangement, or other instrument if the plan or system provides benefits which are only supplemental to, and does not replace or duplicate any state or federal unemployment compensation. The plan or system must provide that funds are to be used solely for the supplementation of state unemployment benefits. Potential recipients of the plan or system must be required to file for unemployment benefits in accordance with state law. The plan or system shall not allow the assignment of benefits or the payment of any consideration in lieu of any benefit upon the employee's withdrawal from the plan or system, his termination of employment or the termination of the plan or system. The plan or system must not be designed for the purpose of avoiding the payment of unemployment taxes on moneys disbursed from its plan or system.

see HE 70 - for discussion of rule.

8 MCAR S 4.3102 Employment.

A. Definitions. For the purpose of 8 MCAR S 4.3102 the following terms have the meaning given to them.

1. "Control" is the power to instruct, direct or regulate the activities of an individual whether or not the power is exercised.

2. "Employing unit" has the meaning given to it in Minn. Stat. S 268.04, subd. 9, and includes any individual or type of

organization that engages, retains, or secures the services of, an individual.

3. "Employment" has the meaning given to it in Minn. Stat. S 268.04, subd. 12, and includes the services of any individual performed for an employing unit under its direction, rule or control as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is performing services in employment shall be determined by the preponderance of the evidence.

4. "Method" is the way, procedure or process for doing something; the means in attaining a result as distinguished from the result itself.

B. Obtaining a determination or opinion. If an employing unit is unsure of the status of an individual performing services for it, the employing unit may obtain a written determination by submitting all relevant facts to the commissioner on questionnaires prescribed for these determinations. The determination shall be final unless a written protest is filed with the commissioner as set forth in Minn. Stat. S 268.12, subd. 13. If any person contemplates hiring or engaging a worker to perform services and is unsure if the services would be deemed employment, a written opinion may be obtained by submitting information about the proposed work arrangement, as the hiring person perceives it will be, on questionnaires prescribed by the commissioner. The commissioner's opinion does not have the effect of a determination and is not subject to appeal. The person requesting the opinion shall clearly indicate that the situation is hypothetical and that an opinion, rather than a determination, is being sought. If an individual is hired or engaged to perform the services in question, a determination may be obtained. This paragraph in no way limits the department's authority under Minn. Stat. S 268.12, subd. 13, clause (1) to make determinations on its own motion.

HE9

~~B.~~ C. Procedures for determining control. The department ~~may~~ shall determine if control exists by:

HE 16

1. Reviewing written contracts between the individual and the employing unit;

2. Interviewing the individual or employing unit;

3. Obtaining statements of third parties;

4. Examining regulatory statutes governing the organization, trade or business;

5. Examining the books and records of the employing unit; and

6. ~~Any other appropriate means~~ Making any other investigation necessary to determine if the elements of control specified in D. exist. HE 76

~~C.~~ D. Evidence of control. Paragraphs 1.-~~12.~~13. describe criteria for determining if there is control over the method of performing or executing services. The total circumstances must be considered to determine if control is present. FdF ¶ 77

1. Authority over individual's assistants. ~~Hiring, supervising, and payment of an individual's assistants by the employing unit shows~~ Control over the individual is indicated when the employing unit hires and pays the individual's assistants and supervises the details of the assistant's work. HE 77

2. Compliance with instructions. ~~Control exists when an individual is required to comply with instructions about when, where and how he is to work. Some individuals may work without receiving instructions because they are highly proficient in their line of work, however, the control factor is present if the employing unit has the right to instruct or direct. Instruction may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.~~ Control is indicated when an individual is required to comply with detailed instructions about when, where, and how he is to work including the order or sequence in which the service is to be performed. Mere suggestions as to detail or necessary and usual cooperation where the work furnished is part of a larger undertaking, does not normally evince control. Some individuals may work without receiving instructions because they are highly proficient in their line of work; nevertheless, HE 7

the control factor is present if the employing unit has the right to instruct or direct the methods for doing the work and the results achieved. Instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished. However, instructions required by state or federal law or regulation or general instructions passed on by the employing unit from a client or customer, generally does not evince control. HE 78

3. Oral or written reports. Control is indicated if regular oral or written reports relating to the method in which the services are performed must be submitted to the employing unit. Periodic reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion of a job, or the reports are needed to determine compliance with the terms of a contract. Completion of receipts, invoices and other forms customarily used in the particular type of business activity or required by law does not constitute written reports. HE 79

4. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work could be done elsewhere. When work is done off the premises it does indicate some freedom from control; however, in some occupations, the services are necessarily performed away from the premises of the employing unit and are still considered to be in employment.

5. Personal performance. ~~If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field.~~ Control is indicated if the services must be personally rendered to the employing unit. Personal performance of a very specialized work, when the worker is hired on the HE 8

basis of professional reputation, as in the case of a consultant known in the academic and professional circles to be an authority in the field, is a less reliable indicator of control. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent. HE 81

~~6. Establishment of work sequence. If a person must perform services in the order or sequence set for him by the employing unit it indicates the worker is subject to control. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently, however, it is sufficient to show control if the employing unit retains the right to do so.~~ Existence of a continuing relationship. The existence of a continuing relationship between an individual and the person for whom he performs services is a factor tending to indicate the existence of an employer-employee relationship. Continuing services may include work performed at frequently recurring, though somewhat irregular intervals, either on call of the employing unit or whenever work is available. HE 82 HE 82

7. Right to discharge. The right to discharge is a very important factor indicating that the right to control exists particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods. An independent worker generally cannot be terminated if he produces an end result which measures up to his contract specifications. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to control. That a right to discharge is restricted because of a contract with a labor union or with other entities does not mean there is not control.

8. Set hours of work. The establishment of set hours of work by the employing unit indicates control. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element

of control.

9. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control especially if the training is given periodically or at frequent intervals.

10. Amount of time. If the worker must devote his full time to the activity, control is indicated. Full time does not necessarily mean an eight hour day or a five or six day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. Full time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else.

11. Tools and materials. The furnishing of tools, materials and supplies by the employing unit is indicative of control over the worker. When the worker furnishes these items it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

12. Expense reimbursement. Payment by the employing unit of either the worker's approved business or traveling expenses, or both, is a factor indicating control over the worker. A lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

13. Satisfying requirements of regulatory and licensing agencies. If an employing unit is required to enforce standards or restrictions imposed by regulatory or licensing agencies, such action does not evince control. HE 83

~~D.~~ E. Independent contractor or employee, factors to consider. Among the factors to be considered, in addition to factors of control, when determining if services are employment are those listed in 1.-~~7.~~ 8.

1. Availability to public. That an individual makes his services available to the general public on a continuing basis

is usually indicative of independent status. An individual may offer his services to the public in a number of ways including having his own office and assistants, displaying a sign in front of his home or office, holding a business license, having a listing in a business directory or a business listing in a telephone directory, or advertising in a newspaper, trade journal or magazine.

2. Compensation on job basis. A person working in employment is usually paid by the hour, week or month. Payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour or periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no ~~requirements~~ requirement for repayment of the excess over ~~earning~~ earnings indicates the existence of employment.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is working in employment is not in that position.

4. Obligation. An individual working in employment usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and is liable for failure to complete the job.

5. Substantial investment. A substantial investment by a person in facilities used by him in performing services for another tends to show an independent status. The furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status. Facilities include equipment or premises necessary for the work, but not tools,

instruments, clothing, and similar items that are provided by individuals working in employment as a common practice in their particular trade. A substantial expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship. Substantial investment means a monetary investment representing something of considerable worth, in relation to the overall requirements of the person's chosen profession, trade, occupation or vocation.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because the worker is usually free from control by any of the firms. It is possible that a person may work for a number of people or firms and still be an employee of one or all of them.

7. Responsibility. An employing unit is usually responsible for the negligence, personal behavior and work actions of a person working in employment in his contacts with customers and the general public during times that he is performing services for the employing unit. An independent worker is usually accountable for his own actions.

~~E.~~ 8. Services in the course of the employing unit's organization, trade or business. Services that are in the course of the employing unit's organization, trade or business consist of services which are a part or process of the employing unit's organization, trade or business and ancillary or incidental services. ~~An individual who performs services which are a part or process of the employing unit's trade or business is in employment and does not have independent status~~ Services which are a part or process of the employing unit's trade or business are generally performed by individuals in employment. Therefore, it is a consideration in determining the status of an individual. This consideration, as with all other considerations, is not a sole determinative factor. "Part" and "process" are not synonymous. Process refers to those services which directly carry out the fundamental purposes for which the organization, trade or business exists, for example, painting

HE 88

and repairing automobile bodies in an automobile body paint and repair shop. Part refers to any other services which are essential to the operation or maintenance of the organization, trade or business, for example, routine cleaning of premises and maintenance of tools, equipment and buildings. Ancillary or incidental services include landscaping the areas around an automobile body paint and repair shop. Other services that meet the part, process or ancillary classification are those services in connection with purchasing, receiving, storing, pricing, displaying, selling and delivery of merchandise and housekeeping services required for the safety and comfort of customers and the general public or to maintain the premises in a manner as to promote business.

F. Independent status, determination. When determining if an individual is in employment or is an independent contractor the factors considered must be weighed to make a determination of the relationship under the facts of the particular case. ~~The weight to be given to a factor is not always constant and there may be other factors not specifically identified in this rule that should be considered. The degree of~~ There are five essential factors to be considered. The two most important are those:

1. That indicate the right or the lack of the right to control the means and manner of performance; and

2. To discharge the worker.

The other essential factors to be considered are: the mode of payment; furnishing of materials and tools; and control over the premises where the work is performed.

Other factors, including some not specifically identified in this rule, may be considered if a determination is inconclusive when applying the essential factors, and the degree of their importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

HERE

G. Agent-drivers and salespersons. Certain classes of agent-drivers, salespersons and commission persons are statutory

employees even though they are independent contractors under common law rules. Minn. Stat. S 268.04, subd. 12, clause (1)(b) sets forth the conditions which must be present for members of each class to be employees.

1. Full-time. In the case of a traveling or city salesperson, other than an agent-driver or commission-driver, Minn. Stat. S 268.04, subd. 12 provides that the individual must be engaged on a full-time basis. "Full-time" means the number of hours in the calendar week during which individuals engaged in the same or similar occupations usually or customarily perform services, except that any week during which an individual worked 40 hours or more providing those services shall be deemed to be full-time.

2. Substantial investment in facilities. Agent-drivers, commission-drivers, and traveling or city salespersons to be employees must not have a substantial investment in facilities, other than facilities for transportation, used in connection with the performance of the services.

a. "Facilities" means equipment or premises necessary to perform the work. Inventory, clothing and items not actually required to adequately perform the assigned tasks are not facilities.

b. "Substantial investment" refers to a monetary investment representing something of considerable worth in relation to the overall investment requirements in the distribution or sale of the particular product involved.

H. In employment by federal law. An individual is in employment if he performs services which are subject to Section 3300 of the Internal Revenue Code of 1954 (Federal Unemployment Tax Act) or performs services which are required by federal law to be covered employment by state law.

I. In employment, general inclusions. The following services described in 1.-3. are considered to be in employment:

1. Services performed by an employee as an insurance agent, insurance solicitor or real estate salesperson for the pay period in which payments for the services not constituting

commissions were paid or became due and payable. The exclusionary provisions of Minn. Stat. S 268.04, subd. 12, clauses (15)(m) and (o) apply to services which require a Minnesota real estate or insurance agent's sales license and to those individuals, except corporate officers, possessing the license. Services of corporate officers, who are employees by statute, shall not be considered in the application of this exclusionary provision. Noncommission remuneration includes guaranteed salary, training allowance, bonus, and draws or advances against future earnings as described in 8 MCAR S 4.3101 D.9. For the purpose of this paragraph commission means remuneration paid to individuals as a direct result of a sale, including the percentage of the sale price paid to the salesperson responsible for the sale, and payments including overrides, listing fees, and closing fees which are related to the sale;

2. Services performed as election judges; and

3. Services performed by factory demonstrators who are placed by a manufacturer or distributor in stores and other locations to aid in the sale of products, who are hired by, who are paid directly or indirectly by, and who work under the direction of the manufacturer or distributor, although this direction may be delegated to the retailer, ~~and they~~ are in the employment of the manufacturer or distributor making the placement. If the retailer, not acting as an agent for the manufacturer or distributor, hires, directs and pays the demonstrator directly, the retailer is the employer. If the wages are paid in part by the manufacturer or distributor, and in part by the retailer, the demonstrator is in the employment of both. Each is required to pay contributions on the part of the remuneration which ~~he~~ it pays, provided that ~~they are employers~~ it is an employer under Minn. Stat. SS 268.03-268.24.

J. Casual labor.

1. Casual labor not in the course of the employing unit's trade or business, although excluded from the term employment by Minn. Stat. S 268.04, subd. 12, clause (15)(b), is conditionally

included as employment under the provisions of Chapter 23, Section 3300 of the Internal Revenue Code of 1954 (Federal Unemployment Tax Act). Minn. Stat. S 268.04, subd. 12, clause (6) provides that the term employment shall include any service which is deemed to be employment under the Federal Unemployment Tax Act; therefore, casual labor is considered employment unless it meets the exclusionary provisions of that act. The exclusionary provisions of that act are in 2.

2. Service not in the course of the employing unit's trade or business, performed in any calendar quarter by an employee is excluded employment unless the cash remuneration earned for the service is $50 or more, and the service is performed by an individual who is regularly employed by the employing unit. For the purpose of this paragraph, an individual shall be deemed to be regularly employed if for some portion of each of 24 days or more, whether or not consecutive, during the current or preceding quarter the individual performs service that is not in the course of the employing unit's trade or business. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining if the cash remuneration test is met. Casual labor not in the course of the employing unit's trade or business includes service that does not promote or advance the trade or business of the employing unit; for example, work performed in connection with the employing unit's hobby or recreational activities, or work as an employee in repairing the employing unit's private home. Service for a corporation cannot be considered as nonbusiness or casual labor.

K. Localized employment.

1. If an employee works in more than one state, it is necessary to determine if the employment is localized in, and reportable to Minnesota. In making this determination, only the regular services for which the employee was hired, and not those characterized as incidental, temporary, transitory or an isolated transaction are to be considered. An employee's

services are considered localized in Minnesota in any calendar quarter in which 80 percent or more of his regular services are performed in Minnesota.

2. Regular services include those services performed in an office located in the home of the employee if all of the following conditions are met:

a. The employer does not provide other facilities;

b. The office meets the requirements of the Internal Revenue Code of 1954 for the deduction of business related expenses; and

c. The services performed are an integral part of the employee's regular duties.

3. Incidental, temporary, transitory and isolated services include:

a. Attending periodic meetings or returning to one's residence which is located outside his area or territory, by salespersons or others who normally perform services within a given area or territory; and

b. Any other services which are apart from or not a permanent part of an employee's regular duties.

L. Multi-state employment. When an individual's services are not localized, and absent any reciprocal agreement provided for in Minn. Stat. S 268.13, subd. 1, clause (1), the employee is a "multi-state" worker and the application of the tests listed in 1.-4. below is required, to determine whether the services are reportable to Minnesota.

1. Base of operations. If an individual's services are not localized in any state and some services, other than those determined to be incidental, temporary, transitory or isolated transactions, are performed in Minnesota and the base of operations is in Minnesota, the employee's entire services are reportable to Minnesota. "Base of operations" means the place, usually permanent in nature, from which the employee starts his work, to which he customarily returns, and to which the employer may direct instructions to the employee. A branch office of the employer or the place of residence of the employee could be a

base of operations.

2. Direction and control. If an individual's services are not localized in any state and the base of operations test does not apply, all of the services are reportable to Minnesota if Minnesota is the state from which the employer exercises general direction and control over the employee, and if some services, other than those determined to be incidental, temporary, transitory or isolated services, are performed in Minnesota.

3. Residence. If an individual's services are not localized within any state and the base of operations and the direction and control tests do not apply, the individual's entire services are reportable to Minnesota if the individual's residence is located in Minnesota and some services, other than those determined to be incidental, temporary, transitory, or isolated transactions are performed in Minnesota.

4. Service not covered under the laws of any other state or Canada. If 1.-3. do not apply, and the individual's services are not covered under the laws of any other state or Canada, the services are covered under Minn. Stat. SS 268.03-268.24 if the services are directed and controlled from Minnesota.

M. Employment partially exempt within a pay period; 50 percent rule.

1. Minn. Stat. S 268.04, subd. 12, clause (15)(p) does not apply to an individual who performs services as an independent contractor and in employment within the same pay period, but does apply to all employment defined in Minn. Stat. S 268.04, subd. 12, except clauses (10)(a) and (b), relating to certain employees of religious organizations.

2. If an individual's services within the pay period consist of 50 percent or more of excluded employment none of that individual's services for that pay period are taken into account nor does any of that individual's remuneration for that pay period constitute wages.

3. Although not applicable to services by an individual referred to in Minn. Stat. S 268.04, subd. 12, clauses (10)~~(1)~~

(a) and (b), other services performed by the same individual are subject to all other provisions of Minn. Stat. SS 268.03-268.24.

N. Previously excluded employment. If within a calendar year an individual's services and remuneration should no longer be excluded because his employing unit has met the employment or wage requirement for that individual's class of workers all of the previously excluded employment for that class within the same calendar year is subject to the provisions of Minn. Stat. SS 268.03-268.24. The previously excluded wages for all workers in that class of employment are reportable in the calendar quarters in which the wages were paid or were due and payable.

O. Employment, general exclusions. Minn. Stat. S 268.04, subd. 12, clause (10)(d) excludes services which are performed as part of a program designed to relieve unemployment, if the specific program, and not just the employing unit, is assisted or financed by any federal agency or an agency of a state or political subdivision thereof. "Assistance" may be in the form of supervision, advice in organizing and operating the program, but it must be substantial and continuing. Occasional, intermittent or incidental services would not be sufficient to invoke the exclusion. Where other than incidental physical facilities or material are furnished the program by a federal agency, the state or any of its political subdivisions, the program has been "assisted or financed".

P. Employment, special exclusion. In the trucking industry, an owner-operator of a vehicle which is licensed and registered as a truck, tractor, or truck-tractor by a governmental motor vehicle regulatory agency is an independent contractor, not an employee, while performing services in the operation of his truck, if each of the following factors are substantially present:

1. The individual owns the equipment or holds it under a bona fide lease arrangement;

2. The individual is responsible for the maintenance of the equipment;

3. The individual bears the principal burdens of the

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operating costs, including fuel, repairs, supplies, vehicle insurance, and personal expenses while on the road;

4. The individual is responsible for supplying the necessary personal services to operate the equipment;

5. The individual's compensation is based on factors related to the work performed including a percentage of any schedule of rates or lawfully published tariff and not on the basis of the hours or time expended;

6. The individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier and specifications of the shipper; and

7. The individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

8 MCAR S 4.3103 Agricultural labor.

A. Purpose. This rule further defines and clarifies terms used in Minn. Stat. S 268.04, subd. 12, clause (15)(a) and in this rule.

B. Definitions.

1. Agricultural and horticultural commodity. "Agricultural or horticultural commodity" includes nuts, fruits, mushrooms, vegetables, honey, milk, eggs and grain, flowers, cut flowers, trees, sod and shrubbery, animal feed or bedding, grass seed, vegetable and cereal seed, flax, soy beans, sunflower seeds, corn, medicinal herbs and other crops.

2. Commodity. "Commodity" refers to a single product. For example, all apples are one commodity. Apples and peaches are two separate commodities.

3. Crop purchase agreement. "Crop purchase agreement" means an agreement whereby a crop is raised under contract with a buyer.

4. Cultivating. "Cultivating" means cultivating of the soil, irrigating crops, spraying, dusting and other related operations.

5. Farm. "Farm," unless otherwise excluded in this rule,

means land or buildings if their primary use is for raising agricultural or horticultural commodities or for activities generally associated with the operation of a ranch, range, livestock or dairy operation. A farm need not be a specific size and it need not be composed of contiguous plots. The performance of agricultural services does not by itself render the place where they are performed a farm.

6. Fur-bearing animals. "Fur-bearing animals" are animals raised for the eventual use of their fur in the manufacture of clothing or other products.

7. Harvesting. "Harvesting" includes baling hay and straw, shredding fodder, combining small grains, hulling nuts, and course grinding of alfalfa. Horticultural commodities including flowers, trees, shrubbery and plants are harvested when they are taken up for sale or storage.

8. Livestock. "Livestock" is any useful domestic animal kept for use on a farm or raised for sale and profit or for eventual consumption.

9. Poultry. "Poultry" is any domestic fowl raised for meat or eggs and includes chickens, turkeys, ducks and geese.

10. Primary. "Primary" means 70 percent or more.

11. Raising. "Raising" as it pertains to livestock, bees, poultry, fur-bearing animals and wildlife means any or all stages of development, including breeding, which are necessary in their maturing for use on the farm or for sale. Raising does not include services in potting, watering, heeling, or otherwise caring for trees, shrubbery, plants, flowers or similar items that are purchased in saleable condition for the purpose of resale.

12. Terminal market. A "terminal market" includes a packing or processing plant or any place where a farmer-producer customarily relinquishes his economic interest in the commodity, its future form or its destiny.

13. Wildlife. "Wildlife" refers to frogs, birds, fish and all animals belonging to a species or class generally considered wild regardless of the element which they inhabit.

C. Farms, exclusions.

1. Feedlots, hatcheries and horse breeding and training. Feedlots, hatcheries and horse training and breeding enterprises are not in themselves farms although they require services generally considered to be agricultural labor.

2. Wildland. Property left in its wild state with no effort expended to perform common farming operations is not a farm.

D. Farms, inclusions.

1. Wild rice. Land developed for seeding, cultivating and raising wild rice is a farm.

2. Christmas trees. A plot of land used primarily for raising Christmas trees is a farm.

3. Mushrooms. Land and structures used primarily for raising mushrooms is a farm.

4. Wildlife. A parcel of real property used for raising any form of wildlife is a farm.

5. Ranges. Land used primarily for grazing is a farm.

E. Crop purchase agreements, farms, agricultural labor.

1. Farm operator. A person agreeing to purchase a commodity grown under a crop purchase agreement does not by that reason qualify as an operator of a farm even though he conducts some or all of the operations necessary for the production and harvesting of the crops purchased.

2. Agricultural labor. Services performed on a farm in the employ of either party to a crop purchase agreement in connection with the raising and harvesting of crops is agricultural labor.

F. Agricultural labor on farms. Services connected with the following activities must be performed on a farm as defined in Minn. Stat. S 268.04, subd. 12, clause (15)(a)(5) and in this rule, to be agricultural labor:

1. Breeding and training horses;

2. Hatching poultry;

3. Aerial seeding, fertilizing, spraying and dusting including services related to the mixing of the spray or dust

material or the loading of the material into the airplane, as well as services related to the measuring of the swaths and the marking and flagging of fields to be dusted or sprayed;

4. Clerical, bookkeeping and other office work in conjunction with the services referred to in Minn. Stat. S 268.04, subd. 12, clause (15)(a)(1); or

5. Holding, feeding and fattening livestock in feed lots.

G. Agricultural labor, ~~specific cases~~ conditional situations.

1. Generally. The services described in 2.-5. are not agricultural labor unless they meet the specific requirements set forth in 2.-5. with regard to where and for whom they are performed. When reference is made to "incidental to ordinary farming operations", that means services of the character ordinarily performed by employees of a farmer or of a farmer's cooperative organization or group as a prerequisite to marketing in its unmanufactured state any agricultural or horticultural commodity produced by the farmer, organization or group.

2. Clerical work. Record keeping and other clerical or office work performed in connection with the functions described in Minn. Stat. S 268.04, subd. 12, clauses (15)(a)(2) and (4) unless they are:

a. Performed in the employ of the owner or tenant or other operator of a farm;

b. Rendered in major part on a farm; and

c. Performed incidentally to ordinary farming operations.

3. Commodity retailing. Retailing agricultural or horticultural commodities, on or off the farm, unless:

a. The services are performed for, and the commodities are produced by the operator of the farm; and

b. Less than 50 percent of the employee's time is devoted to the services. The 50 percent test is to be applied to each employee with respect to either a pay period or 31 days, whichever is less.

4. Waterways work. Services in the construction of canals, reservoirs, waterways or drainage ditches, unless in the

employ of the owner or tenant or other operator of a farm.

5. Land clearance. Services in the clearing of stumps, brush and debris from land in preparation for its use as a farm, unless done in the employ of the owner tenant or other operator of the farm.

H. Agricultural labor exclusions.

1. Generally. Services connected with the following activities do not constitute agricultural labor:

a. Breeding, raising and caring for mice, rats and other rodents and creatures commonly held for sale in pet shops or raised for research and experimental purposes;

b. Breeding, raising, caring for, exhibiting and boarding dogs and cats;

c. Racing, exhibiting and boarding horses, including services connected with a riding stable or academy;

d. Lumbering or landscaping;

e. Collecting and processing maple sap into maple syrup or sugar;

f. Trapping animals;

g. Harvesting native wild rice not grown on land developed specifically for that purpose; or

h. Raising and harvesting worms.

2. Packing plants. Services performed in the employ of any person other than the operator of a farm in hauling crops to a packing plant and services within the plant do not constitute agricultural labor.

I. Agricultural labor, separate commodities. The services with respect to each commodity are to be considered separately in determining whether the conditions set forth in Minn. Stat. S 268.04, subd. 12, clause (15)(a)(4) have been satisfied.

8 MCAR S 4.3104 Domestic service.

A. Purpose. This rule further defines and clarifies terms used in Minn. Stat. S 268.04, subd. 12, clause (14) and in this rule.

B. Definitions.

1. Domestic service. "Domestic service" means work

ordinarily performed as an integral part of household duties that contribute to the maintenance of the employer's private home or administers to the personal wants and comforts of the employer and other members of the employer's household. In general domestic service includes work performed by cooks, waiters, waitresses, butlers, housekeepers, housemen, watchmen, governesses, maids, companions, nursemaids, valets, baby sitters, laundresses, furnace men, caretakers, gardeners, footmen, grooms, seamstresses, handymen and chauffeurs of family automobiles. Domestic service performed for fraternities and sororities also ~~include~~ includes services performed by housemothers.

2. Local college club. "Local college club" means a club operated and controlled by and for the benefit of students enrolled at a university or college.

3. Private home. "Private home" means the fixed abode of one or more persons. Any shelter used as a dwelling may be considered as a private home including a tent, boat, trailer, or a room or suite in a hospital, hotel, sanatorium, or nursing home. A cooperative boarding and lodging facility may also be a private home. In an apartment house, each apartment, together with its stairways, halls, and porches is a private home. Parts of the premises devoted to common use, such as an office, furnace room, lawns, public stairways, halls and porches, are not a part of the private home. If a facility is used mainly as a commercial rooming or boarding house only that part of the house which is used as the operator's living quarters is considered to be a private home.

C. Domestic service, general.

1. Non-domestic service, treatment. If service performed by an employee in or around the private home of an employing unit is not domestic service within the meaning of this rule, it is subject to the other provisions of Minn. Stat. S 268.04, subd. 12.

2. Maintenance of the employer's private home. Domestic service in connection with the maintenance of an employer's

private home is service which contributes directly to the protection, cleaning and normal maintenance, in contrast to major repair projects, of the home and surrounding area. It does not include service which is not ordinarily a part of home duties or which involves the use of skilled or specialized training including service performed by persons in the construction trades.

3. Administering to the personal wants and comforts of the employer. Certain services, although performed in or around the private home of the employer are not domestic services because they are too remotely associated with the requirement that they administer to the personal wants and comforts of the employer. Examples of non-domestic services include those performed by a private or social secretary, tutor, librarian, bookbinder, museum assistant and medical nurse.

4. Domestic service performed by relatives. Domestic service performed by relatives, other than that excluded from employment by Minn. Stat. S 268.04, subd. 12, clause (15)(d), is domestic service within this rule if there is a contractual agreement between a relative and the employing unit.

5. Service performed by employees of landlords or rental agencies. Service of a household nature performed in or around rental units by employees of landlords and rental agencies is not domestic service. Service performed by domestic workers in and around the private home of the landlord is not within this exception.

6. Workers obtained through a referral or placement agency. Domestic workers referred to jobs through employment placement agencies that neither supervise nor pay them directly are in the employ of the recipient of the services. However, if an agency is in the business of providing temporary services to clients the agency is the employing unit and the workers are not providing domestic services.

7. Service performed for a minister, priest, rabbi or any other member of a religious order. Service performed in the private home of a minister, priest, rabbi or any member of a

religious order is considered domestic service if the worker is in the employ of the recipient of the service. If the worker is in the employ of the church or religious order the service is excluded employment. The recipient of the service is the employer if the funds for the payment of the domestic worker are not specifically provided by the church or religious order. Funds provided by a congregation of a church are considered as being provided by the church. If funds are not provided by the church specifically for domestic service and the spouse hires, directs and otherwise controls the worker, the spouse is the employer.

8. Registered and licensed practical nurses. Registered nurses performing private duty services are generally performing service as independent contractors if they have full discretion in administering their professional services and are not subject to direction and control. Registered and licensed practical nurses who are engaged by hospitals, nursing homes, physicians, government agencies or commercial businesses generally are not performing services as an independent contractor and the services are non-domestic.

9. Nurses aides and patient helpers. Nurses aides and patient helpers who are engaged to perform services in the private home of the patient, although they may occasionally administer medication, are usually performing services that are primarily domestic in nature. Patient helpers who are selected by patients who require their services, either in the hospital or after returning to their homes, are generally in the employ of the patient.

10. Service authorized or provided by agencies. Any agency providing or authorizing the hiring of homeworkers or personal care attendants in the private home of an individual is the employer of those individuals performing the services and the services are not considered domestic if the recipient would not receive the care unless provided or funded for by the agency. It is immaterial whether the agency pays the homeworker or attendant directly or if the agency provides the funds to the

recipient.

D. Location of domestic service.

1. Domestic service is service which is performed only in a private home of the employer, local college club, or local chapter of a college fraternity or sorority.

2. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter or university faculty club.

8 MCAR S 4.3105 ~~Employer~~ Records, reports and payments.

A. Scope. This rule clarifies an ~~employer's~~ employing unit's duty with regard to records, reports and payments as required under Minn. Stat. SS 268.06, subd. 1; 268.11, subds. 2 and 3; and 268.12, subd. 8.

B. Notification.

1. ~~Change or transfer of business. The department shall be notified on reports prescribed by the department within 30 days of the start, change, transfer, sale, acquisition or termination of a business in whole or in part. Subsequent requests for additional information required in determining liability, modifying an existing account and assignment of experience rates must be completed and returned to the department within time limits established by the department.~~ Establishment of new business or change in an existing business. Each employing unit shall notify the department within 30 days of a change in legal entity, or of the start, transfer, sale, acquisition, or termination of a business, in whole or in part, insofar as the transaction results in the creation of a new or different employing unit or affects the establishment of employer accounts, the assignment of rates, or the transfer of experience records as provided in Minn. Stat. S 268.06. If the information as submitted is incomplete, subsequent requests for additional information required in determining liability, modifying an existing account and assigning or transferring of experience rates must be completed, signed and returned to the department in accordance with the instructions on the form or accompanying correspondence.

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2. Employer death. The executor, administrator or other legal representative of a deceased employer shall be responsible for notifying the department of the employer's death as soon as possible.

3. Bankruptcy. In the case of bankruptcy or receivership proceedings, or any proceedings for the relief of a debtor who is an employer, the trustee in bankruptcy, receiver, or person designated by order of the court as the one in control of the assets of the debtor shall promptly file notice of ~~that~~ the proceedings with the department.

C. Records. Each employing unit shall establish, maintain and preserve records with respect to individuals performing personal services for it for a period of not less than five years after the calendar year in which the remuneration for the services was paid or payable. The records shall show for each individual the following:

1. Name;

2. Social security number;

3. Days in which the individual performed personal services;

4. Location where services were performed;

5. Wages paid and wages due but not paid for personal services, showing separately:

a. Money wages, excluding special payments;

b. Wages paid and wages due but not paid, in any medium other than money, excluding special payments;

c. Special payments such as bonuses, gifts, and prizes, showing separately money payments, other special payments and the character of the payments;

d. Days for which sick pay was paid; and

e. Tips and gratuities paid to an employee by a customer and accounted for by the employee to the employer as defined in 8 MCAR S 4.3101 E.1. and 2.

6. Rate and base unit of pay;

7. Amounts paid as allowances or reimbursement for travel or other activity pertaining to the furtherance of the employing

unit's business which were not included as wages. The account shall show each item of expense incurred during each pay period or calendar month~~, or if paid per diem, the dates the employee was away from home overnight~~;

8. The date of separation and the reason, in detail, for the termination;

9. The complete resident address of the employee; and

10. For each pay period:

a. The beginning and ending dates of the period;

b. The total amount of wages paid and wages due but not paid for personal services performed; and

c. The date of payment.

D. Records, instate and outstate. For services performed within and without Minnesota the records required by C. shall include:

1. The city or county and state in which the employing unit maintains a base of operations, as defined in 8 MCAR S 4.3102 L.1., used by the individual;

2. The city or county and state from which the services are directed and controlled, if the employing unit does not have a base of operations in the states in which an individual performs services; and

3. A list of the states in which the individual performs other than temporary or incidental services and the dates services were performed at each location.

E. Records, covered and uncovered employment. For services performed in both employment and excluded employment within a pay period the records required by C. shall include the hours spent performing services in employment and the hours spent performing excluded services.

F. Filing reports. An employer's tax report must be filed on a form prescribed by the department, or a reasonable facsimile thereof, not later than the due date for payment of quarterly contributions. Failure to receive forms from the department shall not constitute a valid reason for not filing reports on or before the due date thereof or ~~to pay~~ for not

paying any contribution due. Consolidated reports of corporations having common ownership shall be recognized or permitted only if expressly allowed under 8 MCAR S 4.3106. If the report first submitted is erroneous, the employer shall promptly submit the corrected information on forms prescribed by the department and make any additional payment due.

8 MCAR S 4.3106 Consolidated reports.

A. When permitted. Consolidated reports of parent and subsidiary corporations, or other employing units having common ownership, shall be recognized or permitted only in the case of two or more related corporations:

1. Who concurrently employ the same individuals, including officers, whose wages during the calendar quarter are paid by one of the related corporations as a common paymaster; and

2. Whose application for a joint account has been approved by the commissioner or his delegated representative.

B. Related corporations tests. For the purpose of this rule and Minn. Stat. S 268.06, subd. 21, clause (2), corporations are related for an entire calendar quarter if they satisfy one of the following four tests of 1.-4., at any time during that calendar quarter.

1. Test one. They are either:

a. Members of a parent-subsidiary controlled group which is a group of two or more corporations connected through stock ownership with a common parent corporation if more than 50 percent of the total combined voting power or more than 50 percent of the total value of shares of all classes of stock of each corporation, except the common parent corporation, is owned by one or more of the corporations and the common parent corporation owns stock with more than 50 percent of the total combined voting power of at least one of the other corporations. There shall be excluded in computing the percentage of voting power or value, any treasury stock owned by the subsidiary corporation;

b. Members of a brother-sister controlled group

consisting of two or more corporations in each of which five or fewer of the same individuals, estates or trusts own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of all shares of all classifications of stock of each corporation, taking into account the stock ownership of each person only to the extent the stock ownership is identical with respect to each corporation;

c. Members of a combined group, which is a group of three or more corporations each of which is a member of a parent-subsidiary or brother-sister controlled group and one of which is a common parent corporation included in a parent-subsidiary controlled group and is included in a brother-sister controlled group; or

d. Life insurance companies subject to income tax under Section 802 of the Internal Revenue Code and the provisions of a., b. or c. are met and all other members of the controlled group are subject to Section 802 of the Internal Revenue Code.

2. Test two. They are a corporation that does not issue stock and 50 percent or more of the board of directors, or other governing body, of each of the corporations are the same, or the same holders possess 50 percent or more of the voting power to elect directors to each corporation.

3. Test three. Fifty percent or more of one corporation's officers are concurrently officers of the other corporation.

4. Test four. Thirty percent or more of one corporation's employees are concurrently employees of the other corporation.

C. Stock defined. For the purpose of this rule "stock" does not include:

1. Non-voting stock which is limited and preferred as to dividends;

2. Treasury stock; or

3. Stock that is treated as excluded stock.

D. Excluded stock, parent-subsidiary. "Excluded stock" for a parent-subsidiary controlled group means:

1. Stock in a subsidiary held in trust that is part of an employee's deferred compensation plan;

2. Stock in a subsidiary owned by an individual who is a principal stockholder or an officer of the parent corporation. A "principal stockholder" is one that owns five percent or more of the voting power or five percent or more of the value of all stock of the parent corporation; or

3. Stock in a subsidiary corporation owned by an employee of the subsidiary corporation but only if the parent or subsidiary corporation restricts or limits the employee's right to dispose of the stock.

E. Excluded stock, brother-sister group. "Excluded stock" for a brother-sister controlled group means:

1. Stock in a member corporation held by an ~~employee's~~ employees' trust if the trust is for the benefit of the employees;

2. Stock in a member corporation owned by an employee of the corporation but only if substantial limits or restrictions are imposed on the employee's right to dispose of the stock. A bona fide reciprocal stock repurchase arrangement will not be considered as one that restricts or limits the employee's right to dispose of the stock; or

3. Stock in a member corporation that is held by a nonprofit educational or charitable organization.

F. Limits on groups. A corporation may be treated as a component member of only one controlled group.

G. Concurrent employment. "Concurrent employment" as used in Minn. Stat. S 268.06, subd. 21 and this rule means the simultaneous existence of an "employment" relationship between an individual and two or more related corporations, as defined in Minn. Stat. S 268.04, subd. 12.

An employment relationship shall require the performance of services by the employee for the employing corporation in exchange for wages which, if not for the provisions of Minn.

Stat. S 268.06, subd. 21, clause (2) and this rule, would be reportable by the employing corporation.

The fact that a particular employee is on leave or otherwise temporarily inactive is immaterial in the determination of concurrent employment. Employment is not concurrent with respect to one of the related corporations if there is no employment relationship with that corporation during periods when the employee is not performing services for that corporation.

An individual who does not perform substantial services in exchange for wages for a corporation is presumed not employed by that corporation.

Wages paid to an employee ceasing to be concurrent for services rendered while the employee was in concurrent employment is reportable by the common paymaster. If the employment relationship is nonexistent during a quarter, that employee may not be counted towards the 30 percent test set forth in B.4.

H. Cash payments only. This rule applies only to wages disbursed in money, check or similar instrument by one of the related corporations or its agent, and excludes the value of non-cash compensation such as room and board, received by the common employee from a member corporation other than the common paymaster.

I. Common paymaster.

1. A "common paymaster" of related corporations is any related member that disburses wages to employees of two or more of the related corporations on their behalf and that is responsible for keeping books and records for the payroll with respect to those employees.

2. The common paymaster is not required to disburse wages to all employees of two or more related corporations, but this rule does not apply to any wages that are not disbursed through a common paymaster.

3. Although a corporation may be treated as a component member of only one controlled group, the related corporations

may designate more than one common paymaster but only one common paymaster may be designated for each class of employee.

J. Joint account. A joint account application shall be on forms prescribed by the department. A joint account shall be maintained as a separate unit of the employer account of the common paymaster until that account is terminated or notification is received ~~of~~ regarding a change ~~in~~ of the common paymaster. A joint account cannot be made retroactive prior to January 1 of the year preceding the year in which the application is received.

K. Joint and several liability. The common paymaster has the primary responsibility for the remittance of any contributions, penalties and interest due on wages it disburses as the common paymaster but each related corporation using the common paymaster is jointly and ~~severely~~ severally liable for its proportionate share of any unpaid contributions, penalties and interest.

L. Common paymaster responsibilities. The common paymaster has the sole responsibility for filing contribution reports, wage and separation information and ~~protest~~ protests and appeals pertaining to concurrent employees and to establish effective communications between the related corporations to ensure timely response on all matters affecting claims for unemployment benefits.

M. Reports. Each related corporation which is the employer of an individual will be responsible for reporting the individual's wages and remitting the appropriate contributions for calendar quarters where the related group or concurrent employment conditions are not met, regardless of which corporation disburses the wages.

N. Work other than for common paymaster. If an employee works for a related corporation other than the common paymaster prior or subsequent to the effective period of the agreement, the wages earned and reportable by the employing corporation shall not be combined with the wages reportable by the common paymaster in determining the maximum taxable wage described in

Minn. Stat. S 268.04, subd. 25.

O. Non-related or noncurrent. Where related group or concurrent employment conditions are not met, each employing corporation of an individual shall be responsible for submitting wage and separation information, protests and appeals pertaining to any claim for unemployment benefits of that individual.

P. Wages, wage credits and experience rate factors of a joint account. All wages reportable and benefits charged under the joint account shall remain with that account for contribution, benefit eligibility and experience rating purposes.

Q. Relation cessation. If any corporation ceases to be related the common paymaster shall notify the department within 30 days of the end of the calendar quarter in which the cessation occurs.

R. Termination of agreement. The commissioner may immediately terminate the agreement if it is found that consolidated reporting is not in compliance with this rule, or it is determined that the approved related group changed its common paymaster for the purpose of attaining more favorable experience rates.

S. Written protest. If an application to report under the provisions of Minn. Stat. S 268.06, subd. 21, clause (2) and this rule is denied, or an existing agreement is terminated at the discretion of the commissioner, the denial or termination shall be final unless a written protest is filed with the commissioner as set forth in Minn. Stat. S 268.06, subd. 20.

8 MCAR S 4.3107 Payments of interest.

A. Scope. This rule establishes the conditions upon which interest on contributions due may be waived as provided for in Minn. Stat. S 268.16, subd. 1.

B. Waiver. The commissioner may waive all or part of the interest charges on contributions that are not paid by the due date if:

1. The late payment was caused by department error or misinformation; or

2. The late payment was the result of unreasonable delay

not attributable to the employer.

C. Application. Each application for waiver of interest under this rule must be made in writing by the employer or his authorized representative, except that the commissioner may on his own motion waive interest if in the best interest of the State of Minnesota.

8 MCAR S 4.3108 Contribution rates.

A. Notice of rate. Any employer determined liable by the department prior to January 1 shall be assigned a contribution rate pursuant to Minn. Stat. S 268.06 which shall be mailed on or before March 15 of the year effective.

B. Time limit on voluntary contributions. In no event shall a voluntary contribution paid by an employer pursuant to Minn. Stat. S 268.06, subd. 24 after the expiration of the first 120 days for the period the rate is effective be used in the computation of a new experience ratio.

Repealer. Department of Economic Security rules ES-1, ES-2, ES-3, ES-4, ES-5, ES-6, ES-8, ES-9, ES-10, ES-11, ES-12, ES-17, ES-19, ES-20, ES-27, and ES-28 are repealed.

APPROVED AS TO LEGALITY

June 1, 19 82

WARREN SPANNAUS, ATTORNEY GENERAL

BY Ted A. Mondale

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JUN 2 1982

Joan Anderson Growe
Secretary of State

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Rules as Proposed (all new material)

Chapter One: General Definitions

8 MCAR S 4.3000 Definitions. For the purpose of chapters one, two and three the following terms have the meanings given them.

A. Commissioner. "Commissioner" means the Commissioner of the Department of Economic Security or his duly authorized representative.

B. Department. "Department" means the Minnesota Department of Economic Security.

C. Unemployment office. "Unemployment office" means a location where the department offers unemployment insurance claim services.

Chapter Two: Benefits

8 MCAR S 4.3001 Applicability. Rules 8 MCAR SS 4.3001-4.3011 apply to determinations of a claimant's eligibility for benefits pursuant to Minn. Stat. SS 268.03-268.24.

8 MCAR S 4.3002 Definitions. For the purposes of 8 MCAR SS 4.3001-4.3011 the following terms have the meanings given them.

A. Credit week. "Credit week" means any week within the base period for which wages in the required amount have been paid or were due and payable but not paid for performing services or for vacation periods. Except for vacation payments,

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those payments which are wages as defined in Minn. Stat. S 268.04, subd. 25 or department rules but for which the individual performs no services within the calendar week shall not be used to establish a credit week.

B. Labor market area. "Labor market area" means the geographic area in which the claimant can reasonably be expected to seek and find employment.

C. Seasonal worker. "Seasonal worker" means a claimant whose employer customarily suspends or significantly curtails operations for regularly recurring periods or whose usual occupation cannot be performed for any employer in the labor market area because climatic conditions prohibit performance of the normal duties of the occupation.

8 MCAR S 4.3003 Able to work.

A. Generally. A claimant to be able to work must have the physical and mental ability to perform the usual duties of his customary occupation or other work for which he is reasonably fitted by training, experience or capability and which is gainful employment engaged in by others as a means of livelihood as an employee under conditions ordinarily existing during a normal work week. The burden of establishing ability to work is on the claimant.

B. Particular situations. In determining whether a claimant is able to work the department will consider the facts and circumstances of the claimant's particular situation. The determination shall be made by applying the criteria listed in 1.-4.

1. Medical evidence. Where doubt exists as to the claimant's ability to work the department may require him to furnish medical evidence of his ability to work. Failure of the claimant to furnish requested medical evidence may result in a suspension or a denial of benefits.

2. Medical separation from work. A claimant who was separated from employment due to his own serious illness must demonstrate his ability to perform other work to be deemed able

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to work.

3. No presumption of inability to work. There will be no presumption a claimant is not able to work.

4. Ability to work part-time only. Normally a claimant is required to be able to work and available for full-time work for all shifts which are customary for his occupation. However, a claimant whose physical or mental condition restricts his availability to part-time work or to a particular shift will be deemed able to work if there is a reasonable possibility of obtaining work within these restrictions.

8 MCAR S 4.3004 Available for work.

A. Generally. A claimant is considered available for work only if he is ready and willing to accept suitable employment. There must be no restrictions, either self-imposed or created by circumstances, which prevent accepting employment. A restriction does not prevent accepting employment if there are good prospects for obtaining employment within the restrictions within a reasonable period of time.

B. Absence from labor market area. A claimant who is absent from his labor market area for personal reasons is presumed to be not available for work. However, an absence of two days or less from his labor market area due to a family emergency or for other compelling personal reasons does not make him unavailable for those days.

C. Alien status. A claimant who is an alien must present proof that he is authorized to work in the United States to be available for work.

D. Change of residence. A claimant who has moved permanently to an area where his chances of securing work are materially lessened and who does not make a diligent work search, expand his availability to other occupations, and accept the prevailing wages, hours and other conditions of work is not available for work.

E. Claimant cannot be contacted. Unless good cause exists for the failure to be reachable a claimant who cannot be reached

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by the department for referral to possible employment is not available for work.

F. Failure to report. A claimant who fails without good cause to report as directed to an unemployment office or to a job service office of the Department of Economic Security is not available for work.

G. Incarcerated. A claimant who is incarcerated and who is unable to accept employment under a work release program is not available for work.

H. Labor market area. A claimant must offer his services unequivocally to the labor market area to be available for work.

I. Length of unemployment. As a claimant's duration of unemployment lengthens, to be available for work he may be required to broaden the geographic area in which he will accept work, seek and accept employment on a different shift, accept counseling for possible retraining or change in occupation, or seek and accept employment and the prevailing wages in a new occupation.

J. Seasonal worker. A seasonal worker who is not willing to accept suitable work in other occupations during the off season is not available for work.

K. Self-employment. A claimant is not available for work if he is no longer seeking work as an employee because of his being self-employed or planning to be self-employed and he is devoting time and effort to his self-employment so that he cannot accept work during customary hours for his occupation or other suitable work.

L. Time or shift restriction. A claimant who imposes restrictions on the hours of the day or days of the week which he is willing to work which are not normal for his usual occupation or other suitable work is not available for work. A claimant who imposes restrictions on the hours of the day or days of the week which he is willing to seek work which prevent him from meeting the work search requirements of the department is not available for work.

M. Transportation. A claimant to be available for work must

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have transportation from his residence to his labor market area.

N. Union membership. A claimant who is seeking work only through his union is not available for work unless he is in an occupation or trade where it is customary that substantially all the hiring in that locality is done through his union. He must submit evidence, when required by the department, that he is a union member in good standing, is registered with the union for work and is in compliance with other union rules.

O. Wage restriction. A claimant who has demanded wages exceeding those customary in his labor market area for the type of work he is seeking is not available for work.

8 MCAR S 4.3005 Actively seeking work.

A. Generally. A claimant must make reasonable, diligent efforts to actively seek suitable work for each week for which he files a claim. Reasonable, diligent efforts are those that a person in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area. A claimant who fails to make reasonable, diligent efforts to actively seek work or who limits the search to positions that are not available or are above his training, experience and qualifications is not actively seeking work.

B. Scope of work search. A claimant is not actively seeking work if he has not sought work in accordance with specific and reasonable instructions of the department. The claimant may be required to do any or all of the following to establish that he is actively seeking work:

1. Register with the department's job service;

2. Register with his union hiring or placement facility and meet the union requirements concerning dispatch to a job;

3. Register with a placement facility of his professional organization;

4. Register with a placement facility of a school, college, or university.

5. Apply for employment with former employers;

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6. Make application with employers who may reasonably be expected to have suitable openings;

7. Make applications or take examinations for openings in the civil service of a governmental unit;

8. Respond to want ads for suitable work; or

9. Perform any other action which the department finds to constitute an effective means of seeking work suitable to the claimant.

C. Number of contacts. The number of employer contacts required to be considered actively seeking employment varies. In determining adequacy of work search in terms of the number of contacts required the department will consider the employment opportunities as well as the qualifications of the claimant and normal practices and methods of seeking work.

D. Type of work sought. A claimant will generally be allowed to seek work in his usual trade or occupation before being required to seek other types of work that may be suitable. The length of time allowed to seek work at his usual trade or occupation will be governed by the availability of that work in the labor market area where he is seeking work. A claimant will be required to seek work outside his customary occupation if one of the following conditions prevails:

1. There are available openings outside the claimant's customary occupation and there are few workers unemployed in the locality for whom these openings would be more suitable than for the claimant;

2. The claimant's prospects of securing work in his customary occupation are not as favorable as his prospects of securing work outside his customary occupation; or

3. Work which exists outside the claimant's customary occupation is suitable for the claimant.

E. Permanent and temporary work. Claimants are required to actively seek suitable permanent work. However, a claimant who is on a temporary layoff and who has a verifiable assurance of return to work may limit his search for employment to temporary work.

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F. Seasonal workers. A claimant who is seasonally unemployed is not relieved of the responsibility to actively seek work.

G. Incarcerated worker. A claimant who is incarcerated and who is unable to seek work is not actively seeking work.

H. Filing and reporting only. If due to economic conditions within the labor market area the department finds that for a particular occupation or class of claimants the existence of suitable job openings other than those listed with a union hiring hall, professional organization or similar placement facility or the department are so few that any effort to search for openings would be fruitless to the claimant and burdensome to employers, then registering with and maintaining the requirements for referral by the hiring hall or placement facility or the department shall constitute an active search for employment.

8 MCAR S 4.3006 Suitable work.

A. Applicability. Rules 8 MCAR SS 4.3006-4.3008 shall be used in determining if an individual failed to apply for or accept suitable work or suitable reemployment without good cause.

B. Policy. The suitable work provisions of Minn. Stat. SS 268.03-268.24 and 8 MCAR SS 4.3006-4.3008 shall be administered so as to promote the department's dual responsibilities of ensuring that benefits are paid to only those persons who are involuntarily unemployed through no fault of their own and, as promptly as possible, matching workers with jobs which best utilize their skills, knowledges, and abilities. Toward this end, "suitable work" is to be interpreted to recognize a worker's skills and abilities but not to provide a haven for those who do not wish to work.

Ideally, the department could match job seekers with jobs in their usual occupation with wages, hours, and other conditions of work identical to those previously enjoyed. As a practical matter economic conditions prohibit this ideal and so a reasonable alternative must be developed. Any reasonable alternative should be based on the policy that it is best for

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employers, workers and society as a whole to maximize use of existing skills and abilities for the largest number of workers possible under the existing economic conditions, temporary or permanent, of the labor market area.

C. General. The primary guidelines for determining suitable work must give consideration to the nature of the unemployment whether it be temporary or permanent and the prospects of the individual finding work in his usual or related occupations. The specific statutory interpretations of 8 MCAR SS 4.3007-4.3008 shall be considered in light of the following general guidelines:

1. For persons who have a verifiable assurance of work in the near future suitable work consists of available, temporary work in their usual or a related trade or occupation in the labor market area;

2. For persons with a verifiable assurance of work in the more distant future suitable work is available, temporary work for which the claimant is reasonably suited by virtue of education, training, work experience or ability and which is a reasonable departure from his usual occupation;

3. For seasonal workers suitable work is temporary work in their usual occupation or a related occupation which provides conditions of employment approximating their past employment; however, other employment is suitable if it meets the following conditions:

a. There are available openings in a lower skilled or paid occupation;

b. There are few, if any, unemployed workers for whom these openings would be more suitable;

c. The opening is one for which the claimant is reasonably fitted by virtue of his being able to perform the work; and

d. The work pays a wage equaling at least 150 percent of the claimant's weekly benefit amount.

4. For persons without a verifiable assurance of work, suitable work is permanent work in their usual or related

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occupations which provides wages and conditions of employment approximating those of their past employment if their prospects of finding the work are favorable. If prospects are unfavorable, work at lower skill or wage levels is suitable if there are few, if any, workers unemployed in the locality for whom these openings would be more suitable than for the claimant, the claimant is reasonably suited for the work by virtue of education, training, work experience or ability and the work offered is a reasonable departure from his usual occupation.

In general, "near future" as used in 1. means six weeks or less and "more distant future" as used in 2. means more than six weeks.

8 MCAR S 4.3007 Statutory terms interpreted.

A. Generally. The terms and phrases used in Minn. Stat. S 268.09, subd. 2 as guidelines for determining suitability of work shall have the meanings and explanations given in B.-R.

B. To apply. "To apply" means that the claimant must comply with all necessary application processes, beginning with the notice to appear for the interview with the job service and including actually calling at the place of business of the prospective employer when so advised by the department.

C. Failure to apply. "Failure to apply" includes any willful action or neglect which demonstrates a lack of good faith in applying for employment.

D. Failure to accept. "Failure to accept" may consist of a direct statement of refusal by the claimant or the claimant's failure to take reasonable steps to accept the job after it has been offered to him.

E. Available, suitable work. "Available, suitable work" means that there is a definite job or vacancy to apply for or accept. Work is not available to the claimant when the employer finds the claimant unqualified for the position.

F. Of which he was advised. "Of which he was advised" means that a claimant was made aware of a job by the department and

offered an opportunity to apply for it. Although the employer's name need not be provided to the claimant unless he accepts the referral, the job must be described in sufficient detail so the claimant is aware of the terms and conditions of employment.

G. Risk involved to his health and safety. Work is not suitable for a claimant if the employment presents a risk to his health or physical condition which is not usually customary to that occupation. Extra hazardous work shall not be suitable work unless the claimant has training or experience in that occupation. When a claimant has a demonstrated fear of performing a particular employment that employment shall not be suitable employment. A claimant's loss of ability to avoid previously accepted hazards must be considered.

H. His physical fitness. To determine suitability of work in terms of the claimant's physical fitness the department shall consider the type of work the claimant has most recently performed, any existing physical conditions, whether the work requires any strenuous physical ability the claimant does not possess, and other factors affecting his physical ability to perform the work. If the claimant's physical condition prevents him from doing the work the work is unsuitable. Medical evidence may be required to support the claimant's statement that the work offered is not suitable because of the claimant's physical condition.

I. Prior training and experience. Work that requires a skill or particular training which the claimant does not already possess may be unsuitable. However, if the claimant lacks the skills and training needed to perform offered work, that work may be suitable if as part of the job the claimant is provided with the training necessary to develop the work skills needed or if the time and effort required to develop the skills is minimal.

J. Prospects of securing work in his customary trade or occupation. If the prospects of a claimant finding work in his usual trade or occupation are unfavorable, then work in other occupations may be suitable work if the general conditions of 8 MCAR S 4.3006 are satisfied.

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K. Distance of the available work from his residence. To determine suitability in terms of distance, all factors must be considered, including distance, proximity to transportation, cost of transportation, type of transportation, transportation schedules and time required for transportation. This determination is made not only in comparison to the claimant's most recent job but also in relation to that which is customary in his occupation. If it is customary in the claimant's occupation to relocate or change job sites, regardless of distance, then the work requiring relocation is suitable. To determine the suitability of work located outside the locality of the claimant's residence, the factors to be considered are the claimant's prospects for equally steady work in his home area, the duration of his unemployment, the remuneration offered as related to the cost of transportation, and the distance to the place of employment.

L. Wages. The wages offered must approximate the prevailing wage for the work to be suitable. To determine suitability of work in terms of wages the total earnings must be considered. These include the wage rate, hours of work, method of payment, overtime practices, bonuses, incentive payments and fringe benefits. When the offered work is at a rate of pay lower than the claimant's former rate consideration must be given to the length of the claimant's unemployment and the proportion of difference in the rates. The importance of the difference between the wages offered and the previous rate decreases as the period of unemployment increases. Work which may not be suitable because of lower wages during the early weeks of the claimant's unemployment may become suitable for him as his duration of unemployment lengthens and it becomes evident that prospects are remote for obtaining work in line with prior wages. A wage that is below the person's previous wage may be suitable if it is not substantially less favorable than that prevailing for similar work in the community.

M. Hours. To determine suitability of work in terms of hours, the arrangement of hours in addition to the total number

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of hours are to be considered. An offer to work on a second, third, rotating or split shift is suitable work if workers are generally hired on those shifts.

N. Other conditions of work. The suitability of the work may be determined by considering the provisions of the employment agreement, whether express or implied, including the physical conditions under which the work is done pursuant to the agreement. The term "other conditions of work" includes but is not limited to provisions for work rules, safety rules, sanitation, heat, light, and ventilation.

O. Substantially less favorable to the individual. Whether provisions of the work offered are substantially less favorable to the individual can be determined only by comparison of the conditions of the work offered to those prevailing for similar work in the local labor market area. The conditions of work offered are not compared to the previous work of the individual. Both the extent of the difference as well as its effect on the worker shall be considered. If the work offered has differences of no substantial consequence for the worker, it will not be considered to be substantially less favorable. If the wages offered are more than ten percent below the prevailing rate of pay or less than the applicable federal or state minimum wage for the type of work being considered, it will be considered to be substantially less favorable than that prevailing for similar work in the locality.

P. Prevailing. Prevailing wages, hours and other conditions of work are those which are offered to those who commence employment in similar work in the locality.

Q. Locality. Locality means the claimant's labor market area.

R. Good cause. A claimant has good cause for refusal of suitable work only when there is some necessitous and compelling reason for refusal. Good cause for refusing a job need not be attributable to the employer. Good cause reasons for refusal are usually personal to the claimant and extraneous to the employment. Good cause for refusal of suitable employment must

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be temporary and emergency in character so as not to detach the claimant from the labor market.

8 MCAR S 4.3008 Reemployment offer. A claimant is considered to have refused an offer of suitable reemployment from a base period employer unless the terms and conditions of the offer are substantially less favorable than the terms and conditions under which the principal part of the wage credits in the claimant's base period were earned with that employer.

A refusal of reemployment shall be with good cause if the claimant had previously quit the employment for good cause attributable to the employer and the conditions which were the basis for good cause still exist.

A refusal of reemployment shall be with good cause if the claimant previously separated from that employment because of his own serious illness and the work offered would adversely affect that illness.

8 MCAR S 4.009 Partial benefits exemption. 8 MCAR SS 4.3001-4.3008 shall not apply to a claimant with respect to a claim for partial unemployment benefits.

8 MCAR S 4.3010 Benefit claim procedure.

A. Purpose and scope. This rule defines claim procedure and eligibility criteria under Minn. Stat. S 268.08, subd. 1.

B. Initial claim. To file a new claim for benefits or to reactivate an inactive claim, an individual shall report in person at an unemployment office and shall there:

1. Present a valid social security account number card or other acceptable evidence of his social security number;

2. File an initial claim for benefits on a prescribed form; and

3. Register for work, except that the initial claim for benefits may also constitute the individual's registration for work if it is determined that normal registration should be waived or postponed.

The claim shall be effective on the Sunday of the calendar

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week in which the claim is reactivated or filed.

C. Claim acceptance form. If the unemployment office cannot provide claim service on a given day an individual shall be given a claim acceptance form to verify his attempt to file a claim on that date. If the individual presents a claim acceptance form to one of the local unemployment service offices within 14 days from the date of issuance of the claim acceptance form or when service is next provided in a part-time unemployment office, the initial claim shall be backdated as if filed in the calendar week in which the claim acceptance form was issued.

D. Part-time unemployment office. Any individual who resides in an area in which there is a part-time unemployment office may report in person at that office and file a new or reactivated claim for benefits effective as of the Sunday of the first week of the individual's unemployment, provided that his first day of unemployment is subsequent to the last previous day that service was provided by the part-time unemployment office. No claim shall be effective more than 28 days prior to the calendar week in which the individual reports to file the claim.

E. Permitted benefit years. An initial claim for benefits shall not establish a benefit year which begins prior to the Sunday next following the end of any previous benefit year except as otherwise provided by rule or law.

F. Withdrawal of claim. An initial claim for benefits which has been filed with the department may not be withdrawn by the claimant or otherwise terminated by the department except as provided by other rule or law.

G. Continued claim. To establish eligibility for benefits or waiting period credit for a week or weeks of unemployment following a new or reactivated claim an individual shall continue to report in person or by mail as directed by the department to the office responsible for the administration of his unemployment insurance, in this or any other state.

H. Transferred claim. Any claimant filing continued claims covering more than four weeks of benefits through a single area

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office in this or some other state other than the area office where his initial claim or transferred claim is filed shall transfer his claim to that single office. No claimant shall be ineligible for failure to transfer his claim to another office unless, prior to the filing of a continued claim, the claimant has been directed to transfer his claim and has failed without good cause to comply.

I. Late filed claim. Any individual who fails to file a continued claim in the manner and at the time and place specified by the department may report in person or by mail and file the claim within 14 days following the date specified by the department. Waiting period credit or benefits for each week that was covered by the delinquent claim shall be authorized if the claimant is otherwise eligible. No credit or benefits shall be authorized for subsequent weeks which were not claimed properly.

Any individual who for good cause fails to file a continued claim in the manner and at the time and place specified by the department may file the claim in person or by mail not more than 35 days following the expiration of his benefit year. The claimant, if otherwise eligible, shall be entitled to waiting period credit or benefits for each week that good cause for failure to report is established.

