STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0786

Derrick D. Turner,
Relator,

vs.

MG McGrath,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 7, 2022
Affirmed
Rodenberg, Judge[*]

Department of Employment and Economic Development
File No. 37996683-6

Derrick Turner, St. Cloud, Minnesota (pro se relator)

Anne B. Froelich, Keri Phillips, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent)

MG McGrath Inc., Maplewood, Minnesota (employer)

Considered and decided by Slieter, Presiding Judge; Reilly, Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Relator Derrick Turner challenges an unemployment law judge's dismissal of his request for reconsideration as untimely. Relator also argues that the unemployment law judge's underlying ineligibility decision was erroneous because relator did not commit employment misconduct. We affirm.

FACTS

Respondent MG McGrath, Inc. (MGM) hired relator in November 2019 as a glazer. In January 2020, while residing at a hotel in North Dakota for a long-term work assignment, relator got into a verbal altercation with hotel staff. Hotel staff called the police, and MGM terminated relator's employment the next day because of what it deemed was relator's belligerent and disrespectful behavior.

Relator applied for unemployment benefits in February 2020. In March 2020, respondent Department of Employment and Economic Development (DEED) determined and notified relator that he was ineligible for unemployment benefits because he committed employee misconduct. Relator appealed. On April 8, 2020, an unemployment law judge (ULJ) affirmed DEED's decision and determined that relator was ineligible for unemployment benefits because he was discharged for employee misconduct.

DEED notified relator of the ULJ's April 8 ineligibility decision. The notice stated that the ULJ's decision would "be final unless a request for reconsideration [was] filed with the [ULJ] on or before Tuesday, April 28, 2020." Based on the record, relator did not

request reconsideration before April 28, 2020. Realtor was therefore ineligible to receive benefits.

In August 2020, DEED notified relator that his period of ineligibility ended on May 30, 2020. Relator appealed. On October 28, 2020, the ULJ determined relator's period of ineligibility ended on May 23 rather than May 30, because relator provided paystubs proving he met the statutory requirement to end his period of ineligibility as of May 23.

DEED notified relator of the ULJ's October 28 period-of-ineligibility decision. The notice stated relator could request reconsideration from the ULJ, but the ULJ's decision would "be final unless a request for reconsideration [was] filed . . . on or before Tuesday, November 17, 2020." Relator did not request reconsideration before November 17, 2020.

Relator claims that he spoke with a DEED employee over the phone to make a reconsideration request. Relator does not identify a date of this conversation, nor is there record evidence of the conversation. But on January 8, 2021, DEED notified relator that a request for reconsideration had been made and that relator's written comments must be submitted by January 29, 2021. Relator submitted his written comments concerning reconsideration on January 28, 2021. Relator asserted that his actions at the North Dakota hotel did not amount to employment misconduct under Minn. Stat. § 268.095 (2020), his appeal hearing before the ULJ was unfair because he never had "the opportunity to cross examine the suppose[d] witnesses," and the testimony of the witnesses at his hearing was inconsistent. While relator does not so specify, it seems apparent based on the content of his written statement that he was seeking reconsideration of the ULJ's April 8 ineligibility decision, and not of the October 28 period-of-ineligibility decision.

In May 2021, the ULJ dismissed relator's request for reconsideration as untimely under Executive Order 20-05 because DEED notified relator of the 20-day deadlines to request reconsideration of the April 8 and October 28 decisions, and "[t]here is no indication that [relator] filed, or took any steps towards filing, a request for reconsideration" before the applicable 20-day deadlines. As a result, the ULJ explained that the decisions became final. And once a decision is final, a ULJ "has no legal authority to address the case on its merits and the judge must dismiss the appeal."

This appeal followed.

DECISION

Relator's principal brief asks this court to review the merits of the ULJ's underlying April 8 ineligibility determination. Relator asserts that his actions at the hotel were not employment misconduct, and that he should not have been terminated because MGM did not follow its own progressive disciplinary process. Relator challenges the underlying ineligibility determination. But when a ULJ dismisses an appeal as untimely, the only question before this court is whether the ULJ erred in dismissing the appeal. *See Christgau v. Fine*, 27 N.W.2d 193, 199 (Minn. 1947) (stating the only question before an appellate court when a ULJ dismisses an appeal as untimely is whether the ULJ erred in doing so; we do not consider the merits of the appeal).

