Circuit Court for Anne Arundel County
Case No.: C-02-CV-22-000867

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1604

September Term, 2022

IN THE MATTER OF NELDA FINK

Leahy,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 10, 2023

* 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).

After being employed by Pevco Systems International, Inc. ("Pevco") for nearly twelve years, Nelda Fink, the appellant, was discharged on May 12, 2021. Ms. Fink's claim for unemployment benefits was contested by Pevco. The Board of Appeals for the Maryland Department of Labor, Licensing, and Regulation (the "Board"), as final decision-maker for the agency, ultimately denied Ms. Fink's claim because the Board concluded that she had been discharged by Pevco "for gross misconduct." Ms. Fink sought judicial review of the Board's ruling in the Circuit Court for Anne Arundel County, which affirmed.

Representing herself, Ms. Fink noted this appeal, and only the Board has filed a brief as appellee in this Court. Ms. Fink argues, *inter alia*, that the Board's decision was not supported by substantial evidence in light of the entire record.[1]

We agree with Ms. Fink that the Board's finding that she was terminated for gross misconduct is not supported by substantial evidence in the record, and we shall reverse the judgment.

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[1] In her brief, Ms. Fink states the question as follows:

> Did the Board abuse [its] authority by using illegal methods to produce the required preponderance of evidence when said evidence was unsupported by competent material or substantial evidence in light of the **entire record**[] including Appellant's evidence? (Did the Board abuse its authority to use inference reasoning as the sole basis of their decision?)

She also asserts that the Board exceeded its authority by the manner in which it interpreted the controlling statutes, and she contends that the circuit court erred in its handling of her case. We need not reach either of those two questions.

STANDARD OF REVIEW

In a case conducting judicial review of a ruling of an administrative agency, we look through the judgment of the circuit court and review only the final decision of the administrative agency. *Dep't of Health and Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001).

Our review of the ruling of the Board is expressly limited by Md. Code (1999, 2016 Repl. Vol.), Labor and Employment Article ("LE") § 8-5A-12(d), which provides:

> (d) *Scope of review*. — In a judicial proceeding under this section, findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if:
>
> (1) findings of fact are supported by evidence that is competent, material, and substantial in view of the entire record; and
>
> (2) there is no fraud.

Consequently, the issue before our Court is whether the Board's decision was legally correct and supported by substantial evidence. *Dep't of Lab., Licensing, and Regul. v. Hider*, 349 Md. 71, 77-78 (1998).

"Substantial evidence" has been "defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Piney Orchard Cmty. Ass'n v. Md. Dep't of Env't*, 231 Md. App. 80, 91-92 (2016) (quotation marks and citations omitted). The task of drawing inferences from the evidence and resolving conflicting evidence is exclusively within the province of the Board. *Prince George's Drs. Hosp., Inc. v. Health Servs. Cost Rev. Comm'n*, 302 Md. 193, 200-02 (1985). In applying the "substantial evidence test," we "review the agency's decision in the light most favorable

to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity." *Brandywine Senior Living at Potomac, LLC v. Paul*, 237 Md. App. 195, 210-11 (2018) (quotation marks and citation omitted).

Although we defer to an agency's factual findings if they are supported by substantial evidence, our review of the Board's decisions on issues of law is somewhat broader. The Supreme Court of Maryland explained in *Department of Human Resources v. Hayward*, 426 Md. 638, 650 (2012):

> We also are mindful that [an appellate court's] review of an agency's decision is narrow. *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 576 (1994). When we interpret a statute that governs an administrative body, "a degree of deference should often be accorded the position of the administrative agency," and the "agency's interpretation and application of the statute which [it] administers should ordinarily be given considerable weight by reviewing courts." *Marzullo v. Kahl*, 366 Md. 158, 172 (2001) (citations omitted). While we are certainly not to "substitute [our] judgment for the expertise of those persons who constitute the administrative agency," it remains our role to determine "if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 576-77.

