

No. A12-1283

STATE OF MINNESOTA
IN COURT OF APPEALS

JOHN GODBOUT,

RELATOR,

VS.

DEPARTMENT OF EMPLOYMENT AND
ECONOMIC DEVELOPMENT,

RESPONDENT.

RELATOR'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities	ii
Reply Argument	1
I. DEED’s assertion of compliance with the statute does not demonstrate compliance with the Constitution	1
A. “Last known address” does not mean “last address known” to DEED .	1
B. Adequacy of notice procedures depends on the specific facts	4
II. The cases cited by DEED are factually dissimilar to Relator’s case, and none address the Due Process issue raised by Relator	6
III. DEED’s claim of an “immeasurable burden” has no merit	9
Conclusion	12

TABLE OF AUTHORITIES

	Page
MINNESOTA CONSTITUTION	
Constitution	1, 12
MINNESOTA STATUTES	
Minn. Stat. § 16A.14, subd. 2(a), 2(c)	3
Minn. Stat. § 268.058, subd. 4(a)	3
Minn. Stat. § 268.069, subd. 3	6
Minn. Stat. § 268.18, subd. 2(e)	1
Minn. Stat. § 268.19, subd. 1(a)(11)	2, 3
UNITED STATES SUPREME COURT CASES	
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	1
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	1, 4, 5, 6
MINNESOTA SUPREME COURT CASES	
<i>Christgau v. Fine</i> , 223 Minn. 452, 27 N.W.2d 193 (1947)	7
<i>Jackson v. Minnesota Dept. of Manpower Services</i> , 296 Minn. 500, 207 N.W.2d 62 (1973)	8
<i>Schulte v. Transportation Unlimited, Inc.</i> , 354 N.W.2d 830 (Minn. 1984)	4, 10, 11
<i>Semanko v. Dept. of Employment Services</i> , 309 Minn. 425, 244 N.W.2d 663 (1976) ...	8

MINNESOTA COURT OF APPEALS CASES

Baldinger Baking Co. v. Stepan, 354 N.W.2d 569 (Minn. App. 1984) 7

Cole v. Holiday Inns, Inc., 347 N.W.2d 72 (Minn. App. 1984) 8

Kennedy v. American Paper Recycling Corp., 714 N.W.2d 738 (Minn. App. 2006) 9

King v. University of Minnesota, 387 N.W.2d 675 (Minn. App. 1986) 9

Management Five, Inc. v. Commissioner of Jobs and Training,
485 N.W.2d 323 (Minn. App. 1992) 11

MINNESOTA COURT RULES

M.R.Civ.Pro., Rule 60.02 6

RELATOR'S REPLY BRIEF

I. DEED's assertion of compliance with the statute does not demonstrate compliance with the Constitution.

Respondent DEED rejects relator's argument of inadequate notice by pointing to the language in the statute requiring "only that a determination be mailed to an applicant's last known address." (Resp. Br. at 10). Because overpayments based on fraud are limited by Minn. Stat. § 268.18, subd. 2(e), to reaching only those benefits paid less than four years before the determination is issued, and because DEED mailed notice to relator's old address seven months after relator stopped collecting benefits, DEED concludes that it "did what it was legally obligated to do." (Resp. Br. at 10). But relator's argument is not that DEED failed to follow the statutory scheme. Relator's argument is that DEED's actions pursuant to the statutory scheme did not comport with due process. Respondent fails to address this argument. Despite citing to the seminal due process cases of *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), respondent ignores analysis of its actions under these cases.

A. "Last known address" does not mean "last address known" to DEED.

DEED repeatedly states in its brief that it mailed notice to relator "at the address he had on file with DEED." (Resp. Br. at 1). At the same time, respondent acknowledges the ULJ's findings of fact that relator was not living at that address, Edmund , when DEED mailed notice to that address on April 26, 2006. DEED's defense of

its notice to relator relies on reading “last known address” as equivalent to the “last address known to DEED”, as shown by the repetitive addition of the phrase “of record” and “of record with DEED” each time the language appears in respondent’s brief: “the address he listed on record for DEED” (Resp. Br. at 1); “his address on record” (Resp. Br. at 2); “his last address on record with DEED” (Resp. Br. at 2); “address of record with DEED” (Resp. Br. at 4); “last known address of record” (Resp. Br. at 8); “the last known address he had on record with DEED” (Resp. Br. at 8); “the address he had on record with DEED” (Resp. Br. at 13).

