

NO. A10-423

State of Minnesota
 In Court of Appeals

Shahriar Vasseei,

Relator,

v.

Schmitt & Sons School Buses, Inc.,

Respondent,

and

Department of Employment and Economic Development,

Respondent.

RELATOR SHAHRIAR VASSEI'S BRIEF, ADDENDUM AND APPENDIX

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STATEMENT OF THE ISSUE

Minnesota Statutes section 268.105, subdivision 2, permits a party to an evidentiary hearing before an unemployment law judge to request reconsideration of the ULJ's decision. The statute further provides that the ULJ must order an additional evidentiary hearing if the requesting party demonstrates that evidence not submitted at the hearing would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence. Here, despite finding that the employer did not have good cause for failing to submit certain evidence at the initial evidentiary hearing, the ULJ held an additional evidentiary hearing and took additional evidence. Should this Court reverse the ULJ's decision to exceed its statutory authority?

List of Most Apposite Cases:

Rowe v. Dept. of Empl. & Econ. Dev., 704 N.W.2d 191, 195 (Minn. Ct. App. 2005)

Wichmann v. Travalia & U.S. Directives, Inc., 729 N.W.2d 23, 28-9 (Minn. Ct. App. 2007)

Jaskowiak v. CM Constr. Co., 717 N.W.2d 448, 450-1 (Minn. Ct. App. 2006)

Stottler v. Meyers Printing Co., 602 N.W.2d 916, 918-19 (Minn. Ct. App. 1999)

List of Most Apposite Statutes:

Minn. Stat. § 268.105, subd. 2 (2010)

STATEMENT OF THE CASE

This appeal arises from the employment discharge of Shahriar Vasseei (“Vasseei”) arising from an accident involving a transit bus that Vasseei was driving and a bicyclist. Following his dismissal from his employment with Respondent Schmitt & Sons School Buses, Inc. (“Schmitt & Sons”), Vasseei applied for unemployment benefits. Respondent Department of Employment and Economic Development (the “Department”) ultimately determined that Vasseei was ineligible for benefits because Schmitt & Sons had discharged him because of employment misconduct. But this determination reversed an earlier finding of eligibility and arose from a manifest error of law.

The Department’s initial determination in response to Vasseei’s application for unemployment benefits was that Schmitt & Sons had discharged Vasseei due to employment misconduct. (Hr’g Ex. 1.) Vasseei appealed that determination. (Hr’g Ex. 1.) A Department unemployment-law judge (“ULJ”) conducted a telephone hearing on September 4, 2009. (R.A.¹ at 1.) Schmitt & Sons’ transit manager, Connie Massengale, and its operations manager, David Lies, testified at that hearing, along with Vasseei. (R.A. at 1.) Because of that hearing, the ULJ determined that Vasseei was discharged for “reasons other than employment misconduct” and found that he was eligible for unemployment benefits. (R.A. at 3.)

By an October 1, 2009 letter from its counsel, Schmitt & Sons requested reconsideration of that determination, in part, because it sought leave to present additional evidence of Vasseei’s employment misconduct. (R.A. at 7.) Specifically,

¹ R.A. refers to Relator’s Addendum.

Schmitt & Sons requested an additional evidentiary hearing to present (1) “the video record of the incident that resulted in Mr. Vasseei’s termination;” (2) customer complaints regarding Mr. Vasseei; and (3) an investigation of a different accident involving a bus that Vasseei was driving. (R.A. at 7-8.) The ULJ determined that Schmitt & Sons had not met the requirements for a request for reconsideration under Minn. Stat. § 268.105, subd. 2(c). (R.A. at 10.) Instead, the ULJ held that Minnesota Rule 3310.2921, which provides that the ULJ should assist unrepresented parties with the presentation of evidence at an evidentiary hearing, required the ULJ to hold an additional evidentiary hearing to consider the police report, which had not been entered into evidence and was not identified as additional evidence that Schmitt & Sons sought to introduce. (R.A. at 10.)

The ULJ held the additional evidentiary hearing on November 23, 2009. (R.A. at 11.) The additional evidence demonstrated that “Vasseei’s negligent driving was the proximate cause of the accident.” (R.A. at 13.) Therefore, Vasseei was determined to be ineligible for benefits. (R.A. at 13.) On December 11, 2009, Vasseei requested reconsideration of that determination, arguing, in part, that the ULJ’s decision to reconsider his initial determination of eligibility violated the statutory requirements for reconsideration. (R.A. at 16.) The ULJ rejected those arguments, now finding that Schmitt & Sons had shown good cause for reconsideration. (R.A. at 23.) Therefore, the ULJ upheld its previous determination of ineligibility. (R.A. at 23-4.) This appeal follows.

