Circuit Court for Anne Arundel County
Case No. C-02-CV-22-000353

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1588

September Term, 2022

IN THE MATTER OF ANNE ARUNDEL COUNTY

Nazarian,
Tang,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: July 8, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Charles Pendorf ("Pendorf"), a firefighter/paramedic with the Anne Arundel County Fire Department, applied for service-connected disability retirement after injuring his back. The County personnel officer denied the application after determining that Pendorf did not have a total and permanent disability because of an injury arising out of or in the course of his employment. Pendorf sought review by the Disability Retirement Pension Review Board, which upheld the personnel officer's decision.

Pendorf then appealed to the Anne Arundel County Board of Appeals (the "Board"), which voted in a split 4-2 decision to grant Pendorf service-related disability retirement. Anne Arundel County (the "County") sought judicial review in the Circuit Court for Anne Arundel County. The court reversed and vacated the Board's decision and remanded the case to the Board for a new hearing with specific instructions to follow.

Pendorf noted a timely appeal to this Court. For reasons we shall explain, we affirm in part and vacate in part the judgment of the circuit court. We affirm the court's decision to remand the case to the Board for a de novo hearing, though for different reasons, and we vacate the court's instructions to the Board.

STATUTORY SCHEME

We begin by outlining the statutory scheme for securing retirement based on total and permanent disability and then discuss the facts of the case.

The Anne Arundel County Charter and Code establish a two-step administrative process to secure disability-based retirement. The first step is the administrative-investigative procedure.

A participant of the fire service retirement plan is deemed eligible for a disability pension if the participant "is determined to have a total and permanent disability" "that is the result of bodily injury or disease arising out of and occurring in the course of the participant's employment[.]" Anne Arundel County Code ("Code") § 5-4-206(c)(1), (d)(2). The plan is administered by the Personnel Officer, who has the power to "make determinations concerning total and permanent disability for the purposes of this article[.]" Code § 5-1-104(b).

Section 5-4-206(b) explains "total and permanent disability":[1]

> A participant has a total and permanent disability if the Personnel Officer determines, on the basis of a medical examination by one or more physicians selected by the Personnel Officer, that the participant is wholly and permanently prevented as a result of bodily injury or disease from engaging in any occupation or employment for remuneration or profit or continuing as an employee in the participant's regular assignment or in some other assignment within the Fire Department.

Section 5-1-107 establishes the composition of the Disability Retirement Pension Review Board. Code § 5-1-107(c). If requested by the participant, the Disability Retirement Pension Review Board "shall review and evaluate the initial denial of a disability retirement pension claim by the Personnel Officer. The conclusions and recommendations of the Board shall be transmitted to the Personnel Officer and are advisory only. After

[1] This version of § 5-4-206(b) was in effect in 2019 when Pendorf applied for disability benefits. The Code was later amended to delete the last clause, "or in some other assignment within the Fire Department." The parties agree that the earlier version of § 5-4-206(b) applies to Pendorf's claim.

receiving the Board's advisory recommendation, the Personnel Officer shall make a final decision." Code § 5-1-107(g).

The second step of the administrative process is the administrative-appellate procedure before the Board.[2] Anne Arundel County Charter ("Charter"), Art. VI, § 602(b)-(f) enumerates appeals from orders relating to specific areas as well as "from all other administrative and adjudicatory orders[.]" Section 5-1-105(a) of the Code provides that "[a] person aggrieved by a final decision of the Personnel Officer may appeal to the Board of Appeals." Notably, "[a]ll decisions by the County Board of Appeals shall be made after notice and hearing *de novo* upon the issues before said Board." Charter, Art. VI, § 603 (emphasis added).

FACTUAL AND PROCEDURAL BACKGROUND

The facts presented are based on evidence from the Board hearing. We summarize those facts pertinent to resolving the issues raised on appeal.

Pendorf was hired as a firefighter by the County Fire Department in December 2008. On August 19, 2015, while working as a firefighter/paramedic, Pendorf was getting out of an ambulance during a scheduled shift when a lanyard on his belt got caught on the seat, causing him to fall out of the ambulance and be suspended from the lanyard.

[2] Art. XI-A, § 2 of Maryland's Constitution requires the General Assembly to provide a grant of express powers to counties establishing a charter form of government. *Hill v. Baltimore Cnty.*, 86 Md. App. 642, 648 (1991). The General Assembly provided this grant of express powers in the Maryland Code, in what is known as the Express Powers Act. *Anne Arundel Cnty. v. Bowen*, 258 Md. 713, 715 (1970). The Express Powers Act authorizes counties to enact local laws allowing for the creation of a county Board of Appeals. Md. Code Ann., Loc. Gov't § 10-305(a)(1) (2013 Repl. Vol., 2023 Supp.).

At the hospital, Pendorf was told that he had an L5-S1 herniation and advised to follow up with either "orthopaedic or neurosurgery." Concerned that undergoing a major procedure like lumbar fusion surgery, which involves the implantation of hardware, would disqualify him from becoming a firefighter, he chose conservative treatment. This treatment included physical therapy, participation in a work-hardening program, and medication.

In 2016, Pendorf was cleared to return to work as a firefighter with no restrictions after passing a functional capacity evaluation. That evaluation showed that he could meet the "very heavy" physical demands required for the classification of a firefighter. He worked in this capacity until the spring of 2018 when he started experiencing lower back issues.

Eventually, Pendorf "went out on workers comp" and was further evaluated by doctors. The doctors recommended that he undergo lumbar fusion surgery, which he did in December 2018. Following the surgery, Pendorf completed a course of physical therapy and a work-hardening program. He then transitioned to light duty with the Fire Department.

In September 2019, Pendorf underwent another functional capacity evaluation. This time, it showed that he could only perform at a "medium" physical demand level. This meant he could occasionally carry up to 50 pounds, less than the "very heavy" physical demand level required for a firefighter.

Application for Service-Connected Disability Retirement

In November 2019, Pendorf applied for in-service disability retirement. He claimed that because of the injury on August 19, 2015, he experienced significant restrictions in lifting, sitting, bending, and twisting and struggled to hold his then-11-month-old child.

Cheryl Wyngarden ("Wyngarden"), a personnel analyst with the County Office of Personnel, handled Pendorf's application. During her investigation, Wyngarden visited Pendorf's Facebook page, where he presented himself as the chief operating officer of a hydroponic farm. Photographs on the farm's Facebook page depicted Pendorf engaging in activities such as working with power tools and construction, which Wyngarden believed were inconsistent with Pendorf's claim of injury.