Accord Couret-Rios v. Fire & Police Emps. Ret. Sys. of the City of Baltimore, 468 Md. 508, 528 (2020), stating:

> "Of course, a reviewing court may always determine whether the administrative agency made an error of law." *Balt. Lutheran High Sch. Ass'n*, [*Inc. v. Emp. Sec. Admin.*, 302 Md. 649, 662 (1985)]; *see also Hubbel v. Bd. of Trs. of Fire & Police Emps.' Ret. Sys. of Balt*., 192 Md. App. 742, 749 (2010) (noting that appellate courts "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 relevant law (quoting *Overlook LLLP v. Bd. of Cty. Comm'rs of Wash. Cty*., 183 Md. App. 233, 247-48 (2008))).

FACTUAL AND PROCEDURAL BACKGROUND

From September 23, 2009, until May 12, 2021, Ms. Fink was employed by Pevco as a "Systems analyst." This was a full-time position, for which she was being paid a salary of $110,200 per year. After she was discharged on May 12, 2021, she applied for unemployment benefits. She was initially paid unemployment benefits, but Pevco contested her eligibility. A *de novo* evidentiary hearing was conducted by a hearing examiner for the Lower Appeals Division via telephone on February 14, 2022. The hearing examiner ruled that Ms. Fink was not entitled to receive unemployment benefits because she had voluntarily quit without good cause.

Ms. Fink then filed a petition for the Board to conduct further review, and the Board agreed to review the record from the Lower Appeals Division *de novo*. In a written decision dated April 29, 2022, the Board indicated that it had "thoroughly reviewed the record from the Lower Appeals Division Telephone Hearing[,]" and that it "f[ound] no reason to order a new hearing, to take additional evidence, to conduct its own hearing or to allow additional argument."

Consequently, the totality of evidence in the record consists of the testimony and exhibits introduced during the hearing in the Lower Appeals Division. During that telephonic hearing, the following evidence was presented by the only two witnesses, Ms. Fink and Melissa Lynch (who was Pevco's Human Resources Manager).

Ms. Lynch testified that she was the person who discharged Ms. Fink for "not being willing to wear a mask while in the office." When asked if Ms. Fink had been told of "the

requirement to wear a mask[,]" Ms. Lynch offered in evidence an e-mail from her to Pevco employees (including Ms. Fink), dated November 18, 2020, in which Ms. Lynch stated:

> We were informed late yesterday that one of our warehouse employees has tested positive for COVID19. . . . [W]e believe that our facility is safe at this time. However, it is with an abundance of caution (as well as due to the recent case spikes) that we are requiring social distancing and mandatory wearing of masks while in the warehouse. Please wear your mask when you cannot social distance (walking around, working close to another individual). It is permissible to pull your mask down when you are **isolated** and seated or standing in one place, but you must remember to put it back on when you move about. **This applies to all Pevco employees and guests who enter the warehouse areas.**
>
> As a reminder, social distancing is also required in the office spaces and masks are to be worn when moving about.

(Emphasis in original.)

The hearing examiner asked a clarifying question:

> Q. Okay. So the person has to wear a mask when they're moving about and when they cannot social distance; is that correct?
>
> A. That's correct.

Ms. Lynch added that "Ms. Fink claims to have had a medical reason for not being able to comply[,]" and that Ms. Fink had told the employer "verbally" on March 1, 2021, that she could not wear a mask. According to Ms. Lynch, the employer responded by having a conversation with Ms. Fink and then sending a follow-up memorandum dated March 2, 2021 (the "March 2 Memorandum"), which stated in pertinent part:

> During our meeting, you indicated you have a serious medical condition preventing you from wearing a face mask. I advised you the Company wished to engage in the interactive process with you to determine whether there was a reasonable accommodation enabling you to perform the essential

> functions of your position. I also told you the Company was prepared to accommodate you and I needed more information from your physician.
>
> I am providing you with copies of the following documents:
>
> - Authorization to Release Medical Information
> - Physician/Health Care Provider Form
> - Your job description
>
> As we discussed during the meeting, please complete the enclosed Authorization to Release Medical Information and take the form to your doctor, along with the Physician/Health Care Provider Form and your job description. Have your doctor review the job description and complete the Physician/Health Care Provider Form. Return the completed form to me as soon as possible. Alternatively, you may provide the necessary medical documentation in the form of a healthcare provider note.
>
> Keep in mind, if you fail to provide medical certification supporting your need for accommodations, you will be expected to wear a face mask covering your nose and mouth in public areas of the workplace. Your failure to do so will subject you to disciplinary action up to and including termination.

