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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0419**

Kory Neises,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed December 2, 2013
Affirmed
Worke, Judge**

Department of Employment and Economic Development
File No. 30254110-3

Tim L. Droel, J. Matthew Berner, Peter D. Sparby, Droel, PLLC, Minneapolis, Minnesota (for relator)

Lee B. Nelson, Department of Employment & Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Relator challenges an unemployment-law judge (ULJ) determination that he committed fraud by failing to report his receipt of severance pay, arguing that the decision is not supported by substantial evidence, and that the ULJ failed to make

findings supporting his credibility determinations and acted in an adversarial manner during the appeal hearing. We affirm.

FACTS

Relator Kory Neises was employed by QBE Americas, Inc., as a claim appraiser until his position was eliminated in January 2012. Neises called the Minnesota Department of Employment and Economic Development (DEED) to inquire about eligibility for unemployment benefits. A DEED employee took a verbal application to establish an account; this employee asked Neises a series of questions, including whether he would receive severance pay. Neises replied that he did not know. The DEED employee did not explain that the receipt of severance pay could make Neises ineligible to receive unemployment benefits.

Beginning February 1, 2012, Neises requested weekly benefits. When making his weekly online request for benefits, Neises was required to answer a series of questions, including “For this reporting period, did you or will you receive or apply for income, from any other source, that you have not previously reported to us?” Beneath this question is a link that states, “Please click Here for examples of other income sources.” “Severance, notice, or retention pay, and any other payments made because of separation from employment” are included as examples of income that may affect benefits. These examples are highlighted in bold print.

On February 17, 2012, QBE paid Neises \$39,500 as a severance payment. Neises did not report this as a source of income on his request for benefits for that week or during any subsequent week. He continued to receive unemployment benefits through

September 2012. After QBE reported the severance payment, DEED determined Neises was ineligible for benefits and that he had been overpaid due to fraud. DEED imposed the statutory penalty for fraud. Neises appealed the fraud determination.

When questioned at the telephone hearing about why he did not report this payment, Neises said that he thought that “income from any other source” meant another employer and that he did not think that severance pay was included. The ULJ asked him whether he had received an unemployment handbook and Neises was unsure; he recalled receiving “a lot of papers” but could not recall a handbook. The ULJ found a copy for the relevant period, described it as a “lightish purple color,” and asked if he recalled reading it. Neises did not recall reading the handbook. He remembered referring to some “coversheets” that described how to access the system but he “couldn’t say for certain that [he] ever read the employee handbook.”

The ULJ concluded that Neises should be assessed a fraud penalty. While not specifically using the word “credibility,” the ULJ noted that Neises

acknowledges that the Department representative who took his application over the telephone specifically asked him about severance payment. Neises received the Department’s handbook informing him that severance payments can affect his eligibility to receive unemployment benefits, but he did not look at the handbook closely. Neises had information available to him that could have told him very clearly that he was not eligible to receive unemployment benefits, but he did not access it. The question on the weekly request for benefits asks if Neises had received income, from any other source, that he had not previously reported to the Department. Neises made false statements to the Department without a good faith belief in the statements’ correctness.

The ULJ concluded that Neises's "incorrect reports amounted to fraud" and assessed a penalty.

Neises asked for reconsideration. In affirming his decision, the ULJ wrote that although his testimony that he was unaware that he must report severance pay was uncontradicted, "[t]he idea that it simply never occurred to Neises that his severance payment might be an issue is not credible. Neises had multiple sources available to him to verify the answer, and he chose not to look. Neises did not have a good faith belief in his statement." This appeal by writ of certiorari followed.

D E C I S I O N

We may reverse or modify a ULJ's decision if, among other things, it is "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2012). We review the ULJ's findings in the light most favorable to the decision. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). But we review the ULJ's conclusions based on those facts de novo as a question of law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Misrepresentation/fraud

"Any applicant who receives unemployment benefits by knowingly misrepresenting, misstating, or failing to disclose any material fact, or who makes a false statement or representation without a good faith belief as to the correctness of the statement or representation, has committed fraud." Minn. Stat. § 268.18, subd. 2(a) (2012). "Whether a claimant knowingly and willfully misrepresented or misstated

material facts to obtain benefits involves the credibility of the claimant's testimony." *Burnevik v. Dep't of Econ. Sec.*, 367 N.W.2d 681, 683 (Minn. App. 1985). We defer to the ULJ's credibility determinations. *McNeilly v. Dep't of Emp't & Econ. Dev.*, 778 N.W.2d 707, 710 (Minn. App. 2010).

