UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2494

September Term, 2015

JANET GREENE

v.

DEPARTMENT OF LABOR, LICENSING, & REGULATION

Graeff,
Kehoe,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: January 30, 2017

On October 23, 2014, Janet Greene, appellant/cross-appellee, was terminated from her employment as a Claim Specialist II in the Division of Unemployment Insurance ("DUI") at the Department of Labor, Licensing, and Regulation ("DLLR"), appellee/cross-appellant. Ms. Greene appealed her termination through the process set forth in Maryland Code (2015 Repl. Vol.) §§ 11-109 through 11-110 of the State Personal & Pensions Article ("SPP"), and pursuant to the Administrative Procedure Act, Maryland Code (2014 Repl. Vol.) Title 10, Subtitle 2 of the State Government Article ("SG"), a contested case hearing was scheduled for March 19, 2015, before ALJ Hurwitz, an Administrative Law Judge ("ALJ") in the Office of Administrative Hearings ("OAH").

While her hearing on the termination was pending, Ms. Greene applied for unemployment insurance benefits. A DUI Claims Specialist denied Ms. Greene's application for benefits after determining that she was discharged from employment for gross misconduct. Ms. Greene appealed the benefits determination, and on February 27, 2015, after a hearing, ALJ Friedman upheld DLLR's decision that Ms. Greene was terminated for gross misconduct, and therefore, she was disqualified from receiving unemployment benefits.[1] Ms. Greene did not petition for judicial review of ALJ Friedman's decision.

ALJ Hurwitz subsequently ruled that, pursuant to the doctrine of collateral estoppel, he would give preclusive effect to ALJ Friedman's factual findings, as requested by DLLR.

[1] Although such appeals are ordinarily heard by the Lower Appeals Division of the Department of Labor, Licensing, and Regulation ("DLLR"), because Ms. Greene had been a DLLR employee, the matter was referred to the Office of Administrative Hearings ("OAH").

On May 29, 2015, after a hearing to determine whether DLLR properly terminated Ms. Greene's employment, ALJ Hurwitz issued a decision, concluding that DLLR lawfully terminated Ms. Greene.

Ms. Greene filed a petition for judicial review. After a hearing, the Circuit Court for Baltimore City issued an order vacating ALJ Hurwitz' decision and remanding the matter to DLLR for the "agency to fully comply with the requirements" of SPP § 11-106(a).

On appeal, Ms. Greene raises the following two questions for our review, which we have rephrased, as follows:

> 1. Did ALJ Hurwitz err in adopting ALJ Friedman's factual findings?
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> 2. Did the circuit court err in remanding the case to DLLR to allow the agency to comply with SPP § 11-106(a) when the agency was required to comply with those provisions prior to terminating Ms. Greene?

The DLLR raises the following additional question in its cross-appeal, which we have rephrased, as follows:

> Did the circuit court err in remanding the case to DLLR to comply with SPP § 11-106(a) because ALJ Hurwitz' finding that DLLR fully complied with that section prior to terminating Ms. Greene was supported by substantial evidence?

For the reasons set forth below, we shall reverse the judgment of the circuit court and remand to that court with instructions to affirm the administrative decision.

FACTUAL AND PROCEDURAL BACKGROUND

DUI collects and maintains confidential financial information about employers, employees, and claimants. Maryland law requires that unemployment insurance records be kept confidential. Md. Code (2008 Repl. Vol.) § 8-625 of the Labor & Employment

Article ("LE"); Md. Code (2014) § 4-336 of the General Provisions Article ("GP"); SG § 10-1304. Federal law requires that a state receiving federal funding for its unemployment insurance program adopt policies that ensure that information obtained is maintained in confidence. *See* 20 C.F.R. §§ 603.1 to 603.5 (2016).

Due to the confidential nature of the information gathered through unemployment insurance claims, DLLR has created the "DUI Employee Affirmation of Ethical Responsibilities," which provides, in part, that employees:

> 2. Shall attempt to avoid any conflict of interest and/or any action that may appear to be fraudulent or negligent.
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> ***
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> 4. Shall regard electronic data and other manually maintained records on individual person, employers, and other systems as confidential in nature, to be held in trust, and shall protect and cause to be protected such data and systems against unauthorized disclosures and/or use. These data include, but are not limited to, name, address, social security number, telephone number, age, sex, ethnic background, wage, employment, tax information, user name, logon identification numbers, password, or any other information gathered either from individuals or from agency or other government computer systems.
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> ***
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> 12. Shall not disclose confidential information concerning State operations or affairs for private gain or to benefit any employer or claimant, except for information authorized in the ordinary course of business.
>
> 13. Shall not intentionally use the prestige, authority or status of employment for my private gain or that of another.