Surveillance of Pendorf

Upon making this discovery, Wyngarden had a claims investigator surveil Pendorf. The investigator provided Wyngarden with written reports and video footage detailing Pendorf's actions. The reports documented Pendorf's activities in December 2019, January 2020, and March 2020, along with corresponding videos. In pertinent part, the investigator's reports included the following entries:

On Friday, December 27, 2019, Pendorf drove a Chevrolet SUV for almost 90 minutes to a greenhouse supply store in Pennsylvania. The report stated that Pendorf was seen

> briefly assist[ing] the loader with shrink wrapping and sliding the smaller pipe bundles off the forklift. He appeared to use both hands without difficulty. [Pendorf] then used several ratchet straps to secure the materials,

> and bent forward at the waist several times, again using both hands without difficulty.

The report indicated there was video for December 27, 2019.

> On Wednesday, January 15, 2020, the investigator noted that:
>
> At approximately 10:30 A.M., the subject drove from the area in his Chevrolet SUV towing an enclosed trailer. He was followed to a Home Depot where he left the store pushing a cart loaded with at least four or five 4'x8' sheets of particle board and at least a dozen 2'x4's. He lowered the tailgate of the trailer and loaded the plywood and the 2'x4's inside. He used both hands without any apparent difficulty and *videotape was obtained*.

(Emphasis added).

On Tuesday, March 10, 2020, at 11:20 a.m., the investigator noted that **"**the subject was viewed on a large tractor with an attachment on the back and proceeded to mow down overgrown grass and brush that was on the farm. *Videotape was obtained*." (Emphasis added). At 12:40 p.m., the investigator observed Pendorf "securing a ratchet strap to the tractor and *brief videotape was obtained*." (Emphasis added).

On Thursday, March 12, 2020, at 10:26 a.m., "*[v]ideotape was obtained* of [Pendorf] operating the Chevrolet SUV pulling an empty trailer from the residence. [He] was then observed operating the Chevrolet SUV towing his own empty trailer and drove from the area." (Emphasis added). At 11:50 a.m., the investigator "was able to *obtain videotape* of [Pendorf] working on the property. Over the course of approximately 40 to 45 minutes, the subject used a drill and a hammer, bent forward and squatted multiple times,

at times sustaining bends. He appeared to be securing wood planks with a hammer and drill. *Videotape was obtained*." (Emphasis added).[3]

Examination by Dr. Barry

Wyngarden selected Dr. John Barry to perform an independent medical examination of Pendorf. After reviewing Pendorf's medical records and conducting a physical exam, Dr. Barry concluded that Pendorf's condition did not result from the work-related injury on August 19, 2015. Instead, it was because of degenerative disease of the lumbar spine and complications from his back surgery. Dr. Barry also determined that Pendorf did not have a total and permanent disability, his long-term prognosis was good, and he could perform full duties at work full-time.

Dr. Barry relied in part on reviewing the investigator's surveillance videos. In his report, Dr. Barry noted:

> Review of the videos disclosed [Pendorf] working on a motor vehicle engine, bending, squatting and moving his lower back without apparent stiffness or pain. The video also shows [Pendorf] in the process of constructing a greenhouse. It shows him bending, squatting, and lifting from the ground without difficulty or discomfort. There is also video of [Pendorf] loading building materials into his vehicle, to include 4 x 8 sheets of particle board or plywood as well as 12 or more 2 x 4's. The video then shows [Pendorf] unloading the same materials from his vehicle.

[3] About a year later, before the Board hearing, the investigator supplemented his reports with additional observations of Pendorf's activities in June 2021. The investigator noted, "During the time [Pendorf] was under observation, he appeared to move about in a normal manner, used both hands without difficulty or hesitation, wore no visible braces or supports, and *videotape was obtained*." (Emphasis added).

Wyngarden recommended to the personnel officer, Sherry Dickerson ("Personnel Officer"), that Pendorf's application be denied based on Dr. Barry's examination. The Personnel Officer adopted the recommendation and informed Pendorf that he was not eligible for service-connected disability retirement under § 5-4-206.

Review by the Disability Retirement Pension Review Board

Pendorf requested that the Disability Retirement Pension Review Board review the Personnel Officer's decision. While awaiting a decision by the review board, the Fire Department terminated Pendorf's employment on June 18, 2020, because he was "not physically capable of performing the work normal to [his] classification[.]"

In July 2020, the Disability Retirement Pension Review Board unanimously voted to recommend upholding the Personnel Officer's decision. It considered, among other things, Pendorf's application, medical records, and Dr. Barry's opinion. It also noted that it had reviewed surveillance videos from December 2019, January 2020, and March 2020:

> Portions of videos showed [Pendorf] performing the very functions that he claimed not to be able to do because of his injury . . . without appearing to be stiff or uncomfortable. He appeared to move freely and without restriction. [Pendorf] was not observed on any of the videos lifting particularly heavy items, but he did lift items commensurate with the weight of an 11-month-old child.

In August 2020, the Disability Retirement Pension Review Board re-evaluated the Personnel Officer's denial. No new records were provided to the review board. It unanimously voted again to recommend upholding the Personnel Officer's decision, explaining that there was "overwhelming weight of the evidence" regarding Pendorf's ability to perform physical activity consistent with his duties as a firefighter.

Appeal to Board of Appeals

Pendorf appealed to the Board the Personnel Officer's denial of his claim for service-connected disability retirement. A two-day de novo hearing commenced on August 17, 2021.

On the first day, Pendorf called three witnesses: himself, his wife, Holly Pendorf, and his expert, Dr. Kenneth Lippman. Pendorf then rested his case. The County called its expert, Dr. Barry, whose testimony was completed the same day. All Board members were present on the first day of the hearing.

On the second day of the hearing, the County completed its case by calling Wyngarden and Pendorf. The Board then heard closing arguments. All Board members except one were present on the second day of the hearing.

The investigator who prepared the surveillance reports and videos was not present to testify. The parties stipulated to the admission of the investigator's reports, but as explained later, the admission of video evidence was contested.

Pendorf's Testimony

Pendorf testified about his injury, treatments, and evaluations recounted above. He explained that he had no back issues or injuries before August 19, 2015. But now he could not lift anything over 50 pounds, although he could manage 52 or 55 pounds, but not repeatedly. He also had trouble caring for his two-and-a-half-year-old child, particularly when lifting her from the crib. Moreover, he cannot perform essential job tasks as a

firefighter, such as wearing 50 to 70 pounds of protective gear and conducting rescue dragging or carrying adult victims who could weigh over 200 pounds.

