This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1735

Pro Resources Corporation,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

Filed July 1, 2013
Reversed and remanded
Willis, Judge*

Department of Employment and Economic Development
File No. 29885292-2

Steven A. Johnson, Matthew L. Thompson, Vogel Law Firm, Fargo, North Dakota (for relator)

Lee B. Nelson, Christine Hinrichs, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Willis, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

WILLIS, Judge

Relator PRO Resources Corporation (PRC) challenges the decision of an unemployment-law judge (ULJ) denying reconsideration of an order dismissing PRC's appeal as untimely. PRC argues that the ULJ erred because Minn. Stat. § 268.105, subd. 1(a) (2012), and Minn. R. 3310.2910 (2011) require that respondent Minnesota Department of Employment and Economic Development (DEED) send to all parties a notice of appeal showing the issues to be considered at the hearing, and timeliness was not identified in the notice of appeal as an issue to be considered at the hearing. Because the substantial rights of PRC were prejudiced when DEED failed to send to PRC a notice of appeal stating that the timeliness of its appeal was at issue and did not inform PRC that the issue could be considered upon the motion of a party or the ULJ, we reverse and remand.

FACTS

DEED delivered to PRC a determination of succession and tax-rate notices for the years 2009-12. The determination provides that PRC had acquired either all or part of another business—Micropro Incorporated—as it relates to their activity in Minnesota. As a result, the tax-rate notices provided that PRC would be assessed a higher unemployment-tax rate for the years 2009-12. The tax-rate notices provide that they would become final unless PRC appealed by May 29, 2012; they also describe the manner in which PRC had to appeal:

> All appeals filed by an agent on behalf of an employer must be filed online. Use of another method of filing by an agent does not constitute an appeal. If the agent does not have access to file the appeal online, the agent must instruct the employer to file the appeal. Details of this requirement can be found at uimn.org.

Shortly after receiving the determination of succession and tax-rate notices, PRC's certified public accountant, Bruce Braaten, sent a letter to DEED expressing PRC's disagreement. A DEED employee replied to Braaten by explaining that he must file an appeal online. On May 22, 2012, Braaten and Wendy Cole—a PRC payroll administrator—started the online appeal process. Braaten and Cole selected June 11, 2012, at 2:15 p.m., as the date and time of the hearing. They also printed a screen shot of the online-submission form, which shows that they filed, or attempted to file, an appeal on May 22, 2012, a date that already appeared on the online-submission form provided by DEED.

Believing that they had timely filed an appeal, Braaten, Cole, and Robert Poolman—the owner of PRC—awaited the ULJ's telephone call on June 11, 2012, at 2:15 p.m. When the ULJ did not call, Cole called DEED to ask about the hearing. A DEED employee told Cole that no appeal was "showing on their end and that maybe the confirm button didn't get hit at the end of [the online-submission form]." Cole faxed to DEED the screen shot of the online-submission form to show that PRC had filed, or attempted to file, an appeal. DEED then rescheduled the hearing for July 10, 2012, at 2:15 p.m. DEED sent to PRC a "notice of appeal," which stated that PRC had appealed the tax determination and that a hearing would be conducted by a ULJ. The notice of appeal also identified only one issue to be considered at the hearing: "[t]he [t]ax issue." The notice of appeal did not inform PRC that the ULJ would or could consider other issues, such as the timeliness of the appeal.

During the hearing, the ULJ read an "opening statement," in which he stated that "[t]he issue or issues today appear to be whether the appeal filed here was timely, and if so

whether [PRC] is a successor to Micropro Incorporated." Following the hearing, the ULJ determined that Braaten's mailed letter did not constitute an appeal. The ULJ found that Braaten and Cole failed to click "[c]onfirm" on the online-submission form, apparently relying on the DEED employee's conjecture for the reason that no appeal was "showing on their end," which Cole testified to at the hearing. Thus, the ULJ concluded that PRC did not timely file an appeal online and that he had no jurisdiction to address the merits of the determination of succession and tax-rate notices. PRC requested reconsideration, arguing that it had timely filed an appeal, either by mailed letter or online. The ULJ affirmed, explaining that the prior decision "is factually and legally correct based upon a preponderance of the evidence." This certiorari appeal follows.

D E C I S I O N

"When reviewing a ULJ's decision, we may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced." *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 29 (Minn. App. 2012) (citing Minn. Stat. § 268.105, subd. 7(d) (2010)). The ULJ's decision to dismiss an appeal as untimely is a question of law, which we review de novo. *Id.* We also review de novo whether an agency violated due-process rights. *In re Grand Rapids Pub. Utils. Comm'n*, 731 N.W.2d 866, 875 (Minn. App. 2007). We view the ULJ's factual findings in the light most favorable to the decision; we will not disturb the factual findings if the evidence substantially sustains them. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

An employer may appeal a determination of succession—and the resulting recomputed tax-rate notices—by filing an appeal within 20 calendar days after the date the determination and tax-rate notices were sent to the employer. Minn. Stat. § 268.051, subds. 4(g), 6(c) (2012). If an agent of the employer appeals on the employer's behalf, the agent must appeal online. Minn. Stat. § 268.103, subd. 2a(a) (2012). But if an employee appeals on behalf of the employer, the employee need not file the appeal online. *Id.*[1] The statutory period for appeal is "absolute and unambiguous." *Rowe v. Dep't of Emp't & Econ. Dev.*, 704 N.W.2d 191, 195 (Minn. App. 2005) (quotation omitted); *see also King v. Univ. of Minn.*, 387 N.W.2d 675, 677 (Minn. App. 1986) (stating that "the time for appeal from decisions of all levels of [DEED] should be strictly construed"), *review denied* (Minn. Aug. 13, 1986). "[A] ULJ must dismiss an untimely appeal for lack of jurisdiction." *Kangas v. Indus. Welders & Machinists, Inc.*, 814 N.W.2d 97, 100 (Minn. App. 2012).

