MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Michael Lakes
Foley, Peden & Wisco, P.A.
Martinsville, Indiana

ATTORNEYS FOR APPELLEE

Theodore Rokita
Attorney General of Indiana

Abigail R. Recker
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

C.W.,
Appellant-Petitioner,

v.

Review Board,
Appellee-Respondent.

June 21, 2022

Court of Appeals Case No. 21A-EX-2355

Appeal from the Review Board of the Department of Workforce Development

The Honorable Gabriel Paul, Chairman
Lawrence A. Dailey, Member
Heather D. Cummings, Member

Trial Court Cause No. 21-R-4681

Mathias, Judge.

[1] C.W. appeals the decision of the Review Board of the Department of Workforce Development denying C.W.'s claim for unemployment benefits. C.W. raises two issues for our review, which we restate as follows:

I. Whether C.W. preserved for appellate review his argument that he did not receive notice of the Department's proceedings when, in his filings before the Department, he acknowledged having received notice but asserted he misunderstood its instructions.

II. Whether the Review Board abused its discretion when it declined to receive additional evidence in C.W.'s appeal of the Administrative Law Judge's adverse decision.

[2] We affirm.

Statement of the Case

[3] In August 2019, C.W. worked full-time as a third-grade teacher in the Martinsville public school system (the "Employer"). At some point during the school year, the Employer informed C.W. that he was "failing to meet pedagogical standards in education and instruction," and Employer placed C.W. "on an improvement plan." Appellant's App. Vol. 2, p. 4. However, C.W. "did not improve" in his performance, and, as a result, Employer informed C.W. that his contract would not be renewed. *Id.* In May 2020, C.W. voluntarily resigned his position in order to avoid the nonrenewal of his contract for his "failure to meet performance expectations." *Id.* at 3-4.

[4] C.W. filed a claim for unemployment benefits, and an initial claims investigator determined that C.W. was entitled to benefits. Employer appealed to an Administrative Law Judge ("ALJ"). The ALJ held an evidentiary hearing on July 19, 2021. C.W. "was notified of the hearing but did not participate." *Id.* at 3. The ALJ concluded that Employer terminated C.W.'s employment for just cause and, thus, reversed the initial determination of the claims investigator.

[5] C.W. timely appealed the ALJ's determination to the Review Board. In doing so, he informed the Review Board that he had been "misinformed about how to participate in the hearing" before the ALJ, and "were it not for my confusion, I would have appeared and been able to explain what actually happened." *Id.* at 7. He also asserted that he had "evidence, including documents, a statement from myself, and potentially from other witnesses, that are important . . . to consider in making a determination in this matter." *Id.* C.W. did not elaborate on either of his assertions.

[6] In September, the Review Board entered its order on C.W.'s appeal from the ALJ's decision. In that order, the Review Board adopted the ALJ's findings of fact and conclusions of law and declined to accept additional evidence. The Review Board thus affirmed the decision of the ALJ. This appeal ensued.

Discussion and Decision

I. Notice

[7] On appeal, C.W. first asserts that his due process rights were violated when the Review Board did not hold a hearing to determine whether C.W. had in fact received notice of the hearing before the ALJ. As we have explained:

> The Indiana Employment Security Act ("the Act") is given a liberal construction in favor of employees. *Scott v. Review Bd. of Indiana Dept. of Workforce Development*, 725 N.E.2d 993, 996 (Ind. Ct. App. 2000). It merits such a construction because it is social legislation with underlying humanitarian purposes. *Id.* The Act provides that parties to a disputed claim for unemployment benefits are to be afforded "a reasonable opportunity for fair hearing." Ind. Code § 22–4–17–3. We interpret this provision to include reasonable notice, which requires that parties receive actual, timely notice. *Id.* Where an administrative agency does in fact send notice through the regular course of mail, a presumption arises that such notice is received. *Id.* However, that presumption is rebuttable. *Id.*

Abdirizak v. Rev. Bd. of Ind. Dep't of Workforce Dev., 826 N.E.2d 148, 150 (Ind. Ct. App. 2005).