STATEMENT OF THE FACTS

For the purpose of this appeal, the core facts are not in dispute. Schmitt & Sons School Buses, Inc. is a private contractor for public transportation provided by Minnesota Valley Transit. (Tr. at 19.) Schmitt & Sons employed Shahriar Vassei as a transit driver from January 10, 2008 until his discharge from employment on July 31, 2009. (Tr. at 12.) Vassei is a trained commercial bus and truck driver with a Class A driver's license. (Tr. at 54.)

On July 31, 2009, Vassei was driving a transit bus that was involved in an accident with a bicyclist. (Tr. at 15.) As Vassei was turning the bus from Eleventh Street onto Third Avenue in downtown Minneapolis, the bus struck a bicyclist. (Tr. at 43-4.) Because he could not make the turn properly, Vassei backed the bus up and apparently backed over the bicycle. (Tr. at 29-30, 42-3.) There is no evidence that the rider was injured. (Tr. at 66.) Vassei was unaware of the accident at the time it happened. (Tr. at 24.) Schmitt & Sons dismissed Vassei based on his accident history, including the July 31 incident. (Tr. at 16.)

SUMMARY OF ARGUMENT

After the initial hearing in this matter, the Unemployment Law Judge determined that the evidence presented did not show negligence on the part of Shahriar Vassei that caused the July 31, 2009 accident. The ULJ further concluded that although the employer, Schmitt & Sons, may have had a good business reason to dismiss him, Vassei's actions did not constitute employment misconduct.

Upon request for reconsideration by Schmitt & Sons, the ULJ ordered an additional evidentiary hearing to consider a police accident report that Schmitt & Sons had not previously submitted into evidence. The ULJ erred as a matter of law when he ordered the additional evidentiary hearing because Schmitt & Sons had not demonstrated a good-cause reason for failing to submit the report as required by Minnesota Statutes section 268.105, subdivision 2(c). On his own, the ULJ considered the additional report and concluded that it was relevant. The ULJ also concluded that the additional evidentiary hearing was authorized by his duty to assist unrepresented parties with their presentation of evidence.

This Court should conclude that the ULJ exceeded his statutory authority when he ordered the additional evidentiary hearing to consider the police report and other evidence because the statutory requirements were not met. Moreover, Minnesota Rule 3310.2921 does not provide the ULJ with the means or authority to take additional evidence after the close of the evidentiary hearing. Accordingly, this Court should reverse the findings of the ULJ and reinstate the September 10th Decision that found Vassei eligible for benefits.

STANDARD OF REVIEW

“In reviewing decisions of a ULJ, this court exercises its independent judgment with respect to questions of law.” *Scheeler v. Sartell Water Controls, Inc.*, 730 N.W.2d 285, 287-288 (Minn. Ct. App. 2007). The standard of review for construction of a statute is de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). “When the words of a law in their application to an existing situation are

clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit of a law.” *In re PERA Police & Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 516 (Minn. 2006)

ARGUMENT

I. THE UNEMPLOYMENT LAW JUDGE ERRED AS A MATTER OF LAW BY EXCEEDING THE STATUTORY AUTHORITY PERMITTING RECONSIDERATION.

In determining that Vasseei was ineligible for unemployment benefits, the ULJ ordered an additional evidentiary hearing in a manner that the statute does not authorize. In so doing, the ULJ exceeded his statutory authority to reconsider his earlier determination and committed an error of law that prejudiced Vasseei by finding him ineligible for benefits.

Minnesota Statutes section 268.105 describes the procedure that parties must follow to request reconsideration of the ULJ’s decision arising from the evidentiary hearing on the employee’s claim. Specifically, the statute provides that the applicant, the employer, or the commissioner may request the ULJ reconsider his decision. Minn. Stat. § 268.105, subd. 2(a) (2010). The ULJ must order an additional evidentiary hearing if an involved party shows that evidence that was not submitted at the evidentiary hearing “would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence[.]” *Id.*, subd. 2(c). But the ULJ’s authority is limited by the statute and cannot be applied sua sponte to the prejudice of one of the parties. *See, Rowe v. Dept. of Empl. & Econ. Dev.*, 704 N.W2d 191, 195 (Minn. Ct. App. 2005) (“[A]dministrative agencies have the inherent power to correct erroneous decisions

when the statute does not prohibit such correction and the rights of the parties are not prejudiced.”). Indeed, this Court does not hesitate to reverse a decision of a ULJ who exceeds his or her statutory authority. *E.g., Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28-9 (Minn. Ct. App. 2007); *Jaskowiak v. CM Constr. Co.*, 717 N.W.2d 448, 450-1 (Minn. Ct. App. 2006); *Stottler v. Meyers Printing Co.*, 602 N.W.2d 916, 918-19 (Minn. Ct. App. 1999).

