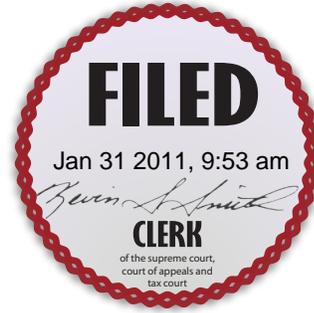


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

T.B.,)
)
Appellant,)
)
vs.) No. 93A02-1003-EX-535
)
REVIEW BOARD OF THE INDIANA)
DEPARTMENT OF WORKFORCE)
DEVELOPMENT,)
)
Appellee.)

APPEAL FROM THE REVIEW BOARD
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
No. 10-R-00176

January 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

T.B. appeals from the Indiana Department of Workforce Development (“DWD”) Review Board’s (“Review Board” or “the Board”) affirmation of an Administrative Law Judge’s (“ALJ”) decision finding that she was terminated for good cause by her employer, Ameristar East Chicago Holdings LLC (“Ameristar”), and thus denying her unemployment insurance claim.

We affirm.

Issue

T.B. raises two issues for our review, one of which we find dispositive, namely, whether T.B. was denied due process when the Review Board’s decision did not address her claims that she did not receive due process in the form of timely notice to allow her to participate in a telephonic hearing.¹

Facts and Procedural History

T.B., an epileptic who suffers gran mal seizures, was employed as a full-time dealer by Ameristar (a hotel and casino), beginning her employment there on August 8, 2007. Ameristar used a point-based attendance system, assessing fixed numbers of points for tardiness and phoned-in absences, and doubling points when lateness and absence occurred during certain busy periods at Ameristar’s casino operation. T.B. received and acknowledged her receipt of an explanation of this policy.

¹ T.B. also asserts that Ameristar’s attendance policy, which served as the basis for the ALJ’s decision that she was dismissed for good cause, is not a reasonable and uniformly enforced attendance policy. See Ind. Code § 22-4-15-1(d)(2). Because we dispose of T.B.’s claims on due process grounds, we do not reach the attendance policy issue.

After accruing points for absences and tardiness, T.B. received two notifications of her points status, one on January 16, 2008, and another on February 8, 2008. After accruing enough points that she would ordinarily have been terminated from employment under Ameristar's attendance policy, T.B. received a written notice on April 26, 2009, indicating that any further instances of absence or tardiness through July 17, 2009, would result in Ameristar's termination of her employment.

On July 5, 2009, T.B. called in to notify Ameristar that she would not arrive for work that day. She called at 12:30 a.m. for a shift slated to begin an hour earlier. As a result, Ameristar terminated T.B.'s employment. T.B.'s final day of employment with Ameristar was thus July 4, 2009.

On July 27, 2009, a DWD claims deputy determined that T.B. was eligible for benefits because, though she failed to arrive at work, she had good cause to miss work on July 4, 2009. Ameristar appealed this determination.² On December 21, 2009, a notice of hearing was mailed to T.B. and to Ameristar. Ameristar returned the appearance form enclosed with the notice of hearing; T.B. did not. A telephonic hearing was held on January 5, 2010, in which only Ameristar participated. On January 7, 2010, the ALJ determined that T.B. was discharged for good cause and that she was therefore ineligible for benefits. T.B. appealed the ALJ's decision with a handwritten letter on January 11, 2010. On February 11, 2010, without considering further evidence or conducting any additional hearings, the Review Board affirmed the ALJ's decision and wholly incorporated his findings and conclusions.

² We note that after its initial notice of appeal, Ameristar dismissed and then reinstated its appeal.

This appeal followed.

Discussion and Decision

We review the Board's unemployment compensation decisions to determine whether a given decision is reasonable in light of its findings. Wolf Lake Pub, Inc. v. Review Bd. of Ind. Dep't of Workforce Dev., 930 N.E.2d 1138, 1141 (Ind. Ct. App. 2010). When an appellant contends that a decision is contrary to law, we consider whether the evidence is sufficient to support the findings, and whether the findings are sufficient to sustain the decision. Id. Though we defer to the Review Board's findings, we are not bound by its interpretations on questions of law. Id.

T.B. claims that the Board abused its discretion when it did not consider additional evidence she submitted in her appeal from the ALJ's decision. The Board responds that T.B. waived such consideration by failing to address these matters before the ALJ, and that even if such consideration was not waived, the Board did not abuse its discretion in declining to consider such evidence.

