

Circuit Court for Baltimore County
Case No. 03-C-15-007310

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1136

September Term, 2017

HILBERT BYERS

v.

DEPARTMENT OF LABOR, LICENSING
AND REGULATION

Wright,
Leahy,
Sharer, J. Frederick.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 19, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Mr. Hilbert Byers, appeals from the decision of the Circuit Court for Baltimore County, which affirmed the decision of the Board of Appeals (“the Board”) of the Department of Labor, Licensing and Regulation (“Appellee” or “DLLR”) to deny Mr. Byers unemployment benefits. The Board’s decision, in turn, affirmed the decision of the DLLR hearing examiner (“Hearing Examiner”) that Mr. Byers was discharged by his employer, Seasons Hospice & Palliative Care of Maryland, Inc. (“Seasons Hospice” or “Employer”) for gross misconduct and was, therefore, disqualified from receiving unemployment benefits.

In this appeal, Mr. Byers presents three questions, which we have rephrased and consolidated as follows:¹

1. Was the Board’s decision supported by substantial evidence, such that a reasoning mind could have concluded that Mr. Byers was discharged for

¹ The questions, as presented by Mr. Byers, are:

1. “Whether the Court’s finding that the decision by the DLLR to uphold the Hearing Examiner’s denial of unemployment benefits to Appellant was supported by substantial evidence.”
2. “Whether “Reasoning Minds” could lawfully find that an employee who testified under oath that his second line supervisor authorized him to violate company rules was not telling the truth when the supervisor in question testified under oath that he simply “did not recall” giving such an authorization and failed to so deny such authorization.”
3. “Whether a hearing examiner has the legal discretion to determine that an employee was not telling the truth about being authorized by a supervisor to violate company rules when said supervisor, under oath, failed to deny giving such authorization but instead simply testified that he “did not recall” giving such an authorization.”

The first question as presented by Mr. Byers misstates this Court’s standard of review on appeal from a circuit court’s review of an agency’s final decision. This Court’s task is to review the final decision of an *agency* under the substantial evidence test, not that of the circuit court. *See Wilson v. Maryland Dep’t. of Environment*, 217 Md. App. 271, 283-84 (2014).

gross misconduct within the meaning of the Maryland unemployment insurance law?

2. Did the Hearing Examiner abuse his discretion in crediting Mr. Friedman's testimony that "he did not recall" a conversation that Mr. Byers testified as to having taken place?

We hold that substantial evidence supported the Board's decision, such that a reasoning mind could have reached the conclusion that Mr. Byers was discharged for gross misconduct within the meaning of Maryland Code (1991, 2008 Repl. Vol.), Labor and Employment Article ("LE"), § 8-1002(a)(1)(i). We are also satisfied that the Hearing Examiner did not abuse his discretion in crediting Mr. Friedman's testimony.

BACKGROUND

A. Mr. Byers' Discharge

Seasons Hospice employed Mr. Byers as an "office care consultant" from November 5, 2012, until October 1, 2014. As an office care consultant, Mr. Byers made field visits to various care facilities.² For each facility he visited, Seasons Hospice required Mr. Byers to document on a "call report" information such as (1) the customer(s) he spoke with and (2) the mileage he incurred traveling to the respective facility. For every mile traveled, Seasons Hospice reimbursed Mr. Byers "56 or 58 cents."

Suspensions concerning the accuracy of Mr. Byers' call reports prompted Mr. Hal Friedman (Seasons Hospice's national director of business development) and Mr. Perry Limes (Seasons Hospice's director of business for Maryland) to call in Mr. Byers for a

² Mr. Byers' worked his position as an office care consultant for the company's sales division.

meeting. Mr. Friedman, Mr. Limes, and Mr. Byers met on September 29, 2014, and discussed a call report he had submitted for the week of September 22-25, 2014. Through Mr. Byers' own admission at the meeting, and a subsequent investigation into the matter, Mr. Friedman and Mr. Limes discovered that Mr. Byers had misrepresented two telephonic visits as in-person visits and falsely reported mileage he had not incurred. Based on this information, Seasons Hospice discharged Mr. Byers on October 1, 2014.

B. Claim for Unemployment Benefits

Following his termination, Mr. Byers applied for unemployment benefits. On November 13, 2014, a DLLR Claims Specialist awarded benefits to Mr. Byers because Seasons Hospice presented “insufficient information [] to show that the claimant’s actions constituted misconduct in connection with the work.” Seasons Hospice appealed this initial determination and requested a hearing. DLLR sent both Mr. Byers and Seasons Hospice a notice for an appeal hearing to be held by a DLLR hearing examiner by telephone.