The plain language of the statute, therefore, requires that the ULJ determine that the additional evidence would likely change the outcome of his earlier decision and that the party requesting the reconsideration demonstrate that there was good cause for not having previously submitted that evidence. Here, Vasseei does not challenge the assertion that the additional evidence submitted by Schmitt & Sons, the police accident report of the July 31, 2009 incident, would likely change the outcome of the ULJ’s decision. Instead, because Schmitt & Sons did not demonstrate good cause for not having previously submitted the evidence at issue, the ULJ lacked authority to set aside its earlier determination and hold an additional evidentiary hearing. Unlike the instant circumstances, relators are the parties who usually appeal the denial of additional evidentiary hearings. *E.g., Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340 (2006). Thus, case law involving appeals from grants of additional evidentiary hearings appears scant or non-existent. Nevertheless, the procedural deficiencies here conflict with the plain language of the statute authorizing additional hearings.

A. Good Cause Requires a Party Demonstrate a Reason That Would Have Prevented a Reasonable Person Acting with Due Diligence From Previously Submitting That Evidence.

The statute is silent on the issue of “good cause” for not having previously submitted evidence that would likely change the outcome of the ULJ’s decision. But the statute does provide some guidance as to what constitutes “good cause.” The statute defines “good cause” for the purposes of considering a request for reconsideration for failing to participate in the hearing as “a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.” Minn. Stat. § 268.105, subd. 2(d). By extension, “good cause” for failing to submit evidence that would likely change the outcome of the ULJ’s decision should be a reason that would have prevented a reasonable person acting with due diligence from previously submitting that evidence. Under this standard, Schmitt & Sons were not entitled to the additional evidentiary hearing and the ULJ erred as a matter of law by ordering it.

B. The ULJ Erred as a Matter of Law by Ordering an Additional Evidentiary Hearing Without a Showing of Good Cause.

In its letter requesting reconsideration, Schmitt & Sons contended, in the alternative, that an additional evidentiary hearing was necessary to demonstrate “the severity of Mr. Vassei’s misconduct.” Schmitt & Sons requested that the ULJ consider three additional categories of evidence: (1) the video recording of the July 31st incident; (2) passenger complaints regarding Vassei; and (3) investigation materials concerning an unrelated incident on July 21, 2009. (R.A. at 7-8.) In the case of the video recording, Schmitt & Sons argues, as required by the statute, that it did not present the video

recording earlier because it was not in Schmitt & Sons' possession and the video raised privacy concerns for the transit passengers. (R.A. at 7.) In the case of the second two categories of evidence, Schmitt & Sons made no attempt to satisfy either prong of the analysis required by section 268.105, subd. 2(c). Its request for reconsideration does not allege that either of these categories of evidence would alter the ULJ's decision. Nor does the request provide any basis for why the company did not previously provide these categories of evidence to the ULJ. (R.A. at 7.)

Importantly, however, Schmitt & Sons did not request an additional evidentiary hearing to present the police report. The police report was not included in one of the categories of additional evidence. Schmitt & Sons did not argue to the ULJ that the police report would alter the ULJ's decision. And Schmitt & Sons did not provide any basis for good cause for not having previously submitted the police report. This is because good cause did not exist.