[8] In *Carter v. Review Board of Indiana Department of Employment and Training Services*, 526 N.E.2d 717 (Ind. Ct. App. 1988), Carter filed a claim for unemployment benefits after he was discharged from his employment. The claims deputy initially found him eligible for benefits. The employer appealed, and notices of a hearing date before a referee were sent to the parties. However, Carter claimed he never received the notice, and he was not present at the

hearing. The referee held the hearing in Carter's absence, and the referee reversed the initial decision. Carter appealed and alleged that he had no notice of the hearing. The Review Board affirmed the referee's decision to deny Carter benefits without addressing his claim of lack of notice.

[9] A panel of this Court determined that, because there was a factual dispute about whether Carter had received notice of the hearing, the case had to be reversed and remanded for a hearing whether the evidence rebutted the presumption of notice. In remanding the case for an evidentiary hearing, we stated:

> Carter cannot be found to have been afforded an opportunity to be heard[,] as mandated by the doctrine of procedural due process, if he was not apprised of the time and place of the referee's hearing. If, on the other hand, Carter is unable to overcome the presumption that he did receive notice through the mail, then he was afforded an opportunity to be heard which he effectively waived by failing to be present at the hearing.

Id. at 719.

[10] C.W. contends that his facts are analogous to those in *Carter*. But C.W.'s facts are very different and his argument is based on representations that have no support in the record. In appealing the ALJ's decision to the Review Board, C.W. stated only that he "was misinformed about how to participate in the hearing." Appellant's App. Vol. 2, p. 7. That is, C.W. did *not* dispute or otherwise suggest that he had not in fact received notice—he *acknowledged* that he had received proper notice and asserted instead that he just did not understand it. Nonetheless, on appeal, C.W., by counsel, asserts that his

statements to the Review Board were that he "did not receive that notice in time to appear," that he "was not permitted to participate," and that "he was not afforded a reasonable opportunity to appear and be heard." Appellant's Br. at 5.

[11] Thus, we cannot agree that *Carter* applies here. In *Carter*, the parties disputed whether the claimant had actually received notice of the evidentiary hearing before the referee. C.W.'s similar allegation in the present appeal is unsupported by his own representations to the Review Board. Here, C.W. acknowledged to the Review Board that he received notice. Accordingly, C.W.'s argument regarding a purported lack of notice is a new argument that he raises for the first time on appeal, which he may not do. Further, his argument on appeal is contrary to his own representations to the Review Board. We therefore conclude that C.W. has not met his burden of showing any error, let alone reversible error on this issue.

II. The Review Board's Refusal to Consider New Evidence

[12] C.W. also asserts that the Review Board abused its discretion when it did not accept new evidence in his appeal from the ALJ's decision. The Indiana Administrative Code provides:

> Each hearing before the review board shall be confined to the evidence submitted before the administrative law judge unless it is an original hearing. Provided, however, *the review board may hear or procure additional evidence* upon its own motion, or upon written application of either party, and *for good cause shown, together with a showing of good reason why the additional evidence was*

> *not procured and introduced at the hearing before the administrative law judge*.

646 Ind. Admin. Code 5-10-11(b) (emphases added). The Review Board's decision to accept or reject additional evidence is in its discretion. *Telligman v. Review Bd. of Ind. Dep't of Workforce Dev.*, 996 N.E.2d 858, 865 (Ind. Ct. App. 2013).

[13] C.W.'s argument on this issue is derivative of his argument on the first issue—that is, he asserts that he "should be given the opportunity to present evidence before the review board regarding the merits of his case due to the failure of notice." Appellant's Br. at 8. But, as explained above, C.W. conceded to the Review Board that he had received proper notice, and he instead argued only that he did not understand the notice. And C.W. does not argue on appeal how he failed to understand the notice or why that failure would be good cause for the Review Board to admit additional evidence. We therefore cannot say that the Review Board abused its discretion when it declined to consider C.W.'s additional evidence on appeal from the ALJ's decision.

Conclusion

[14] For all of the above reasons, we affirm the Review Board's judgment.

[15] Affirmed.

Brown, J., and Molter, J., concur.