8 MCAR S 4.3011 Week of unemployment.

A. Scope and purpose. This rule further defines "week" as defined under Minn. Stat. S 268.04, subd. 23.

B. Week calculated, labor dispute. An individual's week of unemployment shall consist of the consecutive seven-day period beginning with the day on which registration is made effective except following the termination of a labor dispute. Following termination of a labor dispute, week of unemployment is the remainder of the calendar week in which the labor dispute ended. An individual, if otherwise eligible, shall be entitled to one-fifth credit for each day, excluding Saturday, following the date on which the labor dispute ended.

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Chapter Three: Taxation

8 MCAR S 4.3100 Definitions.

A. Generally. Unless the context otherwise requires, terms used in 8 MCAR SS 4.3100-4.3108 shall be construed in the sense in which they are defined in Minn. Stat. SS 268.03-268.24, or in these or other rules of the department.

B. Pay period. "Pay period" means that period of time during which the wages due on any regular pay day were earned. If the period exceeds 31 days, then 31 days shall be deemed to constitute a pay period.

8 MCARS S 4.3101 Wages.

A. Purpose. This rule further defines "wages" as defined in Minn. Stat. S 268.04, subd. 25, and used in Minn. Stat. SS 268.03-268.24, 8 MCAR SS 4.3101-4.3108, interpretations, forms and other official pronouncements issued by the department.

B. Types of wages, generally. "Wages" means remuneration for services. The remuneration may take any form, be paid at various times, and be computed in various ways. Remuneration may be in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or by commission. Remuneration may be paid on an hourly, daily, weekly, monthly, annual or other basis.

C. Paid and payable wages. Wages includes remuneration payable and remuneration paid. "Remuneration payable" is wages that have been earned but that were not paid when due. "Remuneration paid" is wages that have been actually or constructively delivered to, or for the benefit of, an employee.

D. Types of wages. Wages include the monetary value of:

1. Dwelling unit rent, utilities, meals, exchange of services or other goods or services that are to compensate for an employee's services;

2. Vacation pay or payment in lieu of vacation;

3. Termination, severance, or dismissal payment or payment in lieu of notice whether notice is required or not;

4. That portion of the payment which compensates for

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services rendered received in the form of an award or allowance in accordance with a contractual agreement or settlement reached through any arbitrator, regulatory agency or court;

5. Profits, sometimes referred to as dividends, other than those designated as capital gain distributions or return of capital, distributed or allocated to officers and shareholders who perform services for a corporation organized under the rules of Subchapter S of the Internal Revenue Code of 1954. The distribution or allocation of undistributed profits is reportable at the time it is received by, or credited to the account of, the officers and shareholders;

6. The value of any consideration, award, bonus or prize which accrues before separation from employment;

7. Payments for accrued sick leave when not related to a specific absence due to sickness or injury, regardless of whether or not the employer maintains a sick pay plan as defined in Minn. Stat. S 268.04, subd. 25, clause (2);

8. Idle time or standby compensation paid by an employer for a guaranteed minimum number of hours of employment per week when employees are to be available for a specific period of time and payment is made to them for idle time even if they do not render services for the minimum number of hours;

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

10. Amounts paid to corporate shareholders and officers, although designated as loans, where repayments are not made pursuant to a payoff schedule, lack business purpose and fail to provide for the payment of reasonable interest, if the shareholders or officers perform services for the corporation for remuneration below that which would approximate reasonable compensation for services;

11. Payments made directly or indirectly to an individual to perform or assist in performing the work of any employee of the employer provided that the employer had actual or constructive knowledge that the work was being performed;

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12. Payments made for services as a caretaker. Unless there is a contract or other proof to the contrary, remuneration shall be considered as being equally received by a married couple where the employer makes payment to only one spouse, or all tenants of a household who perform services where two or more individuals share the same dwelling and the employer makes payment to only one individual;

13. Payments made for services by a migrant family. Where services are performed by a married couple or a family and an employer makes payment to only one individual each worker shall be considered as having received an equal share of the remuneration unless there is a contract or other proof to the contrary;

14. An employer's vehicle furnished to an employee to the extent the vehicle is used for personal purposes. If the employee has use of the vehicle without charge, the amount deemed to be wages shall be $200 per month or, if for less than a calendar month, $7 for each day that the employee has use of the vehicle for personal purposes. If the employee reimburses the employer, the amount deemed to be wages shall be determined as follows:

a. If the employee reimburses the employer at an established rate of less than 20 cents per mile for each mile of personal use, the amount deemed to be wages shall be the difference, if any, between the amount reimbursed and 20 cents per mile; or

b. If the employee reimburses the employer at an established daily, weekly or monthly rate, the amount deemed to be wages shall be the difference, if any, between the amount reimbursed and $200 per month or, if for less than a month, $7 for each day that the employee has use of the vehicle for personal purposes;

15. Amounts withheld or deducted from an employee's earnings because of a deferred compensation agreement which an employee agrees to participate in or which is part of an employment contract. A deferred compensation agreement

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generally means an arrangement between the employee and the employer for the withholding or deduction of a specific amount from his earnings, to be distributed by the employer or a third person at a later time, usually in post-retirement years.

E. Tips and gratuities.

1. Accounted for to the employer. Tips and gratuities are accounted for to the employer in various manners or forms including if they are:

a. Added to the customer's bill by the employer;

b. Added to the bill by a customer using credit for the purchase;

c. Disbursed by the employer from a tip pool; or

d. Reported to the employer in compliance with the Internal Revenue Code of 1954.

2. Paid to an employee by a customer. Tips and gratuities are considered paid to an employee by a customer if they are:

a. Received directly from the customer;

b. Distributed from a tip pool, whether controlled by the employer or employees; or

c. Received as part of a plan or system under which the person initially receiving them, whether directly from the customer or from a tip pool, distributes a portion of the tips to other employees.

Under a.-c. the tips are considered as being paid by the customer to the person ultimately receiving them.

F. Valuing non-cash remuneration.

1. Except as this rule may otherwise provide, the cash value of remuneration for personal services payable in any medium other than cash shall be:

a. The fair market value of meals or any value agreed upon between the employer and employee if it is not less than the allowance as provided in Minn. Stat. SS 177.21-177.35, the Minnesota fair labor standards act, and rules promulgated thereunder;

b. The value of rent of a house, apartment or other

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lodging, furnished to an employee that would be paid by an employee for similar or equivalent accommodations, but in no event less than the allowance provided in Minn. Stat. SS 177.21-177.35 and rules promulgated thereunder; or

c. The fair market value, determined when received, of any other remuneration for services unless a higher value is agreed upon between the employer and the employee.

2. If the department determines that the reasonable fair market value is other than as determined by the employer it may, after affording the employer reasonable opportunity for the submission of relevant information, determine the reasonable cash value of board, rent, housing, meals, or similar advantage.

G. Employee equipment.

1. The wages of the operator and supplier of a truck, bulldozer, tractor or similar equipment whose remuneration includes wages for personal services as well as the cost of operating and hiring the equipment shall, in the absence of an agreement between the parties, be determined as follows:

a. The value of that part of the total remuneration received which is wages for personal services shall not be less than the prevailing wage scale for similar services by operators of equipment of the same size and type in the locality where the services are performed; or

b. If there is no prevailing wage in the locality in which the services are performed, 40 percent of the total remuneration received from the employer shall constitute wages.

2. Payments to an employee that include advances or reimbursements for use of his personal vehicle of up to 9,000 pounds gross vehicle weight in the employer's business are wages unless the amount attributable to the use of the vehicle is separately paid or stated as prescribed in H.8. and the advance or reimbursement is not unreasonable or arbitrary in which case only the amount attributable to services performed shall be wages.

3. If the commissioner finds that the wage determination of the equipment operators or employees who use their personal

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vehicles in the employer's business prescribed by 1. and 2. would be unreasonable or arbitrary in a particular case, then the commissioner may determine the amount of the wages of the employee involved.

H. Exempt wages. The term "wages" shall not include:

1. The value of any special discount or mark down allowed to an employee in goods purchased from or services supplied by the employer where the purchases are optional and do not constitute regular or systematic remuneration for services rendered;

2. Customary and reasonable directors' fees paid to individuals who are not otherwise employed by the corporation of which they are directors;

3. Moneys allowed to employees for reimbursement of meal expenses when employees are required to perform work after their regular hours;

4. Any payment made to or on behalf of an employee by the employer for legal or dental service plans if provided for all employees generally or for a class or classes of employees;

5. Payments for periods of sickness or injury after the end of six calendar months after the calendar month in which the employee last worked for the employer, if the payments are made by an employer who does not maintain a regular sick pay plan as defined in Minn. Stat. S 268.04, subd. 25, clause (2);

6. Compensation, reimbursement, fees, meals or other remuneration paid or provided through a court to an individual for services performed as a juror;

7. Royalties to an owner of a franchise, license, copyright, patent, oil, mineral or other right;

8. Amounts paid specifically as advances or reimbursements for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer. Traveling and other reimbursed expenses must be identified either by making separate payments or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single

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payment;

9. Remuneration paid to radio and television artists which represents residual payments and are accrued subsequent to the production of musical jingles, spot announcements, radio transcriptions and film sound tracks; or

10. Any payment to or on behalf of an employee under a plan or system established by an employer, which makes provisions for his employees generally or for a class or classes of his employees for the supplementation of unemployment benefits under the written terms of an agreement, contract, trust arrangement, or other instrument if the plan or system provides benefits which are only supplemental to, and does not replace or duplicate any state or federal unemployment compensation. The plan or system must provide that funds are to be used solely for the supplementation of state unemployment benefits. Potential recipients of the plan or system must be required to file for unemployment benefits in accordance with state law. The plan or system shall not allow the assignment of benefits or the payment of any consideration in lieu of any benefit upon the employee's withdrawal from the plan or system, his termination of employment or the termination of the plan or system. The plan or system must not be designed for the purpose of avoiding the payment of unemployment taxes on moneys disbursed from its plan or system.

8 MCAR S 4.3102 Employment.

A. Definitions. For the purpose of 8 MCAR S 4.3102 the following terms have the meaning given to them.

1. "Control" is the power to instruct, direct or regulate the activities of an individual whether or not the power is exercised.

2. "Employing unit" has the meaning given to it in Minn. Stat. S 268.04, subd. 9, and includes any individual or type of organization that engages, retains, or secures the services of, an individual.

3. "Employment" has the meaning given to it in Minn.

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Stat. S 268.04, subd. 12, and includes the services of any individual performed for an employing unit under its direction, rule or control as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is performing services in employment shall be determined by the preponderance of the evidence.

4. "Method" is the way, procedure or process for doing something; the means in attaining a result as distinguished from the result itself.

B. Procedures for determining control. The department may determine if control exists by:

1. Reviewing written contracts between the individual and the employing unit;

2. Interviewing the individual or employing unit;

3. Obtaining statements of third parties;

4. Examining regulatory statutes governing the organization, trade or business;

5. Examining the books and records of the employing unit; and

6. Any other appropriate means.

C. Evidence of control. Paragraphs 1.-12. describe criteria for determining if there is control over the method of performing or executing services. The total circumstances must be considered to determine if control is present.

1. Authority over individual's assistants. Hiring, supervising, and payment of an individual's assistants by the employing unit shows control over the individual.

2. Compliance with instructions. Control exists when an individual is required to comply with instructions about when, where and how he is to work. Some individuals may work without receiving instructions because they are highly proficient in their line of work; however, the control factor is present if the employing unit has the right to instruct or direct. Instruction may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

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3. Oral or written reports. Control is indicated if regular oral or written reports relating to the method in which the services are performed must be submitted to the employing unit. Periodic reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion of a job. Completion of receipts, invoices and other forms customarily used in the particular type of business activity does not constitute written reports.

4. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work could be done elsewhere. When work is done off the premises it does indicate some freedom from control; however, in some occupations, the services are necessarily performed away from the premises of the employing unit and are still considered to be in employment.

5. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

6. Establishment of work sequence. If a person must perform services in the order or sequence set for him by the employing unit it indicates the worker is subject to control. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently; however, it is sufficient to show control if the employing unit retains the right to do so.

7. Right to discharge. The right to discharge is a very important factor indicating that the right to control exists

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particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods. An independent worker generally cannot be terminated if he produces an end result which measures up to his contract specifications. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to control. That a right to discharge is restricted because of a contract with a labor union or with other entities does not mean there is not control.

8. Set hours of work. The establishment of set hours of work by the employing unit indicates control. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

9. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control especially if the training is given periodically or at frequent intervals.

10. Amount of time. If the worker must devote his full time to the activity, control is indicated. Full time does not necessarily mean an eight hour day or a five or six day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. Full time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else.

11. Tools and materials. The furnishing of tools, materials and supplies by the employing unit is indicative of control over the worker. When the worker furnishes these items it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

12. Expense reimbursement. Payment by the employing unit

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of either the worker's approved business or traveling expenses, or both, is a factor indicating control over the worker. A lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

D. Independent contractor or employee, factors to consider. Among the factors to be considered, in addition to factors of control, when determining if services are employment are those listed in 1.-7.

1. Availability to public. That an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways including having his own office and assistants, displaying a sign in front of his home or office, holding a business license, having a listing in a business directory or a business listing in a telephone directory, or advertising in a newspaper, trade journal or magazine.

2. Compensation on job basis. A person working in employment is usually paid by the hour, week or month. Payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour or periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings indicates the existence of employment.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is working in employment is not in that position.

4. Obligation. An individual working in employment usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some

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period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and is liable for failure to complete the job.

5. Substantial investment. A substantial investment by a person in facilities used by him in performing services for another tends to show an independent status. The furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, and similar items that are provided by individuals working in employment as a common practice in their particular trade. A substantial expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship. Substantial investment means a monetary investment representing something of considerable worth, in relation to the overall requirements of the person's chosen profession, trade, occupation or vocation.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because the worker is usually free from control by any of the firms. It is possible that a person may work for a number of people or firms and still be an employee of one or all of them.

7. Responsibility. An employing unit is usually responsible for the negligence, personal behavior and work actions of a person working in employment in his contacts with customers and the general public during times that he is performing services for the employing unit. An independent worker is usually accountable for his own actions.

E. Services in the course of the employing unit's organization, trade or business. Services that are in the course of the employing unit's organization, trade or business consist of services which are a part or process of the employing unit's organization, trade or business and ancillary or incidental services. An individual who performs services which

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are a part or process of the employing unit's trade or business is in employment and does not have independent status. "Part" and "process" are not synonymous. Process refers to those services which directly carry out the fundamental purposes for which the organization, trade or business exists, for example, painting and repairing automobile bodies in an automobile body paint and repair shop. Part refers to any other services which are essential to the operation or maintenance of the organization, trade or business, for example, routine cleaning of premises and maintenance of tools, equipment and buildings. Ancillary or incidental services include landscaping the areas around an automobile body paint and repair shop. Other services that meet the part, process or ancillary classification are those services in connection with purchasing, receiving, storing, pricing, displaying, selling and delivery of merchandise and housekeeping services required for the safety and comfort of customers and the general public or to maintain the premises in a manner as to promote business.

F. Independent status, determination. When determining if an individual is in employment or is an independent contractor the factors considered must be weighed to make a determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant and there may be other factors not specifically identified in this rule that should be considered. The degree of importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

G. Agent-drivers and salespersons. Certain classes of agent-drivers, salespersons and commission persons are statutory employees even though they are independent contractors under common law rules. Minn. Stat. S 268.04, subd. 12, clause (1)(b) sets forth the conditions which must be present for members of each class to be employees.

1. Full-time. In the case of a traveling or city salesperson, other than an agent-driver or commission-driver, Minn. Stat. S 268.04, subd. 12 provides that the individual must

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be engaged on a full-time basis. "Full-time" means the number of hours in the calendar week during which individuals engaged in the same or similar occupations usually or customarily perform services, except that any week during which an individual worked 40 hours or more providing those services shall be deemed to be full-time.

2. Substantial investment in facilities. Agent-drivers, commission-drivers, and traveling or city salespersons to be employees must not have a substantial investment in facilities, other than facilities for transportation, used in connection with the performance of the services.

a. "Facilities" means equipment or premises necessary to perform the work. Inventory, clothing and items not actually required to adequately perform the assigned tasks are not facilities.

b. "Substantial investment" refers to a monetary investment representing something of considerable worth in relation to the overall investment requirements in the distribution or sale of the particular product involved.

H. In employment by federal law. An individual is in employment if he performs services which are subject to Section 3300 of the Internal Revenue Code of 1954 (Federal Unemployment Tax Act) or performs services which are required by federal law to be covered employment by state law.

I. In employment, general inclusions. The following services described in 1.-3. are considered to be in employment:

1. Services performed by an employee as an insurance agent, insurance solicitor or real estate salesperson for the pay period in which payments for the services not constituting commissions were paid or became due and payable. The exclusionary provisions of Minn. Stat. S 268.04, subd. 12, clauses (15)(m) and (o) apply to services which require a Minnesota real estate or insurance agent's sales license and to those individuals, except corporate officers, possessing the license. Services of corporate officers, who are employees by statute, shall not be considered in the application of this

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exclusionary provision. Noncommission remuneration includes guaranteed salary, training allowance, bonus, and draws or advances against future earnings as described in 8 MCAR S 4.3101 D.9. For the purpose of this paragraph commission means remuneration paid to individuals as a direct result of a sale, including the percentage of the sale price paid to the salesperson responsible for the sale, and payments including overrides, listing fees, and closing fees which are related to the sale;

2. Services performed as election judges; and

3. Services performed by factory demonstrators who are placed by a manufacturer or distributor in stores and other locations to aid in the sale of products, who are hired by, paid directly or indirectly by, and who work under the direction of the manufacturer or distributor, although this direction may be delegated to the retailer, and they are in the employment of the manufacturer or distributor making the placement. If the retailer, not acting as an agent for the manufacturer or distributor, hires, directs and pays the demonstrator directly, the retailer is the employer. If the wages are paid in part by the manufacturer or distributor, and in part by the retailer, the demonstrator is in the employment of both. Each is required to pay contributions on the part of the remuneration which he pays, provided that they are employers under Minn. Stat. SS 268.03-268.24.

J. Casual labor.

1. Casual labor not in the course of the employing unit's trade or business, although excluded from the term employment by Minn. Stat. S 268.04, subd. 12, clause (15)(b), is conditionally included as employment under the provisions of Chapter 23, Section 3300 of the Internal Revenue Code of 1954 (Federal Unemployment Tax Act). Minn. Stat. S 268.04, subd. 12, clause (6) provides that the term employment shall include any service which is deemed to be employment under the Federal Unemployment Tax Act; therefore, casual labor is considered employment unless it meets the exclusionary provisions of that act. The

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exclusionary provisions of that act are in 2.

2. Service not in the course of the employing unit's trade or business, performed in any calendar quarter by an employee is excluded employment unless the cash remuneration earned for the service is $50 or more, and the service is performed by an individual who is regularly employed by the employing unit. For the purpose of this paragraph, an individual shall be deemed to be regularly employed if for some portion of each of 24 days or more, whether or not consecutive, during the current or preceding quarter the individual performs service that is not in the course of the employing unit's trade or business. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining if the cash remuneration test is met. Casual labor not in the course of the employing unit's trade or business includes service that does not promote or advance the trade or business of the employing unit; for example, work performed in connection with the employing unit's hobby or recreational activities, or work as an employee in repairing the employing unit's private home. Service for a corporation cannot be considered as nonbusiness or casual labor.

K. Localized employment.

1. If an employee works in more than one state, it is necessary to determine if the employment is localized in, and reportable to Minnesota. In making this determination, only the regular services for which the employee was hired, and not those characterized as incidental, temporary, transitory or an isolated transaction are to be considered. An employee's services are considered localized in Minnesota in any calendar quarter in which 80 percent or more of his regular services are performed in Minnesota.

2. Regular services include those services performed in an office located in the home of the employee if all of the following conditions are met:

a. The employer does not provide other facilities;

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b. The office meets the requirements of the Internal Revenue Code of 1954 for the deduction of related expenses; and

c. The services performed are an integral part of the employee's regular duties.

3. Incidental, temporary, transitory and isolated services include:

a. Attending periodic meetings or returning to one's residence which is located outside his area or territory, by salespersons or others who normally perform services within a given area or territory; and

b. Any other services which are apart from or not a permanent part of an employee's regular duties.

L. Multi-state employment. When an individual's services are not localized, and absent any reciprocal agreement provided for in Minn. Stat. S 268.13, subd. 1, clause (1), the employee is a "multi-state" worker and the application of the tests listed in 1.-4. below is required.

1. Base of operations. If an individual's services are not localized in any state and some services, other than those determined to be incidental, temporary, transitory or isolated transactions, are performed in Minnesota and the base of operations is in Minnesota, the employee's entire services are reportable to Minnesota. "Base of operations" means the place, usually permanent in nature, from which the employee starts his work, to which he customarily returns, and to which the employer may direct instructions to the employee. A branch office of the employer or the place of residence of the employee could be a base of operations.

2. Direction and control. If an individual's services are not localized in any state and the base of operations test does not apply, all of the services are reportable to Minnesota if Minnesota is the state from which the employer exercises general direction and control over the employee, and if some services, other than those determined to be incidental, temporary, transitory or isolated services, are performed in Minnesota.

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3. Residence. If an individual's services are not localized within any state and the base of operations and the direction and control tests do not apply, the individual's entire services are reportable to Minnesota if the individual's residence is located in Minnesota and some services, other than those determined to be incidental, temporary, transitory, or isolated transactions are performed in Minnesota.

4. Service not covered under the laws of any other state or Canada. If 1.-3. do not apply, and the individual's services are not covered under the laws of any other state or Canada, the services are covered under Minn. Stat. SS 268.03-268.24 if the services are directed and controlled from Minnesota.

M. Employment partially exempt within a pay period; 50 percent rule.

1. Minn. Stat. S 268.04, subd. 12, clause (15)(p) does not apply to an individual who performs services as an independent contractor and in employment within the same pay period, but does apply to all employment defined in Minn. Stat. S 268.04, subd. 12, except clauses (10)(a) and (b), relating to certain employees of religious organizations.

2. If an individual's services within the pay period consist of 50 percent or more of excluded employment none of that individual's services for that pay period are taken into account nor does any of that individual's remuneration for that pay period constitute wages.

3. Although not applicable to services by an individual referred to in Minn. Stat. S 268.04, subd. 12, clauses (10)(a) and (b), other services performed by the same individual are subject to all other provisions of Minn. Stat. SS 268.03-268.24.

N. Previously excluded employment. If within a calendar year an individual's services and remuneration should no longer be excluded because his employing unit met the employment or wage requirement for that individual's class of workers all of the previously excluded employment for that class within the same calendar year is subject to the provisions of Minn. Stat. SS 268.03-268.24. The previously excluded wages for all workers

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in that class of employment are reportable in the calendar quarters in which the wages were paid or were due and payable.

O. Employment, general exclusions. Minn. Stat. S 268.04, subd. 12, clause (10)(d) excludes services which are performed as part of a program designed to relieve unemployment, if the specific program, and not just the employing unit, is assisted or financed by any federal agency or an agency of a state or political subdivision thereof. "Assistance" may be in the form of supervision, advice in organizing and operating the program, but it must be substantial and continuing. Occasional, intermittent or incidental services would not be sufficient to invoke the exclusion. Where other than incidental physical facilities or material are furnished the program by a federal agency, the state or any of its political subdivisions, the program has been "assisted or financed".

8 MCAR S 4.3103 Agricultural labor.

A. Purpose. This rule further defines and clarifies terms used in Minn. Stat. S 268.04, subd. 12, clause (15)(a) and in this rule.

B. Definitions.

1. Agricultural and horticultural commodity. "Agricultural or horticultural commodity" includes nuts, fruits, mushrooms, vegetables, honey and grain, flowers, cut flowers, trees, sod and shrubbery, animal feed or bedding, grass seed, vegetable and cereal seed, flax, soy beans, sunflower seeds, corn, medicinal herbs and other crops.

2. Commodity. "Commodity" refers to a single product. For example, all apples are one commodity. Apples and peaches are two separate commodities.

3. Crop purchase agreement. "Crop purchase agreement" means an agreement whereby a crop is raised under contract with a buyer.

4. Cultivating. "Cultivating" means cultivating of the soil, irrigating crops, spraying, dusting and other related operations.

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5. Farm. "Farm," unless otherwise excluded in this rule, means land or buildings if their primary use is for raising agricultural or horticultural commodities or for activities generally associated with the operation of a ranch, range, livestock or dairy operation. A farm need not be a specific size and it need not be composed of contiguous plots. The performance of agricultural services does not by itself render the place where they are performed a farm.

6. Fur-bearing animals. "Fur-bearing animals" are animals raised for the eventual use of their fur in the manufacture of clothing or other products.

7. Harvesting. "Harvesting" includes baling hay and straw, shredding fodder, combining small grains, hulling nuts, and course grinding of alfalfa. Horticultural commodities including flowers, trees, shrubbery and plants are harvested when they are taken up for sale or storage.

8. Livestock. "Livestock" is any useful domestic animal kept for use on a farm or raised for sale and profit or for eventual consumption.

9. Poultry. "Poultry" is any domestic fowl raised for meat or eggs and includes chickens, turkeys, ducks and geese.

10. Primary. "Primary" means 70 percent or more.

11. Raising. "Raising" as it pertains to livestock, bees, poultry, fur-bearing animals and wildlife means any or all stages of development, including breeding, which are necessary in their maturing for use on the farm or for sale. Raising does not include services in potting, watering, heeling, or otherwise caring for trees, shrubbery, plants, flowers or similar items that are purchased in saleable condition for the purpose of resale.

12. Terminal market. A "terminal market" includes a packing or processing plant or any place where a farmer-producer customarily relinquishes his economic interest in the commodity, its future form or its destiny.

13. Wildlife. "Wildlife" refers to frogs, birds, fish and all animals belonging to a species or class generally

considered wild regardless of the element which they inhabit.

C. Farms, exclusions.

1. Feedlots, hatcheries and horse breeding and training. Feedlots, hatcheries and horse training and breeding enterprises are not in themselves farms although they require services generally considered to be agricultural labor.

2. Wildland. Property left in its wild state with no effort expended to perform common farming operations is not a farm.

D. Farms, inclusions.

1. Wild rice. Land developed for seeding, cultivating and raising wild rice is a farm.

2. Christmas trees. A plot of land used primarily for raising Christmas trees is a farm.

3. Mushrooms. Land and structures used primarily for raising mushrooms is a farm.

4. Wildlife. A parcel of real property used for raising any form of wildlife is a farm.

5. Ranges. Land used primarily for grazing is a farm.

E. Crop purchase agreements, farms, agricultural labor.

1. Farm operator. A person agreeing to purchase a commodity grown under a crop purchase agreement does not by that reason qualify as an operator of a farm even though he conducts some or all of the operations necessary for the production and harvesting of the crops purchased.

2. Agricultural labor. Services performed on a farm in the employ of either party to a crop purchase agreement in connection with the raising and harvesting of crops is agricultural labor.

F. Agricultural labor on farms. Services connected with the following activities must be performed on a farm as defined in Minn. Stat. S 268.04, subd. 12, clause (15)(a)(5) and in this rule, to be agricultural labor:

1. Breeding and training horses;

2. Hatching poultry;

3. Aerial seeding, fertilizing, spraying and dusting

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including services related to the mixing of the spray or dust material or the loading of the material into the airplane, as well as services related to the measuring of the swaths and the marking and flagging of fields to be dusted or sprayed;

4. Clerical, bookkeeping and other office work in conjunction with the services referred to in Minn. Stat. S 268.04, subd. 12, clause (15)(a)(1); or

5. Holding, feeding and fattening livestock in feed lots.

G. Agricultural labor, specific cases.

1. Generally. The services described in 2.-5. are not agricultural labor unless they meet the specific requirements set forth in 2.-5. with regard to where and for whom they are performed. When reference is made to "incidental to ordinary farming operations", that means services of the character ordinarily performed by employees of a farmer or of a farmer's cooperative organization or group as a prerequisite to marketing in its unmanufactured state any agricultural or horticultural commodity produced by the farmer, organization or group.

2. Clerical work. Record keeping and other clerical or office work performed in connection with the functions described in Minn. Stat. S 268.04, subd. 12, clauses (15)(a)(2) and (4) unless they are:

a. Performed in the employ of the owner or tenant or other operator of a farm;

b. Rendered in major part on a farm; and

c. Performed incidentally to ordinary farming operations.

3. Commodity retailing. Retailing agricultural or horticultural commodities, on or off the farm, unless:

a. The services are performed for, and the commodities are produced by the operator of the farm; and

b. Less than 50 percent of the employee's time is devoted to the services. The 50 percent test is to be applied to each employee with respect to either a pay period or 31 days, whichever is less.

4. Waterways work. Services in the construction of

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canals, reservoirs, waterways or drainage ditches, unless in the employ of the owner or tenant or other operator of a farm.

5. Land clearance. Services in the clearing of stumps, brush and debris from land in preparation for its use as a farm, unless in the employ of the owner tenant or other operator of the farm.

H. Agricultural labor exclusions.

1. Generally. Services connected with the following activities do not constitute agricultural labor:

a. Breeding, raising and caring for mice, rats and other rodents and creatures commonly held for sale in pet shops or raised for research and experimental purposes;

b. Breeding, raising, caring for, exhibiting and boarding dogs and cats;

c. Racing, exhibiting and boarding horses, including services connected with a riding stable or academy;

d. Lumbering or landscaping;

e. Collecting and processing maple sap into maple syrup or sugar;

f. Trapping animals;

g. Harvesting native wild rice not grown on land developed specifically for that purpose; or

h. Raising and harvesting worms.

2. Packing plants. Services performed in the employ of any person other than the operator of a farm in hauling crops to a packing plant and services within the plant do not constitute agricultural labor.

I. Agricultural labor, separate commodities. The services with respect to each commodity are to be considered separately in determining whether the conditions set forth in Minn. Stat. S 268.04, subd. 12, clause (15)(a)(4) have been satisfied.

8 MCAR S 4.3104 Domestic service.

A. Purpose. This rule further defines and clarifies terms used in Minn. Stat. S 268.04, subd. 12, clause (14) and in this rule.

OFFICE BY:

B. Definitions.

1. Domestic service. "Domestic service" means work ordinarily performed as an integral part of household duties that contribute to the maintenance of the employer's private home or administers to the personal wants and comforts of the employer and other members of the employer's household. In general domestic service includes work performed by cooks, waiters, waitresses, butlers, housekeepers, housemen, watchmen, governesses, maids, companions, nursemaids, valets, baby sitters, laundresses, furnace men, caretakers, gardeners, footmen, grooms, seamstresses, handymen and chauffeurs of family automobiles. Domestic service performed for fraternities and sororities also include services performed by housemothers.

2. Local college club. "Local college club" means a club operated and controlled by and for the benefit of students enrolled at a university or college.

3. Private home. "Private home" means the fixed abode of one or more persons. Any shelter used as a dwelling may be considered as a private home including a tent, boat, trailer, or a room or suite in a hospital, hotel, sanatorium, or nursing home. A cooperative boarding and lodging facility may also be a private home. In an apartment house, each apartment, together with its stairways, halls, and porches is a private home. Parts of the premises devoted to common use, such as an office, furnace room, lawns, public stairways, halls and porches, are not a part of the private home. If a facility is used mainly as a commercial rooming or boarding house only that part of the house which is used as the operator's living quarters is considered to be a private home.

C. Domestic service, general.

1. Non-domestic service, treatment. If service performed by an employee in or around the private home of an employing unit is not domestic service within the meaning of this rule, it is subject to the other provisions of Minn. Stat. S 268.04, subd. 12.

2. Maintenance of the employer's private home. Domestic

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service in connection with the maintenance of an employer's private home is service which contributes directly to the protection, cleaning and normal maintenance, in contrast to major repair projects, of the home and surrounding area. It does not include service which is not ordinarily a part of home duties or which involves the use of skilled or specialized training including service performed by persons in the construction trades.

3. Administering to the personal wants and comforts of the employer. Certain services, although performed in or around the private home of the employer are not domestic services because they are too remotely associated with the requirement that they administer to the personal wants and comforts of the employer. Examples of non-domestic services include those performed by a private or social secretary, tutor, librarian, bookbinder, museum assistant and medical nurse.

4. Domestic service performed by relatives. Domestic service performed by relatives, other than that excluded from employment by Minn. Stat. S 268.04, subd. 12, clause (15)(d), is domestic service within this rule if there is a contractual agreement between a relative and the employing unit.

5. Service performed by employees of landlords or rental agencies. Service of a household nature performed in or around rental units by employees of landlords and rental agencies is not domestic service. Service performed by domestic workers in and around the private home of the landlord is not within this exception.

6. Workers obtained through a referral or placement agency. Domestic workers referred to jobs through employment placement agencies that neither supervise nor pay them directly are in the employ of the recipient of the services. However, if an agency is in the business of providing temporary services to clients the agency is the employing unit and the workers are not providing domestic services.

7. Service performed for a minister, priest, rabbi or any other member of a religious order. Service performed in the

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private home of a minister, priest, rabbi or any member of a religious order is considered domestic service if the worker is in the employ of the recipient of the service. If the worker is in the employ of the church or religious order the service is excluded employment. The recipient of the service is the employer if the funds for the payment of the domestic worker are not specifically provided by the church or religious order. Funds provided by a congregation of a church are considered as being provided by the church. If funds are not provided by the church specifically for domestic service and the spouse hires, directs and otherwise controls the worker, the spouse is the employer.

8. Registered and licensed practical nurses. Registered nurses performing private duty services are generally performing service as independent contractors if they have full discretion in administering their professional services and are not subject to direction and control. Registered and licensed practical nurses who are engaged by hospitals, nursing homes, physicians, government agencies or commercial businesses generally are not performing services as an independent contractor and the services are non-domestic.

9. Nurses aides and patient helpers. Nurses aides and patient helpers who are engaged to perform services in the private home of the patient, although they may occasionally administer medication, are usually performing services that are primarily domestic in nature. Patient helpers who are selected by patients who require their services, either in the hospital or after returning to their homes, are generally in the employ of the patient.

10. Service authorized or provided by agencies. Any agency providing or authorizing the hiring of homeworkers or personal care attendants in the private home of an individual is the employer of those individuals performing the services and the services are not considered domestic if the recipient would not receive the care unless provided or funded for by the agency. It is immaterial whether the agency pays the homeworker

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or attendant directly or if the agency provides the funds to the recipient.

D. Location of domestic service.

1. Domestic service is service which is performed only in a private home of the employer, local college club, or local chapter of a college fraternity or sorority.

2. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter or university faculty club.

8 MCAR S 4.3105 Employer records, reports and payments.

A. Scope. This rule clarifies an employer's duty with regard to records, reports and payments as required under Minn. Stat. SS 268.06, subd. 1; 268.11, subds. 2 and 3; and 268.12, subd. 8.

B. Notification.

1. Change or transfer of business. The department shall be notified on reports prescribed by the department within 30 days of the start, change, transfer, sale, acquisition or termination of a business in whole or in part. Subsequent requests for additional information required in determining liability, modifying an existing account and assignment of experience rates must be completed and returned to the department within time limits established by the department.

2. Employer death. The executor, administrator or other legal representative of a deceased employer shall be responsible for notifying the department of the employer's death as soon as possible.

3. Bankruptcy. In the case of bankruptcy or receivership proceedings, or any proceedings for the relief of a debtor who is an employer, the trustee in bankruptcy, receiver, or person designated by order of the court as in control of the assets of the debtor shall promptly file notice of that with the department.

C. Records. Each employing unit shall establish, maintain and preserve records with respect to individuals performing

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personal services for it for a period of not less than five years after the calendar year in which the remuneration for the services was paid or payable. The records shall show for each individual the following:

1. Name;

2. Social security number;

3. Days in which the individual performed personal services;

4. Location where services were performed;

5. Wages paid and wages due but not paid for personal services, showing separately:

a. Money wages, excluding special payments;

b. Wages paid and wages due but not paid, in any medium other than money, excluding special payments;

c. Special payments such as bonuses, gifts, and prizes, showing separately money payments, other special payments and character of the payments;

d. Days for which sick pay was paid; and

e. Tips and gratuities paid to an employee by a customer and accounted for by the employee to the employer as defined in 8 MCAR S 4.3101 E.1. and 2.

6. Rate and base unit of pay;

7. Amounts paid as allowances or reimbursement for travel or other activity pertaining to the furtherance of the employing unit's business which were not included as wages. The account shall show each item of expense incurred during each pay period or calendar month, or if paid per diem, the dates the employee was away from home overnight;

8. The date of separation and the reason, in detail, for the termination;

9. The complete resident address of the employee; and

10. For each pay period:

a. The beginning and ending dates of the period;

b. The total amount of wages paid and wages due but not paid for personal services performed; and

c. The date of payment.

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D. Records, instate and outstate. For services performed within and without Minnesota the records required by C. shall include:

1. The city or county and state in which the employing unit maintains a base of operations, as defined in 8 MCAR S 4.3102 L.1., used by the individual;

2. The city or county and state from which the services are directed and controlled, if the employing unit does not have a base of operations in the states in which an individual performs services; and

3. A list of the states in which the individual performs other than temporary or incidental services and the dates services were performed at each location.

E. Records, covered and uncovered employment. For services performed in both employment and excluded employment within a pay period the records required by C. shall include the hours spent performing services in employment and the hours spent performing excluded services.

F. Filing reports. An employer's tax report must be filed on a form prescribed by the department not later than the due date for payment of quarterly contributions. Failure to receive forms from the department shall not constitute a valid reason for not filing reports on or before the due date thereof or to pay any contribution due. Consolidated reports of corporations having common ownership shall be recognized or permitted only if expressly allowed under 8 MCAR S 4.3106. If the report first submitted is erroneous, the employer shall promptly submit the corrected information on forms prescribed by the department and make any additional payment due.

8 MCAR S 4.3106 Consolidated reports.

A. When permitted. Consolidated reports of parent and subsidiary corporations, or other employing units having common ownership, shall be recognized or permitted only in the case of two or more related corporations:

1. Who concurrently employ the same individuals,

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including officers, whose wages during the calendar quarter are paid by one of the related corporations as a common paymaster; and

2. Whose application for a joint account has been approved by the commissioner or his delegated representative.

B. Related corporations tests. For the purpose of this rule and Minn. Stat. S 268.06, subd. 21, clause (2), corporations are related for an entire calendar quarter if they satisfy one of the following four tests of 1.-4., at any time during that calendar quarter.

1. Test one. They are either:

a. Members of a parent-subsidiary controlled group which is a group of two or more corporations connected through stock ownership with a common parent corporation if more than 50 percent of the total combined voting power or more than 50 percent of the total value of shares of all classes of stock of each corporation, except the common parent corporation, is owned by one or more of the corporations and the common parent corporation owns stock with more than 50 percent of the total combined voting power of at least one of the other corporations. There shall be excluded in computing the percentage of voting power or value, any treasury stock owned by the subsidiary corporation;

b. Members of a brother-sister controlled group consisting of two or more corporations in each of which five or fewer of the same individuals, estates or trusts own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of all shares of all classifications of stock of each corporation, taking into account the stock ownership of each person only to the extent the stock ownership is identical with respect to each corporation;

c. Members of a combined group, which is a group of three or more corporations each of which is a member of a parent-subsidiary or brother-sister controlled group and one of which is a common parent corporation included in a

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parent-subsidiary controlled group and is included in a brother-sister controlled group; or

d. Life insurance companies subject to income tax under Section 802 of the Internal Revenue Code and the provisions of a., b. or c. are met and all other members of the controlled group are subject to Section 802 of the Internal Revenue Code.

2. Test two. They are a corporation that does not issue stock and 50 percent or more of the board of directors, or other governing body, of each of the corporations are the same, or the same holders possess 50 percent or more of the voting power to elect directors to each corporation.

3. Test three. Fifty percent or more of one corporation's officers are concurrently officers of the other corporation.

4. Test four. Thirty percent or more of one corporation's employees are concurrently employees of the other corporation.

C. Stock defined. For the purpose of this rule "stock" does not include:

1. Non-voting stock which is limited and preferred as to dividends;

2. Treasury stock; or

3. Stock that is treated as excluded stock.

D. Excluded stock, parent-subsidiary. "Excluded stock" for a parent-subsidiary controlled group means:

1. Stock in a subsidiary held in trust that is part of an employee's deferred compensation plan;

2. Stock in a subsidiary owned by an individual who is a principal stockholder or an officer of the parent corporation. A "principal stockholder" is one that owns five percent or more of the voting power or five percent or more of the value of all stock of the parent corporation; or

3. Stock in a subsidiary corporation owned by an employee of the subsidiary corporation but only if the parent or subsidiary corporation restricts or limits the employee's right

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to dispose of the stock.

E. Excluded stock, brother-sister group. "Excluded stock" for a brother-sister controlled group means:

1. Stock in a member corporation held by an employee's trust if the trust is for the benefit of the employees;

2. Stock in a member corporation owned by an employee of the corporation but only if substantial limits or restrictions are imposed on the employee's right to dispose of the stock. A bona fide reciprocal stock repurchase arrangement will not be considered as one that restricts or limits the employee's right to dispose of the stock; or

3. Stock in a member corporation that is held by a nonprofit educational or charitable organization.

F. Limits on groups. A corporation may be treated as a component member of only one controlled group.

G. Concurrent employment. "Concurrent employment" as used in Minn. Stat. S 268.06, subd. 21 and this rule means the simultaneous existence of an "employment" relationship between an individual and two or more related corporations, as defined in Minn. Stat. S 268.04, subd. 12.

An employment relationship shall require the performance of services by the employee for the employing corporation in exchange for wages which, if not for the provisions of Minn. Stat. S 268.06, subd. 21, clause (2) and this rule, would be reportable by the employing corporation.

The fact that a particular employee is on leave or otherwise temporarily inactive is immaterial in the determination of concurrent employment. Employment is not concurrent with respect to one of the related corporations if there is no employment relationship with that corporation during periods when the employee is not performing services for that corporation.

An individual who does not perform substantial services in exchange for wages for a corporation is presumed not employed by that corporation.

Wages paid to an employee ceasing to be concurrent for

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services rendered while the employee was in concurrent employment is reportable by the common paymaster. If the employment relationship is nonexistent during a quarter, that employee may not be counted towards the 30 percent test set forth in B.4.

H. Cash payments only. This rule applies only to wages disbursed in money, check or similar instrument by one of the related corporations or its agent, and excludes the value of non-cash compensation such as room and board, received by the common employee from a member corporation other than the common paymaster.

I. Common paymaster.

1. A "common paymaster" of related corporations is any related member that disburses wages to employees of two or more of the related corporations on their behalf and that is responsible for keeping books and records for the payroll with respect to those employees.

2. The common paymaster is not required to disburse wages to all employees of two or more related corporations, but this rule does not apply to any wages that are not disbursed through a common paymaster.

3. Although a corporation may be treated as a component member of only one controlled group, the related corporations may designate more than one common paymaster but only one common paymaster may be designated for each class of employee.

J. Joint account. A joint account application shall be on forms prescribed by the department. A joint account shall be maintained as a separate unit of the employer account of the common paymaster until that account is terminated or notification is received of a change in the common paymaster. A joint account cannot be made retroactive prior to January 1 of the year preceding the year in which the application is received.

K. Joint and several liability. The common paymaster has the primary responsibility for the remittance of any contributions, penalties and interest due on wages it disburses as the common paymaster but each related corporation using the

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common paymaster is jointly and severely liable for its proportionate share of any unpaid contributions, penalties and interest.

L. Common paymaster responsibilities. The common paymaster has the sole responsibility for filing contribution reports, wage and separation information and protest and appeals pertaining to concurrent employees and to establish effective communications between the related corporations to ensure timely response on all matters affecting claims for unemployment benefits.

M. Reports. Each related corporation which is the employer of an individual will be responsible for reporting the individual's wages and remitting the appropriate contributions for calendar quarters where the related group or concurrent employment conditions are not met, regardless of which corporation disburses the wages.

N. Work other than for common paymaster. If an employee works for a related corporation other than the common paymaster prior or subsequent to the effective period of the agreement, the wages earned and reportable by the employing corporation shall not be combined with the wages reportable by the common paymaster in determining the maximum taxable wage described in Minn. Stat. S 268.04, subd. 25.

O. Non-related or noncurrent. Where related group or concurrent employment conditions are not met, each employing corporation of an individual shall be responsible for submitting wage and separation information, protests and appeals pertaining to any claim for unemployment benefits of that individual.

P. Wages, wage credits and experience rate factors of a joint account. All wages reportable and benefits charged under the joint account shall remain with that account for contribution, benefit eligibility and experience rating purposes.

Q. Relation cessation. If any corporation ceases to be related the common paymaster shall notify the department within 30 days of the end of the calendar quarter in which the cessation occurs.

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R. Termination of agreement. The commissioner may immediately terminate the agreement if it is found that consolidated reporting is not in compliance with this rule, or it is determined that the approved related group changed its common paymaster for the purpose of attaining more favorable experience rates.

S. Written protest. If an application to report under the provisions of Minn. Stat. S 268.06, subd. 21, clause (2) and this rule is denied, or an existing agreement is terminated at the discretion of the commissioner, the denial or termination shall be final unless a written protest is filed with the commissioner as set forth in Minn. Stat. S 268.06, subd. 20.

8 MCAR S 4.3107 Payments of interest.

A. Scope. This rule establishes the conditions upon which interest on contributions due may be waived as provided for in Minn. Stat. S 268.16, subd. 1.

B. Waiver. The commissioner may waive all or part of the interest charges on contributions that are not paid by the due date if:

1. The late payment was caused by department error or misinformation; or

2. The late payment was the result of unreasonable delay not attributable to the employer.

C. Application. Each application for waiver of interest under this rule must be made in writing by the employer or his authorized representative, except that the commissioner may on his own motion waive interest if in the best interest of the State of Minnesota.

8 MCAR S 4.3108 Contribution rates.

A. Notice of rate. Any employer determined liable by the department prior to January 1 shall be assigned a contribution rate pursuant to Minn. Stat. S 268.06 which shall be mailed on or before March 15 of the year effective.

B. Time limit on voluntary contributions. In no event shall a voluntary contribution paid by an employer pursuant to Minn.

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Stat. S 268.06, subd. 24 after the expiration of the first 120 days for the period the rate is effective be used in the computation of a new experience ratio.

Repealer. Department of Economic Security rules ES-1, ES-2, ES-3, ES-4, ES-5, ES-6, ES-8, ES-9, ES-10, ES-11, ES-12, ES-17, ES-19, ES-20, ES-27, and ES-28 are repealed.

APPROVED IN THE
REVISOR OF STATUTES
OFFICE BY:

September 10, 1981
RD 7

OFFICE OF THE REVISOR OF STATUTES
PROPOSED RULES

Agency Department of Economic Security

Division Unemployment Insurance

Agency Contact Mike Fratto Phone Number 6-3574

Title: Proposed Rules Governing Unemployment Compensation

Type of Rules: Permanent_____X Temporary_____

Incorporations by References:

Rule Number Material Incorporated
Author
Title
Place
Publisher
Date
Cost
Places Available

None

See Additional references on back Yes____ No____

Duplication of Statutory Language.

Rule Number Statutory Section Duplicated

The attached rules are approved as to form.

Steven C. Cross
Revisor of Statutes

Name: John C. Fuller

Title: Assistant Revisor

Phone: 296-0955

RECEIVED
OCT 5 1981
ADMINISTRATIVE HEARINGS

Hearing Examiner regarding discovery, witnesses, or intervention of parties pursuant to the Rules of the Office of Administrative Hearings (9 MCAR § 2.213) which rules govern prehearing procedures.

Any person or organization who intends to appear at the hearing must file a Notice of Appearance with the hearing examiner within 20 days of the publication or service of this Notice of and Order for Hearing. If no person or organization contests the proposals or the petition, they may be deemed true. In the event the proposals are taken as true or the issues are deemed proven, it is possible that the proposed amendments to the Basic Manual requested by the WCIRA will be granted.

Copies of the proposed amendments to the Basic Manual may be obtained from the Workers' Compensation Insurers Rating Association of Minnesota, 510 Marquette Avenue, Minneapolis, Minnesota 55402, telephone (612) 338-4500. In addition, copies may be inspected during regular business hours at the Minnesota Insurance Division, Department of Commerce, 500 Metro Square Building, St. Paul, Minnesota 55101, telephone (612) 296-2488.

November 26, 1980

Agency Exh. No. 15 Michael D. Markman
File No. ECSEC-82-003-FL Commissioner of Insurance
Date 10/30/81

Department of Economic Security Unemployment Insurance Division

Notice of Intent to Solicit Outside Opinion Regarding Proposed Rules for the Unemployment Insurance Program

Notice is hereby given that the Department of Economic Security is drafting amendments to existing rules and new rules pertaining to the administration of the Unemployment Insurance Program. The rules are authorized by Minn. Stat. § 268.12, subd. 3 and other provisions in §§ 268.03 to 268.24.

It is the intent of these rules to provide comprehensive procedures and policies governing the administration of the Unemployment Insurance Program including but not limited to employer liability, employer accounts, employer contributions, benefit payments, disqualification for benefits, eligibility for benefits, benefits under reciprocal benefit agreements, extended benefits, appellate procedures, overpayment procedures and other provisions.

The department invites all interested persons or groups to provide information, comments, advice or opinions to:

James Connolly
Unemployment Insurance Division
390 North Robert Street
St. Paul, MN 55101
(612) 296-3568

All statements of information or comment must be received by January 19, 1981. Any written material received by the Department will become part of the public hearing record.

State Board of Investment

Notice of Investment Advisory Council Meeting

The Investment Advisory Council will meet Tuesday, December 16, at 7:30 a.m. at the St. Paul Companies, 385 Washington Avenue, Saint Paul.

Office of the Secretary of State

Notice of Vacancies in Multi-member State Agencies

Notice is hereby given to the public that vacancies have occurred in multi-member state agencies, pursuant to Minn. Stat. § 15.0597, subd. 4. Application forms may be obtained at the Office of the Secretary of State, 180 State Office Building, St. Paul 55155; (612) 296-7876. **Application deadline is January 6, 1981.**

COUNCIL FOR THE HANDICAPPED has one vacancy open immediately for a public member. The council advises the governor, legislature, service-providing agencies and the public on the needs and potentials of disabled people. Members are appointed by the Governor, and receive $35 per diem. For specific information, contact Council for the Handicapped, Suite 208 Metro Square Bldg., St. Paul 55101; (612) 296-6785.

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC SECURITY

RECEIVED
SEP 10 1981
ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES GOVERNING THE UNEMPLOYMENT INSURANCE PROGRAM RELATING TO THE PAYMENT OF BENEFITS AND THE COLLECTION OF EMPLOYER TAXES (8 MCAR 4.3001 - 4.3999)

ORDER FOR HEARING

IT IS ORDERED this 3rd day of September, 1981 that a public hearing on the proposed amendments and new rules captioned above be held in room 116A, Administration Building, 50 Sherburne Ave., St. Paul, Minnesota on October 30, 1981, commencing at 9:00 A.M., and continuing until all persons and representatives of interested groups have had an opportunity to be heard.

These rules will repeal portions of Minn. Reg. ES 1 - 30 which will be codified as required by Minnesota Sessions Law 1981, Chapter 253.

IT IS FURTHER ORDERED, that notice of said hearing be given to all persons who have registered their names with the Department of Economic Security for that purpose and shall be published in the State Register.

Rolf Middleton

Rolf Middleton
Commissioner of Economic Security

Agency Exh. No. 2
File No. ECSEC-82-003-JL
Date 10/30/81

IN THE MATTER OF THE PROPOSED ADOPTION
OF AMENDED AND NEW RULES GOVERNING
THE UNEMPLOYMENT INSURANCE PROGRAM
RELATING TO THE PAYMENT OF BENEFITS AND
THE COLLECTION OF EMPLOYER TAXES
(8 MCAR 4.3001 - 4.3999)

AFFIDAVIT OF
ADDITIONAL NOTICE

RECEIVED
OCT 5 1981
ADMINISTRATIVE
HEARINGS

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

Michael J. Fratto, being first duly sworn deposes and says:

That on the 21st day of September, 1981 at the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Notice of Hearing and Proposed Rules by depositing in the State of Minnesota Central Mail System for Inter-Office Mailing or United States Mailing as appropriate, at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid on those notices and rules which requireit, on all persons on the attached list which the Department of Economic Security at its descretion notified of the proposed adoption of rules by the Department.

Michael J. Fratto

Subscribed and sworn to before me
this 22nd day of September, 1981.

Helen Eckl

HELEN ECKL
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 15, 1987

Agency Exh. No. 11
File No. ECSEC-82-003-JL
Date 10/30/81

DISCRETIONARY MAILING LIST

U.S. POSTAL SERVICE

Charles E. Brown
Vice President
Executive Personnel
Honeywell, Inc.
2701 Fourth Ave. So.
Minneapolis, Mn 55408

Lawrence Binger
St. Paul Chamber of Commerce
300 Osborn Building
St. Paul, Mn 55102

Winston Borden
President
Minnesota Association of Commerce and Industry
480 Cedar Avenue,
Room 200
St. Paul, Mn. 55101

Carl O. Steinnagel
Vice President
Human Resources
McQuay-Perfex, Inc.
5401 Gambel Drive
Minneapolis, Mn 55440

Donald Friborg
Vice President
Industrial Relations
General Mills, Inc.
P.O. Box 1113
Minneapolis, Mn 55440

Leonard Bienas
Minneapolis Building Trade
312 Central Avenue
Room 556
Minneapolis, Mn 55414

Dan Gustafson
Secretary-Treasurer
Minnesota AFL-CIO
175 Aurora Avenue
St. Paul, Mn. 55103

Herb Larsen
United Steelworkers
409 Maryview Lane
Hibbing, Mn. 55474

David Roe
President
Minnesota AFL-CIO
175 Aurora Avenue
St. Paul, Mn. 55103

John R Cullinan
Minnesota DRIVE
3001 University Ave. S.E.
Suite 510
Minneapolis, Mn. 55414

Nellie Stone Johnson
425 Hennepin Avenue
Room 1035
Minneapolis, Mn. 55401

Sue Rockne
550 Warren
Zumbrota, Mn. 55992

George Seltzer
1917 East River Road
Minneapolis, Mn. 55414

Frank Jungas
Commissioner
Cottonwood County Board of Commissioners
County Courthouse
Mountain Lake, Mn. 56159

Eugene Wright
Commissioner
Minnesota Commission of Small Business
9246 Fifth Street North
Minneapolis, Mn. 55401

Elsa Carpenter
9400 Golden Valley Road
Minneapolis, Mn. 55427

Nancy Roth
Region 5 Regional Development Commission
611 Iowa Avenue
Staples, Mn 56479

INTER-OFFICE MAIL

John Davenport
433 State Office Building

Sherri Mortensen
132 State Office Building

Tim Michels
Senate Employment Committee
325 State Capitol

Doug Seaton
Room 11
State Capitol

Darcy Miner
Governor's Office

Paul Hyduke
450 A State Office Building

Judy McLaughlin
Governmental Operations Committee
271 State Office Building

Mike Driscoll
480 State Office Building

Mark Shepard
11 State Capitol

RECEIVED
SEP 22 1981
ADMINISTRATIVE HEARINGS

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC SECURITY

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES GOVERNING THE UNEMPLOYMENT INSURANCE PROGRAM RELATING TO THE PAYMENT OF BENEFITS AND THE COLLECTION OF EMPLOYER TAXES (8 MCAR 4.3001 - 4.3999)

NOTICE OF HEARING

Agency Exh. No. 6
File No. ECSEC-82-003-JL
Date 10/30/81

Notice is hereby given that a public hearing will be held pursuant to Minnesota Statutes section 15.0412, subdivision 4, in the above entitled matter in room 116A, Administration Building, 50 Sherburne Ave., St. Paul, Minnesota on October 30, 1981, commencing at 9:00 A.M. and continuing until all persons or representatives of interested groups have had an opportunity to be heard concerning adoption of the proposed rules. The proposed rules may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rules, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to participate by asking questions and making comments. Statements may made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Jon L. Lunde, Office of Administrative Hearings, 1745 University Avenue, Room 300, St. Paul, Minnesota 55104, either before the hearing or within five working days after the public hearing ends. Mr Lunde's telephone number is (612) 296-5938. The Hearing Examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days.

The rule hearing procedure is governed by Minn. Stat. sections 15.0411-15.0417 and 15.052 and by 9 MCAR sections 2.101-1.113 (Minnesota Code of Agency Rules). If you have any questions about this procedure, call or write the Hearing Examiner.

Notice is hereby given that 25 days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all the evidence and arguments which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rule or rules. Copies of the Statement of Need and Reasonableness by be obtained from the Office of Administrative Hearings at a minimal charge.

The Agency's authority to adopt the proposed rules is contained in Minn. Stat. section 268.12, Subd 3.

The proposed rules relate to various areas in the benefit and tax operations of the Unemployment Insurance Program. These rules expand upon Minn. Reg. ES 1-30 which are being codified. Current regulations (rules) which address subject matter covered in the proposed rules will be repealed.

The rules relating to benefits covers what constitutes Able to Work, Available to Work, Actively Seeking Work, Suitable Work, Re-employment Offer, a credit week and a week of unemployment. It will also cover the Benefit Claims Procedure.

The rules relating to employer taxes covers the definition of employment, what is included in employment; what wages are taxable and nontaxable; record-keeping, reports, and payments; voluntary contributions as it pertains to tax rates; and Agricultural and Domestic employment.

The Department estimates that the cost of implementing the above captioned rules will not exceed $100,000 per year for local public bodies for the two years immediately following their adoption within the meaning of Minn. Stat. section 15.0412, subd 7 (1978). 10

Copies of the rules are available and at least one free copy may be obtained by writing or calling James Connolly, Director, Program Development, Department of Economic Security, 390 N. Robert St., St. Paul, Mn. 55101. Mr. Connolly's telephone is (612) 296-8356. A copy of the proposed rules is attached. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rules, contact Mr. Connolly. 36

Notice: Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the Hearing Examiner (in the case of the Hearing Examiner's Report), or to the agency (in the case of the agency's submission or resubmission the the Attorney General). 8

Minn. Stat. Ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. section 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public official; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials. 6

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

Dated: 9/16/81

Rolf Middleton

Rolf Middleton
Commissioner of Economic Security

IN THE MATTER OF THE PROPOSED ADOPTION
OF AMENDED AND NEW RULES GOVERNING
THE UNEMPLOYMENT INSURANCE PROGRAM
RELATING TO THE PAYMENT OF BENEFITS AND
THE COLLECTION OF EMPLOYER TAXES
(8 MCAR 4.3001 - 4.3999)

AFFIDAVIT OF MAILING

RECEIVED
OCT 5 1981
ADMINISTRATIVE
HEARINGS

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

Michael J. Fratto, being first duly sworn deposes and says:

That on the 21st day of September, 1981, at the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Notice of Hearing and Proposed Rules by depositing in the State of Minnesota Central Mail System for United States Mailing at said city of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who have requested that their names be placed on file with the State Department of Economic Security for the purpose of receiving notice of the proposed adoption of rules by this Department.

Michael D Fratto

Subscribed and sworn to before me
this 22nd day of September, 1981.

Helen Eckl

HELEN ECKL
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 16, 1987

Agency Exh. No. 10
File No. ECSEC-82-003-JL
Date 10/30/81

RECEIVED
OCT 5 1981
ADMINISTRATIVE HEARINGS

STATE OF MINNESOTA

COUNTY OF RAMSEY

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED AND NEW RULES GOVERNING THE UNEMPLOYMENT INSURANCE PROGRAM RELATING TO THE PAYMENT OF BENEFITS AND THE COLLECTION OF EMPLOYER TAXES (8 MCAR 4.3001 - 4.3999)

CERTIFICATE

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minnesota Statute section 15.0412, subdivision 4, that their names be placed on file with and maintained by the Department of Economic Security for the purpose of receiving notice of the proposed sdoption of rules by this department is accurate and complete as of 8:00 A.M., this 21st day of September, 1981.

Bruce Lindsey

Bruce Lindsey
Procedure Coordinator
Minnesota Department of
Economic Security

Agency Exh. No. 12
File No. ECSEC-82-003-JL
Date 10/30/81

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STATE REGISTER

STATE OF MINNESOTA

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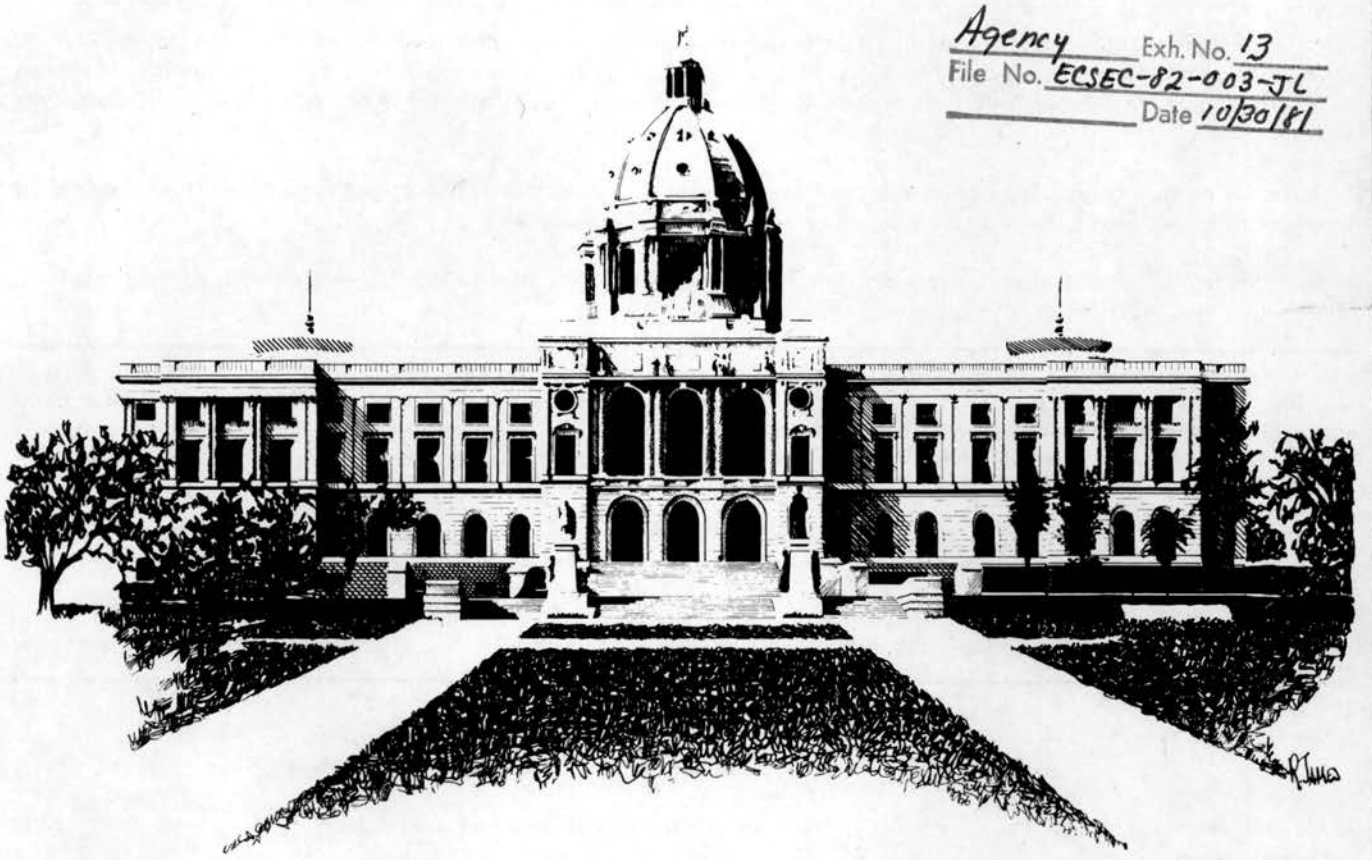

VOLUME 6, NUMBER 13

September 28, 1981

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STATE REGISTER

Printing Schedule for Agencies

Issue Number	*Submission deadline for Executive Orders, Adopted Rules and **Proposed Rules	*Submission deadline for State Contract Notices and other **Official Notices	Issue Date
	SCHEDULE FOR VOLUME 6		
14	Monday Sept 21	Monday Sept 28	Monday Oct 5
15	Monday Sept 28	Monday Oct 5	Monday Oct 12
16	Monday Oct 5	Monday Oct 12	Monday Oct 19
17	Monday Oct 12	Monday Oct 19	Monday Oct 26

*Deadline extensions may be possible at the editor's discretion; however, none will be made beyond the second Wednesday (12 calendar days) preceding the issue date for rules, proposed rules and executive orders, or beyond the Wednesday (5 calendar days) preceding the issue date for official notices. Requests for deadline extensions should be made only in valid emergency situations.

