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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JANE STRONG, *Appellant*,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency,

and

HARBOR FREIGHT TOOLS USA INC.,

Appellees.

No. 1 CA-UB 17-0163
FILED 3-13-2018

Appeal from the A.D.E.S. Appeals Board
No. U-1528849-001

AFFIRMED

COUNSEL

Jane Strong, Prescott Valley
Appellant

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee, Arizona Department of Economic Security

STRONG v. ADES/HARBOR
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Michael J. Brown delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Maurice Portley¹ joined.

B R O W N, Judge:

¶1 Jane Strong appeals her denial of unemployment benefits. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

¶2 Jane Strong (“Claimant”) was employed by Harbor Freight Tools USA, Inc. (“Employer”) as a head cashier. Claimant was discharged for exceeding the maximum allowable attendance violation points after missing work on Friday, May 13, 2016. Six days earlier, Claimant spoke to her manager (“Manager”) and requested Friday off so she could attend a doctor’s appointment. Manager told her he would try to switch her Friday shift to Sunday. To remind himself of the intended switch, he made notes to himself on a non-posted copy of the work schedule. Manager, however, was unable to cover the shift. Although Manager did not tell Claimant he could not accommodate the change, the updated, posted schedules continued to reflect Claimant was assigned to work on Friday. Claimant did not show up or call for her Friday shift.

¶3 When Claimant showed up to work on her next scheduled shift, Manager requested her keys and informed her she was placed on administrative leave pending review of her attendance issues by human resources. Claimant was fired shortly thereafter for exceeding the amount

¹ The Honorable Maurice Portley, retired Judge of the Arizona Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² We “view[] the evidence in a light most favorable to upholding the decision of the appeals board.” *Prebula v. Ariz. Dep’t of Econ. Sec.*, 138 Ariz. 26, 30 (App. 1983).

STRONG v. ADES/HARBOR
Decision of the Court

of points permitted by Employer's attendance policy.³ Claimant then filed for unemployment insurance benefits with the Arizona Department of Economic Security ("ADES").

¶4 An ADES deputy determined Claimant was entitled to benefits because Employer did not provide evidence to warrant disqualification. Employer appealed the deputy's decision to the ADES Appeals Tribunal, arguing Claimant was discharged for excessive absenteeism and that she failed to call or show up to work on May 13, 2016. Following an evidentiary hearing, an administrative law judge ("ALJ") reversed the deputy's decision, finding that Claimant was "discharged for wil[lful] or negligent misconduct connected [to] the employment" because Claimant assumed the schedule change was approved and failed to confirm.

¶5 Claimant timely appealed the ALJ's decision to the ADES Appeals Board ("Board"), asserting for the first time she did not have enough points to justify termination because Employer should have allocated her absence to sick time instead of assigning her additional points that caused her to exceed the 17-point limit. Claimant also argued some of the evidence Employer presented at the evidentiary hearing was incorrect and she could prove this if she could subpoena information from Employer. Claimant indicated she would give the Board "information to subpoena [those] items."

¶6 Over two weeks later, and after the time to file an appeal passed, Claimant wrote the Office of Appeals, listing five items she needed subpoenaed. Claimant again asserted she was incorrectly given points because she had sick leave available and "you don't receive points against you if you have sick time available." Claimant also enclosed six pages of pay stubs she requested "be entered as exhibits" to prove she had sick leave available. The Board denied Claimant's untimely subpoena request, adopted the ALJ's factual findings, and affirmed the ALJ's ruling. Claimant filed a timely application for appeal, which this court granted.

DISCUSSION

¶7 As best we can tell, Claimant raises the following issues on appeal: (1) whether the Board erred in denying her requests for issuance of

³ Employer assigns points to employees that violate its attendance policy. If an employee accrues 17 or more points, Employer's policy is to terminate employment.

STRONG v. ADES/HARBOR
Decision of the Court

subpoenas, (2) whether the Board's finding that Claimant was a no call/no show is supported by the record, and (3) whether the Board failed to understand, or did not take the time to review, Employer's attendance policies and how attendance is calculated.

¶8 We will affirm the Board's decision if "supported by any reasonable interpretation of the record." *Prebula v. Ariz. Dep't of Econ. Sec.*, 138 Ariz. 26, 30 (App.1983). "Our review is limited to the basis upon which the Board's decision was rendered, and we are bound by the Board's findings of fact, unless arbitrary, capricious or an abuse of discretion." *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545 (App. 1995) (citation omitted). "Legal conclusions of the board, however, are not binding on this court and we are free to draw our own legal conclusions in determining if the appeals board properly interpreted the law." *Pettypool v. Ariz. Dep't of Econ. Sec.*, 161 Ariz. 167, 169 (App. 1989).