Pendorf addressed the Facebook photographs showing him participating in various activities. His wife owns a hydroponic farm that cultivates lettuce and microgreens for sale to restaurants. The farm also raises chickens and emus and sells their eggs. Pendorf confirmed that he serves as the chief operating officer of the farm and contributes to farm tasks as much as he is able. His responsibilities primarily involve handling materials, using a tractor to move things, and feeding the livestock without requiring lifting more than 40 or 50 pounds of feed. While he sometimes plants lettuce, he has hired others to do it because he cannot. Pendorf helped manage the construction of the greenhouse, which was built by others. He confirmed that the photographs on Facebook depict him engaging in various activities, such as holding a power tool to help construct a structure.

Pendorf testified that his life has been substantially affected since his surgery in 2018. He can walk unassisted but struggles with most lifting activities. Although his range of motion is decent, he can no longer reach his ankles or touch his toes. He can dress himself but struggles with putting on socks, so he mostly wears flip-flops. He cannot lift significant weight and feels "like crap" after holding his child for a short time. He cannot play with his child on the floor or change a diaper on his hands and knees.

Holly Pendorf's Testimony

Holly Pendorf testified about the Facebook photographs that were taken in 2016 before Pendorf had surgery in 2018. She confirmed that a picture depicted Pendorf with a

power tool on his hip and using two hands to hold a structure. But the structure had "no weight" because it was already braced by people putting it together. She testified that Pendorf would go to Home Depot "a handful of times a week" and was able to bring items back to construct things on the farm, but a farm employee would do all the heavy lifting that Pendorf could not do.

Dr. Lippman's Testimony

On August 12, 2021, a few days before the Board hearing, Pendorf underwent an evaluation with Dr. Lippman, a physician Pendorf chose. After reviewing various records and performing a physical exam, Dr. Lippman concluded that Pendorf could not return to work as a firefighter/paramedic. He considered Pendorf's condition a total permanent disability that was attributable to the injury sustained on August 19, 2015. Dr. Lippman noted that the surveillance videos were unavailable to him.

Dr. Lippman testified without objection and was admitted as an expert in orthopedics. Relying on the 2019 functional capacity evaluation, Dr. Lippman testified that Pendorf can work at a "medium" physical demand level, which means he can lift 50 pounds. Regarding his range of motion, Pendorf could bend over, but only about two-thirds of the way someone his age would be expected to, and not as well as he used to. Dr. Lippman opined that Pendorf could not perform the tasks of a firefighter, which requires working at a "very heavy" physical demand level of lifting over 100 pounds, among other tasks. Although Pendorf was not totally disabled, he was totally disabled from being a firefighter.

Dr. Lippman did not have much of an understanding of Pendorf's work on the farm but was not surprised to learn that he could carry a drill on his belt or hold a board in position. These tasks align with the 2019 functional capacity evaluation findings, which concluded that he could work at a "medium" physical demand level. Dr. Lippman was unaware of any farm activities that mimic being a firefighter.

Dr. Lippman disagreed with Dr. Barry's opinion that Pendorf's injury preexisted the August 19, 2015, incident. According to Dr. Lippman, there was no evidence in the record to suggest this and no evidence that any significant degeneration elsewhere in the back would account for his condition. Dr. Lippman also disagreed with Dr. Barry's opinion that Pendorf could return to being a firefighter, as the medical records did not support Dr. Barry's opinion.

Dr. Barry's Testimony

The County began its case by calling Dr. Barry, who was admitted as an expert in orthopedic surgery. Dr. Barry opined that Pendorf's injury was more consistent with early degenerative changes of the L5-S1 disc rather than an acute disc herniation.

Dr. Barry testified that he reviewed the surveillance videos for his evaluation. He stated that the videos "really didn't show really strenuous activity" but "did show more activity than I would have expected to see." For example, Pendorf was "lifting . . . four by eight sheets of particle board and plywood. I think anyone who has done that kind of work knows how heavy those are"–about 50 pounds apiece.

Dr. Barry disagreed with Dr. Lippman's opinion and, by extension, his reliance on the 2019 functional capacity evaluation. Dr. Barry explained that the functional capacity evaluation is "not an objective test, it's a voluntary test[,]" meaning the subject does "as much as either you can or you want to do[.]" He opined that Pendorf was probably capable of lifting about 100 pounds based on his examination and review of his records but was unsure if he could lift 200 pounds.

Board Member's Absence on the Second Day of the Hearing & Surveillance Video

At the end of the first day, the Chair asked the County how many more witnesses it had. The County proffered that Wyngarden would testify and then introduce video surveillance that "coincides" with the investigator's reports that were admitted into evidence by the parties' stipulation.[4] The Chair indicated that "if we're going to view a video, it's got to be done in here with everybody viewing it at the same time we're viewing it. . . . so everybody is seeing the same thing." Accordingly, the Chair scheduled the second day of the hearing for September 7, 2021, to complete the County's case, including viewing the video.

At the start of the second day of the hearing on September 7, the Chair informed counsel that board member Maria Patterson would not be present to hear the case because of a work conflict. The Chair stated, however, that Ms. Patterson would "listen to the recordings of what she misses[,] and she will remain a voting member on the case."

[4] The record does not clearly indicate whether the County sought to introduce one or more videos. For purposes of this opinion, we refer to the video(s) sought to be introduced in the singular.

The County expressed concern that Ms. Patterson's absence meant she could not watch the video. The discussion then focused on whether the County could authenticate the video and, if so, whether Ms. Patterson could remain a voting member in the case without watching the video and instead rely on the information in the investigator's reports. The following discussion ensued:

> [COUNTY]: My only concern is that we're showing a video tonight that [Ms. Patterson] wouldn't be here for that would not appear on the transcripts. We're happy to provide everyone with a copy of the email. There's just little links that you touch and–
>
> [CHAIR]: Well, at this point I think we made a determination at the last meeting that everybody had to, that was going to see the video had to watch it at the same time to make sure we're all looking at the same thing. And I assume you got somebody to authenticate the video, is that correct?
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> [COUNTY]: (Indiscernible) I have records that—
>
> [CHAIR]: Fine.
>
> [COUNTY]:—corroborate it.
>
> [CHAIR]: Well, anyway, there's enough, as I look through the County's Exhibit No. 1, you have the surveillance report—
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> [COUNTY]: Right.
>
> [CHAIR]:—is pretty detailed, so she has that in front of her. And then there are many photos in here that I'm assuming some of them are chopped from the video?
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> [COUNTY]: No.
>
> [CHAIR]: Well—
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> [COUNTY]: [T]hey are on Facebook—

> [CHAIR]:—she's just going to have to not see the video and make her decision based on not seeing the video and deal with the, as I say, reviewing your surveillance reports. But we're going to allow her to stay on. Is there an objection from you as well?
>
> [PENDORF'S COUNSEL]: No objection.
>
> [COUNTY]: We would object for the record. We would ask that anyone that's going to provide an opinion on this case to see all of the evidence, including the evidence that we have brought here today. We have another mechanism to provide that. It's provided by email. And for those reasons, it's very prejudicial to my client not to have a Board member making a decision on the case see some of the critical evidence.