The affirmation further provides that the employee understands that "violation of any of these policies . . . will result in a formal investigation of my activities and, if appropriate, disciplinary action which could result in . . . dismissal." On October 1, 2013, and August

28, 2014, Ms. Greene signed the "DUI Employee Affirmation of Ethical Responsibility," thereby acknowledging that she understood the ethics rules and that violation of these rules could result in termination of employment. These instructions are reiterated at staff meetings.

DUI regularly instructs its employees not to handle a claim of someone that they personally know, including a family member, friend, or relative. On January 9, 2014, March 20, 2014, and June 12, 2014, Ms. Greene signed statements indicating that she was advised of this policy.

According to Ms. Greene's Notice of Termination, on September 24, 2014, Amanda Greene, an unemployment insurance claimant and Ms. Greene's former daughter-in-law, contacted the Towson Claim Center and reported that Ms. Greene had improperly accessed her unemployment insurance information and relayed information to Amanda's ex-husband, Ms. Greene's son, Aaron Greene. Amanda and Aaron, who have a daughter, Autumn, were divorced in April 2014, and they did not have an amicable relationship.

On May 25, 2014, Amanda filed for unemployment insurance benefits. In June 2014, Amanda saw text messages from Aaron, asking Ms. Greene to check the status of Amanda's benefits. After Amanda filed her claim for benefits, Aaron "congratulated her" and stated: "[N]ow I guess you don't need my child support." He knew the date and time of Amanda's interview with the DUI, the reason for her separation from employment, and the weekly benefit amount she would be receiving. On September 23, 2014, Aaron sent Amanda a text message stating: "[S]o you like defrauding unemployment," and "[y]ou

forget I know everything." The text message further stated: "So my mom's going to get [A]utumn and you want [sic] get reported."[2]

Amanda stated that she had not, and would not, ask either Ms. Greene or Aaron to access her information. She signed an affidavit setting forth her allegations against Ms. Green.

On September 30, 2014, after receiving Amanda's complaint, investigators with DUI's Internal Security and Program Integrity Unit ("ISPI"), the unit that investigates allegations of employee breaches of ethical responsibilities, met with Ms. Greene regarding Amanda's allegations that she had accessed Amanda's claim information. Ms. Greene initially stated that Amanda had directly inquired about her claim, but she later contradicted that statement, stating that Amanda had asked Aaron to ask her about the claim. Ms. Greene admitted that she had accessed the Maryland Automated Benefits System ("MABS") computer screens to review Amanda's claim information, and that of other family members.

After completing its investigation, ISPI contacted DLLR Employee Relations Officer Frederick Blow with the results of its fact finding regarding the allegations against Ms. Greene. Mr. Blow testified that he was "the designator that's assigned to represent the Secretary for the Agency."

On October 17, 2014, Mr. Blow, along with Director of the Towson Claim Center, Leroy Cox, and the four ISPI investigators, met with Ms. Greene and conducted a

[2] Amanda indicated that she made a mistake in the amount of her claim, but she was not aware of the mistake until Aaron contacted her.

mitigation conference. Ms. Greene generally denied wrongdoing, but she admitted that she had accessed Amanda's claims information and told Aaron that Amanda was still filing claims.

Mr. Blow considered mitigating circumstances, which included Ms. Greene's length of service with the State, her lack of prior discipline, and her belief that she did not do anything wrong, despite being aware of the ethical responsibilities of her position. Nevertheless, because "the whole factor of the unemployment insurance policies is to make sure that all . . . information that's divulged from the client to our employees is kept confidential and not divulge[d]," Mr. Blow decided to recommend to Assistant Secretary David McGlone, the appointing authority for the Insurance Administration, that the appropriate discipline was termination.

On October 23, 2014, Mr. Blow met with Mr. McGlone for approximately 25 minutes. He explained the charges against Mrs. Greene and presented Mr. McGlone with several documents, including Aaron's text message; a list of questions and answers from an interview with Ms. Greene on September 30, 2014; Ms. Greene's September 30, 2014, statement; Amanda's affidavit; and the Notice of Termination. Mr. McGlone previously had been briefed on the matter by an ISPI investigator, Pamela Holland. Mr. McGlone then made the final decision to terminate Ms. Greene's employment, and he signed the Notice of Termination, as did Scott Jensen, who was the Deputy Secretary of DLLR.