A. Subpoenas

¶9 Strong argues the Board erred by not issuing the subpoenas she requested. A party's right to have a subpoena issued in this type of proceeding, however, is governed by the Arizona Administrative Code ("A.A.C."), which provides that a party's subpoena "[a]pplication shall be submitted to [ADES] at least 5 calendar days before the hearing to permit preparation and service of the subpoena before the hearing." A.A.C. R6-3-1502(D)(3) (emphasis added). Moreover, before the hearing, ADES mailed Claimant a "Notice of Telephone Hearing," which provided: "**SUBPOENAS:** If a witness refuses to appear or provide documents that you believe you need for your hearing, you may submit a written request for a subpoena. *You must file the request with this office at least 5 calendar days before the hearing.*" (Emphasis added.)

¶10 Claimant first mentioned a subpoena request when she appealed the ALJ's decision. Her actual request was made more than two weeks later, beyond the time for appealing the ALJ's decision. The Board denied Claimant's subpoena request because it was "late and should have been made before the Tribunal hearing." Because Claimant did not submit a request for a subpoena at least five days before the hearing, we find no error.⁴

⁴ Claimant also argues the subpoenaed material should have been admissible at the evidentiary hearing. Because Claimant failed to timely

STRONG v. ADES/HARBOR
Decision of the Court

B. No Call/No Show Finding

¶11 Claimant contends the Board erred in finding “Claimant was a no call/no show on May 13” because Claimant told Manager she was unable to work her May 13 shift. The evidence does not support her contention.

¶12 During the hearing, Manager explained that the company policy requires employees to give two-weeks’ notice before requesting time off. When Claimant requested Friday off, Manager and Claimant agreed that Manager would try, but did not guarantee, to switch her shift. Manager was unable to complete Claimant’s request but did not inform her that she still needed to work on Friday.

¶13 Although Claimant was under the impression she would not be working Friday after her conversation with Manager, Claimant did not check whether the change was finalized. Claimant worked at least two days between her conversation with Manager and Friday, during which Claimant, by virtue of her position as head cashier, should have known she was scheduled to work Friday. Manager expected Claimant to show up because she was required to look at the schedule, which is updated daily, and did not discuss the lack of change with him. By not following up with the Manager regarding the Friday shift, Claimant’s absence and lack of notice thereof can reasonably be interpreted as a no call/no show. Thus, the record supports the Board’s finding that “Claimant was a no call/no show on May 13, 2016, after mistakenly assuming that she had been let off work following a conversation with [Manager].”

C. Attendance Policy

¶14 Claimant argues the Board failed “to understand the policies for attendance and how the attendance tracker worksheet is calculated.” We interpret her argument to mean the Board abused its discretion by not considering new evidence of Claimant’s past attendance.

¶15 Claimant’s letter requesting subpoenas explained that under the Employer’s employment policy, employees are not penalized with points when they are absent with unused sick time. Because she had sick time available, Claimant argued Employer wrongfully assigned her points on May 13 and another occasion, which caused her to exceed the maximum amount of points. The Board explained it would not issue the requested

request the subpoenas, the requested material could not have been admitted.

STRONG v. ADES/HARBOR
Decision of the Court

subpoenas because the request was untimely and that its “focus [was] on the Claimant’s last absence” rather than her “possibly wrongfully receiving attendance points that ultimately led to her discharge.”

¶16 The Board may order the taking of additional evidence when it reviews an ALJ’s decision. *See* Ariz. Rev. Stat. (“A.R.S.”) § 23-672(C); A.A.C. R6-3-1504(B)(2), -1507(C)(1)(b). We review the Board’s decision to consider new evidence for an abuse of discretion. *Avila v. Ariz. Dep’t of Econ. Sec.*, 160 Ariz. 246, 249-50 (App. 1989).

¶17 Although Claimant asserted in her appeal to the Board that Employer improperly charged her with points, she neither explained the dates she was improperly penalized nor argued why the points were improper. Because Claimant did not timely provide the Board with information supporting her contention, the Board did not abuse its discretion when it did not consider Claimant’s new theory. Moreover, to the extent she makes this argument in this appeal, we need not consider it because she failed to timely raise it before the Board. *See* A.R.S. § 41-1993(B) (“An issue may not be raised on appeal that has not been raised in the petition for review before the appeals board.”). Even assuming Claimant’s argument and supplemental material were timely raised, Claimant misinterprets the Employer’s attendance policy. According to Employer’s testimony and the employee handbook, employees must notify Employer if they desire to have an absence covered by sick time. If an employee does not notify Employer when the employee is sick and will be absent, the employee will be sanctioned with points for being a no call/no show. Accordingly, the Board did not abuse its discretion in refusing to consider Claimant’s new theory that she was wrongfully assigned points because she had sick time available.

STRONG v. ADES/HARBOR
Decision of the Court

CONCLUSION

¶18 Based on the foregoing, we affirm the Board's determination that Claimant was not eligible for unemployment compensation benefits.



AMY M. WOOD • Clerk of the Court
FILED: AA