

268.105 APPEALS.

Subdivision 1. **Evidentiary hearing by unemployment law judge.** (a) Upon a timely appeal having been filed, the department must send, by mail or electronic transmission, a notice of appeal to all involved parties that an appeal has been filed, and that a de novo due process evidentiary hearing will be scheduled. The notice must set out the parties' rights and responsibilities regarding the hearing. The notice must explain that the facts will be determined by the unemployment law judge based upon a preponderance of the evidence. The notice must explain in clear and simple language the meaning of the term "preponderance of the evidence." The department must set a time and place for a de novo due process evidentiary hearing and send notice to any involved applicant and any involved employer, by mail or electronic transmission, not less than ten calendar days before the date of the hearing.

(b) The evidentiary hearing is conducted by an unemployment law judge as an evidence gathering inquiry. At the beginning of the hearing the unemployment law judge must fully explain how the hearing will be conducted, that the applicant has the right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed, that the facts will be determined based on a preponderance of the evidence, and, in clear and simple language, the meaning of the term "preponderance of the evidence." The unemployment law judge must ensure that all relevant facts are clearly and fully developed. The department may adopt rules on evidentiary hearings. The rules need not conform to common law or statutory rules of evidence and other technical rules of procedure. The department has discretion regarding the method by which the evidentiary hearing is conducted. A report of any employee of the department, except a determination, made in the regular course of the employee's duties, is competent evidence of the facts contained in it. An affidavit or written statement based on personal knowledge and signed under penalty of perjury is competent evidence of the facts contained in it; however, the veracity of statements contained within the document or the credibility of the witness making the statement may be disputed with other documents or testimony and production of such documents or testimony may be compelled by subpoena.

(c) After the conclusion of the hearing, upon the evidence obtained, the unemployment law judge must make findings of fact and decision and send those, by mail or electronic transmission, to all involved parties. When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony. The unemployment law judge's decision is final unless a request for reconsideration is filed under subdivision 2.

(d) Regardless of paragraph (c), if the appealing party fails to participate in the evidentiary hearing, the unemployment law judge has the discretion to dismiss the appeal by summary order.

By failing to participate, the appealing party is considered to have failed to exhaust available administrative remedies unless the appealing party files a request for reconsideration under subdivision 2 and establishes good cause for failing to participate in the evidentiary hearing under subdivision 2, paragraph (d). Submission of a written statement does not constitute participation. The applicant must participate personally and appearance solely by a representative does not constitute participation.

(e) Only employees of the department who are attorneys licensed to practice law in Minnesota may serve as the chief unemployment law judge, senior unemployment law judges who are supervisors, or unemployment law judges. The commissioner must designate a chief unemployment law judge. The chief unemployment law judge may transfer to another unemployment law judge any proceedings pending before an unemployment law judge.

Subd. 2. **Request for reconsideration.** (a) Any involved applicant, involved employer, or the commissioner may, within 20 calendar days of the sending of the unemployment law judge's decision under subdivision 1, file a request for reconsideration asking the unemployment law judge to reconsider that decision. Section 268.103 applies to a request for reconsideration. If a request for reconsideration is timely filed, the unemployment law judge must issue an order:

(1) modifying the findings of fact and decision issued under subdivision 1;

(2) setting aside the decision issued under subdivision 1 and directing that an additional evidentiary hearing be conducted under subdivision 1; or

(3) affirming the findings of fact and decision issued under subdivision 1.

(b) Upon a timely request for reconsideration having been filed, the department must send a notice, by mail or electronic transmission, to all involved parties that a request for reconsideration has been filed. The notice must inform the involved parties:

(1) of the opportunity to provide comment on the request for reconsideration, and the right under subdivision 5 to obtain a copy of any recorded testimony and exhibits offered or received into evidence at the evidentiary hearing;

(2) that providing specific comments as to a perceived factual or legal error in the decision, or a perceived error in procedure during the evidentiary hearing, will assist the unemployment law judge in deciding the request for reconsideration;

(3) of the right to obtain any comments and submissions provided by the other involved party regarding the request for reconsideration; and

(4) of the provisions of paragraph (c) regarding additional evidence.