**Notices of public hearings on proposed rules and notices of intent to adopt rules without a public hearing are published in the Proposed Rules section and must be submitted two weeks prior to the issue date.

Instructions for submission of documents may be obtained from the Office of the State Register, 506 Rice Street, St. Paul, Minnesota 55103, (612) 296-0930.

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The *State Register* is the official publication of the State of Minnesota, containing executive orders of the governor, proposed and adopted rules of state agencies, and official notices to the public. Judicial notice shall be taken of material published in the *State Register*.

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State agencies must publish notice of their rulemaking action in the *State Register*. If an agency seeks outside opinion before promulgating new rules or rule amendments, it must publish a **NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION.** Such notices are published in the **OFFICIAL NOTICES** section. Proposed rules and adopted rules are published in separate sections of the magazine.

The PROPOSED RULES section contains:

- Calendar of Public Hearings on Proposed Rules.
- Proposed new rules (including Notice of Hearing and/or Notice of Intent to Adopt Rules without A Hearing).
- Proposed amendments to rules already in existence in the Minnesota Code of Agency Rules (MCAR).
- Proposed temporary rules.

The ADOPTED RULES section contains:

- Notice of adoption of new rules and rule amendments (those which were adopted without change from the proposed version previously published).
- Adopted amendments to new rules or rule amendments (changes made since the proposed version was published).
- Notice of adoption of temporary rules.
- Adopted amendments to temporary rules (changes made since the proposed version was published).

All ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES published in the *State Register* will be published in the Minnesota Code of Agency Rules (MCAR). Proposed and adopted TEMPORARY RULES appear in the *State Register* but are not published in the MCAR due to the short-term nature of their legal effectiveness.

The *State Register* publishes partial and cumulative lisitngs of rule action in the MCAR AMENDMENTS AND ADDITIONS list on the following schedule:

Issues 1-13, inclusive
Issues 14-25, inclusive
Issue 26, cumulative for 1-26
Issue 27-38, inclusive
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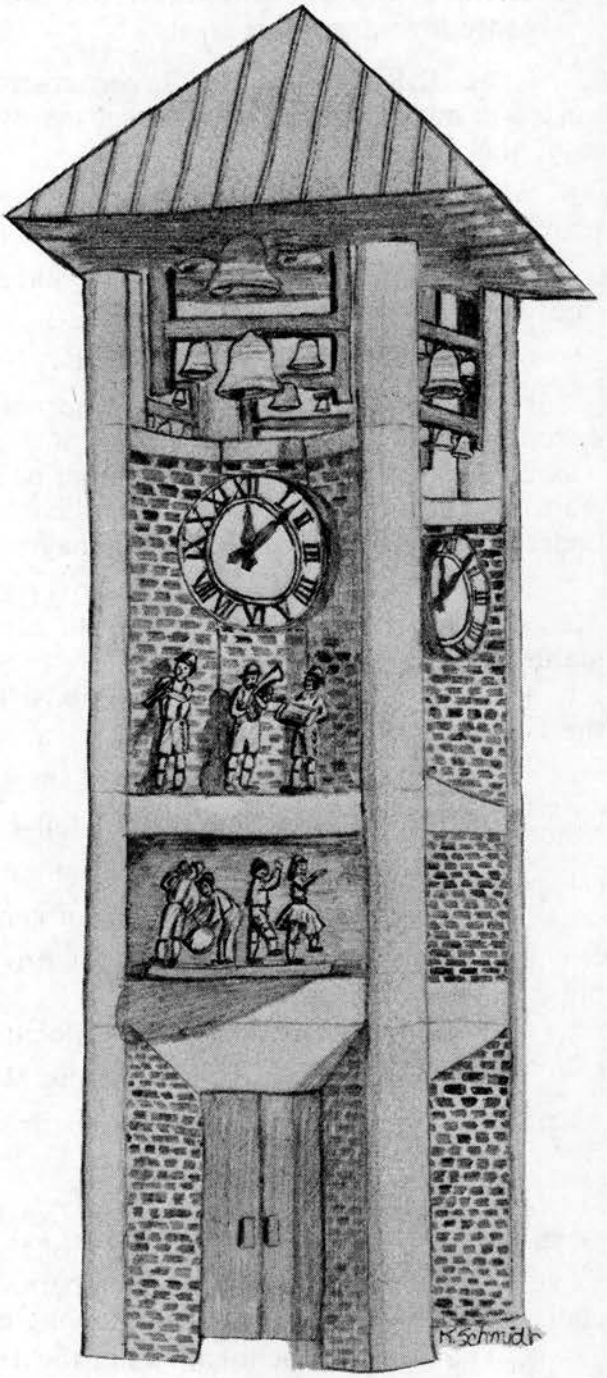


THE GLOCKENSPIEL **— The German heritage of New Ulm, Minnesota is commemorated by a glockenspiel, or performing clock, located on the town's main business street. Originally planned by a Clara Schoniau as a memorial to her late husband, Theodore (founder of State Bond and Mortgage Co.), the carillon clock features 37 bells and animated figures in Bavarian costume. A contest among New Ulm students produced the winning design by Danene Possis. The clock was built by Schulmerich Carillons, Inc., of Pennsylvania at a cost of $200,000, half of which was donated by Mrs. Schoniau. The remaining funds came from 645 other contributors. At 3:00 p.m. and 5:00 p.m. daily, residents enjoy the clock's historical pageant to the strains of "Blue Danube" and other German and Austrian tunes. (Pencil drawing by Kim Schmidt, New Ulm Junior High School student)**

EXECUTIVE ORDERS

Executive Order No. 81-10

Providing for the Establishment of a Governor's Task Force on Low-level Radioactive Waste Management

I, ALBERT H. QUIE, Governor of the State of Minnesota, by virtue of the authority vested in me by the Constitution of the State of Minnesota and applicable statutes, do hereby issue this Executive Order:

WHEREAS, the United States government has placed responsibility on each state to provide for the management of low-level radioactive waste generated within its borders; and

WHEREAS, Minnesota must develop plans for the disposal of low-level radioactive waste in order to discharge this responsibility;

NOW, THEREFORE, I ORDER:

1. The Minnesota Commissioner of Health is designated as the lead official for the executive branch for the development and implementation of plans for low-level radioactive waste management. The commissioner or his designee is responsible for negotiating with other states the establishment of interstate compacts for the purpose of joining with those states to address future directions for the management and disposal of low-level radioactive waste.

2. The establishment of the Governor's Task Force on Low-Level Radioactive Waste Management pursuant to Minnesota Statutes, Section 15.0593 and other applicable state statutes.

3. The Task Force shall be composed of no more than fifteen (15) members appointed by the Governor and shall consist of:

a. One (1) citizen member of the Environmental Quality Board (EQB).

b. Two (2) members of the House of Representatives.

c. Two (2) members of the Senate.

d. Three (3) representatives of generators of low-level radioactive waste.

e. Two (2) representatives of private citizen groups dedicated to the protection and preservation of the environment.

f. Two (2) representatives of local government.

g. One (1) representative of the Minnesota Geological Survey.

h. One (1) public health expert from the faculty of an institution of higher education.

i. One (1) medical doctor.

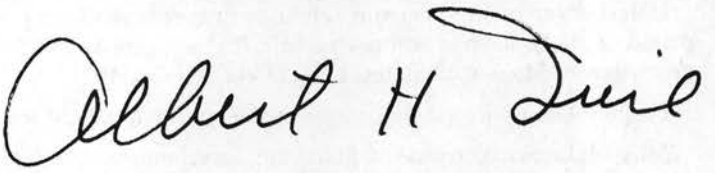
At least two Task Force members shall be farm owners and operators. The Commissioner of Health and the executive director of the Pollution Control Agency or their designees shall serve as non-voting ex-officio members of the Task Force. The Governor shall select the chairman of the Task Force from among its members.

4. The terms of the members of the Task Force shall expire upon completion of its charge as determined by the chair, but not more than two years from the date of this order. Per diem shall not be paid to members. Expenses shall be reimbursed according to the rules of the Department of Employee Relations.

5. The Task Force shall be responsible for advising the Commissioner of Health, the Governor,and the Legislature on all policy issues related to the management of low-level radioactive waste including, but not limited to, interstate compact negotiations.

Pursuant to Minnesota Statutes, Section 4.035 (1980), this order shall be effective fifteen (15) days after filing with the Secretary of State and publication in the *State Register* and shall remain in effect until it is rescinded by proper authority or it expires in accordance with Minnesota Statutes, Section 4.035, subdivision 3.

IN TESTIMONY WHEREOF, I have herunto set my hand this 11th of September, 1981.



PROPOSED RULES

Pursuant to Minn. Laws of 1980, § 15.0412, subd. 4h, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless seven or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules;

and

4. that the rule may be modified if modifications are supported by the data and views submitted.

If, during the 30-day comment period, seven or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of § 15.0412, subds. 4 through 4g, which state that if an agency decides to hold a public hearing, it must publish in the *State Register* a notice of its intent to do so. This notice must appear at least 30 days prior to the date set for the hearing, along with the full text of the proposed rules. (If the agency has followed the provisions of subd. 4h and has already published the proposed rules, a citation to the prior publication may be substituted for republication.)

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 30 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Corrections

Proposed Rules Governing Programs and Services for Battered Women

Notice to Withdraw Rules and Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Department of Corrections is withdrawing the first set of the above-entitled rules which were published at *State Register,* Volume 5, Number 46, May 18, 1981, pp. 1857-1860 (5 S.R. 1857). These rules are withdrawn because the Attorney General found that improper notice was given to the public.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

Notice is hereby given that the Department of Corrections proposes to adopt the above-entitled rules without a public hearing. The commissioner has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, § 15.0412, subd. 4h (1980).

Persons interested in these rules shall have 30 days to submit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, § 15.0412, subd. 4-4f.

Persons who wish to submit comments or a written request for a public hearing should submit such comments or request to:

John McLagan, Director of Standards Development Unit, 430 Metro Square Building, St. Paul, Minnesota 55101, (612) 296-1312.

Authority for the adoption of these rules is contained in Minnesota Statutes, § 241.63. Additionally, a statement of need and reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies that data and information relied upon to support the proposed rules has been prepared and is available from John McLagan, Director of Standards Development Unit, 430 Metro Square Building, St. Paul, Minnesota 55101, upon request.

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, the statement of need and reasonableness, all written comments received, and the final rules as adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should sumbit a written statement of such request to John McLagan, Director of Standards Development Unit, 430 Metro Square Building, St. Paul, Minnesota 55101.

A copy of the proposed rules is attached to this notice.

This is the second notice and publication of these rules. The first notice was found by the Attorney General to be improper notice. These rules are essentially the same as those published earlier although there are a few substantive changes.

Additional copies of this notice and the proposed rules are available and may be obtained by contacting John McLagan, Director of Standards Development Unit, 430 Metro Square Building, St. Paul, Minnesota 55101.

September 11, 1981

Jack G. Young
Commissioner of Corrections

Rules as Proposed (all new material)

11 MCAR § 2.201 Introduction. Minn. Stat. § 241.63, clause (g), requires that the Commissioner of Corrections promulgate all rules necessary to implement the provisions of Minn. Stat. §§ 241.61-241.66 and 256D.05, subd. 3, including emergency rules.

11 MCAR § 2.202 Definitions. For the purpose of 11 MCAR §§ 2.201-2.207, the terms defined in this rule have the meanings given them.

A. "Service provider" means any public agency or private nonprofit corporation which plans, designs, and implements any of the following:

1. Emergency shelter services and support services for battered women;

2. Support services for battered women;

3. Public education programs designed to promote public and professional awareness of the problems of battered women; or

4. Programs for violent partners.

B. "Purchase of service agreement" means a contract or grant agreement between the department and service provider which specifies the programs or services to be provided, the method of delivering the programs or services, the responsibilities of the staff, the budget, and a commitment to assist in the necessary data collection and evaluation research to be completed on the program or service.

C. "Department" means the Department of Corrections.

D. "Emergency shelter services" means housing facilities which regularly provide food, secure lodging, and a crisis phone

line with 24-hour accessibility for women and children seeking safety from assault primarily by a spouse, male relative, or male with whom they are residing or have resided in the past.

E. "Support services" means any of the following: advocacy, emotional support, counseling, legal information, medical referral, transportation, child care, information and referral services, and other services needed by battered women and their families.

F. "Public education programs" means programs designed to promote public and professional awareness of the problems of battered persons.

G. "Commissioner" means the Commissioner of the Department of Corrections.

H. "Data" means summary data as defined in Minn. Stat. § 15.162, subd. 9.

I. "Law enforcement agencies" means police and sheriff's departments operating in Minnesota.

J. "Request for proposals" means solicitation of applications in a uniform format for distribution of funds allocated by the Legislature for programs and services for battered women.

11 MCAR § 2.203 Establishment of an advisory task force.

A. The commissioner shall appoint a nine member advisory task force to advise him on implementation of Minn. Stat. §§ 241.61-241.66. The provisions of Minn. Stat. § 15.059, subd. 6 shall govern the terms, compensation and removal of members of the advisory task force.

B. Prior to the appointment of any new task force member, the existing task force shall choose no more than five organizations, one of which shall be the Department of Corrections, to send representatives to a review committee which shall recommend a slate of applicants based on the following:

1. Criteria mandated in Minn. Stat. § 241.64, subd. 2;
2. Applicant's understanding of problems facing battered women;
3. Representatives from both metro and non-metro areas of the state;
4. Representation from at least three minority groups.

C. If other qualifications are equal, priority in appointments shall be given to persons who have personally experienced partner abuse.

11 MCAR § 2.204 Project coordinator.

A. The advisory task force shall screen applicants for the position of project coordinator and shall recommend to the commissioner the names of five applicants. In appointing the project coordinator, the commissioner shall give due consideration to the list of applicants submitted to him by the advisory task force.

B. If the commissioner takes action contrary to the recommendation of the advisory task force, the commissioner or his designee shall meet with the task force or with representatives of the task force, appointed by its chair, to discuss the rationale for his decision.

C. The project coordinator shall be available to attend all meetings of the advisory task force and its subcommittees.

11 MCAR § 2.205 Awarding grants and contracts.

A. The department shall issue a request for proposals from service providers. The advisory task force shall use uniform procedures and criteria in considering all proposals which comply with the request for proposal outline.

B. The department shall solicit proposals from interested public and private nonprofit organizations, women's organizations, and diverse cultural groups in the state.

C. The department shall establish award criteria and procedures with the participation of the advisory task force prior to any request for proposals. The criteria and procedures shall be available to the public upon request.

D. The advisory task force shall review grant applications and recommend to the commissioner names of applicants recommended to receive funds and the amount of funds recommended for each applicant.

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E. The department shall disburse funds appropriated for the battered women's projects.

F. A portion of the funds appropriated by the Legislature shall be retained by the department for the purpose of implementing public education programs if the commissioner determines that the department can use the funds for their designated purpose more effectively than by purchase of service agreements. The advisory task force shall advise the department on the use of retained funds.

G. All planning, development, data collection, funding and evaluation of programs and services for battered women which are funded under 11 MCAR §§ 2.201-2.207 shall be conducted with the advice of the advisory task force.

11 MCAR § 2.206 Responsibilities of service providers.

A. To be eligible for initial funding consideration from the department for the establishment and operation of programs and services for battered women, service providers shall submit a proposal which includes, at a minimum, the following information:

1. The full name and address of the service provider;

2. The proposed location of the program or service;

3. A budget on forms provided by the department which itemizes such major categories as:

a. Personnel;

b. Travel;

c. Equipment and supplies;

d. Contracted services;

e. Printing;

f. Communications;

g. Other program or service costs;

h. Costs for assistance to individuals, including emergency loan funds for residents, rent deposits, legal fees, and moving costs;

i. Costs related to the rent, maintenance, or purchase of the facility operated by or occupied by the applicant; and

j. Evaluation;

4. A narrative for each line item on the budget request;

5. A description of other funding sources, fund-raising efforts, in kind contributions and services and other items relevant to financial status during the period funds are requested;

6. A description of the duties of each staff position;

7. A statement of the extent to which battered women in the community have been involved and participated in the proposal;

8. A statement of the ways in which potential service providers have solicited support and cooperation from potentially interested or relevant community agencies or groups such as law enforcement agencies, courts, social service agencies, and local boards or departments of health:

9. A timetable for operation;

10. A description of the types of programs or services to be available;

11. A description of the role to be played by volunteers, if any, in the operation of the emergency shelter service or public education program;

12. A statement of compliance with program or service evaluation requirements as established by the commissioner with the consultation of the advisory task force; and

13. Definition of the target group expected to be served.

B. To be eligible for renewed funding consideration from the department for continued operation of services and programs for battered women, service providers shall submit a report which includes, at a minimum, the following information:

1. The full name of the service provider;

2. A budget for the year funding is requested, on forms provided by the department, which itemizes such major categories as:

a. Personnel;

b. Travel;

c. Equipment and supplies;

d. Contracted services;

e. Printing;

f. Communications;

g. Other program or service costs;

h. Costs for assistance to individuals, including emergency loan funds for shelter residents, rent deposits, legal fees, and moving costs;

i. Costs related to the rent, maintenance, or purchase of the facility operated by or occupied by the applicant; and

j. Evaluation;

3. A narrative for each line item on the budget for funds requested;

4. A description of other funding sources, fund-raising efforts, in kind contributions and services and other items relevant to financial status during the period when funds are requested; and

5. A statement of compliance with program or service evaluation requirements.

C. Purchase of service agreements shall provide for the following:

1. The collection, recording and reporting of descriptive data on persons served and the services provided as requested by the commissioner;

2. Complete reports requested by the commissioner; and

3. Implementation of a fiscal policy.

D. Any emergency shelter program operated on the basis of this appropriation shall show evidence that it is licensed by the Department of Health or the Joint Commission on Hospital Accreditation and has passed local fire inspection.

11 MCAR § 2.207 Submission of data—mandatory.

A. Reports on battered women shall be submitted to the department in accordance with Minn. Stat. § 241.66.

B. Reports shall, at a minimum, include summary data which discloses the date of occurrence, location, and characteristics of battering.

Department of Economic Security

Proposed Rules Governing the Unemployment Insurance Program Relating to Payment of Benefits and Collection of Employer Taxes (8 MCAR §§ 4.3001-4.3999)

Notice of Hearing

Notice is hereby given that a public hearing will be held pursuant to Minnesota Statutes, § 15.0412, subd. 4, in the above entitled matter in room 116A, Administration Building, 50 Sherburne Ave., St. Paul, Minnesota on October 30, 1981, commencing at 9:00 a.m. and continuing until all persons or representatives of interested groups have had an opportunity to be heard concerning adoption of the proposed rules. The proposed rules may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rules, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to participate by asking questions and making comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Jon L. Lunde, Office of Administrative Hearings, 1745 University Avenue, Room 300, St. Paul, Minnesota 55104, either before the hearing or within

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five working days after the public hearing ends. Mr. Lunde's telephone number is (612) 296-5938. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days.

The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417 and 15.052 and by 9 MCAR §§ 2.101-1.113 (Minnesota Code of Agency Rules). If you have any questions about this procedure, call or write the hearing examiner.

Notice is hereby given that 25 days prior to the hearing, a statement of need and reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This statement of need and reasonableness will include a summary of all the evidence and arguments which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rule or rules. Copies of the statement of need and reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The agency's authority to adopt the proposed rules is contained in Minn. Stat. § 268.12, subd. 3.

The proposed rules relate to various areas in the benefit and tax operations of the Unemployment Insurance Program. These rules expand upon Minn. Reg. ES 1-30 which are being codified. Current regulations (rules) which address subject matter covered in the proposed rules will be repealed.

The rules relating to benefits cover what constitutes Able to Work, Available to Work, Actively Seeking Work, Suitable Work, Re-employment Offer, a credit week and a week of unemployment. It will also cover the Benefit Claims Procedure.

The rules relating to employer taxes covers the definition of employment, what is included in employment; what wages are taxable and nontaxable; record-keeping, reports, and payments; voluntary contributions as it pertains to tax rates; and agricultural and domestic employment.

The department estimates that the cost of implementing the above captioned rules will not exceed $100,000 per year for local public bodies for the two years immediately following their adoption within the meaning of Minn. Stat. § 15.0412, subd. 7 (1978).

Copies of the rules are available and at least one free copy may be obtained by writing or calling James Connolly, Director, Program Development, Department of Economic Security, 390 N. Robert St., St. Paul, Mn. 55101. Mr. Connolly's telephone is (612) 296-8356. A copy of the proposed rules is attached. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rules, contact Mr. Connolly.

Notice: Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner (in the case of the hearing examiner's report), or to the agency (in the case of the agency's submission or resubmission to the Attorney General).

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. section 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public official; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

September 9, 1981

Rolf Middleton
Commissioner of Economic Security

Rules as Proposed (all new material)

Chapter One: General Definitions

8 MCAR § 4.3000 Definitions. For the purpose of chapters one, two and three the following terms have the meanings given them.

A. Commissioner. "Commissioner" means the Commissioner of the Department of Economic Security or his duly authorized representative.

B. Department. "Department" means the Minnesota Department of Economic Security.

C. Unemployment office. "Unemployment office" means a location where the department offers unemployment insurance claim services.

Chapter Two: Benefits

8 MCAR § 4.3001 Applicability. Rules 8 MCAR §§ 4.3001-4.3011 apply to determinations of a claimant's eligibility for benefits pursuant to Minn. Stat. §§ 268.03-268.24.

8 MCAR § 4.3002 Definitions. For the purposes of 8 MCAR §§ 4.3001-4.3011 the following terms have the meanings given them.

A. Credit week. "Credit week" means any week within the base period for which wages in the required amount have been paid or were due and payable but not paid for performing services or for vacation periods. Except for vacation payments, those payments which are wages as defined in Minn. Stat. § 268.04, subd. 25 or department rules but for which the individual performs no services within the calendar week shall not be used to establish a credit week.

B. Labor market area. "Labor market area" means the geographic area in which the claimant can reasonably be expected to seek and find employment.

C. Seasonal worker. "Seasonal worker" means a claimant whose employer customarily suspends or significantly curtails operations for regularly recurring periods or whose usual occupation cannot be performed for any employer in the labor market area because climatic conditions prohibit performance of the normal duties of the occupation.

8 MCAR § 4.3003 Able to work.

A. Generally. A claimant to be able to work must have the physical and mental ability to perform the usual duties of his customary occupation or other work for which he is reasonably fitted by training, experience or capability and which is gainful employment engaged in by others as a means of livelihood as an employee under conditions ordinarily existing during a normal work week. The burden of establishing ability to work is on the claimant.

B. Particular situations. In determining whether a claimant is able to work the department will consider the facts and circumstances of the claimant's particular situation. The determination shall be made by applying the criteria listed in 1.-4.

1. Medical evidence. Where doubt exists as to the claimant's ability to work the department may require him to furnish medical evidence of his ability to work. Failure of the claimant to furnish requested medical evidence may result in a suspension or a denial of benefits.

2. Medical separation from work. A claimant who was separated from employment due to his own serious illness must demonstrate his ability to perform other work to be deemed able to work.

3. No presumption of inability to work. There will be no presumption a claimant is not able to work.

4. Ability to work part-time only. Normally a claimant is required to be able to work and available for full-time work for all shifts which are customary for his occupation. However, a claimant whose physical or mental condition restricts his availability to part-time work or to a particular shift will be deemed able to work if there is a reasonable possibility of obtaining work within these restrictions.

8 MCAR § 4.3004 Available for work.

A. Generally. A claimant is considered available for work only if he is ready and willing to accept suitable employment. There must be no restrictions, either self-imposed or created by circumstances, which prevent accepting employment. A restriction does not prevent accepting employment if there are good prospects for obtaining employment within the restrictions within a reasonable period of time.

B. Absence from labor market area. A claimant who is absent from his labor market area for personal reasons is presumed to be not available for work. However, an absence of two days or less from his labor market area due to a family emergency or for other compelling personal reasons does not make him unavailable for those days.

C. Alien status. A claimant who is an alien must present proof that he is authorized to work in the United States to be available for work.

D. Change of residence. A claimant who has moved permanently to an area where his chances of securing work are

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materially lessened and who does not make a diligent work search, expand his availability to other occupations, and accept the prevailing wages, hours and other conditions of work is not available for work.

E. Claimant cannot be contacted. Unless good cause exists for the failure to be reachable a claimant who cannot be reached by the department for referral to possible employment is not available for work.

F. Failure to report. A claimant who fails without good cause to report as directed to an unemployment office or to a job service office of the Department of Economic Security is not available for work.

G. Incarcerated. A claimant who is incarcerated and who is unable to accept employment under a work release program is not available for work.

H. Labor market area. A claimant must offer his services unequivocally to the labor market area to be available for work.

I. Length of unemployment. As a claimant's duration of unemployment lengthens, to be available for work he may be required to broaden the geographic area in which he will accept work, seek and accept employment on a different shift, accept counseling for possible retraining or change in occupation, or seek and accept employment and the prevailing wages in a new occupation.

J. Seasonal worker. A seasonal worker who is not willing to accept suitable work in other occupations during the off season is not available for work.

K. Self-employment. A claimant is not available for work if he is no longer seeking work as an employee because of his being self-employed or planning to be self-employed and he is devoting time and effort to his self-employment so that he cannot accept work during customary hours for his occupation or other suitable work.

L. Time or shift restriction. A claimant who imposes restrictions on the hours of the day or days of the week which he is willing to work which are not normal for his usual occupation or other suitable work is not available for work. A claimant who imposes restrictions on the hours of the day or days of the week which he is willing to seek work which prevent him from meeting the work search requirements of the department is not available for work.

M. Transportation. A claimant to be available for work must have transportation from his residence to his labor market area.

N. Union membership. A claimant who is seeking work only through his union is not available for work unless he is in an occupation or trade where it is customary that substantially all the hiring in that locality is done through his union. He must submit evidence, when required by the department, that he is a union member in good standing, is registered with the union for work and is in compliance with other union rules.

O. Wage restriction. A claimant who has demanded wages exceeding those customary in his labor market area for the type of work he is seeking is not available for work.

8 MCAR § 4.3005 Actively seeking work.

A. Generally. A claimant must make reasonable, diligent efforts to actively seek suitable work for each week for which he files a claim. Reasonable, diligent efforts are those that a person in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area. A claimant who fails to make reasonable, diligent efforts to actively seek work or who limits the search to positions that are not available or are above his training, experience and qualifications is not actively seeking work.

B. Scope of work search. A claimant is not actively seeking work if he has not sought work in accordance with specific and reasonable instructions of the department. The claimant may be required to do any or all of the following to establish that he is actively seeking work:

1. Register with the department's job service;
2. Register with his union hiring or placement facility and meet the union requirements concerning dispatch to a job;
3. Register with a placement facility of his professional organization;
4. Register with a placement facility of a school, college, or university;
5. Apply for employment with former employers;
6. Make application with employers who may reasonably be expected to have suitable openings;
7. Make applications or take examinations for openings in the civil service of a governmental unit;
8. Respond to want ads for suitable work; or
9. Perform any other action which the department finds to constitute an effective means of seeking work suitable to the claimant.

C. Number of contacts. The number of employer contacts required to be considered actively seeking employment varies. In determining adequacy of work search in terms of the number of contacts required the department will consider the employment opportunities as well as the qualifications of the claimant and normal practices and methods of seeking work.

D. Type of work sought. A claimant will generally be allowed to seek work in his usual trade or occupation before being required to seek other types of work that may be suitable. The length of time allowed to seek work at his usual trade or occupation will be governed by the availability of that work in the labor market area where he is seeking work. A claimant will be required to seek work outside his customary occupation if one of the following conditions prevails:

1. There are available openings outside the claimant's customary occupation and there are few workers unemployed in the locality for whom these openings would be more suitable than for the claimant;

2. The claimant's prospects of securing work in his customary occupation are not as favorable as his prospects of securing work outside his customary occupation; or

3. Work which exists outside the claimant's customary occupation is suitable for the claimant.

E. Permanent and temporary work. Claimants are required to actively seek suitable permanent work. However, a claimant who is on a temporary layoff and who has a verifiable assurance of return to work may limit his search for employment to temporary work.

F. Seasonal workers. A claimant who is seasonally unemployed is not relieved of the responsibility to actively seek work.

G. Incarcerated worker. A claimant who is incarcerated and who is unable to seek work is not actively seeking work.

H. Filing and reporting only. If due to economic conditions within the labor market area the department finds that for a particular occupation or class of claimants the existence of suitable job openings other than those listed with a union hiring hall, professional organization or similar placement facility or the department are so few that any effort to search for openings would be fruitless to the claimant and burdensome to employers, then registering with and maintaining the requirements for referral by the hiring hall or placement facility or the department shall constitute an active search for employment.

8 MCAR § 4.3006 Suitable work.

A. Applicability. Rules 8 MCAR §§ 4.3006-4.3008 shall be used in determining if an individual failed to apply for or accept suitable work or suitable reemployment without good cause.

B. Policy. The suitable work provisions of Minn. Stat. §§ 268.03-268.24 and 8 MCAR §§ 4.3006-4.3008 shall be administered so as to promote the department's dual responsibilities of ensuring that benefits are paid to only those persons who are involuntarily unemployed through no fault of their own and, as promptly as possible, matching workers with jobs which best utilize their skills, knowledges, and abilities. Toward this end, "suitable work" is to be interpreted to recognize a worker's skills and abilities but not to provide a haven for those who do not wish to work.

Ideally, the department could match job seekers with jobs in their usual occupation with wages, hours, and other conditions of work identical to those previously enjoyed. As a practical matter economic conditions prohibit this ideal and so a reasonable alternative must be developed. Any reasonable alternative should be based on the policy that it is best for employers, workers and society as a whole to maximize use of existing skills and abilities for the largest number of workers possible under the existing economic conditions, temporary or permanent, of the labor market area.

C. General. The primary guidelines for determining suitable work must give consideration to the nature of the unemployment whether it be temporary or permanent and the prospects of the individual finding work in his usual or related occupations. The specific statutory interpretations of 8 MCAR §§ 4.3007-4.3008 shall be considered in light of the following general guidelines:

1. For persons who have a verifiable assurance of work in the near future suitable work consists of available, temporary work in their usual or a related trade or occupation in the labor market area;

2. For persons with a verifiable assurance of work in the more distant future suitable work is available, temporary work for which the claimant is reasonably suited by virtue of education, training, work experience or ability and which is a reasonable departure from his usual occupation;

3. For seasonal workers suitable work is temporary work in their usual occupation or a related occupation which provides conditions of employment approximating their past employment; however, other employment is suitable if it meets the following conditions:

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a. There are available openings in a lower skilled or paid occupation;

b. There are few, if any, unemployed workers for whom these openings would be more suitable;

c. The opening is one for which the claimant is reasonably fitted by virtue of his being able to perform the work; and

d. The work pays a wage equaling at least 150 percent of the claimant's weekly benefit amount.

4. For persons without a verifiable assurance of work, suitable work is permanent work in their usual or related occupations which provides wages and conditions of employment approximating those of their past employment if their prospects of finding the work are favorable. If prospects are unfavorable, work at lower skill or wage levels is suitable if there are few, if any, workers unemployed in the locality for whom these openings would be more suitable than for the claimant, the claimant is reasonably suited for the work by virtue of education, training, work experience or ability and the work offered is a reasonable departure from his usual occupation.

In general, "near future" as used in 1. means six weeks or less and "more distant future" as used in 2. means more than six weeks.

8 MCAR § 4.3007 Statutory terms interpreted.

A. Generally. The terms and phrases used in Minn. Stat. § 268.09, subd. 2 as guidelines for determining suitability of work shall have the meanings and explanations given in B.-R.

B. To apply. "To apply" means that the claimant must comply with all necessary application processes, beginning with the notice to appear for the interview with the job service and including actually calling at the place of business of the prospective employer when so advised by the department.

C. Failure to apply. "Failure to apply" includes any willful action or neglect which demonstrates a lack of good faith in applying for employment.

D. Failure to accept. "Failure to accept" may consist of a direct statement of refusal by the claimant or the claimant's failure to take reasonable steps to accept the job after it has been offered to him.

E. Available, suitable work. "Available, suitable work" means that there is a definite job or vacancy to apply for or accept. Work is not available to the claimant when the employer finds the claimant unqualified for the position.

F. Of which he was advised. "Of which he was advised" means that a claimant was made aware of a job by the department and offered an opportunity to apply for it. Although the employer's name need not be provided to the claimant unless he accepts the referral, the job must be described in sufficient detail so the claimant is aware of the terms and conditions of employment.

G. Risk involved to his health and safety. Work is not suitable for a claimant if the employment presents a risk to his health or physical condition which is not usually customary to that occupation. Extra hazardous work shall not be suitable work unless the claimant has training or experience in that occupation. When a claimant has a demonstrated fear of performing a particular employment that employment shall not be suitable employment. A claimant's loss of ability to avoid previously accepted hazards must be considered.

H. His physical fitness. To determine suitability of work in terms of the claimant's physical fitness the department shall consider the type of work the claimant has most recently performed, any existing physical conditions, whether the work requires any strenuous physical ability the claimant does not possess, and other factors affecting his physical ability to perform the work. If the claimant's physical condition prevents him from doing the work the work is unsuitable. Medical evidence may be required to support the claimant's statement that the work offered is not suitable because of the claimant's physical condition.

I. Prior training and experience. Work that requires a skill or particular training which the claimant does not already possess may be unsuitable. However, if the claimant lacks the skills and training needed to perform offered work, that work may be suitable if as part of the job the claimant is provided with the training necessary to develop the work skills needed or if the time and effort required to develop the skills is minimal.

J. Prospects of securing work in his customary trade or occupation. If the prospects of a claimant finding work in his usual trade or occupation are unfavorable, then work in other occupations may be suitable work if the general conditions of 8 MCAR § 4.3006 are satisfied.

K. Distance of the available work from his residence. To determine suitability in terms of distance, all factors must be considered, including distance, proximity to transportation, cost of transportation, type of transportation, transportation schedules and time required for transportation. This determination is made not only in comparison to the claimant's most recent job but also in relation to that which is customary in his occupation. If it is customary in the claimant's occupation to relocate or change job sites, regardless of distance, then the work requiring relocation is suitable. To determine the suitability of work located outside the locality of the claimant's residence, the factors to be considered are the claimant's prospects for equally

steady work in his home area, the duration of his unemployment, the remuneration offered as related to the cost of transportation, and the distance to the place of employment.

L. Wages. The wages offered must approximate the prevailing wage for the work to be suitable. To determine suitability of work in terms of wages the total earnings must be considered. These include the wage rate, hours of work, method of payment, overtime practices, bonuses, incentive payments and fringe benefits. When the offered work is at a rate of pay lower than the claimant's former rate consideration must be given to the length of the claimant's unemployment and the proportion of difference in the rates. The importance of the difference between the wages offered and the previous rate decreases as the period of unemployment increases. Work which may not be suitable because of lower wages during the early weeks of the claimant's unemployment may become suitable for him as his duration of unemployment lengthens and it becomes evident that prospects are remote for obtaining work in line with prior wages. A wage that is below the person's previous wage may be suitable if it is not substantially less favorable than that prevailing for similar work in the community.

M. Hours. To determine suitability of work in terms of hours, the arrangement of hours in addition to the total number of hours are to be considered. An offer to work on a second, third, rotating or split shift is suitable work if workers are generally hired on those shifts.

N. Other conditions of work. The suitability of the work may be determined by considering the provisions of the employment agreement, whether express or implied, including the physical conditions under which the work is done pursuant to the agreement. The term "other conditions of work" includes but is not limited to provisions for work rules, safety rules, sanitation, heat, light, and ventilation.

O. Substantially less favorable to the individual. Whether provisions of the work offered are substantially less favorable to the individual can be determined only by comparison of the conditions of the work offered to those prevailing for similar work in the local labor market area. The conditions of work offered are not compared to the previous work of the individual. Both the extent of the difference as well as its effect on the worker shall be considered. If the work offered has differences of no substantial consequence for the worker, it will not be considered to be substantially less favorable. If the wages offered are more than ten percent below the prevailing rate of pay or less than the applicable federal or state minimum wage for the type of work being considered, it will be considered to be substantially less favorable than that prevailing for similar work in the locality.

P. Prevailing. Prevailing wages, hours and other conditions of work are those which are offered to those who commence employment in similar work in the locality.

Q. Locality. Locality means the claimant's labor market area.

R. Good cause. A claimant has good cause for refusal of suitable work only when there is some necessitous and compelling reason for refusal. Good cause for refusing a job need not be attributable to the employer. Good cause reasons for refusal are usually personal to the claimant and extraneous to the employment. Good cause for refusal of suitable employment must be temporary and emergency in character so as not to detach the claimant from the labor market.

8 MCAR § 4.3008 Reemployment offer. A claimant is considered to have refused an offer of suitable reemployment from a base period employer unless the terms and conditions of the offer are substantially less favorable than the terms and conditions under which the principal part of the wage credits in the claimant's base period were earned with that employer.

A refusal of reemployment shall be with good cause if the claimant had previously quit the employment for good cause attributable to the employer and the conditions which were the basis for good cause still exist.

A refusal of reemployment shall be with good cause if the claimant previously separated from that employment because of his own serious illness and the work offered would adversely affect that illness.

8 MCAR § 4.009 Partial benefits exemption. 8 MCAR §§ 4.3001-4.3008 shall not apply to a claimant with respect to a claim for partial unemployment benefits.

8 MCAR § 4.3010 Benefit claim procedure.

A. Purpose and scope. This rule defines claim procedure and eligibility criteria under Minn. Stat. § 268.08, subd. 1.

B. Initial claim. To file a new claim for benefits or to reactivate an inactive claim, an individual shall report in person at an unemployment office and shall there:

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1. Present a valid social security account number card or other acceptable evidence of his social security number;

2. File an initial claim for benefits on a prescribed form; and

3. Register for work, except that the initial claim for benefits may also constitute the individual's registration for work if it is determined that normal registration should be waived or postponed.

The claim shall be effective on the Sunday of the calendar week in which the claim is reactivated or filed.

C. Claim acceptance form. If the unemployment office cannot provide claim service on a given day an individual shall be given a claim acceptance form to verify his attempt to file a claim on that date. If the individual presents a claim acceptance form to one of the local unemployment service offices within 14 days from the date of issuance of the claim acceptance form or when service is next provided in a part-time unemployment office, the initial claim shall be backdated as if filed in the calendar week in which the claim acceptance form was issued.

D. Part-time unemployment office. Any individual who resides in an area in which there is a part-time unemployment office may report in person at that office and file a new or reactivated claim for benefits effective as of the Sunday of the first week of the individual's unemployment, provided that his first day of unemployment is subsequent to the last previous day that service was provided by the part-time unemployment office. No claim shall be effective more than 28 days prior to the calendar week in which the individual reports to file the claim.

E. Permitted benefit years. An initial claim for benefits shall not establish a benefit year which begins prior to the Sunday next following the end of any previous benefit year except as otherwise provided by rule or law.

F. Withdrawal of claim. An initial claim for benefits which has been filed with the department may not be withdrawn by the claimant or otherwise terminated by the department except as provided by other rule or law.

G. Continued claim. To establish eligibility for benefits or waiting period credit for a week or weeks of unemployment following a new or reactivated claim an individual shall continue to report in person or by mail as directed by the department to the office responsible for the administration of his unemployment insurance, in this or any other state.

H. Transferred claim. Any claimant filing continued claims covering more than four weeks of benefits through a single area office in this or some other state other than the area office where his initial claim or transferred claim is filed shall transfer his claim to that single office. No claimant shall be ineligible for failure to transfer his claim to another office unless, prior to the filing of a continued claim, the claimant has been directed to transfer his claim and has failed without good cause to comply.

I. Late filed claim. Any individual who fails to file a continued claim in the manner and at the time and place specified by the department may report in person or by mail and file the claim within 14 days following the date specified by the department. Waiting period credit or benefits for each week that was covered by the delinquent claim shall be authorized if the claimant is otherwise eligible. No credit or benefits shall be authorized for subsequent weeks which were not claimed properly.

Any individual who for good cause fails to file a continued claim in the manner and at the time and place specified by the department may file the claim in person or by mail not more than 35 days following the expiration of his benefit year. The claimant, if otherwise eligible, shall be entitled to waiting period credit or benefits for each week that good cause for failure to report is established.

8 MCAR § 4.3011 Week of unemployment.

A. Scope and purpose. This rule further defines "week" as defined under Minn. Stat. § 268.04, subd. 23.

B. Week calculated, labor dispute. An individual's week of unemployment shall consist of the consecutive seven-day period beginning with the day on which registration is made effective except following the termination of a labor dispute. Following termination of a labor dispute, week of unemployment is the remainder of the calendar week in which the labor dispute ended. An individual, if otherwise eligible, shall be entitled to one-fifth credit for each day, excluding Saturday, following the date on which the labor dispute ended.

Chapter Three: Taxation

8 MCAR § 4.3100 Definitions.

A. Generally. Unless the context otherwise requires, terms used in 8 MCAR §§ 4.3100-4.3108 shall be construed in the sense in which they are defined in Minn. Stat. §§ 268.03-268.24, or in these or other rules of the department.

B. Pay period. "Pay period" means that period of time during which the wages due on any regular pay day were earned. If the period exceeds 31 days, then 31 days shall be deemed to constitute a pay period.

8 MCAR § 4.3101 Wages.

A. Purpose. This rule further defines "wages" as defined in Minn. Stat. § 268.04, subd. 25, and used in Minn. Stat. §§ 268.03-268.24, 8 MCAR §§ 4.3101-4.3108, interpretations, forms and other official pronouncements issued by the department.

B. Types of wages, generally. "Wages" means remuneration for services. The remuneration may take any form, be paid at various times, and be computed in various ways. Remuneration may be in cash or in a medium other than cash, on the basis of piece work or percentage of profits, or by commission. Remuneration may be paid on an hourly, daily, weekly, monthly, annual or other basis.

C. Paid and payable wages. Wages includes remuneration payable and remuneration paid. "Remuneration payable" is wages that have been earned but that were not paid when due. "Remuneration paid" is wages that have been actually or constructively delivered to, or for the benefit of, an employee.

D. Types of wages. Wages include the monetary value of:

1. Dwelling unit rent, utilities, meals, exchange of services or other goods or services that are to compensate for an employee's services;

2. Vacation pay or payment in lieu of vacation;

3. Termination, severance, or dismissal payment or payment in lieu of notice whether notice is required or not;

4. That portion of the payment which compensates for services rendered received in the form of an award or allowance in accordance with a contractual agreement or settlement reached through any arbitrator, regulatory agency or court;

5. Profits, sometimes referred to as dividends, other than those designated as capital gain distributions or return of capital, distributed or allocated to officers and shareholders who perform services for a corporation organized under the rules of Subchapter S of the Internal Revenue Code of 1954. The distribution or allocation of undistributed profits is reportable at the time it is received by, or credited to the account of, the officers and shareholders;

6. The value of any consideration, award, bonus or prize which accrues before separation from employment;

7. Payments for accrued sick leave when not related to a specific absence due to sickness or injury, regardless of whether or not the employer maintains a sick pay plan as defined in Minn. Stat. § 268.04, subd. 25, clause (2);

8. Idle time or standby compensation paid by an employer for a guaranteed minimum number of hours of employment per week when employees are to be available for a specific period of time and payment is made to them for idle time even if they do not render services for the minimum number of hours;

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

10. Amounts paid to corporate shareholders and officers, although designated as loans, where repayments are not made pursuant to a payoff schedule, lack business purpose and fail to provide for the payment of reasonable interest, if the shareholders or officers perform services for the corporation for remuneration below that which would approximate reasonable compensation for services;

11. Payments made directly or indirectly to an individual to perform or assist in performing the work of any employee of the employer provided that the employer had actual or constructive knowledge that the work was being performed;

12. Payments made for services as a caretaker. Unless there is a contract or other proof to the contrary, remuneration shall be considered as being equally received by a married couple where the employer makes payment to only one spouse, or all tenants of a household who perform services where two or more individuals share the same dwelling and the employer makes payment to only one individual;

13. Payments made for services by a migrant family. Where services are performed by a married couple or a family and an employer makes payment to only one individual each worker shall be considered as having received an equal share of the remuneration unless there is a contract or other proof to the contrary;

14. An employer's vehicle furnished to an employee to the extent the vehicle is used for personal purposes. If the employee has use of the vehicle without charge, the amount deemed to be wages shall be $200 per month or, if for less than a calendar month, $7 for each day that the employee has use of the vehicle for personal purposes. If the employee reimburses the employer, the amount deemed to be wages shall be determined as follows:

a. If the employee reimburses the employer at an established rate of less than 20 cents per mile for each mile of personal use, the amount deemed to be wages shall be the difference, if any, between the amount reimbursed and 20 cents per mile; or

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b. If the employee reimburses the employer at an established daily, weekly or monthly rate, the amount deemed to be wages shall be the difference, if any, between the amount reimbursed and $200 per month or, if for less than a month, $7 for each day that the employee has use of the vehicle for personal purposes;

15. Amounts withheld or deducted from an employee's earning because of a deferred compensation agreement which an employee agrees to participate in or which is part of an employment contract. A deferred compensation agreement generally means an arrangement between the employee and the employer for the withholding or deduction of a specific amount from his earnings, to be distributed by the employer or a third person at a later time, usually in post-retirement years.

E. Tips and gratuities.

1. Accounted for to the employer. Tips and gratuities are accounted for to the employer in various manners or forms including if they are:

a. Added to the customer's bill by the employer;

b. Added to the bill by a customer using credit for the purchase;

c. Disbursed by the employer from a tip pool; or

d. Reported to the employer in compliance with the Internal Revenue Code of 1954.

2. Paid to an employee by a customer. Tips and gratuities are considered paid to an employee by a customer if they are:

a. Received directly from the customer;

b. Distributed from a tip pool, whether controlled by the employer or employees; or

c. Received as part of a plan or system under which the person initially receiving them, whether directly from the customer or from a tip pool, distributes a portion of the tips to other employees.

Under a.-c. the tips are considered as being paid by the customer to the person ultimately receiving them.

F. Valuing non-cash remuneration.

1. Except as this rule may otherwise provide, the cash value of remuneration for personal services payable in any medium other than cash shall be:

a. The fair market value of meals or any value agreed upon between the employer and employee if it is not less than the allowance as provided in Minn. Stat. §§ 177.21-177.35, the Minnesota fair labor standards act, and rules promulgated thereunder;

b. The value of rent of a house, apartment or other lodging, furnished to an employee that would be paid by an employee for similar or equivalent accommodations, but in no event less than the allowance provided in Minn. Stat. §§ 177.21-177.35 and rules promulgated thereunder; or

c. The fair market value, determined when received, of any other remuneration for services unless a higher value is agreed upon between the employer and the employee.

2. If the department determines that the reasonable fair market value is other than as determined by the employer it may, after affording the employer reasonable opportunity for the submission of relevant information, determine the reasonable cash value of board, rent, housing, meals, or similar advantage.

G. Employee equipment.

1. The wages of the operator and supplier of a truck, bulldozer, tractor or similar equipment whose remuneration includes wages for personal services as well as the cost of operating and hiring the equipment shall, in the absence of an agreement between the parties, be determined as follows:

a. The value of that part of the total remuneration received which is wages for personal services shall not be less than the prevailing wage scale for similar services by operators of equipment of the same size and type in the locality where the services are performed; or

b. If there is no prevailing wage in the locality in which the services are performed, 40 percent of the total remuneration received from the employer shall constitute wages.

2. Payments to an employee that include advances or reimbursements for use of his personal vehicle of up to 9,000 pounds gross vehicle weight in the employer's business are wages unless the amount attributable to the use of the vehicle is separately paid or stated as prescribed in H.8. and the advance or reimbursement is not unreasonable or arbitrary in which case only the amount attributable to services performed shall be wages.

3. If the commissioner finds that the wage determination of the equipment operators or employees who use their

personal vehicles in the employer's business prescribed by 1. and 2. would be unreasonable or arbitrary in the particular case, then the commissioner may determine the amount of the wages of the employee involved.

H. Exempt wages. The term "wages" shall not include:

1. The value of any special discount or mark down allowed to an employee in goods purchased from or services supplied by the employer where the purchases are optional and do not constitute regular or systematic remuneration for services rendered;

2. Customary and reasonable directors' fees paid to individuals who are not otherwise employed by the corporation of which they are directors;

3. Moneys allowed to employees for reimbursement of meal expenses when employees are required to perform work after their regular hours;

4. Any payment made to or on behalf of an employee by the employer for legal or dental service plans if provided for all employees generally or for a class or classes of employees;

5. Payments for periods of sickness or injury after the end of six calendar months after the calendar month in which the employee last worked for the employer, if the payments are made by an employer who does not maintain a regular sick pay plan as defined in Minn. Stat. § 268.04, subd. 25, clause (2);

6. Compensation, reimbursement, fees, meals or other remuneration paid or provided through a court to an individual for services performed as a juror;

7. Royalties to an owner of a franchise, license, copyright, patent, oil, mineral or other right;

8. Amounts paid specifically as advances or reimbursements for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer. Traveling and other reimbursed expenses must be identified either by making separate payments or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment;

9. Remuneration paid to radio and television artists which represents residual payments and are accrued subsequent to the production of musical jingles, spot announcements, radio transcriptions and film sound tracks; or

10. Any payment to or on behalf of an employee under a plan or system established by an employer, which makes provisions for his employees generally or for a class or classes of his employees for the supplementation of unemployment benefits under the written terms of an agreement, contract, trust arrangement, or other instrument if the plan or system provides benefits which are only supplemental to, and does not replace or duplicate any state or federal unemployment compensation. The plan or system must provide that funds are to be used solely for the supplementation of state unemployment benefits. Potential recipients of the plan or system must be required to file for unemployment benefits in accordance with state law. The plan or system shall not allow the assignment of benefits or the payment of any consideration in lieu of any benefit upon the employee's withdrawal from the plan or system, his termination of employment or the termination of the plan or system. The plan or system must not be designed for the purpose of avoiding the payment of unemployment taxes on moneys disbursed from its plan or system.

8 MCAR § 4.3102 Employment.

A. Definitions. For the purpose of 8 MCAR § 4.3102 the following terms have the meaning given to them.

1. "Control" is the power to instruct, direct or regulate the activities of an individual whether or not the power is exercised.

2. "Employing unit" has the meaning given to it in Minn. Stat. § 268.04, subd. 9, and includes any individual or type of organization that engages, retains, or secures the services of, an individual.

3. "Employment" has the meaning given to it in Minn. Stat. § 268.04, subd. 12, and includes the services of any individual performed for an employing unit under its direction, rule or control as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is performing services in employment shall be determined by the preponderance of the evidence.

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4. "Method" is the way, procedure or process for doing something; the means in attaining a result as distinguished from the result itself.

B. Procedures for determining control. The department may determine if control exists by:

1. Reviewing written contracts between the individual and the employing unit;

2. Interviewing the individual or employing unit;

3. Obtaining statements of third parties;

4. Examining regulatory statutes governing the organization, trade or business;

5. Examining the books and records of the employing unit; and

6. Any other appropriate means.

C. Evidence of control. Paragraphs 1.-12. describe criteria for determining if there is control over the method of performing or executing services. The total circumstances must be considered to determine if control is present.

1. Authority over individual's assistants. Hiring, supervising, and payment of an individual's assistants by the employing unit shows control over the individual.

2. Compliance with instructions. Control exists when an individual is required to comply with instructions about when, where and how he is to work. Some individuals may work without receiving instructions because they are highly proficient in their line of work; however, the control factor is present if the employing unit has the right to instruct or direct. Instruction may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

3. Oral or written reports. Control is indicated if regular oral or written reports relating to the method in which the services are performed must be submitted to the employing unit. Periodic reports relating to the accomplishment of a specific result may not be indicative of control if, for example, the reports are used to establish entitlement to partial payment based upon percentage of completion of a job. Completion of receipts, invoices and other forms customarily used in the particular type of business activity does not constitute written reports.

4. Place of work. Doing the work on the employing unit's premises is not control in itself; however, it does imply that the employer has control, especially when the work could be done elsewhere. When work is done off the premises it does indicate some freedom from control; however, in some occupations, the services are necessarily performed away from the premises of the employing unit and are still considered to be in employment.

5. Personal performance. If the services must be rendered personally it indicates that the employing unit is interested in the method as well as the result. Personal performance might not be indicative of control if the work is very highly specialized and the worker is hired on the basis of his professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

6. Establishment of work sequence. If a person must perform services in the order or sequence set for him by the employing unit it indicates the worker is subject to control. Often, because of the nature of an occupation, the employing unit does not set the order of the services, or sets them infrequently; however, it is sufficient to show control if the employing unit retains the right to do so.

7. Right to discharge. The right to discharge is a very important factor indicating that the right to control exists particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods. An independent worker generally cannot be terminated if he produces an end result which measures up to his contract specifications. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to control. That a right to discharge is restricted because of a contract with a labor union or with other entities does not mean there is not control.

8. Set hours of work. The establishment of set hours of work by the employing unit indicates control. Where fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control.

9. Training. Training of an individual by an experienced employee working with him, by required attendance at meetings, and by other methods, is a factor of control especially if the training is given periodically or at frequent intervals.

10. Amount of time. If the worker must devote his full time to the activity, control is indicated. Full time does not necessarily mean an eight hour day or a five or six day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. Full time services may be required even though not specified in writing or orally. For example, a person may be required to produce a minimum volume of business which compels him to devote all of his working time to that business, or he may not be permitted to work for anyone else.

11. Tools and materials. The furnishing of tools, materials and supplies by the employing unit is indicative of control over the worker. When the worker furnishes these items it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

12. Expense reimbursement. Payment by the employing unit of either the worker's approved business or traveling expenses, or both, is a factor indicating control over the worker. A lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

D. Independent contractor or employee, factors to consider. Among the factors to be considered, in addition to factors of control, when determining if services are employment are those listed in 1.-7.

1. Availability to public. That an individual makes his services available to the general public on a continuing basis is usually indicative of independent status. An individual may offer his services to the public in a number of ways including having his own office and assistants, displaying a sign in front of his home or office, holding a business license, having a listing in a business directory or a business listing in a telephone directory, or advertising in a newspaper, trade journal or magazine.

2. Compensation on job basis. A person working in employment is usually paid by the hour, week or month. Payment on a job basis is customary where the worker is independent. Payment by the job may include a predetermined lump sum which is computed by the number of hours required to do the job at a fixed rate per hour or periodic partial payments based upon a percent of the total job price or the amount of the total job completed. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirements for repayment of the excess over earning indicates the existence of employment.

3. Realization of profit or loss. An individual who is in a position to realize a profit or suffer a loss as a result of his services is generally independent, while the individual who is working in employment is not in that position.

4. Obligation. An individual working in employment usually has the right to end his relationship with his employer at any time he wishes without incurring liability, although he may be required to provide notice of his termination for some period in advance of the termination. An independent worker usually agrees to complete a specific job. He is responsible for its satisfactory completion and is liable for failure to complete the job.

5. Substantial investment. A substantial investment by a person in facilities used by him in performing services for another tends to show an independent status. The furnishing of all necessary facilities by the employing unit tends to indicate the absence of an independent status. Facilities include equipment or premises necessary for the work, but not tools, instruments, clothing, and similar items that are provided by individuals working in employment as a common practice in their particular trade. A substantial expenditure of time or money for an individual's education is not necessarily indicative of an independent relationship. Substantial investment means a monetary investment representing something of considerable worth, in relation to the overall requirements of the person's chosen profession, trade, occupation or vocation.

6. Simultaneous contracts. If an individual works for a number of persons or firms at the same time, it indicates an independent status because the worker is usually free from control by any of the firms. It is possible that a person may work for a number of people or firms and still be an employee of one or all of them.

7. Responsibility. An employing unit is usually responsible for the negligence, personal behavior and work actions of a person working in employment in his contacts with customers and the general public during times that he is performing services for the employing unit. An independent worker is usually accountable for his own actions.

E. Services in the course of the employing unit's organization, trade or business. Services that are in the course of the employing unit's organization, trade or business consist of services which are a part or process of the employing unit's organization, trade or business and ancillary or incidental services. An individual who performs services which are a part or process of the employing unit's trade or business is in employment and does not have independent status. "Part" and "process" are not synonymous. Process refers to those services which directly carry out the fundamental purposes for which the organization, trade or business exists, for example, painting and repairing automobile bodies in an automobile body paint and repair shop. Part refers to any other services which are essential to the operation or maintenance of the organization, trade or business, for example, routine cleaning of premises and maintenance of tools, equipment and buildings. Ancillary or incidental services include landscaping the areas around an automobile body paint and repair shop. Other services that meet the part, process or ancillary classification are those services in connection with purchasing, receiving, storing, pricing, displaying,

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selling and delivery of merchandise and housekeeping services required for the safety and comfort of customers and the general public or to maintain the premises in a manner as to promote business.

F. Independent status, determination. When determining if an individual is in employment or is an independent contractor the factors considered must be weighed to make a determination of the relationship under the facts of the particular case. The weight to be given to a factor is not always constant and there may be other factors not specifically identified in this rule that should be considered. The degree of importance may vary depending upon the occupation or work situation being considered and why the factor is present in the particular situation.

G. Agent-drivers and salespersons. Certain classes of agent-drivers, salespersons and commission persons are statutory employees even though they are independent contractors under common law rules. Minn. Stat. § 268.04, subd. 12, clause (1)(b) sets forth the conditions which must be present for members of each class to be employees.

1. Full-time. In the case of a traveling or city salesperson, other than an agent-driver or commission-driver, Minn. Stat. § 268.04, subd. 12 provides that the individual must be engaged on a full-time basis. "Full-time" means the number of hours in the calendar week during which individuals engaged in the same or similar occupations usually or customarily perform services, except that any week during which an individual worked 40 hours or more providing those services shall be deemed to be full-time.

2. Substantial investment in facilities. Agent-drivers, commission-drivers, and traveling or city salespersons to be employees must not have a substantial investment in facilities, other than facilities for transportation, used in connection with the performance of the services.

a. "Facilities" means equipment or premises necessary to perform the work. Inventory, clothing and items not actually required to adequately perform the assigned tasks are not facilities.

b. "Substantial investment" refers to a monetary investment representing something of considerable worth in relation to the overall investment requirements in the distribution or sale of the particular product involved.

H. In employment by federal law. An individual is in employment if he performs services which are subject to Section 3300 of the Internal Revenue Code of 1954 (Federal Unemployment Tax Act) or performs services which are required by federal law to be covered employment by state law.

I. In employment, general inclusions. The following services described in 1.-3. are considered to be in employment:

1. Services performed by an employee as an insurance agent, insurance solicitor or real estate salesperson for the pay period in which payments for the services not constituting commissions were paid or became due and payable. The exclusionary provisions of Minn. Stat. § 268.04, subd. 12, clauses (15)(m) and (o) apply to services which require a Minnesota real estate or insurance agent's sales license and to those individuals, except corporate officers, possessing the license. Services of corporate officers, who are employees by statute, shall not be considered in the application of this exclusionary provision. Noncommission remuneration includes guaranteed salary, training allowance, bonus, and draws or advances against future earnings as described in 8 MCAR § 4.3101 D.9. For the purpose of this paragraph commission means remuneration paid to individuals as a direct result of a sale, including the percentage of the sale price paid to the salesperson responsible for the sale, and payments including overrides, listing fees, and closing fees which are related to the sale;

2. Services performed as election judges; and

3. Services performed by factory demonstrators who are placed by a manufacturer or distributor in stores and other locations to aid in the sale of products, who are hired by, paid directly or indirectly by, and who work under the direction of the manufacturer or distributor, although this direction may be delegated to the retailer, and they are in the employment of the manufacturer or distributor making the placement. If the retailer, not acting as an agent for the manufacturer or distributor, hires, directs and pays the demonstrator directly, the retailer is the employer. If the wages are paid in part by the manufacturer or distributor, and in part by the retailer, the demonstrator is in the employment of both. Each is required to pay contributions on the part of the remuneration which he pays, provided that they are employers under Minn. Stat. §§ 268.03-268.24.

J. Casual labor.

1. Casual labor not in the course of the employing unit's trade or business, although excluded from the term employment by Minn. Stat. § 268.04, subd. 12, clause (15)(b), is conditionally included as employment under the provisions of Chapter 23, Section 3300 of the Internal Revenue Code of 1954 (Federal Unemployment Tax Act). Minn. Stat. § 268.04, subd. 12, clause (6) provides that the term employment shall include any service which is deemed to be employment under the Federal Unemployment Tax Act; therefore, casual labor is considered employment unless it meets the exclusionary provisions of that act. The exclusionary provisions of that act are in 2.

