Circuit Court for Baltimore City
Case No. 24-C-21-003707

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 230

September Term, 2022

IN THE MATTER OF THE PETITION OF
BETELEHEM DEJENE

Leahy,
Reed,
Tang,

JJ.

Opinion by Tang, J.

Filed: October 30, 2025

*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).

This appeal arises from a claim for unemployment insurance benefits. Betelehem Dejene, the appellant, appeals from a decision of the Circuit Court for Baltimore City, which affirmed the decision of the Board of Appeals ("Board"). The Board concluded that the appellant was not "unemployed" within the meaning of § 8-801 of the Labor and Employment Article ("LE") of the Maryland Code. On appeal, the appellant presents the following question for our review, which we have slightly rephrased:[1]

> Did the Board err in determining that the appellant was not unemployed within the meaning of LE § 8-801 while receiving COVID-19 Emergency Time Off payments from her employer?

For the following reasons, we shall reverse the judgment of the circuit court.

I.

OVERVIEW OF RELEVANT LAW

In 1936, the General Assembly enacted Maryland's unemployment compensation law under Article 95A of the Maryland Code Annotated. *See* Md. Code Ann., Art. 95A, § 1, *et seq*. (1936).[2] In 1991, Article 95A was recodified under Title 8 of the Labor and

[1] The question presented in the appellant's brief is:

> Was [the appellant] "unemployed" under Md. Code, Labor & Employment ("LE") § 8-801(b) because the emergency COVID-leave payments she received were not "wages" under LE § 8-101(aa)?

[2] Unemployment insurance was introduced through the Social Security Act of 1935. Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 22 (1945). "The provisions in that act relating to unemployment compensation were designed to induce the states to enact such legislation." *Id.* At its inception, and continuing through the present, unemployment compensation is a federal-state system. *See* Gerard Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. Mich. J.L. Reform 527, 529, 531 (1996). "Federal

Employment Article. 1991 Md. Laws Ch. 8 (H.B. 1). "Title 8 of the Labor and Employment Article, entitled 'Unemployment Insurance,' establishes a program in which cash benefits are paid to individuals who become unemployed involuntarily to 'lighten [the] burden' of the economic instability attributed to prolonged unemployment." *Pub. Serv. Comm'n of Md. v. Wilson*, 389 Md. 27, 75 (2005) (quoting LE § 8-102). "To accomplish this important purpose, weekly income benefits are paid to individuals who have become involuntarily unemployed through no fault of their own, and who are otherwise eligible." *Taylor v. Dep't of Emp. & Training*, 308 Md. 468, 472 (1987). In determining the eligibility of claimants, the provisions of the unemployment insurance law "should be liberally construed to effectuate its legislative intent, and any disqualifying provisions in the remedial statute should be strictly construed." *Id.*

To be eligible for unemployment benefits, an individual who files a claim for benefits must be "unemployed." LE § 8-801(a). An individual is considered to be unemployed in any week during which the individual:

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and state unemployment compensation statutes are designed to operate together as a cooperative endeavor. State statutes need not conform in every way to the federal statute or policy so long as the essential balance between the federal and state laws is not disturbed." 76 Am. Jur. 2d *Unemployment Compensation* § 2 Westlaw (database updated Oct. 2025) (footnotes omitted); *see, e.g.*, 42 U.S.C. § 503 (setting forth certain requirements that states must include in their unemployment schemes); I.R.C. § 3304 (enumerating certain requirements applicable to the Secretary of Labor's approval of state laws); LE § 8-103. However, states are free to "determine the key features of their systems, including eligibility conditions, benefit levels and duration, and employer tax rates and exemptions." Jeremy Pilaar, *Reforming Unemployment Insurance in the Age of Non-Standard Work*, 13 Harv. L. & Pol'y Rev. 327, 331 (2018).

> (1) does not perform work for which wages are payable; or
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> (2) performs less than full-time work for which wages payable are less than the weekly benefit amount that would be assigned to the individual plus allowances for dependents.

LE § 8-801(b)(1), (2). [3]

"Wages" consist of "all compensation for personal services," including bonuses, commissions, tips, and the cash value of all compensation in any medium other than cash. LE § 8-101(aa)(1), (2); *see* LE § 8-101(aa)(3)(i)-(xi) (excluding from the definition of wages certain payments made to an employee on behalf of a health or medical plan, among other types of payments specifically enumerated thereunder which are not applicable here).

The amount of unemployment benefits an individual is entitled to receive is determined by a procedure set out in LE § 8-803(a). The weekly benefit amount under the schedule ranges from $50 to $430. *See* LE § 8-803(b). Benefits are available to a claimant for up to 26 weeks. LE § 8-808(c)(1).

II.