This paragraph does not apply if paragraph (d) is applicable.

(c) In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

(d) If the involved applicant or involved employer who filed the request for reconsideration failed to participate in the evidentiary hearing conducted under subdivision 1, an order setting aside the decision and directing that an additional evidentiary hearing be conducted must be issued if the party who failed to participate had good cause for failing to do so. In the notice that a request for reconsideration has been filed, the party who failed to participate must be informed of the requirement, and provided the opportunity, to show good cause for failing to participate. If the unemployment law judge determines that good cause for failure to participate has not been shown, the unemployment law judge must state that in the order issued under paragraph (a).

Submission of a written statement at the evidentiary hearing under subdivision 1 does not constitute participation for purposes of this paragraph.

All involved parties must be informed of this paragraph with the notice of appeal and notice of hearing provided for in subdivision 1.

"Good cause" for purposes of this paragraph is a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.

(e) A request for reconsideration must be decided by the unemployment law judge who issued the decision under subdivision 1 unless that unemployment law judge: (1) is no longer employed by the department; (2) is on an extended or indefinite leave; (3) has been disqualified from the proceedings on the judge's own motion; or (4) has been removed from the proceedings by the chief unemployment law judge.

(f) The unemployment law judge must send to any involved applicant or involved employer, by mail or electronic transmission, the order issued under this subdivision. An order modifying the previously issued findings of fact and decision or an order affirming the previously issued findings of fact and decision is the final department decision on the matter and is final and binding on the involved applicant and involved employer unless judicial review is sought under subdivision 7.

Subd. 2a. [Repealed by amendment, 2005 c 112 art 2 s 34]

Subd. 3. **Withdrawal of appeal.** (a) Any appeal that is pending before an unemployment law judge may be withdrawn by the appealing person, or an authorized representative of that person, upon filing of a notice of withdrawal.

(b) The appeal must, by order, be dismissed if a notice of withdrawal is filed, unless an unemployment law judge directs that further adjudication is required for a proper result.

(c) A notice of withdrawal may be filed by mail or by electronic transmission.

Subd. 3a. **Decisions.** (a) If an unemployment law judge's decision or order allows unemployment benefits to an applicant, the unemployment benefits must be paid regardless of any request for reconsideration or any appeal to the Minnesota Court of Appeals having been filed.

(b) If an unemployment law judge's decision or order modifies or reverses a determination, or prior decision of the unemployment law judge, allowing unemployment benefits to an applicant, any benefits paid in accordance with the determination, or prior decision of the unemployment law judge, is considered an overpayment of those unemployment benefits. A decision or order issued under this section that results in an overpayment of unemployment benefits must set out the amount of the overpayment and the requirement under section 268.18, subdivision 1, that the overpaid unemployment benefits must be repaid.

(c) If an unemployment law judge's order under subdivision 2 allows unemployment benefits to an applicant under section 268.095 because of a quit or discharge and the unemployment law judge's decision is reversed by the Minnesota Court of Appeals or the Supreme Court of Minnesota, the applicant cannot be held ineligible for any of the unemployment benefits paid the applicant and it is not considered an overpayment of those unemployment benefits under section 268.18, subdivision 1. The effect of the court's reversal is the application of section 268.047, subdivision 3, in computing the future tax rate of the employer.

(d) If an unemployment law judge, under subdivision 2, orders the taking of additional evidence, the unemployment law judge's prior decision must continue to be enforced until new findings of fact and decision are made by the unemployment law judge.

Subd. 4. **Oaths; subpoenas.** An unemployment law judge has authority to administer oaths and affirmations, take depositions, and issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in connection with the subject matter of an evidentiary hearing.