Telephone Proceeding before Hearing Examiner

On December 26, 2014, the Hearing Examiner conducted a telephonic hearing, as permitted by Code of Maryland Regulations (“COMAR”) 09.32.06.02T. The Hearing Examiner framed the issue as follows: “whether [] the Claimant’s separation from this employment was for a disqualifying reason within the meaning of the Maryland Unemployment Insurance Law.” Counsel for Seasons Hospice began the hearing by eliciting testimony from Mr. Friedman and Mr. Limes—the two witnesses on behalf of Seasons Hospice. Mr. Byers, proceeded *pro se* and testified as the only witness on his own behalf.

The Circumstances Leading to the Discharge

At the hearing, Mr. Friedman testified that he and Mr. Limes met with Mr. Byers on September 29, 2014, to discuss the veracity of Mr. Byers' call reports for the previous week (September 22 through 25). Confronted with the call report, Mr. Byers admitted that he falsely documented the visit to Clinton Nursing and Rehabilitation ("Clinton Nursing") as an in-person visit when, in actuality, he had only made a telephone call.³

Mr. Friedman testified that he asked Mr. Byers whether he realized "that that's not the intent; that you have to actually make the visits, and actually by putting activities in the [] system, you actually generate mileage." Mr. Byers responded, "yes, that was my mistake." Apart from this response, Mr. Friedman testified that Mr. Byers did not give any other explanation for his misrepresentation. Mr. Friedman also testified that when he asked Mr. Byers if "there [were] any visits, any other jobs that w[ere] telephonic and were not [a] face-to-face-meeting," Mr. Byers "looked at the document, and after about 30 seconds, he said nope, the others were face to face." Following the meeting, however, Mr. Friedman and Mr. Limes contacted one other facility—Genesis Magnolia Center—on the call report and discovered that Mr. Byers had only contacted the facility by telephone.

Mr. Friedman testified that after he and Mr. Limes presented this information to Seasons Hospice's executive director, Mr. Dean Foreman, and director of human resources, Ms. Angela Baker, they decided collectively to terminate Mr. Byers based on the falsified activities in the call reports. When the Hearing Examiner asked Mr. Limes what made the

³ Mr. Limes later testified that he was able to confirm with the four individuals identified on the call report that Mr. Byers had not visited Clinton Nursing.

misrepresentation on the call report beneficial to Mr. Byers, or “fraudulent, per se[,]” Mr. Limes gave the following explanation: “Mr. Byers, out of all our (indiscernible) receiving the highest mileage [reimbursement], not only in Maryland, but it (indiscernible) company, so there was a question coming from our highest levels as to mileage.” Mr. Limes further agreed with the hearing examiner’s conclusion that, “the advantage here, or the benefit to him, would be that he would collect reimbursement for mileage that he hadn’t actually incurred [and] it would be a financial windfall [] if he were to be fraudulently misrepresenting his visits as in-person visits.”

Mr. Friedman then testified that Mr. Limes and Ms. Baker met with Mr. Byers on October 1, 2014, in order to terminate his employment. Mr. Limes testified that upon presenting Mr. Byers with their findings in regard to the additional visit he falsified in his call report, again, Mr. Byers responded only that he had made a mistake and asked for a “second chance or second opportunity.” When the Hearing Examiner asked Mr. Limes whether Mr. Byers had “any other explanation besides the fact that he had just made a mistake,” Mr. Limes said that he did not.

Mr. Byers’ Testimony

When the Hearing Examiner asked Mr. Byers whether he had any responses to the testimony of Mr. Limes and Mr. Friedman, he testified that, although he “kn[ew] that those calls were falsified” and “[was] not disputing that,” Mr. Friedman had given him permission at a prior sales conference to submit expenses incurred on alcoholic beverages as mileage for reimbursement. Mr. Byers explained further that this conversation with Mr. Friedman took place on the night of September 15 while at a bar with their sales team

following a day of meetings. As part of the “team-building process,” he decided to purchase some alcoholic beverages for the members of his sales team. While he was purchasing the drinks, he testified, Mr. Friedman told him “since you cannot submit receipts for the alcohol, [] you can put in miles instead, to cover the expenses.” Mr. Byers testified that he had receipts for the amounts “[\$]14, []16 or whatever it was.”