(Emphasis in original.)

Ms. Lynch testified that, in response to the communication with Ms. Fink, she received a letter dated March 3, 2021, from Dr. Mary Ann C. Ley, a chiropractor, who stated:

> I am treating Nelda Fink in my office. It is advised, due to her condition, that she refrain from wearing a face covering which will impede her ability to breathe and function optimally, thus, compromising her health progress.
>
> If you have any questions regarding this matter, please do not hesitate to contact me.

Ms. Lynch was not satisfied with the note from Dr. Ley, and Ms. Lynch sent Dr. Ley a letter dated March 17, 2021, stating:

> Pevco is committed to following CDC guidelines to prevent the spread of COVID-19 in our workplace for the safety of our employees and visitors. In follow up to your letter dated 3 March 2021, **please provide additional information regarding requested accommodations for Nelda Fink**. Please keep in mind that our requirements are that employees wear face coverings only in public areas (brief duration when in kitchen/rest room/hallway). Ms. Fink works in a private office where the mask is not required to be worn.
>
> • How long do you expect this accommodation to be necessary?
> • Is there an alternative to the mask that may be used (face shield or different mask type)?
>
> **Your responses will help determine our course of action to provide an alternate accommodation**.

(Emphasis added.)

Dr. Ley responded by letter dated March 30, 2021, which stated:

> In response to your letter requesting additional accommodation information for my patient, Nelda Fink, I am continuing to recommend that she refrain from wearing face coverings indefinitely. There is not sufficient scientific evidence that wearing a face covering will protect the spread of infection especially from a distance as you are suggesting. In fact, there is ample scientific evidence that masks can in fact, contribute to secondary bacterial infections. I would leave the onus up to the individual to report any ill health which may conflict with providing a safe environment for your employees.
>
> Please let me know if you have further questions.

The record discloses no additional communications between Pevco and Dr. Ley. Ms. Lynch testified: "On April 9, 2021, we informed Ms. Fink that she was no longer allowed to enter the building without a face covering." "That was verbal."

The following Monday, April 12, 2021, Ms. Fink sent Ms. Lynch an e-mail stating: "I will be working from home today and will be taking vacation time for the rest of the week." The hearing examiner asked Ms. Lynch if Ms. Fink's statement that she would

work from home and take some vacation time from April 12 to April 16 was "approved," and Ms. Lynch answered "Yes."

Ms. Lynch said she e-mailed Ms. Fink on April 19 to see if she was going to continue to work from home, and Ms. Fink replied "yes, but no other options were viable." The hearing examiner asked what happened next, and Ms. Lynch testified:

> She continued to work at home and use vacation time and then we were informed that . . . she would like to come back to the office on May 12th. So at that point we wanted to schedule a call with her to see what her intentions were upon her return on May the 12th, because, you know, as far as we know she was still not able to wear the mask or face covering and we still hadn't gotten any further reason as to why. At that point she said that she could not come into the office wearing a face covering and she requested that we rent an office space.

At 10:00 a.m. on the morning of May 12, Ms. Fink sent Ms. Lynch an e-mail that made reference to a possible rental office she had located that was available for $500 per month. The e-mail from Ms. Fink further stated:

> I do not have office space here in my house nor do I have a desk like that of my office space in the Baltimore office to support my workflow. I have no place to put the computers or the dual screens which I depend on heavily. My house is occupied with multiple souls besides myself and along with them there are multiple other distractions here as I live in a townhouse community with the tot lot out my kitchen door. I can be productive in this work environment for short periods of time and short term.
>
> I can continue to work from home but I will not be able to continue the level of productivity I was able to maintain in the office.

According to Ms. Lynch, the request for separate office space was denied. She explained: "We had an internal discussion about the situation and decided that we couldn't accommodate the request for an office space rental so we had to let her go."