We strongly disfavor "invoking waiver when we can readily and completely address the issues on the merits." Miller v. Ind. Dep't of Workforce Dev., 878 N.E.2d 346, 354 (Ind. Ct. App. 2007). In an appeal to the Review Board, the Board may consider additional evidence sua sponte, or the parties may make written application for such consideration. 646 Ind. Admin. Code r. 3-12-8(b). Such an application need not be formal in nature. Ritcheson-Dick v. Unemployment Ins. Review Bd., 881 N.E.2d 54, 56-57 (Ind. Ct. App. 2008) (citing Carter v. Review Bd. of Ind. Dep't of Emp't and Training Servs., 526 N.E.2d 717, 719 (Ind.

Ct. App. 1988), trans. denied).

T.B. submitted a one-page document to the Review Board on January 11, 2010, that set forth, in relevant part:

My home phone number is no longer in service how-ever [sic] I do have a cell phone.... My home page did not have my cell number it had my phone number at which was [sic] recently disconnected. There for [sic] I didn't receive a call from the Adjudication Center to partake in the hearing. I did not make it to my P.O. BOX in time to receive the papers notifying me of the hearing, there-for [sic] I did not send in the slip with my cell phone number on it. I tried to call on the date of the hearing but only received a recording.

(App. 6.)

We understand from this statement that T.B. sought in writing to present evidence and argument to the Review Board that she did not have timely notice of the ALJ hearing to be able to comply with the ALJ's instructions that any change in phone number be provided by fax or telephone no later than twenty-four hours prior to the scheduled hearing time.³ This is evidence that, of its nature, could not have been presented to the ALJ. Thus, T.B. did not waive the Board's consideration of her request that it consider additional evidence.

As to the merits of the Review Board's decision not to consider additional evidence, we note that it is within the Review Board's discretion to determine whether it will or will not hear additional evidence. Ritcheson-Dick, 881 N.E.2d at 57. Such a decision may come

³ The instructions, which are on a standard form provided to all parties in an unemployment appeal, require parties to

Provide the judge with ONE contact telephone number. Page 2 of the Notice of Hearing is a form where you can write your contact phone number with area code. You must write **legibly**. These forms may be mailed, faxed, or delivered in-person to the judge's office [here, Fort Wayne, in Allen County; T.B. lives in Griffith, in Lake County]. Faxes should be sent at least 24 hours prior to the hearing.... You may call the judge's clerk 24 hours prior to the hearing.

(Ex. 5-6, 7-8; emphasis in original.)

either “upon its own motion, or upon written application of either party ... for good cause shown, together with a showing of good reason why such additional evidence was not procured and introduced at the hearing before the administrative law judge.” Ind. Admin. Code tit. 646 r. 3-12-8(b).

The Review Board points to the statement, “I did not make it to my P.O. BOX in time to receive the papers notifying me of the hearing” (App. 6), as evidence that T.B. admits that she did not check her P.O. box until after the hearing. It is not clear from this statement that T.B. checked her P.O. box after the hearing; yet neither does this statement give rise to the exclusive inference that T.B. checked the P.O. box before the hearing. Moreover, T.B.’s statements to the Board do not give rise only to an inference that she attempted to call the ALJ after the start of the hearing at 2:00 p.m. The statement that “I tried to call on the date of the hearing” may mean just that—at some point on January 5, 2010, T.B. attempted to call. It is not clear that this attempt came before or after the 2:00 p.m. start time.

Evidence tending to show good cause for failure to attend a hearing may give rise to a deprivation of due process when the Board declines to consider additional evidence presented to it upon appeal. Cf. Ritcheson-Dick, 881 N.E.2d at 57; cf. G.D. v. Review Bd. of Ind. Dep’t of Workforce Dev., 938 N.E.2d 298, 301-02 (Ind. Ct. App. 2010) (remanding for evidentiary hearing where evidence indicated factual dispute regarding reasons for failure to participate in a hearing with an ALJ). Yet we cannot agree with T.B. that she was deprived of due process here. Counter to her assertion in her briefs, T.B.’s statement in her appeal to the Board does not state that she received her notice late or attempted to call the ALJ before

the hearing. Instead, T.B.'s statements give rise to two inferences: one is favorable to her, the other is unfavorable. In such situations, we defer to the Board's decision not to consider her evidence, since her statements do not give rise to an inference solely favoring the existence of good cause under the Board's rules. Cf. 646 IAC 3-12-8(b); Ritcheson-Dick, 881 N.E.2d at 57 (reversing the Board where appellant's evidence before the board illustrated numerous attempts to provide notice of appeal in advance of the scheduled hearing date). Thus, the Review Board did not abuse its discretion when it did not consider additional evidence in its review of the ALJ's decision.

Because the Board did not abuse its discretion when it did not consider T.B.'s additional evidence, we hold that T.B. was not denied due process when the Board refused to consider additional evidence in affirming the ALJ's decision to deny unemployment benefits. Because of this decision, we do not reach T.B.'s claims that she was not provided with timely notice or that her dismissal was not for good cause.

Affirmed.

NAJAM, J., and DARDEN, J., concur.