Stating that he was “having a hard time following” Mr. Byers’ explanations, the Hearing Examiner clarified, “you knowingly falsified your -- the call report, and -- but that was done at the suggestion of Mr. Friedman, who encouraged you to do that, so that you would be reimbursed through your mileage for expenses that you incurred for alcohol at a conference?” Mr. Byers then responded, “[t]hat’s correct.” Still feeling “completely lost,” the Hearing Examiner repeatedly asked Mr. Byers why he didn’t “simply present the receipts for reimbursement” and “[w]hy [he] would fudge [his] mileage or fudge [his] call report to indicate that [he] was making personal visits[.]” Mr. Byers responded that the company had a policy against reimbursing alcoholic beverages. Mr. Byers explained that he nevertheless purchased the drinks because Mr. Friedman “was senior direct[or] of business development at the time, [and] he told me I could submit the [] cost as miles to be reimbursed for it.”

Mr. Byers also explained that he eventually shared this conversation with Mr. Limes on the morning of October 1, 2014, and Mr. Limes responded that “[it] was a game changer[.]” and that he “did not feel comfortable moving forward with termination right now[.]” but, would call Mr. Friedman about the situation. Mr. Byers testified that Mr.

Limes later told him that Mr. Friedman claimed that he didn't recall the conversation with Mr. Byers.

Mr. Friedman's Denial of Authorizing the Falsifications

On redirect, Mr. Friedman testified multiple times that he "d[id] not recall" the conversation with Mr. Byers at the bar, and that the company's policy against alcohol reimbursements was "generally known."

[HEARING EXAMINER:] You don't recall any such – okay. Were you at the bar with him when he was buying drinks for the team members?

[MR. FRIEDMAN:] I was at the bar. I don't – we – you know, there was about probably 50 of us there. I don't recall the actual moment that he's talking about[.]

[HEARING EXAMINER:] Okay. Do you – you don't – do you recall telling him that he could not get reimbursed for any expenditures for alcohol?

[MR. FRIEDMAN:] I don't recall that conversation. I think it was generally known throughout the company that we don't get reimbursed [] for alcohol.

After giving Mr. Byers an opportunity to re-cross examine Mr. Friedman, the Hearing Examiner asked, "Mr. Friedman, do you recall a private conversation at the bar with [] Mr. Byers at that convention in question?" Mr. Friedman responded, "I do not."

Hearing Examiner's Decision

The Hearing Examiner issued a decision on January 6, 2015, and ruled that Mr. Byers was discharged for gross misconduct within the meaning of LE § 8-1002(a)(1)(i). In the Hearing Examiner's findings of fact, he determined that "claimant indicated on his 'call report' that he had made actual field visits to certain clients, when, in fact, the visits

were conducted telephonically.” He found that because of these “misrepresentation(s), the claimant was reimbursed for mileage expenses which he did not incur.” In addition, he determined that “claimant initially denied the extent of the number of misrepresented live visits,” “did not claim that anyone (i.e. Mr. Friedman) had ‘suggested’ to him that he manipulated his call report to recoup expenses for drinks he purportedly purchased (for ‘team members),” and “[a]t the termination meeting with Mr. Limes and [Ms. Baker,] the claimant acknowledged he made a ‘mistake’ and asked for a second chance.” Based on these findings, the Hearing Examiner’s “Evaluation of Evidence” stated as follows:

In this case, the burden has been sustained. The claimant acknowledged that he falsified company records which had the effect of generating mileage reimbursement to which he was not entitled. The claimant’s assertion that Mr. Friedman had authorized him to submit the fraudulent reports was credibly refuted by Mr. Friedman. Moreover, the claimant failed to adequately explain why he was ‘reluctant’ to point this out when he was initially questioned by Mr. Limes and Mr. Friedman. Regrettably, and in sum, the hearing examiner is compelled to determine that the claimant’s actions constituted a willful and deliberate disregard of employment standards within the meaning of Section 8-1002 (falsification of documents and misappropriation of employer funds).

Accordingly, the Hearing Examiner held that “the claimant was discharged for gross misconduct.”

