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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1140**

Trocon U. Mentoe,
Relator,

vs.

Home Care Resources LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 8, 2013
Reversed and remanded
Chutich, Judge**

Department of Employment and Economic Development
File No. 29379370-3

Trocon U. Mentoe, Minneapolis, Minnesota (pro se relator)

Home Care Resources, LLC, Bloomington, Minnesota (respondent employer)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Relator Trocon Mentoe challenges the decision of the unemployment-law judge that his administrative appeal was appropriately dismissed because Mentoe did not have good cause to miss a scheduled telephonic hearing. Because the department did not inform Mentoe of his responsibilities regarding the hearing and because the unemployment-law judge's findings are not substantially supported by the record, we reverse and remand.

FACTS

Mentoe filed an application for unemployment benefits and established an account with the Minnesota Department of Employment and Economic Development (the department) after his employment with Home Care Resources, LLC, ended. The department deemed Mentoe eligible for unemployment benefits and, beginning in August 2010, he received benefits regularly. In early 2012, the department conducted a wage-verification review of Mentoe's account and found that he had failed to report certain earnings that resulted in an overpayment of benefits. Thereafter, the department informed Mentoe of its finding of "overpayment fraud" in eight separate "determination of ineligibility" letters, each of which was assigned a specific issue-identification number.

Mentoe timely appealed the department's ineligibility determinations in eight separate online submissions, each corresponding to the department's eight separate issue-identification numbers. On seven of his eight appeal submissions, Mentoe listed his

telephone number with a 612 area code. On one submission, Mentoe inadvertently listed his telephone number with a 651 area code. The department responded to Mentoe's appeal submissions by sending Mentoe eight separate notices of appeal informing him that he was scheduled for a telephone hearing with an unemployment-law judge on Friday, March 16, 2012, at 2:15 p.m. Each notice explained that Mentoe was to contact the department's appeals office if he needed to reschedule his hearing because the date or time did not work or if he required any accommodations. Each notice informed Mentoe that the unemployment-law judge would, at the time of the scheduled hearing, call him at the telephone number he had provided on his online appeal submissions. No notice contained any information regarding what Mentoe was to do if he did not receive a call from the unemployment-law judge at the time of his scheduled hearing. Each notice listed Mentoe's telephone number, but one notice among the eight listed his telephone number with the incorrect 651 area code. The other seven notices listed Mentoe's telephone number with the correct 612 area code.

The record on appeal contains a transcript of the evidentiary hearing. The transcript lists, at the top of the first page, each of the eight issue-identification numbers assigned to each of Mentoe's determinations of ineligibility and related notices of appeal. One such identification number—that which corresponds to the two documents reflecting the incorrect 651 area code—is bolded and underlined. The rest of the identification numbers are listed in normal font.

On the date of the scheduled hearing, the unemployment-law judge dialed a telephone number¹ and reached a voicemail message beginning “Hi. You’ve reached Kim.” The unemployment-law judge left a message stating that the judge was calling for Mentoe and that Mentoe was to call back “as soon as possible” to participate in the hearing scheduled for 2:15 p.m. The unemployment-law judge re-dialed the telephone number a short time later, received the same voicemail, and left a similar message. Two representatives from Home Care Resources were on the line with the unemployment-law judge and prepared to participate in the hearing. When the unemployment-law judge concluded that Mentoe was not going to call back or otherwise participate in the hearing, the judge ended the hearing without taking any testimony.

The unemployment-law judge dismissed Mentoe’s ineligibility-determination appeal because he failed to personally participate in the hearing. Mentoe was therefore “considered to have failed to exhaust his available administrative remedies” unless he filed a request for reconsideration and established good cause for failing to participate in the hearing. Mentoe timely filed an online request for reconsideration. Mentoe explained that he had good cause for not participating in the hearing because he did not receive a phone call from the unemployment-law judge at any time during the day of the scheduled hearing. Mentoe stated that he had his phone with him throughout the day of the hearing, that he never left his house that entire day because he wanted to “settle this issue,” and that “[t]his is my number 612-[number provided].”

¹ The record provides no evidence as to what specific telephone number the unemployment-law judge dialed.

Upon reconsideration, the unemployment-law judge concluded that Mentoe had not provided good cause for failing to participate in the hearing and that his appeal of the ineligibility determinations had therefore been properly dismissed. The unemployment-law judge's order was based on her finding that

[b]oth parties were sent a telephone hearing instructions sheet with the notice of appeal which states, “[i]f you don’t get a call within 10 minutes after the scheduled time, call us at 651-296-3745.” Mentoe did not indicate in his request for reconsideration why he did not call the Department to report that he had not received a phone call for the appeal hearing.

The unemployment-law judge reasoned that a new hearing would not be scheduled because “a reasonable person acting with due diligence” would have “take[n] care” to (1) be available for the appeal hearing “at the telephone number he provided to the Department,” and (2) call the department within ten minutes of not receiving a call from the unemployment-law judge to report that he was waiting for a call.

This certiorari appeal follows.