2. Service not in the course of the employing unit's trade or business, performed in any calendar quarter by an employee is excluded employment unless the cash remuneration earned for the service is $50 or more, and the service is performed by an

individual who is regularly employed by the employing unit. For the purpose of this paragraph, an individual shall be deemed to be regularly employed if for some portion of each of 24 days or more, whether or not consecutive, during the current or preceding quarter the individual performs service that is not in the course of the employing unit's trade or business. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining if the cash remuneration test is met. Casual labor not in the course of the employing unit's trade or business includes service that does not promote or advance the trade or business of the employing unit; for example, work performed in connection with the employing unit's hobby or recreational activities, or work as an employee in repairing the employing unit's private home. Service for a corporation cannot be considered as nonbusiness or casual labor.

K. Localized employment.

1. If an employee works in more than one state, it is necessary to determine if the employment is localized in, and reportable to Minnesota. In making this determination, only the regular services for which the employee was hired, and not those characterized as incidental, temporary, transitory or an isolated transaction are to be considered. An employee's services are considered localized in Minnesota in any calendar quarter in which 80 percent or more of his regular services are performed in Minnesota.

2. Regular services include those services performed in an office located in the home of the employee if all of the following conditions are met:

a. The employer does not provide other facilities;

b. The office meets the requirements of the Internal Revenue Code of 1954 for the deduction of related expenses; and

c. The services performed are an integral part of the employee's regular duties.

3. Incidental, temporary, transitory and isolated services include:

a. Attending periodic meetings or returning to one's residence which is located outside his area or territory, by salespersons or others who normally perform services within a given area or territory; and

b. Any other services which are apart from or not a permanent part of an employee's regular duties.

L. Multi-state employment. When an individual's services are not localized, and absent any reciprocal agreement provided for in Minn. Stat. § 268.13, subd. 1, clause (1), the employee is a "multi-state" worker and the application of the tests listed in 1.-4. below is required.

1. Base of operations. If an individual's services are not localized in any state and some services, other than those determined to be incidental, temporary, transitory or isolated transactions, are performed in Minnesota and the base of operations is in Minnesota, the employee's entire services are reportable to Minnesota. "Base of operations" means the place, usually permanent in nature, from which the employee starts his work, to which he customarily returns, and to which the employer may direct instructions to the employee. A branch office of the employer or the place of residence of the employee could be a base of operations.

2. Direction and control. If an individual's services are not localized in any state and the base of operations test does not apply, all of the services are reportable to Minnesota if Minnesota is the state from which the employer exercises general direction and control over the employee, and if some services, other than those determined to be incidental, temporary, transitory or isolated services, are performed in Minnesota.

3. Residence. If an individual's services are not localized within any state and the base of operations and the direction and control tests do not apply, the individual's entire services are reportable to Minnesota if the individual's residence is located in Minnesota and some services, other than those determined to be incidental, temporary, transitory, or isolated transactions are performed in Minnesota.

4. Service not covered under the laws of any other state or Canada. If 1.-3. do not apply, and the individual's services are not covered under the laws of any other state or Canada, the services are covered under Minn. Stat. §§ 268.03-268.24 if the services are directed and controlled from Minnesota.

M. Employment partially exempt within a pay period; 50 percent rule.

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1. Minn. Stat. § 268.04, subd. 12, clause (15)(p) does not apply to an individual who performs services as an independent contractor and in employment within the same pay period, but does apply to all employment defined in Minn. Stat. § 268.04, subd. 12, except clauses (10)(a) and (b), relating to certain employees of religious organizations.

2. If an individual's services within the pay period consist of 50 percent or more of excluded employment none of that individual's services for that pay period are taken into account nor does any of that individual's remuneration for that pay period constitute wages.

3. Although not applicable to services by an individual referred to in Minn. Stat. § 268.04, subd. 12, clauses (10)(1) and (b), other services performed by the same individual are subject to all other provisions of Minn. Stat. §§ 268.03-268.24.

N. Previously excluded employment. If within a calendar year an individual's services and remuneration should no longer be excluded because his employing unit met the employment or wage requirement for that individual's class of workers all of the previously excluded employment for that class within the same calendar year is subject to the provisions of Minn. Stat. §§ 268.03-268.24. The previously excluded wages for all workers in that class of employment are reportable in the calendar quarters in which the wages were paid or were due and payable.

O. Employment, general exclusions. Minn. Stat. § 268.04, subd. 12, clause (10)(d) excludes services which are performed as part of a program designed to relieve unemployment, if the specific program, and not just the employing unit, is assisted or financed by any federal agency or an agency of a state or political subdivision thereof. "Assistance" may be in the form of supervision, advice in organizing and operating the program, but it must be substantial and continuing. Occasional, intermittent or incidental services would not be sufficient to invoke the exclusion. Where other than incidental physical facilities or material are furnished the program by a federal agency, the state or any of its political subdivisions, the program has been "assisted or financed".

8 MCAR § 4.3103 Agricultural labor.

A. Purpose. This rule further defines and clarifies terms used in Minn. Stat. § 268.04, subd. 12, clause (15)(a) and in this rule.

B. Definitions.

1. Agricultural and horticultural commodity. "Agricultural or horticultural commodity" includes nuts, fruits, mushrooms, vegetables, honey and grain, flowers, cut flowers, trees, sod and shrubbery, animal feed or bedding, grass seed, vegetable and cereal seed, flax, soy beans, sunflower seeds, corn, medicinal herbs and other crops.

2. Commodity. "Commodity" refers to a single product. For example, all apples are one commodity. Apples and peaches are two separate commodities.

3. Crop purchase agreement. "Crop purchase agreement" means an agreement whereby a crop is raised under contract with a buyer.

4. Cultivating. "Cultivating" means cultivating of the soil, irrigating crops, spraying, dusting and other related operations.

5. Farm. "Farm," unless otherwise excluded in this rule, means land or buildings if their primary use is for raising agricultural or horticultural commodities or for activities generally associated with the operation of a ranch, range, livestock or dairy operation. A farm need not be a specific size and it need not be composed of contiguous plots. The performance of agricultural services does not by itself render the place where they are performed a farm.

6. Fur-bearing animals. "Fur-bearing animals" are animals raised for the eventual use of their fur in the manufacture of clothing or other products.

7. Harvesting. "Harvesting" includes baling hay and straw, shredding fodder, combining small grains, hulling nuts, and course grinding of alfalfa. Horticultural commodities including flowers, trees, shrubbery and plants are harvested when they are taken up for sale or storage.

8. Livestock. "Livestock" is any useful domestic animal kept for use on a farm or raised for sale and profit or for eventual consumption.

9. Poultry. "Poultry" is any domestic fowl raised for meat or eggs and includes chickens, turkeys, ducks and geese.

10. Primary. "Primary" means 70 percent or more.

11. Raising. "Raising" as it pertains to livestock, bees, poultry, fur-bearing animals and wildlife means any or all stages of development, including breeding, which are necessary in their maturing for use on the farm or for sale. Raising does not include services in potting, watering, heeling, or otherwise caring for trees, shrubbery, plants, flowers or similar items that are purchased in saleable condition for the purpose of resale.

12. Terminal market. A "terminal market" includes a packing or processing plant or any place where a farmer-producer customarily relinquishes his economic interest in the commodity, its future form or its destiny.

13. Wildlife. "Wildlife" refers to frogs, birds, fish and all animals belonging to a species or class generally considered wild regardless of the element which they inhabit.

C. Farms, exclusions.

1. Feedlots, hatcheries and horse breeding and training. Feedlots, hatcheries and horse training and breeding enterprises are not in themselves farms although they require services generally considered to be agricultural labor.

2. Wildland. Property left in its wild state with no effort expended to perform common farming operations is not a farm.

D. Farms, inclusions.

1. Wild rice. Land developed for seeding, cultivating and raising wild rice is a farm.

2. Christmas trees. A plot of land used primarily for raising Christmas trees is a farm.

3. Mushrooms. Land and structures used primarily for raising mushrooms is a farm.

4. Wildlife. A parcel of real property used for raising any form of wildlife is a farm.

5. Ranges. Land used primarily for grazing is a farm.

E. Crop purchase agreements, farms, agricultural labor.

1. Farm operator. A person agreeing to purchase a commodity grown under a crop purchase agreement does not by that reason qualify as an operator of a farm even though he conducts some or all of the operations necessary for the production and harvesting of the crops purchased.

2. Agricultural labor. Services performed on a farm in the employ of either party to a crop purchase agreement in connection with the raising and harvesting of crops is agricultural labor.

F. Agricultural labor on farms. Services connected with the following activities must be performed on a farm as defined in Minn. Stat. § 268.04, subd. 12, clause (15)(a)(5) and in this rule, to be agricultural labor:

1. Breeding and training horses;

2. Hatching poultry;

3. Aerial seeding, fertilizing, spraying and dusting including services related to the mixing of the spray or dust material or the loading of the material into the airplane, as well as services related to the measuring of the swaths and the marking and flagging of fields to be dusted or sprayed;

4. Clerical, bookkeeping and other office work in conjunction with the services referred to in Minn. Stat. § 268.04, subd. 12, clause (15)(a)(1); or

5. Holding, feeding and fattening livestock in feed lots.

G. Agricultural labor, specific cases.

1. Generally. The services described in 2.-5. are not agricultural labor unless they meet the specific requirements set forth in 2.-5. with regard to where and for whom they are performed. When reference is made to "incidental to ordinary farming operations", that means services of the character ordinarily performed by employees of a farmer or of a farmer's cooperative organization or group as a prerequisite to marketing in its unmanufactured state any agricultural or horticultural commodity produced by the farmer, organization or group.

2. Clerical work. Record keeping and other clerical or office work performed in connection with the functions described in Minn. Stat. § 268.04, subd. 12, clauses (15)(a)(2) and (4) unless they are:

a. Performed in the employ of the owner or tenant or other operator of a farm;

b. Rendered in major part on a farm; and

c. Performed incidentally to ordinary farming operations.

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3. Commodity retailing. Retailing agricultural or horticultural commodities, on or off the farm, unless:

a. The services are performed for, and the commodities are produced by the operator of the farm; and

b. Less than 50 percent of the employee's time is devoted to the services. The 50 percent test is to be applied to each employee with respect to either a pay period or 31 days, whichever is less.

4. Waterways work. Services in the construction of canals, reservoirs, waterways or drainage ditches, unless in the employ of the owner or tenant or other operator of a farm.

5. Land clearance. Services in the clearing of stumps, brush and debris from land in preparation for its use as a farm, unless in the employ of the owner tenant or other operator of the farm.

H. Agricultural labor exclusions.

1. Generally. Services connected with the following activities do not constitute agricultural labor:

a. Breeding, raising and caring for mice, rats and other rodents and creatures commonly held for sale in pet shops or raised for research and experimental purposes;

b. Breeding, raising, caring for, exhibiting and boarding dogs and cats;

c. Racing, exhibiting and boarding horses, including services connected with a riding stable or academy;

d. Lumbering or landscaping;

e. Collecting and processing maple sap into maple syrup or sugar;

f. Trapping animals;

g. Harvesting native wild rice not grown on land developed specifically for that purpose; or

h. Raising and harvesting worms.

2. Packing plants. Services performed in the employ of any person other than the operator of a farm in hauling crops to a packing plant and services within the plant do not constitute agricultural labor.

I. Agricultural labor, separate commodities. The services with respect to each commodity are to be considered separately in determining whether the conditions set forth in Minn. Stat. § 268.04, subd. 12, clause (15)(a)(4) have been satisfied.

8 MCAR § 4.3104 Domestic service.

A. Purpose. This rule further defines and clarifies terms used in Minn. Stat. § 268.04, subd. 12, clause (14) and in this rule.

B. Definitions.

1. Domestic service. "Domestic service" means work ordinarily performed as an integral part of household duties that contribute to the maintenance of the employer's private home or administers to the personal wants and comforts of the employer and other members of the employer's household. In general domestic service includes work performed by cooks, waiters, waitresses, butlers, housekeepers, housemen, watchmen, governesses, maids, companions, nursemaids, valets, baby sitters, laundresses, furnace men, caretakers, gardeners, footmen, grooms, seamstresses, handymen and chauffeurs of family automobiles. Domestic service performed for fraternities and sororities also include services performed by housemothers.

2. Local college club. "Local college club" means a club operated and controlled by and for the benefit of students enrolled at a university or college.

3. Private home. "Private home" means the fixed abode of one or more persons. Any shelter used as a dwelling may be considered as a private home including a tent, boat, trailer, or a room or suite in a hospital, hotel, sanatorium, or nursing home. A cooperative boarding and lodging facility may also be a private home. In an apartment house, each apartment, together with its stairways, halls, and porches is a private home. Parts of the premises devoted to common use, such as an office, furnace room, lawns, public stairways, halls and porches, are not a part of the private home. If a facility is used mainly as a commercial rooming or boarding house only that part of the house which is used as the operator's living quarters is considered to be a private home.

C. Domestic service, general.

1. Non-domestic service, treatment. If service performed by an employee in or around the private home of an employing unit is not domestic service within the meaning of this rule, it is subject to the other provisions of Minn. Stat. § 268.04, subd. 12.

2. Maintenance of the employer's private home. Domestic service in connection with the maintenance of an employer's private home is service which contributes directly to the protection, cleaning and normal maintenance, in contrast to major repair projects, of the home and surrounding area. It does not include service which is not ordinarily a part of home duties or which involves the use of skilled or specialized training including service performed by persons in the construction trades.

3. Administering to the personal wants and comforts of the employer. Certain services, although performed in or around the private home of the employer are not domestic services because they are too remotely associated with the requirement that they administer to the personal wants and comforts of the employer. Examples of non-domestic services include those performed by a private or social secretary, tutor, librarian, bookbinder, museum assistant and medical nurse.

4. Domestic service performed by relatives. Domestic service performed by relatives, other than that excluded from employment by Minn. Stat. § 268.04, subd. 12, clause (15)(d), is domestic service within this rule if there is a contractual agreement between a relative and the employing unit.

5. Service performed by employees of landlords or rental agencies. Service of a household nature performed in or around rental units by employees of landlords and rental agencies is not domestic service. Service performed by domestic workers in and around the private home of the landlord is not within this exception.

6. Workers obtained through a referral or placement agency. Domestic workers referred to jobs through employment placement agencies that neither supervise nor pay them directly are in the employ of the recipient of the services. However, if an agency is in the business of providing temporary services to clients the agency is the employing unit and the workers are not providing domestic services.

7. Service performed for a minister, priest, rabbi or any other member of a religious order. Service performed in the private home of a minister, priest, rabbi or any member of a religious order is considered domestic service if the worker is in the employ of the recipient of the service. If the worker is in the employ of the church or religious order the service is excluded employment. The recipient of the service is the employer if the funds for the payment of the domestic worker are not specifically provided by the church or religious order. Funds provided by a congregation of a church are considered as being provided by the church. If funds are not provided by the church specifically for domestic service and the spouse hires, directs and otherwise controls the worker, the spouse is the employer.

8. Registered and licensed practical nurses. Registered nurses performing private duty services are generally performing service as independent contractors if they have full discretion in administering their professional services and are not subject to direction and control. Registered and licensed practical nurses who are engaged by hospitals, nursing homes, physicians, government agencies or commercial businesses generally are not performing services as an independent contractor and the services are non-domestic.

9. Nurses aides and patient helpers. Nurses aides and patient helpers who are engaged to perform services in the private home of the patient, although they may occasionally administer medication, are usually performing services that are primarily domestic in nature. Patient helpers who are selected by patients who require their services, either in the hospital or after returning to their homes, are generally in the employ of the patient.

10. Service authorized or provided by agencies. Any agency providing or authorizing the hiring of homeworkers or personal care attendants in the private home of an individual is the employer of those individuals performing the services and the services are not considered domestic if the recipient would not receive the care unless provided or funded for by the agency. It is immaterial whether the agency pays the homeworker or attendant directly or if the agency provides the funds to the recipient.

D. Location of domestic service.

1. Domestic service is service which is performed only in a private home of the employer, local college club, or local chapter of a college fraternity or sorority.

2. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter or university faculty club.

8 MCAR § 4.3105 Employer records, reports and payments.

A. Scope. This rule clarifies an employer's duty with regard to records, reports and payments as required under Minn. Stat. §§ 268.06, subd. 1; 268.11, subds. 2 and 3; and 268.12, subd. 8.

B. Notification.

1. Change or transfer of business. The department shall be notified on reports prescribed by the department within 30 days of the start, change, transfer, sale, acquisition or termination of a business in whole or in part. Subsequent requests for

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additional information required in determining liability, modifying an existing account and assignment of experience rates must be completed and returned to the department within time limits established by the department.

2. Employer death. The executor, administrator or other legal representative of a deceased employer shall be responsible for notifying the department of the employer's death as soon as possible.

3. Bankruptcy. In the case of bankruptcy or receivership proceedings, or any proceedings for the relief of a debtor who is an employer, the trustee in bankruptcy, receiver, or person designated by order of the court as in control of the assets of the debtor shall promptly file notice of that with the department.

C. Records. Each employing unit shall establish, maintain and preserve records with respect to individuals performing personal services for it for a period of not less than five years after the calendar year in which the remuneration for the services was paid or payable. The records shall show for each individual the following:

1. Name;

2. Social security number;

3. Days in which the individual performed personal services;

4. Location where services were performed;

5. Wages paid and wages due but not paid for personal services, showing separately:

a. Money wages, excluding special payments;

b. Wages paid and wages due but not paid, in any medium other than money, excluding special payments;

c. Special payments such as bonuses, gifts, and prizes, showing separately money payments, other special payments and character of the payments;

d. Days for which sick pay was paid; and

e. Tips and gratuities paid to an employee by a customer and accounted for by the employee to the employer as defined in 8 MCAR § 4.3101 E.1. and 2.

6. Rate and base unit of pay;

7. Amounts paid as allowances or reimbursement for travel or other activity pertaining to the furtherance of the employing unit's business which were not included as wages. The account shall show each item of expense incurred during each pay period or calendar month, or if paid per diem, the dates the employee was away from home overnight;

8. The date of separation and the reason, in detail, for the termination;

9. The complete resident address of the employee; and

10. For each pay period:

a. The beginning and ending dates of the period;

b. The total amount of wages paid and wages due but not paid for personal services performed; and

c. The date of payment.

D. Records, instate and outstate. For services performed within and without Minnesota the records required by C. shall include:

1. The city or county and state in which the employing unit maintains a base of operations, as defined in 8 MCAR § 4.3102 L.1., used by the individual;

2. The city or county and state from which the services are directed and controlled, if the employing unit does not have a base of operations in the states in which an individual performs services; and

3. A list of the states in which the individual performs other than temporary or incidental services and the dates services were performed at each location.

E. Records, covered and uncovered employment. For services performed in both employment and excluded employment within a pay period the records required by C. shall include the hours spent performing services in employment and the hours spent performing excluded services.

F. Filing reports. An employer's tax report must be filed on a form prescribed by the department not later than the due date for payment of quarterly contributions. Failure to receive forms from the department shall not constitute a valid reason for not filing reports on or before the due date thereof or to pay any contribution due. Consolidated reports of corporations having common ownership shall be recognized or permitted only if expressly allowed under 8 MCAR § 4.3106. If the report first

submitted is erroneous, the employer shall promptly submit the corrected information on forms prescribed by the department and make any additional payment due.

8 MCAR § 4.3106 Consolidated reports.

A. When permitted. Consolidated reports of parent and subsidiary corporations, or other employing units having common ownership, shall be recognized or permitted only in the case of two or more related corporations:

1. Who concurrently employ the same individuals, including officers, whose wages during the calendar quarter are paid by one of the related corporations as a common paymaster; and

2. Whose application for a joint account has been approved by the commissioner or his delegated representative.

B. Related corporations tests. For the purpose of this rule and Minn. Stat. § 268.06, subd. 21, clause (2), corporations are related for an entire calendar quarter if they satisfy one of the following four tests of 1.-4., at any time during that calendar quarter.

1. Test one. They are either:

a. Members of a parent-subsidiary controlled group which is a group of two or more corporations connected through stock ownership with a common parent corporation if more than 50 percent of the total combined voting power or more than 50 percent of the total value of shares of all classes of stock of each corporation, except the common parent corporation, is owned by one or more of the corporations and the common parent corporation owns stock with more than 50 percent of the total combined voting power of at least one of the other corporations. There shall be excluded in computing the percentage of voting power or value, any treasury stock owned by the subsidiary corporation;

b. Members of a brother-sister controlled group consisting of two or more corporations in each of which five or fewer of the same individuals, estates or trusts own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of all shares of all classifications of stock of each corporation, taking into account the stock ownership of each person only to the extent the stock ownership is identical with respect to each corporation;

c. Members of a combined group, which is a group of three or more corporations each of which is a member of a parent-subsidiary or brother-sister controlled group and one of which is a common parent corporation included in a parent-subsidiary controlled group and is included in a brother-sister controlled group; or

d. Life insurance companies subject to income tax under Section 802 of the Internal Revenue Code and the provisions of a., b. or c. are met and all other members of the controlled group are subject to Section 802 of the Internal Revenue Code.

2. Test two. They are a corporation that does not issue stock and 50 percent or more of the board of directors, or other governing body, of each of the corporations are the same, or the same holders possess 50 percent or more of the voting power to elect directors to each corporation.

3. Test three. Fifty percent or more of one corporation's officers are concurrently officers of the other corporation.

4. Test four. Thirty percent or more of one corporation's employees are concurrently employees of the other corporation.

C. Stock defined. For the purpose of this rule "stock" does not include:

1. Non-voting stock which is limited and preferred as to dividends;

2. Treasury stock; or

3. Stock that is treated as excluded stock.

D. Excluded stock, parent-subsidiary. "Excluded stock" for a parent-subsidiary controlled group means:

1. Stock in a subsidiary held in trust that is part of an employee's deferred compensation plan;

2. Stock in a subsidiary owned by an individual who is a principal stockholder or an officer of the parent corporation. A "principal stockholder" is one that owns five percent or more of the voting power or five percent or more of the value of all stock of the parent corporation; or

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3. Stock in a subsidiary corporation owned by an employee of the subsidiary corporation but only if the parent or subsidiary corporation restricts or limits the employee's right to dispose of the stock.

E. Excluded stock, brother-sister group. "Excluded stock" for a brother-sister controlled group means:

1. Stock in a member corporation held by an employee's trust if the trust is for the benefit of the employees;

2. Stock in a member corporation owned by an employee of the corporation but only if substantial limits or restrictions are imposed on the employee's right to dispose of the stock. A bona fide reciprocal stock repurchase arrangement will not be considered as one that restricts or limits the employee's right to dispose of the stock; or

3. Stock in a member corporation that is held by a nonprofit educational or charitable organization.

F. Limits on groups. A corporation may be treated as a component member of only one controlled group.

G. Concurrent employment. "Concurrent employment" as used in Minn. Stat. § 268.06, subd. 21 and this rule means the simultaneous existence of an "employment" relationship between an individual and two or more related corporations, as defined in Minn. Stat. § 268.04, subd. 12.

An employment relationship shall require the performance of services by the employee for the employing corporation in exchange for wages which, if not for the provisions of Minn. Stat. § 268.06, subd. 21, clause (2) and this rule, would be reportable by the employing corporation.

The fact that a particular employee is on leave or otherwise temporarily inactive is immaterial in the determination of concurrent employment. Employment is not concurrent with respect to one of the related corporations if there is no employment relationship with that corporation during periods when the employee is not performing services for that corporation.

An individual who does not perform substantial services in exchange for wages for a corporation is presumed not employed by that corporation.

Wages paid to an employee ceasing to be concurrent for services rendered while the employee was in concurrent employment is reportable by the common paymaster. If the employment relationship is nonexistent during a quarter, that employee may not be counted towards the 30 percent test set forth in B.4.

H. Cash payments only. This rule applies only to wages disbursed in money, check or similar instrument by one of the related corporations or its agent, and excludes the value of non-cash compensation such as room and board, received by the common employee from a member corporation other than the common paymaster.

I. Common paymaster.

1. A "common paymaster" of related corporations is any related member that disburses wages to employees of two or more of the related corporations on their behalf and that is responsible for keeping books and records for the payroll with respect to those employees.

2. The common paymaster is not required to disburse wages to all employees of two or more related corporations, but this rule does not apply to any wages that are not disbursed through a common paymaster.

3. Although a corporation may be treated as a component member of only one controlled group, the related corporations may designate more than one common paymaster but only one common paymaster may be designated for each class of employee.

J. Joint account. A joint account application shall be on forms prescribed by the department. A joint account shall be maintained as a separate unit of the employer account of the common paymaster until that account is terminated or notification is received of a change in the common paymaster. A joint account cannot be made retroactive prior to January 1 of the year preceding the year in which the application is received.

K. Joint and several liability. The common paymaster has the primary responsibility for the remittance of any contributions, penalties and interest due on wages it disburses as the common paymaster but each related corporation using the common paymaster is jointly and severely liable for its proportionate share of any unpaid contributions, penalties and interest.

L. Common paymaster responsibilities. The common paymaster has the sole responsibility for filing contribution reports, wage and separation information and protest and appeals pertaining to concurrent employees and to establish effective communications between the related corporations to ensure timely response on all matters affecting claims for unemployment benefits.

M. Reports. Each related corporation which is the employer of an individual will be responsible for reporting the individual's wages and remitting the appropriate contributions for calendar quarters where the related group or concurrent employment conditions are not met, regardless of which corporation disburses the wages.

N. Work other than for common paymaster. If an employee works for a related corporation other than the common paymaster prior or subsequent to the effective period of the agreement, the wages earned and reportable by the employing corporation shall not be combined with the wages reportable by the common paymaster in determining the maximum taxable wage described in Minn. Stat. § 268.04, subd. 25.

O. Non-related or noncurrent. Where related group or concurrent employment conditions are not met, each employing corporation of an individual shall be responsible for submitting wage and separation information, protests and appeals pertaining to any claim for unemployment benefits of that individual.

P. Wages, wage credits and experience rate factors of a joint account. All wages reportable and benefits charged under the joint account shall remain with that account for contribution, benefit eligibility and experience rating purposes.

Q. Relation cessation. If any corporation ceases to be related the common paymaster shall notify the department within 30 days of the end of the calendar quarter in which the cessation occurs.

R. Termination of agreement. The commissioner may immediately terminate the agreement if it is found that consolidated reporting is not in compliance with this rule, or it is determined that the approved related group changed its common paymaster for the purpose of attaining more favorable experience rates.

S. Written protest. If an application to report under the provisions of Minn. Stat. § 268.06, subd. 21, clause (2) and this rule is denied, or an existing agreement is terminated at the discretion of the commissioner, the denial or termination shall be final unless a written protest is filed with the commissioner as set forth in Minn. Stat. § 268.06, subd. 20.

8 MCAR § 4.3107 Payments of interest.

A. Scope. This rule establishes the conditions upon which interest on contributions due may be waived as provided for in Minn. Stat. § 268.16, subd.1.

B. Waiver. The commissioner may waive all or part of the interest charges on contributions that are not paid by the due date if:

1. The late payment was caused by department error or misinformation; or
2. The late payment was the result of unreasonable delay not attributable to the employer.

C. Application. Each application for waiver of interest under this rule must be made in writing by the employer or his authorized representative, except that the commissioner may on his own motion waive interest if in the best interest of the State of Minnesota.

8 MCAR § 4.3108 Contribution rates.

A. Notice of rate. Any employer determined liable by the department prior to January 1 shall be assigned a contribution rate pursuant to Minn. Stat. § 268.06 which shall be mailed on or before March 15 of the year effective.

B. Time limit on voluntary contributions. In no event shall a voluntary contribution paid by an employer pursuant to Minn. Stat. § 268.06, subd. 24 after the expiration of the first 120 days for the period the rate is effective be used in the computation of a new experience ratio.

Repealer. Department of Economic Security rules ES-1, ES-2, ES-3, ES-4, ES-5, ES-6, ES-8, ES-9, ES-10, ES-11, ES-12, ES-17, ES-19, ES-20, ES-27, and ES-28 are repealed.

Minnesota Energy Agency
Alternative Energy Development Division

Proposed Rules Relating to District Heating Preliminary Planning Grants

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Minnesota Energy Agency ("agency") intends to adopt the above-entitled rules without a public hearing. The director of the agency has determined that the adoption of the rules will not be controversial and has elected to follow the procedures set out in Minn. Stat. § 15.0412, subd. 4h.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

The 1981 Legislature appropriated $300,000 for district heating preliminary planning grants to municipalities for planning related to the development of district heating systems. Laws of 1981, ch. 356, § 30. Grant requests must be submitted to the agency for analysis and for further consideration by the legislative advisory commission, which will recommend certain projects for approval by the governor. The proposed rules set out the contents of grant requests, the ranking criteria, the evaluation process and the terms of the agreement successful applicants must enter into with the state. Two notices of intent to solicit opinions concerning the subject matter of the proposed rules were published earlier at 6 S.R. 26-27 (July 6, 1981) and 6 S.R. 174-76 (August 10, 1981). Copies of the proposed rules may be obtained by writing or calling Mr. Sundberg at the address or telephone number given below.

Please be advised that you have an opportunity for the 30-day period following publication of this notice and the proposed rules to submit comments in writing on the proposed rules and to object to the lack of public hearing on the proposed rules. Your written comments or request for hearings should be submitted to the Minnesota Energy Agency c/o Ronald Sundberg, 980 American Center Building, 160 East Kellogg Boulevard, Saint Paul, Minnesota 55101. Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, no public hearing will be held. If seven or more persons request hearings on the proposed rules, the agency will order public hearings in accordance with Minn. Stat. § 15.0412, subds. 4-4f. The agency may modify the proposed rules if modification is supported by the data and views submitted in written comments and if no substantial change results from the modification.

If no hearing is required, and the agency decides to adopt the rules as proposed, or as modified if written comments justify modification, the agency will submit to the Attorney General for review of form, legality and substantial change the following documents: this notice with the rules as proposed, the rules as adopted, the order adopting the rules, any written comments received by the agency, the agency's statement of need and reasonableness supporting adoption of the rules, and any written comments received by the agency in response to the earlier notices seeking outside opinions. Any person may request notification of the date the agency makes the submission to the Attorney General. If you desire to be so notified, you must inform the agency in writing during the 30-day comment period.

The agency has prepared a statement of need and reasonableness in support of the proposed rules which is also available from the agency by writing to the address indicated above or calling (612) 296-9096.

The agency's authority to promulgate the proposed rules can be found in Minn. Stat. § 116H.08(a) and Laws of 1981, ch. 356, § 30.

Please be advised that Minnesota Statutes, chapter 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he/she becomes a lobbyist. Lobbying includes attempting to influence rulemaking by communicating or using others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

Dated: September 14, 1981.

Mark Mason
Director

Rules as Proposed (all new material)

6 MCAR § 2.4001 Authority and purpose.

A. Authority. Rules 6 MCAR §§ 2.4001-2.4007 implementing the district heating preliminary planning grants program are promulgated by the agency pursuant to Laws of 1981, ch. 356, § 30.

B. Purpose. The objective of the district heating preliminary planning grant program is to encourage the development and expansion of economically viable district heating systems which have the potential to save energy and displace scarce fuels such as oil and natural gas. The program shall encourage: construction of new hot water district heating systems; reconstruction or major expansion of existing steam district heating systems; and expansion of district heating systems by development of satellite systems or heat islands which could be connected to an existing or proposed major central heating system later.

6 MCAR § 2.4002 Definitions. For the purpose of 6 MCAR §§ 2.4001-2.4007 the words or terms defined in this rule have the meanings given them.

A. Agency. "Agency" means the Minnesota Energy Agency.

B. Applicant. "Applicant" means a municipality as defined in F. as well as any organization submitting a joint application with the municipality. No application shall be accepted unless submitted by a municipality as sponsor or co-sponsor.

C. Community heatload survey and map. "Community heatload survey and map" means a description of the district heating market including location of heat source, location, type and age of heating systems of potential nonresidential customers, annual energy consumption and temperature requirements and approximate load duration for process heat customers.

D. Director. "Director" means the director of the Minnesota Energy Agency.

E. Major central system. "Major central system" is one that does not rely on oil or natural gas.

F. Municipality. For purposes of applying for grants under this program, "municipality" means a city however organized.

G. Project. "Project" means the preliminary planning project.

H. Satellite or heat island. A "satellite or heat island" system relies on oil, natural gas or the combustion of waste material and is a heating system which in the future would become a part of a major central system.

6 MCAR § 2.4003 Preliminary planning grant program.

A. Application schedule. The agency shall accept grant applications on two-month intervals after the effective date of 6 MCAR §§ 2.4001-2.4007. Applications received shall be ranked, and the director shall recommend ranked applications which meet all the criteria to the legislative advisory committee for approval and funding. No municipality shall be awarded more than two grants out of the same appropriation.

B. Review process. Applications shall be reviewed and ranked by the agency. The director shall prepare and submit to the legislative advisory committee a list of all district heating grant requests. The list shall contain the necessary supporting information. The recommendations of the legislative advisory committee shall be transmitted to the Governor. The Governor shall approve, disapprove, or return for further consideration each project recommended for approval by the legislative advisory committee. Upon approval by the Governor, a grant agreement shall be negotiated with the agency in accordance with 6 MCAR § 2.4006. Comments on applications not selected for grant awards shall be forwarded to the applicant. Applications not funded shall be included in the next funding round unless withdrawn. Applicants may modify or supplement their proposals for the next funding interval if desired.

6 MCAR § 2.4004 Contents of preliminary planning grant applications. Applications shall contain the information required by Laws of 1981, ch. 356, § 30, and at least the following information:

A. A community heatload survey and map. The survey shall contain a description of the heat source and an estimate of the district heating market.

1. If plans call for an existing heat source such as an electric generation plant or a coal-fired boiler, the application shall include at least a discussion of: type, size, age, fuel, present use and emission controls. If a new heat source is proposed to be used, the application shall include: fuel, estimated cost of fuel and fuel availability.

2. The estimate of the district heating market shall contain nonresidential building information including location, type and age of heating system, type of fuel and annual energy consumption and a description of process load including temperature requirements and load duration.

3. The map shall show the location of the heat source and major load concentrations.

B. Community benefit. Briefly discuss the impact of the district heating system on the community and how it would relate to community development plans.

C. Community commitment. Include written expressions of interest and commitment from major potential loads, owner of heat source, and the municipal governing body.

D. Project plan. The project plan shall include a list of tasks, time estimates for each task and a list of deliverables. It should also include rough estimates of time required in successive stages such as design and construction.

E. Project budget. Include an estimate of expenditures by categories such as personnel and travel and estimates of costs by project plan task.

F. Project organization chart and use of consultants. Assistance in preparing applications can be obtained from the agency.

6 MCAR § 2.4005 Ranking criteria. Applications will be ranked according to the following criteria, which are listed in order of importance:

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A. Estimated capital cost per million BTU of energy sold per year;

B. Benefit to the community;

C. Project plan;

D. Community commitment;

E. Thoroughness of community heatload survey;

F. Qualifications of project personnel;

G. Clarity and conciseness.

6 MCAR § 2.4006 Agreement. After approval by the Governor, the applicant shall enter into an agreement with the agency.

A. Contents. The agreement shall specify the grant amount and the duration of the grant. The agreement shall include assurance that the local share will be provided and that the agreed upon work program will be carried out. A grant agreement based upon a joint application must be executed by the lead applicant. Amendments and extensions may only be made in writing and must be signed by all parties.

B. Funding period. Planning grants will be approved for a period of up to one year.

C. Grant limitations. Planning grants shall not exceed 90 percent of eligible planning costs. No single grant shall exceed $20,000.

D. Disbursement schedule. Ninety percent of grant monies shall be disbursed at the outset upon receipt of invoice to the agency of project costs. The remaining ten percent shall be disbursed upon completion and receipt of a satisfactory final report.

E. Required reports. The grantee shall submit to the agency on the first of each month a report briefly stating the activities that have transpired during the month. The grantee shall provide the agency with three copies, one of which shall be a camera-ready copy, of the final preliminary planning report.

F. Records. The grantee shall maintain for a period of not less than three years from the date of the execution of the contract all records relating to the receipt and expenditures of grant monies.

G. Contract deviations. No grant funds shall be used to finance activities by consultants or local staff if the activities are not included in the grant contract, unless agreed upon in writing by the agency. Unless agreed upon by the agency, a municipality may not contract out all its energy-related activities to consultants.

6 MCAR § 2.4007 Evaluation.

A. Evaluation. The agency shall conduct an evaluation within 60 days of the submission by the grantee to the agency of the final report and all the required reports and financial documents. The evaluation shall assess:

1. Whether the local share contributed was equal to or greater than ten percent of the total cost of the preliminary planning project;

2. Whether the agreed-upon work program was complete;

3. Whether the governing body has formally reviewed the completed preliminary district heating plan.

B. Review. Upon completion of a satisfactory evaluation the remaining ten percent of the grant shall be disbursed to the grant recipient. If the results of the evaluation are unfavorable to the grantee and the grantee does not agree with the findings of the evaluation, the grantee may request a review by the director.

Minnesota Housing Finance Agency

Proposed Rules Amending Provisions Relating to Downpayments under the Homeownership Assistance Fund

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Minnesota Housing Finance Agency ("agency") proposes to adopt the above-entitled rules without a public hearing. The agency has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 15.0412, subd. 4h(1980).

Persons interested in these rules shall have 30 days to submit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 15.0412, subds. 4-4f. If a public hearing is requested, identification of the particular objection, the suggested modifications to the proposed language, and the reasons or data relied on to support the suggested modifications is desired.

Persons who wish to submit comments or a written request for a public hearing should submit such comments or request to:

Monte Aaker, Research Coordinator
Research Division
Minnesota Housing Finance Agency
Suite 200—Nalpak Building
333 Sibley Street
St. Paul, Minnesota 55101
Telephone (612) 296-9952

September 28, 1981

James J. Solem, Executive Director

Rule as Proposed

12 MCAR § 3.134 Homeownership assistance fund; downpayment assistance. The agency may provide interest-free downpayment assistance loans to eligible recipients who are determined, on the basis of normal credit procedures, to lack the cash or land equity necessary to pay the required downpayment, plus closing costs, expenses, and origination fees on the dwelling to be purchased. The amount of the downpayment assistance loan shall equal the amount by which the sum of the downpayment, closing costs, expenses, and origination fees exceeds five percent of the purchase price of the dwelling, but itshall not exceed the lesser of 50 percent of the downpayment or ~~$1,000~~ $1,500.

Department of Labor and Industry Occupational Safety and Health Division

Proposed Revisions to the Occupational Safety and Health Standards

Request for Comment

Please take notice that Russell B. Swanson, Commissioner of the Department of Labor and Industry, has determined that the following revisions to the Occupational Safety and Health Codes shall be promulgated pursuant to Minn. Stat. § 182.655 (1980) establishing, modifying, or revoking Occupational Safety and Health Standards described below. These standards and revisions to existing standards have already been adopted by the Federal Occupational Safety and Health Administration.

Complete copies of the specific standards, changes, additions, deletions, and corrections are available by writing: Occupational Safety and Health Division, Department of Labor and Industry, 444 Lafayette Road, St. Paul, Minnesota 55101.

Interested persons are hereby afforded a period of 30 days to submit written data or comments on the rules proposed. Any interested person may file with the commissioner written objections to the proposed rules stating the grounds therefor; such person may request a public hearing on those objections.

Russell B. Swanson
Commissioner

Rules as Proposed

8 MCAR § 1.7001, which adopts Federal Occupational Safety and Health Standards by reference, is hereby changed by incorporating and adopting by reference the following additions made to Title 29 of the Code of Federal Regulations, Part 1910 "Occupational Safety and Health Standards for General Industry" as published in Part II, Volume 39, No. 125 of the Federal Register on October 24, 1978 and corrected on November 7, 1978:

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

A. Subpart L "Fire Protection," as published in *Federal Register*, Volume 45, No. 179, on September 12, 1980.

This revision to Subpart L of 29 CFR Part 1910 replaces the previously adopted fire protection standards. New Subpart L is intended to minimize employee exposure to hazardous situations involving unwanted fires in workplaces and to provide for fire protection equipment and services for the safe evacuation or rescue of employees endangered by unwanted workplace fires. Three general areas are covered: portable fire protection equipment, fixed fire protection systems, and fire brigades.

Section 1910.156, "Fire Brigades," contains requirements for the organization, training, and personal protective equipment for fire brigades. This standard does not require an employer to establish a fire brigade; however, whenever fire brigades are established, the requirements of this section apply. Whether the fire brigade performs incipient stage firefighting or interior structural firefighting, the employer is required to prepare and maintain a written statement which establishes the existence of the fire brigade, describes functions the fire brigade is to perform, and describes the type, amount and frequency of training fire brigade members are to receive. Employers who have fire brigades are required to provide training to those employees commensurate with the functions the fire brigade is expected to perform.

Fire brigades expected to perform interior structural firefighting must be equipped with appropriate protective clothing. Section 1910.156 includes requirements for protection of feet, legs, body, hands, head, eyes and face. Protective clothing purchased after the effective date of this standard in Minnesota must meet the requirements of this section. All personal protective clothing in use after July 1, 1985 must meet these requirements.

In addition to protective clothing, this standard requires the use of respiratory protective devices by fire brigades expected to perform interior structural firefighting. Self-contained breathing apparatus purchased after the effective date of this standard in Minnesota must be of the positive-pressure type. After July 1, 1983, all self-contained breathing apparatus in use must be of the pressure-demand type.

Fire brigade members who are expected to perform interior structural firefighting must meet the physical capability requirements outlined in the standard. Employees assigned to fire brigades before the effective date of this standard in Minnesota must meet these requirements by September 15, 1990. Employees assigned to fire brigades after the effective date of this standard in Minnesota, must meet these requirements before being assigned to the fire brigade.

The requirements of this fire protection standard apply to all general industry locations; the standard does not apply to forest firefighting or airport "crash-rescue" type operations, nor does it apply to construction, agricultural or maritime industries. Because the Minnesota Occupational Safety and Health State Plan provides coverage for public as well as private industry employees, the requirements of Subpart L will apply to all public employees. Therefore, fire departments will be required to meet requirements of the fire brigade portion of this standard; i.e. training and education, personal protective clothing, and respiratory protection. For the purpose of enforcement of this standard, the Department of Labor and Industry will define "fire departments" as those organized, officially established fire departments that meet the requirements to qualify for state aid as described in Minn. Stat. § 69.001, subd. 4 (1980).

Also included in Subpart L are requirements for the design, installation, inspection and maintenance of standpipe equipment; the selection, distribution, maintenance, inspection and testing of portable fire extinguishers; minimum design and installation criteria for automatic sprinkler systems, general requirements for all fixed extinguishing systems as well as specific design and installation requirements for fixed extinguishing systems using dry chemical, gaseous agents, and water or foam solution as the extinguishing agents; and requirements for fire detection systems.

This standard is written as a "performance" rather than a "specification" standard allowing employers greater flexibility for compliance. A non-mandatory appendix, included as part of the standard, provides assistance to employers in meeting requirements.

B. Subpart E, "Means of Egress," as published in *Federal Register*, Volume 45, No. 179 on September 12, 1980.

Section 1910.38 has been added to Subpart E and describes employee emergency action plans and fire prevention plans. This standard does not require an employer to establish such plans; it only contains criteria to follow when such plans are required by other OSHA Standards.

Paragraph (a) describes minimum elements that should be part of an emergency action plan. An emergency action plan is a pre-emergency plan developed by an employer to organize employee and employer actions during an emergency in order to assure employee safety during fires or other emergencies. The emergency action plan must be in writing and must describe those actions each employee and the employer must take in an emergency. The plan must include methods of announcing an emergency, types of evacuation, emergency escape routes and procedures, rescue and medical duties of appropriate personnel, and training.

Paragraph (b) describes criteria for establishing and implementing fire prevention plans in workplaces. The fire prevention plan must also be in writing and should include descriptions or lists of major workplace fire hazards, potential ignition sources, proper storage and handling practices for hazardous materials, types of fire protection equipment and systems, housekeeping

procedures, names or titles of personnel responsible for fire protection systems and equipment, maintenance procedures for equipment and systems, and training.

Appropriate changes have been made to § 1910.35 to include definitions of an "emergency action plan" and "emergency escape route." Section 1910.37(n) has been revised to delete existing testing and maintenance requirements for alarm and fire protection systems; a cross-reference to new § 1910.165 of the fire protection standard has been substituted. An appendix has been included as part of Subpart E to aid employers in meeting the requirements of this section.

C. Subpart H, "Hazardous Materials" as published in *Federal Register*, Volume 45, No. 179, on September 12, 1980.

The changes in Subpart H, specifically to 1910.107, 1910.108 and 1910.109, are primarily editorial in nature and do not change the technical substance of the specific requirements. The changes eliminate the incorporation by reference of outdated national concensus standards and references appropriate sections of Subpart L.

D. Corrections made to Subparts E, H, and L of Part 1910 as published in *Federal Register*, Volume 46, No. 84, on May 1, 1981.

This document corrects inadvertent errors and omissions in the September 12, 1980 publication of 29 CFR Part 1910 Subparts E, H, and L as described above. These corrections are of typographical errors and errors in metric conversions.

SUPREME COURT

Decisions Filed Friday, September 18, 1981

Compiled by John McCarthy, Clerk

51803/Sp. Donald J. Kuchenmeister v. Illinois Farmers Insurance Company, Appellant. Washington County.

The trial court did not err in determining that the insurer failed to make the statutorily required offer of underinsured motorist coverage. See Minn. Stat. § 65B.49, subd. 6 (1978) (repealed 1980).

An insurer's failure to make the required offer of underinsured motorist coverage will result in that coverage being implied in law as included in the insured's policy.

Affirmed. Sheran, C. J.

51642/Sp. State of Minnesota v. Johnnie N. Walker, Appellant. Hennepin County.

Evidence on the issue of identification was sufficient, and trial court did not prejudicially err in evidentiary rulings on identification evidence, other-crime evidence, or the use of prior convictions for impeachment purposes.

Affirmed. Otis, J.

52078/Sp. Aetna Life & Casualty, Casualty & Surety Division, Appellant, v. Edward Clifford Anderson. Hennepin County.

Where an employee settles with the third party tortfeasor without the consent of employer's workers' compensation insurer, insurer may credit a portion of the settlement to the workers' compensation liability and, in addition, bring an action against the third party for the amount of liability in excess of the credit.

Reversed and remanded with instructions. Otis, J.

51040/Sp. State of Minnesota v. Robert Keith Johnson, Appellant. Carver County.

Evidence was sufficient to support a second-degree conviction and trial court did not prejudicially err (a) in allowing a juror to remain on the jury after she staed that she had seen a truck similar to defendant's truck in her driveway after the trial started or (b) in refusing to give a requested instruction as part of its instructions on self-defense.

Affirmed. Peterson, J.

51645/Sp. State of Minnesota v. Helen L. Hinkle, Appellant. Hennepin County.

Evidence of defendant's guilt of aggravated robbery was sufficient, and trial court did not prejudicially err in evidentiary rulings or in instructions to the jury.

Affirmed. Peterson, J.

51638/Sp. Red Owl Stores, Inc., petitioner, v. Commissioner of Agriculture, Appellant. Hennepin County.

The provision of the Dairy Unfair Trade Practices Act prohibiting sales below cost, Minn. Stat. § 32A.04, subd. 1(o) (1978), which incorporates by reference the definition of cost set forth in Minn. Stat. § 325.01, subd. 5 (1978), does not violate due process, and the commissioner's determination that sales were made of certain dairy products below cost for the purpose or with the effect of injuring a competitor or destroying competition is sustained.

Reversed. Peterson, J.

51548/23 Donald E. Bolin, *et al.*, Appellants, v. State of Minnesota, Department of Public Safety and Commissioner of Personnel. Ramsey County.

Where a restriction on a first amendment right is involved, the least restrictive means available to achieve the governmental purpose served by the restriction must be adopted.

Reversed. Amdahl, J. Dissenting, Simonett, J., Sheran, C. J., Otis, J., and Peterson, J.

50992 In Re the Marriage of: Harry Rydell, petitioner, v. Marjorie E. Rydell, Appellant. Ramsey County.

An award of spousal maintenance in a separation decree does not preclude the court in a subsequent marriage dissolution proceeding from modifying the award where there has been a material change in circumstances, consisting of a substantially increased need, in the interval.

Reversed and remanded. Simonett, J.

51348 Carrie L. Tlougan, an infant, by Michael D. Klampe, her guardian ad litem, v. Auto-Owners Insurance Company, Appellant. Olmsted County.

Injury to a child playing with matches in the cab of a pickup truck did not arise out of the maintenance or use of a motor vehicle under Minnesota's no-fault auto insurance statute.

Reversed. Simonett, J.

51380 Joseph E. Romain, *et al.*, Appellants, v. Pebble Creek Partners, *et al.*, The Griffin Companies, Inc., Raymond F. Vavrosky Realty. Hennepin County.

This earnest money purchase agreement is not subject to the cancellation notice requirement of Minn. Stat. § 559.21 (1978) where the parties provided the contract would end if they did not reach agreement on an essential term of the contract by a certain time.

The awarding of deposition expense to the prevailing party lies within the sound discretion of the trial judge.

Affirmed. Simonett, J.

51861 Richard Forcier, individually and as trustee for the heirs of Elvern Forcier and Dolly Forcier, and the Special Administrator for the Estates of Elvern Forcier and Dolly J. Forcier, *et al.*, v. State Farm Mutual Automobile Insurance Company, Appellant. Hennepin County.

An auto insurer was not limited by Minn. Stat. §§ 72A.1493 and 72A.1494 (1969) to offer just the three supplemental insurance coverages contained therein but could, in addition, offer coverages both less than and greater than the limits specified.

"Necessary" funeral expenses for medical pay benefits under Minn. Stat. § 72A.1492, subd. 5 (1969), include flowers, vocalists and organist but not certified copies of death certificates.

A good-faith settlement of an uninsured motorist claim wherein medical pay benefits may have been deducted is not to be set aside when this court had not yet ruled that such medical pay benefits were not to be deducted. As to uninsured motorist claims still pending, *Van Tassel v. Horace Mann Mut. Ins. Co.*, 296 Minn. 181, 207 N.W.2d 348 (1973), governs.

A class action for recovery of necessary funeral expenses is not appropriate under section (1) (A) of Minn. R. Civ. P. 2302; the case is remanded to determine if a class action is appropriate under section (3) of that rule.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Simonett, J.

49526/335 (1979) International Society for Krishna Consciousness, Inc., *et al.*, Appellants, v. Michael Heffron, Secretary and Manager of the Minnesota State Agricultural Society Board of Managers, *et al.* Ramsey County.

Affirmed. Per Curiam.

Decision Filed Tuesday, September 15, 1981

81-625 State of Minnesota, Appellant, v. Elizabeth Cheryl Kanzenbach. Rice County.

State's right to appeal sentences in criminal cases under Minn. Stat. § 244.11 (1980) applies only to sentences for crimes committed before May 1, 1980, when the Sentencing Guidelines became effective.

Appeal dismissed. Sheran, C. J.

STATE CONTRACTS

Pursuant to the provisions of Minn. Stat. § 16.098, subd. 3, an agency must make reasonable effort to publicize the availability of any consultant services contract or professional and technical services contract which has an estimated cost of over $2,000.

Department of Administration procedures require that notice of any consultant services contract or professional and technical services contract which has an estimated cost of over $10,000 be printed in the *State Register*. These procedures also require that the following information be included in the notice: name of contact person, agency name and address, description of project and tasks, cost estimate, and final submission date of completed contract proposal.

Department of Commerce
Office of Consumer Service

Notice of Request for Proposals for Analysis of Cost Allocation Methods and Rate Design Issues

Kris Sanda, Director, Office of Consumer Services, Department of Commerce, is soliciting proposals from qualified consultants to perform an analysis of cost allocation methods and rate design in connection with Interstate Power Company's proposal to increase its rates by $5.6 million. The matter is currently before the Minnesota Public Utilities Commission.

Final submission date: October 16, 1981
Estimated cost: $15,000

The formal RFP may be requested and inquiries should be directed to:

Leonard A. Nelson, Manager
Residential Utility Consumer Unit
Office of Consumer Services
162 Metro Square Building
7th and Robert Streets
St. Paul, MN 55101
(612) 296-6032

Minnesota Housing Finance Agency

Notice of Intent to Enter into a Contract for Loan Portfolio Servicing

Notice is given that the Housing Finance Agency intends to enter into a 2 year contract commencing November 1, 1981, for the servicing of a portion of its loan portfolio. The estimated amount of the contract is $70,000. Any inquiries should be addressed to Kathleen Anderson, Rehabilitation Loan Program Coordinator, Minnesota Housing Finance Agency, 333 Sibley Street, St. Paul, MN 55101, on or before October 12, 1981.

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Ethical Practices Board

Notice of Special Public Meeting

The Ethical Practices Board will hold a special meeting on Wednesday, October 7, 1981, at 9 a.m. in Room 51, State Office Building, at 435 Park Street in the Capitol Complex, St. Paul. The board seeks comments by lobbyists, elected officials and their campaign committees, political parties, governmental associations, and the public on the subject of fundraising projects by elected state officeholders while the Legislature is in active session.

Written and oral statements are welcomed. To schedule an oral statement, individuals are asked to write or call the Board office, 41 State Office Building, St. Paul, MN 55155 (612) 296-5148.

Information gathered will be used by the board in its current study of this issue. The board is authorized by the Ethics in Government Act to report and offer legislative recommendations to the Legislature about the conduct of campaigns for public office.

Department of Transportation Technical Services Division

Appointment and Scheduled Meeting of a State Aid Standards Variance Committee

Notice is hereby given that the Commissioner of Transportation has appointed a State Aid Standards Variance Committee who will conduct a meeting on Tuesday, September 29 at 10:00 a.m. in Room 419, State Transportation Building, John Ireland Boulevard, St. Paul, Minnesota.

This notice is given pursuant to Minnesota Statutes, § 471.705.

The purpose of the open meeting is to investigate and determine recommendation(s) for variances from minimum State Aid roadway standards as governed by 14 MCAR § 1.5032 M.4.b., Rules for State Aid Operations under Minnesota Statute, Chapters 161 and 162 (1978), as amended.

The agenda will be limited to these questions:

1. Petition of County of Dodge for a variance from Standards for Design Speed on Mantorville Town Road 51 between Trunk Highway 57 and 0.85 mile East.

2. Petition of the County of Faribault for a variance from Standards for Street Width along CSAH 60 (Broadway Avenue) between Franklin Street and 2nd Street North in the City of Wells.

3. Petition of City of Cloquet for a variance from Standards for Street Width along Doddridge Avenue between 7th Street and 14th Street.

4. Petition of City of Litchfield for a variance from Standards for Street Width on Ripley Street between Swift Avenue and Sibley Avenue.

The cities and counties listed above are requested to follow the following time schedule when appearing before the Variance Committee:

1:00 p.m.	Dodge County
1:30 p.m.	Faribault County
2:00 p.m.	City of Cloquet
2:30 p.m.	City of Litchfield

Dated this 21st day of September, 1981.

Richard P. Braun
Commissioner of Transportation

Petition of the City of Litchfield for a Variance fom State Aid Standards for Street Width

Notice is hereby given that the City Council of the City of Litchfield has made a written request to the Commissioner of Transportation for a variance from minimum design standards for street width along Ripley Street between Swift Avenue and Sibley Avenue.

The request is for a variance from 14 MCAR § 1.5032 H.1.C., Rules for State Aid Operations under Minnesota Statute, Chapters 162 and 163 (1978) as amended, so as to permit a minimum roadway width of 44 feet with parking permitted instead of a roadway width of 46 feet.

Any person may file a written objection to the variance request with the Commissioner of Transportation, Transportation Building, St. Paul, Minnesota 55155.

If a written objection is received within 20 days from the date of this notice in the *State Register,* the variance can be granted only after a contested case hearing has been held on the request.

Dated this 21st day of September, 1981.

Richard P. Braun
Commissioner of Transportation

Petition of the County of Faribault for a Variance from State Aid Standards for Diagonal Parking and Street Width

Notice is hereby given that the County Board of the County of Faribault has made a written request to the Commissioner of Transportation for a variance from minimum design standards for street width along CSAH 60 (Broadway Avenue) between Franklin Street and 2nd Street North in the City of Wells.

The request is for a variance from 14 MCAR § 1.5032 H.4. Rules for State Aid Operations under Minnesota Statute, Chapters 162 and 163 (1978) as amended, so as to permit 30° diagonal parking on a roadway width of 60 feet instead of 45° diagonal parking on a roadway width of 66 feet.

Any person may file a written objection to the variance request with the Commissioner of Transportation, Transportation Building, St. Paul, Minnesota 55155.

If a written objection is received within 20 days from the date of this notice in the *State Register*, the variance can be granted only after a contested case hearing has been held on the request.

Dated this 21st day of September, 1981

Richard P. Braun
Commissioner of Transportation

Waste Management Board

Notice of Intent to Solicit Outside Opinions and Information Concerning Proposed Rules on Supplementary Review of Certain Solid and Hazardous Waste Facilities

Notice is hereby given that the Minnesota Waste Management Board is seeking opinions and information from sources outside the agency for the purpose of preparing rules on supplementary review of certain proposed solid and hazardous waste facilities. Such rules are authorized by Minn. Stat. § 115A.32.

Supplementary review of facilities is authorized by the Waste Management Act only when a facility has been issued permits required by the Pollution Control Agency *and* a political subdivision has refused to approve the establishment or operation of the facility. Only certain entities may request supplemental review. See Minn. Stat. §§ 115A.32-115A.39 and Laws of 1981, ch. 352, § 23. They are as follows:

A. A generator of sewage sludge within the state who has been issued permits by the Pollution Control Agency for a facility to dispose of sewage sludge or solid waste resulting from sewage treatment;

B. A political subdivision which has been issued permits by the Pollution Control Agency, or a political subdivision acting on behalf of a person who has been issued permits by the Pollution Control Agency, for a solid waste facility which is no larger than 250 acres, not including any proposed buffer area, and is located outside the metropolitan area;

C. A generator of hazardous waste within the state who has been issued permits by the Pollution Control Agency for a hazardous waste facility to be owned and operated by the generator, on property owned by the generator, and to be used by the generator for managing the hazardous wastes produced by the generator only;

D. A person who has been issued permits by the Pollution Control Agency for a commercial hazardous waste processing facility at a site included in the Waste Management Board's inventory of preferred sites for such facilities adopted pursuant to section 115A.09; and

E. A person who has been issued permits by the agency for a disposal facility for the nonhazardous sludge, ash, or other solid waste generated by a permitted hazardous waste processing facility operated by the person.

Minn. Stat. § 115A.36 (1980) requires *at least* the following factors be considered in the supplementary review process:

A. The risk and effect of the proposed facility on local residents, units of government, and the local public health, safety, and welfare, including such dangers as an accidental release of wastes during transportation to the facility; water, air and land pollution; fire or explosion, where appropriate; and the degree to which the risk or effect may be alleviated.

B. The consistency of the proposed facility with, and its effect on, existing and planned local land use and development; local laws, ordinances, and permits; and local public facilities and services.

C. The adverse effects of the facility on agriculture and natural resources and opportunities to mitigate or eliminate the adverse effects by additional stipulations, conditions, and requirements respecting the proposed facility at the proposed site.

D. The need for the proposed facility, especially its contribution to abating solid and hazardous waste disposal, the availability of alternative sites, and opportunities to mitigate or eliminate need by additional and alternative waste management strategies or actions of a significantly different nature.

E. Whether, in the case of solid waste resource recovery facilities, the applicant has considered the feasible and prudent waste processing alternatives for accomplishing the purposes of the proposed project and has compared and evaluated the costs, and the effects of the alternatives on the cost to generators.

Written or oral information and comments on these factors, additional factors which should be considered, the structure of the supplementary review process or any other matter related to the supplementary review process should be addressed to:

Waste Management Board
Attn: Madeline Harris
123 Thorson Building
7323-58th Avenue North
Crystal, Minnesota 55428
612/536-0816

All statements of information or comment should be received by November 1, 1981. Written material received by this date will become part of the record of any rules hearing held on this subject.

September 18, 1981

Robert G. Dunn, Chairman
Waste Management Board

Waste Management Board

Notice of Intent to Solicit Opinions and Information Concerning Rules for Solid Waste Demonstration Program

Notice is hereby given that the Minnesota Waste Management Board is seeking opinions and information from sources outside the agency for the purpose of preparing rules for administering a solid waste demonstration program. Such rules are authorized by Minn. Stat. § 115A.49 (1980).

Under Minn. Stat. § 115A.53 (1980) the Waste Management Board may provide technical and financial assistance in the form of grants and loans to eligible applicants and projects to stimulate and encourage the acquisition and betterment of waste processing facilities and transfer stations. Financial assistance provided under this program may only be used for capital costs of a project. The rules, if adopted, would regulate at least the following aspects of the solid waste demonstration program: (1) application and review procedures, (2) criteria for eligibility, (3) levels of local funding required, and (4) priority criteria for funding eligible projects. The Waste Management Act requires the board in administering these programs to give priority to areas where natural geologic and soil conditions are unsuitable for land disposal of solid waste and areas where the capacity of existing solid waste disposal facilities is less than five years. In addition, in areas outside the metropolitan area, priority must be given to projects serving more than one local governmental unit.

Any person desiring to submit information or comment on the subject of the proposed rules may do so either orally or in writing. All statements of information or comment should be received by November 1, 1981. Written material received by this date will become part of the record of any rules hearing on this subject. Written or oral information or comment should be addressed to:

Robert Pulford
Minnesota Waste Management Board
123 Thorson Building
7323-58th Avenue North
Crystal, Minnesota 55428
612/536-0816

September 18, 1981.

Robert C. Dunn, Chairman
Minnesota Waste Management Board

Waste Management Board

Notice of Intent to Solicit Outside Opinions and Information Concerning Rules on Accepting, Evaluating, and Selecting Applications for Permits for Certain Hazardous Waste Facilities

Notice is hereby given that the Waste Management Board is seeking opinions and information from sources outside the agency for the purpose of preparing rules on accepting, evaluating, and selecting applications for permits for certain hazardous waste facilities. Such rules are authorized by Minn. Stat. § 115A.10 (1980).

