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ARKANSAS COURT OF APPEALS

DIVISION IV
No. E-21-427

TOBIAS MITCHELL

APPELLANT

V.

DIRECTOR, DEPARTMENT OF
WORKFORCE SERVICES; AND
POROCEL INDUSTRIES, LLC

APPELLEES

Opinion Delivered June 1, 2022

APPEAL FROM THE ARKANSAS
BOARD OF REVIEW
[NO. 2021-BR-01863]

AFFIRMED

LARRY D. VAUGHT, Judge

Tobias Mitchell appeals the Arkansas Board of Review’s decision denying him unemployment benefits based on its finding that he was terminated for misconduct. We affirm.

Mitchell was discharged from his work at Porocel Industries, LLC (Porocel), on September 9, 2020, for using a racial slur against another employee. On September 10, he filed an application for unemployment benefits. The Department of Workforce Services denied Mitchell’s unemployment claim.

Mitchell sought review by the Appeal Tribunal and received a hearing on April 29, 2021. Porocel plant manager, Gerald Ashford, testified at the hearing on behalf of the employer. Ashford stated that Mitchell was fired for using a racial slur against an employee named Cedric Clay. Ashford’s testimony revealed that Mitchell had previously been reprimanded for harassing a female employee and had been given a warning in April 2019. A

signed and dated statement written by Clay, which recounted Mitchell's use of the racial slur, was entered into evidence, as was a written statement from another employee, Terence Stigall, who witnessed the incident. Ashford testified that a third employee, Wheeler Simms, had been in the room at the time and was interviewed but had stated that he did not want to get involved and had not heard Mitchell use the slur.

Mitchell's attorney cross-examined Ashford but was prevented by the hearing officer from asking about Ashford's relation to an employee who worked in human relations at Porocel named Linda Ashford. The hearing officer deemed this line of questioning irrelevant. Mitchell's attorney was permitted to ask Ashford about whether an employee who had been a witness to the event denied having heard Mitchell use the slur, how long Ashford investigated before firing Mitchell, and whether Ashford's mind was made up to fire Mitchell before doing any investigation, but the hearing officer stopped Mitchell's attorney from asking repetitive questions about those topics. While the transcript reveals that the hearing officer was impatient with, and rude to, Mitchell's attorney, she did not prevent him from eliciting testimony from Ashford on these matters. The hearing officer also stopped Mitchell's attorney from repeatedly asking similar questions. Mitchell's counsel stated for the record that he thought that the proceedings had been infected with some sort of bias and that the hearing was unfair to his client. Later, the hearing officer ended Mitchell's cross-examination of Ashford, determining that Mitchell's attorney was, at that point, asking questions that had already been answered.

Mitchell then testified. In addition to denying having used the racial slur, he also produced a statement from Wheeler Simms denying that Simms had heard Mitchell use it. The hearing officer informed Mitchell's attorney that the time for submitting exhibits had already

passed and that it was too late to now enter the document into evidence. However, Mitchell's attorney was able to have Mitchell read the statement into the record.

The hearing officer concluded the hearing and, shortly thereafter, released a decision affirming the denial of benefits. The Board of Review affirmed this decision.

On appeal, Mitchell argues that the hearing violated his due-process rights and that substantial evidence does not support the Board's findings. Neither argument provides a basis for reversal.

First, we note that the appellees argue that Mitchell's due-process challenge is not preserved for appellate review because they contend that he is raising it for the first time on appeal. We disagree. It is true that when an appellant has failed to raise an issue below, we will not consider it on appeal. *Carp Constr. v. Stiles*, 23 Ark. App. 24, 26, 740 S.W.2d 632, 634 (1987); *City of Fort Smith v. Moore*, 269 Ark. 617, 599 S.W.2d 750 (Ark. App. 1980). While Mitchell's attorney did not use the exact phrase "due process" during the hearing, he clearly argued that the proceedings were unfair to his client and that the hearing officer was demonstrating bias and hostility. He also repeatedly challenged the officer's decisions to prohibit him from asking certain questions or introducing evidence. We therefore cannot say that Mitchell's due-process challenge is unpreserved for our review.

On its merits, however, the due-process claim does not warrant reversal. Administrative hearings must be conducted in such manner as to ascertain the substantial rights of the parties and the fundamental requisite of due process of law is the opportunity to be heard and to confront and cross-examine adverse witnesses. *Smith v. Everett*, 276 Ark. 430,

637 S.W.2d 537 (1982); *Ark. Dep't of Hum. Servs. v. A.B.*, 374 Ark. 193; 286 S.W.3d 712 (2008).

In *A.B.*, *supra*, the supreme court explained:

The United States Supreme Court has stated that “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). Furthermore, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Id.* at 269. More specifically, the Supreme Court has extended the due-process rights of confrontation and cross-examination to certain types of administrative proceedings. *Greene v. McElroy*, 360 U.S. 474 (1959).

