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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0514

Scott R. Schultz,
Relator,

vs.

Performance Office Papers, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 3, 2012
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 25444615-8

Anne M. Loring, Minneapolis, Minnesota (for relator)

Performance Office Papers, Inc., Lakeville, Minnesota (respondent)

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

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SCHELLHAS, Judge

Relator challenges a decision of an unemployment-law judge (ULJ) that, following a hearing on July 29, 2010, the ULJ's decision was mailed to him on August 4, 2010, arguing that the ULJ (1) abused her discretion and violated relator's constitutional rights by conducting an additional evidentiary hearing to supplement the record, (2) made mistakes of law at the additional evidentiary hearing that prejudiced his substantial rights, and (3) improperly admitted evidence at the additional evidentiary hearing.

We affirm.

FACTS

Respondent Performance Office Papers, Inc. (POP) terminated relator Scott Schultz's employment in May 2010. Schultz applied for unemployment benefits and respondent Department of Employment and Economic Development (DEED) determined that he was eligible for benefits. POP appealed, and DEED conducted a hearing on July 29, 2010. Schultz did not participate in the hearing. The ULJ issued a decision, concluding that Schultz was ineligible for benefits because POP discharged him for misconduct. The decision stated that it would be final unless a request for reconsideration was filed on or before Tuesday, August 24, 2010. Schultz requested reconsideration on October 4, 2010. The ULJ dismissed the request for reconsideration as untimely. By writ of certiorari to this court, Schultz challenged the dismissal of his request for reconsideration, denying his receipt of the ULJ's decision following the hearing on July 29, 2010, and arguing that his request for reconsideration therefore was not

untimely. Because the record contained no evidence "that would satisfy DEED's burden of proof" to establish, "based on a preponderance of the evidence, that the [decision] was in fact sent" to Schultz, this court reversed and remanded "for an additional evidentiary hearing in front of a ULJ to resolve the factual dispute over whether the ULJ's decision was mailed." *Schultz v. Performance Office Papers, Inc.*, No. A10-2085, 2011 WL 3241867, at *3 (Minn. App. Aug. 1, 2011) (*Schultz I*). This court stated that "[o]n remand the ULJ could consider the affidavit and supporting material regarding DEED mailing procedures, among other evidence, when deciding whether DEED has met its burden of proof."

On remand, at the second evidentiary hearing, held on September 1, 2011, Schultz testified that he did not receive the ULJ's decision following the July 29, 2010 hearing, and that he has had problems receiving mail in the past—about a year before the September 1 hearing. A DEED employee testified about how DEED's mail system functioned and that the system was functioning properly when the decision would have been mailed to Schultz. On September 9, 2011, the ULJ issued a second decision, finding that the first decision following the hearing on July 29, 2010, was mailed on August 4, 2010, and concluding that the decision was final because Schultz did not file a request for reconsideration on or before Tuesday, August 24, 2010. Schultz requested reconsideration, arguing that DEED "failed to meet its burden of proving that it mailed the August 4, 2010 decision to . . . Schultz." On December 8, 2011, the ULJ ordered a third evidentiary hearing and set aside the findings of fact and decision issued on September 9, 2011.

A different ULJ conducted a third evidentiary hearing on December 28, 2011. Two DEED employees testified regarding DEED's mail system. The DEED employees explained how ULJs enter their decisions into the system, that the system showed that the decision had been entered into the system on August 3, that the decision had been printed, and that the decision had been sent to DEED's mailroom.

The ULJ issued a third decision on December 30, 2011, concluding that the testimony showed by a preponderance of the evidence that DEED mailed the decision to Schultz on August 4, 2010, rendering Schultz's request for reconsideration untimely. Schultz requested reconsideration, arguing that (1) the ULJ should not have conducted the additional evidentiary hearing on December 28, 2011, because DEED did not show good cause for not presenting its evidence at the evidentiary hearing on September 1, 2011; (2) the ULJ should not have permitted DEED to present additional evidence at the hearing on December 28, 2011; (3) to preserve Schultz's right to equal protection of the laws, the ULJ should set aside the decision issued on December 30, 2011; and, alternatively, (4) all decisions from all hearings must be set aside because DEED did not give Schultz the statutorily mandated notice for the hearing conducted on July 29, 2010. The ULJ affirmed her decision.

This appeal by writ of certiorari follows.

D E C I S I O N

When this court reviews the decision of a ULJ, it may reverse or modify the decision if the "substantial rights" of the relator have been prejudiced because, among other reasons, the ULJ's decision is "(1) in violation of constitutional provisions; (2) in

excess of the statutory authority or jurisdiction of the department . . . [or] (4) affected by other error of law." Minn. Stat. § 268.105, subd. 7(d)(1)–(2), (4) (2010). This court reviews "the ULJ's factual findings in the light most favorable to the decision." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). In doing so, this court "give[es] deference to the credibility determinations made by the ULJ" and "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Rowan v. Dream It, Inc.*, 812 N.W.2d 879, 882 (Minn. App. 2012).