The unemployment law judge must give full consideration to a request for a subpoena and must not unreasonably deny a request for a subpoena. If a subpoena request is initially denied,

the unemployment law judge must, on the unemployment law judge's own motion, reconsider that request during the evidentiary hearing and rule on whether the request was properly denied. If the request was not properly denied, the evidentiary hearing must be continued for issuance of the subpoena. The subpoenas are enforceable through the district court in Ramsey County. Witnesses subpoenaed, other than an involved applicant or involved employer or officers and employees of an involved employer, must be paid by the department the same witness fees as in a civil action in district court.

Subd. 5. Use of evidence; data privacy. (a) All testimony at any evidentiary hearing conducted under subdivision 1 must be recorded. A copy of any recorded testimony and exhibits offered or received into evidence at the hearing must, upon request, be furnished to a party at no cost during the time period for filing a request for reconsideration or while a request for reconsideration is pending.

(b) Regardless of any provision of law to the contrary, if recorded testimony and exhibits received into evidence at the evidentiary hearing are not requested during the time period for filing a request for reconsideration, while a request for reconsideration is pending, during the time for filing any appeal under subdivision 7, or during the pendency thereof, that testimony and other evidence may later be made available only under a district court order. A subpoena is not considered a district court order.

(c) Testimony obtained under subdivision 1, may not be used or considered for any purpose, including impeachment, in any civil, administrative, or contractual proceeding, except by a local, state, or federal human rights agency with enforcement powers, unless the proceeding is initiated by the department.

Subd. 5a. No collateral estoppel. No findings of fact or decision or order issued by an unemployment law judge may be held conclusive or binding or used as evidence in any separate or subsequent action in any other forum, be it contractual, administrative, or judicial, except proceedings provided for under this chapter, regardless of whether the action involves the same or related parties or involves the same facts.

Subd. 6. Representation; fees. (a) In any proceeding under subdivision 1 or 2, an applicant or involved employer may be represented by any agent.

(b) Except for services provided by an attorney-at-law, an applicant may not be charged fees, costs, or disbursements of any kind in a proceeding before an unemployment law judge, the Minnesota Court of Appeals, or the Supreme Court of Minnesota.

Subd. 7. Judicial review. (a) The Minnesota Court of Appeals shall, by writ of certiorari to the department, review the unemployment law judge's decision, provided a petition for the writ is

filed with the court and a copy is served upon the unemployment law judge or the commissioner and any other involved party within 30 calendar days of the sending of the unemployment law judge's order under subdivision 2.

(b) Any employer petitioning for a writ of certiorari must pay to the court the required filing fee and upon the service of the writ must furnish a cost bond to the department in accordance with the Rules of Civil Appellate Procedure. If the employer requests a written transcript of the testimony received at the evidentiary hearing conducted under subdivision 1, the employer must pay to the department the cost of preparing the transcript. That money is credited to the administration account.

(c) Upon issuance by the Minnesota Court of Appeals of a writ of certiorari as a result of an applicant's petition, the department must furnish to the applicant at no cost a written transcript of any testimony received at the evidentiary hearing conducted under subdivision 1, and, if requested, a copy of all exhibits entered into evidence. No filing fee or cost bond is required of an applicant petitioning the Minnesota Court of Appeals for a writ of certiorari.

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

(e) The department is considered the primary responding party to any judicial action involving an unemployment law judge's decision. The department may be represented by an attorney licensed to practice law in Minnesota who is an employee of the department.

History: 1995 c 54 s 11; 1996 c 417 s 22,31; 1997 c 66 s 60; 1998 c 265 s 31,44; 1999 c 107 s 47,66; 2000 c 343 s 4; 2001 c 175 s 44; 1Sp2003 c 3 art 2 s 15; 2004 c 183 s 71; 2005 c 112 art 2 s 34; 2007 c 128 art 1 s 18; art 2 s 9,10; art 3 s 18,24; art 6 s 76-79; 2009 c 78 art 4 s 34-38