C. DLLR Board of Appeals

Mr. Byers appealed the Hearing Examiner’s decision to the DLLR Board of Appeals. Without conducting its own hearing, the Board reviewed the record *de novo* and affirmed the Hearing Examiner’s determination. The Board recognized that the “gravamen of the claimant’s argument is that Mr. Friedman directed the claimant to falsify his mileage records.” Nevertheless, the Board in its decision stated that it “concurs with the hearing

examiner's *Evaluation of Evidence* and finds insufficient credible evidence that warrant a change to the hearing examiner's findings. The Board finds that the hearing examiner properly weighted the credible evidence in the record."

D. Appeal to the Circuit Court

Mr. Byers petitioned for review in the Circuit Court for Baltimore County. In a decision dated July 6, 2017, the circuit court affirmed the Board's decision by concluding that the Hearing Examiner's finding of gross misconduct was supported by substantial evidence. The circuit could ruled as follows:

In this case, the Hearing Examiner heard from both the Petitioner, as well as Mr. Friedman, and evaluated the evidence presented to him. The Hearing Examiner pointed out that the Petitioner acknowledged that he falsified the mileage records, failed to adequately explain why he did not point this out when first confronted by Mr. Friedman and Mr. Limes, and that Mr. Friedman's testimony credibly refuted the Petitioner's assertion. [] Based on the evidence contained in the record, this Court finds that the decision by the Hearing Examiner was supported by substantial evidence, and accordingly, the decision of the Board of Appeals is affirmed.

Mr. Byers noted his timely appeal to this Court on August 4, 2017.

DISCUSSION

Standard of Review

This Court’s task in reviewing an administrative decision “is precisely the same as that of the circuit court: [] we must review the administrative decision itself.” *Wisniewski v. Dep’t. of Labor, Licensing and Regulation*, 117 Md. App. 506, 515 (1997) (citations omitted). An employee who is denied unemployment insurance benefits by the Board may seek judicial review in the circuit court. Judicial review of administrative adjudications of unemployment insurance benefits is governed by LE § 8-5A-12(d), which provides:⁴

Scope of review:

(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:

- (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.

Maryland courts have emphasized that judicial review of an administrative decision under § 8-5A-12(d) is narrow. *See e.g., Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005); *Dep’t. of Labor v. Boardley*, 164 Md. App. 404, 421 (2005). An agency’s final decision is *prima facie* correct and presumed valid, and this Court must review that decision in the light most favorable to the agency. *Boardley*, 164 Md. App. at 417; *Wisniewski*, 117 Md. App. at 516. As such, a reviewing court “is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and

⁴ Mr. Byers incorrectly relies on the Administrative Procedure Act in stating the scope of this Court’s review. This Court established in *Dep’t. of Labor, License and Regulation v. Woodie*, 128 Md. App. 398, 409-10 (1999), that the Administrative Procedure Act does not govern unemployment insurance proceedings.

conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Noland*, 386 Md. at 571 (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-69 (1999)). Accordingly, 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.” *Boardley*, 164 Md. App. at 417.

In applying the substantial evidence standard, the relevant inquiry before a reviewing court in “determining whether the Board’s findings of fact are supported by substantial evidence is[:] whether reasoning minds could reach the same conclusion from the facts relied upon by the Board.” *Boardley*, 164 Md. App. at 417 (citing *Dep’t. of Labor, Licensing and Regulation v. Hider*, 349 Md. 71, 78 (1998)). In making this determination, “[a] reviewing court should defer to the agency’s fact-finding and drawing of inferences if they are supported by the record.” *Noland*, 386 Md. at 571 (quoting *Banks*, 354 Md. at 68). It is *not* the task of a reviewing court to “engage in its own fact-finding.” *Wisniewski*, 117 Md. App. at 517. Rather, it is the exclusive function of the agency to “draw[] inferences from [] and resolv[e] conflicts in the evidence.” *Id.* And, “where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.” *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513 (1978). As the Court of Appeals summarized in *Snowden v. Mayor & City Council of Baltimore*, 224 Md. 443, 448 (1961), “[t]he Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is *reasonableness*, not rightness.” (internal quotation omitted) (emphasis added).

I.