Pendorf's counsel interjected, explaining that it was premature to discuss Ms. Patterson's ability to view the video because its authenticity was in question, and it might not even be admitted as evidence. If the County could not authenticate the video, then Ms. Patterson's absence would not be a concern because there would be no video to watch.

The Chair then asked the County if it had "a witness to lay the foundation, who took the video and can authenticate it[.]" The County responded that the investigator's reports, which were already admitted, "corroborate the times of the video itself."

> [CHAIR]: Okay. And that's different from what Ms. Patterson would see or not see?
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> [COUNTY]: No, but it's just the actual video itself is much different than the report.
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> [CHAIR]: So then the report might not be as accurate as the video, is that what you are telling me?
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> [COUNTY]: No. But pictures and videos by their very nature are more influential than the words on the paper.
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> [CHAIR]: He doesn't have a witness to lay a foundation.

Pendorf's counsel objected to the admission of the video because the person who recorded it was not present to verify its authenticity. He argued that the person who recorded the video could confirm whether the information in the reports matched what was shown in the video and whether the person in the video was Pendorf. Counsel acknowledged the stipulation to the admission of the investigator's reports but insisted that the reports could not be used to authenticate the video. The only way to authenticate the video was to have the person who recorded it testify. Counsel also pointed out that without the person who recorded the video, he would be unable to cross-examine anyone about the distance from which the video was taken or how long the person had observed Pendorf.[5]

The County responded that because hearsay is admissible in administrative hearings, the Board could rely on the reports to authenticate the video. Additionally, the County could call Pendorf as a witness in the County's case and attempt to authenticate the video through Pendorf. For instance, Pendorf could testify based on personal knowledge whether the truck depicted in the video was his, whether he was driving a tractor, and whether the video depicts him lifting plywood at Home Depot. The County explained that if Pendorf wished to challenge the video's authenticity, he could do so himself in rebuttal.

After taking a recess, the Board sustained Pendorf's objection to the admission of the video. The Chair explained:

> [CHAIR]: After a lengthy discussion, I have decided that we're not going to allow the video in. There is nobody here to authenticate it. There is nobody here for [Pendorf's counsel] to cross-examine about it[.] And I understand

[5] Interestingly, Pendorf did not raise a concern about his inability to cross-examine the investigator in relation to the admitted reports that described Pendorf and his activities.

> we do allow certain hearsay, but I feel this is too, this damages [Pendorf's] case if I allow [the County] to put a video that [Pendorf's counsel] cannot cross-examine and [Pendorf] cannot verify that that's even him in the video.

Since the County was presenting its case-in-chief, it asked the Board for an opportunity to call Pendforf to authenticate the video "because he's in the video." Pendorf's counsel objected, stating that Pendorf "can't authenticate the video. He's not the taker of it" and could not confirm if he was in it. The Chair agreed and rejected the County's claim that Pendorf might be able to authenticate the video based on personal knowledge:

> [CHAIR]: I'm still going to have a problem with authentication. And the fact that there's no possibility to cross-examine . . . whatever you want to show us. If there is somebody here to authenticate it, they could cross-examine that person. The person who wrote the report, I assume would be the same as showing the video.
>
> * * *
>
> [COUNTY]: But [Pendorf] could say that he is in the video. He's inside the video. He's acting in the video. So when the question is provided, he could authenticate the video and he's in there so he can tell you—
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> [CHAIR]: Well, he can say that he's in it, but he didn't take the video . . . accurately depicts everything that's on that screen.
>
> [COUNTY]: He could say that.
>
> [CHAIR]: He can't, and he can't even say some things were cut out.
>
> [COUNTY]: He could say—
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> [CHAIR]: How does he know some of the video wasn't deleted?
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> [COUNTY]: Well, that would be his testimony. We would have to hear that—
>
> * * *

> [CHAIR]: I'm going to stick with the ruling. We're not going to allow the video in. I'll note all your objections for the record. So that video is not coming in. Ms. Patterson will remain on the case.

The County made a final attempt to persuade the Board that the video could be authenticated with corroborating information from the investigation reports already in evidence. But the Chair rejected the argument, stating that the video may not necessarily depict what is described in the investigation reports:

> [CHAIR]:—you've got, you cited some video but just because the report is in evidence doesn't mean that that's the video we're going to see. So—
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> * * *
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> [COUNTY]: So if [the Board] saw a stamp and a time in the video, it would be corroborated by the evidence of the reports.
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> [CHAIR]: Well, we're not going to see the video. I've made my decision on the video. And this obviously is in the record. The report is in the record.

Wyngarden's Testimony

The County went on to call Wyngarden, who testified about her investigation of Pendorf's claim and her recommendation to the Personnel Officer to deny the claim, as recounted above. She also testified that she did not have Dr. Lippman's report when the claim was denied.

Pendorf's Testimony (County's Case)

The County concluded its case by calling Pendorf. In pertinent part, Pendorf explained that the Facebook photograph showing him building the greenhouse was taken after he went back on full duty in 2016 and before the 2018 surgery.

Closing Arguments

The County argued that Pendorf failed to meet his burden of proof that he was permanently and totally disabled under § 5-4-206. It argued the Board should rely on Dr. Barry's opinion and weigh heavily the evidence generated from Wyngarden's investigation and the recommendation of the Disability Pension Review Board to deny the claim.

The County also argued that the Board should give Dr. Lippman's opinion little to no weight because his opinion "wasn't part of the equation" when the Personnel Officer denied Pendorf's claim. It would set a "bad precedent" for the Board to consider this new evidence, as the decision by the Personnel Officer (and the recommendation of the Disability Pension Review Board) was based on the examination completed by the physician selected by the Personnel Officer (Dr. Barry) under § 5-4-206.

Pendorf's counsel disagreed with the County's view about Dr. Lippman's opinion. The Board hearing is a de novo review of the Personnel Officer's decision, which means the Board can consider any evidence before it and weigh the evidence however it likes. He argued, "[T]he law does not tell [the Board that it] must follow the County doctor [Dr. Barry]. To do otherwise . . . would be . . . an abuse of due process."