That same day, Mr. Blow hand-delivered the Notice of Termination to Ms. Greene and explained her appeal rights. The Notice of Termination stated that "Ms. Greene's actions in disclosing her former daughter-in-law's confidential unemployment insurance

information to her son violate numerous provisions of the Ethical Responsibility Statement," as well as Code of Maryland Regulations ("COMAR") and statutory violations. The Notice of Termination stated that a mitigation conference had been held in accordance with SPP § 11-106(a).

Ms. Greene appealed her termination to DLLR Office of the Secretary, and Secretary Leonard J. Howie, III, upheld the decision. She then appealed to the Secretary of the Department of Budget and Management, who referred the matter to the OAH for a contested case hearing.

As indicated, on January 29, 2015, prior to the OAH termination hearing, ALJ Friedman conducted a contested case hearing on Ms. Greene's entitlement to unemployment benefits. At the hearing, DLLR offered exhibits and called several witnesses, Amanda, Ms. Holland, the acting director of ISPI, and Mr. Blow.

Ms. Greene called several witnesses, including her son and her husband, who testified that Amanda had asked or given Ms. Greene permission to look into her claims. Ms. Greene also called Wanda Hawkins, a co-worker, who testified that another staff member accessed their relative's claim information, and Carol Swigar, a former co-worker, who testified that DLLR told employees that "it was okay" to give information to claimants who were not relatives and did not live in the employee's household. Finally, Ms. Greene testified that Amanda's allegations were false, and that, when she learned from Aaron that Amanda may be committing fraud, she "felt that it was [her] duty . . . to see if she was committing fraud."

Following the hearing, ALJ Friedman made the following findings of fact based on the testimony and evidence presented.

> 1. At all times relevant to this matter, [Ms. Greene] was a Claims Center Specialist II assigned to the Towson Claim Center. She was discharged from her employment on October 24, 2014. Her last day of work was October 23, 2014. She was paid $39,196.00 per year.
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> 2. UI Division employees are required to adhere to strict rules of ethical responsibility. These rules are necessary, because the agency collects and maintains confidential financial information about employers, employees and claimants. One rule requires employees to regard individuals' electronic UI records as confidential in nature, to be held in trust. Employees are directed to protect such information from unauthorized disclosure. This includes any information gathered from individuals or from agency or other government computer systems.
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> 3. Other ethics rules require an employee to avoid conflicts of interest and not to intentionally use the prestige, authority or status of State employment for private gain or that of another.
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> 4. On October 1, 2013 and again on August 28, 2014, [Ms. Greene] signed a form indicating she understood that any violation of these ethics rules [would] result in investigation and sanctions, including possible dismissal.
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> 5. UI employees are regularly instructed not to handle anyone's claim that they know personally, including family, friends or relatives. UI management takes this very seriously, because it wants to avoid conflicts of interest among its staff and the public. [Ms. Greene] signed a statement acknowledging that she was advised of this instruction on January 9, 2014, March 20, 2014 and June 12, 2014.
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> 6. [Ms. Greene's] son, Aaron Greene (Aaron), was married to Amanda Greene (Amanda); they were divorced in April 2014. They share a daughter, Autumn.
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> 7. Aaron and Amanda had a difficult divorce and do not have an amicable relationship.
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> 8. Amanda Greene applied for UI benefits on May 25, 2014.

> 9. In June 2014, Aaron Greene gave his mother, [Ms. Greene], Amanda's Social Security number and asked her to check the status of Amanda's UI claim. [Ms. Greene] accessed the Maryland Automated Benefits System's (MABS) Z01 and Z03 computer screens to review Amanda's claim, and then disclosed to Aaron the status of Amanda's claim, including her weekly benefit amount (WBA), separation information and other employer information.
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> 10. Aaron told Amanda in June 2014 that he knew the date and time of her UI interview, when her UI benefits were approved, her WBA, what was said during her telephone interview, and her employer's stated reason for her discharge. Aaron told Amanda that he was going to withhold child support payments as a result of her receiving UI benefits.
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> 11. [Ms. Greene] accessed Amanda's UI screens again on or about September 23, 2014, and reported information regarding Amanda's pay status to Aaron.
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> 12. On September 23, 2014, Aaron sent a text message to Amanda stating that Amanda had erroneously reported information to UI that might result in her having an overpayment. Specifically, he state in the text: "So you like defrauding unemployment[.] You forget I know everything[.] So my mom's going to get autumn and you want get reported[.]"
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> 13. After she received this text, Amanda contacted UI.
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> 14. [Ms. Greene's] son, Jonathan Greene, and ex son-in-law, Jason Napolitano, filed for UI benefits. [Ms. Greene] accessed their claims on MABS.

