MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

M.D.,

Appellant-Petitioner,

v.

Review Board of the Indiana Department of Workforce Development,

Appellee-Respondent,

August 11, 2021

Court of Appeals Case No. 21A-EX-219

Appeal from the Review Board of the Department of Workforce Development

The Honorable Josh Craig, Administrative Law Judge

Steven F. Bier, Chairperson

Larry A. Dailey, Member

Review Board No. 20-R-2009

Robb, Judge.

Case Summary and Issues

[1] M.D. appeals the decision of the Review Board of the Indiana Department of Workforce Development ("Review Board") to affirm an Administrative Law Judge's ("ALJ") order denying M.D. unemployment benefits. M.D. raises multiple issues for our review, which we restate as: (1) whether M.D. was deprived of her due process right to notice of her right to counsel; and (2) whether the Review Board erred in determining the ALJ's order was supported by substantial evidence. Concluding that M.D. was provided sufficient notice of her right to counsel and that the ALJ's order was supported by substantial evidence, we affirm.

Facts and Procedural History

[2] M.D. was employed by Proactive Automotive, LLC ("Employer"). In March 2020, M.D. left work sick. Soon thereafter, M.D., her stepson, and her nephew, who were both living with her, all began experiencing symptoms of COVID-19. Then the boys' school and daycare closed due to the Governor's emergency order. As a result, M.D. was unable to return to work for multiple weeks; however, she remained in contact with Employer. On April 10, 2020, M.D. texted Dave Petree, Director of Services, asking whether there was any work she could do from home. Petree responded stating that there was not and that "[i]t does hurt us not having you at work. But, we are making it work." Exhibits, Volume 3 at 39. On April 30, 2020, M.D. contacted Employer's Human Resource Department ("HR") and informed them that the boys could

return to daycare on May 4, 2020, and she would be able to return to work. However, following a phone call with Ryan Sexton, M.D.'s manager, on May 3, 2020, M.D. was no longer employed by Employer.

[3] Employer completed a termination notice form that contained several categories pertaining to separation from employment, including "Laid Off," "Terminated," and "Resignation." *Id.* at 11. Employer indicated with an "X" that M.D. had been "Laid Off." *Id.* However, the termination notice stated that "[M.D.] offered to return part time. [Employer] advised we do no[t] need part time help[,]" and "[M.D.] was advised she could re[-]apply for this position when she was able to work her complete scheduled shift she was hired to work." *Id.*

[4] M.D. then applied for unemployment benefits. On May 8, 2020, Employer filed a protest with the Indiana Department of Workforce Development ("DWD") claiming that "[M.D.] was not terminated due to lack of work. [M.D.] chose to terminate on her own." *Id.* at 9. However, a Claims Investigator with the DWD determined that "it cannot be established that [M.D.] quit voluntarily[,]" and that M.D. was qualified for unemployment benefits. *Id.* at 4.

[5] Employer appealed the Claims Investigator's determination. On September 30, 2020, the DWD mailed M.D. a Notice of Telephone Hearing before the ALJ. The notice stated the issue on appeal was "[w]hether the claimant voluntarily left the employment without good cause in connection with the work . . . [or w]hether the employer discharged the claimant for just cause." *Id.* at 17.

Enclosed with the notice were an "Acknowledgement Sheet" and "U.I. Appeals Hearing Instructions." *See id.* The Acknowledgement Sheet needed to be completed and returned to participate in the hearing, which M.D. did. *See id.* at 34. The U.I. Appeals Hearing Instructions state that "[p]arties may be represented at the hearing." *Id.* at 20.

[6] On October 14, 2020, the ALJ began to conduct a hearing via conference call; however, after determining the parties needed additional time to submit documentary evidence, the ALJ continued the hearing to November 2, 2020. *See* Transcript, Volume 2 at 28-31. When the hearing resumed, Sexton testified that M.D. had called him on April 30 to inform him that she could return to work but only from 6:30 a.m. to 12:00 p.m. Sexton informed M.D. that such a decision was above his position, and he would have to call her back. Sexton testified that he called M.D. on May 3 to inform her that Employer needed her to work from "6:30 to roughly 4:30 Monday through Friday" as she had been hired to do and that she could not come back to work on a modified schedule. *Id.* at 33, 37. However, M.D. testified that her employment was ended due to a reduction in available work and that she never told Employer that she could only work until around noon. Jackie Smith, Employer's HR manager, testified that no managers worked part-time during any of the COVID-19 related work slowdown.