Under Minn. Stat. §§ 115A.09, 115A.18-.30 (1980), the Waste Management Board is required to select at least one hazardous waste disposal facility for the state and to prepare an inventory of sites for the chemical processing, incineration, and transfer and storage of hazardous waste. The rules referred to in this notice will establish a basis for accepting, evaluating, and selecting applications for permits for facilities to be located at these sites. The rules must address at least the following subjects: (1) standards and procedures for making determinations on minimum qualifications, including technical competence and financial capability, of permit applicants for processing and disposal facilities; and (2) standards and procedures for soliciting and accepting bids or permit applications and for selecting developers and operators of hazardous waste disposal facilities at sites chosen by the Board, including a preference for qualified permit applicants who control a site chosen by the Board.

Any person desiring to submit information or comment on the subject of the proposed rules may do so either orally or in writing. All statements of information or comment should be received by November 1, 1981. Written information or comment received by this date will become part of the record of any rules hearing on this subject. Written or oral information or comment should be addressed to:

Waste Management Board
Attn: Madeline Harris
123 Thorson Building
7323 - 58th Avenue North
Crystal, Minnesota 55428
612/536-0816

September 18, 1981

Robert G. Dunn, Chairman
Waste Management Board

Minnesota Water Resources Board

Notice of Hearing on the Petition to Withdraw Territory

A hearing on a Petition to Withdraw Territory from the Minnehaha Creek Watershed District will begin at 7:30 p.m. on Wednesday, October 7, 1981, at the Medina City Hall, 2052 County Road 24 (located near the intersection of County Road 24 and Medina Road) in Medina, Minnesota.

A complete notice of and order for hearing will be published in the Crow River News, Osseo, Minnesota, on September 16 and 23, 1981.

Copies of the complete notice are also available from the Minnesota Water Resources Board's office at 555 Wabasha Street, Room 206, St. Paul, Minnesota 55102 (612-296-2840).

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Economic Security
Attn: Comm
390 N. Robert
INTEROFFICE

ECSEC-82-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF ECONOMIC SECURITY

In the Matter of the Propoed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes (8 MCAR 4.3001-4.3999).

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner on Friday, October 30, 1981, commencing at 9:00 a.m. in Room 116A, Administration Building, 50 Sherburne Avenue, St. Paul, Minnesota, pursuant to a Notice of Hearing dated September 16, 1981. The hearing continued on Monday, November 2, 1981. This is a rule-making proceeding conducted pursuant to Chapter 15 to determine whether the Department of Economic Security has authority to adopt the rules proposed and whether the rules are necessary and reasonable and may be adopted. The Chief Hearing Examiner extended the due date for completion of this Report from December 24, 1981 to January 8, 1982 at the request of the Hearing Examiner.

Peter C. Andrews, Special Assistant Attorney General, 390 North Robert Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Economic Security (hereinafter the "Department"). Eight Departmental witnesses appeared at the hearing, including the Commissioner, Rolf Middleton, and the Assistant Commissioner for Unemployment Insurance, Barbara Beerhalter. Approximately 30 persons attended the hearing and 14 of them signed the hearing register. The hearing continued until all persons present had had an opportunity to be heard. Subsequent to the close of the hearing, but before the expiration of the 20-day comment period ordered by the Hearing Examiner, 21 timely comments, including one Departmental comment, were filed with the Office of Administrative Hearings. One comment was filed late.

The Commissioner of Economic Security must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980), this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in those instances where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the recommendations, he may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Stat. § 15.0412, subd. 4d (1980).

If the Commissioner elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the Commissioner shall submit the rule to the Attorney General for review of form and legality. If the Commissioner makes changes in the rule other than those recommended by the Hearing Examiner, then he shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Stat. § 15.0412, subd. 4e (1980).

When the Commissioner submits the rule to the Attorney General, he shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On September 10, 1981, the Department filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.

2. On Monday, September 28, 1981, more than 30 days prior to hearing, a Notice of Hearing and a copy of the proposed rules were published at 6 State Register 511-533.

3. On September 21, 1981, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On October 5, 1981, more than 25 days prior to hearing, the Department filed the following documents:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) The Statement of Need and Reasonableness.
(e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.
(g) An Affidavit of Additional Notice.
(h) All materials received following a Notice of Intent to Solicit Outside Opinion published at 5 State Register 991, which was published on Monday, December 15, 1980.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The record remained open through Tuesday, November 24, 1981 for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 20 calendar days following the hearing. Normally, the record would have closed 20 days following the final hearing in this matter which would have been on Sunday, November 22, 1981. However, pursuant

to Minn. Stat. § 645.15, when the last day for doing an act under Minnesota law falls on a Sunday, or any day made a legal holiday by the laws of the State, such day is omitted from the time computation involved. Since November 22 was a Sunday, the final day for the filing of written comments would have been Monday, November 23, 1981. However, the Hearing Examiner takes administrative notice of the fact that on November 23rd, the Commissioner of Public Safety declared a state emergency, and later, by memo dated November 25, 1981, the Commissioner of Employee Relations authorized the closing of state offices that day. Those declarations are deemed by the Hearing Examiner to have tolled the running of the 20-day time period, authorizing the record to remain open through Tuesday, November 24, 1981. Comments received on or before that date have been considered timely by the Hearing Examiner.

Statutory Authority

6. As authority for the adoption of the rules proposed, the Department cited Minn. Stat. § 268.12, subd. 3 (1980), which provides as follows:

> Subd. 3. Rules, regulations. Notwithstanding any inconsistent provision of law the commissioner is hereby authorized to adopt, amend, or rescind regulations as may be necessary for the administration of sections 268.03 to 268.24. Each proposed regulation, excepting those relating solely to the internal operation of the department, shall be adopted pursuant to the provisions of chapter 15.

The referenced statute delegates authority to the Commissioner to adopt the rules proposed, and unless hereinafter qualified or held to the contrary the rules proposed by the Department are within the scope of its delegation.

7. The Legal Services Advocacy Project (hereinafter LSAP) argued that the referenced statute must be read in conjunction with other specific sections of the unemployment laws and especially with § 268.08, subd. 1(1) and (2). LSAP noted that while clauses (1) and (2) of the latter statute authorize the Department to adopt rules regarding registration for work, reporting requirements and claim procedures, no such specific delegation is contained in clause (3) relating to ability to work, availability for work, and actively seeking work. The Hearing Examiner is not persuaded that the latter provision in any way restricts the Commissioner's authority to adopt rules with respect to determinations of eligibility, including rules pertaining to the ability to work, the availability for work, and the actively seeking work requirements of the law. On the contrary, § 268.08, subd. 1(1), merely authorizes the Commissioner to waive the statutory requirements contained therein which waiver or variance the Commissioner could not otherwise grant under Minn. Stat. § 15.0412, subd. 1a. Thus, the grant of authority to waive statutory requirements cannot be construed as a limitation on the Commissioner's rulemaking authority under other provisions but is, in fact, an enlargement of the Commissioner's rulemaking authority.

Similarly, the provisions of Minn. Stat. § 268.08, subd. 1(2), is merely a statement by the Legislature that all claimants for unemployment insurance benefits must file their claim for benefits in accordance with the Commissioner's rules. This is not a limitation on the Commissioner's other rulemaking authority but, when enacted, would have merely given the Commissioner's rules with respect to benefit claims the force and effect of law. At the time clause (2) was enacted, interpretative rules did not have the force and effect of law as they now have under Minn. Stat. § 15.0413, subd. 3 (1981 Supp.).

LSAP also argued that the Department is without authority to adopt rules which are inconsistent with Supreme Court declarations interpreting Chapter 268, or with federal requirements. Those issues will be considered where necessary in conjunction with the discussion of particular rules proposed by the Department.

Substantive Provisions

8. The proposed rules are codified as 8 MCAR §§ 4.3000 to 4.3108. They deal extensively with unemployment insurance benefit payments and the collection of employer taxes, and replace various portions of former rules contained in Minn. Regs. ES 1-30. The benefit payment rules are found in §§ 4.3001 to 4.3011 and taxation rules are found in §§ 4.3100 to 4.3108. In view of their extensive nature, it is suggested that the Department consult with the Revisor of Statutes on the advisability of adopting an index to the rules which could be included in the final version adopted. It is also suggested, consistent with the current practices of other agencies, that future rules be drafted without using the masculine gender.

As indicated on page 1 of the Department's Statement of Need and Reasonableness (hereinafter the "Statement"), the rules represent a codification of existing practices and policies of the Department, reflect pertinent court decisions and the requirements of federal law. A great deal of public comment was received. The major comments are discussed in connection with the sections to which they relate. Since more drafting changes were proposed in this case than are usually made, many language changes have been proposed. It is hoped that these recommendations will be of assistance to the Department. If particular public comments are not addressed in this Report, that does not mean those comments are not worthy of consideration and the Department is urged to consider them.

9. Sections 4.3000 - 4.3001. These sections are both necessary and reasonable provisions. The former defines the words "Commissioner", "Department", and "Unemployment Office." The definitions are non-controversial and should be adopted to clarify the meaning of the terms used. The latter is merely an introduction to the benefit payment provisions of the rules. It states that they apply to determinations of an unemployment insurance claimant's eligibility for benefits under Chapter 268.

Eligibility for Unemployment Insurance Benefits

10. Section 4.3002. This section contains three definitions which are applicable to benefit eligibility determinations. Part A. clarifies the definition of "credit week" contained in Minn. Stat. § 268.04, subd. 29. The definition proposed is necessary and was subject to no adverse public comment. The rule makes a distinction in the treatment of vacation pay and other payments, such as severance pay and bonuses. The former is generally allocable to specific weeks of employment, while the latter is not. Consequently, it is reasonable for the Department to include vacation pay in an individual's credit weeks while excluding severance pay or bonuses.

11. Part B. defines the words "labor market area" as the "geographic area in which the claimant can reasonably be expected to seek and find employment." LSAP recommended that the definition be amended to make it clear that a claimant's access to and means of transportation be explicitly considered in deter-

mining a person's labor market area and suggested that the rule also be amended to provide that in determining a claimant's labor market area, the Department consider the factors listed in § 4.3007 K., which pertains to the determination of the suitability of work in terms of its distance from a claimant's home. The Department declined to adopt the recommended amendment on the grounds that a lack of transportation does not generally justify the refusal of otherwise suitable employment. The Department's rejection of the proffered amendment is reasonable because the provisions of § 4.3007 K. concern the acceptance of a particular position by a particular claimant instead of the general area where that claimant must be available.

12. The Department's Statement (p. 3) indicates that the definition of "labor market area" is needed to assist its claims deputies (who monitor claimant eligibiity) in determining claimants' availability and active work search. It is necessary to have a general definition of the area in which a claimant must be available for work. However, it is unclear from the rule how the area in which a claimant can be "reasonably" expected to seek work is to be determined. The word "reasonably" is broad and imprecise by its very nature, and susceptible to the use and application of innumerable factors. The factors can range from the area in which employees generally might seek work to the area in which the particular claimant based on his own prior employment history or his occupation or other factors would seek work. The Department's Statement indicates that the labor market will depend upon the claimant's occupation and other "appropriate" factors. Under Minn. Stat. § 15.0411, subd. 3, rules are required to "make specific the law enforced or administered" by the agency involved. The proposed definition of a labor market area, even when read in conjunction with the Department's Statement, only marginally meets the specificity required. Therefore, it is recommended that the definition be amended to state the factors to be considered in determining the area in which a claimant can reasonably be expected to seek and find employment. The rule could read, for example, as follows:

> B. Labor market area. "Labor market area" means the geographic area in which the claimant can reasonably be expected to seek and find employment. In determining the labor market area, the commuting patterns of persons with the same or similar occupations residing in the claimant's locality, shall be considered. ✓p.2

This amendment focuses attention on the areas in which persons like the claimant commonly seek or hold employment and requires the claimant to travel and be available for work within that same area. It clarifies the meaning of the phrase and eliminates consideration of unknown and potentially inconsistent factors. If the Department finds that the suggested amendment does not state its intention, the rule should, nonetheless, be amended to state the factors which should be considered in determining reasonableness.

Able to work

13. Section 4.3003. Minn. Stat. § 268.08, subd. 1(3) provides that an individual claimant for unemployment benefits is not eligible to receive benefits unless "able to work" during the period for which benefits are claimed. Section 4.3003 implements that statutory requirement. Part A. simply provides that a claimant must have the physical and mental ability to perform the usual duties of his customary occupation or other work for which he is reasonably fitted by training, experience or capability.

Part B.3. prohibits any presumptions that a claimant is unable to work. In response to LSAP's suggestion, Part B.3. will be deleted from the final version of these rules and added to the very end of Part A and the other subparts will be renumbered and the new subparts noted on page 2, line 27. Part A., as amended, is necessary and reasonable, but the Hearing Examiner believes that the language would be clearer if that Part is amended to read as follows:

> A. Generally. To be able to work, a claimant must have the physical and mental ability to perform the usual duties of his customary occupation or the usual duties of other work for which he is fitted by training, experience or capability and which is gainful employment engaged in by others as a means of livelihood. The burden of establishing ability to work is on the claimant, but there will be no presumption that a claimant is not able to work.

The proposed amendment eliminates the word "reasonably" and the words "as an employee under conditions ordinarily existing during a normal work week." Neither of the quoted provisions are necessary. The concept of reasonableness is implicit in the criteria specified and the latter is repetitious of the words "usual duties."

14. The Minnesota Motor Transport Association (MMTA) suggested that language prohibiting a presumption that a claimant is unable to work is inconsistent and confusing when read in conjunction with the provision placing the burden of establishing one's ability to work on a claimant. The Hearing Examiner does not agree with this objection. The prohibition of presumptions is not inconsistent with a rule placing the ultimate burden of establishing one's ability to work upon the claimant in the event a dispute arises. Furthermore, the prohibition of presumptions does not prohibit the drawing of inferences from facts available to the Department. Presumptions are deductions the law requires a trier of facts to make while inferences are deductions which the trier may or may not make. Nothing prohibits the drawing of inferences from facts otherwise available to the Department. On the contrary, all the rule does is prohibit findings of an inability to work regardless of facts known to Departmental personnel. It properly requires claims deputies to consider the facts of each particular case.

15. Part 4.3003 B. This Part specifies the criteria which will be used in determining whether a claimant is able to work. Part B.1. provides that the Department "may" where doubt exists as to the Claimant's ability to work require that the Claimant furnish medical evidence of his ability and that the failure to furnish the requested medical evidence "may" result in the suspension or denial of benefits. LSAP suggested that this Part be amended to provide that medical evidence of a claimant's ability to work be required only where it has a "substantial basis in fact" to doubt the claimant's ability and that where the claimant cannot pay for the medical opinion requested, the Department should pay for it. MMTA, on the other hand, suggested that the rule be amended to require the submittal of medical evidence in all cases where the Department has a doubt as to the Claimant's ability to work. The Department rejected LSAP's suggested amendment on the grounds that it has no obligation to absorb the costs incurred by a claimant in claiming or establishing entitlement to unemployment benefits. Nothing in the law requires that the Department

assume any liability for medical expenses incurred by a claimant in establishing eligibility for unemployment benefits, and the Department's refusal to do so is reasonable. It is equally reasonable to require claimants to submit medical verification of their ability to work where a "doubt" exists as to their ability.

16. However, MMTA's suggestion to change the word "may" to "shall" must be adopted in both cases. Minn. Stat. § 15.0411, subd. 3, defining a rule clearly indicates that rules must "make specific" the law enforced or administered by an agency. As construed by the Attorney General, this language requires an agency to specify with particularity the situations when an action should or should not be taken and the Attorney General has consistently disapproved rules which use the permissive word "may" which subjects the public to the unfettered discretion of agency personnel. Part B.1., which permits Departmental personnel, at their discretion, to require the furnishing of medical evidence or to make a finding of inability to work violates § 15.0411, subd. 3, as so construed. This constitutes a substantive violation of the law for purposes of Minn. Stat. § 15.0412, subd. 4c. To correct this defect, the word "may" in Part B.1. (page 2, lines 29 and 31), must be replaced with the word "shall." Where there is a doubt as to a claimant's ability to work, the requirement that the claimant furnish medical evidence pertaining to his ability should be imposed equally on all individuals irrespective of their "status" in the eyes of the administrative decision-maker. Furthermore, where such a doubt exists and requested medical evidence is not furnished, benefits should not be paid.

replaced p 2

17. Part 4.3003 B.2. This Part requires that a claimant separated from his last employment due to a serious illness must demonstrate his ability to perform other work to be deemed able to work. LSAP suggested that the rule be amended to read as follows:

> 2. Medical separation from work. A claimant who is separated from employment due to his own serious illness must demonstrate that he has substantially recovered from that illness or that he is able to perform other work to be deemed able to work. (Emphasis added)

The language proposed by the Department seems to be a necessary and reasonable requirement because a medical separation from employment resulting in the filing of a claim for benefits is, itself, indicative of an inability to work. Under such circumstances, it is necessary and reasonable for the Department to have some procedure whereby a claimant's ability to work at the same or other employment can be evaluated. The Department, while having no objection to the amendment proposed by LSAP, stated in its posthearing comments that the proposed amendment is unnecessary because the Rule presumes that the claimant is able to be gainfully employed in some occupation. The Hearing Examiner is confused by the Department's comment because the rule contains no presumption that claimants are able to be gainfully employed in some occupation; in fact, the rule creates a presumption that claimants who were separated from employment due to a serious illness are unable to work unless they demonstrate to the contrary. Furthermore, the comment does not address the issue raised by LSAP, which pertains to an individual's ability to return to his customary occupation because of a recovery from the illness that required a separation from employment. The current rule technically limits Departmental consideration to a

claimant's ability to perform work other than work in his customary occupation, where there has been a serious illness separation. It ignores consideration of the claimant's ability to return to his usual occupation. To clarify what is believed to be the Department's intent, it is recommended that Part B.2., if it be adopted, be amended to read as follows:

> 2. Medical separation from work. A claimant separated from his last employment due to his own serious illness shall demonstrate that he is able to perform the usual duties of his customary occupation or that he is able to perform other work to be deemed able to work.

In this amendment, the word "must" has been changed to "shall", the requisite mandatory language. In addition, the adjective "last" has been added to modify the word employment because separations before one's last employment would not normally be relevant.

18. Part B.2. seems necessary upon initial consideration, but under closer scrutiny appears redundant and inconsistent with the presumption stated by the Department. The manner in which a claimant would demonstrate the ability to perform other work was not discussed. The Hearing Examiner agrees with the Department's stated presumption that any individual is normally able to perform some job regardless of his training or experience. Consequently, the demonstration that one is able to perform other work would, no doubt, apply to one's physical or mental ability to perform some work. How does one make such a demonstration if it is not obvious? If a doubt exists as to such a physical or mental ability after the claimant is observed and questioned by a claims deputy, such a doubt can be resolved only by medical evidence. The procedure in such a case is adequately covered in Part B.1.

Furthermore, if the Department presumes that anyone is able to perform some job, why does it, in effect, presume that one is unable to work where there has been a serious illness separation from employment unless the claimant demonstrates to the contrary? There should be no need to require such a demonstration if no doubt exists and where a doubt does exist, the procedures in Part B.1. are adequate.

Since Part B.2. in effect creates a presumption that is inconsistent with the Department's stated intent, since it is redundant when considered in connection with Part B.1., since no demonstration should be necessary when no doubt exists as to a claimant's ability to perform some work, and since there was no showing that any demonstration would involve more than the submittal of medical evidence, Part B.2. has not been shown to be necessary or reasonable as required by Minn. Stat. § 15.0412, subd. 4c. To cure this defect, the rule must be deleted. deleted p 2

If the Department desires to make a specific allusion to claimants who separated from their last employment due to a serious illness, amendments to Part B.1. should be adequate. For example, it could add the words ", either because of his separation from employment due to his own serious illness or for other reasons," after the word "work" on page 2, line 29.

19. Part 4.3003 B.4. This Part states the general rule that physical or mental conditions which limit a claimant's ability to work to part-time employment or to a particular shift will not render him unable to work if there is a "reasonable possibility" that work within the limitations may be obtained. The Department has a great deal of discretion in establishing criteria governing

the ability (or availability) of persons who are subject to involuntary restrictions and special consideration for such individuals is necessary and reasonable. The words "reasonable possibility" are not unreasonably vague but could be construed in different ways. A reasonable possibility must mean that there are jobs in the claimant's labor market area consistent with the limitations involved or that such jobs are expected to arise. The rule establishes no time period within which the "reasonable possibility" must exist so it must be construed to mean at any time during the claimant's benefit year. If the Department believes that a time period should be imposed, it should be added to the rule. To make the rule more specific, it is suggested that it be amended to read as follows:

> . . . However, a claimant whose physical or mental condition restricts his availability to part-time work or to a particular shift shall be deemed able to work if there are jobs in his labor market area consistent with the limitations or such jobs can be expected to arise [(during his benefit year), (within ____weeks), or (in a reasonable period of time)].

In addition, to make it clear that such persons will not be considered unavailable for work because of the restrictions involved, §§ 4.3004 A. and L. should be amended by adding the following language to the beginning of the sentences which start on line 15, page 3, and on line 28, page 4, respectively:

> Except as provided in Section 4.3003 B.2. . . . [or B.3. depending on the final form of the rules]

Although not discussed, the Hearing Examiner is concerned with the status of those severely disabled persons who, in spite of their disabilities, have earned sufficient wages to qualify for unemployment benefits. Their prospects for re-employment may be virtually non-existent if laid-off, and it does not appear unreasonable to pay benefits based on those wages regardless of the remoteness of their job prospects. It is suggested that their status be considered.

Available for Work.

20. Part 4.3004 A. This part of rule implements § 268.08, subd. 1(3), which requires a claimant to be "available for work." Since availability is a central criteria of eligibility for the collection of unemployment benefits, it is necessary for the Department to elaborate on the tests used to make sure that a claimant is unemployed due to a lack of suitable work and not for other reasons. Part A. contains the general requirement that a claimant is considered available for work only if "ready and willing to accept suitable employment" and that there can be no restrictions on a claimant's availability for work as a matter of personal circumstances or personal choice. In that respect, the rule is consistent with prior decisions of the Minnesota Supreme Court holding that to be available for work, one must be ready, willing and able to accept suitable work and genuinely or unequivocally attached to the labor market. See, e.g., Olson v. Starkey, 259 Minn. 364, 107 N.W.2d 386 (1961); Thompson v. Schraiber, 253 Minn. 46, 48, 90 N.W.2d 915, 916 (1958); and Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 449, 61 N.W.2d 526, 529 (1953). Self-imposed or circumstantial restrictions do not render a

claimant unavailable for work under Part A. if the claimant has "good prospects" for obtaining employment within the restrictions existing within a reasonable period of time. Like the remainder of Part A., this is a reasonable provision which, consistent with case law, recognizes that claimants do not have to be available for every conceivable, suitable position.

21. The language permitting retrictions on availability if there are "good prospects for obtaining employment within a reasonable period of time" was objected to by the Minnesota Association of Commerce and Industry (MACI) as too vague and indefinite. A "good prospect" for work is probably a better prospect than a "reasonable possibility" as is required under § 4.3003 B.4. While the term does not have a precise meaning, it is clear that the circumstances of the thousands of persons who annually claim unemployment benefits are of a virtually infinite variety and more precise language may be exceedingly difficult to devise without sacrificing necessary flexibility. In Can Mfrs. Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979), the Court upheld broad rules where flexibility was needed and it was unlikely that significantly more precise rules could be devised. In this case, it is concluded that the same rationale is applicable and that the language proposed is necessary and reasonable. However, the Department should consider substituting "favorable" with "good" to be consistent with the language used in § 4.3006 C.4. (page 9, line 3).

substituted p.3

In many cases, the restriction a claimant will place on his availability consists of the understandable desire to locate new work that is not significaly different from his last work. The Department has recognized this as a legitimate desire consistent with the policies of the unemployment law. See, Statement, p. 17. The policy permitting such a shopping period or opportunity had to be balanced against the contrary policy that restrictions on availability are inconsistent with general eligibility requirements. The Department's approach reasonably considers these two conflicting factors.

22. Several parties, including the Minnesota Transport Services Association (MTSA), objected to Part A. on the grounds that no restrictions whatsoever are authorized under the law. The law does not so provide. Not only is availability limited to suitable work but the Department has discretion in determining when restrictions are de minimis or not inconsistent with the other policies of the unemployment laws. The AFL-CIO objected to Part A. because it does not state that registration for benefits creates a presumption of availability as allegedly held in Olson v. Starkey, supra. However, the case cited does not hold that registration creates such a presumption. On the contrary, the Court merely cited a Pennsylvania case alluding to such a presumption in its discussion of the issues involved therein. Failure to state such a presumption is not, therefore, inconsistent with current law. The Minnesota Retail Merchants' Association (MRMA) suggested that the words "full-time" be added to the rule between the words "accept" and "suitable" (p. 3, line 13) to make it clear that claimants must be generally be available for full-time employment. The Department declined to adopt this recommendation on the grounds that suitable employment is "presumed" to be full-time. The rule nowhere states such a "presumption" and it is recommended that MRMA's suggestion be adopted. The fundamental requirements of availability, while obvious to those familiar with the law, may not be clear to claimants. The proper construction of availability should

nevertheless, "full-time" is added

not rest on inferences or presumptions that are not stated in the rules. The Department did agree to adopt LSAP's suggestion to replace the term "suitable employment" with the term "suitable work" wherever it appeared in Part A. This would make the terminology used throughout the rule more consistent and, if adopted by the Department, is a necessary and reasonable amendment which does not constitute a substantial change for purposes of 9 MCAR § 2.111.

23. 8 MCAR § 4.004 B. This Part of the rule establishes the presumption that a claimant who is absent from his labor market area for personal reasons is unavailable for work, but states that absences of two days or less, if due to family emergencies or other compelling reasons do not render one unavailable. The AFL-CIO argued that the presumption of unavailability is unauthorized and unreasonable because the mere fact that a claimant travels to St. Cloud for three days does make him unavailable for work. The Department has authority to adopt presumptions in its rules. In Juster Bros. v. Christgau, 214 Minn. 108, 7 N.W.2d 501, 507 (1943), the Minnesota Supreme Court stated as follows:

> Unquestionably, the legislature, or its administrative adjunct, may declare that certain things may constitute prima facie evidence or create a rebuttable presumption.

However, as pointed out in that case, such presumptions cannot be conclusive. Therefore, the rule should be amended by adding a new sentence immediately after the first sentence in the rule to state as follows: "This presumption is rebuttable." Such an amendment does not constitute a substantial change for purposes of 9 MCAR § 2.111. It makes the rule consistent with the holding in Christgau, supra, and permits the claimant to show that, in spite of a particular absence from his labor market area, that he was available for work. Contrary to the arguments of LSAP, the rule is not unnecessary or adequately covered by 8 MCAR § 4.3004 E. or the actively seeking work requirements of § 4.3005. Obviously, the provision is intended to cover those individuals who take vacations during periods when they are otherwise unemployed and who are not generally available for work. It is reasonable for the Department to presume that such vacations or other absences for personal reasons render one unavailable for work. The Department's attempt to treat those individuals in the rule is necessary and reasonable.

24. However, the second sentence of the existing rule is improper. It treats claimants who are, in fact, unavailable for work due to a family emergency or other compelling personal reasons as available for work, contrary to Minn. Stat. § 268.08, subd. 1(3), which provides that an individual's weekly benefit amount shall be reduced one-fifth for each day such individual is unavailable for work. Thus, an individual who is unavailable for work during the normal work week from Monday through Friday must have his weekly benefit entitlement reduced during each day of his unavailability regardless of the cause. Therefore, it constitutes a substantive violation of the law because the Department is without authority to adopt a rule which is inconsistent with the law it administers. 73 C.J.S. Public Administrative Bodies and Procedure § 93; Sellner Mfg. Co. v. Comm'r. of Taxation, 295 Minn. 71, 202 N.W.2d 886 (1972). In addition, the rule unreasonably differentiates between persons absent for non-compelling reasons from those persons who are absent for compelling reasons. One would normally expect that one absent for compelling reasons

would be less likely to be available than one whose absence is not compelling. To correct this defect, the second sentence must be deleted. If the Department desires to make the presumption applicable only to absences of more than two days, it may do so, but any such presumption must apply to all claimants.

25. 8 MCAR § 4.3004 C. This Part requires that aliens must present proof that they are authorized to work in the United States in order to be considered available for work. Since aliens must be specifically authorized to work in the United States before they can be employed, aliens without that authorization are not available for work. Consequently, the Department's rule is necessary and reasonable. However, if the Department knows the identity of those agencies from which such authorization must be obtained, those agencies, or the kind of proof needed, should be specified.

26. 8 MCAR § 4.3004 D. This Part specifically addresses the availability of claimants who move to an area where the chances of securing work are materially lessened and requires that claimants who move must make a diligent work search and expand their availability to other occupations and accept the prevailing wages, hours and other conditions of work in the new locality. This is a necessary and reasonable provision which alerts claimants to the fact that eligibility criteria vary between localities depending on local conditions. The Department has the expertise and ability to determine when a claimant has materially lessened his chances of securing work because it has access to labor market information, computerized listings of job openings, and job service offices located throughout the state. However, it is unclear why the provision applies to only those claimants who have moved "permanently" to a new area rather than to those claimants who move only temporarily. If someone moves for a period of three months, for example, it is unclear whether such a move would be deemed permanent for purposes of the rule. Use of the word "permanently" only adds unnecessary confusion and it should be deleted. Similarly, the reference to the "diligent work search", as written, is redundant. Consequently, it is suggested that Part B. be amended to read as follows:

> A claimant who moves to an area where his chances of securing work are materially lessened shall expand his work search, expand his availability to other occupations and accept the prevailing wages, hours and other conditions of work available in the labor market area where he moves.

27. Part 4.3004 E. This Part provides that a claimant is not available for work unless good cause exists for his failure to be reachable by the Department for referral to possible employment. This rule is necessary and reasonable because one who cannot be contacted by the Department can reasonably be considered to be unavailable for work and not genuinely attached to the labor force. LSAP suggested that the Part E. be amended to read as follows:

> E. Claimant cannot be contacted. Unless good cause exists for the failure to be reachable by the Department, a claimant who cannot be reached after reasonable efforts by the Department for referral to available, suitable work is not available for work.

The Department stated in its posthearing comments that it had no objection to the amended language proposed by LSAP, but it is unclear whether or not those amendments will be adopted. To the extent that the rule is amended to provide that the claimant must be reachable "by the Department", and "after reasonable efforts" to locate him, the Hearing Examiner endorses LSAP's proposed amendments. However, substitution of the words "available, suitable work" for the

words "possible employment" is not recommended. Under Chapter 268, the issue of availability is merely a test of one's genuine attachment to the labor force. Claimants must be accessible for referrals to possible employment regardless of the nature of the employment involved. That is, claimants must be available for referrals to work generally even if the specific referral would not have been suitable for one reason or another.

Marta Breeland stated that this Part would result in hardship to those persons who have no telephone or no permanent address. Her concerns should be cured by the language proposed by LSAP. However, the Department should also consider specifying the claimants' obligation to report a change of telephone number or address in its rules. Unless there is some specific obligation that claimants do that within a stated time period, such changes may always constitute "good cause" for their unavailability.

28. Part 3.004 F. Under this Part, a claimant who fails "without good cause" to report "as directed" to the local unemployment or job service office is not considered available for work. It implements Minn. Stat. § 268.08, subd. 1(1), which makes eligibility contingent upon a claimant's continued reporting to an employment office in accordance with rules adopted by the Commissioner. In its Statement (p. 7), the Department explained that claimants may be required to report to a local employment office so that claims deputies can inquire into their eligibility or assist them with their job searches. The necessity for an inquiry into a claimant's eligibility for benefits during his benefit year is obvious since the statute requires periodic reporting after a claim is filed to demonstrate continuing entitlement to benefits. The requirement for such periodic reports is not fully covered in § 4.3010 of the rule and periodic reporting does indirectly relate to availability. However, applying a good cause test for the failure to report in both cases is improper. A simple example reveals the unfairness of the rule proposed. Assume that a question arises as to a claimant's eligibility for benefits, either because of the information reported on a continued claim or for some other reason, and the Department "directs" the claimant involved to report to the employment office to discuss his eligibility. If the claimant fails to report "as directed", and a claims deputy determines that he is, therefore, unavailable under Part F., the claimant is deprived of benefits on appeal, regardless of his actual availability, if his failure to report as directed was without good cause. The need and reasonableness of such a result was not demonstrated. To correct this defect, the words "to an unemployment office or" must be deleted or Part F. should be rewritten to provide that a claims deputy may presume that a claimant who fails to report to an unemployment office as directed is unavailable for work. If such a determination is appealed, the issue would then be the claimant's actual availability during the period in question and not his "good cause" for failing to report it at a particular time. To accomplish that, Part F. could provide:

> F. Failure to report. A claiant who fails without good cause to report as directed to a job service office of the Department is not available for work. A claims deputy may presume that a claimant who fails to report as directed to an unemployment office to discuss his eligibility for benefits is unavailable for work.

see similar added language p. 4

Such an amendment makes "good cause" an essential element of inquiry where a failure to comply with a work search is involved. This is reasonable because

claimants can be expected to report to the job service when directed to do so. Furthermore, it permits a claims deputy to make a finding of unavailability if a claimant fails to report to a local unemployment office. In the latter case, good cause is not in issue. Rather, the issue is the claimant's failure to demonstrate availability by clarifying questions raised by the Department when, without such clarification, availability is doubtful. On appeal in the former situation, the claimant must show good cause for failing to follow a work search requirement. On appeal in the latter case, the claimant must merely demonstrate availability. Use of the word "may" is appropriate here because the issue of a claimant's availability may be clarified before a determination is issued. Any further reporting requirements should be added to § 4.3010.

29. The Department also noted that Part F. was designed to assist claimants in their work searches. It is necessary and reasonable to require that claimants report to a local job service office when such reports are necessary to conduct an active or effective search for work. However, such work search requirements should also be made a part of § 4.3005, which pertains to active work searches. That Part now requires only registration for work. Thus, § 4.3005 B. could be amended to require a claimant to:

> Report to the department's job services when such reports are made a required part of a claimant's active work search and improve his opportunities of finding work.

So amended p. 6

30. Part 4.3004 I. This Part provides that to be considered available for work, a claimant may be required to make adjustments in the area where he will accept work or the conditions of work he will accept or the type of employment he is willing to accept. LSAP challenged the provision as inconsistent with the decision in Berthiaume v. Christgau, 218 Minn. 65, 15 N.W.2d 115, 118 (1944). In that case, the Court held that a claimant must be available for work in his usual trade and, if there were no prospects of employment in his usual trade within a reasonable period of time, the claimant must also be available for work in other occupations for which he is reasonably fitted and which is otherwise suitable under the law. LSAP suggested that this Part be amended to refer specifically to the claimant's prospects of work in his usual trade within a reasonable period of time. The Hearing Examiner recommends that LSAP's suggestion be adopted (Ex. B, p. 16) to make the requirements clear. However, since suitable work is thoroughly covered by other Sections of the rule and will control the situations when greater availability is required, Part I. is necessary and reasonable as proposed.

amended p. 4

31. Part 4.3004 K. This Part pertains to the availability of self-employed claimants. LSAP stated that the terminology providing "so that he cannot accept work" is unclear and that it is uncertain whether the rule intended to require a showing of a causal relationship between the time and effort devoted to self-employment and the absence of availability, or whether it was intended to establish an arbitrary standard that a devotion to such time and effort will automatically result in a finding of unavailability. LSAP's suggested amendment to this part, is acceptable to the Department. The amendment reads as follows:

> K. Self-employment. A claimant is not available for work if he is no longer seeking work as an employee because of his being self-employed or planning to be self-employed and he is devoting time and effort to his self-employment and will not accept suitable work during customary hours for his occupation or other suitable work.

By endorsing this amendment, the Hearing Examiner understands that a claimant will not be considered available for work if he is self-employed and not seeking employment or if he is planning to become self-employed and unwilling to accept other suitable work. If that is the intention of the rule, it is suggested that it be amended to read as follows:

> K. Self-employment. A claimant is not available for work if he is self-employed and no longer seeking other suitable work or if he is planning to become self-employed and will not accept other suitable work.

So amended p. 5

If a presumption of non-availability is to be removed from the rule as is suggested by the Department's lack of objection to LSAP's amendment, reference to the time and effort devoted to the claimant's self-employment or the hours of the suitable work he will not accept is immaterial. Neither of the amendments to the text of the rule constitutes a substantial change for purposes of 9 MCAR § 2.111 and the amendments proposed, in either form, are necessary and reasonable.

32. Part 4.3004 M. This Part provides that a claimant must have transportation from his residence to his labor market area to be considered available for work. LSAP objected to this provision as unnecessary, confusing and repetitive. Consideration of a claimant's ability to get to and from work is an essential ingredient in determining a claimant's availability, even though the definition of a claimant's labor market area is not wholly unrelated to the transportation available to a claimant. However, under § 4.3004 A., transportation restrictions which do not prevent a claimant from accepting employment do not render that claimant unavailable for work if he has good prospects for obtaining employment within the restrictions within a reasonable period of time. When read together, the requirement for transportation to and from work is necessary and reasonable.

Actively Seeking Work.

33. This Part implements the requirements of Minn. Stat. § 268.08, subd. 1(3), which requires that a claimant "actively seeking work" in order to be eligible for the receipt of unemployment benefits. Parts A. and B. provide a general statement of the meaning of an active work search and the scope of the work search which might be required of any particular claimant. At the suggestion of LSAP, the Department proposes to replace the words "work" or "employment" with the term "suitable work" wherever it appears in § 4.3005. Such a technical amendment adds consistency to the rules, is necessary and reasonable and does not constitute a substantial change for purposes of 9 MCAR § 2.111.

OK

p. 5, 6

34. Part 4.3005 B.5. This Part was the subject of a great amount of public concern. It authorizes the Department to require claimants to apply for employment with former employers. The AFL-CIO suggested that claimants should not be required to apply for work with employers when the claimant previously quit employment with the same employer and with "good cause attributable to the employer," unless it can be demonstrated that the good cause for which the claimant quit no longer exists. LSAP had a similar comment, based on the same rationale, and Representative Karen Clark discussed the requirement where an employee previously quit because of sexual harassment. She argued that women who quit an employer because of sexual harassment should not be required to reapply for work with the responsible employer. She suggested that the rule be

amended to specifically exempt women from the requirement if they had terminated prior employment because of sexual harassment. In its posthearing comments, the Department expressed agreement with the concerns raised by the public and with the conclusion that claimants should not be required to accept reemployment if the conditions which gave them good cause to terminate prior employment with the same employer continue to exist. The Department did not agree that a clarification was required because § 4.3008 permits claimants, for good cause, to refuse offers of reemployment made by "base period employers." However, the latter Section applies only to offers made by "base period" employers (those who employed the claimant during the 12-month period prior to the filing of the unemployment claim), and not to non-base period employers. Consequently, the Hearing Examiner recommends that Part B.5. be amended to protect individuals from the burden of applying for employment with any employer if the claimant previously terminated employment with good cause attributable to the employer. To do that, it is recommended that Part B.5. be amended to read as follows:

> 5. Apply for employment with former employers; however, claimants may refuse to reapply for work with employers where the claimant previously terminated employment with the same employer and with "good cause attributable to the employer" if the conditions constituting good cause for the prior quit continue to exist and will affect the claimant upon reemployment.

amended p.6

Such a provision not only clarifies the Department's intent but it protects claimants from required reemployment with all former employers and not just "base period" employers. It also permits a claimant to avoid the time and expense of reapplication where the claimant can demonstrate that the conditions which led to a prior quit continue to exist and will necessarily affect the claimant. Specific reference to sexual harassment is not necessary, and it seems inappropriate to single out sexual harassment for special consideration without mentioning other equally invidious types of employer conduct, such as racial discrimination.

The Department's refusal to exempt discharged employees from the requirement to apply for work with their former employers, as LSAP suggested, is necessary and reasonable because the mere fact that a claimant was previously discharged does not necessarily have any bearing on that claimant's prospects for reemployment. The remainder of Part B. is also necessary and reasonable; however, to clarify the scope of the rules, it is suggested that the word "suitable" be added to Part B.7. and that the word "reasonable" be added to Part B.9. as suggested by LSAP. In addition, the language suggested in Finding 29 should be added to Part B.5.

OK p.6 OK p.6 added to B.1, p.6

35. Part 4.3005 D. This Part specifies the type of work a claimant will be required to seek. It states the general rule that a claimant will be allowed to seek work in his usual trade or occupation before being required to seek other types of suitable work. The time allowed to seek work in the claimant's usual trade or occupation is governed by the availability of work in his labor market area. It further specifies that a claimant will be required to seek work outside his customary occupation only under specified conditions. The rule does not prohibit one from searching for work in one's usual trade at any time but requires an active search for work outside one's usual trade in some circumstances. When those circumstances exist, a search limited to work in one's usual trade will not constitute an active work search.

As initially proposed, the rule required claimants to seek work outside their customary occupations, if any one of three specified conditions prevailed. In its posthearing comments, however, the Department proposed to amend the rule to require a claimant to seek work outside his customary occupation only if all of the three conditions prevail. To that end, the word "one" (p. 6, line 22) will be changed to the word "all" and the word "or" (p. 6, line 29) will be deleted. Such an amendment is necessary to make the rule internally consistent and does not constitute a substantial change for purposes of 9 MCAR § 2.111. However, in addition to the amendments proposed, the Department should change the word "prevails" (p. 6, line 22) to the singular.

irrelevant - original language is deleted. p.7

36. Part D.1.-3. provides that a work search outside one's customary occupation is required if (1) there are available jobs outside the claimant's customary occupation and few workers for whom these openings would be more suitable than for the claimant, (2) that the claimant's prospects of securing work in his customary occupation are less favorable than his prospects of securing other work, and (3) the work outside the claimant's customary occupation is suitable for him. Both LSAP and the AFL-CIO challenged the conditions specifying when a claimant will be required to seek work outside his customary occupation as inconsistent with the decision in Berthiaume v. Christgau, supra. In that case, the Court considered the relationship between the requirement that a claimant be available for work and provisions requiring a claimant to accept suitable work when offered to him, stating as follows (pp. 118-119):

> . . . It is apparent the legislature intended that an individual should not be disqualified for benefits because of his refusal to accept employment in a trade other than his own when there are reasonable prospects of his securing local work in his customary occupation. As indicated, § 5(E)(1) of the 1943 Act, [which is nearly identical to Minn. Stat. § 268.09, subd. 2(a)] provides that, in determining whether any available work is suitable, the Director shall first consider the prospects of the applicant's obtaining local work in his customary occupation. Presumably, if there are such prospects, then substitute work offered is not deemed suitable within the meaning of that section.
>
> In the light of such limitation, § 4(C), [Minn. Stat. § 268.03, subd. 1(3)],[1], must be construed to mean that, to be eligible for unemployment benefits, applicant must be available for work in his usual trade (which, of course, would be suitable), and, if there are no prospects of employment therein within a reasonable time, also for work in other occupations for which he is reasonably fitted and which is otherwise suitable under § 5(E)(1) of the Act. In other words, if an applicant can present sufficient evidence to establish as a fact the prospects of returning to work in his own trade within a reasonable time, then work in some other trade for which he should otherwise be available and which would otherwise be deemed suitable becomes unsuitable under the definition thereof above referred to.
>
> On the other hand, should it be deemed determined as a question of fact that a claimant has no prospect of returning to his usual trade within a reasonable time, then work in some other trade for which he is reasonably fitted and which meets the other

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[1] The prior statutory provision requiring a claimant to be available for work contained the words "in his usual trade or occupation or in any other trade or occupation for which he demonstrates he is reasonably fitted and is actually seeking work." That language no longer appears in Chapter 268.

requirements specified in § 5(E)(1) may become suitable, and the burden falls upon him to establish that he has held himself available therefore, as well as for work in his own trade, under § 4(C).

37. In Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 449, 61 N.W.2d 526 (1953), the Court again had occasion to discuss the availability requirements in connection with the suitable work requirements. In that case, the Court noted that the words "available for work" could not be defined in precise terms or mechanically applied to the facts of each case and that no definite rule could be stated as to what precise facts constitute availability. It noted, however, that the unemployment statute does not contemplate total availability under all circumstances, and that the availability requirement is designed to test a claimant's continued and current attachment to the labor force and that a claimant must be willing, able and ready to accept suitable work which he does not have good cause to refuse. To be available, the Court said (p. 531) that a claimant must be accessible or attainable for work when suitable work is offered at such hours as are customary in the type of employment to which the claimant is suited. No doubt the Court would also apply the same requirements to the wages and other conditions which are customary to the type of employment suitable to a claimant. The Court also considered the meaning of the words "suitable work" stating as follows:

> We consider "suitable work," within the meaning of the employment and security act, to be such work as the employee customarily performs, or such as he is reasonably fitted to perform by past experience or training and which is otherwise suitable under the provisions of § 268.09, subd. 1(5).

Of course, in determining whether other work is suitable under § 268.09, subd. 2(a), the Department must consider, among other things, the length of the claimant's unemployment and his prospects of securing local work in his customary occupation.

38. Subsequently, in Di Re v. Central Livestock Order Buying Company, 246 Minn. 279, 74 N.W.2d 518 (1956), the Court noted that the Commissioner is "vested with wide discretion" in determining whether offered work is suitable for a particular individual. The Court, without noting the statutory change which had occurred in the available-for-work requirement, reiterated the tests laid down in Berthiaume v. Christgau, supra, that the Commissioner should determine whether the claimant has "no prospect of returning to his usual trade within a reasonable time." (p. 526). If there are no prospects, the Court held that work in some other trade for which he is reasonably fitted, and which meets the other requirements of suitable work, must be accepted. The Court went on to indicate (p. 526) that, if the claimant in that case had no prospects of securing "substantially equivalent" employment within a reasonable time, then the claimant would be required to accept other suitable work as defined in the law. The Court also stated (p. 526):

> The Unemployment Compensation Act was never intended as a guarantee that an employee would always receive benefits unless he was offered employment of precisely the same kind of character as that of his most recent employment. The purpose of the act is to assist those who are unfortunate enough to be involuntarily unemployed, not to benefit those who capriciously refuse similar work for which they are reasonably fitted by past training and experience. Admittedly, the development and preservation of worker skills and the advancement and utilization of the employee's full training is a desirable and important factor in administer-

ing the Unemployment Compensation Act, but a modification of that objective is required when a particular skill or trade is not in demand either because of protracted economic conditions or because of technological changes. Suitability is not a matter which can be rigidly determined, but rather depends on various factors, an important one of which is the present expectancy of obtaining other employment similar to the employee's customary occupation.

39. The Department argued that Part D., as proposed, is authorized by Swanson, while LSAP and AFL-CIO argued that the rule is prohibited by Christgau and that the rule must provide that a claimant is not required to seek work other than work in his usual or customary occupation unless there are "no prospects of employment in his usual trade or occupation within a reasonable period of time." Under the Department's rule, that criterion is not specifically mentioned, but they are clearly implied, and the proposed rule is consistent with current law, necessary and reasonable.

The available for work requirement of § 268.08, subd. 1(3), no longer contains language providing that a claimant must be available for work "in his usual trade or occupation or in any other trade or occupation for which he demonstrates he is reasonably fitted and is actually seeking work." However, it would be absurd to require a claimant to seek work which he would not be required to accept under the suitable work criteria. Consequently, the decisions in Christgau and Di Re are applicable in determining the appropriate scope of a claimant's work search. The Court's references to "prospects" or "no prospects" of returning to one's usual trade do not mean that a claimant who has even a remote prospect of returning to work in his usual trade within a reasonable period of time may not be compelled to seek other suitable work. What the Court intended was that where a claimant has no reasonable prospects of returning to work in his customary occupation within a reasonable period of time, the claimant is required to seek and accept other suitable employment.

40. Part D. states that a claimant will be permitted to seek work in his customary trade or occupation for a time period determined by the availability of work in that trade or occupation. To that extent, it is consistent with the cited cases which hold that a claimant may so restrict his availability when prospects for work exist. However, the rule continues by requiring a claimant to seek work outside his customary trade when three specified conditions exist, and none of the conditions clearly relate to the Claimant's prospects of finding work in his usual trade within a reasonable period of time. While the claimant's prospects in that respect are implied, it is preferable to clearly state current law. Therefore, the rule should be rewritten as proposed infra, or in some other manner which clarifies the fact that a claimant is not required to seek work outside his usual trade unless he has no reasonable prospects of securing work in his usual trade within a reasonable period of time.

41. Since the connection between Part D. and § 4.3006 C. is not clear, and since Part D. is somewhat redundant, it is suggested that Part D. be amended to read as follows:

D. Type of Work Sought. A claimant will be allowed to limit his work search to work in his usual or customary trade or occupation if he has favorable prospects of returning to work in his usual trade or occupation within a reasonable period of time under Section 4.3006 J. The length of time allowed to a claimant to limit his work search to work in his usual trade or occupation

so amended P.7.

will be governed by the availability of that work in the labor market area where he is seeking work. When the claimant has no such prospects, he shall be available for other suitable work under the guidelines in Section 4.3006 C.

42. In addition, it is suggested that the Department adopt standards for determining when a claimant has reasonable prospects for returning to work in a reasonable period of time by amending § 4.3006 J. by adding the following language:

added to 3007 J p. 12, 13

In determining whether a claimant's prospects are favorable or unfavorable, the Department shall consider the following factors:

1. Whether there are available openings outside the claimant's customary occupation and there are few workers unemployed in the locality for whom these openings would be more suitable than for the claimant;

2. Whether the claimant's particular skill or trade is not in demand because of protracted economic conditions, technicological changes or other reasons;

3. The number of unemployed persons seeking employment in the claimant's customary trade or occupation compared to the number of positions available;

4. The extent of the claimant's training and experience in his customary trade or occupation compared to the training and experience of other individuals seeking similar work;

5. The extent to which the claimant has investigated or exhausted the prospects available in his labor market area;

6. The length of time normally required to find work in the claimant's usual trade or occupation.

7. The prospects of work in his customary trade or occupation compared to the prospects of other suitable work.

8. The claimant's verifiable assurances of work.

Rule amendments of this nature concentrate on the question of determining when a claimant has prospects for obtaining employment in his usual trade, and the amount of time reasonably necessary to locate and investigate whatever prospects exist and whether he should seek other suitable work. In addition, they eliminate the confusion resulting from two separate sets of suitable work guidelines contained in §§ 4.3005 D. and 4.3006 C.

43. Part 4.3005 E. This Part requires claimants to actively seek permanent work unless they are on a temporary lay-off and have a verifiable assurance of a return to work. MRMA objected to this provision on the grounds that the words "verifiable assurance" were too vague, and on the further grounds that employees subject to a seasonal lay-off can usually be assured of further work sometime in the future, and to limit their job search requirement to temporary work practically negates any need for them to search at all. MRMA also argued that if permanent jobs are available, claimants should be required to search for and accept them. The requirements imposed upon seasonal workers are covered in § 4.3005 F. and 4.3006 C.3. and no further clarification of their status in this Part is necessary, and while MRMA desires to have claimants accept any work that is available, such a requirement is inconsistent with the Court's declarations in Berthiaume, supra, and contrary to purposes of the Unemployment Act.

However, the Hearing Examiner agrees that the words "verifiable insurance" should be made more specific as is discussed infra. It is unclear, for example, whether a "verifiable assurance" is similar to the reasonable assurance found in Minn. Stat. § 268.08, subd. 6(b), and (c), or whether it is something else. Part E. is also different in scope than § 4.3006 C.3. which contains no mention of temporary layoffs. Apparently, Part E. is to be consistent with § 4.3006 C.3. If so, Part E. should be amended to read as follows:

Except as provided in Section 4.3006 C., claimants are required to seek suitable permanent work.

Suitable Work

44. Section 4.3006. Parts A. and B. of this Section outline the applicability and policy underlying the suitable work rules. While the particular language used was subject to some objection by members of the public, statements of policy are particularly within the wide discretion residing in the Department, and a description of the purposes of this section and a statement of the Department's policy determinations is necessary and reasonable as proposed. However, the Hearing Examiner endorses LSAP's recommended amendment to Part A. (Ex. B., p. 22) to specifically mention that the criteria apply in making disqualification determinations.

45. The suitable work rules do not directly incorporate statutory criteria. The Hearing Examiner believes that this will lead to confusion and that the requirements of Minn. Stat. § 268.09, subd. 2(b) should be restated as suggested by LSAP. It is recommended, therefore, that Part C. be redesignated Part E. and the following Subpart C. be added to the rule:

C. Unsuitable work. In general, suitable work is available work in the claimant's labor market area. Work in the claimant's customary trade or occupation is always suitable; however, work is not suitable under any of the following conditions:

1. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

2. If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

3. If as a condition of being employed the individual would be required to join a union or to resign from or refrain from joining any bona fide labor organization; or

4. If the individual is in training with the approval of the commissioner.

In addition, it is recommended that LSAP's suggestion for a direct statement of the criteria in Minn. Stat. § 268.09, subd. 2(a), be included in the rule as Part D. (See recommendation, Ex. B, p. 26). However, in consideration of the other recommendations made herein, that new part, if adopted, should read as follows:

D. Suitable Work. In general, suitable work is available work which is reasonably related to a claimant's qualifications. In determining whether a particular job is suitable, the Department shall consider the degree of risk involved to the claimant's health, safety, and morals; the claimant's physical fitness, prior training and experience; the claimant's length of unemployment and prospects of securing local work in his customary occupation; and the distance of the work from the claimant's residence.

These amendments to the rule, if adopted, would be crucial to the ability of individuals affected by it to understand its meaning and effect for purposes of Minn. Stat. § 15.0412, subd. 1, and would not constitute a substantial change under 9 MCAR § 2.111.

46. Part 4.3006 C. Part C. provides that the primary factors involved in "suitable work" determinations are whether the claimant's unemployment is of a temporary or permanent nature and the claimant's prospects of finding work in his usual trade or occupation. The rule, as written, is necessary and reasonable, but the Hearing Examiner agrees with LSAP that the language used could be more precise. While the words "temporary or permanent" should not be replaced with the words "determinant or indeterminant", it is suggested that Part C. be amended as noted at Finding 53

The type of work a claimant is required to seek under § 4.3005 D. must be consistent with the suitable work provisions of § 4.3006 specifying when an individual must accept work outside his usual or customary trade or occupation because a claimant is not required to be available for work which is not suitable. Therefore, the two separate sections must be harmonious and internally consistent. Under the former section, a claimant's verifiable assurances of work are not specifically considered, and indeed, even if they existed, a claimant would not be required to seek work outside his customary trade unless the currently proposed conditions are met. For that reason, the rule should be amended to clarify the inter-relationship between the two as was suggested at Finding 41 or in some other manner.

47. Part C. separates workers according to their "assurances" of work and establishes different criteria for requiring suitable work outside the claimant's usual trade, depending on the nature of the assurance or its existence. It is reasonable to make distinctions on this basis because the classes established have different known job prospects and the nature of their unemployment is different. It is necessary to adopt general criteria for the uniform treatment of claimants.

Under Part C.1., for persons with a "verifiable assurance" of work within six weeks, suitable work is limited to temporary work in the claimant's usual trade or in a "related trade or occupation." Part C.1. is necessary and reasonable because persons within its scope have prospects of work within a reasonable period of time. On the other hand, if the "assurance" is for work in more than six weeks, suitable work under Part C.2. is limited to temporary work for which the claimant is reasonably suited by his training, education, work experience or ability and which is a reasonable departure from his usual occupation. The words "verifiable assurance" are not defined in the rule. Normally, the word "assurance" means:

> The act of assuring; a being assured or a positive or encouraging declaration or a full confidence; undoubting conviction.

Since words in a rule are construed in their usual sense, the words "verifiable assurance" must mean that a claimant has been promised or has accepted employment to commence at a definite date or has a definite date of recall to work, either by employer declaration, custom or contractual agreement. In such a situation, the claimant is "assured" of employment and the assurance can be verified by contacting the employer involved. However, the words could have a slightly different meaning and not require that a definite reemployment date be

known. Consequently, it is recommended that the Department define the term "verifiable assurance" so that there is no confusion in that respect.

48. Under Part C.1., if one has such an assurance to start work within six weeks, he is required only to accept temporary work in his usual trade or in "a related trade or occupation." The quoted words are not defined. In Di Re, supra, the Court indicated that where a claimant has prospects of employment within a reasonable period of time, suitable work is work in his usual trade or "substantially equivalent" work. A "related" trade is not a "substantially equivalent" trade. Since the words "related trade" seem to have a broader meaning than the Department or the Court intended, and since the Court has used the "substantially equivalent" language, it is recommended that the words "related trade" be deleted and replaced with the words "substantially equivalent employment."

Under Part 4.3006 C.2., for claimants with a verifiable assurance of work in more than six weeks, suitable work is any temporary work for which the claimant is suited "by virtue of his education, training, work experience or ability" and work "which is a reasonable departure from his usual occupation." In Di Re, the Court held that a claimant is not required to accept work outside his usual trade unless he has "no prospects" of securing work in his usual trade within a reasonable period of time. While the words "no prospects" as used by the Court do not mean the absence of any chance of obtaining employment, those words are not the same as having a "verifiable assurance" of work. Simply because a claimant has no verifiable assurances of work within six weeks does not mean that he has no prospects of work. The proposed rule does not clarify the relationship between assurances and prospects for persons with verifiable assurances in more than six weeks. As commonly defined, a prospect is based upon mere probabilities drawn from present indications. Thus, in common understanding, a "verifiable assurance" and a "prospect" seem to be as different as particular offers of work are from a general demand for that type of work in a particular locality. Verifiable assurances are much more definite in nature than mere prospects. If a claimant has such prospects, he is not required to seek work outside his customary trade or occupation as the court held in Di Re, and the rule must be so construed.

49. Under Part C.2., the work considered suitable for claimants with a verifiable assurance of employment in more than six weeks is: (1) temporary work, (2) suited to the claimant by virtue of education, training, work experience or ability, and (3) a reasonable departure from his usual occupation. The Department has limited suitable work to temporary work because it believes that it is unreasonable to require a claimant to accept unrelated permanent employment which he would be obliged to quit when his usual work becomes available. This rationale renders the rule necessary and reasonable as a general proposition.

50. Part C.2. partially restates the guidelines in § 268.09, subd. 2(a). The additional factors listed are within the Department's authority to adopt. Minn. Stat. § 268.09, subd. 2(a), lists the factors the Department must consider but does not limit the Commissioner to consideration of only those factors. On the contrary, under his broad rulemaking powers, other factors may be added which are germane to the overall purposes and policies of the Act. The same conclusion applies to the provision permitting the work to be a "reasonable

departure" from a claimant's usual occupation as specified in the last phrase of Part C.2.

51. While the "reasonable departure" language is authorized, the term is ambiguous. The Department's Statement indicates that suitable work under C.2. is broader than under C.1. It appears to the Hearing Examiner that the "reasonable departure" language of Part C.2. is somewhat redundant when considered in connection with the other language used. Since the idea is to maximize the worker's prior training and experience, it is recommended that the words in C.2. which provide "and which is a reasonable departure from his usual occupation" be replaced with the words "and which is in a related trade or occupation."

52. Part C.3. pertains to seasonal workers. It provides that suitable work is (1) temporary work in a Claimant's usual or a "related occupation" which provides "employment approximating their past employment" and other work which meets specified criteria. The requirement that the temporary work offer conditions of work approximating their past employment is confusing. Under § 4.3004 O., a claimant must be available for work offering wages customary in the labor market area. Under C.3., it is unclear whether the conditions of work must be customary or merely approximate. The wages could be customary but not approximate. Moreover, it is not clear why one who has a verifiable assurance of work in more than six weeks must accept work to which he is suited by virtue of his education, training, work experience or ability and which is a reasonable departure from his usual occupation under Part C.2., while seasonably unemployed workers must only accept work in a related occupation which provides conditions of employment approximating their past employment. It is suggested that the differing treatment of these two groups in this regard be eliminated and that the section be amended as suggested, infra. The rule is necessary and reasonable, however, because it requires seasonally unemployed claimants, who generally have no prospects of work in their customary trade, to accept other work.

53. The language proposed by the Department for Part C.1. - 3. is necessary and reasonable. However, based on prior comments, it is suggested that it be amended to read as follows:

> C. General. In determining what is suitable work, the Department shall give primary consideration to the temporary or permanent nature of the claimant's unemployment and whether he has favorable prospects of finding work in his usual or customary occupation within a reasonable period of time. 8 MCAR §§ 4.3007 through 4.3008 shall also be considered in light of the following general guidelines:
>
> 1. For persons who have a verifiable assurance of work within six weeks, suitable work is limited to available, temporary work in their usual trade or substantially equivalent work.
>
> 2. For persons with a verifiable assurance of work in more than six weeks, suitable work includes available, temporary work under C.1. or other temporary work in a related trade or occupation which the claimant is suited for by virtue of his education, training, work experience or ability.
>
> 3. For seasonal workers, suitable work includes temporary work under Part C.2. Other temporary work is suitable if it meets the following conditions:
>
> a. There are available openings in a lower-skilled or paid occupation;

b. The work pays a wage equal to 150% of the claimant's weekly benefit amount.

In determining whether other work is suitable under Part C.3., the Department shall also consider whether there are few, if any, unemployed workers for whom these openings would be more suitable.

These amendments prioritize suitable work requirements, eliminate the need for defining near future and more distant future (p. 9, lines 11-13) and eliminate the necessity in Part C.3.c. for the Department to make an affirmative showing in each case that there are few, if any, unemployed workers for whom these openings would be more suitable. Such a criterion imposes a heavy evidentiary burden on the Department and while this factor should be considered, it may not be a proper requirement in all cases. As amended, Part C. provides that persons with verifiable assurances of work may limit their work search to temporary work in their usual trade or occupation and that for persons who have verifiable assurances of work in more than six weeks, or who are seasonally unemployed, temporary work is work which is suitable by virtue of the claimant's education, training, work experience or ability and which is related to the work of their usual trade or occupation. Of course, these individuals could limit themselves to temporary work in their usual occupation if they had prospects for finding such temporary work and would be required to accept other work if work within the guidelines is unavailable. Further, for seasonal workers, other employment is suitable if it meets the stated criteria. The proposed amendments make it clear that seasonal workers have a greater scope of availability than do persons with verifiable assurances of work in more than six weeks, and attempt to clarify the criteria originally proposed by the Department.