ALJ Friedman upheld the decision that, due to her gross misconduct, Ms. Greene was not entitled to unemployment benefits.

Subsequently, on March 17, 2015, prior to the administrative hearing on the termination case, counsel for DLLR wrote a letter to ALJ Hurwitz, requesting that the factual findings from the January 29, 2015, hearing be deemed established pursuant to the doctrine of collateral estoppel. The letter stated, in part:

> The same witnesses Ms. Greene has subpoenaed to testify in the [second hearing scheduled for March 19, 2015] were present and testified at the unemployment insurance hearing. On February 27, 2015, the [ALJ] issued a decision holding that Ms. Greene was discharged for actions amounting to gross misconduct. . . .
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> DLLR intends to introduce [the ALJ's] decision into evidence at the upcoming hearing. It is understood that a holding of gross misconduct under the unemployment insurance law is not dispositive of whether Ms. Greene was properly terminated under the statutes and regulations governing the discipline and termination of state employees. However, [the ALJ's] findings of fact regarding Ms. Greene's conduct leading to her termination, as well as her credibility determinations involving the very same witnesses who are selected to testify in the upcoming hearing, are directly relevant as to whether Ms. Greene revealed confidential information in violation of DLLR policy, warranting her termination. DLLR contends that [the ALJ's] findings of facts should be deemed established in the upcoming action, pursuant to the precepts of collateral estoppel (issue preclusion).

On April 9, 2015, after postponing the initial scheduled hearing to allow for the parties to brief the issue, ALJ Hurwitz ruled that he would give preclusive effect to ALJ Friedman's factual findings pursuant to the doctrine of collateral estoppel, as DLLR had requested. ALJ Hurwitz stated "that there is a different issue here, and a different standard, but the underlying facts" were "relevant in this hearing for a different purpose."

On April 16, 2015, ALJ Hurwitz held a hearing to determine whether DLLR properly terminated Ms. Greene's employment. In light of the ALJ's ruling on collateral estoppel, DLLR did not call Amanda to testify, but it did call Ms. Holland, Mr. Blow, and Mr. Cox, and it offered seven exhibits into evidence.

Of particular relevance, Mr. Blow testified to the procedures followed surrounding Ms. Greene's termination. He testified that he was acting as "the designator" assigned to represent the Secretary. After the ISPI investigators completed their investigation, he

conducted a mitigation conference, at which Ms. Greene was presented with the allegations made against her and given the opportunity to provide a response, including mitigating circumstances. He specifically asked Ms. Greene if she gave any information to her son concerning her ex-daughter-in-law, and he showed her a document, "which was her written statement" that indicated she had divulged the information, and she acknowledged that she had written it. As to his inquiry about mitigating circumstances, Mr. Blow testified that he asked about her rationale, and "she said she didn't think she did anything wrong when she did that, meaning giving the information to anybody else." He explained that he found Ms. Greene's explanation inadequate, stating:

> [B]ecause of the fact of the ethics responsibility policy that – that she violated. I asked her if she was familiar with the – with the policy and she said yes, but – and that was her answer.
>
> She didn't think that she did anything wrong because she testified though, she said that her son asked her what was the definition of fraud and she tried – she said she gave him a definition.

Mr. Blow testified that he looked at Ms. Green's overall work history and her many years of State service, during which "[t]here was no discipline. A couple of counselings but no discipline." He stated, however, that what she did was "was more egregious than what I saw as being a model employee."

After considering mitigating circumstances and determining that the appropriate discipline to recommend was termination, Mr. Blow met with Assistant Secretary McGlone for approximately 25 minutes. He explained the charges against Ms. Greene and her actions that precipitated the termination recommendation. Mr. Blow explained that, prior to his meeting with Mr. McGlone, Ms. Holland also had briefed Mr. McGlone about

Ms. Greene's misconduct. At the conclusion of their meeting, Mr. McGlone signed the Notice of Termination. Later that day, after the Notice of Termination also was signed by Mr. Jensen, Mr. Blow delivered the Notice to Ms. Greene.