Board's Decision

On January 27, 2022, the Board voted 4-2 to grant Pendorf service-related disability retirement. Ms. Patterson joined in the majority opinion in concluding that Pendorf proved he suffered an injury arising out of or occurring in the course of employment, and, with respect to being a firefighter/paramedic, Pendorf's disability is permanent and total. The

majority found Dr. Lippman's testimony more compelling than Dr. Barry's. It did not consider the surveillance video, stating that the "videos were available to Dr. Barry, but were not available to Dr. Lippman or this Board. Their content, therefore, is not relevant in this hearing."

In a dissenting opinion, the minority found that although the Board did not view the surveillance video, Wyngarden testified credibly that the video showed Pendorf was "fully capable." It noted that, in August 2019, Pendorf claimed to be unable to sit without pain for more than ten minutes. But the investigator's reports revealed that Pendorf "traveled by car to Pennsylvania for 1½ hours, loaded materials into the vehicle, then immediately returned and unloaded with relative ease—a three hour seated experience with lifting." Additionally, the Facebook photographs contradicted Pendorf's claim that he could not bend; the "photos show the full range of [Pendorf's] motion, including sitting and squatting."

The minority relied on Dr. Barry's examination over Dr. Lippman's because it was based on more objective findings; Dr. Lippman's examination was based on Pendorf's reported condition rather than on objective findings. Even assuming that Pendorf was disabled to serve as a firefighter, the minority found that his disability did not result from an injury arising out of or occurring in the course of his employment.

Petition for Judicial Review

The County petitioned for judicial review in the circuit court. After hearing arguments, the court found that the Board erred when, in evaluating § 5-4-206, it

considered Dr. Lippman's testimony as "new evidence" on the issue of total and permanent disability rather than as evidence to impeach Dr. Barry, the physician selected by the Personnel Officer.

The court concluded that the Board abused its discretion in excluding the surveillance video because there are various ways a video can be authenticated, including by the subject himself.

The court also found it problematic that Ms. Patterson was absent during the second day of the hearing when the County presented most of its evidence and arguments. It concluded that the Board erred by allowing Ms. Patterson to remain a voting member in the case without "some averment" that she had listened to an audio-recording of the evidentiary portion of the hearing and closing arguments.

Accordingly, the court reversed, vacated, and remanded the case for a de novo hearing with three "provisos." The provisos required the Board, on remand, to:

1. allow the County to lay a foundation for the surveillance video and admit the video if the Board determines that a foundation has been established, whether by the person who took the video or by another person who can testify that it fairly and accurately represents the activities depicted, including Pendorf himself;

2. consider Dr. Lippman's testimony in accordance with § 5-4-206. This means that rather than viewing his testimony as "foundational evidence" of Pendorf's total and permanent disability, it should be considered as impeachment of the opinion given by the physician selected by the Personnel Officer (Dr. Barry); and

3. require all deciding Board members to be present for the presentation of evidence. If they cannot attend, they must provide "a robust and unambiguous averment" that they have listened to all the evidence and closing argument, preferably in the form of an audio or a video recording. But this should be a last

resort—the hearing date(s) should be scheduled to allow all decision-makers to be present for the entire presentation of evidence.

Pendorf noted a timely appeal. Additional facts will be supplied as they become relevant in the discussion.

ISSUES PRESENTED

On appeal, Pendorf presents the following four questions, which we have reordered and rephrased:[6]

I. Did the Board err in weighing Dr. Lippman's opinion over that of the physician the Personnel Officer selected (Dr. Barry) when it determined that Pendorf was totally and permanently disabled under Code § 5-4-206?

II. Did the Board abuse its discretion by excluding the surveillance video?

III. Did the Board err by permitting a Board member (Ms. Patterson), absent on the last day of the hearing, to participate in the decision?

IV. Was the Board's decision supported by substantial evidence?

[6] Pendorf phrases the questions presented in his brief as follows:

1. Did the Board of Appeals properly interpret Section 5-4-206 of the Anne Arundel County code in considering the opinion of Mr. Pendorf's medical expert in reaching their decision?

2. Was the Board's decision awarding the Appellant a service-connected disability supported by substantial evidence?

3. Did the Board abuse its discretion by refusing to admit the County's video evidence within its sound discretion when the County offered no authentication witness of its own?

4. Did the Board violate due process by permitting a Board member who was not present on both days of the hearing to participate in the decision?

As we explain below, we answer the second question in the affirmative. We hold that the Board abused its discretion in excluding the surveillance video for the reasons that the Board stated on the record. Therefore, we remand the case to the Board for a de novo review. To provide guidance on remand, we will address the first and third questions and answer them in the negative. Since we are remanding the case for a de novo hearing, we need not address the final question about whether the Board's decision is supported by substantial evidence.

STANDARD OF REVIEW

When an appellate court reviews the final decision of an administrative agency such as a county Board of Appeals, the court looks through the circuit court's decision, although applying the same standards of review, and evaluates the agency's decision. *People's Couns. for Balt. Cnty. v. Surina*, 400 Md. 662, 681 (2007). We, therefore, shall focus on the decision of the Board.

Appellate review of an agency's factual findings is limited to "determin[ing] whether the agency decision is supported by substantial evidence in the record." *P Overlook, LLLP v. Bd. of Cnty. Comm'rs*, 183 Md. App. 233, 247 (2008) (citation omitted). The appellate court "must not itself make independent findings of fact or substitute its judgment for that of the agency." *Maryland-Nat'l Cap. Park and Plan. Comm'n v. Anderson*, 395 Md. 172, 180–81 (2006) (citation omitted). But appellate review is less deferential regarding the agency's legal conclusions. *P Overlook, LLLP*, 183 Md. App. at 248. This Court can reverse the agency's legal decisions where the legal conclusions

reached by that body are based on an erroneous interpretation or application of the applicable county codes, regulations, and the like. *See id.*

DISCUSSION

I.

Dr. Lippman

The County challenges the Board's reliance on the testimony of Dr. Lippman, the physician selected by Pendorf, rather than on Dr. Barry, the physician "selected by the Personnel Officer" under § 5-4-206 ("A participant has a total and permanent disability if the Personnel Officer determines, *on the basis of a medical examination by one or more physicians selected by the Personnel Officer* . . ." (emphasis added)). Based on the language in § 5-4-206, the County argues that the only relevant medical examination regarding total and permanent disability is conducted by the physician(s) selected by the Personnel Officer. Dr. Lippman's testimony was irrelevant because his opinion was provided *after* the Personnel Officer denied the claim.[7] In the alternative, Dr. Lippman's opinion should be used to impeach the opinion of the County's physician rather than received as substantive evidence. Thus, according to the County, the Board applied the

[7] To the extent the County argues that Dr. Lippman's testimony should have been excluded, the argument is not preserved. The County did not object to the admissibility of Dr. Lippman's testimony when he testified at the Board hearing. *See Halici v. City of Gaithersburg*, 180 Md. App. 238, 249 (2008) ("[a] party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceedings, may not thereafter complain about the error at a judicial proceeding." (internal quotations omitted)).

wrong legal standard when it relied on Dr. Lippman's testimony in granting Pendorf's disability claim.