Neises argues that the ULJ did not find that he had "knowingly" made misrepresentations without a good faith belief in their correctness, because the ULJ wrote that Neises "may have committed fraud." But Neises is citing a sentence in the ULJ's order of affirmation out of context. The ULJ was replying to Neises's charge that the ULJ "improperly subjected him to cross-examination . . . [and] assumed an adversarial role." The ULJ continued,

Neises's contention is without merit. The undisputed facts suggested that Neises may have committed fraud. The ULJ asked pointed and direct questions to determine what Neises was thinking when he made his requests for benefits. The intention was not to get Neises to admit to fraud; the intention was to see if Neises could provide credible explanations for the evidence that was not in his favor. If Neises had been able to give satisfactory answers to the ULJ's questions, the ULJ would not have made a finding of fraud. Neises was not able to do so.

The ULJ concluded that Neises's statement that it never occurred to him that his severance pay was an issue was "not credible" because of the "multiple sources available to him to verify the answer." Furthermore, the ULJ's original order states that Neises committed fraud and sets forth several reasons why the ULJ concluded that Neises did not have a good faith belief as to the correctness of his statement: (1) a DEED representative asked him if he would receive severance pay; (2) he received a DEED

handbook with specific information about the effect of severance pay on eligibility; and (3) the weekly request for benefits asked whether he had received any income “from any other source.”

As required, the ULJ determined that Neises committed fraud based on the conclusion that he was not credible. There are substantial facts in the record to support this determination.

Credibility

Neises argues that the ULJ failed to articulate the reasons for discrediting Neises’s uncontroverted testimony. “When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (2012). We will remand if the ULJ fails to make credibility findings in a decision that rests on the credibility of a witness or party. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007).

In his original order, the ULJ cited several circumstances that made him conclude that Neises had made false statements “without a good faith belief in the statements’ correctness.” The ULJ found that (1) a DEED representative asked Neises if he would receive severance pay; (2) he received the handbook but did not look at it closely; (3) he had information that would have told him that he was not eligible for benefits; and (4) he answered a question on the weekly request for benefits about whether he had received income from any other source. In the order of affirmation, the ULJ was more specific. The ULJ noted that on the request for benefits there is a link describing what income

from any other source means, and a DEED employee asked him about severance payments, which at least should have alerted him that this was a potential issue. The ULJ concluded, “The idea that it simply never occurred to Neises that his severance pay might be an issue is not credible. Neises had multiple sources available to him to verify the answer, and he chose not to look.” This is an adequate explanation of the basis for the ULJ’s credibility determination.

Although Neises disputes that he received the handbook and argues that the ULJ should accept his testimony because it was uncontroverted, the transcript reveals that his testimony is not as positive as he describes. When asked if he received the handbook, Neises stated,

You know I did receive a packet of information. I don’t recall you know exactly if it was a handbook or not. I know it was a lot of papers on different you know, you know available through the department to help you get reemployed, you know different websites, things like that. I don’t recall exactly if it was the employee or unemployment handbook.

When asked if he recalled reading the handbook, he replied,

You know I don’t think I actually read it. I know there was some coversheets that basically explained I think if I remember right that you know the sign in process and you know as far as accessing the system or something like that if I remember right. And you know I obviously did refer to those because you know that’s how I went on weekly to make my payments or to request a payment. But I don’t recall, I couldn’t say for certain that I ever read the employee handbook.

This testimony is equivocal enough to permit the ULJ to doubt relator’s credibility.

Fair hearing

Neises argues that the ULJ failed to conduct a fair hearing. The ULJ conducts a hearing as “an evidence gathering inquiry.” Minn. Stat. § 268.105, subd. 1(b) (2012). The ULJ is required to explain the procedures for the hearing and the meaning of the term “preponderance of the evidence” in simple and clear language. *Id.* The ULJ “must ensure that all relevant facts are clearly and fully developed.” *Id.* The ULJ may determine the order of presentation of the evidence and should assist unrepresented parties. Minn. R. 3310.2921 (2011).

The transcript does not support Neises’s claim that the ULJ acted in an adversarial manner. The ULJ questioned Neises, an unrepresented party, to allow him the opportunity to explain why he failed to report his severance pay. The ULJ retrieved a copy of the handbook that Neises received, or should have received, in order to describe the color of the cover. The ULJ encouraged him to expand on his answers; in the order of affirmation, the ULJ stated that his questions were made with “the intention . . . to see if Neises could provide credible explanations for the evidence that was not in his favor.” It is evident from the transcript that the ULJ attempted to gather evidence and to assist Neises in developing his defense. The transcript does not depict an adversarial hearing in which the ULJ took advantage of an unrepresented party.

Affirmed.