At 3:57 p.m. on May 12, Ms. Lynch e-mailed Ms. Fink a notice of termination. The e-mail stated:

> Nelda,
>
> Pevco will continue to comply with State and County requirements and CDC and OSHA guidance to wear face coverings when indoors for as long as they are in effect, to promote the safety of our entire workforce.
>
> You are not eligible for an accommodation since you have not provided details of a medical condition or disability that prevents you from wearing a face covering in public spaces of the office as requested. We have attempted to work this out with you, but it appears that we are not able to reach a compromise.
>
> I regret to inform you that your employment with Pevco will end today. You will be paid through 5/21/21 (end of the current pay period). We wish you the best of luck in the future.
>
> Please arrange a time to return all company equipment and retrieve your personal belongings.

Ms. Fink testified at the telephonic hearing: "[W]hen I was terminated I felt very confused and abandoned." She explained:

> I did not intentionally disregard any policy. I believed in my doctor. I provided the note from my doctor as was requested by me [sic]. I – it's my belief that my doctor is the person who is authorized to look at my healthcare information and that's not a part of my employer's responsibility. So I believe in my doctor and I followed my doctor's advice.

Ms. Fink also introduced her most recent employment assessment form dated 2021-02-22. For most of the competencies addressed in the evaluation, and for her "Overall Score," Ms. Fink received a rating of 3.00, which was described in the form as meaning: "On Target. Performance consistently meets all job requirements."

The hearing examiner for the Lower Appeals Division concluded that "the claimant's unemployment was due to leaving work voluntarily, without good cause or valid circumstances, within the meaning of [LE] § 8-1001 (Supp. 1996)." But the Board rejected this determination, finding that this was clearly a case in which the employee did not voluntarily quit.

With respect to the pertinent facts, the Board substituted its own findings for those of the hearing examiner, explaining:

> The Board finds the hearing examiner's Findings of Fact are not entirely supported by substantial evidence in the record and they are incomplete. The Board rejects the hearing examiner's Findings of Fact, in their entirety, and makes the following Findings of Fact, in their place:
>
> > The claimant, Nelda E. Fink, began working for the employer, Pevco Systems International, Inc., on September 23, 2009, and her last day worked was May 12, 2021. At the time of her separation from employment, the claimant worked full-time as a Systems Analyst, earning an annual salary of $110,200.
> >
> > On November 18, 2020, the employer advised its employees one of its warehouse workers tested positive for COVID-19 and, although the employer did not believe the other workers were exposed, the employer was implementing a policy "requiring social distancing and mandatory wearing of masks while in the warehouse," effective immediately. (ER EX #1). The claimant was aware of the employer's mask wearing policy.
> >
> > On March 1, 2021, the claimant advised the employer she had a medical condition that prevented her from wearing a face mask. In response to the employer's request for medical documentation to verify the claimant's assertion, she produced a letter dated March 3, 2021, under the signature of Dr. Mary Ann C. Ley. In the letter Dr. Ley advised the claimant to "refrain from wearing a face covering which will impede her (the claimant's) ability to breathe and function optimally, thus, compromising her health progress." (ER EX #3).

> Because Dr. Ley did not elaborate upon the claimant's actual medical condition, the employer requested Dr. Ley provide additional medical information regarding the claimant's medical condition. In response, Dr. Ley informed the employer, by a letter dated March 30, 2021:
>
> > There is not sufficient scientific evidence that wearing a face covering will protect (*sic*) the spread of infection especially from a distance as you are suggesting. In fact, there is ample scientific evidence that masks can in fact, contribute to secondary bacterial infections. (ER EX #7).
>
> Dr. Ley again declined to provide any additional information regarding the claimant's underlying medical condition. Dr. Ley is a Doctor of Chiropractic; not a licensed physician.
>
> Because the claimant would not comply with the employer's mask wearing policy, the claimant chose to work remotely, from her residence, and to supplement her time by taking intermittent leave. The claimant later determined this arrangement was not suitable for completing her assigned tasks and inquired about the employer renting a separate office space, where the claimant could isolate herself in an office setting.
>
> Although the employer explored this alternative, the employer decided it was too costly and asked the claimant to return to its primary place of business. When the claimant declined, again citing Dr. Ley's advice, the employer informed the claimant, on May 12, 2021:
>
> > I regret to inform you that your employment with Pevco will end today. You will be paid through 5/21/21 (end of the current pay period). We wish you the best of luck in the future. (ER EX #10).