BACKGROUND

In the spring of 2020, the COVID-19 pandemic began to spread throughout the United States. In March 2020, Governor Larry Hogan issued a series of orders to control

[3] In addition, eligibility for individual unemployment benefits generally requires the individual to be able to work, available for work, and actively seeking work. LE § 8-903. An individual who is otherwise eligible to receive benefits is disqualified for various reasons such as leaving work voluntarily without good cause and where unemployment is due to the employee's discharge for gross misconduct connected to work. *See* LE §§ 8-1001 through 8-1009. The issue in this appeal does not implicate eligibility under LE § 8-903 or disqualification under LE § 8-1001 *et seq*.

the spread of COVID-19, including a shelter-in-place order, requiring all persons to stay at home.[4]

The appellant had been working as a flight attendant for Southwest Airlines Company ("Southwest") since 2011. She was contractually obligated to work eighty hours a month, though she typically worked more. Due to the pandemic, the appellant ceased in-person work as of March 21, 2020. Southwest paid the appellant for her work through March 20, 2020. The appellant did not work in April 2020, and Southwest did not pay her for that month.

In response to the pandemic, Southwest offered its flight attendants program options that were "critical components to voluntarily reduce [its] workforce so that [it could] preserve the long-term viability of [the] Company." These included voluntary separation (i.e., resignation and retirement) and time off and leave without pay (i.e., "monthly release time"). In addition, Southwest introduced the "COVID-19 Emergency Time Off (ETO) Program for Flight Attendants." The program offered flight attendants "voluntary time off with partial pay" beginning May 1, 2020. Initially, Southwest offered ETO in one or two-month increments, but it later increased the increments to six, twelve, and eighteen months,

[4] *See Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 354 (2022) (summarizing the legal measures taken to combat the pandemic). In addition, the General Assembly enacted the COVID-19 Public Health Protection Act of 2020, which authorized the Secretary of Labor to determine that an individual, who was not separated from employment, was eligible for unemployment benefits if, for instance, the individual's employer temporarily ceased operations due to the pandemic, preventing the employee from coming to work, notwithstanding the provisions of Title 8 of the Labor and Employment Article. *See* SB 1080, Ch. 13 (Mar. 19, 2020, effective through Apr. 30, 2021).

with the possibility that employees return to work earlier "if needed for operational needs." According to the appellant, the ETO program was designed to help flight attendants "who [were] high risk to be at work or have high risk family members, and those who were unable to work due to having childcare issues. The [program] was also to protect the company from furloughing [employees] because of the decline in air travel and being overstaffed."

In relevant part, the ETO program provided that flight attendants "on an ETO will be paid 40.0 TFP [trip for pay] for each bid period awarded." A flight attendant participating in the ETO program was not permitted to "bid a line" (request a schedule for flights) for the month(s) on ETO. Nor could the attendant pick up pairings from "open time" (available flights that need coverage). However, the program did not disrupt an attendant's flight or health benefits. Nor did it affect an attendant's seniority; an awarded ETO month still counted as a month of credited service.

The appellant lived with her elderly parents who were high risk for the virus and felt she had no choice but to stay at home. According to her, she was essentially faced with a Hobson's choice of either not working without any benefit, or not working while receiving significantly reduced monthly pay under the ETO program. The appellant opted to participate in the ETO program until March 2021, and she remained employed with Southwest. In April 2021, she took monthly release time and then resumed her flight schedule on July 1, 2021.

Southwest issued the appellant ETO payments in monthly sums effective May 1, 2020 as follows. In June, Southwest paid the appellant a gross amount of $1,773.60, representing forty hours of ETO at her regular pay rate ($44.34) for May, when the program began. In July, Southwest paid the appellant a gross amount of $1,879.20, representing forty hours of ETO at an increased rate ($46.98)[5] for June. Southwest paid the appellant the same gross amount for August and September. Between May and September 2020, Southwest paid the appellant a total of $7,411.20 in ETO payments.

A.

Application for Unemployment Insurance Benefits

On April 12, 2020, the appellant filed a claim for unemployment insurance benefits with the Maryland Department of Labor ("DOL"). DOL initially approved the benefits and issued the appellant $430 per week between April 18 and August 1, totaling $6,880. In addition to receiving $430 weekly, the appellant received federal pandemic unemployment compensation in the amount of $600 weekly between April 18 and July 25, 2020, totaling $9,000.[6]

[5] The increased rate reflects the annual raise she received.

[6] On March 27, 2020, in response to the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which provided enhanced unemployment insurance benefits for workers who would not otherwise be eligible for relief. *See* 15 U.S.C. § 9001 *et seq.* The CARES Act created various temporary unemployment benefit programs, including Pandemic Unemployment Assistance, 15 U.S.C. § 9021; Federal Pandemic Unemployment Compensation, 15 U.S.C. § 9023; and Pandemic Emergency Unemployment Compensation, 15 U.S.C. § 9025. *Ireland v. United States*, 101 F.4th 1338, 1341 (Fed. Cir. 2024). The issue of whether the appellant was eligible to receive enhanced benefit payments under the CARES Act is not before us.

B.

DOL Claims Examiner's Determination

On August 10, 2020, a DOL claims examiner conducted an initial fact-finding. On August 17, DOL issued the appellant a notice stating that it did not deem the appellant "unemployed" for the claimed weeks under LE § 8-801. Thus, according to DOL, "[b]enefits [were] not payable to the claimant for the weeks in question[.]" DOL denied the appellant's unemployment insurance benefits for the week beginning April 12, 2020. As a result of the decision, DOL demanded repayment of the amounts paid to the appellant, totaling $15,880, in state and federal unemployment benefits. *See* LE § 8-809 (providing for the recovery of benefits paid to a claimant).