Whether a ULJ properly dismissed an appeal as untimely presents a question of law that we review de novo. *In re Murack*, 957 N.W.2d 124, 127 (Minn. App. 2021); *Godbout v. Dep't of Emp't & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013). We may reverse or modify the decision of a ULJ if a relator's substantial rights were prejudiced "because

the findings, inferences, conclusion, or decision" are based on an error of law or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2020). "[W]e review findings of fact in the light most favorable to the ULJ's decision" and we refrain from disturbing those factual findings when the evidence substantially sustains them. *Fay v. Dep't of Emp't & Econ. Dev.*, 860 N.W.2d 385, 387 (Minn. App. 2015) (quotations omitted); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

After a person applies for unemployment benefits, DEED determines and notifies the applicant of the eligibility status determination. Minn. Stat. § 268.101, subd. 2(a)–(b) (2020). The applicant has "20 calendar days" to appeal the eligibility determination. *Id.* subd. 2(f) (2020). After a timely appeal, a ULJ holds a de novo due-process hearing, after which the ULJ "must make written findings of fact, reasons for decision, and decision" and send copies to all parties. Minn. Stat. § 268.105, subds. 1(a), 1a(a) (2020). The ULJ's decision is final unless reconsideration is requested "within 20 calendar days" of sending notification of the ULJ's decision. *Id.*, subds. 1a(a), 2 (2020). "The [ULJ] *must* issue a decision dismissing the request for reconsideration as untimely if the judge decides the request for reconsideration was not filed within 20 calendar days." *Id.* subd. 2(e) (emphasis added). This dismissal is the final decision on the matter and is binding. *Id.* "When a decision becomes final, the department is deprived of jurisdiction to conduct further review." *Rowe v. Dep't of Emp. and Econ. Dev.*, 704 N.W.2d 191, 196 (Minn. App. 2005) (citing *In re Emmanuel Nursing Home*, 411 N.W.2d 511, 516 (Minn. App. 1987), *rev.*

denied (Minn. Oct. 13, 1987); *Johnson v. Metro. Med. Ctr.*, 395 N.W.2d 380, 382 (Minn. App. 1986)).

Usually this 20-day statutory time limit is absolute and unambiguous and must be strictly construed. *Rowe*, 704 N.W.2d at 195-96 (quoting *Semanko v. Dep't of Emp. Servs.*, 244 N.W.2d 663, 666 (Minn. 1976)). But Governor Walz issued Emergency Executive Order 20-05 (EEO 20-05) on March 16, 2020, suspending strict compliance with Chapter 268 of the Minnesota Statutes. *See* Emerg. Exec. Order No. 20-05 *Providing Immediate Relief to Employers & Unemployed Workers During the COVID-19 Peacetime Emergency* (Mar. 16, 2020).

We interpreted EEO 20-05 in *Murack*, and held that EEO 20-05 "suspends strict compliance, but not all compliance" with statutory deadlines under Chapter 268. 957 N.W.2d at 130. "In the absence of strict compliance with a statutory provision, there must still be a showing of at least 'substantial compliance.'" *Id.* (referencing *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 608 (Minn. 2016); *Manco of Fairmont, Inc. v. Town Bd. Of Rock Dell Twp.*, 583 N.W.2d 293, 295 (Minn. App. 1998), *rev. denied* (Minn. Oct. 20, 1998)). In describing substantial compliance, we stated:

> A party may be said to have substantially complied with a statute where she has a reasonable explanation for failing to strictly comply, has taken steps to comply with the statute, and has generally complied with the statute's purpose; and there is reasonable notice and a lack of prejudice to other parties.

Id. Employing this substantial-compliance standard, we determined in *Murack* that the ULJ erred by dismissing Murack's appeal as untimely "without considering whether Murack was in substantial compliance with the administrative appeal deadline." *Id.* at 131.

Here, DEED contends that relator did not substantially comply with the statutory deadline because relator "did not file, or take any steps toward filing, a request for reconsideration" before the statutory time limit elapsed, and because relator "[did] not state [in his principal brief] that he did take any steps towards filing a request for reconsideration, and does not provide any explanation for filing late."