Based on the above findings of facts, the Board stated that it would reverse and alter "the hearing examiner's Decision, from a voluntary quit, without good cause or valid circumstances, to a discharge." The Board explained that there was insufficient evidence that Ms. Fink "ever entertained the notion of resigning her position[,]" noting: "In fact, the record is replete with the claimant's efforts to maintain her employment, despite her

medical concerns; and she took a number of steps in furtherance of continuing her employment." The Board further noted that Pevco's communication of May 12, 2021, was a notice of discharge that stated: "I regret to inform you that your employment with Pevco will end today." The Board explained: "Therefore, the Board concludes the employer discharged the claimant on May 12, 2021, ... Accordingly, this separation must be considered in light of the provisions of [LE] *§§8-1002 and 8-1003.*"

Despite specifically finding that Ms. Fink's departure was not an instance of a voluntary quit that would have been analyzed under LE § 8-1001, the Board next focused upon whether a statement from a chiropractor was sufficient to support a claimant's claim for benefits pursuant to LE § 8-1001 after voluntarily quitting. The Board noted that LE § 8-1001(c)(2) states that an employee who voluntarily quits because of health is required to '"submit a written statement or other documentary evidence of the health problem from a hospital or physician.'" The Board recognized that the more pertinent statutes—LE §§ 8-1002 and 1003, which address disqualification from receiving unemployment benefits if the employee is discharged for misconduct—are "silent as to the credentials necessary for a medical opinion" to support an accommodation. But, citing *Beverungen v. Briele*, 25 Md. App. 233, 239-40 (1975), where this Court held (in a different context) that a chiropractor is not a "physician," the Board observed that a statement from a chiropractor would not satisfy the requirement under LE § 8-1001(c)(2) for a claimant who has voluntarily quit to provide documentary evidence "from a hospital or physician." The Board stated:

> A written statement from a chiropractor does not meet the requirements of *Section 8-1001*, which provides that in the case of a health problem, the

claimant must produce written or other documentary evidence of that health problem from a physician or a hospital. While the Board would normally construe this requirement liberally to cover all health care professionals, the Board is bound by a decision of the Maryland Court of Special Appeals which specifically held that a chiropractor is not a physician. *Beverungen v. Briele, 25 Md. App. 233, 333 A.2d 664 (1975).* The decision in this case is prompted only by the specific ruling of the Court and the Board is not ruling that other recognized health professionals connected with physicians and hospitals cannot supply sufficient evidence under *Section 8-1001.*

* * *

As stated, the claimant submitted medical statements from her Chiropractor. The Board is bound by a decision of the Maryland Court of Special Appeals which specifically held that a chiropractor is not a physician. (See *Beverungen v. Briele*, 24 Md. App. 233, 333 A2d 664 (1975)). The written statement from a chiropractor does not meet the requirement that the claimant produce written or other documentary evidence of that health problem from a physician or a hospital. Therefore, the Board must find the claimant's medical documentation does not meet the burden of proof.

Accordingly, the claimant produced deficient justification for her refusal to comply with the employer's reasonable, workplace, health policy. In accordance with *Dunavent v. Federal Armored Express, Inc*., above [949-BR-85], the Board finds the claimant deliberately and willfully disregarded the standards of behavior the employing unit rightfully expected of its employees and showed a gross indifference to the interests of the employing unit.

* * *

The Board holds the employer discharged the claimant for gross misconduct connected with the work, within the meaning of [LE § 8-1002(a)(1)(i)]. The claimant is disqualified from receiving benefits from the week beginning May 9, 2021, and continuing thereafter until the claimant becomes re-employed, earns at least twenty-five (25) times her Weekly Benefit Amount (WBA), and becomes unemployed again, under non-disqualifying conditions.[2]

[2] In *Beverungen v. Briele*, 25 Md. App. 233 (1975), this Court considered a claim by a group of physicians who had asked the circuit court to declare that licensed (continued…)

Based upon its view of the law, the Board determined that Ms. Fink's conduct—specifically, submitting documentary evidence from a *chiropractor* rather than a licensed *physician*—"produced deficient justification for her refusal to comply with [Pevco's] reasonable, workplace, health policy." The Board held that this was gross misconduct that, pursuant to LE § 8-1002(a)(1)(i), disqualified Ms. Fink from receiving unemployment benefits because, the Board reasoned, there is "no meaningful distinction between a separation from employment by discharge and a separation from employment by voluntary quit, as far as the need for medical evidence is concerned."