C.

Lower Appeals Division's Determination

On September 1, 2020, the appellant filed an appeal with the Lower Appeals Division. *See* LE §§ 8-508(a)(1), 8-806(g) (providing for appeals to the Lower Appeals Division of DOL). On September 28, the Lower Appeals Division held a hearing.

On October 19, 2020, the Lower Appeals Division issued its decision. It found that the appellant "began a leave of [a]bsence" from Southwest on March 21, 2020 in response to the pandemic, "continues to be employed," and "expects to return back to work in March 2021." Regarding the ETO payments, the Lower Appeals Division found that the appellant "received emergency paid time off in the sum of $800 in May 2020 for April 2020; $1,773.60 in June 2020 for May 2020; $1,879.20 in July 2020 for June 2020; $1,879.20 in

August 2020 for July 2020; and $7,411.20 in September 2020 for August 2020." The Lower Appeals Division concluded that the appellant was "not unemployed nor partially employed." Accordingly, it held that the appellant was disqualified from receiving unemployment insurance benefits beginning April 12, 2020, and it affirmed the claims examiner's decision.

D.

Board of Appeals' Determination

On December 4, 2020, the appellant filed an appeal with the Board of Appeals.[7] *See* LE § 8-5A-10 (providing for appeals to the Board). In a letter, the appellant explained her reasons for appealing. She challenged the Lower Appeals Division's findings of fact, explaining that it attributed ETO payments to various months incorrectly. First, she did not receive an ETO payment for April 2020, because the ETO program was not effective until May. Second, Southwest did not pay her $7,411.20 for September; instead, the amount reflected the total ETO payments she received for May through September.[8]

[7] Although the appeal letter was filed beyond the November 3, 2020 deadline, the Board deemed it timely because the appellant did not receive notice of the Lower Appeals Division's decision in the mail.

[8] The appellant also took exception to the Lower Appeals Division's belief that she had been teleworking. In its decision, the Lower Appeals Division framed the issue as whether the appellant was unemployed under LE § 8-801 because her "teleworking hours [were] equivalent to the customary number of hours [she] worked prior to the state of emergency." The appellant stated in her appeal letter that she did not telework during the relevant time.

On April 7, 2021, the Board held a hearing on the legal arguments.[9] Southwest did not appear at the hearing.

On July 28, 2021, the Board issued its decision. For reasons explained in the discussion below, the Board affirmed the Lower Appeals Division's determination that the appellant was not unemployed. Therefore, the Board determined that she was not entitled to full unemployment benefits under LE § 8-801(b)(1). However, it remanded the matter to the Lower Appeals Division for additional fact-finding to determine whether she was eligible for partial unemployment benefits during any benefit week under LE § 8-801(b)(2).

E.

Petition for Judicial Review

The appellant petitioned for judicial review in the Circuit Court for Baltimore City. Following a hearing, the court affirmed the Board's finding that the appellant was not unemployed. The appellant noted a timely appeal.

III.

STANDARD OF REVIEW

"When an administrative agency's decision is before this Court, we review the agency's decision; we do not review the circuit court's decision." *J.H. v. TidalHealth Peninsula Reg'l, Inc.*, 253 Md. App. 111, 119 (2021). Judicial review of administrative

[9] The Board held a consolidated hearing along with two other claimants, a teacher and a food service worker, whose claims are not the subject of this appeal.

adjudications of unemployment insurance benefits is governed by LE § 8-5A-12(d), which provides:

> (d) 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:
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> (1) findings of fact are supported by evidence that is competent, material, and substantial in view of the entire record; and
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> (2) there is no fraud.

Accordingly, under LE § 8-5A-12(d), our review is limited to "(1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision." *Thomas v. Dep't of Lab., Licensing, & Regul.*, 170 Md. App. 650, 657 (2006) (citation omitted). Therefore, a "reviewing court may not reject a decision of the Board supported by substantial evidence unless that decision is wrong as a matter of law." *Dep't. of Lab. v. Boardley*, 164 Md. App. 404, 417 (2005) (citation omitted); *see Md. Dep't of the Env't v. Cnty. Comm'rs of Carroll Cnty.*, 465 Md. 169, 203 (2019) (explaining that an agency decision will not be upheld if based on an erroneous legal conclusion).

> On review, this Court must examine the agency's final decisions to determine their legality and whether there was substantial evidence from the record as a whole to support the decisions. In making our review, the decisions of the administrative agency are *prima facie* correct, and the agency's decisions must be viewed in the light most favorable to the agency. Further, in interpreting the provisions at issue here, we give considerable weight to the construction of the statute by the agency responsible for administering it.

Westinghouse Elec. Corp. v. Callahan, 105 Md. App. 25, 35 (1995) (internal citations omitted).