In this repetitive embellishment of the statute’s language, DEED seeks to cast “last known address” as meaning only what DEED has in its files or computer data banks and to avoid any duty for even a minimal investigation of an individual’s actual “last known address”. Not having to ascertain an individual’s last known address may be administratively convenient for DEED, but this procedure has led to inadequate notice to relator that DEED in April, 2006, was initiating a claim against him in excess of \$11,000, a claim that could not be brought in any other Minnesota forum without personal service.

There is no definition in Chapter 268 of the phrase “last known address”, making it clear that this phrase cannot automatically mean the “last address known to DEED”. That this phrase means something more than DEED’s reading is shown by Minn. Stat. § 268.19, subd. 1(a)(11), in which the Legislature grants DEED specific authority to access data from law enforcement agencies in order “to ascertain the last known address” of an

individual. This provision demonstrates that the Legislature did not intend “last known address” to mean merely the “last address known to DEED” or the “last address on record with DEED.”

The language authorizing DEED to ascertain an individual’s last known address by seeking out information from law enforcement agencies would be just surplus language if the Legislature intended “last known address” to be “last address known” from DEED’s internal information. Rather, the specific language in § 268.19 must inform this Court’s reading of “last known address” in other parts of the statutory scheme – the address “on record with DEED” may not be an individual’s last known address. Therefore, *starting* a claim against a former recipient of unemployment benefits by merely mailing to the address last known to DEED is not always reasonably calculated to effectively apprise an individual that DEED is initiating a civil claim against him.¹

¹ Minn. Stat. § 268.058, subd. 4(a), provides separate authorization for “[a]ny amount due under this chapter * * * from an applicant” to be collected by civil action heard under the provisions of Minn. Stat. § 16A.14. Subd. 2(a) of § 16A.14 allows claims under \$2,500 to be brought in conciliation court “by first class mail to the debtor’s last known address.” Subd. 2(c), however, contains recognition that such mail service to a “last known address” may not be sufficient: “If a judgment is obtained in Ramsey County Conciliation Court when the form was sent by first class mail under this subdivision and the debtor reasonably demonstrates that the debtor did not reside at the address where the form was sent or that the debtor did not receive the form, the commissioner or the attorney general shall vacate the judgment without prejudice and return any funds collected as a result of enforcement of the judgment. Evidence of the debtor’s correct address include, but are not limited to, a driver’s license, homestead declaration, school registration, utility bills, or a lease or rental agreement.” This alternate route for collecting an overpayment debt from a former unemployment insurance applicant contains the default-reopening provisions that are absent from the

B. Adequacy of notice procedures depends on the specific facts.

“Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. at 332. And see, *Schulte v. Transportation Unlimited, Inc.*, 354 N.W.2d 830, 833-34 (Minn. 1984) [discussing *Mathews*]. The required due process analysis must focus on the specific governmental and private interests at stake. The first *Mathews* factor is the private interest affected by the governmental action. Here, DEED’s single 2006 mailed notice saddled relator with a \$19,436 debt. Relator’s “interest” is an opportunity for a hearing where he can demonstrate that the anonymous tip underlying this debt does not constitute credible or substantial evidence of the alleged fraud. “This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.” *Mathews v. Eldridge*, 424 U.S. at 333. DEED’s assertion of fraud has not been tested at any hearing.

The second *Mathews* factor is the risk of an erroneous deprivation of relator’s interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. It is clear in this case that DEED has acted as an

method applied against the relator. Had DEED made an effort to ascertain relator’s actual address by exploring other evidence of relator’s address – such as the driver license address used in 2010 – the notice of the claim might have reached relator sooner than four years later. This statute also negatives any inference that the Legislature meant to obviate due process of law when authorizing DEED to collect overpayments.

adversary party, having commenced a proceeding against relator asserting notorious, quasi-criminal allegations of fraud, with a substantial, \$19,436 liability imposed on relator. In making this fraud allegation, DEED was not acting as a neutral arbiter of a dispute between an employer and a former worker about the nature of a separation from a job. There has been no independent or impartial assessment of the merits of DEED's claim by any official. The imposition of this debt on relator was made merely from the supposition of a fraud investigator based on an anonymous tip. After the lapse of thirty days from mailing one letter to an address where relator did not reside, relator's debt was made final and unreviewable by the statutory scheme DEED has followed. The risk of erroneous deprivation is substantial where anonymous evidence motivates a claim that is never tested by any independent assessment. There is reasonable value in reducing the risk of erroneous deprivation by allowing the adversely affected relator to obtain a hearing on the merits. There has been no hearing on DEED's claim, and the statute provides no independent review of the sufficiency and reasonableness of such a claim within the agency.