This court "defer[s] to a ULJ's decision to grant or deny an evidentiary hearing and will reverse only for an abuse of discretion." *Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010). But "the ULJ's discretion is not absolute" and must be exercised within the bounds of statutory authority. *Id.*

Decision to Conduct Additional Evidentiary Hearing on December 28, 2011

Schultz argues that, at the evidentiary hearing on September 1, 2011, DEED failed to meet its burden of proving that it mailed the August 4, 2010 decision to him, and that the ULJ abused her discretion by conducting an additional evidentiary hearing on December 28, 2011, without requiring DEED to show good cause. We disagree that the ULJ abused her discretion by conducting an additional evidentiary hearing on December 28, 2011.

The ULJ's duty is to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2010). After a ULJ issues her decision, "[a]ny involved applicant, involved employer, or the commissioner" may file a "request for reconsideration asking the [ULJ] to reconsider [her] decision," so long as that request

is filed within 20 days of the sending of the ULJ's decision. Minn. Stat. § 268.105, subd. 2(a) (2010). After a party files a timely request for reconsideration, the ULJ must modify the finding of facts in the original decision, set aside the original decision and order an additional evidentiary hearing, or affirm the finding of facts in the original decision. Minn. Stat. § 268.105, subd. 2(a)(1)–(3). The ULJ "must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the [original] evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence." Minn. Stat. § 268.105, subd. 2(c) (2010).

Good-Cause Requirement for Additional Evidentiary Hearing

Schultz argues that the ULJ lacked statutory authority to conduct the additional evidentiary hearing on December 28, 2011. He argues that a party requesting an additional evidentiary hearing must show good cause for a ULJ to be authorized to conduct an additional evidentiary hearing, and that DEED did not show good cause for an additional evidentiary hearing. Section 268.105, subdivision 2(c), requires a party to show "good cause" for not having produced evidence at the initial evidentiary hearing.[1] But in *Vasseei* this court noted that section 268.105, subdivision 2(c), states when a "ULJ *must* order an additional hearing," not "that a ULJ may *only* order an additional hearing [when good cause is shown]." 793 N.W.2d at 751. Moreover, "[n]othing in section

[1] Because this court ordered on remand that DEED prove by a preponderance of the evidence that it mailed the ULJ's decision to Schultz following the hearing on July 29, 2010, we do not address whether DEED was a party to the proceeding at the evidentiary hearings on September 1 and December 28, 2011.

268.105 restricts a ULJ's authority to order an additional evidentiary hearing after receiving a request for reconsideration under other circumstances" and "[n]othing in the law restricts a ULJ from correcting a mistake before the decision is final." *Id.*

In *Vasseei*, this court stated that the result would be absurd if section 268.105, section 2(c), were interpreted to require a ULJ "to deny the request for reconsideration and affirm his decision even though he believed that his decision was erroneous." *Id.* Nothing in the statute prohibits the ULJ from conducting an additional evidentiary hearing on his or her own initiative in the interests of justice. We conclude that the ULJ did not abuse her discretion by conducting the additional evidentiary hearing on December 28, 2011. Accordingly, we reject Schultz's equal-protection argument because section 268.105, subdivision 2(c), does not require a party to show "good cause" before the ULJ *may* hold an additional evidentiary hearing. *See Vasseei*, 793 N.W.2d at 751. And Schultz otherwise failed to develop his equal-protection argument in his brief.

Burden of Proof

Schultz argues that the ULJ erred by failing to place the burden of proof on DEED at the hearing on December 28, 2011. Schultz is correct that in the ULJ's February 14, 2012 decision, affirming her December 29, 2011 order, the ULJ stated: "The Minnesota Court of Appeals has held there is no 'burden of proof' in an unemployment appeal hearing,"[2] that "[t]he department is not a party at the administrative appeal level," and

[2] Until August 2, 2009, Minnesota Statutes section 268.069, subdivision 2, .105, subdivision 1(b) (2008), specifically provided that evidentiary hearings in unemployment-benefit cases were conducted "without regard to any burden of proof," but the legislature removed that language effective August 2, 2009. 2009 Minn. Laws ch.

that "[t]he department is not required to show a reason why the evidence was not presented on September 1, 2011." The ULJ's statements contradict this court's decision in *Schultz I*, 2011 WL 3241867, at *3, which is a final decision and therefore the issues decided constitute the law of the case. *See Sigurdson v. Isanti Cnty.*, 448 N.W.2d 62, 66 (Minn. 1989) (stating that the "law of the case applies when the appellate court has ruled on a legal issue and remanded for further proceedings on other matters" and that the "issue decided becomes 'the law of the case' and may not be relitigated in the trial court *or reexamined in a second appeal*" (emphasis added) (quotation omitted)).