The Minnesota Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty or property without due process of law." Minn. Const. art. I, § 7. Notice is "universally recognized as essential to due process." *Juster Bros., Inc. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 508 (1943). "Upon a *timely* appeal having been filed, [DEED] 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." Minn. Stat. § 268.105, subd. 1(a) (emphasis added). The procedure for notifying parties of the issues to be considered at an unemployment-benefits hearing is addressed by DEED regulation: "The notice must state . . . the issues to be considered at the

[1] At oral argument, DEED was unable to offer a reason for the distinction.

hearing." Minn. R. 3310.2910. But upon the motion of a party to a hearing, or upon the ULJ's motion, the ULJ "may take testimony and render a decision on issues not listed on the notice of hearing if each party is so notified on the record at the hearing and does not object on the record." *Id.*

Here, the notice of appeal that DEED sent to PRC failed to identify the issue that actually was considered at the hearing. Nothing on the face of the notice of appeal indicated that the appeal that triggered the notice might be considered untimely by DEED, to alert PRC that their appeal could be dismissed unless it made a showing of timeliness. Before the hearing, therefore, PRC understandably believed that its appeal was timely.

PRC was not notified that timeliness was an issue, or *the* issue, until the ULJ's "opening statement," in which he stated that one issue "appear[s] to be whether the appeal filed here was timely." PRC did not object to the ULJ's opening statement. And during the hearing, the ULJ elicited testimony from Braaten and Cole on the timeliness issue without objection. But because of the lack of notice, PRC was unable to adequately prepare for the hearing. If PRC had received notice that timeliness would be an issue, it could have been prepared to produce documentation on the issue, could conceivably have called a computer-forensics expert to testify regarding why DEED did not receive the online appeal, or might have hired an attorney to represent its interests at the hearing. *See Stottler v. Meyers Printing Co.*, 602 N.W.2d 916, 919 (Minn. App. 1999) ("When a party induces another to believe that certain facts exist and the other justifiably relies on that belief and loses rights, the party may be estopped from denying the existence of the facts relied upon."). It also could have sought to subpoena witnesses or documents from DEED to challenge the

determination that the appeal was untimely. Minn. Stat. § 268.105, subd. 4 (2012). And it is particularly misleading when, as here, DEED sends to parties a notice of appeal stating that an appeal has been filed because, by statute, DEED is required to send a notice of appeal only upon a *timely* appeal having been filed. Minn. Stat. § 268.105, subd. 1(a).

DEED's notice of appeal, which did not indicate that timeliness would or could be an issue, is troubling for several reasons. As we have noted, such lack of notice prevents parties from adequately preparing for the hearing, which in turn can prevent the ULJ from holding an evidentiary hearing that sufficiently develops the record. Moreover, it can also result in the loss of important documentation and evidence. A party is less likely to preserve evidence that shows that it timely filed an appeal when DEED misleads a party to believe that timeliness will not be an issue. We also note that parties in unemployment-law cases often appear pro se. Although both unrepresented and represented parties are entitled to timely notice of the issues to be considered at the evidentiary hearing, we conclude that DEED's actions are particularly problematic when parties, as here, appear pro se. *See* Minn. R. 3310.2921 (2011) ("The judge should assist unrepresented parties in the presentation of evidence."); *see also Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 751 (Minn. App. 2010) ("This court has remanded DEED cases because a ULJ failed to fulfill his or her duty to assist unrepresented parties when it constituted a significant procedural defect.").

We acknowledge that rule 3310.2910 allows the ULJ, upon motion, to take testimony and render decisions on issues not listed on the notice of appeal. But "[t]he requirement of due process is a constitutional one and cannot be waived or dispensed with either by the

legislature or by an executive tribunal to which it delegates the duty of administering a law." *Godbout v. Dep't of Emp't & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013) (quotation omitted). When, as here, a challenge involves the adequacy of notice, we determine whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *McShane v. Comm'r of Pub. Safety*, 377 N.W.2d 479, 482-83 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Jan. 23, 1986). DEED's notice of appeal did not notify PRC that timeliness could be an issue considered at the hearing. Moreover, DEED did not notify PRC that it might invoke rule 3310.2910 to take testimony and render decisions on issues not identified in the notice of appeal. On this record, we conclude that DEED's notice of appeal was not reasonably calculated to apprise PRC of the issues to be considered at the hearing.

We therefore conclude that the substantial rights of PRC were prejudiced when DEED failed to provide PRC with adequate notice of the issues to be considered at the evidentiary hearing. Thus, the ULJ erred by dismissing PRC's appeal as untimely. We remand for the ULJ to consider the issue identified in the notice of appeal, that is, "[t]he [t]ax issue."

Reversed and remanded.