54. Part C.4. pertains to persons who have no verifiable assurances of work. It provides that for such persons, suitable work is permanent work in their usual or related trade or occupation which provides wages and conditions of employment approximating those of their past employment if their prospects of finding work are favorable. This requirement raises three questions. First, an individual who has favorable prospects of finding work in his usual trade is not required under the decision in Di Re to accept work in a "related trade or occupation". Of course, the quoted term may be susceptible to various interpretations, but the Hearing Examiner believes that work in a "related trade" is much broader than the language used by the Court in Di Re with respect to "substantially equivalent" employment and the section should be amended to reflect the Court's decision in that case. Furthermore, under the availability guidelines established by the Department, an individual is required to be available for suitable work providing wages and conditions of employment customary in that trade or occupation in the claimant's labor market area and not wages and conditions approximating those of their past employment. Among the workers in any particular trade, wages may vary a great deal, and while it may be desirable to permit an unemployed worker to attempt to find employment approximating the employment he lost, it does not appear to be the proper criteria in all cases and it is inconsistent with the availability rules adopted by the Department. Consequently, it is suggested that the word "approximate" be deleted and replaced with the words "customary in the claimant's labor market area." Workers already have a "shopping period" to attempt to locate employment approximating the employment they lost under § 4.3003.

not replaced p.10

55. In view of these comments, it is suggested that Part C.4. be amended to read as follows:

> 4. For persons without a verifiable assurance of work, suitable work is permanent work in their usual trade or occupation which provides wages and conditions of employment customary in their labor market area. If the claimant's prospects of obtaining such work within a reasonable period of time are unfavorable, work in a related trade at a lower skill or wage level is suitable if the claimant is suited for the other work by virtue of his education, traning, work experience or ability. If the claimant's prospects of obtaining work in a related trade or occupation are unfavorable, suitable work may be a reasonable departure from such related work. In determining whether other work is suitable under Part C.4., the Department shall also consider whether there are fewer unemployed workers for whom these openings would be more suitable.

similar language p.10

Such an amendment prioritizes suitable work. If work in a usual trade is not available, then work in a related trade becomes suitable. If work in a related trade is not available, work in an unrelated trade becomes suitable. As such, it is consistent with the Department's policy statement in Parts A. and B.

56. Part 4.3007. This Part consists of 17 separate definitions or explanations of terms used in Chapter 268 which pertain to suitable work determinations. There were a number of public comments on these proposed "definitions" but most were of a grammatical or technical nature, and the definitions proposed by the Department are found to be necessary and reasonable, within the Commissioner's discretion and consistent with the statute. However, the more important comments are discussed. The mere fact that a particular comment is not discussed does not mean that the Hearing Examiner disagrees with it, and the Department is urged to consider all comments made to make their "definitions" as clear, uniform and precise as is possible.

57. Part 4.3007 F. This Part defines the words "of which he was advised." It generally provides that the quoted words mean that a claimant was made aware of a job by the Department and offered an opportunity to apply for it. It further provides that the employer's name need not be provided to the claimant unless the claimant accepts the referral and that the job must be described in sufficient detail so that the claimant is aware of the terms and conditions of employment. LSAP and the AFL-CIO both objected to the provision permitting the Department to withhold the identity of the employer until such time as the claimant accepts a job referral. They argued that there was no rational basis for withholding the employer's identity until the claimant utters the magic word "yes" indicating that he will accept a referral. On the other hand, the Department believes that it is generally unreasonable for a claimant to reject employment simply because the identity of the employer is withheld, and that it should keep the employer's identity private unless there is an interested job-seeker to protect that employer from numerous inquiries from individuals attempting to obtain information as to the suitability of the job. While disclosure of the employer's identity may save some time as where a claimant quit employment with that employer for good cause at a prior time, or knows of conditions at the plant which render the job unsuitable to him, revelation of the employer's identity is not required at the time the original position is discussed. If the claimant is interested in the type of employment discussed with him, the employer's name will be revealed and, at that time, if the claimant has objections to seeking employment with that particular employer, they can

be stated. Therefore, it is concluded that disclosure of the identity of the employer at the first mention of the job is not required to make the section necessary and reasonable.

It is noted that the rules nowhere specify that an individual who fails to accept a referral to suitable work may be subject to a disqualification from benefits. While the Department may have communicated that fact to claimants, it is suggested that it consider whether or not the claimant must be specifically advised of the potential disqualification imposed for failure to apply for available, suitable work. That notice could be contained in the rule. The Department should also consider a provision relating to the propriety of a disqualification where the claimant's tentative refusal to apply is treated by Departmental personnel as acceptable.

58. Part 4.3007 D.K. The Department has agreed to amend the definition in Part D. by deleting the words "may consist" and replacing them with the word "consists" and by deleting the words "the job" and replacing them with the words "suitable work." In addition, the Department has agreed to a proposed amendment to § 4.3007 H. to delete the word "strenuous", and to delete the last sentence of Part K., commencing with the last word on line 10 through the last word on line 16. These are necessary and reasonable amendments which do not result in substantial changes for purposes of 9 MCAR § 2.111.

Part 4.3007 M. - N. Part M. pertains to the hours of work which are considered suitable and provides that offers to work on a second, third, rotating or split shift are not unsuitable if workers are generally hired on those shifts. LSAP and AFL-CIO citing Thompson v. Schraiber, 253 Minn. 46, 90 N.W.2d 915 (1958), argue that suitable work in terms of hours must be evaluated in terms of what hours are customary for a particuar trade and not what is customary for a particular employer. They suggested amendments to this Part to cure that alleged defect. The Department rejected the suggested amendments on the ground that in some areas, there are employers who hire all workers to commence employment on the second or third shift, and for individuals who customarily work in these plants, such shifts are suitable, and that to change the definition as suggested would render such work unsuitable if the hours were not customary in the trade or occupation. The Hearing Examiner agrees with the amendment offered by the public since the suggested amendment more clearly states the general rule, while the Department's comments generally relate to an exception to that rule. Both the general rule and the exception can easily be stated in one definition so that the general rule, as well as the exception, is clear. To that end, it is recommended that Part M. be amended to read as follows:

> M. Hours. To determine suitability of work in terms of hours, the arrangements of hours in addition to the total number of hours are to be considered. An offer to work on a second, third, rotating or split shift is suitable work if it is customary in the trade or occupation in the labor market area. However, such shifts are always suitable for individuals who customarily work for employers whose customary shifts are different.

The Department agreed with suggested amendments to Part N., deleting the word "may" and replacing it with the word "shall". This is a necessary and reasonable change and is not substantial for purposes of 9 MCAR § 2.111.

60. Part 4.3007 O. This Part defines the statutory phrase "substantially less favorable" found in Minn. Stat. § 268.09, subd. 2(b)(2). The statute

makes new work offering conditions which are substantially less favorable than those prevailing in the community unsuitable. LSAP objected to the language in this Part stating that work offered which has "differences of no substantial consequence for the worker" will not be considered to be substantially less favorable than the conditions prevailing for similar work. LSAP argued that if the conditions of work are substantially less favorable than those prevailing for similar work in the locality, the work is unsuitable and that any inquiry into its impact on a particular claimant violates the purposes of the Act and exceeds the authority of the Commissioner. The proposed language provides that conditions of work offered are not to be compared to the previous work of the individual, but also further provides that if the work offered has no differences of substantial consequence for the worker, it will not be considered to be substantially less favorable. This language is consistent with § 268.09, subd. 2(b)(2) which mmandates consideration of the individual effects (i.e., substantially less favorable to the individual). The statute clearly does not render work unsuitable where the wage paid is the same wage previously received by the claimant for the same work. If it did, a claimant would not be required to accept reemployment of his prior job upon identical conditions.

61. Part 4.3007 R. This Part defines the meaning of the words "good cause" found in Minn. Stat. § 268.09, subd. 2, which permits a claimant to refuse suitable work for good cause without penalty. It generally provides that good cause is some "necessitous and compelling reason" for refusing a job and that it need not be attributable to the employer. It further provides that good cause reasons are usually personal to the claimant and extraneous to the employment and must be of a temporary or emergency character that does not detach the claimant from the labor market. The Department indicated in its Statement (p. 18) that "employer fault" can constitute good cause under the rule. Thus, where the claimant had previously discontinued employment with the employer because of sexual or racial harassment or other good cause attributable to the employer, the claimant might not be required to accept the work if the conditions persist. In order to clarify that, it is suggested that the rule be amended to read as follows:

> R. Good cause. The claimant has good cause for the refusal to apply for or accept suitable work only when there is some necessitous and compelling reason for refusal. Good cause for refusing a job may, but need not be, attributable to the employer. Good cause reasons for refusal are usually personal to the claimant and extraneous to the employment and are usually of a temporary and emergency nature so as not to detach the claimant from the labor market.

So amended except for deletion of "apply for" p. 15

This amendment makes it clear that good cause may be attributable to the employer and eliminates the requirement that good cause "must" be of a temporary and emergency nature. Good cause attributable to the employer would not be of a temporary and emergency character, and therefore, while good cause usually is of such a nature, it is not required to be so. Such an amendment would also address Representative Clark's concern for women who previously quit work for employers who engaged in sexual harassment. While that is made clear in § 4.3008, the latter provision applies only to offers from base period employers and provides no protection to offers from non-base period employers where the conditions for discontinuing employment remain.

62. Section 4.3008. This Section pertains to offers of reemployment made by base period employers. It is a necessary and reasonable implementation of the provisions of § 268.09, subd. 2, and implicitly recognizes the sexual harassment problems raised by Representative Clark. However, as pointed out by LSAP and the AFL-CIO, the rule does not specifically recognize the Supreme Court's holding in Hendrickson v. Northfield Cleaners, 295 N.W.2d 384 (Minn. 1980) in which the Court held that under certain circumstances, an offer of reemployment would not be suitable due to the claimant's changed circumstances resulting from the claimant's improved skills and qualifications. It is suggested that the Department develop language to deal with the holding in that case.

no change - see FoFO 62

63. Part 4.3010 pertains to the benefit claim procedure claimants must follow. It contains some definitions relating to the terms used. The section as proposed is necessary and reasonable and is adequately supported by the Department's Statement. The Department has agreed to amend § 4.3010 B. to include a statement requiring it to make reasonable efforts to assist claimants in filing for benefits. This is a necessary and reasonable provision and does not constitute a substantial change for purposes of 9 MCAR § 2.111. The rules refer to "continued claims" and require claimants to file such "continued claims" in the manner and at the time and place specified by the Department, but the term is not defined. It is suggested that the continued claims referred to be defined in Part G. and that the date or time when such continued claims must be filed be specified. Thus, new language could be inserted at the beginning of Part G. to read as follows:

added as .3010 J p. 18

defined p. 17

> A continued claim is the claimant's biweekly claim for unemployment benefits he is entitled to receive under his claim. Unless otherwise specified by the Department, continued claims must be filed with the appropriate unemployment office on the _____ day of the week following the two-week period for which benefits are claimed. To establish eligibility for benefits or waiting period credit for a week or weeks of unemployment following a new or reactivated claim, an individual shall file such continued claims with the office responsible for the administration of his unemployment insurance claim in this or in any other state.

Although MRMA questioned the necessity of the Department's granting of waivers to registration and objected to the filing of continued claims by mail, the Department's posthearing response to those comments (p. 11-12) clearly shows that it is essential, when a large number of claimants come to a local unemployment office, that registration by some of those claimants be deferred. This is an administrative necessity in some cases and permitting a delayed filing is necessary and reasonable. Furthermore, due to the large volume of unemployment claims handled by the Department and the long distances some claimants would be otherwise required to drive in order to file their claims, the Department's use of mailed-in claims is necessary and reasonable.

Unemployment Taxation.

64. Part 4.3101. This Section defines the term "wages" for purposes of determining an employer's unemployment tax liability and the claimant's weekly benefit entitlement, if any. Like Minn. Stat. § 268.04, subd. 25, wages are generally defined as remuneration for services. This is a broad definition, but it is consistent with the definition in the statute and is necessary and

reasonable. While Lutheran Social Services objected specifically to the inclusion of termination, severance or dismissal payments within the term "wages" in Part D.3., the Department has traditionally included such payments in wages for purposes of Chapter 268, and such an inclusion is consistent with provisions of the Federal Unemployment Tax Act, the Internal Revenue Code, and the Federal Insurance Contributions Act. Inclusion of such payments within the definition of "wages" is necessary, and since such payments can be linked to services performed by an employee, the Department's determination is reasonable. Lutheran Social Services also objected to the inclusion of accumulated sick leave not otherwise excluded in the definition of wages under Part D.7. The Department has construed the exclusion from wages for payments made to employees under a plan established by the employer to provide for sickness or accident disability not to include lump sum payments which are not attributable to a particular sickness or a disability. Its construction is not unnecessary or unreasonable and the provision is authorized. The statute itself does not exclude all sick pay but only the sick pay specified in 268.04, subd. 25(2), and the wording of the statute, by its very nature, indicates that other forms of sick pay are not excluded. The Department, in administering Chapter 268, must interpret the provisions of that Chapter, and ordinarily, an administrative construction of a statute, unless clearly and palpably erroneous or inconsistent with existing case law, is entitled to a considerable amount of discretion. In this case, it is appropriate to defer to the Department's construction.

65. Part 4.3101 F. The Minnesota Motel Association objected to the Department's method of valuing certain non-cash remuneration received by employees. Under Parts F.1.a., and b., meals and lodging furnished to employees are included within the term "wages". The Association noted that in Rowan Company v. United States, - U.S. -, 101 S.Ct. 2228, - L.Ed.2d - (1981), the United States Supreme Court held that meals and lodging furnished to employees "for the convenience of the employer" are not wages for purposes of Social Security, the Federal Unemployment Tax Act, or the Internal Revenue Act. The Supreme Court found, in that case, that the various federal acts should be construed in a consistent manner for ease of administration and consistency among federal programs and that while wages are income, not all income constitutes wages, the latter being a narrower concept. The Association argues that the definition adopted by the Department should exclude from "wages" the meals and lodging furnished to employees for the convenience of the employer to be consistent with federal enactments. The Department declined to adopt a similar exclusion on the ground that state law does not permit an exclusion of remuneration paid for the "convenience of the employer."

66. In a program letter No. 39-81 issued by the Employment and Training Administration of the United States Department of Labor on September 2, 1981, the impact of the Court's decision in the Rowan case was discussed, and state agencies were instructed to "take appropriate action to assure that State law is consistent with the Federal law so that employers will not lose their tax credits if a State does not include in its definition of wages . . . meals and lodging which are not furnished for the employer's convenience on the employer's premises." As was previously stated, the Department declined to adopt the exclusion on the grounds that deductions for meals and lodging furnished

for the convenience of the employer were not specifically authorized. The Hearing Examiner is not persuaded that the Department may not adopt the language recommended by the Association. The Department is authorized to adopt rules which more clearly define the general definition of wages as "all remuneration for services." Meals and lodging furnished solely for the convenience of the employer could reasonably be defined by the Department as excluding meals and lodging furnished to employees for the convenience of the employer on the grounds that they do not constitute remuneration for services performed. Since the Department is authorized and could reasonably find that meals and lodging furnished for the convenience of the employer do not constitute "remuneration for services", it is strongly recommended that the Department adopt the amended language proposed by the Minnesota Motel Association which would exclude from wages meals and lodging furnished to employees solely for the convenience of the employer.

not adopted see FoF 65

67. Part 4.3101 F. Part F.2. provides that if the Department determines that the fair market value of other non-cash remuneration is different from that determined by the employer and reported to the Department, the Department "may" after affording the employer reasonable opportunity for the submission of relevant information, determine the reasonable cash value of the non-cash remuneration. As was noted earlier, the Attorney General has consistently struck down agency use of the permissive "may" where the Department's actions will result in inconsistent treatment and unfettered discretion. For that reason, the use of the word "may" in Part F.2. is not authorized under Minn. Stat. § 15.0411, subd. 3, and constitutes a substantive violation of law for purposes of Minn. Stat. § 15.0412, subd. 4c. To correct this defect, it must be replaced with the mandatory word "shall." If the Department determines that the fair market value is not as reported by a particular employer, the Department should, in all cases, make its own determination of fair market value and should not do so only with respect to particular employers. Rules must be applied uniformly to all persons regulated.

replaced p. 23

68. Part 4.3101 G. The Minnesota Association of Commerce and Industry (MACI) objected to the valuation of wages where an employee's remuneration is based upon services performed coupled with the furnishing of a vehicle or other equipment. Part G.1.b. provides that in the absence of an agreement between the employer and the employee which allocates the remuneration between services and the furnishing of a vehicle, and if there is no prevailing wage in the area involved, that remuneration received for services rendered shall be considered to be 40% of the total amount paid to the employee. According to the Department, the 40% figure "reflects the average breakdown of labor and equipment rental costs in the circumstances addressed by the rules." MACI's position is that this statement does not constitute a sufficient statement of facts supporting the rule and that it cannot therefore, be considered to be necessary and reasonable. Since the actual value can be determined by agreement or by prevailing wages in the locality, and since the 40% figure is based on the average breakdown of labor and rental equipment costs, it is concluded that the rule, as proposed, is necessary and reasonable, and that the Department's allusion to average labor and equipment costs is a sufficient statement of facts supporting the rule. If interested parties disputed that figure, they had an opportunity to present evidence to the contrary.

For the same reasons as were previously mentioned, however, the word "may" found in Part G.3. (p. 21, line 3) must be replaced with the word "shall." replaced p. 24

69. In its posthearing comments, the Department has proposed several amendments to § 4.3101. These amendments are all technical in nature and are necessary and reasonable to clarify grammar, punctuation or intent and none of the proposed amendments to that Section (found in Attachment F. to the Department's posthearing comments) constitute a substantial change for purposes of 9 MCAR § 2.111.

Employment.

70. Section 4.3102. In this Section, the Department has attempted to define the term "employment" and to distinguish between those persons who are independent contractors and those who are employees for purposes of Chapter 268. The rule occupies some ten pages in length and was subject to a great deal of public comment and concern. Concern was expressed by the Minnesota Association of Commerce and Industry, the Minnesota Retail Merchants Association, and by many trucking companies who feel that the wide scope of the rule will make employees of what have traditionally been independent contractors, thus subjecting the latter to unfair tax liability and the necessity for a great deal of litigation. The commenters generally felt that the Department should not attempt to define the distinction between independent contractors and employees but should rely on existing case law. They argued that the Department's proposed rule is not necessary or reasonable or supported by affirmative facts in the record, and that if the Department did adopt the rule as proposed, special provision should be included therein for the trucking industry. The special provision took the form of various "safe haven" tests which would be applied to the trucking industry. At the hearing, the Department stated that it was not its intention to enlarge the concept of an independent contractor as it currently exists, but merely to codify the existing state of the law.

71. In its argument that Part 4.3102 is unnecessary, MMTA stated as follows (p. 4):

> At the present time the determination of employee versus independent contractor status is made on an individual case basis. Questions that have arisen have been adequately handled under existing law. The supporting documentation provided by the Department presents no compelling argument that the interests of the unemployed worker, the employer, or the State have been frustrated or indequately served by the present process, which has been the rule for many years in Minnesota. The record clearly indicates that UC administrators and triers of disputed cases have not floundered in resolving questions of employment, but rather have always been able to arrive at a decision. Where disputes persist, the established review and appeal processes has worked well - and continues to do so. Neither has there been any evidence that the current system has been outmoded by new circumstances which would necessitate the adoption of the dramatic rule changes proposed.

MACI makes similar arguments, stating that before rules can be considered to be necessary, an agency must demonstrate the existence of a problem requiring administrative attention, and that if no problem exists, there is no "need" for a rule.

These arguments are not without merit but are not determinative of the need for the rules proposed by the Department. The need for a rule does

not necessarily depend upon the existence of a problem in the usual sense of that word. The Hearing Examiner must take administrative notice of the provisions of Minn. Stat. § 15.041 et seq., the so-called Administrative Procedure Act which governs agency rulemaking. Section 15.0412, subd. 3, requires state agencies to adopt rules setting forth the requirements of all procedures related to agency duties to the extent that those procedures directly affect the rights of the public. This provision alone supports the need for most of the rules proposed by the Department. In addition, the Department is required to adopt as rules, all of its pronouncements of general applicability and future effect pursuant to § 15.0411, subd. 3. Under that statute, current Departmental guidelines, whether in the form of handbooks, memorandums, or other written statements, constitute rules which must be formally adopted. Thus, under the Administrative Procedure Act, it is clear that agency discretion is intended to be exercised in accordance with established rules and that formal rulemaking is the preferred course of action in establishing agency policy. Without such rulemaking, the agency would presumably have no written guidelines establishing public rights, limiting discretion, or promoting uniformity in the areas covered by the rules. While guidelines, or rules, may not be necessary in a particular case, the Hearing Examiner is persuaded that to demonstrate the need for rules like those proposed by the Department is extensive factual support is not generally required. The administration of an unemployment system, like income taxes or welfare programs, requires rules. Such rules are unlike rules pertaining to pollution control. In the latter case, it must be determined whether a particular chemical causes an adverse environmental impact requiring state regulation. In the unemployment insurance program, similar factual findings do not present themselves and "need" in terms of such facts are not required. The Department's Statement and evidence presented at the hearing show that there is a need for a consolidation of current policy in one, available set of rules which clarify ambiguities under the law and establish criteria for the uniform application of the unemployment insurance program. For these reasons, it is concluded that a need exists for the adoption of § 4.3102.

72. The same parties who questioned the need for the rule also questioned its reasonableness, arguing, among other things, that the rules are too complicated, fail to prioritize or weight the criteria to be examined to determine the employment status, if any, of a particular person and are so broad and encompassing that no independent contractor relationship could ever be found. Comments from trucking companies expressed a considerable degree of concern that the rules would, in fact, change the existing status of independent contractors in that industry.

Section 15.0412, subd. 4c, requires agencies to demonstrate need and reasonableness with an affirmative presentation of facts. As was intimated above, the facts involved in rulemaking proceedings are not all of the same kind. Facts may be "legislative" in nature and represent policy choices among alternatives, or they may be "judicial" in nature and involve such questions as whether acid rain is caused by utilities, whether motor vehicle exhaust contains lead, or whether particular standards or criteria accurately reflect existing law. The facts necessary to demonstrate the reasonableness of § 4.3102 primarily involve facts which demonstrate that the criteria adopted

by the Department for determining an employee or independent contractor relationship reflect existing law. Under 9 MCAR § 2.104, each agency statement of need and reasonableness should contain citations to any statutes or case law to be relied upon by the agency proposing rules. In this case, the Department's Statement, while generally alleging that its rules reflect the current status of the law, does not contain any specific references to existing case law or statutes supporting the adoption of the provisions proposed. However, its posthearing comments, as well as the comments submitted by the public, do cite current law. In addition, the law applicable to the independent contractor issue is both readily available and well developed. Therefore, it is concluded that more specific citations to that body of law, while preferable, is not essential here and that sufficient affirmative facts were presented demonstrating the general reasonableness of the proposed rules. Notice must be taken of the general state of the law in cases of this nature.

Professor Davis has discussed the facts necessary to establish support for a rule as follows:

> "Of course, the plain reality is and always has been that some rules rest heavily on a factual foundation, some have so little to do with facts that neither a rulemaker or a challenger of rules is conscious of any factual ingredient, and many other rules are between the two extremes. . . . Generally, a rule must be supported with facts when an issue of fact has arisen in a rulemaking proceeding that needs to be resolved in order to determine the content of the rule and when the rule would be unreasonable unless it is supported with facts. . . . The problem area about required facts in support of rules is the area where facts and policy thinking are mixed together in such a way that the factual ingredient of the rules is hard to identify. At one end, rules may be based on a law, on interpretation of a statute, and on policy preferences, and hardly at all on identifiable facts; such rules may clearly be valid without factual support. Tax regulations often call for no factual inquiry beyond common knowledge; . . . . At the opposite end of the scale, a rule may be obviously unreasonable unless the factual support for it is adequate; for instance, the Consumer Product Safety Commission may not ban a consumer product unless it supports the ban with facts showing that the product presents an unreasonable risk of injury." 1 Davis, Administrative Law Treatise, (2d ed.) § 6.13, p. 507-8, 510.

Under Chapter 15, a rule must have factual support, but, as Davis concludes, the nature and extent of the facts necessary will vary from case to case. In this case, the factual support presented was adequate.

73. Sween and Salazar, Ltd., attorneys at law, argued that the Department failed to present affirmative facts establishing a need for the proposed rule at the hearing and further argued that the Department should be required to make a written statement identifying the need and the facts supporting those needs and be required to serve that statement on all persons because it is fundamentally unfair to require an opponent to present its arguments unless and until the proponent agency has made an affirmative presentation. In that regard, it should be pointed out that the Department did prepare a Statement of Need and Reasonableness which was filed with the Office of Administrative Hearings more than 25 days prior to hearing as required in 9 MCAR § 2.104. Pursuant to that same rule, that Statement of Need and Reasonableness contained the verbatim affirmative presentation of the Agency and was introduced as an exhibit into the record as though read. The Agency did, in compliance with existing rules, make its initial affirmative presentation, and parties were then

given an opportunity to respond to that written presentation. Procedurally, therefore, the manner in which the Department's presentation was made was in full compliance with existing rules.

74. Part 4.3102 A.1. This Part of the rule defines the word "control" as the "power to instruct, direct or regulate the activities of an individual whether or not the power is exercised." It is necessary to define this term because an essential characteristic of the master and servant relation is the retention by the former of the right to direct and control the manner in which work shall be performed. 56 C.J.S., Master and Servant, § 2d. Dart Transit Company (hereinafter "Dart"), as well as Sween & Salazar, objected to the proposed definition, stating that control is not the "power" to instruct or direct, but rather the "right" to instruct or direct. Since the purpose of the rules is ostensibly to adopt existing law in the area of independent contractor and master and servant, the rules should use language commonly used by the courts. In Guhlke v. Roberts Truck Lines, 268 Minn. 141, 128 N.W.2d 324 (1964), the Minnesota Court held that a factor to be used in determining whether an employer-employee relationship existed is whether the relationship under scrutiny involved the employer's "right to control the means and manner of performance" of the work involved. The language used by the Court in that case, regarding a "right" to control performance is not inconsistent with the Department's definition of the word "control". The word "control" normally means the power to govern, dominate, direct or supervise the conduct of another. See 18 C.J.S., Control, p. 28; Webster's New Collegiate Dictionary, p. 247 (1975). The Department's adoption of the ordinary meaning of the word "control" is concluded to be appropriate in all respects. The fact that the power need not be exercised is consistent with the Court's holding in Burman v. Zahler, 286 Minn. 400, 178 N.W.2d 234 (1970).

75. Part 4.3102 A.3. The public also challenged the Department's proposed definition of the term "employment" set forth in this Part. Employment has been defined as having the same meaning given to it in Minn. Stat. § 268.04, subd. 12, and as including the services of any individual performed under "the direction, rule or control of an employing unit as to both the method of performing or executing the services and the result to be effected or accomplished."

Under Minn. Stat. § 268.04, subd. 12, employment is defined to mean service performed by an individual "who is a servant under the law of master and servant or who performs services for any employing unit, unless such services are performed by an independent contractor." An employing unit is defined in Minn. Stat. § 268.04, subd. 9, as any individual or type of organization having had someone "in its employ." or "performing services for it." The Department's proposed definition picks up on the statutory terminology, and the general characteristics of the master-servant relationship. 56 C.J.S., Master and Servant, § 2d. provides as follows:

> The essential characteristic of the master and servant relation is the retention by the employer of the right to direct and control the manner in which the work shall be performed, the right to determine not merely the result but the methods and means by which such result is to be accomplished.

For these reasons, it is concluded that the proposed definition of employment is proper in all respects.

76. Part 4.3102 B. This Part contains the procedures which the Department will follow to determine if control exists. It provides that the Department "may" make a determination regarding control by interviewing witnesses, obtaining statements, examining applicable laws and reviewing existing contracts and by "other appropriate means." As was previously stated, the use of the word "may" is not favored in Agency rules, and in its present form, the rule constitutes a substantive violation of law. To correct this defect, the word "may" must be replaced in this Part with the mandatory word "shall." In addition, the last clause should be made more specific because the words "any other appropriate means" are exceedingly vague. It is suggested that those words be replaced with the words "make any other investigation necessary to determine if the elements of control specified in § 4.3102 C. exist." With these amendments, the Department is required to review obvious sources of information and, if those sources are insufficient to make an informed determination, make such further investigation as is necessary to determine the nature and extent of control involved.

77. Part 4.3102 C. This Part contains twelve criteria to be considered by the Department in determining whether the control involved in any particular relationship evinces the existence of an employer-employee relationship. The criteria are not weighted and are not listed in any prioritized order.

Part C.1. provides that the hiring, supervising and payment of an individual's assistants by the employment unit is evidence of control. Dart objected to this criterion because, in the trucking industry, carriers are required to exercise authority over drivers who might be hired by their independent contractors (or owner-operators). The scope of the exercise of this authority, which derives from shipper requirements or state or federal laws or regulations, is the same for the owner-operator as for the owner-operator's employees. Dart believes that, in these cases, the exercise of authority should not indicate control.

The source and authority for the criterion in this rule was not specified by the Department which merely alleged that it, along with the other criteria specified in this Part, constitutes a major factor to be reasonably considered in determining the existence of an employment relationship (Statement, p. 30). In 56 C.J.S., Master and Servant, § 2d, p. 37, it is noted that a "mere authority to direct the course of a third person's servant is not inconsistent with his remaining the servant of such third person." In § 3(1) of the same encyclopedia, however, the same criteria are stated to be proper factors for consideration of an employment relationship. Thus, in Larson v. La Mere, 220 Minn. 25, 18 N.W.2d 696 (1945), the Court held that one who is hired and paid by an employee to help in performing the employer's work with the employer's consent and subject to the employer's control as to details of the work would be considered to be an employee of the employer. In view of these cases, it is concluded that the criterion is proper but should be made more specific by providing that the supervision mentioned include only supervision of the details of the assistants work. For example, this Part could be amended to read as follows:

> 1. Authority over individual's assistants. Control over the individual is indicated when the employing unit hires and pays the individual's assistants and supervises the details of the assistants' work.

78. Part 4.3102 C.2. This Part provides that control "exists" when an individual is required to comply with instructions about when, where and how he is to work. Both Dart and MRMA objected to this criterion as overly broad. Dart pointed out that in the trucking industry, shippers frequently instruct owner-operators (independent contractors) when a load is to be picked up or delivered, where it is to be taken or delivered, and what type of equipment should be used. MRMA pointed out that if a retailer hires an independent contractor to lay a carpet, it will frequently specify the date when the carpet should be laid, where the carpet should be laid, and what special instructions are applicable. Both parties argued that these types of instructions do not evince an employment relationship.

As was cited above, the essential characteristic of the master and servant relation is the retention by the employer of the right to direct and control the manner in which the work shall be performed, the right to determine not merely the result, but the methods and means by which such result is to be accomplished. 56 C.J.S., Master and Servant, id. However, it is equally true that in order to constitute a weighty, if not conclusive factor in determining whether the relationship between the parties is that of master and servant, the control must be complete or unqualified and reaching to the details of how the work is performed and must be distinguished from mere suggestion as to detail or necessary cooperation where the work furnished is part of a larger undertaking. Id., p. 36-37.

In order to bring the rule into closer harmony with the extent of control that must be exercisable by the master, it is suggested that the first sentence of Part C.2. be amended to read as follows:

> Control is indicated when an individual is required to comply with detailed instructions about when, where and how he is to work. Mere suggestion as to detail or necessary and usual cooperation where the work furnished is part of a larger undertaking, does not normally evince control. Some individuals may work without receiving instructions because they are highly proficient in their line of work; nevertheless, the control factor is present if the employing unit has the right to instruct or direct the methods for doing the work and the results achieved. Instruction may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished. However, instructions required by state or federal law or regulation or passed on by the employing unit from some third party, do not evince control.

So amended p. 27, 28

If this amendment is adopted, the Part incorporates existing case law, eliminates the troublesome word "exists" which seems to make this criterion determinative when it is intended to be merely indicative, and makes provision for instructions which do not originate from the employing unit, but from some third source, such as federal or state agencies or, in the case of trucking companies, from the shipper, himself.

79. Part 4.3102 C.3. This Part provides that control is indicated if regular oral and written reports relating to the method in which the services are performed must be submitted to the employing unit. Both MMTA and Dart pointed out that government regulations require independent truckers to submit reports to the carriers who contract with them and that other reports are necessary to enable the carrier to determine whether the trucker is complying with the terms of his contract. It is suggested that the rule be clarified to address these problems. For example, the second sentence could be amended by

adding to the end thereof the following words: "Or the reports are needed to determine compliance with the terms of a contract." And the last sentence of that Part could be amended by adding, after the word "activity", the words "or required by law".

added p.28

80. Part 4.3102 C.4. This Part basically provides that the performance of work on the employing unit's premises indicates control, especially when the work could be done elsewhere. The place where work is performed has been held to be an indication of the existence of a master and servant relationship but not a determining factor. See, 56 C.J.S., Master and Servant, § 2f. Dart objected to this provision on the assumption that while working off the premises indicates freedom from control, that indication would not apply where off-premises work is an industry-wide practice. Dart felt this was unfairly discriminatory in those industries that do have common practices. The Hearing Examiner is not persuaded that the rule, as written, is discriminatory or that off-premises work will not indicate a lack of control if such off-premises work is an industry-wide practice. The rule provides that services that are "necessarily performed" away from the employing unit's premises, may not indicate a lack of control. An industry practice is not equivalent to that which is "necessarily" performed away from those premises.

81. Part 4.3102 C.5. This Part provides that if the services involved must be personally rendered, control is indicated, and that the lack of control is indicated when a substitute can be retained to do the work without the employing unit's knowledge or consent. MRMA suggested some grammatical changes to this Part which the Hearing Examiner endorses. Based on its suggestions, and for purposes of clarity, it is suggested that this Part be amended to read as follows:

> 5. Personal performance. Control is indicated if the services must be personally rendered to the employing unit. Personal performance of very specialized work, when the worker is hired on the basis of professional reputation, as in the case of a consultant known in academic and professional circles to be an authority in the field, is a less reliable indicator of control. Lack of control is indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

so amended p.28,29

Dart pointed out again that carriers must know and consent to the hiring of substitute drivers under Federal regulations requiring them to determine that the substitute is qualified. While Dart suggested no language to correct this problem, the Department is urged to consider Dart's comments in the formulation of its final version of its rules.

82. Part 4.3102 C.6. This Part provides that where a person must perform services in the order or sequence set by the employing unit, control is indicated. The section is not unnecessary nor unreasonable but appears to be too broad and somewhat redundant when considered in connection with Part C.2. (which pertains to compliance with instructions about when, where and how an individual is to perform work). It is also redundant because it provides that an employee who retains the right to exercise the establishment of the work sequence has control even if the right is not exercised. This duplicates the provisions of Part A.1. which define the word "control". For the sake of simplicity and the avoidance of duplication, it is suggested that this Part be deleted and if the Department determines that some allusion to work sequence is necessary, that that language be made a part of Part C.2.

deleted p.29

Instead of the current Part C.6., pertaining to the establishment of work sequences, the Department could include in its place reference to the existence of a continuity of service. As stated in 56 C.J.S., § 2f., as a general rule, some continuity of service is essential to the existence of a master and servant relation.

included p.29

83. Part 4.3102 C.7. This Part provides that the right to discharge is an important factor indicating the existence of the right to control, particularly if the individual may be terminated with little notice, without cause or for failure to follow specified rules or methods. This criteria is consistent with the usual rule that the right of control, including the right to hire and discharge, is an essential, if not the most significant factor in determining an employment relationship. See, e.g., Urban v. Continental Convention & Show Management, 244 Minn. 44, 68 N.W.2d 633 (1955). Dart objects to that part of the rule which provides that independent workers cannot generally be terminated if they produce an end result which measures up to their contract specifications. Dart alleged that carriers must exercise some control over independent truckers under Federal regulations specifying minimum age limits, health standards, and similar regulations. Again, Dart failed to recommend any specific corrective language to deal with this problem and it is suggested that the Department consider its objections to this Part. Of course, in drafting general guidelines to be applicable to all industries, the Department's rules cannot be tailor-made for any particular industry and cannot be structured to resolve all situations which might arise or all doubt and confusion which might exist. It is also true that the criteria adopted by the Department which indicate an employment relationship will sometimes apply to independent contractors, and the mere fact that one of the indicators is applicable does not render the criteria unreasonable. Thus, Parts C.8. and 9., relating to specified hours of work and training provided by the employing unit which must be attended, are necessary and reasonable, even if those criteria would apply to persons who are normally considered to be independent contractors. Since the trucking industry is repeatedly concerned with indicia of control, manifested by a carrier's implementation or compliance with Federal and State laws and regulations, the Department should consider adding a new part C.13 to Part 4.3102 which would provide that control authorized or exercised by an employing unit shall be disregarded where that control is required by law or regulation.

84. The other indicia of an employee-employer relationship specified in Part 4.3102 C. are all necessary and reasonable factors. Although the trucking industry expressed some concerns with the remaining provisions, they were similar to the concerns expressed with the other provisions and the Hearing Examiner believes that the amendments previously suggested to the rules should cure some of their objections. Nonetheless, it is necessary to consider the "safe harbor" provisions recommended by many individuals in the trucking industry. Their "safe harbor" proposal consists of a special provision applicable to the trucking industry. It provides as follows:

> Employment, special exclusion.
> In the trucking industry, an owner-operator of a truck is an independent contractor, not an employee, if the following factors are substantially present:
>
> (a) The individual owns the equipment or holds it under a bona fide lease arrangement;

(b) The individual is responsible for the maintenance of the equipment;

(c) The individual bears the principal burdens of the operating costs, including fuel, repairs, supplies, vehicular insurance, and personal expenses while on the road;

(d) The individual is responsible for supplying the necessary personal services to operate the equipment;

(e) The individual's compensation is based on factors related to the work performed and not on the basis of the hours or time expended.

(f) The individual generally determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the carrier, and specifications of the shipper.

(g) The individual enters into a contract that specifies the relationship to be that of an independent contractor and not that of an employee.

This proposal was, with the exception of the last clause, recommended by nearly every trucking company that commented on the rules. However, MTSA suggested an alternative safe haven proposal similar to that adopted in Section 530 of the Revenue Act of 1978, (P. L. 95-600, which prohibits the adoption of Federal regulations on employment status until July 1, 1982 to Congress an opportunity to develop a uniform definition of an independent contractor. Under the Federal scheme, if there is a reasonable basis for not treating an individual as an employee, the individual will not be so treated. A reasonable basis exists when a taxpayer has reasonably relied on judicial precedent or published ruling or other advice issued by the IRS; when a taxpayer has reasonably relied on past IRS audits involving employer taxes, when there were no assessments attributable to the taxpayer's treatment of employees holding positions substantially similar to the position of the individual in question; when the taxpayer has a reasonable basis for treating a particular employee as an independent contractor because such treatment is consistent with long-standing, recognized practices of a significant segment of the industry in which the individual in question is engaged; or finally, when the taxpayer has some other reasonable basis for treating a particular individual as an independent contractor.

The first safe haven proposal cited is preferable. It concentrates on a unique industry which has traditionally utilized a large number of independent contractors and in which the distinction between employees and independent contractors has been well defined. It is not only the most popular proposal, but is more responsive to the manifestations of control appearing in the trucking industry due to its heavy regulation by state and federal authorities. MTSA's proposal, on the other hand, clearly reflects Congress's desire to maintain the status quo, irrespective of traditional tests for determining the status of a particular worker. In view of the broad nature of the rules proposed by the Department and the unique types of control manifested in the trucking industry as a result of regulation by governmental authorities, it is recommended that the Department adopt the safe haven test initially cited and incorporate its terms with any necessary and reasonable modifications deemed appropriate, into the final version of the Department's rules.

adopted 39,40 P.

86. Part 4.3102 D. In addition to specifying criteria indicating the presence or absence of an employment relationship, the Department has specified

now "E"

additional criteria indicating the presence or absence of an independent contractor relationship. Seven such criteria are contained in Part D. The criteria in the rule pertain to the availability of the individual's services to the general public, the manner in which the individual's compensation is paid, the individual's realization of a profit or loss, the individual's ability to terminate his relationship with the employing unit at any time, the nature and scope of the investment in facilities, the existence of more than one contract with several employing units, and the individual's accountability for his own actions.

87. Generally, an independent contractor is one who exercising an independent employment, contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of his work. 56 C.J.S., Master and Servant, § 3(1). The tests for determining when an independent contractor relationship exists are many. Among the factors generally considered are whether the contractor is carrying on an independent business; whether the work is part of the employer's general business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of the work to another; the power to terminate the relationship; the existence of a contract for the performance of a specified piece of work; the control and supervision of the work; the employer's powers and duties with respect to the hiring, firing and payment of the contractor's servants; the control of the premises; the duty to supply the premises, tools, appliances, materials and labor; and the mode, manner and terms of payment. Id., § 3(2). The criteria adopted by the Department in Part D., combined with those specified in Part C., are substantially equivalent to the criteria normally used to determine whether a particular relationship is that of employer-employee or an independent contractor. Consequently, it is concluded that the criteria specified in Part D. are necessary and reasonable. Those criteria were not subject to any significant adverse public comment.

88. Part 4.3102 E. This Part pertains to services in the course of the employing unit's organization, trade or business. When such services are a part or process of the employing unit's organization, the individual performing such services is stated to be "in employment and does not have independent status." Dart Transit argued that this rule is without foundation, stating as follows, p. 7:

> There are many types of businesses who may employ independent contractors to sell, transport, consult, manufacture or otherwise participate in the business process. For example, the manufacturer of engines may contract with another manufacturer to supply one of the component parts of that engine. The producer of goods may contract with the manufacturer's representative to sell those goods. In today's business practice, the number of businesses who use any independent contractors is substantial. It is, therefore, not realistic to limit the status of independent contractor as Paragraph E of the proposed rules attempts to do.

The Department's Statement (p. 32) describing this Part, states as follows:

> This additional criterion is provided in recognition of the fact that work performed in the course of the employer's business will normally be performed by employees, since that is the purpose of engaging employees, while work done outside the course of that business is likelier to be performed by an independent contractor. The paragraph defines "in the course of" and related terms and provides examples in order to assist in these determinations.

The Department's Statement does not justify the language used in the rule making the criteria specified in it determinative of the existence of an employer-employee relationship. No law was cited supporting the Department's attempt to make this criterion determinative on the issue of employment, and the Hearing Examiner could find no support for such an approach. Under existing law, no single criterion is determinative on that issue; rather, the courts have uniformly held that all factors must be considered. Furthermore, when the various criteria to be examined are priotized by the courts, the courts have uniformly held that the most sigificant factor and the chief or controlling consideration, is the employing unit's right to control the mode of doing the work performed by the individual involved. See, 56 C.J.S., Master and Servant, §§ 2d and 3(3). Thus, the Minnesota Supreme Court has held that the right to control, including the right to hire and discharge, is an essential, if not the most significant factor in determining an employment relationship. Rosvold v. Independent Consolidated School Dist. No. 102, 251 Minn. 297, 87 N.W.2d 646 (1958), and Urban v. Continental Convention & Show Management, 244 Minn. 44, 68 N.W.2d 633 (1955). Whether or not the Department intended this criteria to be determinative, as the rule reads, it is inconsistent with existing case law. This inconsistency constitutes a substantive violation of the law for purposes of Minn. Stat. § 15.0412, subd. 4c, and the Part in its present form may not be adopted. Since services in the course of the employing unit's business are a factor that can be legitimately considered, however, the criteria Part E., modified so as not to be controlling, could be made part of the general criteria specified in Part D. and redesignated as Part D.8. The only other way to correct this defect is to eliminate Part E.

rewritten, redesignated p. 32

89. Part 4.3102 F. This Part provides that when evaluating the criteria specified in Parts C. and D., the weight to be given to any particular factor is not constant, and other unspecified factors may be considered in a particular case. Several individuals felt that this Part renders § 4.3104 meaningless and unnecessary. It was their belief that if factors are not weighted or prioritized, or if additional unspecified factors can be considered in any particular case, that the general criteria specified in the rule are unnecessary, uninformative and unreliable. There is merit to these arguments. As was stated above, courts have given more weight to some criteria than to others and have paid particular attention to the employer's right to control the details of the manner in which the particular individual performs the services involved in a particular relationship, and the employer's right to discharge. In addition, as noted in the comments from Sween & Salazar, the Courts have concentrated on five essential criteria which are as follows:

1. The right to control the means and manner of performance;

2. The mode of payment;

3. The furnishing of materials or tools;

4. The control of the premises where the work is done; and

5. The right of the employer to discharge.

However, the Court has noted that consideration of other criteria is not inappropriate in a particular case. The United States Supreme Court, in United States v. Silk and Harrison and Gray Van Lines, Inc., 331 U.S. 704, 91 L.Ed.

1757 (1947), also noted that no one criteria is controlling, but in determining whether an independent owner-operator was an employee, the Court said that the agency involved in that case should consider the degrees of control, the individuals' opportunities for profit or loss, the investment in facilities, the permanency of the relation existing between the parties, and the skill required of the individual.

Since the Minnesota Supreme Court has concentrated on five specific criteria, and since the Courts uniformly looked to control and the right to discharge as the essential, if not the most significant factor in determining an employment relationship, the Hearing Examiner believes that the rules should, in some manner, reflect t hat fact. It is suggested that the right to control the means and manner of performance, and the right of the employer to discharge the employee, be specifically stated to be the primary criteria and that the mode of payment, the furnishing of materials or tools, and the control of the premises where the work is performed be specifically noted to be of nearly equal importance, and that the other criteria contained in the rule be specifically stated to be of lesser importance in a typical case. The Department's approach, which concentrates quite heavily on the existence of the right to control in Part C., is not unreasonable but the importance of the right to control could be stated in clearer terms.

In any given case, it is recognized that other factors may have to be considered. However, the rule should more clearly specify when those other factors will be considered. To do that, Part F. should be amended to provide that unspecified factors will only be considered when a consideration of those factors specified is inconclusive and a consideration of other factors is essential to make a determination of the status of a particular individual. amended p 33

90. In its Statement, the Department noted that if a particular employing unit was unsure of the status of an individual performing services for it, that employing unit could, at any time, request that the Department make a determination on that individual's status under § 4.3102 E. In an area fraught with uncertainty, such a procedure is commendable and could save the employer from having to pay back taxes on a particular individual's wages. However, the existence of that procedure should be made a part of Part 4.3102 so that employers have notice that such prior determinations are available from the Department. Therefore, it is suggested that in its final version of the rules proposed, the Department add a new part to Section 4.3104 providing that employers may request a written determination on the status of any particular individual. That determination should be issued by the Department within a specified period of time and should then be appealable in the same manner that other Departmental determinations may be appealed. added as 3102 B p 26

91. The remainder of Part 4.3102, consisting of Parts G. - O., covers particular types of employment relationships subject to special statutory provisions, including agent-drivers and salespersons, casual labor, localized and multi-state employment, employment covered by Federal law, and some partially exempt employment. These provisions were subject to no substantial public comment and are found to be necessary and reasonable as proposed.

With respect to Parts H. and J., which reference certain Federal laws and their impact on determinations of an employment relationship, the Department is advised to consider the Court's holding in Wallace v. Commissioner of

Taxation, 289 Minn. 220, 184 N.W.2d 588 (1971). In that case, the Court held that changes in Federal laws may not alter the force and effect of the provisions of a prior state law governing the same subject because the Legislature may not delegate its powers to any outside agency, including the United States Congress. Therefore, where state laws adopt Federal law by reference, the adoption is to the Federal law in existence at the time the state statute was enacted, and that the state statute does not enact future modifications to the federal law. Such modifications in state law must be specifically enacted in this state.

92. Section 4.3103. This Section of the rule further defines and clarifies terms used in Minn. Stat. § 268.04, subd. 12(15)(a), pertaining to agricultural labor. Like the provisions of § 4.3104 pertaining to domestic service, the rules were subject to virtually no adverse public comment and are found to be necessary and reasonable in their entirety.

93. Part 4.3105. This section pertains to employer records, reports and unemployment tax payments. It implements various provisions of Chapter 268 and, except as is noted here, was subject to no significant adverse public comment and is found to be necessary and reasonable as proposed.

MMTA objected to Part B. which provides that the Department shall be notified within 30 days of "the start, change, transfer, sale, acquisition or termination of a business, in whole or in part." MMTA argued that this provision was unreasonably broad and burdensome. The Hearing Examiner agrees that it is unreasonable to require a report when there is any change in a business or any partial transfer, sale, acquisition or termination of that business. This constitutes a violation of Minn. Stat. § 15.0412, subd. 4c. To correct this defect, Part B.1. must be rewritten to clarify who is to file the requisite reports and what changes, transfers, sales, acquisitions or terminations are to be reported. Under the current rule, the identity of the entity or individual who is to make the report is not specified and the rule is unnecessarily broad. Clearly, the Department is not interested in every "change" in a business or any partial transfer, sale or acquisition of a business since the latter would apparently cover the sale of a used vehicle or the acquisition of new office supplies. If the Department is attempting to determine when a new business is created, or an old business is terminated, the Rule should provide in more specific language. If the sale or acquisition of a distinct severable portion of a business or substantially all of another employing unit is intended to be covered, then language to that effect should be specifically set out.

94. Other provisions of the Rule which were not specifically discussed in this Report were not the subject of substantial adverse public comment and the remainder of the Rules proposed by the Department are found to be necessary and reasonable. The posthearing amendments proposed to the Rule by the Department were all technical in nature and merely clarified the meaning and intent of the Rules, as originally proposed. None of those amendments involve substantial changes for purposes of 9 MCAR § 2.111, and all the amendments are necessary and reasonable.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) and all other procedural requirements of law or rule.

3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 15.0412, subd. 4e and 15.052, subd. 3(4)(i) and (ii) (1980), except as noted at Findings 16, 24, 67, 68, 76 and 88.

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. § 15.0412, subd. 4c (1980), except as noted at Findings 18, 28 and 93.

5. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 15.0412, subd. 4d (1980) and 9 MCAR §§ 2.110 A. and 2.111 (1980 Ed.).

6. That the Revisor of Statutes has approved the form of the rules proposed.

7. That the Hearing Examiner has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 16, 24, 67, 68, 76 and 88.

8. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Stat. § 15.0412, subd. 4d (1980).

9. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

10. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 8th day of January, 1982.

JON L. LUNDE
Hearing Examiner

ECSEC-82-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF ECONOMIC SECURITY

In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to The Payment of Benefits and the Collection of Employer Taxes (8 MCAR § 4.3001-4.3999)

REPORT OF THE CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980) which provides in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of section 15.0412, subdivisions 4 through 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change or of failure to comply with Minn. Stat. § 15.0412, subd. 4-4f (1980) or of failure to establish need for and reasonableness of the proposed rule.

In order to correct the defects enumerated by the Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Examiner a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defect in regard to substantial change and the requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) have been corrected.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated this 17th day of January, 1982.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

ECSEC-82-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF ECONOMIC SECURITY

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES GOVERNING THE UNEMPLOYMENT INSURANCE PROGRAM RELATING TO THE PAYMENT OF BENEFITS AND THE COLLECTION OF EMPLOYER TAXES (8 MCAR §§ 4.3001-4.3999).

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, hearings were held on October 30 and November 2, 1981, before Jon L. Lunde, a Hearing Examiner of the State Office of Administrative Hearings, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Economic Security and;

WHEREAS, the Department of Economic Security has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4-4f; and

WHEREAS, the Department of Economic Security has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. §§ 15.0412, subds. 4d and 4e, and 15.052, subd. 4, and 9 MCAR § 2.111; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Economic Security has cured the defects in the rules as previously found by the Hearing Examiner and the Chief Hearing Examiner except that Rule 8 MCAR § 4.3105 B.1. remains in violation of a substantive provision of law as detailed more fully in Finding 93 of the Hearing Examiner's Report. In order to cure this defect, the Department of Economic Security must amend the Revisor's April 28, 1982, draft of the Adopted Rules as follows:

Page 48, line 22, after "transaction" insert: "results in the creation of a new or different employing unit or". inserted p. 48

NOW, THEREFORE, upon receipt of this Order, the Department of Economic Security shall not adopt the rules unless § 4.3105 B.1. is either withdrawn or amended as discussed herein and the rules have been submitted to the Chief Hearing Examiner for review pursuant to the provisions of Minn. Stat. § 15.0412, subd. d.

Dated: May 5th, 1982.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

ECSEC-82-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF ECONOMIC SECURITY

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES GOVERNING THE UNEMPLOYMENT INSURANCE PROGRAM RELATING TO THE PAYMENT OF BENEFITS AND THE COLLECTION OF EMPLOYER TAXES (8 MCAR §§ 4.3001-4.3999).

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, hearings were held on October 30 and November 2, 1981, before Jon L. Lunde, a Hearing Examiner of the State Office of Administrative Hearings, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Economic Security and;

WHEREAS, the Department of Economic Security has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4-4f; and

WHEREAS, the Department of Economic Security has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. §§ 15.0412, subd. 4e and 15.052, subd. 4, and 9 MCAR § 2.111; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Economic Security has cured the defects in the rules as required.

NOW, THEREFORE, upon receipt of this Order, the Department of Economic Security has the responsibility of submitting the complete hearing record and the rules as adopted by the Department of Economic Security to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4e and 4f.

Dated: May 5th, 1982.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

MEMORANDUM

In addition to the rule discussed in the body of this Order, two other items were found which should be addressed.

In Rule 8 MCAR § 4.3006 C., the Department has adopted the Examiner's recommendation but has deleted a phrase. Therefore, it should be amended at page 9, line 8, of the Revisor's April 28, 1982, draft as follows: after "claimant's" insert "health, safety, and morals; the claimant's".

In Rule 8 MCAR § 4.3007 M. (page 14, lines 15-19 of the Revisor's April 28, 1982, draft), the changes ordered by the Commissioner in his discussion of the Examiner's Finding 59 have not been made in the adopted rules.

DRH

ECSEC-82-003-JL

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC SECURITY

In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes. (8 MCAR SS 4.3001-4.3999)

FINDING OF FACT, CONCLUSIONS AND ORDER TO ADOPT RULES

A Hearing was held on the above entitled matter before Jon L. Lunde, duly appointed Hearing Examiner, on Friday October 30, 1981 and continuing on Monday, November 2, 1981, in Room 166A, Administration Building, 50 Sherburne Avenue, St. Paul, Minnesota pursuant to a Notice of Hearing dated September 16, 1981 in compliance with Minn. Stat. § 15.041.

The Department accepts the Report of the Hearing Examiner dated January 8, 1982 and the Report of the Chief Hearing Examiner dated January 17, 1982 in its entirety with the following exceptions:

Finding 8

The agency accepts the Finding of the Hearing Examiner with the addition in the last sentence of the first paragraph that "future rules will be drafted, to the greatest extent feasible, without using the masculine gender."

Finding 9

Part 4.3000-4.3001. The agency accepts the Finding of the Hearing Examiner, but has changed the wording in 8 MCAR S 4.3001. The change is due solely to the March 31, 1982 enactment of new statutory criteria for active work search and suitable work for the federal-state extended benefits program, as required by federal law. Because the criteria vary from those pertaining to regular benefits, the adopted rules apply only to regular benefits and to the portions of the extended benefits program which do not conflict with the statutory changes in Section 268.071 Subdivisions 8 and 9. This change is necessary and reasonable and is not a substantial change.

Finding 12

Part 4.3002 B. The agency accepts the Finding and Suggestion of the Hearing Examiner but eliminates the comma between the words "locality" and "shall" as unnecessary. This change is necessary and reasonable and is not a substantial change.

Finding 17

Part 4.3003 B.2 The agency accepts the Finding of the Hearing Examiner but does not make the recommended change because it is superceded by the recommended change in Finding 18, which is accepted.

Finding 18

Part 4.3003 B.2. The agency accepts the Finding of the Hearing Examiner that this part is not necessary or reasonable. The Suggestion to delete the rule is accepted rather than the alternative suggestion to amend Part 4.3003 B.1.

Finding 19

Part 4.3003 B.4. (New B.2.). The agency accepts the Finding of the Hearing Examiner and, of the three alternatives proposed, chose "in a reasonable period of time". This phrase best provides the flexibility to consider what is "reasonable" for a severely disabled claimant.

Part 4.3004 A. and L. The agency accepts the Finding and Suggestion in its entirety.

Finding 21

Part 4.3004 A. The agency accepts the Finding of the Hearing Examiner and the Suggestion for change with the understanding that the last sentence in the first paragraph was meant to read "substituting 'favorable' for 'good'", rather than "substituting 'favorable' with 'good'".

Finding 25

Part 4.3004 C The agency accepts the Finding of the Hearing Examiner but uses the phrase "under Federal law" rather than listing specific agencies. The authority for immigration and work permits is not centered with a single agency and the requirements frequently change through statutory, regulatory, administrative or judicial action. Listing agencies would result in missing some which may be valid. Therefore, the agency language is reasonable and necessary and is not a substantial change.

Finding 27

Part 4.3004 E. The agency accepts the Finding of the Hearing Examiner and the specific language Suggestion for this part.

Part 4.3010 New. The Hearing Examiner's Suggestion for specifying reporting of a change of address or telephone number has been inserted as a new Part 4.3010 K. Because contacts with claimants are required for many purposes, not just job referrals, it is important to include it in the general reporting section. The change is necessary and reasonable and is not a substantial change.

Finding 28

Part 3.004 F. The department accepts the Finding of the Hearing Examiner that a claimant cannot be disqualified for unavailability for an entire period solely for missing, without good cause, a scheduled report for a certain day. That was not the intent of the proposed wording, but the proposal obviously was not clear. Failure to report to an unemployment office to discuss eligibility involves two separate issues, eligibility for a prior period and eligibility for the day of the report. A report cannot be held open indefinitely for failure to provide sufficient information to establish eligibility, however. Therefore, the Suggestion of the Hearing Examiner has been modified to clarify

the two separate issues involved in not reporting, as scheduled, to an unemployment office. The change is necessary and reasonable and is not a substantial change.

Finding 30

Part 4.3004 I. The agency accepts the Finding of the Hearing Examiner that this part is necessary and reasonable as proposed. However, he also recommended adopting the suggestion of the LSAP. The LSAP proposal changes the title which then would be identical as the title for Part 4.3007 J. The department is concerned that claimants understand both their responsibilities and rights, but altered the suggestion for clarity. The change is necessary and reasonable and is not a substantial change.

Finding 34

Part 4.3005 B.5. The agency accepts the Finding and Suggestion of the Hearing Examiner except for changing three words in the suggested language. The word "where" is changed to "if" so that the phrase now reads "to reapply for work with employers ~~where~~ if the claimant ...". The word "and" between "employer" and "with good cause attributable" is deleted as unnecessary. The word "if" is changed to "and" so that the phrase now reads "the employer ~~if~~ and the conditions constituting good cause". The changes were made to further clarify that the exception applies only if both conditions exist. The change is necessary and reasonable and is not a substantial change. Also, the reference to Finding 29 to amend Part B.5. was adopted but amended to B.1. instead. It is clearer to put both references to the Job Service in the same clause. Therefore, the change is reasonable and necessary and is not a substantial change.

Finding 35

Part 4.3005 D. The agency accepts the Finding and Suggestion of the Hearing Examiner but adopts, in the alternative, the suggested language in Finding 41 which covers the same clause. This change is reasonable and necessary and not a substantial change.

Finding 41

Part 4.3005 D. The agency accepts the Finding and Suggestion of the Hearing Examiner with minor modifications. The reference to the connection between Part D. and 4.3006 C. with the other accepted suggestions should now be between Part D. and 4.3006 E. The same reference change should be made in the last phrase of the new D. The reference to Section 4.3006 J. should be to Section 4.3007 J. In the last sentence of the suggested language for D., the phrase "has not such" has been changed to "does not have favorable" to make the construction more parallel with the first sentence and to avoid the chance of misinterpreting that search for other suitable work is required only when there are no prospects. These changes are necessary and reasonable and are not substantial changes.

Finding 42

Part 4.3006 J. (Should be 4.3007 J.) The agency accepts the Finding of the Hearing Examiner and accepts the Suggestion with minor modification. The reference to Part 4.3006 J. should be to Part 4.3007 J. Because of the wording in the Finding and other findings, the phrase "in a reasonable period of time"

has been added to the first paragraph of J. and to the first sentence in the new paragraph of the suggested language. In addition, clause (1) of the suggested language has been eliminated because further review indicates that it has no reasonable or necessary bearing on whether prospects for finding work in the person's usual occupation are favorable or unfavorable. The only appropriate comparison is included in item 7 of the suggested language (item 6 in the accepted language). These changes are necessary and reasonable and are not a substantial change.

Finding 44

Part 4.3006. The agency accepts the Finding and Suggestion of the Hearing Examiner. In addition, the word "regular" has been inserted between "receiving" and "benefits" in Part 4.3006 A. for the reasons noted in Finding 9 above. Also, in the second sentence of the second paragraph of Part 4.3006 B. the word "may" has been inserted between the phrases "economic conditions" and "prohibit this ideal" because in good economic times the ideal may be possible for most claimants and even in bad economic times for some claimants in demand occupations. The changes are reasonable and necessary and are not substantial changes.

Finding 45

Part 4.3006 New C. and D. The agency accepts the Finding of the Hearing Examiner and the Suggestions, with minor modification. The recommended new Part D. has been made Part C. and the new Part C. has been made Part D. so that the rule precedes the exception. Also, the general statements of suitable work in the suggested C. and D. are different, so they have been combined into a single statement at the beginning of the part on suitable work (suggested D. which now is C.). It is not necessary to repeat it in the section on unsuitable work now that that part follows the part on suitable work. The changes are reasonable and necessary and are not substantial.

Finding 47

Part 4.3006 C. (New 4.3006 E.) The agency accepts the Findings of the Hearing Examiner and has drafted language defining "verifiable assurance", as suggested. There is no requirement for a definite date because an assurance may be an approximate date and still verifiable and bona fide. If employment does not materialize on the specific or approximate date, then the Department must find whether an assurance still exists. The changes are necessary and reasonable and are not substantial.

Finding 48

Part 4.3006 C. (New E.) The agency accepts the Finding of the Hearing Examiner. Language was added in the first paragraph following Part 4.3006 E. 4. to comply with Suggestion on how the rule must be construed. The change is necessary and reasonable and is not a substantial change.

Finding 53

Part 4.3006 C. 1-3 (New 4.3006 E. 1.-3.) The agency accepts the Finding of the Hearing Examiner and the Suggestion with minor modification. The phrase "nature of the claimant's unemployment" has been changed to "nature of the claimant's separation from ~~un~~employment". This clarifies that no person's prospect should be for permanent unemployment but that the nature of the separation

does bear on whether prospects are favorable or unfavorable for finding usual or customary work within a reasonable period of time. In Part C. 1., the words "or occupation" were added after "trade" to make the construction parallel with Part C. 2. Also in Part C. 1., the word "employment as suggested in Finding 48 (which was accepted) was used rather than the word "work" at the end of the sentence. In Part C. 2., the suggested reference to C. 1. was changed to E. 1. because Part C. has now become Part E. Likewise in Part C. 3., the suggested reference to C. 2. was changed to E. 2. Also in Part C. 2., the phrase "which the claimant is suited for" was changed to "for which the claimant is suited ~~for~~" for grammatical reasons. The last paragraph after 4.3006 E. 3. b. is deleted as unnecessary and unreasonable because it does not have a bearing on the suitableness of any work beyond the criteria set forth in Parts 4.3007-4.3008. The changes are necessary and reasonable and not substantial.