[7] On November 9, 2020, the ALJ issued a decision in favor of Employer concluding:

> Claimant owed a duty to the Employer to work her normal hours. Claimant breached that duty by informing the Employer she could not return to work at her normal hours. Claimant placed her own personal interests in conflict with those of the Employer who held her job for an extended period of time before ending the employment when they learned she couldn't work full time. Employer discharged the Claimant for just cause.

Appellant's Appendix, Volume 2 at 8.

[8] M.D then filed a Petition for Judicial Review and Request for New Hearing claiming that she "was not advised of her right to have the assistance of counsel and not able to fully present her case."[1] *Id.* at 25. She also claimed the ALJ's decision was not supported by substantial evidence. On January 8, 2021, the Review Board issued an order affirming the ALJ's decision.[2] M.D. now appeals. Additional facts will be provided, as necessary.

Discussion and Decision

I. Standard of Review

[9] When reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings. *Stanrail Corp. v.*

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[1] M.D. filed an application for leave to introduce additional evidence. *See* Appellant's App., Vol. 2 at 9. However, no additional evidence was considered by the Review Board.

[2] The Review Board adopted and incorporated by reference the findings of fact and conclusions of law of the ALJ except for correcting that John Neely represented Employer and did not participate in the hearing. Appealed Order at 1.

Unemployment Ins. Rev. Bd., 734 N.E.2d 1102, 1105 (Ind. Ct. App. 2000). Our review of the Review Board's findings is subject to a "substantial evidence" standard of review. *Abdirizak v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 826 N.E.2d 148, 150 (Ind. Ct. App. 2005). In this analysis, we neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable to the Review Board's findings. *Id.* Further, we will reverse the decision only if there is no substantial evidence to support the Review Board's findings. *Id.*

[10] When the decision of the Review Board is challenged as contrary to law, we consider whether the evidence is sufficient to support its findings and whether the findings are sufficient to sustain the decision. *NOW Courier, Inc. v. Rev. Bd. of Ind. Dep't of Workforce Dev.,* 871 N.E.2d 384, 387 (Ind. Ct. App. 2007). The Review Board's findings of fact are generally conclusive and binding; however, when an appeal involves a question of law, this court is not bound by the Review Board's interpretation of the law. *Art Hill, Inc. v. Rev. Bd. of Ind. Dep't of Workforce Dev.,* 898 N.E.2d 363, 366 (Ind. Ct. App. 2008). Whether a party was denied due process is a question of law that we review de novo. *Miller v. Ind. Dep't of Workforce Dev.,* 878 N.E.2d 346, 351 (Ind. Ct. App. 2007).

II. Due Process

[11] M.D. argues that she was "denied due process because she was not notified of her right to be represented by counsel prior to the evidentiary hearing."

Appellant's Brief at 9-10. Although "the Review Board is allowed wide latitude in conducting its hearings, due process must be accorded a party whose rights will be affected." *Wolf Lake Pub, Inc. v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 930 N.E.2d 1138, 1141 (Ind. Ct. App. 2010) (quotation omitted). We have stated that due process "requires an administrative procedure reasonably calculated to inform a claimant of his right to appear by counsel." *Sandlin v. Rev. Bd. of Ind. Emp. Sec. Div.*, 406 N.E.2d 328, 333 (Ind. Ct. App. 1980).

> [N]otice must be both timely and adequate, given within a reasonable time prior to the taking of any action, and specifying the proposed action and grounds therefor, indicating the information needed to determine eligibility, and advising the recipient of the right to be heard and to be represented by counsel.

Id. (quotation omitted) "[A]t least a written notice to the claimant is required." *Id.*

[12] Here, the record shows that on September 30, 2020, a Notice of Telephone Hearing was mailed to M.D. Ex., Vol. 3 at 17. This notice clearly states that enclosed with the notice are an Acknowledgement Sheet and U.I. Appeals Hearing Instructions. *See id.* The U.I. Appeals Hearing Instructions include a written statement that parties may be represented by counsel at the hearing. *See id.* at 20. After the original hearing began and was continued, a new set of documents, including the U.I. Appeals Hearing Instructions, was mailed to M.D. *See id.* at 26. However, M.D. contends that the Review Board assumes, without evidence, "that M.D. actually received the sheet advising her of her