Following the hearing, ALJ Hurwitz issued a written decision. In addition to the adopted findings of fact, he made the following findings, which Ms. Greene does not dispute:

> 15. [Ms. Greene] has had no disciplinary actions on her record in 38 years of employment with the State.
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> 16. On October 17, 2014, Management conducted a mitigation conference that [Ms. Greene] attended.
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> 17. On October 23, 2014, [Ms. Greene's] Appointing Authority, David McGlone, Assistant Secretary, DLLR, issued a Notice of Termination without prejudice to [Ms. Greene]. The Notice of Termination, signed by Scott Jensen, Deputy Secretary, DLLR, contained a statement listing the cause for termination and how [Ms. Greene] could appeal her termination.

With respect to the termination process, the ALJ concluded that DLLR had followed all procedures required by COMAR 17.04.05.04D,[3] stating:

> COMAR 17.04.05.04D establishes procedures that agencies within the State Personnel Management System must follow before disciplining an employee for misconduct:
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> ***
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> Management followed all of the procedures required by COMAR 17.04.05.04D. DLLR ISPI's investigation included interviews with the Appellant, giving her an opportunity to respond to the allegations. After the DLLR ISPI's investigation of the Appellant's alleged misconduct concluded,

[3] The ALJ referred to the relevant Code of Maryland Regulations ("COMAR") provision, COMAR 17.04.05.04D, which is the regulation implementing Maryland Code (2015 Repl. Vol.) § 11-106(a) of the State Personal & Pensions Article ("SPP"). Both require the "appointing authority" to take the required preliminary steps.

> Management conducted a mitigation conference on October 17, 2014. DLLR Employee Relations Director Blow presided at that meeting. In addition, Lucy Smith Chinn, Director, UI Division, was present along with Pamela Holland, Supervisor, Andrea Somerville, Unemployment Program Specialist, Miesha Marvin, of the ISPI Unit, and Leroy Cox, Director of Towson UI claim Center. The Appellant signed a statement indicating that she was unable to obtain union representation at the conference.
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> At the conference, the Appellant denied any wrongdoing. She explained that her son asked her the definition of fraud and she provided one in the context of a UI claim. The Appellant also recalled that her son asked if his ex-wife, Amanda, was still filing UI claims and she answered in the affirmative, not knowing what her son was going to do with that information.
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> Mr. Blow was not satisfied with the Appellant's responses and her stated claim that she did not believe that she did anything wrong, despite being aware of the ethical responsibilities of a person in her position at the UI division. Mr. Blow considered mitigating circumstances. He acknowledged that the Appellant had never had any disciplinary action taken against her by her employer. Nevertheless, Mr. Blow maintained that the Appellant's action in violating claimant confidentiality was an egregious breach of UI law and the public trust. He explained that the breach of confidentiality was so serious that it left termination of the Appellant's employment as the only appropriate sanction he could recommend to the appropriate authority.
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> Ultimately, David McGlone, Assistant Secretary of DLLR, the appointing authority, approved the Appellant's termination and signed the October 23, 2014 Notice of Termination, as did Scott Jensen, then-Deputy Secretary of DLLR. On the same day, Management handed the Notice of Termination to the Appellant, which included her appeal rights.
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> The Appellant did not focus so much on the termination process as she did on her belief that she did nothing wrong. I find that Management complied with the procedural requirement set forth in COMAR 17.04.05.04D.

The ALJ concluded, "as a matter of law that DLLR lawfully terminated [Ms. Greene] for disclosing confidential UI benefit information to a third party, her son, without authorization from the claimant, her ex-daughter in law."

Ms. Greene appealed the ALJ's decision to the circuit court. In her Memorandum of Law in support of her Petition for Judicial Review, Ms. Greene asserted that ALJ Hurwitz erred in: (1) adopting ALJ Friedman's findings of fact; and (2) "failing to find that [DLLR] had deprived [Ms. Greene] of her rights," under SPP § 11-106, in that DLLR did not follow the procedures set forth in that section.

On December 9, 2015, the circuit court held a hearing on Ms. Greene's petition for judicial review. The circuit court found that ALJ Hurwitz properly adopted the prior findings of fact under the doctrine of collateral estoppel. With respect to the second issue, however, it agreed with Ms. Greene. In that regard, the court found that there was no evidence that Mr. McGlone, the appointing authority, met with Ms. Greene, and that, although the appointing authority could delegate his or her authority to act, such delegation must be in writing, and there was no evidence of such a writing.