Finding 55

The agency accepts the Finding of the Hearing Examiner and the Suggestion except for the last sentence of the suggested language. The last sentence is deleted for the same reason a similar sentence was deleted in Finding 53 above. The change is necessary and reasonable and is not a substantial change.

Finding 56

Part 4.3007. The agency accepts the Finding and Suggestion of the Hearing Examiner. In complying with the Suggestion for more clarity, the title for 4.3007 A. was changed from "General" to "Applicability" and the words "as guidelines for determining suitability of work" were deleted because Parts 4.3007 B.-F. are not actually used in determining suitable work but only in whether a person has failed to accept or apply for suitable work. The change is necessary and reasonable and is not a substantial change.

Finding 57

The agency accepts the Finding and Suggestion of the Hearing Examiner. To comply with the suggestion that the rules specify that a person may be disqualified for failure to accept a referral to suitable work, Part 4.3006 A. has been amended. The change is necessary and reasonable and is not a substantial change.

Finding 59

Part 4.3007 M. The agency accepts Finding of the Hearing Examiner and the Suggestion is accepted except for some word changes in the last sentence. To improve clarity, the phrase now reads "for employers who~~se~~ ~~customary~~ use several shifts ~~are different~~." The change is necessary and reasonable and the change is not substantial.

Finding 62

Part 4.3008. The agency accepts the Finding of the Hearing Examiner. Also, one phrase in the first sentence was placed in a different place to make it more clear. The change is necessary and reasonable and is not a substantial change. The Hearing Examiner also suggested drafting language to address certain circumstances dealt with in Northfield Cleaners. Because the manner in which Northfield Cleaners is interpreted could substantially affect the rights of

either claimants or employers, the Department cannot develop language at this time which would not be a substantial change. Instead, the agency will address the issue in future rules.

Finding 63

Part 4.3010. The agency accepts the Finding of the Hearing Examiner. A new Part 4.3010 J. has been included to require the Department to make reasonable efforts to assist claimants in filing for benefits. In addition, alternate language has been used for Part 4.3010 G. A continued claim may be for any number of weeks, even though biweekly is the most common. In addition, the number of days allowed to file the claim and have it accepted for processing varies. Those conditions are dealt with in Part 4.3010 I. The change is necessary and reasonable and is not a substantial change.

Finding 65

Part 4.3101 F. The Minnesota Motel Association suggested and the Hearing Examiner strongly suggested that the rules exempt as wages any meals and lodging provided for the convenience of the employer. The recommendation is based on a Federal Supreme Court case (Rowan Company v. United States). This would represent a change in the way the department determines wages for tax and benefit purposes. Federal law says the fair value of meals and lodging is wages unless the meals and lodging are furnished for the convenience of the employer. In Rowan, the court held that meals and lodging furnished on an oil rig sixty miles off shore were for the convenience of the employer. Other courts also have ruled that meals furnished to employees of Kresge's is not for the convenience of the employer and therefore is wages (taxable and useable for benefits). Those who argue for a Rowan exclusion in our rules ignore the fact that Minnesota law does not have the same exception as the federal law. The Unemployment Insurance Reporter of Commerce Clearing House also notes this fact:

"The Department of Labor cautions that the problem that arose in the Rowan Cos. case probably would not arise under state unemployment insurance laws since there is no comparable 'convenience of the employer' rule under the state laws" (Unemployment Insurance Reporter, p. 21,650).

Because it would be a change in Department administration, a rule would have to define "for the convenience of the employer". Because the varying interpretations possible would be the subject of considerable controversy and because the definition would affect both the benefit rights of the employees and the tax liability of employers, any language developed by the Department would amount to a substantial change. Therefore, the Suggestion of the Hearing Examiner is not accepted.

Finding 76

Part 4.3102 B. 6. (New C. 6.) The agency accepts the Finding and Suggestion of the Hearing Examiner except that the reference should be to D. rather than C. because a new Part C. was added in response to Finding 90. The change is necessary and reasonable and is not a substantial change.

Finding 77

Part 4.3102 C. (New D.) The agency accepts the Finding and Suggestion of the Hearing Examiner with the minor adjustment of changing the first phrase to

reference paragraphs 1.-13. rather than 1.-12. because a new 13. was added to address Finding 83. The change is necessary and reasonable and not a substantial change.

Finding 78

Part 4.3102 C. 2. (New D. 2.) The agency accepts the Finding and Suggestion of the Hearing Examiner except for some changes in the last sentence. The suggested words "third party" were too vague and open to conflicting interpretations beyond the apparent intent. The change is necessary and reasonable and not a substantial change.

Finding 81

Part 4.3102 C. 5. (New D. 5.) The agency accepts the Finding and Suggestion of the Hearing Examiner. In addition, the suggestion to consider Dart's comments is covered in the language complying with Finding 84.

Finding 82

Part 4.3102 C. 6. (New D. 6.) The agency adopts the Finding and Suggestion of the Hearing Examiner. The language developed to comply with the Suggestion to C. 6. (now D. 6.) as a reference to existence of continuity of service is necessary and reasonable and is not a substantial change.

Finding 83

Part 4.3102 C. (now D.) The agency accepts the Finding and Suggestion of the Hearing Examiner and the language developed for the Suggestion for a new C. 13. (now D. 13.) is necessary and reasonable and is not a substantial change.

Finding 84

Part 4.3102 C. (Now D.) The agency accept the Finding of the Hearing Examiner on this part. The Hearing Examiner also recommended a "safe harbor" proposal which the agency accepts, with modification, and incorporates as Part 4.3102 P. Some changes were made in the first paragraph to more clearly define the trucking industry so that merely owning a truck does not make a person a part of the trucking industry. The intent is to maintain status quo as far as determinations of independent-contractor or employee status in the trucking industry but not to extend it to other categories currently treated as employees. In addition, wording was changed to clarify that each factor must be substantially present rather than the factors as a group being substantially present. In unemployment law, substantial often indicates quantity rather than quality. The "safe harbor" provision cannot apply on a simple plurality. Representatives of the trucking industry indicate that all factors are present with a true independent contractor, although the responsibilities in factors 2. and 3. may be handled by others through a lease or contract arrangement. Those arrangements would be sufficient to substantially comply with the requirement. Total absence of a factor would not be sufficient to meet the test for the special exclusion. The changes are necessary and reasonable and are not substantial changes.

Finding 88

Part 4.3102 F. (Now E. 8.) The agency accepts the Finding and Suggestion of the Hearing Examiner. The department developed language to meet the requirements

of the Suggestion. The change is necessary and reasonable and is not a substantial change.

Finding 89

Part 4.3102 F. The agency accepts the Finding and Suggestion of the Hearing Examiner. Language was developed to specifically meet the Suggestion. The change is necessary and reasonable and is not a substantial change.

Finding 90

Part 4.3102 New B. The agency accepts the Finding and Suggestion of the Hearing Examiner. The language to meet the Suggestion is included as a new Part 4.3102 B. A specified period for the Department to make a determination was not included because there are no specified time periods for any determinations to be made by the Department, only performance goals. The change is necessary and reasonable and is not a substantial change.

Finding 91

Part 4.3102 G.-O. (Now G.-P.). The agency accepts the Finding and Suggestion of the Hearing Examiner except with respect to Parts H. and J. The Hearing Examiner referred to Wallace v. Commissioner of Taxation about references to federal law. A recent decision, Minnesota Recipients Alliance v. Noot (313 NW 2nd 584), modifies the earlier decision when federal and state programs are inter-related rather than just parallel. In addition, the statute (268.06 Subdivision 1 (1)) prohibits the Commissioner from adopting a rule that would deny an employer full Federal tax credit on the federal unemployment tax (FUTA). If federal law requires coverage but the state law did not, the federal tax would be 3.4 percent. However, when state law also requires coverage, the employer gets a 2.7 percent credit and pays only 0.7 percent FUTA tax. Therefore, the agency does not believe modification is needed on the basis of Wallace.

Finding 93

Part 4.3105 B. 1. This part includes a required change. The original rule as proposed referred to changes "of" a business not "by" a business and was not intended to cover transactions of personal property. However, sale, partial transfer, acquisition, termination or change of legal entity does have an impact on tax liability and rates. The need is not solely when a business is created or terminated. The thirty day requirement is provided also to protect the employer from unknown liabilities due to changes. The language developed to address this Finding is reasonable and necessary and is not a substantial change.

The above exceptions and modifications comply with the Finding of Fact of the Hearing Examiner as enumerated in his report and the Report of the Chief Hearing Examiner. Therefore, I ORDER that these rules for the Unemployment Insurance Program be adopted.

Dated: April 29, 1982

Rolf Middleton

Rolf Middleton, Commissioner

ECSEC-82-003-JL

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC SECURITY

In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes. (8 MCAR SS 4.3001-4.3999)

ADDITIONAL FINDING OF FACT AND AMENDED ORDER ADOPTING RULES

Upon receipt of the Chief Hearing Examiner's Report on the above entitled matter dated May 5, 1982, the Commissioner makes the following additional findings:

1. Additional language has been added to 8 MCAR § 4.3105 B.1. after the word "transaction" in the second sentence of the amended language as required by the Chief Hearing Examiner. The new language now reads: "...transaction results in the creation of a new or different employing unit or affects..."

2. 8 MCAR § 4.3006 C. is further amended to add the words: health, safety, and morals; the claimant's. The second sentence now reads: "In determining whether a particular job is suitable, the department shall consider the degree of risk involved to the claimant's health, safety, and morals; the claimant's physical fitness; the claimant's prior..."

3. 8 MCAR § 4.3007 M. is changed to read as indicated in the Commissioner's Finding of Fact, Conclusions, and Order to Adopt Rules dated April 29, 1982, Finding 59.

The above Findings comply with the Chief Hearing Examiner's Report dated May 5, 1982 are not substantial and are necessary and reasonable. Therefore, I ORDER that these rules for the Unemployment Insurance Program be adopted.

Dated: May 5 1982

Rolf Middleton, Commissioner

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC SECURITY

RECEIVED
OCT 5 1981
ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE PROPOSED RULES OF THE DEPARTMENT OF ECONOMIC SECURITY GOVERNING THE UNEMPLOYMENT INSURANCE PROGRAM RELATING TO PAYMENT OF BENEFITS AND COLLECTION OF EMPLOYER TAXES (8 MCAR §§ 4.3001 - 4.3999)

STATEMENT OF NEED AND REASONABLENESS

Agency Exh. No. 14
File No. ECSEC-82-003-JL
Date 10/30/81

The above captioned rules are hereby presented by the Department of Economic Security (DES) in accordance with the provisions of the Minnesota Administrative Procedures Act (APA), Minn. Stat. § 15.0412 and the Rule Hearing Procedures, 9 MCAR §§ 2.101 - 2.113. The statutory authority of DES to promulgate rules concerning unemployment compensation benefits and taxation is contained in Minn. Stat. § 268.12, subd. 3 which provides that the Commissioner of Economic Security may adopt rules as may be necessary to administer Minn. Stat. §§ 268.03 - 268.24.

DES was exempted from the rulemaking provisions of the APA prior to the passage of 1980 Minn. Laws, Ch. 615 § 2. Necessary implementation guidelines previous to that time were derived from non-APA regulations and policies and from case by case adjudications. Thus, the above captioned rules represent the initial comprehensive APA rulemaking effort in the unemployment compensation benefit and taxation areas by DES. In large measure, the rules represent the codification of existing practice, policy and case law. In addition, some statutory provisions which have never been comprehensively interpreted by any of these three means are implemented by these rules. In many areas DES has also drawn on the national experience in administering the joint state-federal unemployment compensation system and the rules are consistent with the interelated portions of the Federal Unemployment Tax Act, the Federal Insurance Contribution Act, the Internal Revenue Code of 1954, as amended and similar state provisions. The rules are generally consistent, also, where analogous terms and issues are involved, with related employment statutes such as the Workers' Compensation and Labor Standards Acts.

This document contains the verbatim affirmative presentation of the facts and circumstances necessary to establish the need for and reasonableness of the proposed rules. The statement is submitted pursuant to the requirements set forth in 9 MCAR § 2.104.

Chapter One: General Definitions

8 MCAR § 4.3000 Definitions.

This chapter provides three general definitions of terms which occur throughout the proposed rules of Chapters Two (benefits) and Three (taxes) in order to permit a shorter form of reference, avoid needless repetition of titles and explanations, and prevent possible ambiguity.

A. Commissioner.

The term "commissioner" refers to the Commissioner of the Department of Economic Security or his designated agent. Thus "commissioner" standing alone is always a reference to the Commissioner of the Department of Economic Security or his designee, while necessary references to commissioners of other departments will include their full title. The definition permits a shorter reference while preventing possible confusion as to the official indicated.

B. Department.

The term "department" refers to the Minnesota Department of Economic Security. The need for and purposes of this definition are the same as in A.

C. Unemployment office.

The phrase "unemployment office" is defined as a location where unemployment insurance claim services are offered. Benefit eligibility depends in these rules on various applications and appearances at an "unemployment office." This definition is supplied in order to clarify that such offices are only those supplying unemployment insurance claims service, rather than offices which, for example, are responsible for vocational rehabilitation or other services also provided by the department. The definition is necessary to avoid ambiguity and to inform claimants as to the offices responsible for receiving their claim applications.

Chapter Two: Benefits

8 MCAR § 4.3001 Applicability.

This section establishes that the rules provided in this chapter govern benefit eligibility determinations under the unemployment compensation statute. This rule is necessary to establish the scope of this chapter since the department's rulemaking authority extends only to those statutes which it is mandated to administer and since other rules govern other activities of the department.

8 MCAR § 4.3002 Definitions.

This part of the rule provides definitions to supplement and clarify those provided in Minn. Stat. § 268.04. These definitions are needed to establish with precision the meaning of terms which are essential in benefit eligibility determinations. These definitions will assure that such determinations can be made in a routine and timely manner consistent with the language and

policy of Chapter 268 and that claimants are aware of the specific elements of eligibility.

A. Credit Week.

This definition is necessary to clarify Minn. Stat. § 268.04, subd. 29. "Credit week" is defined as any week during the claimant's base period for which the required amount of wages has been paid or is payable as remuneration for services or for vacation periods. Other forms of wages not attributable to a specific week of employment, such as severance pay, are not to be used to establish credit weeks, though they are includable in wages for tax purposes. Under most circumstances wages are clearly allocable to a specific week of employment and eligibility or non-eligibility are easily ascertained by totaling the wages for each week in the base period. The treatment of sums not allocable to a specific week of employment, such as severance pay or bonuses, however, is not as easily determined. Such sums could conceivably be arbitrarily allocated to some portion of the employment period for purposes of establishing credit weeks, but this rule recognizes that such sums are not reasonably treated as wages in this context. To allocate sums to a week when no specific services were rendered for those sums in that week would defeat the purpose of the statute in requiring minimum levels of wages for a minimum period of employment before eligibility can be established. The exclusion of such sums prevents this result. Vacation pay, however, is allocable to specific weeks of employment, even though no services may be performed during the vacation week. It is therefore reasonable to include vacation pay in credit week wages, especially since a contrary rule would serve to disqualify weeks in which a full-time employment relationship was present, contrary to the intent of the credit week provision.

B. Labor market area.

The phrase "labor market area" is defined as the geographic area in which the claimant can reasonably be expected to seek and secure work. The definition is needed to assist in decisions as to claimant's availability and active search for suitable work. This rule recognizes that a claimant's reasonable area of search will depend upon his occupation and other appropriate factors and is therefore not necessarily subject to a specific area or mileage requirement.

C. Seasonal worker.

"Seasonal worker" is defined as an employee who performs agricultural, industrial, construction or other work where it is customary for the employer to curtail operations intermittently because of climactic or other reasons. This definition is necessary because seasonal workers must be available for work outside of their customary occupation during the off-season while this is not necessarily true for non-seasonal workers during their periods of unemployment.

8 MCAR § 4.3003 Able to work.

A. Generally.

This rule provides an explanation of the phrase "able to work" as used in Minn. Stat. § 268.08, subd. 1 (3) and in these rules. Ability to work, as defined, requires that the claimant establish that he is physically and mentally able to perform in his usual or other occupation for which he is qualified and which is regular gainful employment for others. The rule is necessary since benefit eligibility is dependent in part on an affirmative showing by the claimant of his ability to work. The rule is intended to establish the criteria by which the department will determine ability to work as well as specific requirements which must be met in individual cases. These criteria are reasonable since they logically relate to ability to work and indicate the particular meaning this phrase has in situations where doubt as to ability to work is present.

B. Particular situations.

This part of the rule establishes that the department, in making determinations as to the claimant's ability to work, will consider all the relevant facts and circumstances of the claimant's case and specifies the criteria to be used in this determination. This approach is a reasonable one since the circumstances of each case may vary widely. An inquiry into all the circumstances in light of particular criteria, rather than the application of a rigid formula, will assure that ability to work can be correctly ascertained.

1. Medical evidence of a claimant's ability to work may be required if there is a question regarding his mental or physical condition. This requirement is a reasonable one since the burden of establishing ability to work falls on the claimant and the department must be in a position to consider all the relevant evidence when doubt of this ability exists. Medical evidence is clearly relevant and it is appropriate for the department to reach a negative determination as to ability to work if the facts raise doubt about ability to work and no medical evidence to the contrary is provided by the claimant. Since the department does not presume inability to work under 3 below, the claimant is assured a decision based on the facts.

2. While medical separation from work due to serious illness will not alone result in a determination that a claimant is unable to work, the claimant must satisfactorily demonstrate that he is able to perform some other work in order to be determined able to work. This provision is reasonable since medical separation is itself indicative of inability to work at the job separated from but not necessarily of inability to work at some other job. It does raise a legitimate issue, however, which the claimant, under his general burden to establish ability to work, can reasonably be asked to respond to by providing evidence of ability to work at another job.

3. This paragraph establishes that no facts or circumstances will give rise to a presumption that a claimant is unable to work. The claimant has the burden to establish the conditions

of his eligibility for benefits, including ability to work, but the department, under B, is required to base its determinations on all the facts and circumstances of the specific case rather than a presumption of inability to work.

4. This section establishes that availability normally means availability for full-time work for all customary shifts in the occupation, but that a claimant who is restricted as a result of his physical or mental condition to part-time work or to a particular shift will be judged able to work if the likelihood of his obtaining employment within these restrictions is reasonable. This is a reasonable rule since availability should normally be determined according to the requirements of the market in the claimant's occupation, but ought to be modified in cases in which the claimant has good reason to restrict his search to part-time or specific shifts, so long as work can be obtained within these constraints.

8 MCAR § 4.3004 Available for work.

A. Generally.

This rule is necessary to clarify the phrase "available for work," a prerequisite for unemployment compensation benefit eligibility, as used in Minn. Stat. § 268.08, subd. 1 (3) and these rules. This paragraph provides that the availability requirement will generally be satisfied if the claimant demonstrates that he is unequivocally ready and willing to work at suitable employment when offered. Restrictions on availability for suitable employment, whether circumstantial or imposed by the claimant, are acceptable only if the claimant retains good prospects of obtaining employment within a reasonable time under the restrictions. This general statement is modified and applied by the more specific provisions in B through O. The general rule provided in this paragraph is necessary to establish the meaning of availability for work in the specific contexts in which the issue arises. Since availability is a major requirement of eligibility for unemployment compensation benefits, it is important that the meaning of the terms be clearly delineated. The general rule in A is a reasonable one since it is based on the central policy of the unemployment compensation system, that those available and willing to work and unable to find work after a non-disqualifying termination from previous employment should be compensated. The requirements of this rule that a claimant be ready and willing to accept work and that there be no unreasonable self-imposed or circumstantial restrictions on availability are consistent with this policy. Although circumstantial restrictions on the claimant's availability to work may not be under the claimant's control, the unemployment compensation system is not designed to compensate those who are unavailable for work. It is, therefore, inappropriate for benefits to be paid when suitable work is available but not accepted by the claimant because of restrictions on his availability. Self-imposed restrictions on availability are also inconsistent with genuine availability for employment when they diminish the claimant's prospects of obtaining work. Otherwise benefits would be payable when suitable work was actually available to the claimant. Reasonable restrictions on availability which do not significantly diminish the claimant's likelihood of obtaining work, however, are permitted under this rule.

B. Absence from labor market area.

This paragraph provides that a claimant who is absent from his labor market area for personal reasons will be considered unavailable for work unless the period of absence is due to extraordinary family or personal circumstances and is limited to two days or less. This provision is reasonable since the requirement of availability is contingent on the employee's search for employment in the labor market on a continuing basis. Absence from the area makes fulfillment of this requirement a physical impossibility and raises the possibility of missed employment opportunities. The section recognizes the need for extraordinary absences, but limits them to two days as would be the case in most employment settings. Work searches outside the claimant's usual labor market area would not be prohibited by this rule.

C. Alien status.

This section requires that claimants who are aliens submit evidence that they are lawfully authorized to work in the United States. Alien status legitimately raises the issue of availability, since aliens must be specifically authorized to work in the United States. An alien claimant who cannot legally be employed cannot reasonably be considered available for work whatever his marketability apart from this fact. This rule, which is consistent with federal law, is designed to clarify that legal prohibitions on employment, like other restrictions, are inconsistent with availability for work.

D. Change of residence.

This paragraph provides that, when a claimant's employment opportunities are substantially decreased because of a change in the location of his residence, he must look for employment on a regular basis, expand his search to other occupations and accept the prevailing wages, hours and other conditions of work prevalent in his new area in order to be considered available for work. This rule is necessary since a claimant must reasonably alter his expectations if he voluntarily moves to a geographic area where employment opportunities are curtailed. By moving to an area of more restricted opportunities, the claimant has in effect imposed a restriction on his availability for work, contrary to the general rule in A. It is therefore appropriate for the claimant to be considered unavailable unless he actively searches for work and removes other restrictions on his availability. In the absence of such a rule a claimant could move from an area where employment in his customary occupation was likely to one in which it was unlikely, or even impossible, and remain eligible for benefits without any requirement that he accept other employment.

E. Claimant cannot be contacted.

This part provides that a claimant who cannot be contacted for employment referrals will be deemed unavailable for work, unless good cause is established for his inability to be reached. This requirement is necessary since a claimant who cannot be contacted by the department, or by prospective employers, cannot reasonably be said to be available for employment. This rule is necessary to assure that claimants are actively engaged in a work search and available to receive information about employment possibilities, and in order to implement the provisions of parts B and D.

F. Failure to report.

This section establishes, pursuant to Minn. Stat. § 268.08, subd. 1 (1) and (3), that a claimant who does not report to an unemployment office as required will be deemed unavailable for work unless he can demonstrate good cause for his failure to report. The department may require a claimant to report to an unemployment office in order to inquire into his eligibility or to a job service office in order to assist him with his job search. If the claimant fails to report, the department will be unable to answer questions about eligibility or to provide employment information. Required reporting may be necessary to assure that a claimant is available for work and failure to report suggests that the claimant is unavailable under B, D or other provisions of this rule. The rule permits the claimant to establish good cause for failure to report, but in other cases it is reasonable to conclude that the claimant is not available for work. In the absence of this provision, the department's ability to enforce eligibility requirements would be severely restricted.

G. Incarcerated.

This part of the rule establishes that an individual who is imprisoned and is not able to participate in a work release program is considered unavailable for work. As with part C, this paragraph recognizes that legal impediments on employability necessarily indicate that the claimant is unavailable for work. To hold otherwise would permit those unable to actually accept employment to receive unemployment compensation benefits, contrary to the policy of the statute. Those eligible for work release would be qualified for benefits under this paragraph.

H. Labor market area.

This provision states that to be considered available for work the claimant must make himself unequivocally available for employment throughout his labor market area. This rule is necessary since a claimant who does not in fact offer himself for employment under the usual conditions customary for his occupation in his labor market area cannot reasonably be viewed as available for work. This rule is needed to avoid ambiguity in situations in which a claimant is sufficiently equivocal and conditional in his "offering" of his services that he cannot really be said to be seeking employment.

I. Length of unemployment.

This paragraph establishes that to be available for work a claimant who has been unemployed for a lengthy period of time may be required to expand the geographic area in which he is seeking work, accept new shifts, enter counseling or retraining or accept employment at the prevailing wages in a new occupation. This section is necessary to establish that the meaning of availability for work will vary depending on the length of claimant's unemployment. The general rule in A provides that no restrictions can be imposed by the claimant on his availability for work which has the effect of diminishing his prospects for obtaining employment in a timely manner. This paragraph recognizes that restrictions, whether geographic or occupational, which are

reasonable at the initial stage of unemployment may cease to be so as unemployment lengthens. A claimant may, therefore, impose an initial restriction on his job search which does not appear to diminish prospects for employment in an unreasonable way. After lengthy unemployment without job offers, however, it is no longer possible to say that this restriction does not decrease the claimant's prospects for employment. At this stage the restriction no longer meets the requirements of A and thus it is reasonable for a claimant to be required to remove that restriction on his availability.

J. Seasonal worker.

This part of the rule provides that seasonal workers will be required to accept work in a different occupation during the off-season or will be deemed unavailable for work. Since, by definition, the normal occupation of a seasonal worker is not open to him in the off-season, it is reasonable for him to be required to be available for other employment during that time. A restriction on availability which guarantees that no employment can be obtained is clearly inconsistent with the requirement provided in A that a restriction can not prevent the acceptance of employment.

K. Self-employment.

This paragraph provides that a claimant is not available for work if he has ceased to seek employment because of current self-employment or preparation for self-employment which activities prevent him from accepting suitable employment under the customary conditions. Though self-employment is clearly a solution for unemployment, if the claimant has actually become self-employed, or his preparations for self-employment are so extensive that he is not able to accept suitable employment, and he is not in fact seeking such employment, it is reasonable to treat him as no longer available for work.

L. Time or shift restriction.

This paragraph provides that a claimant may not restrict the hours of the day or days of the week during which he will work in a way inconsistent with the usual schedule in his occupation or other suitable work and also prevents time and schedule restrictions which interfere with seeking work. These provisions are consistent with the general rule in A, which is essentially that restriction on the claimant's availability be reasonable in light of the object of obtaining employment. Time and schedule restrictions which make it impossible for the claimant to accept suitable work or to search for it are necessarily unreasonable.

M. Transportation.

This paragraph establishes that a claimant must have transportation to his labor market area to be available for work. A claimant's availability for work is dependent upon his having a means of access to his labor market area, both for his job search and for the maintenance of employment once he has found it. This provision clarifies that transportation is the claimant's responsibility and not that of the present or prospective employer.

N. Union membership.

This part of the rule provides that a claimant who is seeking work only through his union is unavailable for work unless he is in an occupation and locality in which substantially all the employment is handled through the union. In such a case the claimant may still be required to submit evidence that he is seeking work through the union, is a member in good standing and is complying with union rules. This rule is consistent with the general rules on restrictions on availability for work. If a union hiring hall, for example, is the source of all those unemployed in an occupation in the claimant's labor market area, it is not an unreasonable restriction on availability for the claimant to limit his job search to the hiring hall. If workers in the area, however, are not normally employed through the hiring hall, it cannot be said to be a reasonable restriction on availability for the claimant to limit his search to the hiring hall. In such a case he unreasonably restricts his access to prospective employment in his occupation and must be viewed as unavailable for work.

O. Wage restriction.

This paragraph provides that a claimant is not available for work if he requires wages in excess of those customary in his labor market area for the work he is seeking. This rule recognizes that a labor market is an economic market. Thus insistence on a higher wage than the customary wage in the labor market area is an unreasonable restriction on availability, contrary to part A, since the restriction is one which will prevent acceptance of employment even though employment at the usual rate is available.

8 MCAR S 4.3005 Actively seeking work.

A. Generally.

This rule is necessary to establish the meaning of the phrase "actively seeking work" as used in Minn. Stat. § 268.08, subd. 1 (3), and these rules. This section provides that the claimant must use reasonable, diligent efforts to actively seek work in each week of unemployment and must not restrict his search to positions for which he is not qualified or which are not available. The actual means required in his search would depend on the circumstances, so long as they corresponded with those a person in the claimant's situation would use if actually seeking employment. These are reasonable requirements since they permit flexibility in determining what steps a claimant must take to seek work, but require him to take the steps another would take in similar circumstances to find employment. "Diligence" requires an active, serious effort to find work, rather than a pro forma search and "reasonable" indicates that appropriate steps must be taken but that there are limits on what a claimant should be required to do in seeking employment. The requirements with respect to limited searches are reasonable ones since a claimant cannot be viewed as actively seeking work if he is only searching for work which is not available or for which he is unqualified.

B. 1-9. Scope of work search.

This part of the rule clarifies that to fulfill the requirements of actively seeking work, a claimant must comply with instructions provided by the department which are pertinent to the customary methods of obtaining employment in claimant's usual occupation and labor market area. This is a reasonable requirement since the department has expertise in job survey and placement activities, has regular information on job openings and possibilities, and is able to assess the claimant's job qualifications. The department is thus able to assist the claimant in his search and failure to respond to instructions with respect to that search is reasonably viewed as failure to actively seek work. This paragraph provides some of the methods, such as registration with a union hiring hall and completion of appropriate job applications, which would normally be elements of an active work search and which may reasonably be required of a claimant. The list is not meant to be all inclusive and actions other than those listed may also be required by the department, since particular occupations and circumstance may require other or additional efforts.

C. Number of contacts.

This part of the rule specifies that a claimant's employer contacts will be considered by the department in assessing whether he is actively seeking work, but that no arbitrary number of contacts is required. Rather, the circumstances of a particular case will determine the volume of contacts which is appropriate. This is a reasonable requirement since actual contact with employers is necessary in any work search, yet the specific number of contacts cannot be stipulated in an arbitrary way, but depends upon the opportunities present in the occupation and the labor market area, claimant qualifications, the normal practices in the occupation and the like.

D. Type of work sought.

This part provides that a claimant will normally meet the "actively seeking work" requirement if he pursues employment opportunities in his usual trade or occupation. However, this section requires that the claimant begin to seek work outside his customary occupation after a period of unsuccessful search in his own occupation if any of several specific circumstances indicate that a broadened search is appropriate and work in his usual occupation is not available. This is a reasonable rule since it permits the claimant to initially seek work in his customary occupation when there is any likelihood of his securing suitable employment in that occupation, but requires him to broaden his search to other suitable employment if and when it becomes apparent that work in that occupation is not to be found.

1. This part provides that the claimant must broaden his search where there are sufficient suitable openings outside of his customary occupation and there are few unemployed workers in the locality for whom the employment would be more suitable. This is a reasonable requirement since the claimant's employment should not be at the expense of other unemployed workers who would be more suitable for a particular position. But when there are no such workers and the work is suitable for the claimant, he should be required to seek that work.

2. This part requires a claimant to seek work outside his usual occupation when his prospects of finding work outside are more favorable than his chances of obtaining work in his customary occupation. This is a reasonable requirement since, if claimant's chances of obtaining work in his usual occupation are remote, he must alter his expectations and seek work in a different but reasonably suitable field. The claimant's attachment to his usual occupation should not prevent his accepting other suitable employment when prospects in his usual occupation are not good.

3. This part provides that if work outside claimant's usual occupation is suitable employment, the claimant can be required to seek such work. This section recognizes that work outside of claimant's customary occupation may be commensurate with the skills, training and education of a claimant, though it is not in his usual occupation. In such a case it would be unreasonable to allow the claimant to decline to seek such work.

E. Permanent and temporary work.

This paragraph provides that a claimant is generally required to seek permanent work but that a claimant on temporary layoff who is assured of recall in the near future may limit his work search to work of a temporary nature. It is reasonable for claimants to be expected to seek permanent work, even if it is outside their normal occupation, pursuant to part D, when they have been permanently terminated from employment. But it would not be appropriate to require this of a claimant whose former job will again be available after a layoff period. In such a situation temporary employment is a reasonable objective which will also serve to preserve the established labor force of an employer who is forced to impose temporary layoffs.

F. Seasonal workers.

This paragraph requires seasonal workers to actively seek work. This rule is consistent with the requirement in 8 MCAR § 4.3004 (J) that a seasonal worker seek work in other occupations during the off-season. It is a reasonable rule since off-season work may be suitable for a claimant and a search for work which is by definition not available cannot reasonably be viewed as "actively seeking work".

G. Incarcerated worker.

This paragraph indicates that an incarcerated worker who is not a participant in a work release program is not "actively seeking work." This rule specifies the logical result of the application of the general rule on actively seeking work to the situation of an incarcerated person unable because of his imprisonment to seek employment. By definition, if a claimant cannot seek work, he is not doing so.

H. Filing and reporting only.

This paragraph provides that where economic conditions would make a more extensive job search a futile exercise for claimants in a particular occupation or group, and a burden for employers, the department may

require only that the claimant avail himself of a union hiring hall, professional or similar placement facilities or the department's resources in order to actively seek work. This section recognizes that in certain situations the usual avenues of employment search are fruitless and that to require them would simply be harassment of the claimants and the would-be employers. The principle here is that an active search for employment known to be unavailable is an anomoly not intended by the active search requirement.

8 MCAR § 4.3006 Suitable Work.

A. Applicability.

This paragraph states that rules 8 MCAR §§ 4.3006 - 4.3008 are to be used in determinations of whether a claimant has failed without good cause to apply for or accept suitable work, as required by Minn. Stat. § 268.09, subd. 2. This rule is necessary to establish and limit the circumstances to which the referenced rules apply.

B. Policy.

This paragraph establishes the policy according to which the department will interpret and administer the suitable work provisions in Chapter 268 and in the rules. Since the department has the dual responsibilities of disbursing benefits only to those involuntarily terminated without fault and of placing such workers in the jobs for which they are best qualified, the suitable work provisions will be interpreted to recognize the claimant's skills and abilities but not to encourage or sanction the avoidance of work. This statement of policy is necessary since a very narrow construction of the phrase "suitable work" could, as the paragraph indicates, result in the finding that no work other than the exact work previously done by the claimant was "suitable work". Such a result would be absurd and the policy statement indicates that the workings of the labor market reasonably require more flexibility in the matching of claimant and job than such a reading would authorize. The alternative to this narrow interpretation is the policy of interpreting "suitable work" so that employers, employees and society as a whole benefit from the maximum utilization of the skills of the largest number of workers possible under existing economic conditions.

C. General.

This part of the rule provides guidelines within which determinations under Minn. Stat. § 268.09, subd 2 and 8 MCAR §§ 4.3007 - 4.3008 as to the suitability of work will be made. These guidelines are needed to provide general guidance in the application of the specific provisions of 8 MCAR §§ 4.3007 and 4.3008 to situations involving three broad categories of employees: workers with assurance of future work, workers without such assurances and seasonal workers. These are reasonable distinctions to make in rule because major differences in labor market status require different approaches to "suitable work."

1. Suitable work for an individual who has an assurance of work in the near future (generally six weeks or less), is normally temporary work in his usual or a related occupation. It is reasonable for an individual who is, in effect, only temporarily separated from his usual occupation to limit his

search to temporary jobs in that or related occupations. A requirement that he search for and accept unrelated permanent employment, which he would then be obliged to quit to accept his usual work would be an unreasonable burden on both the claimant and the unrelated employer.

2. Suitable work for an individual with an assurance of work in the distant future (generally more than six weeks) is normally temporary work in his usual or a related occupation or an area which is a reasonable departure from his customary occupation. This rule has the same basis and rationale as that of 1. The difference is that when unemployment is to be prolonged for longer than six weeks it is reasonable to require a more extensive departure from the employee's usual occupation.

3. a-d. Suitable work for a seasonal worker is generally temporary work in his usual occupation or in an occupation in which conditions closely approximate those of his previous position. The rule provides an exception if 1) job openings exist in a lower skilled or lower paid occupation, 2) there are few unemployed workers for whom this work would be more suitable, 3) claimant is able to perform the work, and 4) the pay equals at least 150 percent of the claimant's weekly benefit amount. If all of these conditions are met the work is suitable even if not in a related occupation. This is a reasonable rule since it recognizes that seasonal workers will normally return to work in their seasonal employment. Thus, a requirement that they must accept employment in unrelated occupations, when there are others better suited for those positions would be unreasonable and a burden on the claimant. This reasoning does not hold, however, when no other employees are better suited for such jobs. Thus, the rule would reasonably require such work to be accepted so long as the claimant was able to do it and suffered no economic loss in doing so.

4. This part makes clear that for claimants who do not have assurances of future work, suitable work is that which approximates the conditions of their former employment if job prospects are reasonably good. If the likelihood of employment in the claimant's customary occupation is remote, however, work at a lower skill or wage will be deemed suitable if the claimant has skills and qualifications which may reasonably be adapted to the new work and if the work is a reasonable departure from his usual work unless there are other unemployed workers in the locality for whom the work is more suitable. This rule recognizes the principle that suitable work must respond to labor market conditions. If work initially deemed suitable, proves not to be available, it is reasonable to require the claimant to adjust his expectations toward work which is available, so long as the work is not unreasonably removed from the claimant's experience and abilities and there are few others better suited. A contrary rule would tend to discourage the most effective utilization of labor and would be contrary to the policy annunciated in A.

8 MCAR § 4.3007 Statutory terms interpreted.

A. Generally.

This rule provides definitions to clarify the terms and phrases used in Minn. Stat. § 268.09, subd. 2. These definitions are necessary since the operative words in this subdivision are crucial to eligibility determinations. Thus, in fairness to both claimants and employers, these terms should be defined as clearly as possible. The reasonableness of these definitions, however, is in many cases self-evident from the statutory language. Where this is so the rationale will not be set forth in detail.

B. To apply.

This paragraph is necessary to set forth the scope of the phrase "to apply" as used in the statutory provision cited above. It is specified that "to apply" means that the claimant must fulfill all job application procedures mandated by the department commencing with the job service interview itself and including personal application at the prospective employer's place of business when referral has been made by the department. This is a reasonable extrapolation from the statute since the claimant cannot be in a position to apply for employment unless he first comes to the job service interview for assistance in surveying available positions. Personal application at the place of business of the employer is the custom in many occupations and industries and thus it is reasonable to define "to apply" as including such applications.

C. Failure to apply.

This definition of the phrase "failure to apply", as including any knowing action or omission exhibiting lack of good faith effort to seek a position, makes clear that a claimant who goes through the motions of "application" for employment but does not make a genuine effort to obtain the position may be constructively in violation of Minn. Stat. § 268.09, subd. 2. This is a reasonable definition of the phrase, consistent with the policy of the statute and is designed to avoid ambiguity over the status of a pro forma application which no reasonable person would regard as a genuine effort to obtain employment.

D. Failure to accept.

This definition of the phrase "failure to accept" makes clear that an indirect refusal of a job offer as well as a direct refusal will be sufficient to result in disqualification from benefits pursuant to the statute. This provision establishes that conduct which would be regarded by a reasonable person as a refusal of a job offer will be deemed a "failure to accept." The rule thus clarifies that inactive, as well as active "failure to accept" are contemplated by the statute.

E. Available, suitable work.

This paragraph specifies that "available, suitable work" means that a specific position is open for application or acceptance and clarifies that work is not "available" if the claimant's qualifications have been found unsuitable by the employer. This provision recognizes that

it is unfair to disqualify a claimant from benefits on the grounds that work is generally or putatively available. It is only reasonable to require a claimant to accept work which is actually, specifically open for application or acceptance. Nor can a job be reasonably viewed as available if it has not in fact been offered to the claimant by the prospective employer because the claimant was not qualified.

F. Of which he was advised.

This paragraph clarifies that the claimant must be informed by the department of the actual nature of the duties of any position "of which he was advised". This section indicates, however, that this requirement does not mean that the firm's name need be revealed, unless the claimant accepts the referral, but only sufficient detail be provided to indicate the terms and conditions of employment. It is reasonable for the claimant to know the nature of the duties of a prospective position and the terms and conditions of employment. Otherwise it is difficult to see of what he can have been "advised". However, an employer may reasonably withhold his identity from any but active applicants and it is unreasonable, in any case, for a claimant to reject prospective employment simply because of the identity of the employer. Thus, "advice" of a position need not include the identity of the employer.

G. Risk involved to his health and safety.

This definition establishes that work conditions that may threaten the health or safety of the claimant must be considered in determinations as to the suitability of work. Similarly, claimant's demonstrable fear may exempt him from accepting certain kinds of work. This section also indicates that current inability to avoid hazardous conditions would constitute such work unsuitable. These are reasonable provisions since risks and hazards with which the claimant is unfamiliar or with which he is in fact unable to cope, should be considered in determining suitability, just as the nature of the work wages, levels of skill and the like are to be considered. It is unfair to require the unemployed to accept work which involves risks not customary to the occupation, since to require this is to invite the under-cutting of safety standards. Extra-hazardous work requires special training and it would thus be unreasonable to require the untrained claimant to accept such work. The definition also recognizes that hazards and risks previously born by the claimant may later be beyond his tolerance. The rule thus excepts from suitable work, employment which involves serious and unusual hazards but recognizes that employment always involves some risk or hazard. These everyday dangers associated with an occupation are not contemplated by this rule and work is thus not unsuitable simply because there is some danger or hazard involved.

H. His physical fitness.

This definition delineates the factors (previous work, physical conditions, physical demands of the job) which would be considered by the department in determining whether the physical requirements of a particular job would make it unsuitable for the claimant. The section clarifies that medical evidence substantiating claimant's physical condition may be required. It is reasonable for the department to consider claimant's genuine physical limitations in determining the suitability of work. The

factors specified are all reasonably related to ascertaining such limitations and medical evidence of physical condition is certainly relevant in such cases.

I. Prior training and experience.

This definition provides that claimant's "prior training and experience" will be considered in determinations as to the suitability of particular work. The section specifies that work may be suitable if, despite claimant's lack of relevant skills and training, the skills necessary require minimal training or the training is provided as part of the offered employment. It is reasonable to consider previous training and experience since these will often limit the potential employment of a claimant, but it is also rational to require a claimant to undergo "on-the-job" training when provided or to learn the skills required in an available job if they can be mastered in a short time, on his own.

J. Prospects of securing work in his customary trade or occupation.

This definition indicates that a claimant may be expected to find work outside of his usual trade or occupation if the likelihood of obtaining work in his customary area is remote. The section clarifies, however, that before claimant will be required to pursue work outside his customary trade or occupation, the general conditions on suitable work set forth in 8 MCAR § 4.3006 must be satisfied. This definition recognizes that suitability varies depending on the availability of work. A reasonable person would shift his sights to other work if work in his usual occupation proved unavailable for a significant period of time. The rule thus provides that a claimant must seek other work if employment in his usual occupation is unlikely, so long as it is otherwise suitable.

K. Distance of the available work from his residence.

This definition sets forth criteria to be used in determinations of the suitability of particular work in relation to the distance of the work from claimant's residence. The section reasonably provides that in addition to the distance, the availability and nature of transportation and the customary distance and means of transportation in claimant's occupation will be considered. If relocation is common in claimant's occupation, he will be required to follow suit. The department will consider the likelihood of employment proximate to claimant's residence, the length of his unemployment, the wages offered in relation to the cost of transporation and the actual distance to the available work in its determinations as to the suitability of particular work. This rule provides reasonable flexibility for the department to accommodate available job offers with transportation factors so that excess distance without offsetting wages or the like may result in a determination of unsuitability, while typical transportation or customary relocation patterns may result in a suitable work finding.

L. Wages.

This definition of "wages" establishes that suitability is dependent in part upon whether the total earnings offered claimant are comparable to the prevailing wage in the locality for similar work. If the wage rate is lower than claimant's previous rate, suitability will depend upon the length of claimant's unemployment and the proportional difference

in the rates. This rule recognizes that it is unfair to require a claimant to accept permanent employment at significantly lower wages than are usually paid for the job offered or wages lower than he has enjoyed in the past, at an early stage of his unemployment. However, if employment at his usual work or wage rate proves unavailable, it then becomes reasonable to require him to seek other, perhaps less attractive, work. Even in such a case, the percentage wage differential is a factor to be considered in determinations of suitability.

M. Hours.

This definition of "hours" clarifies that the scheduling of work as well as the number of hours of work will be considered in determinations as to the suitability of available work. While work on the first shift may be the most desirable, work on other shifts may be suitable if new employees are normally hired to work on them. It is more reasonable to require claimants to accept less desirable shifts and scheduling if these are the normal conditions for entry level personnel, but less reasonable in other circumstances. Nonetheless, such employment may be suitable work if other work were unavailable or if claimant's unemployment were lengthy.

N. Other conditions of work.

This definition establishes that the suitability of available work will depend upon all of the conditions of work. This paragraph provides for consideration of all express or implied contractual terms of employment as well as the actual physical circumstances in which the work is done. Since a reasonable person would evaluate these factors in accepting employment, it is reasonable for the rules to provide for their discretionary consideration.

O. Substantially less favorable to the individual.

This definition of "substantially less favorable to the claimant" specifies that the comparison is to be between the terms offered to the claimant and that offered for similar work in the labor market area. The past employment terms of the claimant are not considered in this comparison. Minor variances will not be determinative but the subjective impact of the differences will be considered. The definition provides that wages more than 10 percent below those prevailing for the work in question or less than the applicable minimum wage will be deemed "substantially less favorable." This section establishes that the comparison intended by the statutory language is between the wages of the work offered and those prevailing for similar work, rather than previous employment. This paragraph provides for the discounting of de minimus variances, but consideration of subjective effects when appropriate. The 10 percent and minimum wage limitations are reasonable flat indications of necessarily "substantially less favorable" terms of employment since 10 percent is "substantial" by most measures and wages less than the applicable minimum wage standard are illegal.

P. Prevailing

"Prevailing" is defined in reference to the initial wages, hours and

other conditions of work of individuals who begin similar work in the labor market area. This is a reasonable interpretation of the statutory term since those newly accepting employment are necessarily in competition with those commencing employment. "Prevailing" in this context should thus reasonably refer to the conditions of entry level (or equivalent) employment in the suitable work involved.

Q. Locality.

This definition of "locality" clarifies that it refers to claimant's labor market area, since this is the operative geographic term under the statute and these rules.

R. Good cause.

This definition clarifies the phrase "good cause" since it is a crucial factor in determining whether a claimant rightfully or wrongfully refused suitable employment. "Good cause" rejection of employment occurs only in compelling circumstances. The paragraph further clarifies that "good cause" for refusal of employment is usually personal to the claimant and of a temporary and emergency character and need not be a matter of employer fault. This section is necessary since the meaning of "good cause" could be the source of significant dispute. This definition restricts the application of the phrase to unusual, temporary, personal circumstances or cases of employer fault. The definition reasonably provides that a refusal for "good cause" cannot normally be based on the circumstances of the employment itself. Thus, a subjective dislike of otherwise suitable employment would not constitute "good cause." This part also clarifies that rejection of employment cannot be continuing since the claimant in that case would cease to be available for work.

8 MCAR § 4.3008 Re-employment offer.

This rule establishes, pursuant to Minn. Stat. § 268.09, subd. 2, that failure to accept suitable re-employment offered by a base period employer will disqualify the claimant from benefit eligibility unless the terms and conditions offered are substantially less favorable than those existing during the principal part of his previous employment or good cause for the refusal is demonstrable. This is a reasonable rule since there can be little question of the suitability of work offered by a previous employer which is substantially equivalent to that done in the past by the claimant and the continuance of a preexisting employment relationship should be encouraged. The rule, however, provides exceptions in cases in which the terms and conditions of the employment are significantly less favorable than in the past, or the circumstances of the previous good cause separation continue, or there is otherwise good cause for refusal, since in these cases the presumption of suitability would be rebutted.

8 MCAR § 4.009 Partial benefits exemption.

This rule clarifies that claimants who are eligible for partial benefits are exempt, pursuant to Minn. Stat. § 268.08, subd. 1 (1), from the eligibility limitations and requirements of 8 MCAR §§ 4.3001 - 4.3008. This exemption is provided since partially unemployed claimants continue to be employed, though on a less than full-time basis due to a temporary lack of work. The temporary nature of the underemployment and the certainty of full-time employ-

ment in the near future make this exemption reasonable. It would be counter-productive and oppressive for the claimant and his employer, as well as for prospective employers, to require the employee to seek full-time work, register with the job service and meet the other requirements of Chapter Two of these rules, when he is currently partially employed and likely to be fully employed by the same employer in a short period of time.

8 MCAR § 4.3010 Benefit claim procedure.

A. Purpose and scope.

This rule is necessary to clarify the claim procedure and eligibility criteria set forth in Minn. Stat. § 268.08, subd. 1. The purpose is to provide a precise indication of the requisites and procedures for filing a claim.

B. 1-3. Initial claim.

This paragraph delineates the procedures to be followed by an individual when filing or reopening a claim for benefits. An in-person application is reasonably required since it is the best way to assure that all inquiries relevant to eligibility can be made and benefits approved or denied in a timely fashion. A claimant's social security number can reasonably be required to be furnished in this context as a means to establish employment history. The department provides a form to facilitate the processing of claims and to minimize errors and omissions. The registration requirement is reasonable since it is consistent with the general requirement of availability for work and actively seeking work.

C. Claim acceptance form.

This paragraph provides that a claim acceptance form will be presented to a claimant if the unemployment office to which he initially reports is unable to provide claim service at that time. The form serves to establish the date the claimant initially filed. This provision is reasonable and necessary since it allows the claimant to establish a filing date (important for the commencement of benefits) as of the date of an attempted filing even if he is unable, because of the volume of business or the like, to complete the process. The principle applied here is that the claimant should not be penalized, by a later benefit commencement date, when he has attempted in good faith to file as required.

D. Part-time unemployment office.

This provision sets forth the procedures to be followed by an individual who lives in an area in which there is a part-time unemployment office. The paragraph provides that a claimant may file retroactive to the Sunday of his first week of unemployment when he files with a part-time unemployment office in his locality so long as the day he actually files is his first opportunity to file. This is a necessary provision to avoid disadvantaging claimants who live in areas served by part-time unemployment offices by later commencement of benefits.

E. Permitted benefit years.

This provision establishes that benefit years may not overlap unless this result is specifically required in a given situation or by law or rule. This is a reasonable rule since benefit years function more or less as specific accounting periods for benefits. If benefit years are allowed to overlap, more benefits would be paid than is contemplated by the statute.

F. Withdrawal of claim.

This paragraph provides that an initial claim for benefits may not be withdrawn or terminated, once filed, except as provided by rule or law. This provision is designed to prevent the claimant from withdrawing his claim in response to possible harassment or solicitations by previous employers and to assure that no claim is terminated except when required by law or rule.

G. Continued claim.

This section requires that after filing the initial claim the claimant continue to report to the unemployment office charged with administering his claim in the manner and with the frequency prescribed by the department. This provision is designed to provide the department with the flexibility to periodically monitor the continued eligibility of the claimant and to closely assist him in his work search when this is required by the circumstances while authorizing a less direct oversight role when appropriate.

H. Transferred claim.

This paragraph requires a claimant who files for more than four weeks of benefits through an area office other than that of his initial claim to transfer his claim to the second office. Eligibility would not be denied, however, unless the claimant was directed to transfer his claim prior to the continued filing. This rule is necessary to assure that the area office which is in the best position to monitor claimant's eligibility and his work search is the office with responsibility for his claim. In the absence of this requirement the enforcement of availability, work search and other requirements in statute and rules would be made very difficult, especially for out-of-state claimants.

I. Late filed claim.

This paragraph stipulates that a claimant who fails to file a continued claim in the manner, time and place specified by the department may file the claim within fourteen days, in person or by mail, of the date specified without effect on the benefits or waiting week credit. Good cause on the part of the claimant will serve to extend this period to within thirty-five days of the end of the benefit year. This section makes clear, however, that a claimant will not be entitled to credit or benefits for subsequent weeks for which he has neglected to file unless good cause for this noncompliance can be adequately demonstrated. This rule thus reasonably provides the claimant with additional time without penalty where there is good cause for the delay, but restricts eligibility when he fails to report without sufficient justification.

8 MCAR § 4.3011 Week of unemployment.

A. Scope and purpose.

This rule is necessary to clarify the definition of "week" as defined in Minn. Stat. § 268.04, subd. 23 in the context of a labor dispute.

B. Week calculated, labor dispute.

This paragraph provides that a "week" in the circumstances of a labor dispute, is whatever days in the week remain after the termination of the dispute. A proportional credit is to be allowed for each such day toward benefit or waiting week eligibility.

Chapter Three: Taxation

8 MCAR § 4.3100 Definitions

A. Generally.

This paragraph indicates that the terms used in 8 MCAR §§ 4.3100 - 4.3108 should be interpreted in accordance with the definitions provided in Minn. Stat. §§ 268.03 - 268.24 or the rules promulgated by the department.

B. Pay period.

This part of the rule clarifies the term "pay period" and provides a maximum length pay period of one month for the purposes of these rules.

8 MCAR § 4.3101 Wages

A. Purpose.

This rule provides a comprehensive explanation of the term "wages" as used in the unemployment compensation benefit and tax system. A general definition is provided in Minn. Stat. § 268.04, Subd. 25, in which "wages" are defined as "all remuneration for services." The purpose of the rule is to apply this definition to include as "wages" various types of specific payments which should reasonably be regarded as remuneration for services in an employment situation. Other specific types of payments not properly regarded as "wages" are excluded by the rule. There is need for this rule since "wages" are an essential component in numerous types of decisions the department must make in administering the unemployment compensation statute. It is a reasonable rule since its provisions consistently apply the general statutory definition of "wages" to specific, recurring circumstances in which wages may or may not be present. The rule lists many of the forms remuneration for services may take and still constitute "wages" and examples of payments which are not contemplated by the term "wages" are also included as a guide in borderline situations. The rule provides clarification of the term wages so that employer tax liability and employee benefit rights can be determined with precision and in a timely fashion.

B. Types of wages, generally.

This part of the rule makes clear that to constitute wages, remuneration for services is not limited by the medium of payment, the time or interval of payment, or the basis or measurement of payment. Any actual compensa-

tion for services rendered, under this rule, is to be treated as "wages" unless some exception applies. This part of the rule is needed to make clear that "wages" is not limited to hourly pay, but includes all compensation for employment services. The purpose is to ensure that all compensation is treated in an equivalent manner and to avoid ambiguity over the status as "wages" of piecework payment, salary, commissions and the like.

C. Paid and payable wages.

This part of the rule establishes that remuneration for services constitutes "wages" whether they are paid or merely payable. Receipt is thus not necessary for inclusion as "wages". This section is designed to avoid ambiguity concerning the status as wages of remuneration not yet received by the employee and to establish that all remuneration the right to which has matured is wages.

D. Types of wages.

Since part B defines wages as including all forms of remuneration for employment services, a method of determining the "wage" value of the different forms of remuneration is needed. This part provides that "wages" equal the monetary value of various types of remuneration. The list of certain forms of remuneration does not exhaust or limit the taxable forms of wages but instead provides examples of the commonest forms of wages.

1. The term "wages" as defined in Minn. Stat. § 268.04, subd. 25, includes remuneration for services paid in a medium other than cash. Thus, "wages" result if the employer provides a dwelling unit, utilities or meals or furnishes services or goods as compensation for services. This rule is required in order to establish a method for the treatment of such in-kind payments. The rule provides that the monetary value of these items is to be treated as "wages" so that this form of remuneration can be aggregated with cash wages for tax and benefit calculations.

2. Remuneration paid an employee on vacation, despite the employee's absence from work, is to be treated as constituting wages under this paragraph, since the vacation allowance represents remuneration for personal services rendered in the past. Thus, vacation pay is subject to contribution and is to be included in benefit determinations.

3. This part of the rule establishes that all separation payments made by an employer to an employee, regardless of whether the employer is legally obligated to make the payment, are taxable wages. Such pay is to be treated as remuneration for past services rendered since it is not reasonable to view it as a "gift". The status of such payments as "wages" is unaffected by the fact that they are paid after separation and is not altered by the voluntary or involuntary character of the separation, since past services are the source of the "wage" status of these payments. This paragraph is necessary in order to avoid ambiguity over the wage status of remuneration paid an employee on account of termination, severance or dismissal.

4. This paragraph provides that monies paid an employee for remuneration for services pursuant to an award or settlement made in resolution of a dispute arising out of the employment relationship comprise "wages." The types of payments contemplated by this paragraph include remuneration for past services determined to be due under minimum wage or overtime requirements, or under a collective bargaining agreement or pursuant to a discriminatory wage remedy, for example. Portions of the award not constituting payment for services actually rendered are not to be treated as wages. Wages, therefore, do not include amounts paid as penalties or as damages for employment wrongfully witheld.

5. This paragraph establishes that payments received by officers or shareholders of a chapter S corporation who render services to the corporation are treated as "wages" unless they constitute a return of capital or capital gain. This section is needed because in its absence there would be constant disputes over the labels applied to such payments and the portions of them constituting remuneration. Since the largest part of such payments will be remuneration, it is reasonable to define all such payments as wages even though an indeterminable amount may be said to constitute income from capital. These wages like other wages are taxable when actually or constructively received.

6. The term "wages" as defined in Minn. Stat. § 268.04, subd. 25 explicitly includes the value of commissions and bonuses. This paragraph applies this general rule by providing that the monetary value of an award, bonus or any other consideration from the employer if accrued during the course of the employment relationship is deemed remuneration for services. This recognizes that such sums represent additional compensation for personal services rendered in the past by the employee, rather than a disinterested "gift." This paragraph represents an application of the general rule that consideration paid for services rendered by an employee regardless of form or timing is subject to contribution and must be considered in benefit determinations.

7. This paragraph provides that if an employer compensates or partially compensates an employee for unused sick leave or allows such payments in circumstances other than personal absence due to sickness, the payments constitute wages. This section is necessary to make clear that payments from sick leave accumulation which are not related to illness are always to be treated as wages since they represent delayed remuneration for services rendered in the past.

8. This paragraph clarifies that standby or idle time payments made to employees for certain minimum periods during which the employer can require the employee to remain available, even though he may not actually perform work, constitute wages. In such a situation availability for performance is itself treated as providing services regardless of whether the employee actually does work during this time.

9. This paragraph provides that advance payments made by an employer to an employee for work to be done in the future constitute wages and are taxable at the time of payment. However, if the payments are indicated by the employer on its books as amounts loaned to employees or a return of employee's capital investment, the payments will not be considered wages. This rule is needed in order to establish a clear point in time for the taxing of wages paid in advance and to separate such wages from other types of payments to employees. It is both reasonable and convenient to subject such payments to contribution and to treat them as wages for benefit purposes as of the time of payment since the employer has disbursed and the employee has use of the funds.

10. This part of the rule subjects to contribution payments made to corporate shareholders and officers which, though called "loans", fail to exhibit any of the characteristics of loans, when those persons have actually rendered service to the corporation and have not received amounts constituting reasonable compensation for those services. This section recognizes that "loans" may sometimes be remuneration for services and seeks to pierce that fiction when the amounts actually constitute "wages." Failure to establish this requirement would invite mislabeling of wage payments and cause loss of appropriate tax revenue.

11. This part clarifies that payments made to individuals acting as assistants or substitutes to an employee, whether paid directly by the employer or indirectly through the employee, are considered wages of the assistants or substitutes if they are in payment of personal services rendered. The assistant or substitute becomes in effect an employee so long as the employer knows or has reason to know of the use of assistants. This rule is needed to avoid dispute as to whether the employer or the employee is the employer of an assistant or substitute. The knowledge requirement serves to protect the employer against tax liability in cases in which he is not even aware or able to be aware of the assistant or substitute arrangement since such a result would be unfair.

12. This paragraph establishes that remuneration for services rendered by a caretaker is wages and will be considered to have been equally received by a spouse or other members of the caretaker's household who also perform services unless a contract or other evidence establishes otherwise. This is necessary to clarify that benefit eligibility will extend to all members of the caretaker's household who perform services unless payment of remuneration has been specifically limited solely to an individual. The rule follows the general practice in the caretaker occupation and appropriately treats as employees all members of the caretaker household who perform services and allocates their wages accordingly. An employer may establish a different pattern, however, merely by specifying that only certain individuals are his employees and monitoring adequate records of this fact.

13. This paragraph specifies that remuneration for personal services rendered by a migrant family is wages. Amounts paid will be deemed to have been received equally by each worker in a household, despite the fact that the employer makes payment to only one member of the family, unless a contract or other evidence clearly establishes that other members of the family are not employees. This rule conforms to general industry practice and is necessary to ensure that benefit rights are available to all members of a migrant family who actually render services and to avoid unnecessary disputes over this fact.

14. This paragraph establishes that the cash value to an employee of the use of an employer's vehicle for personal purposes will be computed as wages within the meaning of Minn. Stat. § 268.04, subd. 25, if the vehicle is provided in lieu of wages as compensation for services rendered. The monetary value to the employee of the use of the vehicle is deemed in this part to be $200 per month, and if used less than a month, $7 per day. Clauses a and b of this section establish that amounts by which employee reimbursements fall short of these amounts (or of 20¢ per mile on a mileage basis) are also to be treated as wages. The provision of a vehicle which may be used in part for personal use is common in many occupations. Since the personal use of a vehicle clearly falls within "wages" as in-kind remuneration for services, a rule is necessary to establish a monetary value for this form of wages. This paragraph establishes amounts reflective of actual leasing, rental and mileage reimbursement schemes in order that the taxing of "wages" in the form of vehicle use may be administered effectively.

15. This paragraph establishes that monies deducted from an employee's earnings pursuant to a deferred compensation agreement are to be treated as wages for tax purposes in the year in which the employee would otherwise have received them. Although the employee does not actually receive the remuneration until a fixed time in the future, usually after retirement, the employer has disbursed them and the employee has rendered the services on which they are based. The rule thus provides that the sums paid into the program are merely deferments of previously earned wages and thus give rise to benefit eligibility and employer contributions in the year the sums are paid into the fund. These sums could not be taxed after retirement, since the employment relationship will have terminated. The rule is thus needed to avoid loss of contribution on deferred wages.

E. Tips and gratuities.

This part of the rule defines the terms necessary to implement Minn. Stat. § 268.04, subd. 25, which provides that "wages" include tips and gratuities paid to an employee by a customer of an employer and accounted for by the employee to the employer.

1. a-d. These sub-parts describe the several methods by which tips and gratuities may be "accounted for to the employer" and thus subjected to contribution.