Review of the Board's Decision

Mr. Byers' main contention on appeal is that the circuit court erred in finding that there was substantial evidence in the record to uphold the Hearing Examiner's determination that Mr. Friedman's testimony credibly refuted Mr. Byers' sworn testimony. Mr. Byers argues that the Hearing Examiner abused his discretion to determine the credibility of a witness because there was no such evidence "as a reasonable mind might accept as adequate to support a conclusion that he reached as to the credibility of Mr. Friedman." Mr. Byers contends that the testimony before the Hearing Examiner "was not a simple 'yes' or 'no' matter to be left to the discretion of Hearing Officer or DLLR or the lower court" because Mr. Friedman's testimony was "a less than unequivocal and complete denial." Mr. Byers argues that Mr. Friedman's testimony of "'did not recall' clearly do[es] not constitute a denial" as these words "could simply mean that such a conversation could have happened – that maybe he told [Mr. Byers] to take the actions he took – or maybe not." Mr. Byers concludes that the Hearing Examiner's finding that Mr. Byers' testimony was credibly refuted by Mr. Friedman is "reversible error."

The DLLR responds that "Mr. Friedman did not testify that he could not recall whether *or not* he gave Mr. Byers this instruction, he testified that he had no recollection" of the alleged instruction. Mr. Friedman also testified that he believed the company's policy against alcohol reimbursement was generally known. Accordingly, DLLR argues that this evidence supported a reasonable inference that he never instructed Mr. Byers to falsify the mileage reimbursements in his call reports. DLLR further argues that Mr. Byers'

focus on only one portion of Mr. Friedman’s entire testimony is misplaced because a court’s task is to review the Hearing Examiner’s findings of fact in light of the record as a whole. DLLR also argues that Mr. Byers’ undisputed actions—falsifying the mileage reimbursements in his call reports in order to receive reimbursements for alcohol—alone satisfied the standard for “gross misconduct.”

LE § 8-1002 disqualifies an otherwise eligible employee from receiving unemployment benefits when his or her discharge results from “gross misconduct.” Section 8-1002 reads, in pertinent part, as follows:

- (a) *Gross misconduct defined.* In this section, “gross misconduct”:
 - (1) Means conduct of an employee that is:
 - (i) deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit; or
 - (ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee’s obligations[.]
- (b) *Grounds for disqualification.* An individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is gross misconduct in connection with employment.

Considering the evidence presented in the light most favorable to the Board, *Boardley*, 164 Md. App. at 417; *Wisniewski*, 117 Md. App. at 516, we hold that substantial evidence supported the Board’s conclusion. First we must reject Mr. Byer’s contention that Mr. Friedman’s testimony was the “sole basis” for the Board’s decision. Nothing in the Hearing Examiner’s decision, which the Board affirmed, indicates that the disputed portion of Mr. Friedman’s testimony was the “sole basis” for its conclusion. Indeed, the Hearing Examiner found that “[Mr. Byers] acknowledged that he falsified company

records which had the effect of generating mileage reimbursement to which he was not entitled” and “failed to adequately explain why he was ‘reluctant’ to point this out when he was initially questioned by Mr. Limes and Mr. Friedman.”

The evidence supported the Hearing Examiner’s finding that Mr. Byers’ conduct was accompanied by a “deliberate” and “willful” state of mind that demonstrated gross indifference. *See* LE § 8-1002. At the telephone hearing, Mr. Friedman testified that Mr. Byers admitted to falsifying mileage reimbursements for one telephonic visit on his call report at the September 29 meeting. When Mr. Friedman asked Mr. Byers whether he falsified any other visits, Mr. Byers stated that he did not. Subsequent investigation by his supervisors, however, revealed that Mr. Byers had indeed falsified mileage reimbursements for another telephonic visit on his call report, which Mr. Byers later conceded at the October 1 meeting. Mr. Byers himself testified multiple times that he knowingly and fraudulently entered mileage for two telephonic visits in his call report, even explaining his calculated scheme for generating the number of miles necessary for the reimbursements.

Additionally, it was undisputed that Mr. Byers failed to disclose the alleged conversation with Mr. Friedman at the initial September 29th meeting. Before the Hearing Examiner, Mr. Byers explained that he did not reveal this information at the meeting only because he was “very reluctant to” as he “did not know what [had] been discussed[.]” On re-direct, however, Mr. Friedman testified multiple times that he “d[id] not recall” the alleged conversation with Mr. Byers. Based on all of this evidence, a reasoning person could appropriately conclude that Mr. Byers’ falsification of mileage in his call report in order to receive reimbursements from his employer for a prohibited expense was

accompanied by a willful and deliberate state of mind that demonstrated a gross indifference to the employer's interests and whether he kept his job. *See Dep't. of Econ. and Emp't Dev. v. Hager*, 96 Md. App. 362, 374 (1993). We hold that Mr. Byer's admission that he falsified company records constituted substantial evidence to support a determination that Mr. Byers committed gross misconduct within the meaning of LE § 8-1002.