The third *Mathews* factor is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The specific function of DEED in this case is prevention and correction of erroneous or fraudulent payment of unemployment benefits. This is an important interest, and when such claims are asserted while an unemployment

insurance applicant is actively seeking benefits, the standard notice and hearing procedures provide the process that is due. But when the relationship between DEED and an applicant has been severed by the expiration of benefits, and weekly communication between the applicant and DEED has ceased as it was in relator's circumstances, due process requires that notice of the claim must still be reasonably calculated to reach and apprise an individual of the claim. When that notice fails or is inadequate, the "additional or substitute procedural requirement" sought by relator is the opportunity to obtain relief from default, to reopen the proceeding and get a hearing on the merits. This burden is not substantially more significant than the hearing that would have been provided had notice reached its intended recipient in the first place.

Relator has suggested that an analogue of the test applied under M.R.C.P., Rule 60.02 for reopening a default judgment would be a reasonable procedural safeguard. DEED argues to the contrary, that such a reference is inapplicable because "there is no common law or equitable entitlement to unemployment benefits," citing Minn. Stat. § 268.069, subd. 3. (Resp. Br. at 11). Whatever that statutory language might mean, it cannot restrict this Court from using the "common law" of *Mathews v. Eldridge* to analyze DEED's actions in this case.

II. The cases cited by DEED are factually dissimilar to Relator's case, and none addresses the Due Process issue raised by Relator.

The cases cited in DEED's brief arise out of much different factual situations than

relator's circumstances. Instead of considering constitutional due process arguments about notice, the several court decisions cited by DEED in its brief reject varied claims of "mitigating circumstances" as being outside the statutory language defining the timely appeal period.

In *Christgau v. Fine*, 223 Minn. 452, 27 N.W.2d 193 (1947), an employer that received a notice of an unemployment tax rate claimed to have mishandled the notice internally before mailing in its appeal and payment about eight days late. The Employment Security Department rejected the appeal as not filed "within 30 days of the mailing date of the notice of determination of their contribution rate." 223 Minn. at 455, 27 N.W.2d at 195. This fact pattern is wholly different from relator's, who never received a mailed notice of the Department's claim for four years but then acted promptly to seek an appeal as soon as he had actual notice. In *Christgau*, the Supreme Court went through a lengthy analysis of the substantive jurisdiction of the agency before reversing the dismissal on lateness grounds of the appeal: "Our conclusion is that the director had jurisdiction of the application by the employers to obtain the lower contribution rate and that he erred in dismissing the appeal...". 223 Minn. at 465, 27 N.W.2d at 199. In this regard, the result in *Christgau* mirrors what relator asks here: that the Department should recognize the ineffective notice and reopen the matter on the merits.

Mishandling of the notice by an employer's bookkeeper – not failure to receive the notice – led to a late filing of appeal in *Baldinger Baking Co. v. Stepan*, 354 N.W.2d 569,

571 (Minn. App. 1984), but that fact was “irrelevant” because dismissal of a late appeal was required “regardless of alleged mitigating circumstances.”

The claimant in *Jackson v. Minnesota Dept. of Manpower Services*, 296 Minn. 500, 501, 207 N.W.2d 62, 63 (1973), did not claim non-receipt of notice, but appealed from the dismissal of his one-day-late appeal, arguing to the court that the seven day “limitation period did not begin to run until he received the notice of determination in the mail. We do not agree.”

In *Semanko v. Dept. of Employment Services*, 309 Minn. 425, 244 N.W.2d 663 (1976), the court reviewed the timeliness of the claimant’s appeal from a notice mailed July 15, 1975. He appealed on July 23, 1975, outside the statute’s then-limit of seven calendar days, but *Semanko* raised a much different argument than relator. “Claimant concedes that his appeal from the determination of the claims deputy is untimely. However, he argues that he was improperly denied a hearing where he might show compelling good cause for his otherwise late filing of appeal.” 309 Minn. at 428, 244 N.W.2d at 665. In this context, the court found the statutory language to be “absolute and unambiguous.” 309 Minn. at 430, 244 N.W.2d at 666. *Semanko* did not involve nonreceipt of notice, and the claimant made no argument about due process.

Cole v. Holiday Inns, Inc., 347 N.W.2d 72, 74 (Minn. App. 1984), was an untimely appeal from a “determination mailed to Holiday Inns and to relator at their correct addresses.” Cole’s losing argument admitted untimeliness but challenged the content of

the notice she received as inadequate to deprive her of unemployment benefits, which contention the court found to be without merit.

