

ARKANSAS COURT OF APPEALS

No. E12-215

THOMAS L. JOHNSTON
APPELLANT

V.

DIRECTOR, DEPARTMENT OF
WORKFORCE SERVICES AND
POWELL FEED SERVICE
APPELLEES

Opinion Delivered October 3, 2012

APPEAL FROM THE ARKANSAS
BOARD OF REVIEW
[2011-BR-00186]

REVERSED AND REMANDED

DAVID M. GLOVER, JUDGE

The issue raised in this unbriefed unemployment case is whether the Board of Review abused its discretion in refusing to take additional evidence requested by appellant Tom Johnston. By agency determination, the Department of Workforce Services initially denied Johnston's claim for unemployment on the basis of misconduct. Johnston timely filed an appeal with the Appeal Tribunal and was granted a hearing. During that hearing, Johnston inquired of the hearing officer why he did not have Johnston's statement and other statements that were supposed to have been mailed to the hearing officer from the Department's Harrison office. The hearing officer replied that he had not received any documents; however, instead of allowing the record to remain open and investigating why the information from the Harrison office had not been received, the hearing officer closed the record and issued an opinion, affirming the agency determination that Johnston was



terminated for misconduct. Johnston then appealed to the Board of Review, again asserting that he had provided evidence that had not been placed in the Appeal Tribunal file for the hearing. The Board of Review likewise refused to take additional evidence, holding that there had been a reasonable opportunity at the hearing before the Appeal Tribunal for the presentation of evidence on the issues. Johnston now appeals to our court, arguing that his evidence was never submitted to the Appeal Tribunal or the Board of Review. We hold that the Board of Review abused its discretion in not holding another hearing.

The Board of Review may direct additional evidence to be taken. Ark. Code Ann. § 11-10-525(c)(1) (Supp. 2011). However, this is discretionary with the Board, and there must be an abuse of that discretion to reverse. *Fry v. Director*, 16 Ark. App. 204, 698 S.W.2d 816 (1985).

Before the Appeal Tribunal, Johnston clearly questioned the hearing officer as to why certain documents that he had taken to the Harrison office to be forwarded to the Appeal Tribunal were not included in his file. He reiterated his documents inquiry to the Board in his appeal of the Appeal Tribunal decision; however, the Board declined to take additional evidence. Johnston's appeal to the Board of Review contained only his statement and statements from his co-workers, Debbie Johnston and Lacey Powell. However, the record reflects a sheet from Johnston's unemployment-claim file showing that on Monday, October 18, 2010 (prior to the January 20, 2011 hearing before the Appeal Tribunal), a notation was made that Johnston had said he would have more information to submit to the Appeal Tribunal for hearing and that Johnston was told to bring it in and the office would mail it. On Monday, October 25, 2010, there was a second notation that additional documents had



been imaged and mailed to the Appeal Tribunal to be included in Johnston's appeal; likewise, on October 27, 2010, there was a third notation confirming that additional statements were imaged and mailed to the Appeal Tribunal to be included in the hearing. Against this background record, the hearing officer said that he had received nothing; despite the fact that Johnston informed him of the missing statements, the hearing officer failed to keep the record open and investigate why those documents had not been received.

While the Board of Review cannot simply accept additional evidence and consider it without the other party having an opportunity to respond to such evidence, *see Arkansas Game & Fish Commission v. Director*, 36 Ark. App. 243, 821 S.W.2d 69 (1992), the Board of Review does have the authority to order another hearing in pending appeals for the purpose of taking additional evidence. *Id.* In this case, Johnston timely notified the hearing officer of the missing documents at his hearing, and the agency's own case file supports his assertion that these documents were supposed to be sent to the Appeal Tribunal but were never placed in Johnston's appeal file. Despite being informed that all of Johnston's evidence was not in the file before him, the hearing officer closed the record and issued a decision. The Board of Review perpetuated this mistake by refusing to take additional evidence and affirming the Appeal Tribunal decision. We hold that this was an abuse of discretion, and we reverse and remand for the Board to hold an additional hearing to consider the documents that were sent to the Appeal Tribunal but yet did not make it into Johnston's file.

Reversed and remanded.

VAUGHT, C.J., and MARTIN, J., agree.

Thomas L. Johnston, pro se appellant.