II.

Agency Credibility Determinations

We will now address Mr. Byers' second question presented to this Court: whether the hearing examiner had legal discretion to determine that Mr. Friedman's testimony "credibly refuted" Mr. Byers' testimony. At the telephone hearing conducted by the Hearing Examiner, Mr. Byers testified that Mr. Friedman had granted him permission to falsify his mileage reimbursements on his call reports. Mr. Friedman, however, testified multiple times that he "d[id] not recall" the alleged conversation with Mr. Byers:

[COUNSEL FOR EMPLOYER:] I was just going to ask you, you heard the Claimant's testimony about the reimbursement and fudging the mileage on his call report. Can you respond to that?

[MR. FRIEDMAN:] Yeah, I do not recall the conversation at the bar.

[HEARING EXAMINER:] You don't recall any, any conversation in which you purportedly suggested that Mr. Byers falsify his call report in order to generate mileage that would reimburse him for his expense in purchasing the drinks at the bar?

[MR. FRIEDMAN:] Yes.

[HEARING EXAMINER:] You don't recall any such – okay. Were you at the bar with him when he was buying drinks for the team members?

[MR. FRIEDMAN:] I was at the bar. I don't – we – you know, there was about probably 50 of us there. I don't recall the actual moment that he's talking about[.]

[HEARING EXAMINER:] Okay. Do you – you don't – do you recall telling him that he could not get reimbursed for any expenditures for alcohol?

[MR. FRIEDMAN:] I don't recall that conversation. I think it was generally known throughout the company that we don't get reimbursed [] for alcohol.

[HEARING EXAMINER:] Um-hum. But you don't have [] any recollection of suggesting that he, you know, collect reimbursement [] by [] putting, you know, false information on his call report?

[MR. FRIEDMAN:] Correct. I do not.

Based on Mr. Friedman's testimony, the Hearing Examiner ultimately found that “[Mr. Byers' assertion] that Mr. Friedman had authorized him to submit the fraudulent reports was *credibly refuted* by Mr. Friedman.” (emphasis added).

Before this Court, Mr. Byers argues that a hearing examiner's discretion to resolve conflicting testimony exists only when it is a simple “yes or no situation.” Mr. Byers contends that, under *Bulluck, supra*, 283 Md. 505, the Hearing Examiner could not have determined the credibility of Mr. Friedman's testimony that he “d[id] not recall,” because his testimony was a “less than unequivocal and complete denial” of Mr. Byers' testimony. DLLR responds that the Hearing Examiner could have reasonably concluded that Mr. Friedman's testimony constituted a denial because he did not testify “that he could not recall whether *or not* he gave Mr. Byers this instruction,” rather, “he testified that he had no recollection of instructing Mr. Byers to falsify his mileage in order to be reimbursed for an alcohol purchase.” DLLR maintains that, even if the evidence could support alternative

conclusions, the Board's conclusion must be upheld because it was reasonable and the result of a permissible credibility determination within the exclusive province of the agency.

Mr. Byers' argument fails logically and it fails under *Wisniewski*, in which we emphasized this Court's inability to substitute our own judgment for that of an agency. 117 Md. App. at 520. This Court explained, "credibility determinations and the inferences to be drawn from the facts are the exclusive province of the Board" and "'where inconsistent inferences from the *same* evidence can be drawn, *it is for the agency to draw the inference.*'" *Id.* at 517, 520 (quoting *Baltimore Lutheran*, 302 Md. 649, 663 (1985)) (emphasis added). In order to prevail on an argument that the agency improperly assessed the credibility of a witness, this Court announced, "[an] appellant would have to persuade us that *no reasonable person* could have credited [the other witness's] testimony over appellant's." *Id.* at 520 (emphasis added). In the instant case, Mr. Byers has not made this showing. That there is substantial evidence to support the opposite inference that Mr. Friedman instructed Mr. Byers to falsify his mileage reimbursements does not render the inference drawn by the Hearing Examiner an unreasonable one. *See id.* at 517. As it was the province of the agency to resolve the conflicting testimonies of Mr. Friedman and Mr. Byers in Mr. Friedman's favor, we decline to second guess the Hearing Examiner's finding on appeal. *See Id.* at 517, 520. Applying the teachings of *Wisniewski*, we conclude that the Hearing Examiner did not abuse his discretion in crediting Mr. Friedman's testimony over that of Mr. Byers.