> Although an administrative interpretation or construction of a state unemployment compensation statute is clearly not binding on the courts,

> where a state agency charged with administration of the state's unemployment compensation statute has construed or interpreted the statute in a particular way, the courts of the state, in recognition of the agency's expertise in the field, will give such interpretation great deference unless it is in conflict with legislative intent or relevant decisional law, or is clearly erroneous, arbitrary, or unreasonable.

Id. (quoting 76 Am. Jur. 2d *Unemployment Compensation* § 17 at 761 (1992)).

IV.

DISCUSSION

The appellant focuses on the question of whether she qualifies as "unemployed" under LE § 8-801(b)(1). She argues that the Board erred in deciding that she was not unemployed because, during the period in question, she did not "perform work" for Southwest for which "wages [were] payable." She contends that the ETO payments were not "wages" under LE § 8-101(aa)(1), because she performed no "personal services" for Southwest during the relevant time.

DOL, the appellee, argues that the Board's decision should be affirmed. DOL contends that the Board's determination is supported by substantial evidence and contained no error of law. It maintains that the appellant "perform[ed] work"/"personal services" for Southwest for which she received wages through ETO payments. According to DOL, the work/personal service she performed was to be on stand-by status for Southwest until she resumed her flight schedule. Therefore, according to DOL, the appellant was not unemployed within the meaning of the statute.

A.

Proceeding Below

Before detailing the Board's analysis and decision, it is helpful to summarize two cases on which it relied to support its determination that the appellant was not unemployed: *Westinghouse Electric Corporation v. Callahan*, 105 Md. App. 25 (1995), and *Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

1. *Westinghouse Electric Corporation v. Callahan*

In *Westinghouse Electric Corporation v. Callahan*, 105 Md. App. 25 (1995), this Court interpreted the language "perform work for which wages are payable" under LE § 8-801(b)(1). There, the employer initiated a reduction-in-force and distributed permanent separation notices to many employees. *Id.* at 29. These employees received full pay and benefits and remained on active employee rolls for two months. *Id.* The employees were permitted to use the resource center in search of new employment. *Id.* Although they received paychecks, the employer did not expect the employees to perform their regular job duties during this period. *Id.* at 30. In many instances, the employees were unable to perform their job duties because they were required to surrender their employee badges, which authorized access to the employer's premises. *Id.*

The employees applied for unemployment benefits. *Id.* The hearing examiner concluded that the claimants were unemployed for the two months they remained on the payroll and that the payments made to them were not wages within the meaning of the statute. *Id.* at 31 (citing LE § 8-101(v)(1), the predecessor to LE § 8-101(aa)). We affirmed,

concluding that the agency's factual determinations were supported by substantial evidence and that it did not err, as a matter of law, in determining that the claimants did not perform work for the employer during this period. *Id.* at 41.

Although not binding on us, we deferred to the agency's expertise in interpreting the statutory language. We were persuaded by the Board's "consistent application of the statutory standard that deems payments as wages only if given as compensation for services rendered." *Id.* at 38. We found two prior Board decisions in *Abbott, et al. v. Westinghouse Electric Corp.*, No. 1458–BH–91 (Nov. 18, 1991) ("*Abbott*"), and *Fusco, et al. v. Steamship Trade Assoc.*, No. 1388–BH–91 (Nov. 6, 1991) ("*Fusco*"), instructive:

> In [*Abbott*], former Westinghouse employees filed claims for unemployment insurance benefits after receiving notice that they were being laid off from work. Some of the employees were kept on the payroll for one month, and were paid regardless of whether they reported to work. Additionally, during this one month period, employees were told they should either report to work or visit the Career Counseling Center, which would help employees find other jobs.
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> The issue in *Abbott,* as in [*Westinghouse*], was the date on which the claimants became unemployed. The employer claimed that payments made to the claimants were wages and therefore the claimants were not unemployed during the one month period. The Board disagreed because the employer's argument failed to take into account the statutory requirement that the employee "perform work" for the payments. The Board stated:
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> > The Board has consistently interpreted the statute as written. Payments made in weeks during which no services were performed, *Dayton* (199–BR–83), including payments made for services performed in the past, *Markowski v. Baltimore County Personnel* (749–BR–82), *Lendo v. Garrett County Board of Education* (299–BR–82)[,] do not take the recipients out of the category of the "unemployed," for the purposes of the Unemployment Insurance Law.
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> > *Abbott*, at 3. [FN 7. The Board further explained that it recognized "the reasoning behind the employer's unwillingness to have its former

> employees collect paychecks and unemployment benefits for the same four weeks." The Board rationalized, however, that "[a]lthough this may seem like an unusual result, the legislature has clearly chosen to be generous to those whose jobs have been permanently lost." *Abbott,* at 5.] The Board concluded that, because visits to the Career Counseling Center did not qualify as performing services for the employer, the claimants were, indeed, unemployed.
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> Similarly, in *Fusco* . . . , the Board considered whether payments made to claimants were wages within the meaning of L.E. § 8-101(v) [predecessor to LE § 8-101(aa)]. There, longshoremen applied for unemployment insurance benefits, claiming they met the initial eligibility requirement of having earned wages in the previous quarter. The facts showed, however, that they actually had received "Guaranteed Annual Income Fund" (GAIF) payments in exchange for being available for hire. In order to receive the GAIF payments, the claimants were required to report to a central hiring hall in the morning, from which they were dispatched to whatever work was available. Employees that were not assigned any work for the day were allowed to leave after an hour and were eligible to receive GAIF benefits for the day. The Board concluded: "The facts of this case do not establish that the claimants were paid wages as defined by Section 8-101(v). No services were provided . . . other than reporting to the Hall . . . to see if work was available."