The court subsequently issued an order vacating the decision of ALJ Hurwitz and remanding to DLLR. The order provided, in relevant part, as follows:

> **ORDERED** that the decision of [ALJ Hurwitz], issued May, 29, 2015, be, and is hereby **VACATED**; and it is further
>
> **ORDERED** that the above-captioned matter be, and is hereby, **REMANDED** to the [DLLR], for that agency to fully comply with the requirements of [SPP §] 11-106(a), whereby prior to taking any disciplinary action related to employee misconduct, the appointing authority shall:
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> (1) Investigate the alleged misconduct;
> (2) Meet with the employee;
> (3) Consider any mitigating circumstances;
> (4) Determine the appropriate disciplinary action, if any, to be imposed; and
> (5) Give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.

This appeal and cross-appeal followed.

STANDARD OF REVIEW

Judicial review of an administrative decision "generally is a 'narrow and highly deferential inquiry.'" *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 733 (2010) (quoting *Maryland-Nat'l Park & Planning Comm'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83 (2009)). This Court looks "through the circuit court's decision" and reviews the administrative decision, *Chesapeake Bay Found., Inc. v. Clickner*, 192 Md. App. 172, 181 (2010), determining "'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.'" *Cosby v. Dep't of Human Res.*, 425 Md. 629, 638 (2012) (quoting *Bd. of Phys. Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)). *Accord Bragunier Masonry Contractors, Inc. v. Comm'r of Labor and Indus.*, 111 Md. App. 698, 716 (1996), *cert. denied*, 344 Md. 566 (1997).

With respect to the agency's factual findings, we apply the substantial evidence test, which "'requires us to affirm an agency decision, if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Miller v. City of Annapolis Historic Pres. Comm'n*, 200 Md. App. 612, 633 (2011) (quoting *Montgomery County v. Longo*, 187 Md. App. 25, 49 (2009)). *Accord Comm'r of Labor and Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 24 (1996). "With respect to the agency's conclusions of law, a certain amount of deference may be afforded when the agency is interpreting or applying the statute the

agency itself administers," *Employees' Ret. Sys. of Balt. v. Dorsey*, 430 Md. 100, 111 (2013), but we are under no constraint "'to affirm an agency decision premised solely upon an erroneous conclusion of law,'" *Id.* at 110 (quoting *Thomas v. State Ret. & Pension Sys. of Maryland*, 420 Md. 45, 54-55 (2011)). Instead, we review legal conclusions *de novo* for correctness. *Colburn v. Dep't of Pub. Safety & Corr. Servs*, 403 Md. 115, 128 (2007) ("'[I]t is always within our prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong.'") (quoting *Schwartz v. Dep't of Natural Res.*, 385 Md. 534, 554 (2005)).

As long as an administrative decision does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence, a reviewing court may not reverse or modify the decision unless the action was "'*so extreme and egregious*'" as to render it arbitrary and capricious. *Harvey v. Marshall*, 389 Md. 243, 300 (2005) (quoting *Md. Transp. Auth. v. King*, 369 Md. 274, 291 (2002)). This Court will not reverse the decision as "arbitrary or capricious" if the agency's actions are reasonably or rationally motivated. *Id.* at 298-99.

DISCUSSION

I.

Collateral Estoppel

Ms. Greene contends that ALJ Hurwitz erred as a matter of law in adopting ALJ Friedman's findings of fact from the hearing regarding unemployment insurance, "an entirely separate matter." She asserts that, pursuant to *Cicala v. Disability Review Board for Prince George's County*, 288 Md. 254, 264 (1980), "a quasi-judicial determination such

as the instant unemployment appeals determination should not be given res judicata effect by another agency deciding the same issue under a different statute."

We agree with DLLR that Ms. Greene's reliance on *Cicala* is misplaced because the issue in that case was whether *res judicata* applied to a mixed question of fact and law, and *res judicata* is a distinct doctrine from collateral estoppel, the issue in this case. The Court of Appeals has explained the difference between the doctrine of res judicata and the doctrine of collateral estoppel as follows:

> [I]f a proceeding between parties involves the same cause of action as a previous proceeding between the same parties, the principle of res judicata applies and all matters actually litigated or that could have been litigated are conclusive in the subsequent proceeding. . . . If a proceeding between parties does not involve the same cause of action as a previous proceeding between the same parties, the principle of collateral estoppel applies, and only those facts or issues actually litigated in the previous action are conclusive in the subsequent proceeding. . . . When the issue of collateral estoppel applies, facts or issues decided in the previous action are conclusive only if identical to facts or issues presented in the subsequent proceeding.