Schmitt & Sons did not posit any reason at all why it did not previously submit the police report for consideration by the ULJ. Moreover, Schmitt & Sons did not establish that there was any reason that would have prevented a reasonable person acting with due diligence from previously submitting that evidence. Company representatives provided sufficient testimony to establish that the company had received the police report, reviewed it, were familiar with its contents, and did not request that the ULJ continue the hearing to permit submission of the police report. Schmitt & Sons' human resources representative, Karen Halstead, received and was in possession of the police report. (Tr. at 23, 25.) Testimony by company representatives makes clear that

Schmitt & Sons reviewed and considered the police report as part of the investigation by its safety committee. (Tr. at 25.) Furthermore, testimony indicates that Schmitt & Sons relied on the police report for its decision to dismiss Vasseei. (Tr. at 25-6.) The ULJ gave both company representatives ample opportunities to submit any additional evidence during the hearing. (Tr. at 34, 39, 46, 52, 76.) At no time during the hearing did Schmitt & Sons attempt to introduce the police report. The report may have been relevant, but Schmitt & Sons did not establish good cause—either at the hearing or in its subsequent request for reconsideration—as to why it had not submitted the police report as evidence.

Not surprisingly, the ULJ did not find that Schmitt & Sons had established good cause for failing to previously submit the police report as evidence at the September 4th hearing. (R.A. at 10.) Specifically, the ULJ found that Schmitt & Sons did not “provide any explanation why the additional evidence was not submitted at the hearing.” (R.A. at 10.) But despite the established facts that Schmitt & Sons had not based its request for an additional evidentiary hearing on its failure to submit the police report, and that Schmitt & Sons did not have good cause for failing to submit the police report at the earlier hearing, the ULJ granted ordered an additional evidentiary hearing for the “sole purpose of . . . present[ing] additional testimony relating to the police accident report.” (R.A. at 10.) The ULJ reached this conclusion by deciding that the police report was a “relevant and potentially important exhibit.” (R.A. at 10.) The ULJ reasoned that the statutory requirements prescribed by Minn. Stat. § 268.105, subd. 2(c), somehow incorporated by reference Minnesota Rule 3310.2921, which provides that a ULJ should

assist unrepresented parties in the presentation of evidence. At the subsequent evidentiary hearing, the ULJ stated that:

because Schmitt & Sons wasn't represented in that hearing, I determined that there was a, my responsibility to help the parties develop the record hadn't been met by not asking the employer to, either to adjourn the hearing or continue the hearing to get, to receive that particular exhibit into evidence, since it was the subject of testimony.

(Tr. at 90.) Such an analysis should be reversed as contrary to both the facts and the governing statute.

The ULJ's post-hoc decision to permit consideration of the police report based on his duty to assist unrepresented parties—in this case, the employer—in the presentation of evidence is not borne out by the record. Before the request for reconsideration, the ULJ showed little regard for other evidence that was “the subject of testimony” that had not been introduced into evidence. For example, company representatives testified that Schmitt & Sons used a disciplinary point system and that Vassei was discharged from his employment for the July 31st incident and for exceeding a reasonable level of disciplinary points within a two-year period. (Tr. at 35.) Schmitt & Sons did not enter into the records documentary evidence showing Vassei's disciplinary point history or point total. (Tr. at 36.) When the company representative offered to fax those documents, the ULJ interrupted her statement and interjected, “She said she had them, okay? I mean, Mr. Onkka, I'm giving you a lot of leeway here, but she said she had them and she hasn't sent them in and so I don't, I think we've established both of those facts.” (Tr. at 36.) Thus, testimony established that (1) Vassei's point totals were a reason for his discharge; (2) no documents concerning Vassei's disciplinary points were entered

into the record; (3) Schmitt & Sons was in possession of those records; (4) Schmitt & Sons was prepared to submit those records; and (5) the ULJ did not seek to develop the record in this regard by assisting the company with the presentation of this evidence.

The ULJ was on notice throughout the September 4th hearing regarding documents that were not in evidence such as the police report, the video recording, and Vasseei's disciplinary point history. Indeed, as part of his closing statement, counsel for Vasseei identified many documents that had not been submitted as evidence, including written policies, a safety manual, the video record, and the police report. (Tr. at 77-78.)

Moreover, the ULJ's assertion that the rule requiring the ULJ to assist unrepresented parties in the presentation of evidence at a hearing is not supported by the numerous cases where the denial of a pro se party's request for an additional evidentiary hearing is upheld based on the conduct of the hearing. *See, e.g., Long v. Gina M. Benassi Chiropractic Inc.*, A07-1284, 2008 WL 3897050 (Minn. Ct. App. Aug. 26, 2008) ("Because relator was afforded ample opportunity to present her evidence and the ULJ appropriately deferred to relator's decision to rely on documentary evidence, relator has not demonstrated good cause for failing to submit the evidence."); *Cunniën v. Med. Arts Press Inc.*, A07-0933, 2008 WL 2573713 (Minn. Ct. App. July 1, 2008) ("Relator failed to show good cause for failing to submit the new evidence. Under the statute, that is enough to deny relator's request to reopen the record."); *Axelsson v. Kelly Servs. Inc.*, A06-699, 2007 WL 1191588 (Minn. Ct. App. Apr. 24, 2007) (denying pro se relator's request for additional evidentiary hearing).² These cases—cited for their general

² Unpublished cases are included as part of the Relator's Appendix.

procedural relevance rather than precedential value—demonstrate that the ULJ’s duty to assist pro se parties is a custom more honored in the breach than the observance.