Westinghouse, 105 Md. App. at 37–38. We found that the Board's analyses also comported with the reasoning of courts in other jurisdictions whose statutory language was comparable to Maryland's. *Id.* at 38–39 (collecting cases).

We concluded that these cases made clear that the hearing examiner in *Westinghouse* properly focused on whether the claimants received "wages" and whether the claimants "performed work" within the two months at issue. *Id.* at 40. While we acknowledged that the payment by the employer and the payment of unemployment benefits resulted in the employees' "double-dipping," our decision was based on the facts and our construction of the applicable statute. *Id.* at 41. We suggested that if the results were not what the legislature intended, it would have to effect the appropriate statutory change. *Id.*

2. *Social Security Board v. Nierotko*

In *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), the United States Supreme Court decided whether money received as back pay by the employee for his wrongful termination was considered "wages" under Title II of the Social Security Act. *Id.* at 359. That Title governed federal old-age benefits and was meant "to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." *Id.* at 364. It defined "wages" as "all remuneration for" "any service . . . performed . . . by an employee for his employer." *Id.* at 362–63. Under that Title, only those who earned wages were eligible for benefits. *Id.* at 361. The Social Security Board had concluded that back pay was not wages because the employee did not actually perform any services for his employer. *Id.* at 365.

The Supreme Court rejected that position, finding the Board's interpretation of "service" too "limited." *Id.* Instead, the Court concluded that the words "any service . . . performed . . . for his employer" did not implicate only "productive activity." *Id.* The Court interpreted "service" to mean "not only work actually done but *the entire employer-employee relationship* for which compensation is paid to the employee by the employer." *Id.* at 365–66 (emphasis added). The Supreme Court explained:

> [W]e need further only consider whether under the Social Security Act its definition of employment, as 'any service * * * performed * * * by an employee for his employer,' covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to 'wages earned' for 'work done.' We are unable, however, to follow the Social Security Board in such a limited circumscription of the word 'service.' The very words 'any service * * *

> performed * * * for his employer,' with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that 'service' can be only productive activity. We think that 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

Id. (footnote omitted). Thus, the Court concluded that payments for back pay were "remuneration for" "any service * * * performed * * * by an employee for his employer." *Id.* at 364. Justice Frankfurter concurred, explaining:

> The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another, though he be inactive. This is, practically speaking, the ordinary situation of employment in a 'stand-by' capacity. The basis of a back-pay order under the National Labor Relations Act . . . is precisely that. When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time. In short, an employer must pay wages although, in violation of law, he has subjected his employee to enforced idleness. Since such compensation is in fact paid as wages, it is a plain disregard of the law for the Social Security Board not to include such payments among the employees' wages.

Id. at 370–71 (Frankfurter, J. concurring) (citations omitted).

3. Board's Analysis and Decision

In determining that the appellant was not unemployed, the Board applied the *Nierotko* Court's interpretation of "wages" under the Social Security Act (defined as "any . . . service performed") to "wages" under LE § 8-101(aa)(1) (defined as "all compensation for personal services") to mean "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Nierotko*, 327 U.S. at 365–66.

The Board determined that the appellant was "effectively put on 'stand-by capacity' as it relates to the provision of service." It explained that Southwest never terminated the appellant during the compensable period at issue, and it found that Southwest "paid the [appellant] to remain on [its] payroll and in forbearance of seeking other available employment—to be 'on stand-by capacity' as Justice Frankfurter called it." The Board was convinced that "this was a service to the employer during [Maryland's] declared State of Emergency."

The Board distinguished the appellant's case from *Westinghouse*. It explained that, unlike in *Westinghouse*,

> [the appellant] never received a layoff notice, an end date for [her] employment, a directive to look for other employment, nor [was she] provided resources to facilitate a new job search. [She was] continuously connected to [her employer].
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> [T]here [was] no such final action by the employer resulting in the affirmative and overt termination of the employees. Rather, [the appellant] received payment to preserve the benefit or potential benefit associated with reigniting the employee's affirmative services to the employer. The services rendered by the [appellant] were "stand-by" services, and by compensating [the appellant] to be on stand-by, the employer did not have to undertake at its own cost, the activities associated with searching, hiring, and training new individuals unfamiliar with the organization's protocols, procedures, and practices into its organization. In other words, the act of performing services was simply to be at the ready.
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> The payments to [the appellant] were not dismissal payments. [She] never received lay-off notices. [She] never received an end date and w[as] never instructed to look for a new job by [Southwest]. Indeed, [her] job[] remained intact[.] [The appellant] accepted [Southwest's ETO] payments and did not search for alternate work.
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> [P]ayments made to [the appellant] were designed to preserve the employer-employee relationship that existed, for however long. [The appellant was]

> effectively put on "inactive duty." This is wholly consistent with the Supreme Court's recognition of the importance of preserving the employer-employee relationship, broadening the protections this relationship affords both parties and thus effectuating the intent of the Coronavirus Aid Relief and Economic Security (CARES) Acts, the Maryland Unemployment Insurance Law, the Paycheck Protection Program (PPP) and the Emergency Time Off ("ETO") program targeted to the airline industry.