Colandrea v. Wilde Lake Community Ass'n, Inc., 361 Md. 371, 388-89 (2000).

Here, the issue is whether the ALJ properly determined that, pursuant to the doctrine of collateral estoppel, the factual findings in the initial proceeding, involving unemployment benefits, were conclusive in the hearing in the subsequent proceeding, the termination case. In that regard, the Court of Appeals in *Garrity v. Board of Plumbing*, 447 Md. 359, 368 (2016), recently explained:

> The doctrine of collateral estoppel provides that, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Cosby v. Dep't of Human Res.*, 425 Md. 629, 639 (2012) (alteration in original) (quoting *Murray Int'l Freight Corp. v.*

> *Graham*, 315 Md. 543, 547 (1989)). The doctrine is based on two principles: judicial economy and fairness. Treating adjudicated facts as established "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy and . . . promot[es] judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

The Court went on to explain that four questions must be answered in the affirmative before collateral estoppel can be applied:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
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> 2. Was there a final judgment on the merits?
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> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id. at 369 (quoting *Colandrea*, 361 Md. at 391).

In *Garrity*, the State Board of Plumbing (the "Plumbing Board") brought a disciplinary proceeding against a licensed master plumber under the Maryland Plumbing Act, Maryland Code, Title 12 of the Business Occupations & Professions Article (the "Plumbing Act"). *Id.* at 366. The Plumbing Board sought to give preclusive effect to factual findings made in a prior administrative decision issued by the Consumer Protection Division of the Maryland Office of the Attorney General ("CPD"), which determined, after a two-day contested hearing before an administrative law judge, that Mr. Garrity had engaged in unfair and deceptive trade practices. *Id.* at 365-66. Mr. Garrity did not seek judicial review of that decision. *Id.* at 365. The Court of Appeals concluded that the Plumbing Board properly used collateral estoppel to give preclusive effect to the CPD's

findings and conclusions because all four of the required factors were satisfied, and use of the collateral estoppel doctrine comported with principles of judicial economy. *Id.* at 375-76. The Court explained: "Requiring the [Plumbing] Board to present the same evidence already presented to the CPD, to establish the same set of facts, would be a waste of resources." *Id.* at 376. The procedure also comported with principles of fairness because Mr. Garrity had "every 'incentive to defend vigorously' the CPD's allegations" in the first administrative proceeding, and each proceeding involved substantially similar procedural opportunities. *Id.* at 376-77.

Similarly, here, each of the four factors was satisfied. First, the factual issue in Ms. Greene's unemployment insurance benefits appeal was identical to the factual issue in her termination hearing, i.e., whether Ms. Greene's conduct in accessing and disclosing confidential unemployment insurance information without authorization was misconduct for which she could be terminated/denied unemployment benefits. *See* SPP § 11-104; COMAR 17.04.05.04B & C (noting that if an employee's actions are egregious, termination from employment is an appropriate discipline); LE § 8-1002 and § 8-1003 (defining gross misconduct and misconduct, respectively, as grounds for disqualifying an individual from receiving unemployment benefits).

Second, Ms. Greene does not dispute that she did not petition for judicial review of ALJ Friedman's decision, nor has she raised any questions about the finality of the judgment. Thus, ALJ Friedman's decision is a final administrative decision on the merits. *See, e.g.*, *Dep't of Health & Mental Hygiene v. Rynarzewski*, 164 Md. App. 252, 254 (2005)

(where DHMH did not file petition for judicial review of ALJ's ruling, that ruling was final and not subject to further review).

Third, there is no dispute that Ms. Greene was a party in both proceedings.

Finally, Ms. Greene was given a fair opportunity to be heard on the issue of whether she accessed and disclosed confidential unemployment insurance information without authorization. The record reflects that, at the outset of the unemployment insurance hearing, ALJ Friedman explained what was at issue. DLLR then called three witnesses, who were subject to cross-examination by Ms. Greene. DLLR also offered ten exhibits, and Ms. Greene had the opportunity to object to their admissibility. Moreover, Ms. Greene testified, and called four other witnesses to testify on her behalf, in support of her contention that she had not engaged in employee misconduct because Amanda had authorized her to disclose her unemployment insurance information to Aaron. Accordingly, all four *Garrity* factors, permitting collateral estoppel to be applied, were satisfied.