As we understand, the County essentially interprets § 5-4-206 to mean that the Board must defer or give presumptive effect to the opinion of Dr. Barry, the physician selected by the Personnel Officer, and by extension to the final decision made by the Personnel Officer (and the recommendation of the Disability Retirement Pension Review Board). But this interpretation conflicts with the Charter and Code provisions.

The clause in § 5-4-206—"on the basis of a medical examination by one or more physicians selected by the Personnel Officer"—specifies that the Personnel Officer must base their determination of a participant's total and permanent disability on a medical examination of a physician they select. The decision by the Personnel Officer is a prerequisite to proceeding before the Board, but it does not mean that the Board must defer to the Personnel Officer's decision or the medical opinion it is based on. *See Halle Companies v. Crofton Civic Ass'n*, 339 Md. 131, 143 (1995) (a Board of Appeals hearing "is appellate review mainly in the sense that a decision by the administrative hearing officer is a prerequisite to proceedings before the Board and not in the sense that the Board is restricted to the record made before the administrative hearing officer.").

Significantly, the Charter does not limit how the Board must decide the issues. It states that it must be decided de novo. In *Boehm v. Anne Arundel County*, 54 Md. App. 497 (1983), we explained that "unless otherwise limited by statute or court rule, a *de novo* hearing is an entirely new hearing at which time all aspects of the case should be heard

anew as if no decision had been previously rendered." *Id*. at 511. This means that "new and additional evidence is permitted." *Halle Companies*, 339 Md. at 142. Thus, the Board may consider Dr. Barry's opinion in any light it desires and is not bound by his opinion (or the Personnel Officer's decision) in its de novo review. *See Boehm*, 54 Md. App. at 511.

Hill v. Baltimore County, 86 Md. App. 642 (1991), is instructive. There, Hill suffered an injury while working at the Baltimore County Department of Recreation. *Id*. at 646–47. He applied for disability retirement through the county's retirement and pension system. *Id*. at 647. During the administrative investigation, the county's Board of Trustees referred the case to the county Medical Board, per the county code, to determine whether Hill's injury was severe enough to warrant retirement. *Id*. According to the Baltimore County Code, the Medical Board determines whether an applicant is disabled, while the Board of Trustees decides whether the disability is work-related. *Id*. at 648. The Medical Board concluded that Hill was not totally disabled, and the trustees determined he was not entitled to disability retirement benefits. *Id*. at 647. Hill appealed to the Baltimore County Board of Appeals, which affirmed the earlier decision. *Id*. The circuit court also affirmed the decision. *Id*.

On appeal, Hill claimed that the Board of Appeals usurped the function of the Medical Board when it decided the issue of disability instead of limiting itself to the nature, ordinary or accidental, of his disability. *Id*. at 650. The Court outlined the two-step administrative process to secure disability-based retirement under the Baltimore County Charter and Code. *See id.* at 651. The Medical Board and Board of Trustees function in the

first step of the administrative process—the investigative stage—while the Board of Appeals deals with the second step—the appellate procedure. *Id*. The Court explained that the two phases are distinct, with the appellate phase requiring due process that is not part of the investigatory stage. *Id*.

The Court referred to the language of the Baltimore County Charter, which, like Anne Arundel County Charter, provides for a de novo hearing and the ability to decide all the issues before the Board of Appeals. *Id*. at 651 (citing § 603 of the Baltimore County Charter, which mandates that the decision of the Board of Appeals can be made only after "notice and opportunity for a de novo hearing"). It explained that the Charter does not limit how the Board of Appeals may decide the issues. *Id*. Thus, the Board of Appeals could fully decide the case and even reverse without remanding the case to the Medical Board. *Id*.

The Court explained that when confronted with two proposed interpretations—one rendering legislation valid and the other invalid—courts generally attempt to read the enactment in a manner that renders it valid. *Id*. at 651–52 (citation omitted). It rejected Hill's interpretation that the Board had to yield to the Medical Board's and Board of Trustee's decisions. *See id.* at 652. It explained:

> To interpret the provisions of the Code and Charter to mean that the Board of Appeals could not decide all the issues would render these provisions violative of due process. The Board of Appeals is the first administrative level at which appellant receives full notice and an opportunity to be heard. If the Board of Appeals was required to remand as [Hill] asserts the [caselaw] and the Code require, the Medical Board and the Board of Trustees would be the ultimate or dispositive decision maker. Because an applicant does not have the opportunity to participate at these levels, due process would be

> violated. We conclude that the Board of Appeals may decide all the issues before it[.]

Id.

As in Baltimore County, the Anne Arundel Charter and Code establish a two-step administrative process outlined above. Although the mechanics of the investigative processes in the two jurisdictions differ, the reasoning behind the Board's de novo review without deference to the record or decision-making at the investigative stage applies equally here. To interpret § 5-4-206 as requiring the Board to defer to the opinion of the physician selected by the Personnel Officer (Dr. Barry), and consequently the Personnel Officer's decision (or even the recommendation by the Disability Pension Review Board), would essentially make the Personnel Officer the ultimate decision maker. Because the applicant does not have the opportunity to participate in the investigatory phase when the Personnel Officer decides the applicant's total and permanent disability, due process would be violated. *See id*.

For the reasons stated, the Board can give whatever weight it desires to the evidence presented and is not required to defer to the opinion of the physician selected by the Personnel Officer in its de novo review.

II.

Surveillance Video

The County argues that the Board's decision to exclude the surveillance video was arbitrary, capricious, and highly prejudicial because the Chair wrongly believed that the taker of the video was a necessary witness. According to the County, the Chair excluded

the video partly because of Ms. Patterson's absence and inability to view the video with the Board. Pendorf responds that the Chair did not abuse his discretion by excluding the video.

Evidentiary rulings are entrusted to the sound discretion of the administrative agency. *See Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 386 n.17 (2013). "We do not disturb such rulings absent an abuse of [the agency's] discretion." *Solomon v. State Bd. of Physician Quality Assurance*, 155 Md. App. 687, 705 (2003) (citing *Md. State Police v. Zeigler,* 330 Md. 540, 557 (1993) (stating that "as long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts")). "It is only when an agency's exercise of discretion, in an adjudicatory proceeding, is 'arbitrary' or 'capricious' that courts are authorized to intervene." *Zeigler*, 330 Md. at 558.

