

# ARKANSAS COURT OF APPEALS

DIVISION III

No. E12-697

PAUL SIMS

APPELLANT

V.

DIRECTOR, DEPARTMENT OF  
WORKFORCE SERVICES and  
BISMARCK PUBLIC SCHOOLS  
APPELLEES

Opinion Delivered April 17, 2013

APPEAL FROM THE ARKANSAS  
BOARD OF REVIEW  
[NO. 2011-BR-01978]

REVERSED AND REMANDED

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**BRANDON J. HARRISON, Judge**

Bismarck Public Schools discharged Paul Sims in 2009 for misconduct. Sims applied for unemployment benefits and was denied at the departmental level. He timely appealed the denial to the Appeal Tribunal and retained attorney Andrea Davis to represent him in a telephone hearing before the Tribunal, which was scheduled in October 2009. On the day of the hearing, the hearing officer tried to call claimant Sims one time before beginning. The hearing officer also called attorney Davis on her cell phone; Davis answered and agreed to proceed with the hearing without Sims. The hearing officer then placed Davis on hold while others were connected to the hearing conference call. Davis remained on hold for at least ten to fifteen minutes while others were being connected. At some point, the hearing officer realized that attorney Davis was not actively on the line. He tried to call Davis back four times but received her voicemail

each time. Davis eventually hung up her cell phone, called the hearing officer back, and was told that the hearing had already taken place.

Following the October 2009 telephone hearing, the Tribunal determined that Bismarck Schools discharged Sims for misconduct and that he could not receive unemployment benefits. Sims appealed, and the Board of Review remanded the case to the Tribunal, directing it to hold a limited-issue hearing on whether Sims had good cause for not appearing at the October 2009 hearing.

The Tribunal held the limited-issue hearing in 2011. During the second hearing, attorneys Andrea Davis and Gerry Schulze appeared on behalf of Sims. After taking some brief testimony from Davis, the hearing officer found that Davis had contacted the Tribunal forty-five minutes after the hearing was scheduled to begin and that Sims had not shown good cause for failing to appear at the October hearing. Sims appealed that decision to the Board of Review.

The Board adopted the Tribunal's decision as its own, finding that Davis's failure to call the hearing officer back in a timely manner meant that Sims lacked good cause for failing to appear at the October hearing. The Board also concluded that Davis's failure to contact the Tribunal during the October hearing was not due to circumstances beyond her control. The Board reasoned that if Davis had called back while the hearing was still ongoing, then she would have been allowed to participate. The Board also noted that Sims never testified why he was unavailable when the hearing officer called or why he didn't call the Tribunal within ten minutes of the scheduled time of the hearing when he had not been contacted.

Sims has timely appealed to our court, arguing that the Board's decision to deny him a meaningful hearing is not supported by substantial evidence. Our review asks whether the Board could reasonably reach its decision upon the evidence before it. *Ballard v. Dir., Ark. Dep't of Workforce Servs.*, 2012 Ark. App. 371, at 4. Credibility of witnesses and the weight of their testimony are matters for the Board to determine. *Id.* We reverse the Board's findings only when they are not supported by substantial evidence. *Id.*

The specific legal question here is whether substantial evidence supports the Board's determination that Sims failed to show good cause for not participating in the October 2009 hearing. See Ark. Code Ann. § 11-10-524(d)(1)–(2) (Supp. 2011). The Director argues that substantial evidence supports the Board's decision because Davis and Sims did not follow a written instruction from the Tribunal that directed Sims to contact the Tribunal within ten minutes after the scheduled hearing time if he had not received a call by that time.

Sims counters that he was not personally required to call the Tribunal that day because he had an attorney to represent him during the hearing. We agree with Sims. A claimant need not make a personal appearance before the Tribunal may receive a claimant's evidence and argument. *Stewart v. Daniels*, 601 S.W.2d 245, 246 (1980). The Board found as fact that the hearing officer actually connected with Sims's attorney, Andrea Davis, before the hearing began. This means that Sims did not have to explain why he himself was unavailable when the hearing began. Simply put, Sims's silence is not

substantial evidence that he lacked good cause for failing to attend the October 2009 hearing.

Next, the Director argues that Davis's failure to follow the same written instructions that were mailed to Sims from the Tribunal is evidence that Sims lacked good cause for not joining the hearing. We disagree. Even if the instructions sent to Sims bound his attorney, Davis followed the Tribunal's written instructions—she was available and actually received a call from the hearing officer within ten minutes of the hearing time; the Board so found. The Tribunal's instructions only apply on their own terms if a claimant (or his representative) does not receive a call within ten minutes of the hearing time.

Finally, we reject the Board's determination that Davis's failure to contact the Tribunal during the October 2009 hearing was not due to circumstances beyond her control. There was no evidence that Davis had any way to know that her phone went silent because the Tribunal had disconnected her instead of placing her on hold. The Director argues that Davis should have known that it was the Tribunal who was calling her back on the other line. But the Tribunal's calls were from an unknown number. It was reasonable for Davis to believe that she was still on the line with the Tribunal when she received other calls from an unfamiliar number. Davis's absence from the hearing was due to a simple miscommunication or technical difficulty, not from a failure to follow instructions or from Sims's decision not to participate in the hearing.

The Board's decision to deprive Sims the opportunity to have his counsel represent him in a meaningful way during the October 2009 hearing was unreasonable. So we

reverse the Board's July 2012 decision and remand for a new hearing on the merits of Sims's claim for benefits.

Reversed and remanded.

GRUBER and BROWN, JJ., agree.

*Baker, Schulze & Murphy*, by: J.G. "Gerry" Schulze, for appellant.

*Phyllis Edwards*, Associate General Counsel for Artee Williams, Director,  
Department of Workforce Services.