In accordance with these principles, our court has recently reiterated that a party appearing before an administrative agency is entitled to due process in the proceedings. *C.C.B. v. Ark. Dep't of Health & Human Servs.*, 368 Ark. 540, 247 S.W.3d 870 (2007). We have also held that a fair trial by a fair tribunal is a basic requirement of due process, and that this rule applies to administrative agencies as well as to courts. *Id.* at 545, 247 S.W.3d at 873. While it is well settled that an administrative proceeding is civil in nature and that the rules of evidence need not be strictly adhered to, *id.* at 548, 247 S.W.3d at 875, our court has recognized the due-process rights of confrontation and cross-examination in certain types of administrative proceedings. *Smith v. Everett*, 276 Ark. 430, 637 S.W.2d 537 (1982); *see also Priest v. United Parcel Serv.*, 58 Ark. App. 282, 950 S.W.2d 476 (1997).

374 Ark. at 201; 286 S.W.3d at 718.

In this case, Mitchell was not only represented at the hearing by legal counsel, but he also had the opportunity to cross-examine adverse witnesses, an opportunity of which he availed himself. Additionally, the notice of hearing that the tribunal sent to Mitchell indicated that he had the opportunity to present documentary evidence before the hearing. The fact that his attorney failed to do so and was, as a result, barred from introducing Simms’s statement as an exhibit was not a violation of Mitchell’s due-process rights. In the end, Mitchell was able to read the statement into the record despite not having submitted it in a timely manner. Mitchell was also notified that he had the right to request witnesses be subpoenaed to testify at the hearing, which he apparently did not do. Mitchell argues that he was not allowed to ask

certain question in his cross-examination of Ashford or submit Simms's statement into evidence, but in both cases, he succeeded in getting the substance of that evidence into the record. For example, Mitchell's attorney was able to demonstrate that Ashford had not investigated the incident for very long before firing Mitchell. He was also able to establish that Simms had been in the room at the time, that the room was fairly small, and that Simms denied hearing Mitchell use a racial slur. Therefore, Mitchell had an adequate opportunity to be heard and an opportunity to confront and question Ashford, who was the only adverse witness. The hearing officer's rudeness to Mitchell's attorney, while unprofessional, did not prevent Mitchell from presenting his case.

Mitchell also challenges the sufficiency of the evidence supporting the Board's decision to deny him benefits. On appeal, the findings of the Board are affirmed if those findings are supported by substantial evidence. *Families, Inc. v. Dir.*, 2016 Ark. App. 475, 505 S.W.3d 217. Substantial evidence is evidence that a reasonable mind might accept as adequately supporting the Board's conclusion. *Id.* We review the evidence and all reasonable inferences therefrom in the light most favorable to the Board's findings. *Id.* at 6. The credibility of witnesses and the weight to be accorded to their testimony are matters to be resolved by the Board. *Johnson v. Dir.*, 84 Ark. App. 349, 141 9 S.W.3d 1 (2004). The sole question on appeal is whether the Board could have reasonably reached its decision on the evidence before it. *Perdrix-Wang v. Dir.*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Under Arkansas law, an employee who has been fired for misconduct is not entitled to unemployment benefits:

If an individual is discharged from his or her last work for misconduct in connection with the work on account of dishonesty, drinking on the job, reporting for work while

under the influence of intoxicants, including a controlled substance, or willful violation of the bona fide written rules or customs of the employer including those pertaining to his or her safety or the safety of fellow employees, persons, or company property, harassment, unprofessional conduct, or insubordination, he or she shall be disqualified until, subsequent to the date of the disqualification, the individual has been paid wages in two (2) quarters for insured work totaling not less than thirty-five (35) times his or her weekly benefit amount.

Ark. Code Ann. 11-10-514(b)(I) (Supp. 2021).

Here, Ashford testified that Mitchell was terminated for misconduct because he harassed another employee by using a racial slur. That testimony was supported by written statements from Cedric Clay and Terence Stigall. Mitchell had also been previously disciplined for harassing another employee. Mitchell testified that he did not use the slur, and he provided a statement from Wheeler Simms stating that Simms had not heard it. Mitchell is not arguing that the use of a racial slur against a fellow employee does not constitute misconduct; he simply contends that he did not do it. Mitchell's arguments on appeal ask us to reweigh the evidence in his favor, which we cannot do. In *Grigsby v. Everett*, we stated that "[t]he credibility of the witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review." 8 Ark. App. 188, 190, 649 S.W.2d 404, 406 (1983) (citing *Daniels v. Hillcrest Homes, Inc.*, 268 Ark. 576, 594 S.W.2d 64 (Ark. App. 1980)). We affirm.

Affirmed.

HARRISON, C.J., and VIRDEN, J., agree.

The Law Office of Geoffrey D. Kearney, PLLC, by: *Geoffrey D. Kearney*, for appellant.

Cynthia L. Ubrynonycz, for separate appellee Director, Arkansas Division of Workforce Services.