Accordingly, the Board concluded that the appellant's ETO payments were "wages" payable for personal services and determined that she was not unemployed within the meaning of the LE § 8-801.[10]

[10] In addition to the two cases discussed above, the Board considered a guidance letter issued by the U.S. Department of Labor in its Unemployment Insurance Program Letter ("UIPL") as persuasive authority for interpreting "wages." The Board cited "UIPL 14-20, change 1," which addressed the question: "If an individual is working and being paid through PPP, how does this impact his or her eligibility for unemployment benefits?" The letter answered, in part: "[I]f an individual is working full-time, he or she does not meet the definition of being 'unemployed' and would be ineligible for benefits. Additionally, an individual receiving full compensation through paid sick leave or paid family leave is not 'unemployed' and is ineligible for [unemployment compensation.]" UIPL No. 14-20, Change 1, pp. 3–4 (Aug. 12, 2020), available at https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-14-20-change-1.

At oral argument before this Court, DOL, for the first time on appeal, cited the letter as guidance for the proposition that an employee receiving paid leave, akin to ETO payments, is not eligible for unemployment benefits. DOL's reliance on the letter is unavailing. As noted in n.2 *supra*, federal and state unemployment compensation statutes work in tandem. "From time to time, the [U.S.] Department of Labor issues so-called 'Program Letters' to inform the states of its interpretation of controlling federal law, including FUTA [Federal Unemployment Tax Act] and the Social Security Act." *U.S. Steel Corp. (USX Clairton Works) v. Unemployment Comp. Bd. of Rev.*, 579 Pa. 618, 629 (2004). "The letters play an important role in maintaining federal certification for a given state." *Id*.; *see also* LE § 8-103 (construing the provisions "[t]o the extent necessary to ensure that the United States Secretary of Labor certifies this title. . ."). However, Congress has generally "afforded great discretion to the states in the design and operation of their unemployment insurance programs, particularly in the benefit structures and *qualifying requirements*." *Watkins v. Cantrell,* 736 F.2d 933, 937 (4th Cir. 1984) (emphasis added).

B.

Analysis

We conclude that the Board erred in determining that the appellant was not unemployed under LE § 8-801(b)(1). The Board's determination was not supported by substantial evidence, and it legally erred in interpreting and applying the law.

1. The Board's Finding that Southwest Paid the Appellant to Be on Stand-By Status Was Not Supported by Substantial Evidence.

The substantial evidence test "is limited to determining whether a reasoning mind could have reached the factual conclusion reached by the agency." *Dep't of Econ. & Emp. Dev.t v. Lilley*, 106 Md. App. 744, 754 (1995) (citation omitted). "Even if the reviewing court could have reached a different result based on the evidence before the agency, the court must uphold the agency's determination if it is rationally supported by the evidence in the record." *Id.* "In reviewing an agency decision, a court may not uphold an agency's decision unless it is sustainable on the agency's findings and for the reasons stated by the agency." *Id.* at 755–56 (citation omitted).

The Board's finding that Southwest compensated the appellant to be on stand-by so that it "did not have to undertake at its own cost, the activities associated with searching,

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Therefore, we must look to Maryland law to interpret whether the appellant qualifies as "unemployed."

Even if the letter were persuasive authority, it does not provide substantive support for DOL's position. The letter refers to an individual being "unemployed" if she were "working full-time" or receiving "full compensation through paid sick leave or paid family leave," neither of which was the case here.

hiring, and training new individuals unfamiliar with the organization's protocols, procedures, and practices into its organization" was not rationally supported by the evidence. The only evidence for why Southwest decided to implement the ETO program was in the appellant's explanation letter, in which she quoted Southwest's CEO as stating, "These programs are critical components to voluntarily reduce our workforce so that we can preserve the long-term viability of our Company" in response to the COVID-19 pandemic. The CEO continued: "All of our functions are essential, but given our planned smaller schedule and network, we are overstaffed and may continue to be overstaffed for the next several years . . . ." In other words, Southwest was attempting to reduce labor costs due to its diminished operations. Reasoning minds could not have reached the Board's finding, based on this evidence, that Southwest paid the appellant to be on stand-by status so that it would not have to undertake costs to hire and train new employees. Instead of relying on the evidence, the Board used the language from *Nierotko*'s concurring opinion and extrapolated factual findings based on Justice Frankfurter's remark about stand-by status.