DISCUSSION

The Maryland General Assembly enacted unemployment insurance laws for the purpose of providing "unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own." *See* LE § 8-102(c). The "Declaration of Policy" section of the law states that the economic insecurity due to involuntary unemployment "is a serious menace" to the health and welfare of the people in Maryland. *See* LE § 8-102(b)(1). We stated in *Thomas v. Department of Labor, Licensing, and Regulation.*, 170 Md. App. 650, 659-60 (2006):

chiropractors should not be permitted to hold themselves out to members of the public as "chiropractic physicians." The circuit court agreed and enjoined the defendant chiropractors from using that designation. On appeal, this Court stated: "The sole question presented on this appeal is whether a chiropractor may be designated a 'Chiropractic Physician.'" *Id*. at 234.We held that, under Maryland licensing laws, a chiropractor is not a physician, and, unless the individual is also licensed to practice medicine, the term "chiropractic physician" could not be used. *Id*. at 242. There was zero discussion of unemployment benefits in *Beverungen*.

> "In the context of unemployment insurance law, because of its remedial nature, its provisions are liberally construed in favor of eligibility for benefits." *Department of Econ. & Employment Dev. v. Taylor*, 108 Md. App. 250, 268 (1996) (citing *Sinai Hosp.* [*of Baltimore, Inc. v. Dep't of Emp. & Training*, 309 Md. 28, 40 (1987)]). Accordingly, "provisions that disqualify claimants from receiving benefits are construed narrowly." *Id.*

In discharge cases, the employer has the burden of demonstrating that the employee's actions rose to the level of misconduct or gross misconduct based on a preponderance of credible evidence. *Dep't of Econ. and Emp. Dev. v. Hager*, 96 Md. App. 362, 370 (1993).

The statute governing unemployment benefits defines "gross misconduct" as conduct that is a "deliberate and willful disregard of standards of behavior" of an employing unit or "repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations[.]" LE § 8-1002(a)(1)(i)-(ii). Gross misconduct is conduct that shows "an utter disregard of the employee's duties and obligations to [the employee's] employer" and is "calculated to disrupt the discipline and order requisite to the proper management and control" of a company. *Emp. Sec. Bd. of Md. v. LeCates*, 218 Md. 202, 210 (1958). "The important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Dep't of Econ. and Emp. Dev. v. Jones*, 79 Md. App. 531, 536 (1989).

Ms. Fink argues that the Board erred in concluding that the documentation provided by Dr. Ley was insufficient as a matter of law to justify Ms. Fink's request for an accommodation relative to Pevco's mask policy. She points out that Pevco's mask wearing policy did not state that a physician was the only health care provider who could provide

documentation to support an accommodation under the policy. Indeed, the March 2 Memorandum from Ms. Lynch specifically advised Ms. Fink, in a sentence that was underlined: "Alternatively, you may provide the necessary medical documentation in the form of a healthcare provider note." (Emphasis in original.)

Ms. Fink emphasizes in her brief in this Court: "The evidence shows Employer did not specify any particular qualifications of the healthcare provider" but *did* specify "that a physician OR a healthcare provider would be acceptable as indicated by the slash and the use of the word 'alternatively[.]'" Further, she correctly points out: "Employer never questioned the healthcare provider's qualifications[,] nor did Employer indicate that specific qualifications were required[.]" Therefore, she asserts, her failure to provide a statement from a physician could not be proper grounds for the Board's finding of misconduct. We agree with Ms. Fink.

In this case, the Board's finding of misconduct focused upon the fact that the evidence of a health concern that Ms. Fink provided Pevco was a note from her chiropractor, which the Board considered inadequate as a matter of law based upon its interpretation of *Beverungen*. But, in focusing on the requirements of LE § 8-1001 for supporting a voluntary quit—despite finding that section of the statute generally inapplicable to a discharge—the Board ignored the uncontradicted evidence regarding Pevco's instructions to Ms. Fink describing the need for her to provide a statement from her physician **or** her "healthcare provider" in order to comply with Pevco's company policy. *See* March 2 Memorandum from Ms. Lynch to Ms. Fink.