Respondent is correct that relator did not raise an issue of timeliness in his principal brief, but he does address the issue briefly in his reply brief.[1] Relator vehemently disputes DEED's claim it did not receive a reconsideration request "before April 28, 2020." Relator claims that he mailed a reconsideration request on April 20, 2020, and "took pictures of the mail before placing it in the mailbox addressed to [DEED]." Relator also contends that he spoke to a DEED employee named Twyla, who found the scanned image of his reconsideration request, told relator that DEED "mishandled" the paperwork, apologized, and said she would send a reconsideration notice.[2] After this conversation, DEED notified

[1] Generally, issues not argued in relator's principal brief could not be raised in his reply brief. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010). Even so, because the rules of procedure limit relator's reply brief to new matter raised in DEED's brief, relator's reply brief does not exceed the scope of DEED's brief because the only issue on appeal and discussed in DEED's brief is whether the ULJ's timeliness decision was erroneous. *See* Minn. R. Civ. App. P. 128.02, subd. 3; *Wood v. Diamonds Sports Bar & Grill, Inc.*, 654 N.W.2d 704, 707 (Minn. App. 2002) (citing *Berg v. State*, 557 N.W.2d 593, 596 (Minn. App. 1996)) ("If an argument is raised in a reply brief but not raised in an appellant's main brief, and it exceeds the scope of the respondent's brief, it is not properly before this court and may be stricken from the reply brief.").

[2] Exhibit 26 is a fax that seems to be the scanned copy that relator claims Twyla found. The fax is an image of an envelope sent to DEED with relator's return address.

relator that a reconsideration request had been made, and relator submitted his written statement requesting reconsideration on January 28, 2021.[3]

Relator's claim that he sent an April 20 reconsideration request, but DEED failed to handle the request properly, is an alluring argument that he substantially complied with the statutory deadline. But there is neither any record evidence nor any indication in the record on appeal that relator presented these facts or this argument to the ULJ during the hearing on timeliness. And relator did not raise this argument in his January 2021 request for reconsideration. Given that the ULJ had no opportunity to hear and decide relator's claim about the April 20 reconsideration request, we cannot address the issue on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those issues previously presented to and considered by the district court, to include key facts supporting legal arguments). Moreover, whether relator sent an April 20 reconsideration request is a question of fact that the ULJ did not decide, and "[i]t is not within the province of [appellate courts] to determine issues of fact on appeal." *Kucera v. Kucera,* 146 N.W.2d 181, 183 (Minn. 1966).

Despite the copies of documents that relator now includes in his responsive brief and appendix, we are powerless to do anything other than review the record as constituted. When we consider the record before the ULJ in the light most favorable to the ULJ's decision, as we must, the ULJ's decision is supported by substantial evidence. DEED provided relator with notice of the ULJ's decisions and informed relator of the time frame

[3] Relator does not provide the date or time of his conversation with Twyla.

in which he needed to request reconsideration. The January 2021 reconsideration request is the only request in the record on appeal and was sent well after the April 28, 2020, deadline, and relator failed to explain his tardiness at the hearing before the ULJ. *See* Minn. Stat. § 268.105, subd. 7(d); *Fay*, 860 N.W.2d 387.

The ULJ also considered the substantial-compliance requirement, as *Murack* required. The ULJ determined relator "did not substantially comply with the appeal deadline under [EEO] 20-05," because there was "no indication [relator] filed, or took any steps towards filing, a request for reconsideration" before the deadline for either of the ULJ's decisions on April 8 and October 28. *See Murack*, 957 N.W.2d at 130 (determining substantial compliance requires (1) the party to produce a reasonable explanation for failing to strictly comply, (2) the party to take steps towards complying with the statute, (3) the party to generally comply with the statute's purpose, and (4) there is reasonable notice and a lack of prejudice to other parties).

Again, we are not immune to relator's sympathetic position. Had relator made to the ULJ the arguments that he now makes on appeal concerning his conversation with Twyla and having filed an April 2020 reconsideration request, the result might be different. But our review is constrained by the applicable statutes and standard of review, and we cannot reverse the ULJ based on an argument not made and materials not submitted. As such, we are powerless to do anything other than affirm based on the record as constituted because the ULJ's decision to dismiss as untimely is supported by substantial evidence in the record and is not affected by an error of law.

Affirmed.