The ULJ’s assertion that it was assisting an unrepresented party with its presentation of evidence is further belied by the fact that the request for reconsideration, which does not request to introduce the police report and does not establish good cause for failing to do so earlier, was written by counsel. (R.A. at 5-8.) Assuming for the sake of argument that the ULJ had not exceeded his statutory authority by ordering the hearing, as of the date of that letter (October 1, 2009) his duty to Schmitt & Sons as an unrepresented party had ceased. The ULJ’s duty, however, does not outweigh a party’s obligation to establish good cause for failing to introduce evidence at a hearing. And by concluding that there was good cause, where there was none, the ULJ exceeded the authority conferred by Minn. Stat. § 268.105.

C. The ULJ’s February 4, 2010 Decision Contradicts His Earlier Decision and Perpetuates the Error of Law.

After the November 23rd evidentiary hearing, Vassei requested reconsideration of the ULJ’s reversal of its earlier determination of eligibility. In part, Vassei argued, as here, that the additional evidentiary hearing was not authorized by Minn. Stat. 268.105. (R.A. at 23.) The ULJ’s response, although contradicting its earlier finding that Schmitt & Sons had not asserted good cause for failing to submit the police report, was more correct in its application of that statute. The ULJ, in support of its earlier decision, held for the first time that Schmitt & Sons had shown good cause for not submitting the police report. Specifically, the ULJ stated, “Schmitt & Sons was unrepresented during

the hearing and the police accident report was clearly relevant.³ Even though Schmitt & Sons may not have used the statutory language in requesting reconsideration, good cause was shown.” (R.A. at 23.)

Vasseei does not argue that the Court must apply Minn. Stat. § 268.105 in an overly technical manner. Instead, Vasseei simply insists that the ULJ could not have made a finding of good cause because Schmitt & Sons made no attempt to show that the reason it failed to enter the police report into evidence was one that would have prevented a reasonable person acting with due diligence from previously submitting that evidence. Vasseei is prevented from arguing the merits of such a reason because none was given. Moreover, the ULJ’s explanation does not comport with the plain language of the statute that requires good cause. Instead, the ULJ revised the statute to include two additional factors meriting an additional evidentiary hearing: relevance and representation.

Because neither factor is part of the analysis for ordering an additional evidentiary hearing, and because Schmitt & Sons demonstrated no good cause for failing to submit the police report at the earlier hearing, the ULJ exceeded its statutory authority by ignoring the plain language of Minn. Stat. § 268.105 to order an additional evidentiary hearing. This violation of his statutory authority was prejudicial to Vasseei because it resulted in a reversal of the earlier determination of eligibility for unemployment

³ Shmitt & Sons, however, did not appear to consider the police report particularly relevant to the initial hearing. Testimony by company representatives showed a general lack of familiarity with the contents of the police report, challenging the weight and importance that the ULJ ultimately gave to the police report. (Tr. at 25-9.)

benefits. Accordingly, this Court should reverse the decision of the ULJ to permit an additional evidentiary hearing and reinstate the September 10, 2009 Decision of the ULJ.

CONCLUSION

Shahriar Vasseei asks this Court to reverse the ULJ's November 25, 2009 Decision and to reinstate the ULJ's September 10, 2009 Decision. The statute governing requests for reconsideration of ULJ decisions requires that a party seeking an additional evidentiary hearing to demonstrate good cause for not previously submitting that evidence. Here, without any such showing and a determination to the contrary, the ULJ ordered an additional evidentiary hearing to consider evidence that the employer possessed but failed to submit. Rather than abide by the requirements of the statute, the ULJ looked to its duty to assist unrepresented parties to present evidence. In so doing, the ULJ exceeded its statutory authority to reconsider its earlier decision. Accordingly, this decision should be reversed in favor of the ULJ's earlier decision.

Respectfully submitted,

Dated: June 14, 2010

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