In *King v. University of Minnesota*, 387 N.W.2d 675 (Minn. App. 1986), there again was no claim that mailed notice was not received; rather, the issue was whether the time for petitioning for certiorari was triggered by mailing to the claimant or by the subsequent mailing to the claimant's attorney. The Court of Appeals' opinion is not about due process: "Although the question is close, we believe that the term "party" should be strictly construed and that the time for appeal began to run when King himself received notice of the Department decision." *Id.* at 677.

In *Kennedy v. American Paper Recycling Corp.*, 714 N.W.2d 738, 740 (Minn. App. 2006), the benefit applicant did not argue non-receipt but asked unsuccessfully to be excused from his one-day-late filing by claiming he had initially sent his appeal to an old address for the Department, not the address listed on the notice.

None of the cases cited by respondent addresses the fundamental due process issue here, that DEED has, in essence, obtained a default judgment of nearly \$20,000 against relator without sufficient process apprising him of the claim and allowing a meaningful opportunity for a hearing.

III. DEED's claim of an "immeasurable burden" has no merit.

Respondent DEED raises the specter of "an immeasurable burden upon DEED"

(Resp. Br. at 14) if it were required to take steps to ascertain the actual address of an individual before mailing a notice. DEED claims, without record evidence or citation, to have mailed hundreds of thousands of form 1099's every year to individuals who have received unemployment insurance benefits. DEED accuses relator of wanting DEED to make "thousands, if not millions of calls" (Resp. Br. at 14) to check the validity of mailing addresses. These facts and numbers cited by DEED are inapposite to relator's case or his claims.

The 1099 forms issued by DEED are not notices of claims against those individuals with a temporal limit imposing liability. Form 1099 is merely a tax document, easily duplicated, if necessary. The purpose of such forms is distinctly different from, the commencement of a claim of many thousands of dollars against an individual. In the presumably much smaller universe of fraud overpayment claims against former unemployment benefit recipients, due process demands that the notice procedure that is utilized be reasonably calculated, under all the circumstances, to reach the intended defendant and apprise him of the agency's claim. When the facts show that the notice chosen is inadequate or ineffective, the remedy under due process is plain – reopen the matter so that the defaulted party may defend on the merits. This is exactly the result in *Schulte v. Transportation Unlimited, Inc.*, *supra*, 354 N.W.2d at 835.

DEED's inclusion of non-record material in the appendix to its brief (Resp. Br. App. A11-A-13) has no bearing on the issue of notice. The transcript of the hearing in

this case contains no reference to the alleged “2005 information handbook,” (Resp. Br. at 10), and DEED does not cite to any other portion of the record.² Moreover, the actual contents of these non-record papers in DEED’s appendix fail to mention in any way the potential of DEED using the benefit applicant’s address with DEED to initiate a claim exceeding \$10,000 by mail anytime in the next four years. Although there is precatory language about changing one’s address “even if you have stopped receiving benefits,” there is no description of consequences of not doing so, nor other notice language, and the information is given in the context of receiving a form 1099 – a document easily replicable and as to which there is no liability attached to nonreceipt. These extraneous and extra-record documents make no difference in the analysis of the sufficiency of DEED’s notice to relator.

DEED asserts that relator “made no effort” to create a forwarding address “to ensure that important documents would reach him.” (Resp. Br. at 11). DEED cites no duty within the ambit of unemployment compensation law that makes this an obligation of relator, an obligation that is neglected at the peril of DEED initiating a huge monetary claim against him. Such a duty cannot exist independent of notice. That is why DEED errs when it ignores the import of *Schulte*.

² Nothing in the record or DEED’s appendix shows by affidavit or other proof the mailing of such a handbook to relator. Without factual proof of mailing, no presumption of receipt can arise. See, *Management Five, Inc. v. Commissioner of Jobs and Training*, 485 N.W.2d 323 (Minn. App. 1992).

CONCLUSION

The claim by respondent DEED that Relator owes \$19,436 has been created without adequate notice or opportunity for a hearing. The underlying factual claim has not been evaluated or tested by any impartial official or in any sort of hearing. The Minnesota Constitution does not permit the imposition of this obligation on inadequate mailed notice, without an opportunity for relator to be relieved of default by showing the inadequacy of the notice. In this case, at a hearing on the merits, relator can have the opportunity to demonstrate that he has a reasonable defense on the merits, that he has acted with reasonable promptness after actual notice, and that there is no undue prejudice. The decision of the Unemployment Law Judge must be reversed, and this case must be remanded for a hearing on the merits.

Respectfully submitted,

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