right to counsel." Appellant's Br. at 15. She argues that there is "nothing to indicate [the U.I. Appeals Hearing Instructions sheet] was ever mailed to M.D." because the copy of the U.I. Appeal Hearing Instructions submitted for the record does not independently contain a date or case identifying information. Appellant's Reply Brief at 8. This argument ignores that the notice of hearing, which M.D. acknowledges was mailed and that she received, *see id.*, specifically states that the U.I. Appeal Hearing Instructions is enclosed with the notice. Further, M.D. concedes that she received the Acknowledgement Sheet which she filled out and returned to the ALJ prior to both hearings. M.D.'s argument that she twice received a Notice of Telephone Hearing and, along with it, one of the items stated to be enclosed but not the other is not one we will entertain.

[13] M.D. further argues that even if notice of her right to counsel had been sent, the notice "would be insufficient Due Process under the 14th Amendment" if she did not see it.[3] Appellant's Br. at 18.

[3] M.D. makes additional arguments in this vein. M.D. argues that she should have been afforded a new hearing because she was not given notice of her right to an attorney. However, because we conclude she was given proper notice we need not address this argument. M.D. also argues that the Review Board erred by not considering post-hearing evidence after she learned of her right to counsel and retained an attorney. However, M.D. fails to present case law or a cogent argument for this contention and it is therefore waived. *See* Indiana Appellate Rule 46(8)(a).

[14] In determining the sufficiency of due process in a given situation, Indiana has adopted the three-prong test prescribed in *Mathews v. Eldridge* and thus must examine:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. 319, 335 (1976); *see Melton v. Ind. Athletic Trainers Bd.*, 53 N.E.3d 1210, 1219-20 (Ind. Ct. App. 2016).

[15] In evaluating the private interest affected we have previously emphasized the importance of rights impacting unemployment benefits, stating:

> [T]here can be no doubt that any evidentiary hearing conducted on the claim is of significant import for the claimant. Unemployment compensation provides a claimant and family with the means to purchase essentials such as food and housing; in turn, the benefits serve the health, morale, and general welfare of the claimant and family.

Berzins v. Rev. Bd. of Ind. Emp. Sec. Div., 439 N.E.2d 1121, 1123 (Ind. 1982); *see also Sandlin,* 406 N.E.2d at 332 ("Suffice it to say that a qualified claimant's interest in unemployment compensation is substantial."). However, this does not outweigh the remaining *Mathews* factors.

[16] Given that the written notice informing M.D. of her right to counsel was enclosed in the Notice of Telephone Hearing which advised M.D. of the date and time of her hearing (and which she must have received because she participated in the hearing) along with an Acknowledgement Sheet which M.D. needed to and in fact did fill out and return to the ALJ, the "risk of erroneous deprivation" of M.D.'s interest was minimal because it was reasonably calculated to advise M.D. of her right to counsel. Further, we have previously stated that "we find no administrative or economic burden on the state which would result if the notice provided to the parties appeared on one of the numerous forms which are sent to them[,]" and we believe requiring more would create such a burden. *Berzins*, 439 N.E.2d at 1126. Thus, while M.D. presents alternative ways of notifying claimants of their right to counsel, we are unconvinced that anything more than the written notice provided here is necessary under these circumstances. *See Foster v. Rev. Bd. of Ind. Emp. Sec. Div.*, 413 N.E.2d 618, 620 (Ind. Ct. App. 1980) (stating an ALJ, or referee, is not required to advise claimants of their right to counsel).

[17] We conclude that M.D. was not denied due process because she was provided sufficient notice of her right to counsel.

III. Substantial Evidence

[18] M.D. also argues the "ALJ's decision was not supported by substantial evidence." Appellant's Br. at 25. Specifically, M.D. contends that "at no point did the Employer even contend that M.D. had been discharged at all; the

Employer claimed M.D. quit voluntarily" and therefore there was no factual basis for the ALJ's decision.[4] *Id.* at 26.

[19] Under Indiana Code section 22-4-15-1(a), "an individual who voluntarily left the employment without good cause . . . or was discharged from the employment for just cause" is ineligible for unemployment benefits. Discharge for just cause includes "any breach of duty in connection with work which is reasonably owed an employer by an employee."[5] Ind. Code § 22-4-15-1(d)(9). The burden is on the employer to prove that it had just cause to discharge the claimant. *S.S. LLC v. Rev. Bd. of the Ind. Dep't of Workforce Dev.*, 953 N.E.2d 597, 601 (Ind. Ct. App. 2011).