D E C I S I O N

When reviewing an unemployment-benefits decision, this court may remand, reverse, or modify an unemployment-law judge's decision if the relator's substantial rights were prejudiced because the findings, conclusion, or decision were affected by an error of law, unsupported by substantial evidence, or were arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(4)–(6) (2010). We review an unemployment-law judge's decision to decline a request for an additional hearing for an abuse of discretion. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

When an applicant appeals a determination that the applicant is ineligible for unemployment benefits, an evidentiary hearing with an unemployment-law judge is scheduled. Minn. Stat. § 268.105, subd. 1(a) (2010). The department must send a notice of appeal to all involved parties, and the notice must, among other things, “set out the parties’ rights and responsibilities regarding the [scheduled] hearing.” *Id.*

An applicant must personally participate in the evidentiary hearing. *Id.*, subd. 1(d) (2010). If an applicant fails to participate in a scheduled hearing, the unemployment-law judge “has the discretion to dismiss the appeal by summary order.” *Id.* A non-participating applicant is thereafter considered to have failed to exhaust available administrative remedies unless the applicant seeks reconsideration and shows “good cause” for failing to participate in the evidentiary hearing. *Id.* “Good cause” is defined as “a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.” *Id.*, subd. 2(d) (2010). If the non-participating applicant shows good cause for failing to participate in the evidentiary hearing, the unemployment-law judge must order an additional evidentiary hearing. *Id.*

I. Statutory notice requirements

The unemployment-law judge concluded that Mentoe did not have good cause to miss the hearing because Mentoe should have called the department within ten minutes of the scheduled hearing if the unemployment-law judge did not call Mentoe. In support of its assertion that Mentoe had such a responsibility, the department cites only to a website which contains a copy of the “telephone hearing instruction sheet” Mentoe allegedly

received from the department with his notices of appeal. The department's assertion is without support in the record on appeal.

The record provided by the department itself, shows that Mentoe's notice of appeal did not explicitly or implicitly address his responsibility to call the department if the unemployment-law judge failed to call at the scheduled time. The notice of appeal sent by the department to Mentoe before the evidentiary hearing makes no reference to any such ten-minute call-back requirement or to the specific portion of the department's website listing the expectation. No evidence of record shows that Mentoe was ever sent a "telephone hearing instruction sheet." We conclude, therefore, that the department failed to comply with the statutory requirement that the notice of appeal "set out the parties' rights and responsibilities regarding the hearing." *Id.*, subd. 1(a).

Because the department places responsibility on applicants who do not receive a call from the unemployment-law judge at the time of a scheduled hearing to call the department within a short timeframe, that duty must be conspicuously included in the notice of appeal. *See id.* This clear notice is especially necessary if the department bases a dismissal of an applicant's appeal solely on the applicant's non-compliance with this alleged responsibility.

II. Unsupported findings

In the order concluding that Mentoe did not provide good cause for missing the hearing, the unemployment-law judge asserts that she dialed "the telephone number listed on the Notice of Appeal and noted by Mentoe on his request for reconsideration." The department argues that the unemployment-law judge called "the same phone number that

Mentoe has always provided.” The record does not substantially support the unemployment-law judge’s conclusion that Mentoe was unavailable at the time of the hearing “at the telephone number he provided to the Department.”

The record indicates that the unemployment-law judge likely did dial the incorrect telephone number provided by Mentoe on *one* of the eight notices of appeal/requests for reconsideration. While it is true that Mentoe supplied the telephone number with the erroneous area code to the department, the mistake was on one document out of many associated with his appeal. This inadvertent typographical error hardly amounts to a lack of due diligence or reasonableness on Mentoe’s part.

Additionally, for the department to claim that the unemployment-law judge dialed the telephone number Mentoe had “always” provided the department, the unemployment-law judge would have had to cross-reference Mentoe’s telephone number with a different source the day of the hearing—such as one of the seven other requests for appeal that were available to the judge for reference or use during the hearing. Had the judge done so, the judge would have realized the proper area code was 612, and not 651. Because no evidence in the record shows that the unemployment-law judge called Mentoe’s correct 612 telephone number, to which the judge had ready access, the record does not contain evidence substantially supporting the unemployment-law judge’s conclusion that Mentoe was unavailable “at the telephone number he provided.”

We conclude that the record is without substantial evidence to support the unemployment law judge’s conclusion that Mentoe was without good cause for missing his evidentiary hearing. The record shows Mentoe acted reasonably and with due

diligence. The department failed to provide Mentoe proper notice of his responsibilities concerning the hearing, Mentoe made what appears to have been an inadvertent typographical error on one of many documents that otherwise reflected his correct area code, and no evidence shows that the unemployment-law judge cross-referenced Mentoe's telephone number with any other readily-available documents before the judge concluded that he was not available to participate in the hearing. Because the department never expressly or implicitly placed on Mentoe the responsibility to take any immediate action if the call from the unemployment-law judge did not occur, Mentoe is entitled to an evidentiary hearing.

Reversed and remanded.