2. The Board Erred in Its Construction of the Statutory Definition of "Unemployed."

We hold that the Board erred as a matter of law. The Board distinguished *Westinghouse* by focusing on the appellant's continued employment with Southwest. While it is true that the *Westinghouse* claimants received a notice of termination and here, the

appellant maintained her employment status, the appellant's connection to employment does not take her out of the category of "unemployed."[11]

The Board has held, in other cases, that a claimant's connection with her employer is irrelevant to the statutory definition of "unemployed." In *Fourtinakis v. Johns Hopkins University*, 870-BH-81 (Oct. 2, 1981), the claimant worked at Johns Hopkins University. *Id.* at 1. She requested and was granted a leave of absence without pay from December 1, 1980 to May 1, 1981 due to her pregnancy and work-related stress. *Id.* at 2. During her leave of absence, she performed no services for which wages were payable. *Id.* at 2. She did, however, retain her employee health care coverage and other non-cash benefits. *Id.* Following the birth of her child in March 1981, she developed a serious medical problem that prevented her from working. *Id.* She tried to extend her leave of absence, but the employer denied the request. *Id.* When she did not return to work as scheduled, the employer terminated her in August of 1981. *Id.*

The Board concluded that the claimant "clearly" met the statutory definition of "unemployed" during the period between December 1, 1980 and the first week of August 1981 because she "performed no services for which wages were paid or payable during the period in question." *Id.* The Board explained:

> The Board is aware that there remained some connection between the Claimant and the Employer during this period, such as the continuation of her medical insurance benefits and her seniority rights. Such a connection often exists between a laid-off employee and his or her Employer. The

[11] Indeed, at oral argument, DOL acknowledged that while severance from employment was a factor in *Westinghouse*, a claimant's termination from employment is not dispositive in deciding whether she is unemployed under LE § 8-801.

> Claimant in this case expressed her intention to return and was (at first) promised that she could return on a certain date. Such an intention of returning, and such an assured return date, are also often characteristic of layoffs.
>
> *The Board concludes that attributes of employment* such as medical insurance, seniority *and a guaranteed return date*, *however relevant they might be to an everyday definition of the term, are irrelevant to the statutory definition of unemployment in Section 20(l)* [predecessor to LE § 8-801]. *The Board holds that the crucial test of whether a person meets that definition is whether an individual has performed services with respect to which wages are paid or payable.*

Id. at 2–3 (emphases added); *accord Helmstetter v. U.S. Postal Serv.*, 1507-RR-82 at 2 (Oct. 15, 1982) (concluding that the claimant, a carrier relief employee for the Postal Service, was unemployed for each week he earned less than his weekly benefit amount; the fact that he was not "separated" from the employment was "totally beside the point").

As we explained in *Westinghouse*, and as other Board decisions consistently confirmed, the "statutory standard" is that payments are deemed as "wages" under LE § 8-801(b)(1) "only if given as compensation for services rendered." *Westinghouse*, 105 Md. App. at 38; *see Abbott*, at 3 (explaining that the "statutory requirement that the employee 'perform work' for the[] payments" must be considered). While Board decisions are not binding on us, the *Fourtinakis* decision is yet another instance where the Board consistently applied the "statutory standard that deems payments as wages only if given as compensation for services rendered." *Westinghouse*, 105 Md. App. at 38.

In the instant case, there was no dispute that the appellant did not do any actual work for Southwest during the period in question. The fact that she maintained employment with Southwest is irrelevant to the statutory definition of "unemployed" under the statute. This

is because the crucial test is whether, under the statute, the claimant has "perform[ed] work for which wages are payable." LE § 8-801(b)(1). The appellant did not perform such work and therefore, she met the statutory definition of unemployed under LE § 8-801(b)(1).

The Board's reliance on *Nierotko* is inapt. First, interpreting "wages" broadly to include the entire employer-employee relationship for which compensation is paid, as described in *Nierotko*, does not account for the language in LE § 8-801(b)(1). As noted, the Social Security Act defined "wages" as "all remuneration for" "any service . . . performed . . . by an employee for his employer." *Nierotko*, 327 U.S. at 362–63. Maryland's Labor and Employment statute defines "wages" as "all compensation for personal services." LE § 8-101(aa)(1). At first sight, the definitions of "wages" under each statute seem comparable. But the statutory analysis does not end there. "Wages" under LE § 8-101(aa)(1) must be read in the context of LE § 8-801(b)(1), which defines an unemployed individual as one who "does not perform work for which wages are payable." Therein lie two separate clauses: "does not *perform work*" and "*for which wages are payable*." (Emphasis added). The language in LE §§ 8-801(b)(1) and 8-101(aa)(1)—when read together—describes payments as wages only if given as compensation for services rendered. *See Westinghouse*, 105 Md. App. at 38; *Harford Cnty. v. Mitchell*, 245 Md. App. 278, 284 (2020) ("[W]e read a statute so that no word, phrase, clause, or sentence is rendered surplusage or meaningless."); *see also Waters v. State ex rel. Md. Unemployment Ins. Fund*, 220 Md. 337, 350 (1959) (rejecting the State's reliance on *Nierotko* in holding that the possibility of claimant's reinstatement and of his receiving compensation for time

lost did not prevent his being unemployed when he was "actually not working" and when employer did not pay him wages and contested his right to compensation under the collective bargaining agreement).