[20] The ALJ determined that:

> [M.D.] owed a duty to the Employer to work her normal hours. [M.D.] breached that duty by informing the Employer she could not return to work at her normal hours. Claimant placed her own personal interests in conflict with those of the Employer, who held her job for an extended period of time before ending the employment when they learned she couldn't work full time. Employer discharged the Claimant for just cause.

Appellant's App., Vol. 2 at 8.

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[4] M.D. also argues that there was not substantial evidence that she quit; however, given that the ALJ determined that M.D. was terminated for just cause and did not conclude that M.D. quit, we need not address this argument.

[5] M.D. does not argue that her alleged refusal to work full-time, when hired to do so, did not constitute a breach of duty. Ind. Code § 22-4-15-1(d)(9).

[21] M.D. argues that the ALJ does not have the authority to change Employer's claimed basis for denying M.D. unemployment benefits.[6] *See* Appellant's Br. at 11. To support this, M.D. relies on *S.S. LLC*. In *S.S. LLC,* when an S.S. representative was asked whether the claimant quit, they responded: "[W]e were talking to her in a meeting and she walked out of the facility and she didn't clock out. According to our handbook, if somebody walks out they voluntarily resign." *Id*. The representative later stated, "I never said one word about her being terminated" and "She got up and left the office and our policy states that if she leaves the facility without permission it's considered a voluntary walk off, and that's how I take it." *Id.* at 603. Therefore, we concluded:

> Here, at the hearing before the ALJ, S.S. did not argue that [Claimant] was discharged for just cause. Instead, S.S.'s sole contention was that [Claimant] voluntarily resigned. Thus, as the Review Board concluded, S.S. did not present evidence that [Claimant] was discharged for knowingly violating a reasonable and uniformly enforced rule.

S.S. LLC, 953 N.E.2d at 602.

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[6] M.D. begins to conflate issues in her Reply Brief, stating, "An [ALJ] cannot change the Employer's stated reason for discharge." *See* Appellant's Reply Br. at 5 (quoting *S.S. LLC*, 953 N.E.2d at 600). However, the issue originally presented by M.D. is whether Employer claimed M.D. was discharged or quit voluntarily, not whether M.D. was found to have been discharged for a different reason than one originally given by Employer.

[22] We find the case at hand distinguishable from *S.S. LLC*. Here, Employer has no policy stating that M.D.'s refusal to accept her agreed upon work hours constitutes a voluntary resignation. Further, none of Employer's testimony at the hearing before the ALJ indicates that M.D. quit. Instead, the testimony leads to the reasonable inference that upon being unable to reach an agreement regarding work hours, M.D.'s employment was terminated. Sexton testified:

> A. If that's the phone call that - that that's where we discussed then yes I would've said that, you know, you were hired to work a full, you know, a full day, and that's what we need you to work. We hired you for that purpose, and we need a manager to staff the store for that time frame.
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> * * *
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> Q. Okay, so basically you told her she couldn't come back, because she wanted to modify her schedule, is that right?
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> A. That is correct.

Tr., Vol. 2 at 36-37.

[23] Even M.D.'s own testimony indicated that Employer's assertion at the hearing was that she was discharged for just cause. This exchange occurred during the ALJ's examination of M.D.:

> Q. The Employer has asserted that the reason that they ended the employment was because they're saying you wanted to only work half the day -

A. Right.

Id. at 42.

[24] To support her argument that Employer's claim was that she quit, M.D. relies on the protest letter sent by Employer to the DWD on May 8, 2020 that states, "M.D. chose to terminate on her own[,]"and an email sent by Employer to the DWD on July 27, 2020, stating "[M.D.] quit her job[.]" Ex., Vol. 3 at 9, 16. Both communications took place prior to the ALJ hearing. However, as noted above, Employer made no assertion that M.D. quit at the ALJ hearing. Further, Employer completed a termination notice for M.D. indicating that that she did not resign, stating instead "[M.D.] offered to return part time. [Employer] advised we do not need part time help." *Id.* at 11. We conclude there was substantial evidence supporting the Review Board's decision that M.D. was discharged for just cause.

Conclusion

[25] We conclude that M.D. was provided sufficient notice of her right to counsel and that the Review Board's order was supported by substantial evidence. Accordingly, we affirm.

[26] Affirmed.

Bailey, J., and May, J., concur.