Here, the question the Board addressed was whether Ms. Fink's actions relative to her employer's request for medical documentation amounted to gross misconduct. This required an assessment of what was required under Pevco's mask wearing policy. Because that policy, as communicated to Ms. Fink by the March 2 Memorandum, plainly permitted her to provide documentation "in the form of a healthcare provider note[,]" and she did cause her healthcare provider to send Pevco a note, the Board erred in ruling that Ms. Fink's submission of a note from a chiropractor instead of a physician constituted gross misconduct. In making its decision, the Board made a factual finding that was not supported by substantial evidence in the record as a whole, and made an erroneous legal ruling in concluding that this Court's holding in *Beverungen* mandated that finding.

There was no evidence in the record that Pevco ever told Ms. Fink that Dr. Ley was not a healthcare provider. Nor did Pevco ever assert—either before discharging Ms. Fink or during the agency hearing—that furnishing a statement from a chiropractor could not satisfy its policy regarding masks and accommodation. Indeed, the evidence plainly showed that Pevco's Human Resources Manager, Ms. Lynch, initially replied to Dr. Ley with a letter asking her to "please provide *additional information regarding requested accommodations* for Nelda Fink." (Emphasis added.)

The Board's finding that "the employer requested Dr. Ley provide additional medical information regarding the claimant's medical condition" misstates what Ms. Lynch said in her only letter to Dr. Ley. That letter to Dr. Ley, dated March 17, 2021, did not ask for additional details regarding Ms. Fink's medical condition, but only asked about

accommodations for Ms. Fink's condition. And the letter certainly did not tell Dr. Ley or Ms. Fink that, in Pevco's view, chiropractors are not healthcare providers. Even the Board did not make such an assertion.[3]

Accordingly, there is not substantial evidence in the record to support the Board's findings that Ms. Fink's conduct in submitting a note from a chiropractor, instead of a physician, constituted misconduct.[4] Because this is the basis upon which the Board found misconduct, we shall order the circuit court to reverse the ruling of the Board and remand the case to the agency for entry of a ruling in favor of the claimant. *Cf. Campbell*, 364 Md. at 123 (We "may not pass upon issues presented to [the administrative agency] for the first time on judicial review and that are not encompassed in the final decision of the

[3] In Maryland, the requirements for chiropractors to be licensed are found in Md. Code (1981, 2021 Repl. Vol.), Health Occupations Article ("HO"), Title 3. The term "practice chiropractic" is defined in HO § 3-101(h) as follows:

> (1) "Practice chiropractic" means to use a drugless system of health care based on the principle that interference with the transmission of nerve impulses may cause disease.
>
> (2) "Practice chiropractic" includes the diagnosing and locating of misaligned or displaced vertebrae and, through the manual manipulation and adjustment of the spine and other skeletal structures, treating disorders of the human body.
>
> (3) Except as otherwise provided in this title, "practice chiropractic" does not include the use of drugs or surgery, or the practice of osteopathy, obstetrics, or any other branch of medicine.
>
> (4) The definition of "practice chiropractic" does not prohibit a chiropractor from selecting diet and hygiene measures for an individual.

[4] The Board's finding of misconduct on the part of Ms. Fink is also at odds with the Board's finding that "the record is replete with the claimant's efforts to maintain her employment, despite her medical concerns; and she took a number of steps in furtherance of continuing her employment."

administrative agency."); *Baines v. Bd. of Liquor License Comm'rs for Baltimore City*, 100 Md. App. 136, 143 (1994) (On judicial review of an agency decision, we may not uphold a decision "unless it is sustainable on the agency's findings and for the reason stated by the agency." (quotation marks, citation, and emphasis omitted)).

JUDGMENT VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR ENTRY OF A JUDGMENT REVERSING THE DECISION OF THE BOARD OF APPEALS FOR THE MARYLAND DEPARTMENT OF LABOR, LICENSING, AND REGULATION, AND REMANDING THE CASE TO THE AGENCY FOR ENTRY OF A RULING IN FAVOR OF APPELLANT.

COSTS TO BE PAID BY APPELLEES.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1604s22cn.pdf