In *Schultz I*, in reliance on *Nafstad v. Merchant*, 303 Minn. 569, 570–71 228 N.W.2d 548, 550 (1975), this court concluded that because Schultz denied receipt of the decision, the burden of proof was placed on DEED to demonstrate that it mailed the decision. *Schultz I*, 2011 WL 3241867, at *3. Under *Nafstad*, a presumption exists that mail is received by the addressee when it is properly addressed and sent with prepaid postage. 303 Minn. at 570, 228 N.W.2d at 550. But, after the intended recipient denies having received the mail, the burden shifts to the sender to prove "timely mailing by a *fair preponderance of the evidence*." *Id*. at 571, 228 N.W.2d at 550 (emphasis added); *see also* Minn. Stat. § 268.031, subd. 1 (2010) (stating that "[a]ll issues of fact under the

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78, art. 3, § 5, at 590, § 17, at 597, art. 4, § 34, at 615, § 52, at 623 (removing the words "without any regard to any burden of proof" effective August 2, 2009). Effective July 1, 2012, the legislature added the words "without regard to a burden of proof" to the statute. 2012 Minn. Laws ch. 201, art. 3, § 5, at 351, § 17, at 357 (to be codified at Minn. Stat. § 268.069, subd. 2 (2012)). Because POP terminated Schultz in May 2010, the 2010 version of the statute is controlling. *See Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 186 (Minn. App. 2004) (stating that "[a]n employee's conduct should be judged against the law in effect at the time of the termination").

Minnesota Unemployment Insurance Law are determined by a preponderance of the evidence"). To satisfy its burden of proof, the sender must "show evidence of habit or custom with respect to mailing from the sender's office, coupled with some evidence showing compliance with the custom in the particular instance." *Id.* (citing *Dep't of Emp't Sec. v. Minn. Drug Prods., Inc.*, 258 Minn. 133, 135−38, 104 N.W.2d 640, 642−44 (1960)).

Here, the ULJ, applying the proper standard of proof—a preponderance of the evidence, determined that the testimony from DEED's employees was sufficient to prove that the decision following the July 29, 2010 hearing was mailed to Schultz on August 4, 2010. Our careful review of the evidence adduced at the evidentiary hearing on December 28, 2011, leads us to conclude that substantial evidence supports the ULJ's decision. Therefore, the ULJ's contradictory statements regarding the law of the case in *Schultz I* did not prejudice Schultz's substantial rights. Because we will reverse the ULJ only if her error prejudiced Schultz's substantial rights, Minn. Stat. § 268.105, subd. 7(d), we will not reverse the ULJ's decision here because her decision did not prejudice Schultz's substantial rights.

Evidence Admitted

Schultz argues that the ULJ improperly admitted hearsay at the additional evidentiary hearing on December 28, 2011, when a DEED witness testified as to the content of computer displays no one else could see. Schultz contends that, upon his objection to the hearsay, the ULJ "could have ordered DEED to create screenshots to

share with the parties and the ULJ and easily avoided admitting hearsay." This contention is the entirety of Schultz's argument, which we conclude is unpersuasive.

ULJs are "not bound by statutory and common law rules of evidence" and may receive "any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2011). The purported hearsay evidence in this case was probative because it was testimony as to how the DEED mailing system functioned and whether the system showed that the August 4 notice was correctly entered into the system and mailed out, the crux of the issue before the ULJ. Further, testimony from three DEED employees made under penalty of perjury is sufficiently reliable. *See Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 122–23 (Minn. App. 2008) (concluding that ULJ did not err by "allowing . . . witnesses to testify" as to the content of voicemail "messages without producing the voicemail messages" despite relator's argument that the testimony was hearsay), *review denied* (Minn. Dec. 16, 2008).

Validity of July 29 Hearing

Citing Minn. Stat. § 268.105, subd. 1(a) (2010), which requires that DEED provide notice "not less than ten calendar days before the date of the hearing," Schultz argues that the evidentiary hearing on July 29, 2010, was conducted only nine days after the date of DEED's notice of appeal—July 20, 2010—and therefore that the ULJ's decision following the hearing is void because the ULJ lacked jurisdiction to conduct the hearing. Schultz also argues that the lack of ten days' notice for the July 29, 2010 evidentiary hearing violated his constitutional right to due process. Schultz claims that his

counsel preserved this issue for appeal during her closing argument on December 28, 2011. But the amount of notice provided by DEED in the notice of appeal, dated July 20, 2010, was outside the scope of appeal in *Schultz I*, *see Schultz v. Performance Office Papers, Inc.*, No. A10-2085 (Minn. App. Jan. 11, 2011) (order) ("The appeal shall not include the issue of whether [DEED] provided the relator with proper notice of the July 29 evidentiary hearing."), and therefore is outside of the scope of this court's remand. Moreover, appellate courts "do not decide constitutional questions except when necessary to do so in order to dispose of the case at bar." *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981). We will not consider this issue now. Because the ULJ did not abuse her discretion by conducting the additional evidentiary hearing on December 28, 2011, and because the ULJ's findings are substantially supported by the record evidence, we affirm.

Affirmed.