Unlike courts, "administrative agencies generally are not bound by the technical common law rules of evidence[.]" *Dep't of Pub. Safety and Corr. Servs. v. Cole*, 342 Md. 12, 31 (1996). They are not prevented from observing such rules "as long as the evidentiary rules are not applied in an arbitrary or oppressive manner that deprives a party of his right to a fair hearing." *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 422 (1981). The Supreme Court of Maryland "mandate[s] only that administrative agencies observe the basic rules of fairness as to parties appearing before them . . . and that they admit evidence

that has sufficient reliability and probative value to satisfy procedural due process." *Cole*, 342 Md. at 32 (citations omitted).

Rule 4-104 of the Anne Arundel County Code governs the admission of evidence in a contested case before the Board:

> (a) **Generally.** The Chair may admit evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. The Chair shall give effect to the rules of privilege recognized by law. The Chair may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

"[W]hether in judicial or administrative proceedings, the evidence presented must be considered, 'competent.'" *Travers v. Balt. Police Dep't*, 115 Md. App. 395, 412 (1997) (citation omitted). "[T]he principal factors considered in the competency analysis" are "the evidence's probative value, reliability, and fairness of its utilization[.]" *Id*. at 413.

It is improper for an agency to consider the challenged evidence without first carefully considering its reliability and probative value. *See id.* Although the Board did not appear to consider the probative value of the video, there does not seem to be a dispute that the video had probative value; the video bears on Pendorf's credibility and the nature and extent of his alleged disability. *See Smith v. State*, 423 Md. 573, 590 (2011) (probative value is "the tendency of evidence to establish the proposition that it is offered to prove") (citation omitted). Instead, the dispute was about the reliability of the video.

The process of authentication refers to "laying a foundation" to admit "nontestimonial evidence [such] as documents and objects" sufficient to establish "a connection between the evidence offered and the relevant facts of the case." *Jackson v.*

State, 460 Md. 107, 115–16, 18 (2018) (citation omitted). The standard for admissibility is low. *Reyes v. State*, 257 Md. App. 596, 630 (2023). The court "need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Jackson*, 460 Md. at 116 (citation omitted).

A "videotape is considered a photograph for admissibility purposes[,]" and both videotapes and photographs are "subject to the same general rules of admissibility[.]" *Washington v. State*, 406 Md. 642, 651 (2008). As such, all photographic evidence, including video evidence, may be authenticated under several theories, including the "pictorial testimony" theory and the "silent witness" theory. *Reyes*, 257 Md. App. at 630 (citing *Washington*, 406 Md. at 652; Md. Rule 5-901(b)(4) & (9) (setting forth examples of permitted authentication methods, including, respectively, "[c]ircumstantial evidence . . . that the offered evidence is what it is claimed to be" and "[e]vidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result")).

"Authentication of a photograph does not require testimony of the person who took the photograph." *Washington*, 406 Md. at 653; *see Sisk v. State*, 236 Md. 589, 596 (1964) ("The testimonial sponsor of a photographic exhibit need not be its maker."). "[T]he pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge[.]" *Prince v. State*, 255 Md. App. 640, 652 (2022) (citation omitted); *see State v. Broberg*, 342 Md. 544, 553 n.5 (1996) (stating that "[t]he photographer need not testify provided that someone

with personal knowledge verifies that the photograph accurately portrays it[s] subject"). Under the "silent witness" theory, a party can authenticate video evidence through "presentation of evidence describing a process or system that produces an accurate result." *Washington*, 406 Md. at 652. This method of authenticating pictorial evidence does not require first-hand knowledge. *Id*. There is no rigid or fixed foundational requirement for the admission of evidence under the silent witness theory of authentication. *Cole*, 342 Md. at 26. "[A] foundation is adequate, at least for an administrative hearing, if there are sufficient indicia of reliability so that the trier of fact can 'reasonably infer that the subject matter is what its proponent claims.'" *Id*. at 26–27 (citation omitted).

We hold that the Board abused its discretion in excluding the video for the reasons that the Board stated on the record. *First*, it erroneously concluded that the only way to authenticate the video was by having the person who took it testify. It assumed that Pendorf could not authenticate the video himself and foreclosed the County's attempt to authenticate the video through Pendorf since he did not record it. Pendorf claims that while he might be able to identify himself in the video and determine where the video was taken, he cannot guarantee the accuracy of the process that produced the video. Under the pictorial testimony theory, however:

> The witness who lays the authentication foundation need not be the photographer, *nor need the witness know anything of the time, conditions, or mechanisms of the taking of the picture*. Instead, the witness need only have personal knowledge of the facts represented or the scene or objects photographed.

2 Kenneth S. Broun, *et al.*, *McCormick on Evidence* § 215, at 30 (8th ed. 2020) (footnotes omitted) (emphasis added); *see also Pearson v. State*, 182 Md. 1, 8 (1943) ("[I]t is well settled that while the photographer is, of course, a proper person to identify or authenticate a photograph, it is not essential that the foundation be laid by him, but it is permissible for any one with knowledge of the facts to testify to its correctness as a representation or likeness.").

If the County had been allowed to question Pendorf about the video, Pendorf might have been able to confirm his identity in it and verify that the locations and activities depicted were accurate. This could have provided the foundation to authenticate the video under the pictorial witness theory or, at the very least, in the context of an administrative proceeding, could have provided the indicia of reliability sufficient for the Board to reasonably infer that the subject matter in the video was what the County claimed. *See Cole*, 342 Md. at 26–27.

Second, the Board abused its discretion in failing to assess whether the investigator's reports provided sufficient indicia of reliability. The County had proffered to the Board that the video "coincides" with the admitted reports prepared by the investigator and that the reports "corroborate the times of the video itself." It was suggested that the time stamps on the video match the dates and times in the reports, which detailed when the investigator observed Pendorf. Rather than evaluating the claim, the Board summarily concluded that the information in the reports might not align with the content of the video and that it was "not going to see the video."

Finally, the Board erred in concluding that cross-examination of the person who took the video was the only way to satisfy the basic rules of fairness. It is true that a basic tenet of fairness in administrative adjudications is the requirement of an opportunity for reasonable cross-examination. *See Travers*, 115 Md. App. at 416–17 (discussing hearsay evidence) (citing *Am. Radio Tel. Serv., Inc. v. Pub. Serv. Comm'n*, 33 Md. App. 423, 434 (1976) (error to admit two affidavits because affiants were not available for cross-examination)); *Tron v. Prince George's Cnty.*, 69 Md. App. 256, 268 (1986) (claimant was entitled to a reasonable opportunity to cross-examine physicians upon whose reports denial of disability retirement was based). But the basic rules of fairness are governed not by form but by substance. *Dal Maso v. Bd. of Cnty. Comm'rs of Prince George's Cnty*., 238 Md. 333, 337 (1965).