2. a-c. These sub-parts itemize the various ways that tips and gratuities may be paid to an employee by a customer. These provisions are necessary to clarify the phrase "paid to an employee by a customer" in terms of the various arrangements in effect in different work settings.

F. Valuing non-cash remuneration.

1. Wages under Minn. Stat. § 268.04, subd. 25, include remuneration for services paid in a medium other than cash. This part of the rule sets forth the method by which non-cash remuneration for services is to be valued for tax purposes so that such valuations can be made in a timely and consistent manner.

a. This section establishes that the value of meals furnished without charge to an employee by an employer is to be treated as remuneration for services rendered. Fair market value or an agreed value is to be the measure of "wages" in such a case so long as the result is higher than the meal allowance provided pursuant to the state fair labor standards act.

b. This paragraph of the rule defines the rental value of lodging furnished without charge to an employee by an employer as remuneration for services rendered. The value of the lodging for employer tax purposes is measured by the rental value of equivalent accomodations as long as it is not less than the allowance provided pursuant to the state fair labor standards act.

c. This paragraph extends the reasoning of a and b to any other in-kind remuneration. Any compensation provided an employee by an employer in a medium other than cash is thus to be valued at its fair market value at the time of receipt unless a higher value is agreed upon between the employer and employee. This provides a general method for the valuation of unanticipated forms of in-kind remuneration.

2. This part of the rule is necessary in order to authorize the department to reevaluate the employer's estimate of the fair market value of remuneration for services furnished to the employee if the department reasonably believes that the employer's determination is incorrect. Though the parties are free to fix a higher value than fair market value on such remuneration, the department must have authorization to reevaluate unreasonably low valuations.

G. Employee equipment.

This rule sets forth a method for the treatment of mixed payments of remuneration for services and vehicular equipment rental. The basic principle is that the value of vehicular equipment furnished by the

employee in the interest of the employer's business is not wages for tax or benefit purposes since any payments made the employee for the use of the equipment do not represent remuneration for services.

1. This paragraph establishes the manner by which the value of the employee's equipment will be determined in order that the employee's taxable wages can be calculated.

    a. This part provides that the wages of the employee shall not be less than the prevailing rate of pay of other employees, not furnishing equipment, who do similar work, operating similar equipment, in the locality where the work is being conducted. This should provide the most accurate base value of the employee's services at the time and place they are rendered.

    b. This part establishes that if there is no local prevailing wage for the type of work being performed, 40 percent of the total pay shall be deemed to constitute remuneration for personal services. This rule is necessary to provide a method of allocation where no comparable wage measure is available and it does reflect the average breakdown of labor and equipment rental costs in the circumstances addressed by the rule.

2. This paragraph establishes that, contrary to the rule on vehicular equipment, payments to an employee which include reimbursements for use of a personal vehicle are to be treated as wages, unless such reimbursements are separately paid or accounted for and then only when the amounts are reasonable. This rule recognizes the common practice of hiring on a "must have car" basis, where no real equipment rental payment is contemplated by the parties and it is thus reasonable to treat the entire payment as wages. Genuine reimbursements, however, are to be treated as such and not as wages.

3. This paragraph is necessary to authorize the department to reevaluate the employer's wage determination if the department reasonably believes that the employer's determination is unreasonable or arbitrary in a particular case.

H. Exempt wages.

This rule provides a non-exclusive list of payments or benefits furnished by the employer to the employee which are not considered wages under any circumstances. This rule is designed to avoid disputes over payments and benefits which it is not reasonable to treat as remuneration for services.

1. Discounts on goods or services offered by employers to employees are not be be considered wages unless they are so routine and on such a scale as to constitute in-kind remuneration. Since such discounts are optional and may or may not be received by those doing the same work, it is appropriate to treat them as privileges rather than remuneration for services.

2. Fees paid to directors not otherwise employed by a corporation, if deemed customary and reasonable, are not included as wages. This paragraph recognizes that outside directors are properly treated as independent contractors or consultants, rather than employees, but provides an exception when fees are more than is usual for a non-employee director.

3. This part of the rule clarifies that money furnished by the employer to compensate an employee for meal expenses made necessary by overtime work are not wages, but reimbursements.

4. Minn. Stat. § 268.04, subd. 25 (2) expressly exempts employer payments on behalf of an employee for retirement or for accident or health insurance from wages. This section extends this exemption to employer payments for dental and legal service plans since these newer plans are in every respect analogous to health and accident insurance or retirement payments and should be treated in a consistent manner.

5. This paragraph establishes that long term payments made to employees to compensate for sickness or disability are not to be counted as wages for employment tax purposes if the employer does not maintain a plan pursuant to Minn. Stat. § 268.04, subd. 25. The rule assumes that after six months of payments it is appropriate to regard such payments as disability or income maintenance insurance type payments, rather than remuneration for services.

6. Fees in the form of cash or other medium paid by a court to an individual during jury duty are deemed not to be wages since these fees are in the nature of reimbursements of expenses and since the services performed by the individual were not the result of an employment relationship.

7. This paragraph excludes royalties and similar payments from wages since they are a form of income from property rather then remuneration for services.

8. This part of the rule establishes that reimbursements paid to an employee for traveling or for other expenses incurred while performing services for the employer are not wages if they are paid specifically for such expenses and are identified as such at the time of payment. This rule properly excludes reimbursements and advances for expenses from wages, but limits this exclusion to cases of clearly documented expense-related payments in order to avoid ambiguity.

9. This paragraph provides that residual payments for the use of broadcast or film properties are not wages since, like royalties, these payments are income from property, rather than remuneration for services.

10. Payments made to an employee pursuant to a general supplemental unemployment compensation benefit plan established by the employer are not wages. This paragraph recognizes that many employers provide supplements to statutory unemployment compensation benefits. It is arguable that such supplements are remuneration for past services. The rule,

however, excludes them from wages, consistent with the treatment of long-term sick pay, since no present services are being remunerated and in order to avoid penalizing employers who provide such supplements. The section stipulates general safeguards in order to assure that such plans are merely supplementary and do not function in such a way that unemployment compensation obligations are duplicated, evaded or modified and to limit the use of such funds to supplementary unemployment compensation payments.

8 MCAR § 4.3102 Employment.

A. Definitions.

This part of the rule provides definitions to supplement and clarify those provided in Minn. Stat. § 268.04.

1. This definition clarifies the term "control" since it is a significant factor in determining whether an employment relationship exists under these rules and in employment law generally.

2. The definition of "employing unit" incorporates the one provided in Minn. Stat. § 268.04, subd. 9 and includes any person or organization securing services in order to make clear that the tests for the existence of an employment relationship will be applied in any situation in which services are secured.

3. This definition of "employment" incorporates that in Minn. Stat. § 268.04, subd. 12 and states that employment is services performed under control as to method and result. This is the classic definition provided throughout employment law.

4. This definition clarifies the term "method" as it is used in this rule since control over the method of performing services, rather than merely the results, is a factor tending to establish the existence of an employment relationship, rather than that of independent contractors.

B. 1-6. Procedures for determining control.

This paragraph provides notice of the sources the department may examine to ascertain whether "control" in the employment sense is present in a specific situation. The section lists contracts, interviews, statements, statutes pertaining to the occupation or business, records and other appropriate means as sources for evidence as to the existence of the control factor. The specific items listed would normally be the major evidenciary indicia of the nature of the employment situation. The last item allows the department to examine other evidence as well when appropriate.

C. Evidence of control.

This part of the rule provides the criteria which will be used by the department in its determination of whether the element of control is present in order to determine whether an employment relationship exists.

Such criteria are needed in order that determinations may be made according to all the relevant facts and circumstances rather than the label that may be attached to the relationship by the parties. The criteria are also provided so that the parties may better understand their own relationship in terms of their rights and duties under the unemployment compensation statute. These criteria are not meant to be exhaustive but they do constitute the major factors which would reasonably be considered in any determination of the existence of an employment relationship. These criteria are traditional in determinations of employment status under common law and under several statutory schemes such as workers' compensation, labor relations, labor standards and the like.

1. The employing unit's authority over the individual's assistants suggests an employment relationship since the employing unit would not normally have such authority over an independent contractor's assistants.

2. Mandatory compliance with instructions by an individual concerning when, where and how he is to work generally indicates control since an independent contractor makes his own decisions concerning such matters.

3. Oral or written reports if submitted on a regular basis to the employing unit are reasonable indicia of control since independent contractors are not, as a rule, required to complete regular status reports.

4. The place where the work is accomplished is a significant factor in the determination of the existence of an employment relationship, since work on the employer's premises often indicates employment status and work elsewhere, independent status, though these presumptions may not always operate.

5. The requirement that the work be done personally by an individual may reasonably suggest the presence of an employment relationship. Conversely, if the employing unit is only due a specific result and not a particular method of execution, the likelihood that an independent contractors' relationship exists is greater.

6. The establishment of a work sequence or the retention of the right to establish a work sequence constitutes indicia of control since an independent contractor will normally establish his own sequence of work.

7. The right to discharge is typically indicative of an employment relationship since an independent contractor cannot be discharged until contract termination unless his end product does not meet contract specifications. The rule indicates limits to the application of this criterion where a labor agreement restricts discharge and where an independent contractor may be terminated, under the agreement, short of non-delivery of the final result.

8. Set hours of work generally suggest an employment relationship since an independent contractor usually establishes his own hours of work.

9. It is reasonable to consider the factor of training as an index of control since independent contractors are not normally provided training by those engaging their services.

10. The amount of time spent at work is a significant factor in the determination of an employment relationship. Full time work in a single activity strongly suggests that control is present.

11. The provision of tools and materials by the employing unit reasonably indicates the existence of an employment relationship, since contractors typically furnish their own equipment and materials.

12. Expense reimbursement typically suggests an employment relationship since an independent contractor will normally cover his own expenses from the total contract price.

D. Independent contractor or employee, factors to consider.

The focus of this section of the rule is on factors which suggest a nonemployment or independent contractor relationship. The independent contractor criteria provided in this part of the rule will be considered by the department in conjunction with employment criteria in its determination of whether an employment relationship exists. These negative factors are intended to assist the parties and the decision-maker in identifying the nature of the relationship especially in borderline situations in which many of the criteria for employment may also be present. The factors provided are similar to those traditionally used in the determination of independent contractor status under common law and statutes such as FUTA and FICA, except where there are clear reasons for deviation. These items are stated as factors for consideration since none is in itself conclusive. Employment on a commission basis may contravene 3 (profit or loss), for example, and skilled workers may furnish their own tools as employees, despite 5.

1. The fact that an individual routinely makes his services available to the general public reasonably suggests that his status is that of an independent contractor since this availability strongly implies that the individual is offering and supplying services to many individuals and entities rather than to a single employer.

2. Compensation on a job basis rather than by the hour, week or month, is indicative of an individual's independent status since this arrangement suggests that the individual is being compensated for delivering a result rather than for providing services under a traditional employment relationship.

3. The capacity to realize profit or loss as a result of his work suggests that an individual is an independent contractor since an individual in an employment relationship does not normally assume risks of loss and is not usually in a position to expect gain other than specified remuneration for services rendered.

4. The inability to sever an employment relationship at will is usually indicative of an individual's independent status since the independent contractor normally contracts to achieve a result based on the satisfactory completion of a specific job. While an employee generally need only supply reasonable notice of termination to his employer, severance before the job is finished would normally subject the independent contractor, on the other hand, to damages for breach of contract.

5. A substantial monetary investment by an individual in the facilities used by him in providing services for another would reasonably suggest an independent status, under most circumstances, since the employer generally provides the facilities necessary for his employees to render the services which are due.

6. An individual performing work under simultaneous contracts for more than one individual or entity will normally be treated as an independent contractor since an individual in an employment relationship usually performs services for a single individual or entity.

7. Whether an employing unit is held legally accountable for an individual's actions in the course of his work is a factor in determining his status as an employee or independent contractor. An employer would, for example, be held responsible for tortious acts committed by an employee during the course of his employment, but since an independent contractor is not considered an agent or representative of an employing unit, the employer would not be held responsible for such acts committed by the individual in performance of his contract, except in exceptional circumstances.

E. Services in the course of the employing unit's organization, trade or business.

This section introduces an additional factor which is to be considered by the department in its determination as to the existence of an employment relationship. It provides that, if services performed by an individual are in the course of the employing unit's business, the individual's relationship to the employing unit is likely to be treated as that of an employee. This additional criterion is provided in recognition of the fact that work performed in the course of the employer's business will normally be performed by employees, since that is the purpose of engaging employees, while work done outside the course of that business is likelier to be performed by an independent contractor. The paragraph defines "in the course of" and related terms and provides examples in order to assist in these determinations.

F. Independent status, determination.

This section of the rule is necessary to explain the general method by which the department intends to make determinations concerning the nature of work relationships. Part F indicates that the department will utilize the foregoing factors for determination of the existence of an employment relationship on a case-by-case basis, rather than through any mechanical or formulaic application of the factors. Since

industry and occupational customs and practices differ dramatically, the factors noted must be applied and weighted differently depending on the circumstances. This flexibility is needed in order to allow a reasoned determination of employment status based on the employment realities of individual industries, occupations and situations.

G. This paragraph applies Minn. Stat. § 268.04, subd. 12 (1) (b) under which certain specified agent-drivers, commission-drivers and salespersons, although classified as independent contractors under the common law, are considered employees if they perform services for remuneration for a principal employer under certain prescribed circumstances.

1. This section of the rule clarifies the meaning of the term "full-time" in its application to traveling or city salesman as it is used in Minn. Stat. § 268.04, subd. 12 (1) (b). It is necessary to establish that the traveling or city salesman is engaged upon a full time basis in the solicitation of orders for his principal since anything less may be indicative of an independent status.

2. Consistent with Minn. Stat. § 268.04, subd. 12 (1) (b), this part of the rule provides that, to qualify as employees, agent-drivers and salespersons cannot have a significant investment in their permanent work facilities. This section is necessary to further distinguish these employees from independent contractors who would normally have a substantial investment in their own work facilities.

a. This definition is necessary to clarify the term "facilities" as used in Minn. Stat. § 268.04, subd. 12 (1) (b) and this rule in order to make decisions about the presence or absence of substantial investment by agent-drivers or related personnel.

b. This definition is necessary to clarify the term "substantial investment" as used in Minn. Stat. § 268.04, subd. 12 (1) (b) and this rule in order to ascertain the employment status of agent-drivers and related personnel.

H. In employment by federal law.

This part of the rule indicates that a person will be considered an employee if his services subject an employer to the federal unemployment tax, or if his services are required to be defined as employment in the federal statute. The first part of this section recognizes that tax liability indicates that a considered judgment as to the existence of an employment relationship has been made for tax purposes which should reasonably be extended to other purposes under these rules. It also is designed to achieve uniformity in the state-federal systems. The second part of this section is derived from Minn. Stat. § 268.04, subd. 12 (c).

I. In employment, general inclusions.

This paragraph of the rule specifically includes certain services within the meaning of the term employment.

1. This part indicates that persons who perform services and receive remuneration in part in the form of commission

allowances as a direct result of a sale are in an employment relationship. This section of the rule is necessary since in certain instances elements of both an employment and a nonemployment relationship might be present. The rule reasonably resolves this ambiguity by providing that the employment aspect will dominate. All remuneration in such cases, including commissions, will thus be treated as wages in the determination of employer tax liability and benefit eligibility. This is a reasonable provision since it is logically inconsistent for a person to be both an employee and a nonemployee with respect to the same relationship. Licensed insurance and real estate persons, all of whose income is in commissions would not be treated as employees under this rule.

2. This section establishes that services performed by election judges are employment services. That election judges' services fall within the meaning of employment is consistent with the general rule since they provide services for remuneration. In the absence of an express inclusion, it might be claimed such services were casual or merely civic duties.

3. This section of the rule clarifies that factory demonstrators, whether employed by the manufacturer, distributor or retailer, are performing services arising out of an employment relationship since it would be inappropriate to treat such an individual as an independent contractor. This part of the rule further states that if the employee is paid partly by the manufacturer or distributor and partly by the retailer, he is providing service to both and both are subject to contribution in proportion to the remuneration paid by each. Proportional contribution is the fairest means to allocate liability in cases in which a demonstrator works, in part, for several employers. This is consistent with the treatment of other multiple employer situations and avoids a possible anomalous result: that the demonstrator is an employee of, for example, the manufacturer, but an independent contractor with respect to the retailer.

J. Casual Labor.

1. This section specifies that "casual labor", not in the course of the employer's business, is employment for the purposes of this rule, unless the labor in question meets the exclusionary provisions in paragraph 2. "Casual labor" is generally excluded from the term employment by Minn. Stat. § 268.04, subd. 12 (15) (b). Federal law, however, includes most casual labor within employment. Another provision in state law provides a means to reconcile these two provisions. Minn. Stat. § 268.04, subd. 12 (6) states that employment shall include that which is deemed employment under the Federal Unemployment Tax Act. Thus, casual labor, to the degree it is covered in the federal act, is employment for the purpose of this rule, while it is excluded from employment to the degree it does not meet the federal definition, pursuant to Minn. Stat. 268.04, subd. 12 (15) (b). Since casual labor is treated in a different way than "in the course of" labor in much employment law this rule is necessary to clarify that,

while certain casual labor is excluded from coverage under these rules, much casual labor will give rise to tax liability and benefit eligibility. The federal act is thus treated as defining casual labor for the purposes of the state law's exclusionary provision, implemented by this paragraph of the rule.

2. This paragraph defines casual labor excluded from the term employment as labor, for which less than $50 cash remuneration is received, performed by an employee not regularly employed by the employer and which does not advance or promote the trade or business of the employing unit. Corporate employees are always to be treated as regular employees. This rule is necessary to define and limit excludable casual labor. Casual labor traditionally occurs in small employer situations in which business and non-business employment may not be clearly segregable. It is therefore reasonable to limit excludable casual labor to non-regular employees, earning small amounts, doing clearly non-business work in non-corporate settings.

K. Localized employment.

1. This part of the rule identifies the criteria the department uses to determine whether an employee who works in more than one state performs sufficient services in Minnesota to constitute localized and thus reportable employment. This rule reasonably limits Minnesota employers' tax liability to employees who perform 80 percent of their regular services in Minnesota. This is sufficient contact to make the employee a Minnesota employee for the purposes of these rules. To require 100 percent localized employment would invite abuses and leave large amounts of wages untaxed in any state.

2. a-c. This section provides that regular services may be performed in an office located in the home of the employee only if the home office is the only office used by the employee, federal tax deductibility is established and the office and the duties performed there are regular duties. The limitations are needed in order to assure that decisions about the localization of employment are not distorted by consideration of non-regular duty work performed in an ancillary office. The main work location or locations of the employee should be the determinant of the locality of employment.

3. a-b. This part of the rule defines incidental, temporary, transitory and isolated services in order to distinguish them from regular services. These services, in contrast to regular services, would not affect the 80 percent requirement of localized employment, since the locality of employment should reasonably be established only by reference to regular services.

L. Multi-state employment.

This part of the rule sets forth the tests the department will utilize in determining whether the services of an employee whose employment is not localized to Minnesota are nonetheless reportable to Minnesota.

These tests establish reasonable bases for identifying an employment relationship to Minnesota and are necessary to avoid gaps in benefit eligibility and tax liability in the national unemployment compensation system.

1. The base of operations test provides that if an employee performs part of his regular services in Minnesota and the "base of operations" is in Minnesota, the employee's entire services are reportable to Minnesota. This test is a reasonable one since an employment relationship meeting the test would exhibit more extensive employment contacts with Minnesota than with any other state.

2. The direction and control test provides that if an employee performs part of his regular services in Minnesota and if Minnesota is the state from which the employer exercises "direction and control", the employee's entire services are reportable to Minnesota. As with the first test, the direction and control test establishes a Minnesota locality for an employment relationship when the relationship is more identified to Minnesota than to any other state. Some reporting location is necessary and it is reasonable to make it Minnesota if this test is applicable.

3. The residence test reasonably provides that if an employee performs part of his regular services in Minnesota and his residence is located in Minnesota, the employee's entire services are reportable to Minnesota. Reporting to Minnesota is reasonable in such a case since no greater contacts exist with another state. Residence establishes jurisdiction in many other contexts and is adequate to require reporting to Minnesota here.

4. The "no other coverage" test provides that if an employee's services are not covered in any other jurisdiction and if his services are directed and controlled from Minnesota, the employee's entire services are reportable to Minnesota. This is in effect, a "minimum contacts" test, but where no other coverage is appropriate and direction and control from Minnesota are present, reporting to Minnesota is a reasonable requirement.

M. Employment partially exempt within a pay period; 50 percent rule.

1. This part of the rule clarifies the application of the 50 percent rule as provided in Minn. Stat. § 268.04, subd. 12 (15) (p). The statute creates the presumption that if one-half of an individual's work constitutes employment, all of his services will be considered employment. The rule indicates that work which is specifically excluded by statute from the definition of employment, such as services performed by an independent contractor or services performed for a religious organization, cannot become employment by application of the 50 percent rule since it is not appropriate in such a case to "presume" that those services are employment. This rule reasonably limits the application of the statutory presumption to cases where services have not been specifically excluded from employment in a separate provision.

2. This part of the rule clarifies application of Minn. Stat. § 268.04, subd. 12 (15) (p) by providing a reverse 50 percent rule: if 50 percent or more of an individual's services are excluded employment, none of the individual's services are employment during that pay period. This provision is a reasonable one since it supplies a presumption logically consistent with the employment presumption and equally helpful in administration of the statute and rules.

3. This part of the rule makes clear that although services performed for a religious organization are exempt from Chapter 268 (under the 50 percent rule or otherwise), other employment services performed by the same individual are subject to the provisions of the Chapter. This establishes that although an individual's work may consist in part of excluded employment, services performed by the individual in an employment relationship are severable and will be taken into account in benefit determinations and in tax contribution decisions.

N. Previously excluded employment.

This section of the rule makes clear that if an individual's status under Minn. Stat. §§ 268.03 - 268.24 changes within a calendar year because his employing unit's status changes, his previously excluded remuneration is retroactively reportable. This part of the rule is necessary because liability is determined on an annual basis. No change in status can be administered other than on an annual basis without disparities resulting between benefits to be paid and taxes due.

O. Employment, general exclusions.

This provision clarifies the application of Minn. Stat. § 268.04, subd. 12 (10) (d), which excludes from employment services performed for an unemployment work relief or training program assisted or financed by a governmental authority, except for certain CETA participants. The paragraph establishes that the assistance or financial aid in question need only be supervision or advice, but must be substantial and continuing in nature, that the provision of non-incidental facilities or material is always "assistance" and that the financing or assistance must be provided directly to the program, rather than indirectly as assistance to the agency operating the program. This part of the rule is necessary to establish the level and kind of assistance which would serve to exclude employment under Minn. Stat. § 268.04, subd. 12 (10) (d) and to make clear that only direct assistance and funding, rather than revenue sharing funds, tax credits and the like provided generally to the agency operating the program, are assistance or financing under the statute.

8 MCAR § 4.3103 Agricultural Labor.

A. Purpose.

This rule provides definitions to supplement and clarify terms used in Minn. Stat. § 268.04, subd. 12 (15) (a) and in this rule.

B. 1-13. Definitions.

The terms in this section are for the most part defined for identification purposes consistent with their usual dictionary meaning and with trade practices. Thus poultry is defined as "...domestic fowl raised for meat or eggs and includes chickens, turkeys, ducks and geese." Since agricultural employment is treated, in some respects, differently than other types of employment, these terms are necessary in order to provide a means to distinguish agricultural from other employment. The definitions are reasonable since they correspond to the everyday meanings of these terms and the trade practices associated with them. The following definitions are discussed individually since they limit or replace the everyday meanings of the terms used.

5. "Farm" is generally defined in the rule as land and buildings primarily used for raising crops, livestock or poultry. No certain size is required, nor is contiguousness of plots, but agricultural services alone will not suffice to make land a farm. This definition is necessary in order to establish a clear rule which will permit the department to routinely make the determinations required under the statute and rules. It is a reasonable definition since it will include all working farms regardless of size or shape, even if some non-agricultural labor is performed on them, so long as the primary occupation on the farm is agricultural work, but excludes hobby farms, manufacturing plants operated in farm buildings and the like.

10. "Primary", for the purpose of applying the "farm" definition, is identified as 70 percent or more. It is necessary that this term be precisely defined for ease of application and 70 percent is a standard requiring predominantly agricultural activities, but permitting substantial non-agricultural work in recognition of the sometimes extensive non-farm labor performed on a modern farm as a supplement to agriculture.

C. Farms, exclusions.

This part of the rule is necessary to establish that certain operations on land are not in themselves "farms" since they might otherwise be thought to meet the general definition in B. These exclusions are consistent with the general definition and make for ease of application.

1. Feedlots, hatcheries and horsebreeding and training are explicitly excluded from the term farm despite the fact that some of the services associated with such operations might be considered agricultural labor. This paragraph is a necessary and reasonable one because it recognizes that feedlots and hatcheries are in the nature of processing operations for "semi-finished" agricultural products, while horsebreeding and training is a "commercial" rather than an agricultural operation. This section would not exclude a farm which included a feedlot or a horsebreeding and training component, but such activities alone, since not necessarily agricultural, would not suffice for a farm.

2. Land upon which no effort has been made to conduct any farming operations is excluded from the term farm consistent with the definition in B (5), since it is evident in such a case that

no agricultural or horticultural products are being produced, even if hunting and gathering is done.

D. 1-5. Farms, inclusions.

This part of the rule is necessary in order to fix the nature of specific arrangements which contain ambiguous elements, but which are most properly treated as farms under Chapter 268. These situations involve crops (or wildlife) which can be gathered wild, or in the case of ranges, land which is left in more or less its natural state. But in these cases the crops and wildlife are actually being raised and the land used as part of a livestock operation, so treatment as a farm is reasonable.

E. Crop purchase agreements, farms, agricultural labor.

1. This part of the rule clarifies that an individual who purchases a commodity under a crop purchase agreement is not a farm operator even if he is involved in the production and harvesting of the corp. This section draws this distinction to avoid confusion as to the status of the buyer when a farm's crops are subject to a crop purchase agreement. Since a crop purchase agreement is a commercial transaction it is inappropriate for the buyer to be treated as a farmer even if he severs the crop from the land.

2. This part clarifies that services performed for either party to a crop purchase agreement are agricultural labor. Though the crop purchaser is not a farm operator, this should not imply that labor hired by the buyer to, for example, harvest the crop, is not agricultural labor. This section thus defines such labor as agricultural to avoid this inappropriate inference.

F. 1-5. Agricultural labor on farms.

This part of the rule establishes that horse breeding and training, poultry hatching, aerial seeding and the like, office work directly related to raising and harvesting and feedlot operation will be treated as agricultural labor only if they are conducted on a farm. This section is necessary since the listed activities are merely ancillary to agriculture proper and may be conducted in non-agricultural settings. It is thus reasonable to define such activities as agricultural labor only when performed on a farm.

G. Agricultural labor, specific cases.

1. This paragraph provides examples of work which are ancillary to agricultural work but when performed in the context indicated are deemed agricultural work. This section is needed to delineate the conditions under which the specified ancillary activities will be treated as agricultural. Since these activities are less directly related to primary agricultural operations than those in F, it is reasonable to specify additional conditions on their treatment as agricultural labor.

2. a-c. This paragraph indicates that clerical work not directly related to raising and harvesting, but related to farm operation and management or the preparation and delivery of agricultural products, is agricultural labor if it is performed on the farm, in the employ of the operator and incidentally to agricultural operations. Since the types of clerical work cited can also be performed in a non-agricultural setting, the section specifies reasonable conditions to assure that such work is only treated as agricultural when genuinely ancillary to farm operations.

3. a-b. This part of the rule makes clear that commodity retailing is agricultural labor only if it is performed by an employee of the farm operator utilizing less than half his time for retailing and only when the operator's own products are being sold. This section is necessary to segregate ancillary "roadside" retailing by farm operators, which is properly treated as agricultural labor, from substantial retail operations conducted on a farm, which is not appropriately defined as agricultural labor.

4. This part of the rule clarifies that waterways work conducted in the employ of the operator of a farm is agricultural labor. This is reasonable since a farm operator is unlikely to engage in work on waterways except as an adjunct to farm operations. Thus no further conditions are necessary to assure that such labor is ancillary to farming. Those employed by others to do such work, on the other hand, are more properly treated as employed in construction work.

5. This section of the rule establishes that land clearance performed in the employ of the operator of the farm is agricultural labor. The same reasoning applies as in 4 above.

H. Agricultural labor exclusions.

1. a-h. This paragraph provides examples of kinds of work which appear to have some of the characteristics of agricultural labor but which are specifically excluded. Activities associated with pets, experimental animals or non-draft horses might be viewed as "livestock" related, but it is more appropriate to treat these activities as non-agricultural since they do not result in either food or fiber products. Activities associated with trapping, maple syrup processing and wild rice harvesting result in food or fiber, but they involve gathering wild products rather than husbandry. Lumbering is a separate commercial activity from farming and landscaping is the commercial retailing of one type of product of the soil.

2. This part of the rule clarifies that services performed in connection with hauling crops to a packing plant and services within the plant for an individual other than the operator of the farm are excluded from the term agricultural labor, since such activities are more properly treated as part of the processing, meat packing and canning industries.

I. Agricultural labor, separate commodities.

This paragraph requires that determinations of whether services are agricultural labor are to be made on a commodity-by-commodity basis. This rule is necessary to prevent the unintended exemption from these rules of farmers who combine their produce with the different commodities of others for delivery.

8 MCAR § 4.3104 Domestic Service.

A. Purpose.

The purpose of this part of the rule is to provide definitions to clarify terms related to domestic service in the statute and rules.

B. Definitions.

1. This definition of "domestic service" is necessary to clarify the nature of the work contemplated by the term and to delineate some of the categories of workers who are encompassed by this employment term. It is necessary to distinguish domestic service since, the statute mandates a different threshold wage level for domestic service than for other types of service before the provisions of the statute apply. The definition is a reasonable one since it includes all of the services traditionally considered domestic services when performed in a private home or college club.

2. This part provides a definition of "local college club" since such clubs are sites where domestic services may be performed. The definition clarifies that a local college club must be a non-profit organization in order to distinguish profit-making businesses which may be called college or student clubs, but which are not properly treated as locations where domestic service is performed.

3. This definition is necessary to clarify with specificity the meaning of "private home" since it is the primary location where domestic services are performed. The definition establishes that a "private home" is any place of abode and clarifies how the department treats facilities that have mixed uses. This definition is reasonable since it includes all possible forms of private homes while separating portions of the same facility which may be used for business purposes or as the residence of others.

C. Domestic service, general.

1. This paragraph establishes that services for remuneration performed at the private home of the employing unit, if non-domestic in nature, will be subject to the other provisions of Chapter 268. This section clarifies that the exemption of domestic service from employment does not extend to other services performed by an employee in a private home. This is consistent with the statute and is necessary to avoid disputes over non-exempt services performed in an otherwise domestic setting.

2. This paragraph is designed to distinguish housekeeping and normal maintenance, which are exempt as domestic service, from related non-exempt services such as major repair and construction labor or other skilled work performed by contract in the home. This distinction follows traditional employment law and is designed to avoid claims of exemption for employment services simply because they are performed in a dwelling.

3. This section of the rule is intended to distinguish personal care domestic service from related types of service which are non-domestic. This paragraph is also intended to provide for the non-exemption of certain employment services performed in the home. Nurses and secretaries, for example, even though employed in a domestic setting, do not perform services traditionally understood as domestic service. The reason for this provision, as with 2, is to clarify the employment status of non-domestic services even when performed in a home. The nature of the services, rather than the setting alone, is the determining factor.

4. This part of the rule makes clear that relatives may perform domestic services if the employment relationship is evidenced by a contractual agreement, so long as the services are not performed by the employer's minor child or by a parent or spouse, since these services are excluded from employment in the statute. This rule recognizes that where a genuine employment relationship exists, employment is present whether the parties are related or not, subject to express exemptions.

5. This part of the rule is designed to clarify that housekeeping services performed with respect to rental units by employees of a landlord or rental agency do not qualify as domestic service since such labor is clearly employment in the course of a rental business. This paragraph is consistent with the two part approach to domestic services set forth in these rules: they must be both housekeeping services and they must be performed in the residence of the employer.

6. This section clarifies that employment qualifies as domestic service only if the employee is paid directly by the recipient of the services. This rule is necessary to distinguish a domestic employed through a referral, who is properly treated as providing domestic service, from an employee of a housekeeping service which contracts with an individual to provide services. The latter employee ought not to be exempt since he provides services in the course of the business of his employer.

7. This part of the rule is designed to distinguish service performed in the private home of a minister, priest, rabbi or other member of a religious order where the worker is paid by the recipient of the services from a situation where the worker is paid directly by the religious organization. The former comes within the meaning of domestic service while the latter is entirely excluded from employment since the services are performed for a religious organization. Since services performed for a religious organization are exempt,

this section is necessary to clarify that this exemption extends to services which would otherwise be domestic services under the rules. The treatment of services paid for directly by the recipient as domestic services is reasonable since only services for a religious organization are entirely exempt.

8. This part of the rule is necessary to clarify the status of registered and licensed practical nurses with respect to one another and to domestic services. The rule provides a presumption that registered nurses providing services privately in a home are independent contractors, if they are not subject to direction and control, but that registered nurses and licensed practical nurses engaged by other entities to provide such services are not independent contractors and are not providing domestic services. Since nursing services in the home are common, this rule is necessary to provide a routine manner of treating them under the rules. These presumptions are consistent with the general rules on independent contractors and with 3 above and can be rebutted when the parties intend a different relationship.

9. This paragraph is necessary to clarify the status of nurses aids and patient helpers with respect to domestic service. Since such personnel normally are engaged in providing domestic services, the rule presumes this is their status, though rebuttal is possible. If the patient selects the person who provides patient-helper services, he will be presumed to be the employer, with rebuttal again possible. These presumptions are consistent with the general rules on domestic service and the employment relationship and permit such situations to be treated in a uniform and routine manner under the rules.

10. This section establishes that services provided in the private home of an individual by homeworkers who are funded by governmental agencies are not considered to be domestic services. Since such personnel are in the employ of the governmental unit engaged in providing this service they are clearly in the course of the agency's "business" and not employed by the individual, even if the individual is the conduit for the employee's wages.

D. Location of domestic service.

1. This part establishes that service which is classified as domestic service must be performed solely in a private home, a college club or fraternal organization, consistent with the definition in B (1).

2. This section expressly excludes alumni and faculty clubs from the definition of college club or fraternal organization consistent with the definition in B (2).

8 MCAR § 4.3105 Employer records, reports and payments.

A. Scope.

This rule is necessary to clarify employer responsibilities pursuant to Minn. Stat. §§ 268.06, subd. 1; 268.11, subds. 2 and 3; and 268.12, subd. 8.

B. Notification.

1. This paragraph imposes reporting duties on the employer when the business is transferred in order to assure that employer taxes will be assessed and collected in an effective and timely manner and to make the successor aware of tax liability and benefit determinations which would affect him. These are reasonable requirements since the employer, and not the department, is in a position to know of such events.

2. This paragraph requires that the executor or similar representative notify the department of the employer's death so that the department can be prepared to take the necessary steps to assure that contributions and experience are assessed to the appropriate account.

3. This paragraph is designed to assure that the department is given adequate notice of an employer's bankruptcy in order that the employer's tax liability can be appropriately provided for in the proceedings.

C. 1-10. Records.

This part of the rule specifies that records be kept by the employer for the purpose of establishing, among other things, the employee's identity, the periods of employment, the location of the employment, the wages paid, the rate of pay, reimbursement of expenses and the date and reason for termination. The paragraph reasonably requires that these records be preserved for a minimum of five years after the wages have been actually or constructively paid in order that the department have the opportunity to ascertain the employer's experience rating, determine the extent of any overdue taxes and resolve any litigated issues. The records required by this provision are necessary to enable the department to make reasonable and informed decisions regarding tax liability and benefit eligibility. These are reasonable requirements since such records are normally retained for federal tax purposes for even longer periods of time.

D. 1-3. Records, instate and outstate.

This paragraph specifies additional records that need be kept if the employee works both within Minnesota and outside of the state. The records required are necessarily more extensive than in C so that the department will be able to make the more complicated determinations required in ascertaining to what extent the employment was localized in Minnesota.

E. Records, covered and uncovered employment.

This section is designed to assure that employer records adequately distinguish between included and excluded employment so that tax liability and benefit eligibility can be more readily ascertained. Segregating included hours of work and excluded time is unavoidable if these determinations are to be made.

F. Filing reports.

This paragraph specifies that the employer's tax report must be filed in a timely fashion on forms and in the manner prescribed by the department. Consolidated reports are authorized only to the extent

specified in the rules and corrections of erroneous reports are required. This section is necessary to assure that tax assessments and benefit determinations can be administered in an efficient and effective manner. The assignment of the basic reporting responsibility to the employer is reasonable since he is the one who knows the information necessary to establish liability and is consistent with similar duties under other tax statutes.

8 MCAR § 4.3106 Consolidated reports.

A. 1-2. When permitted.

This rule authorizes, pursuant to Minn. Stat. § 268.06, subd. 21, the submission of consolidated tax reports by corporations having common ownership under specified circumstances. The rule stipulates that consolidated reports will be acceptable only if 1) the related corporations employ the same individuals, 2) they provide compensation through a common paymaster which is one of the corporations and 3) the arrangement has been previously approved by the commissioner. These requirements are designed to ensure that tax liability can be properly ascertained and are made necessary by the increasing use of consolidated payroll and accounting systems by related corporations. The provisions of this rule parallel the treatment accorded consolidated tax reports by the Internal Revenue Service. See, e.g. I.R.C. § 1563.

B. Related corporations tests.

This section provides tests which will be used by the department to ascertain the relatedness of two or more corporations. The applicability of any one of the tests is sufficient for treatment as related corporations. Four separate tests are necessary since relatedness can occur in each of four major ways.

1. a-d. This test focuses on the relatedness of two or more corporations as a result of common stock ownership. This test would treat corporations as related if the parent corporation owned more than 50 percent of the stock or voting power of any one of the related corporations and the others owned more than 50 percent in one another, or if five or fewer individuals or entities own these percentages in each of the related corporations, and in cases of combinations of these two situations and specifically authorized linkages of life insurance companies. Control through ownership is one effective means of relatedness of corporations and the rule reasonably presumes that ownership of more than 50 percent of the stock or voting power of a corporation is actual control.

2. This test focuses on the relatedness of two or more non-stock issuing corporations as a result of a common directorship. Relatedness would be established by 50 percent or greater common directors or power to elect 50 percent or more or the directors on the part of the same persons. This is a reasonable test for relatedness since the directors' majority is the sole source of control in a non-stock issuing corporation.

3. This test focuses on the relatedness of two or more corporations as a result of common officers. Fifty percent or greater common officers could establish relatedness. Since the day-to-day affairs of the corporation are in the hands of its officers, this test is also a reasonable index of relatedness.

4. This test focuses on the relatedness of two or more corporations as a result of common employees. Relatedness would be established in cases in which 30 percent or more of a corporation's employees were also employees of the related corporation. Control may be absent in such a case, but the actual relatedness of the firms for purposes of employment taxes is clearly established.

C-E. Stock defined; Excluded stock, parent-subsidiary; Excluded stock, brother-sister group.

These paragraphs define "stock" and related terms in order that test 1 in part B can be effectively implemented. Non-voting preferred stock and treasury stock are not "stock" under these rules since they cannot be voted and hence are not a measure of control. "Excluded stock", as defined in the rules, includes stock owned by parent corporation shareholders, employees, employer trusts and non-profit organizations, under certain circumstances. These exclusions are appropriate because it is not reasonable to count the votes of such stock as potentially opposed to that of the control group. That is, if 41 percent of the total stock of corporation A is owned by corporation B, but 20 percent of the stock is owned by a major stockholder in B, B should be considered as controlling A since B's shareholder is unlikely to be opposed to B's control.

F. Limits on groups.

This paragraph makes clear that a corporation is authorized to make consolidated reports with only one group of corporations. This rule is based on the premise that control or majority ownership of a corporation can only logically be held by one entity.

G. Concurrent employment.

This paragraph is necessary as it defines the term "concurrent employment" as used in Minn. Stat. § 268.06, subd. 21, and in test 4 in part B of this rule. The section clarifies that an individual must be party to an employment relationship on a continuous basis with two or more corporations during a pay period for the employment to qualify as concurrent. Substantial services in return for wages are required for employment to exist, as in other contexts, but leave or inactivity at any given time does not vitiate concurrent employment, so long as some services are performed during a quarter. This section is necessary to delineate the circumstances under which an employee is concurrently employed by two or more corporations and the limits on that concurrency. The rule is reasonable since it requires actual employment services for both corporations but allows short periods of exclusive service for one or the other.

H. Cash payments only.

This paragraph establishes that consolidated wage reports are acceptable only for cash wages, except with respect to the paymaster corporation itself. The value of non-cash remuneration provided by a related corporation is explicitly excluded. Consolidated wage reporting is a privilege accorded under the rules to accomodate automated common payroll systems. The rule reasonably limits this privilege to cash payments of related corporations in order to avoid an undue administrative burden. In-kind wages are to be included in the consolidated report, if they are earned in the employ of, as well as paid by the paymaster corporation itself. In-kind wages attributable to a related corporation even if paid by the common paymaster, are to be reported by the related corporation only.

I. 1-3. Common paymaster.

This paragraph defines "common paymaster" to assist in the application of the consolidated reporting provisions. The common paymaster can be any one of the related corporations which disburses wages on behalf of the group to at least some of the employees of the group. There can be more than one common paymaster with respect to different classes of employees. Wages of employees not paid through one of the common paymasters cannot be included in consolidated reports. This rule provides a necessary definition of common paymaster, allows maximum flexibility with respect to the paymaster corporation(s) and authorizes partial as well as total consolidated reporting so long as only one system or paymaster applies to any one class of employees.

J. Joint Account.

This section of the rule is necessary to provide notice of how joint accounts of related corporations filing consolidated reports should be applied for and maintained. This provision is necessary to implement the consolidated reporting rules.

K. Joint and several liability.

This part makes clear that all related corporations party to a consolidated reporting system will be jointly and severally liable for any unpaid contribution, penalties and/or interest due on wages. This provision is reasonable because the corporations in a consolidated reporting system are jointly controlled or intimately related. This section is necessary in order to provide against the insolvency of the paymaster corporation, with unpaid taxes, while the related corporations escape contribution.

L. Common paymaster responsibilities.

This paragraph establishes that the common paymaster has administrative responsibility with respect to tax and benefit issues pertaining to all of the related corporations. This rule is designed to assure that there is a single focus of responsibility for unemployment compensation matters when related corporations file jointly.

M. Reports.

This section makes clear that the individual corporations are responsible for all tax and benefit matters when the group fails to meet relatedness requirements with respect to some or all employees. This rule is necessary to fix responsibility for contributions and information when consolidated reports are not authorized.

N. Work other than for common paymaster.

This paragraph establishes that wages earned in the employ of a related corporation during a period when consolidated reporting is not authorized cannot be combined with wages earned while consolidated reports are authorized. This rule is designed to prevent the evasion of the consolidated reporting requirements and the loss of contribution which would ensue from the consolidation of wages, for purposes of determining the maximum taxable wage, when such consolidation is inappropriate.

O. Non-related or noncurrent.

This part of the rule make clear, consistent with other provisions of this rule, that if the relatedness or concurrent employment conditions are not met, each corporation is responsible individually for its own employees. This rule is necessary to fix liability with the individual employer when consolidated reporting is not permissible.

P. Wages, wage credits and experience rate factors of a joint account.

This part of the rule makes clear that a joint account of related corporations filing consolidated reports is a single account for contribution, benefit and experience rating purposes. This is consistent with the purpose of this rule to treat related corporations as a single entity under the statute when required conditions are met.

Q. Relation cessation.

This paragraph creates a duty in the common paymaster to inform the department whenever a related corporation ceases to have that status. This rule reasonably allocates this duty to the entity which has both reason to know of the change of circumstances and a financial interest in relaying it to the department. The thirty days provided is ample time for the report to be made.

R. Termination of agreement.

This paragraph authorizes the commissioner to terminate agreements which do not comply with the requirements set forth in this rule as well as those which have been abused in order to obtain more favorable experience rating. This rule is necessary in order to avoid abuses in the consolidated reporting system and to prevent the commissioner's being contractually bound by an agreement in violation of these rules.

S. Written protest.

This provision establishes that a denial of permission for consolidated reporting or a termination of such permission is final unless written protest is filed. The rule is designed to promote finality and is consistent with due process requirements.

8 MCAR § 4.3107 Payments of interest.

A. Scope.

This rule provides conditions which if met would reasonably warrant the waiver of interest due on contributions pursuant to Minn. Stat. § 268.16, subd. 1. This rule is needed to implement the statutory waiver provision in circumstances in which the employer is not at fault.

B. 1-2. Waiver.

This part of the rule reasonably provides that interest will be waived if the delay was clearly not attributable to the employer, either because the department itself or another caused the late payment. This rule is a reasonable one since the interest payment is designed as a penalty for failure to pay. Such a penalty is inappropriate where the employer was not able to make a timely payment through no fault of his own.

C. Application.

This section establishes the method by which the employer may secure waiver of interest. As is reasonable, the employer himself must generally seek the waiver, since he is the one who is likely to know of the circumstances for the late payment. The commissioner, however, is authorized to waive interest on his own motion, when the states' interest is served.

8 MCAR § 4.3108 Contribution rates.

A. Notice of rate.

This part establishes how and when an employer will receive notice of his contribution rate. The section specifies that an employer determined to be liable by the department prior to the first of the year shall be notified of his contribution rate by March 15 of the year in which the rate is effective. This paragraph provides for notice to the employer in time for orderly submission of taxes due without hardship.

B. Time limit on voluntary contributions.

This section makes clear that voluntary contributions made pursuant to the statute in order to avoid the inclusion of the benefits involved in experience rating will not have that effect unless paid before 120 days of the new tax period have elapsed. This requirement is designed to encourage an employer to make such contributions in a timely fashion to allow the department to close its books on the previous tax year. Minn. Stat. § 268.06, subd. 24 was intended to allow employers to avoid adverse experience rating but this privilege was not intended to continue indefinitely after the close of the tax year. One hundred and twenty days is ample time in which to make such contributions if desired.

In the Matter of the Proposed Adoption
of Rules of the State of Minnesota,
Department of Economic Security
Governing Unemployment Compensation
Taxation and Benefits.

STATEMENT OF
COMPLIANCE WITH
RULEMAKING PROCEDURES

I, Thomas R. Nelson, Special Assistant Attorney General, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Thomas R. Nelson

THOMAS R. NELSON
Special Assistant
Attorney General

Dated: May 11, 1982

ECSEC-82-003-JL

In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes. (8 MCAR SS 4.3001-4.3999)

AFFIDAVIT OF MAILING NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Michael J. Fratto, being first duly sworn, deposes and says:

That on the 11th day of May, 1982, in the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached notice of submission to the Attorney General by depositing in the United States Mail at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who requested notice that the rules in the above-entitled matter have been submitted to the Attorney General.

Michael J. Fratto

Subscribed and sworn to before me
this 11th day of May, 1982.

Helen Eckl

HELEN ECKL
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 16, 1987

Mailing List of Those Requesting Notice
of Submittal to
Attorney General's Office

Harold Turner
Legal Services Advocacy
60 East 4th St.
St. Paul, Mn. 55101

Chris Miller
601 Ridgewood
Apt. 207
Minneapolis, Mn. 55403

Jay Benanar
Minnesota AFL-CIO
700 Title Insurance Building
Minneapolis, Mn 55401

John Lennes
Minnesota Association of
Commerce and Industry
Room 200
480 Cedar St.
St. Paul, Mn 55101

Wendy Borschein
Minnesota Retail
Merchants Association
180 Metro Square Bldg.
St. Paul, Mn. 55101

Abe Rosenthal
Minnesota Transport Services Association
Minnesota Independent Truckers Association
1821 University Avenue
St. Paul, Mn. 55104

James Denn
Minnesota Motor
Transport Association
1821 University Ave.
Suite 134 N.
St. Paul, Mn. 55104

K.A. Hotz
N.W.B.
200 South 5th Street
Minneapolis, Mn.

Al Brodie
Minnesota Motel Association
1000 E. 146th St.
Burnsville, Mn. 55337

Dan Gustafson
Minnesota AFL-CIO
175 Aurora
St. Paul, Mn.

Brian Fahey
Minnesota Association of
Commerce and Industry
Room 200
480 Cedar St. Paul, Mn. 55101

ECSEC-82-003-JL

STATE OF MINNESOTA

DEPARTMENT OF ECONOMIC SECURITY

In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes. (8 MCAR SS 4.3001-4.3999)

NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the office of the Attorney General on this date, May 11, 1982, for review as to form and legality. Pursuant to 1 MCAR § 1 206 B., the Attorney General will not approve the rules for at least ten calendar days after receipt to allow any person or association time to comment on the legality of the above-captioned rules, after which that office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, 204 Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone number (612) 296-6555. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

If you are interested in determining what changes, if any, were made in the proposed rules after the hearing and before submission to the Attorney General, you may contact Michael J. Fratto, Supervisor UI Evaluation and Analysis, Minnesota Department of Economic Security, 390 North Robert Street, St. Paul, Minnesota 55101, telephone number (612) 296-3574.

Rolf Middleton

Rolf Middleton, Commissioner

MINNESOTA MOTEL ASSOCIATION

1000 East 146th Street
Suite 121
Burnsville, Minnesota 55337

(612) 432-2224
Al Brodie
Executive Vice President

May 20, 1982

RECEIVED
MAY 21 1982
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Mike Miles
Office of the Attorney General
204 Administration Building
50 Sherburne Ave.
St. Paul, MN 55155

Mr. Miles,

In regard to the adoption of Amended Rules 8MCAR SS 4.3001 - 4.3999.

It is our opinion the Department of Economic Security in refusing to change its taxing of meals and lodging furnished "at the convenience of an employer" (4.3101 F) violates the Supreme Court decision in the Rowan Case.

Also, as is noted in both the Hearing Examiners report and in the enclosed program letter (#39-8) issued by the U.S. Department of Labor, States have been instructed to take action to assure State law is consistant with Federal law in this matter. This they have also failed to do.

Legality of the issue aside, it appears to be another state agency has said right or wrong we do it our way.

Sincerely,

Al Brodie

Al Brodie
Executive Vice President

AB/ae
Enclosure

65. Part F.1.b.1. The Minnesota Motel Association objected to the Department's method of valuing certain non-cash remuneration received by employees. Under Parts F.1.a., and b., meals and lodging furnished to employees are included within the term "wages". The Association noted that in Rowan Company v. United States, - U.S. -, 101 S.Ct. 2228, - L.Ed.2d - (1981), the United States Supreme Court held that meals and lodging furnished to employees "for the convenience of the employer" are not wages for purposes of Social Security, the Federal Unemployment Tax Act, or the Internal Revenue Act. The Supreme Court found, in that case, that the various federal acts should be construed in a consistent manner for ease of administration and consistency among federal programs and that while wages are income, not all income constitutes wages, the latter being a narrower concept. The Association argues that the definition adopted by the Department should exclude from "wages" the meals and lodging furnished to employees for the convenience of the employer to be consistent with federal enactments. The Department declined to adopt a similar exclusion on the ground that state law does not permit an exclusion of remuneration paid for the "convenience of the employer."

66. In a program letter No. 39-81 issued by the Employment and Training Administration of the United States Department of Labor on September 2, 1981, the impact of the Court's decision in the Rowan case was discussed, and state agencies were instructed to "take appropriate action to assure that State law is consistent with the Federal law so that employers will not lose their tax credits if a State does not include in its definition of wages . . . meals and lodging which are not furnished for the employer's convenience on the employer's premises." As was previously stated, the Department declined to adopt the exclusion on the grounds that deductions for meals and lodging furnished for the convenience of the employer were not specifically authorized. The Hearing Examiner is not persuaded that the Department may not adopt the language recommended by the Association. The Department is authorized to adopt rules which more clearly define the general definition of wages as "all remuneration for services." Meals and lodging furnished solely for the convenience of the employer could reasonably be defined by the Department as excluding meals and lodging furnished to employees for the convenience of the employer on the grounds that they do not constitute remuneration for services performed. Since the Department is authorized and could reasonably find that meals and lodging furnished for the convenience of the employer do not constitute "remuneration for services", it is strongly recommended that the Department adopt the amended language proposed by the Minnesota Motel Association which would exclude from wages meals and lodging furnished to employees solely for the convenience of the employer.

UI Program Letter 39-81

SUBJECT : Decision of U.S. Supreme Court in Rowan Cos., v. United States, on June 8, 1981--Wages Under FICA and FUTA--Exclusion of Meals and Lodging Furnished for Employer's Convenience

1. Purpose. To inform SESAs of the Court's decision on exclusion of the value of meals and lodging from "wages."

2. References. Definition of "wages" in section 3306(b), FUTA, and in section 2(q)(1) in Manual of State Employment Security Legislation.

3. Background. Under FUTA and FICA, "wages" is defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." For income-tax withholding, "wages" is defined as "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." Related to the latter definition of "wages" is an exclusion from income to an employee, for income-tax purposes, under section 119 of the Internal Revenue Code of 1954, of meals and lodging furnished to an employee and the employee's spouse and dependents by the employer for the convenience of the employer on the business premises of the employer.

The Internal Revenue Service (IRS) interpreted the word "wages" in regulations for purposes of income-tax withholding by employers and of excise tax obligations under FUTA and FICA. The IRS did not require employers to include in amounts for income-tax withholding the value of meals and lodging furnished for the convenience of the employer. It did require, in contrast, that the cash value of meals and lodging, even when furnished for the convenience of the employer, ordinarily be included in the "wages" subject to the FUTA and FICA taxes.

RESCISSIONS	EXPIRATION DATE
	August 31, 1982

DISTRIBUTION

In the Rowan case, the employer owned and operated rigs for drilling oil and gas wells, both on land and offshore. Some of the employer's offshore rigs were located as many as 60 miles from land. It was less costly and more convenient for the employer to provide meals and lodging to employees on those rigs than to transport them back and forth daily. The employees worked on the rigs for 10-day tours of duty with five days off. The employer did not include the cash value of the meals and lodging in its computation of "wages" for purposes of income-tax withholding or paying FUTA and FICA taxes. Upon audit, the IRS included the fair value of the meals and lodging in the wages paid by the employer for FUTA and FICA purposes, but not for income-tax withholding, which was consistent with its regulations. The employer paid the additional assessment and then sued for refund.

Both the U.S. District Court for the Southern District of Texas and the U.S. Court of Appeals for the Fifth Circuit upheld the IRS position. The U.S. Supreme Court reversed.

4. Court's Decision. The Court held that "Congress intended its definition [of wages] to be interpreted in the same manner for FICA and FUTA as for income-tax withholding." The base for measuring employers' obligations under FUTA, FICA, and income-tax withholding is "wages." Even if certain payments in money or kind are "income" to employees, and reportable by the employees as "income," those payments are not necessarily "wages." Wages are usually income, but not all income is wages. Wages is a narrower concept.

The Court analyzed the history of the word "wages" in FUTA and FICA, and in income-tax withholding, and found that "Congress intended . . . to coordinate the income-tax withholding system with FICA and FUTA" in the interest of simplicity and ease of administration. The value of meals and lodging is, nevertheless, correctly included in "wages" for FUTA and FICA, unless they are provided for the employer's convenience.

5. Applicability to State Laws. The Court interpreted the meaning of "wages" under the specified Federal statutes. Its interpretation is not necessarily applicable to the definition of "wages" in State unemployment compensation laws. If contribution provisions of State laws are interpreted, when appropriate, consistently with the Internal Revenue Code of 1954, they may, of course, be so interpreted in accordance with the Rowan decision.

The problem that arose in the Rowan case probably would not arise under a State law. The Internal Revenue Code contains a variety of tax provisions, including those on income taxes, FUTA and FICA. The IRS administers all the tax provisions of the Code. SESAs, in contrast, usually administer only the State's unemployment compensation program. There is no provision comparable to Section 119 of the Code with respect to "income" in State unemployment compensation laws.

6. Action Required. State Administrators are requested to:

(a) review the Court's decision and make appropriate determination on liability, and

(b) take appropriate action to assure that the State law is consistent with the Federal law so that employers will not lose their tax credits if a State does not include in its definition of "wages" (by statue, regulation, or interpretation) meals and lodging that are not furnished for the employer's convenience on the employer's premises.

7. Inquiries. Questions should be directed to the appropriate regional office.

Minnesota Department of Economic Security

390 North Robert Street ● St. Paul, Minnesota 55101

UNEMPLOYMENT INSURANCE DIVISION
Phone: 296-3574
Teletypewriter Number: 612/296-3711

May 17, 1982

Mr. J. Michael Miles
Assistant Attorney General
Department of Administration
204 Administration
50 Sherburne Avenue
St. Paul, Mn. 55155

re: Submittal of Amended page for Rules Adopted

Dear Mr. Miles,

I am resubmitting page 13 of the adopted rules relating to the Unemployment Insurance program which were submitted to you on May 11, 1982.

The reason for resubmittal is the Revisor noticed the word "technological" was misspelled in line three. He has advised me he has accepted the adopted rules with the substitution of this page for the original page 13.

Please accept the revised page 13 as part of the adopted rules. Thank You.

Sincerely,

Michael J. Fratto
Supervisor, UI Evaluation
and Analysis

Minnesota Department of Economic Security

390 North Robert Street ● St. Paul, Minnesota 55101

COMMISSIONER'S OFFICE

Phone: 296-3574
Teletypewriter Number: 612/296-3711

May 11, 1982

Mr. J. Michael Miles
Assistant Attorney General
Department of Administration
204 Administration Building
50 Sherburne Avenue
St. Paul, Mn. 55155

re: Submittal of Adopted Rules for Review as to Legality and Form

Dear Mr. Miles,

I am submitting the enclosed Official Record In the Matter of the Proposed Adoption of Amended Rules and New Rules Governing the Unemployment Insurance Program Relating to the Payment of Benefits and the Collection of Employer Taxes (8 MCAR §§ 4.3001-4.3999) for your review and approval.

In addition to the Official Record, I have enclosed two copies of the rules as they have been Adopted; The final report of the Chief Hearing Examiner; A statement of Compliance with the Rulemaking Procedure; an affidavit of mailing the notice of submission to the Attorney General with attached mailing list; and the Notice of submission to the Attorney General.

I believe these are the documents you require for your review of these rules as to legality and form.

Sincerely,

Michael J. Fratto
Supervisor, UI Evaluation
and Analysis

Southern Minnesota Regional Legal Services, Inc.

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May 21, 1982

Bruce A. Beneke
Executive Director
Mark A. Bohnhorst
Litigation Coordinator
Michael Hagedorn
Attorney-Administrator
Sylvia Lane
Comptroller

Mr. Peter Andrews
Office of the Attorney General
204 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

RE: Adopted Rules Governing the Unemployment Insurance Program

Dear Mr. Andrews:

This letter is in response to the Department of Economic Security's submission of the final rules governing the Unemployment Insurance Program to the Attorney General's Office. Specifically the Legal Services Advocacy Project (LSAP) wishes to address 8 MCAR §4.3008 concerning reemployment offers.

In their original comments to the Department's proposed rules both LSAP and the AFL-CIO pointed out that §4.3008 does not recognize the Minnesota Supreme Court's holding in Hendrickson v. Northfield Cleaners, 295 N.W. 2d 384 (Minn., 1980). In Hendrickson the Court held that an offer of reemployment under identical terms and conditions of employment by a base period employer is not necessarily an offer of suitable work due to the claimant's changed circumstances. As it stood proposed rule §4.3008 established three bases for validly refusing an offer of reemployment: the terms and conditions of the offer are substantially less favorable than the terms under which the wage credits were earned; the claimant quit the employment with good cause attributable to the ER and the conditions which were the basis for the good cause still exist; and the claimant left the employment because of a serious illness which would be adversely affected by returning to the job.

In his report the hearing examiner Jon Lunde agreed that the proposed rule did not recognize the Hendrickson principle and suggested that the Department draft language to incorporate it (Report of the Chief Hearing Examiner, January 17, 1982, Finding No. 62, p. 29). The Department rejected the Hearing Examiner's recommendation explaining as follows:

> Because the manner in which Northfield Cleaners is interpreted could substantially affect the rights or either claimants or employers, the Department cannot develop language at this time which would not be a substantial change. Instead, the agency will address the issue in future rules.

(Finding (sic) of Fact, Conclusions and Order to Adopt Rules, Finding No. 62). The Department nonetheless has ordered adoption of §4.3008 as originally proposed with no mention of the Hendrickson principle.

Because the rule as it stands ignores one critical basis on which a claimant may refuse an offer of reemployment with impugnity, it is a flat misstatement of Minnesota law. If the rule cannot be changed to incorporate the Hendrickson principle, then it should be deleted.

The consequences which might flow from adoption of this incomplete rule are serious, especially for claimants. The purpose of the rules is to govern benefit eligibility determinations and, inter alia, to provide guidelines for claims deputies, lay people unfamiliar with recent case law developments. The rules were intended to be comprehensive and exhaustive on those topics specifically addressed.

Section 4.3008 as proposed implies that there are only three circumstances under which a claimant may reject a offer of reemployment without being disqualified from benefits. Claimants in fact situations identical to the plaintiff in Hendrickson would be disqualified from benefits, contrary to Minnesota law. The only claimants who might prevail ultimately would be those who appeal the initial determination.

The Department's position that adding language consistent with Hendrickson would constitute a substantial change in the proposed rules is not necessarily compelled by the APA. The hearing examiner suggested that the Department draft language consistent with Hendrickson. In adopting the hearing examiner's recommendations the chief hearing examiner concluded as follows:

> Based upon a review of the record in this proceeding, the Chief Hearing

> Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change...
>
> (Report of the Chief Hearing Examiner, January 17, 1982).

The chief hearing examiner thus has found that adding the Hendrickson rule to §4.3008 would not constitute a substantial change. Since the hearing examiner's office is charged with the responsibility of determining, there need be no legal bar to the Department adding the Hendrickson rule to §4.3008.

However, given that the rule as proposed is illegal on its face it would be better and fairer to claimants to omit §4.3008 and deal with offers of re-employment as the Department did in the past before any rules were promulgated, than to adopt a rule which is ostensibly complete but whichin fact ignores an important exception to the general rule.

Thank you for your consideration.

Very truly yours,

Katherine G. Hadley

Katherine G. Hadley
Attorney at Law

ss

cc: Commissioner Rolf Middleton