Mr. Byers’ attempt to evade our standard of review by relying on *Bulluck* is misguided. In *Bulluck*, the Court of Appeals granted certiorari to consider, *inter alia*, whether substantial evidence supported the decision of the Commission on Human Relations (“Commission”), which found that Pelham Wood Apartments (“Pelham”) had denied Bulluck housing discriminatorily based on his race. 283 Md. 505, 507, 510 (1978). The Commission found probable cause to believe that Pelham had violated a Maryland statute prohibiting discriminatory housing practice based, in part, on testimony by its investigators that the same Pelham rental agent who told Bulluck that one bedroom units were unavailable, told the Commission’s white investigators that a one bedroom and den apartment was in fact available. *Id.* at 510. On appeal, the circuit court subsequently reversed the Commission’s decision, holding that it was not supported by substantial evidence. *Id.* After granting *certiorari*, the Court of Appeals began its decision by identifying the scope of its review:

[I]n order to uphold the conclusion that there had been a violation [of the statute,] a court would have to find substantial evidence showing (1) that Pelham Wood engaged in a misrepresentation concerning present or future apartment availability, and (2) that such misrepresentation was made for discriminatory reasons.

Id. at 514. The Court then proceeded to review “essentially all of the evidence in the present record tending to support the Commission’s critical finding that ‘(a)t the time Complainant visited the rental office of Pelham Wood Apartments, there was a one-bedroom and den apartment available.’” *Id.* at 515. This included (1) Bulluck’s testimony that Pelham’s rental agent told him that one, two, and three bedroom units were unavailable; and (2) the Commission investigator’s testimony that the same rental agent

told her that a one bedroom and den apartment had been available “during the month of August.” *Id.* at 514. After reviewing this evidence, the Court of Appeals determined that the evidence supporting the finding with regard to Pelham’s misrepresentation of apartment availability was equivocal. *Id.* at 517. The evidence specifically at issue was the Commission investigator’s testimony:

It is not at all clear to us that when the rental agent told the investigator that a one bedroom and den apartment had been available “during the month of August,” she meant that it had been available, or that she knew that it would shortly be available, on the day in the beginning of August when Mr. Bulluck visited the office. It might not be inconsistent with her statement if the apartment did not become available until the latter part of August. Moreover, if this were the case, she might not have known when Mr. Bulluck visited that it would be available at the end of the month. The testimony by the president [] that he was unable to say that an apartment “was not available on August 1st, 1973,” is obviously different from saying that an apartment “was available on August 1st.”

Id. at 515.

Despite determining that the testimony was equivocal, the Court of Appeals declined to proceed with “determin[ing] whether this [evidence] met the ‘substantial evidence’ standard,” and instead “decided upon a different course of action under the particular circumstances of th[e] case.” *Id.* at 516-17. Namely, the Court explained that the judicial review statute governing decisions by the Human Relations Commission contained a provision allowing parties to present additional evidence to a reviewing court “without the necessity of an application or without the necessity of showing reasons for the failure to present it at the hearing before the Commission.” *Id.* at 517 (internal quotations omitted). Given that the Commission investigator’s testimony “was unclear and equivocal[,]” the Court determined that “[t]his matter [] could have been clarified or

further developed in the circuit court.” *Id.* at 517. The Court decided it “appropriate to remand th[e] case to the circuit court [] for the taking of additional testimony” on the basis that “[n]one of the parties in th[e] case took advantage of this provision.” *Id.* at 517-18.

Nothing in *Bulluck* stands for the proposition that an administrative agency abuses its discretion when it draws credibility assessments in the absence of “yes or no situations.” *Bulluck* is not instructive on the issue of agency credibility determinations given that the Court of Appeals never even proceeded to determine whether the “equivocal” evidence met the substantial evidence standard. Rather, the holding of the Court of Appeals in *Bulluck* rested distinctly on a provision in the Human Relations Commission’s judicial review statute that is not similarly present in the judicial review statute in the instant case—LE 8-5A-12(d). *See Dep’t. of Labor, Licensing and Regulation v. Woodie*, 128 Md. App. 398, 406-07 (1999) (stating that the statute is silent on the issue of remands “because it simply does not contemplate them, absent extraordinary circumstances.”).

For the foregoing reasons, we hold that there was substantial evidence to support the Board’s findings, and find no error or abuse of discretion in the Hearing Examiner or the Board’s decisions.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**