"When the party appearing before the board has the opportunity, however informally granted, to examine and challenge the [evidence] in question before the board reaches its conclusion, the requisite of procedural fairness has been met." *Id*. It follows that fairness can be accomplished through an opportunity to cross-examine and the presentation of rebuttal, additional evidence, and further arguments. *See, e.g.*, *Zeigler*, 330 Md. at 560 (holding that board fully complied with due process requirements when, after direct testimony of a witness at the reopened hearing, parties "were given an opportunity to cross-examine the witness[,] . . . *present rebuttal evidence, . . . [and] were allowed additional closing arguments*" (emphasis added)); *Schultz v. Pritts*, 291 Md. 1, 7 (1981) ("When an administrative agency relies upon evidence submitted after the close of a hearing, due

process may be violated if no opportunity is provided to challenge the evidence by cross-examination *or rebuttal*" (emphasis added)); *Rogers v. Radio Shack*, 271 Md. 126, 129 (1974) ("with no opportunity for cross-examination *or rebuttal*, fundamental fairness would preclude reliance upon the [subsequently received] report by an administrative agency" (emphasis added)); *Temmink v. Bd. of Zoning Appeals*, 205 Md. 489, 497 (1954) (where a party had no opportunity to challenge evidence relied upon by the agency, the case would be remanded to the agency for a further hearing at which "the parties *may produce any further evidence* and have the right of cross-examination" (emphasis added)).

Had the Board admitted the video, it could have ensured fairness by allowing Pendorf to testify in rebuttal and challenge the content in the video, for instance, by explaining that the activities depicted in the video were not as the County claimed.

For the reasons stated, the Board abused its discretion in excluding the surveillance video for the reasons that the Board stated on the record. *See Maddox v. Stone*, 174 Md. App. 489, 502 (2007) (a court must exercise discretion and not "simply apply some predetermined position"); *Gunning v. State*, 347 Md. 332, 351 (1997) (holding that a court's "unyielding adherence" to a "predetermined position amounts to a misunderstanding of the law and a failure to properly exercise discretion"). Our holding should not be construed as an order to admit the surveillance video on remand. We leave it to the Board to determine the admissibility of the video using the correct standard based on any new foundation that may be established on remand.

III.

Absent Board Member

The County contends that the Board should have excluded Ms. Patterson from deciding the case because of her absence on the second day of the hearing and because there was no affirmation that she had listened to the stenographer's recording for the day she missed.

Preliminarily, the point is not preserved. "Generally, objections that have not been raised in proceedings before an agency will not be considered by a court reviewing an agency order." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 637 (1997). The County objected to Ms. Patterson's absence because she could not view the surveillance video if it were admitted into evidence. Once the video was excluded, the County did not object to Ms. Patterson remaining as a voting member on the case. Nor did the County argue before the Board that the absent member had to affirm or certify that she had listened to the stenographer's recording for the day she missed. *See Cap. Com. Props., Inc. v. Montgomery Cnty. Plan. Bd.*, 158 Md. App. 88, 102 (2004) (because the appellant did not present to the administrative agency the argument it raised before this Court, the issue was not preserved); *Templeton v. Cnty. Council of Prince George's Cnty.*, 21 Md. App. 636, 645 (1974) (because the appellant did not present a question before a hearing examiner or District Council, the question was "not properly before this Court").

Even if preserved, the County's argument fails. Rule 1-103(d) of the Anne Arundel County Code allows the Chair of the hearing to permit a board member to listen to

recordings for a missed hearing and still participate in the decision of the Board unless the member misses the first hearing on any appeal:

> Only those members who have actually heard all the evidence and testimony in an appeal shall participate in the decision unless all parties to the appeal shall agree otherwise, *except that the Chair of the hearing shall have the ability to permit a member to listen to the official stenographer's recording for any missed hearing or any missed portion of a hearing, as applicable, and participate in the decision.* In no event shall a member be permitted to participate in a decision if that member misses the first hearing on any appeal.

(Emphasis added). The rule does not require an absent Board member to affirm that she listened to the recordings, nor will we read such a requirement into it. *See Harford Cnty. People's Couns. v. Bel Air Realty Assocs. Ltd.*, 148 Md. App. 244, 266 (2002) ("when the language of the statute is clear, a tribunal, in this case the Board, may neither add nor delete language, so as to reflect an intent not evidenced in that language." (internal quotations omitted)).

Furthermore, "[t]here is a strong presumption that public officers properly perform their duties." *Lerch v. Md. Port Auth.*, 240 Md. 438, 457 (1965). *In re Bennett*, 301 Md. 517, 526 (1984), is instructive in its application of that presumption. In that case, the Judicial Disabilities Commission investigated a judge for misconduct. *Id*. at 525–26. In accordance with the applicable rule, the Commission made a preliminary investigation to determine whether formal proceedings should be instituted and held a hearing. *Id*. 526. Ultimately, the Commission gave the accused judge formal notice that it had made and completed a preliminary investigation and had instituted formal proceedings to inquire into the matters relating to the judge's alleged misconduct. *Id*.

The accused judge complained that the decision required a majority of the members of the Commission to be present at the hearing and believed that the record should have reflected that the Commission met and formally approved the charges against him. *Id*. The Supreme Court of Maryland explained that the formal complaint issued by the Commission was evidence that it met and formally approved the charges against him, that there is a strong presumption that public officers properly perform their duties, and that "such a presumption is equally applicable to a commission such as this." *Id*. (citing *Lerch*, 240 Md. at 457).

In this case, at the start of the second day, when the Chair informed the parties that Ms. Patterson would be absent, the Chair stated that the Board would "allow her to listen to the recordings of what she misses[.]" The majority opinion by the Board, in which Ms. Patterson joined, notes that "[a]ll testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings." The majority also summarized the evidence adduced at the hearing, including the testimony of Wyngarden and Pendorf taken on the second day of the hearing when Ms. Patterson was absent. Ms. Patterson's signature is on the majority opinion, showing that she considered the testimony presented on the day she was absent. We see no reason why the strong presumption that public officers properly perform their duties should not apply equally to a member serving on the Board. The County has not pointed to any evidence to rebut that presumption.

In sum, we affirm the circuit court's decision to remand the case to the Board of Appeals for a de novo review. But we vacate the court's "provisos" in its order, *supra*.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND VACATED IN PART; CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO REMAND TO THE BOARD OF APPEALS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. PARTIES TO PAY THEIR OWN COSTS.