Second, adopting *Nierotko*'s broad interpretation of "wages" to include the entire employer-employee relationship for which compensation is paid, rather than work actually performed under LE § 8-801(b)(1), would be contrary to Maryland's unemployment insurance law's purpose and the mandate to "liberally construe" its provisions to effectuate the legislative intent of the remedial statute. We find persuasive the rationale in *American Sugar Co. v. Doyal*, 237 So.2d 415, 418 (La. Ct. App. 1970), which rejected *Nierotko*'s broad interpretation. There, employees were laid off but received a guaranteed annual wage by contract. *Id.* at 416. The employer argued that all claimants performed a service during the layoff period by remaining available to return to work if recalled and, further, that they were paid for keeping themselves available when they received the lump sum payment. *Id.* at 417. Although claimants received no funds during the layoff period, the employer argued that it was "simply an accounting problem to apportion the lump sum payment retroactively to the weeks of the layoff." *Id.* For support, the employer relied on *Nierotko*. *Id.*

The Court of Appeal of Louisiana held that the availability of laid-off employees to return to work during layoff was not a service performed by the employees within the meaning of Louisiana's unemployment compensation statute (the Louisiana Employment Security Act). *Id.* at 417–18 (citing LSA-R.S. 23:1472(19) and (20), which provide that "[a]n individual shall be deemed to be 'unemployed' in any week during which he performs

no services and with respect to which no wages are payable to him" and that "wages" means "all remuneration for services").

In rejecting the employer's reliance on *Nierotko*, the *Doyal* court explained:

> At first glance it would appear *Nierotko* is authority for concluding the claimants in the instant cases did receive wages for services performed during the layoff period because the guaranteed annual wage payment could be apportioned to the weeks for which the claim is made. However, in *Nierotko*[,] the Court noted the result was reached to accomplish a stated Congressional purpose in the Social Security Act to afford the broadest coverage possible. In the instant case we too are charged with reaching a result consistent with the stated purposes of the [Louisiana Employment Security Act]. Thus, were we to conclude that claimants' availability to return to work during the layoff was a 'service performed' or that the lump sum guaranteed annual wage payment could be construed as 'wages' paid for the weeks of layoff, we would lend an interpretation to LSA-R.S. 23:1472(19) that would defeat the stated intent of the Louisiana Employment Security law; the continued purchasing power of the worker during periods of unemployment would not be assured by the payment of weekly benefits during those periods.
>
> Availability to return to work during a layoff is not, as urged by [the employer], a service performed by the employees in the instant case. A reduction in work force might lay employees off for a period from one day to six months or longer. Were we to conclude availability to work was a service performed, this interpretation would defeat claims of a large segment of employees the act was designed to cover. The unemployment benefits are needed during layoffs to maintain the buying power of the family.
>
> We cannot conclude a lump sum payment under the guaranteed annual wage provision of the labor contract can be treated as wages paid for the weeks of the layoff. While from an accounting standpoint it is possible to do so, such a result would do violence to the act. Because the lump sum payment is not due until one month after the contract year ends, the employee who is laid off must subsist in the meantime.

Id. at 418.

Likewise, here, interpreting LE § 8-801(b)(1) broadly to include the entire employer-employee relationship for which compensation is paid, rather than work actually

performed, would not only be inconsistent with the interpretation in *Westinghouse* and past Board decisions, but would also run contrary to the legislative intent to "favor broad access to unemployment benefits[.]" *Lilley*, 106 Md. App. at 760–61.

V.

CONCLUSION

We are careful to circumscribe our holding to the circumstances of this case. The Board's finding that the appellant was paid to be on "stand-by status" to avoid the cost of hiring and training new employees, which undergirded its legal analysis, was not supported by substantial evidence. In addition, we cannot defer to the Board's interpretation of LE § 8-801(b)(1) because it conflicts with legislative intent and relevant decisional law.

The COVID-19 pandemic occasioned a singularly broad societal reaction, affecting huge swathes of diverse employment sectors including the airline industry, the likes of which had not been seen in the United States in recent memory. We recognize that the appellant's circumstances in this case were unique in that she not only did not perform work, but indeed could not do so under a multi-layered interdiction. The appellant was affirmatively prevented from performing her work both by Southwest's own ETO policy and, at least for a time, Governor Hogan's stay-at-home order and subsequent limitations. Given these unique circumstances, our conclusion should not be read to sanction the availability of unemployment insurance benefits in every situation in which an employee retains some connection to the employer. Whether a claimant is considered unemployed under the Maryland's Labor and Employment Article depends on the circumstances of each

individual claimant and his or her situation, and whether the claimant satisfies the eligibility requirements under the statute, including eligibility provisions not at issue in this particular instance. *See supra* n.3.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO REVERSE THE DECISION OF THE BOARD OF APPEALS; APPELLEE TO PAY COSTS.