Ms. Greene asserts, however, that the Court in *Garrity* recognized that it would be unfair to apply collateral estoppel to cases in which the party against whom it is sought would not have had the "incentive to defend vigorously" the allegations involved, or where the stakes of the initial case were "small and nominal." In that regard, she asserts that "the regulations governing unemployment appeal hearings, in limiting procedural rights and capping attorneys' fees, necessarily decrease the incentive, and even ability, of a party to defend vigorously a denial of benefits." Moreover, she asserts that, although "an

unemployment benefit is certainly significant to one who has just become unemploy[ed], it pales in comparison to the loss of a career built over a lifetime."

Ms. Greene also asserts that there were "vastly different procedures and protections available to [Ms. Greene] in the unemployment hearing versus those at play in a personnel hearing conducted under the State Personnel and Pensions Article," which raises "fairness implications." She points to different "procedural opportunities," including the timing of a DLLR hearing, the lack of discovery at an unemployment hearing, capping of attorney's fees at an unemployment hearing, evidentiary rules, and ALJ Friedman's conducting of the hearing (as opposed to ALJ Hurwitz' conducting of the hearing), and she asserts that, because of these differences, she was deprived of a fair hearing. We are not persuaded.

As DLLR notes, in unemployment insurance cases, "former State employees have every incentive to defend vigorously any allegation of misconduct," as the stakes are not "nominal or small." To the contrary, a "finding of misconduct disqualifies an unemployed claimant/former State employee from receiving benefits for a period of time," which is "motivation enough to vigorously contest the factual allegations asserted by the State, as the employer."

Moreover, contrary to Ms. Greene's assertion, she was afforded substantially the same procedural opportunities in both hearings, which were held before an administrative law judge of the OAH, who applied OAH's Rules of Procedure found in COMAR 28.02.01.[4] In both cases, DLLR had the burden to prove its allegations of employee

[4] In both cases, Ms. Greene was entitled to representation, either by an attorney or another authorized person. *See* Md. Code (2008 Repl. Vol.) § 8-507(a) of (continued . . .)

misconduct by a preponderance of the evidence, *see* SG § 10-217; LE § 8-508(c)(2); SPP § 11-103(a); COMAR 17.04.05.01D, Ms. Greene had the opportunity to call witnesses, to examine and cross-examine witnesses, and to object to evidence, *see* COMAR 09.32.11.02K; COMAR 28.02.01.20, the OAH was given the authority to issue a final administrative decision, *see* SPP § 11-110(d)(3); COMAR 28.02.01.25, and Ms. Greene had the right to petition for judicial review, *see* SG § 10-222; LE § 8-806(h)(4) and § 8-5A-12.

Ms. Greene also attempts to distinguish *Garrity* by asserting that applying the doctrine of collateral estoppel to preclude her from relitigating the facts established in ALJ Friedman's decision would have a "chilling effect on an employee's willingness to seek benefits." This is so, she argues, because an employee seeking unemployment insurance may be afraid that the result of that hearing will affect his or her ability to defend the job at a second hearing. Although the purpose of the two proceedings may be different, i.e., the unemployment hearing arises after an former employee's claim to allow the claimant to collect insurance benefits and the disciplinary hearing arises after the employee's termination and affects whether the employee's disciplinary action should be upheld, in both cases, as indicated, an employee has "every incentive to defend vigorously the . . .

(. . . continued) the Labor & Employment Article ("LE"); SPP § 11-103(d); COMAR 09.32.11.02F; COMAR 28.02.01.08. Despite Ms. Greene's assertion that she was not afforded the same opportunity for representation at the unemployment insurance hearing as she was at the disciplinary hearing because attorney's fees are capped under the procedures governing unemployment insurance hearings, COMAR 09.32.11.02G provides attorneys representing claimants in unemployment insurance proceedings with a mechanism to obtain attorney's fees above the cap.

allegations." A finding of misconduct in an unemployment benefits hearing disqualifies the former employee from receiving benefits for a period of time, which is a serious consequence. *See* LE § 8-1002 and § 8-1003.

For these reasons, we conclude that ALJ Hurwitz properly applied the collateral estoppel doctrine and precluded Ms. Greene from relitigating the facts established in the first proceeding. The circuit court properly upheld the ALJ's ruling in this regard.

II.

DLLR's Compliance with SPP § 11-106(a)

Ms. Greene's next contention involves the circuit court's ruling that DLLR failed to comply with SPP § 11-106 because the "appointing authority," Mr. McGlone, never met with Ms. Greene or considered mitigating circumstances, as is required by the statute, and Mr. Blow was not delegated the authority to act as the appointing authority. Although she agrees with the court's finding in this regard, she contends that the court erred in its remedy of remanding to the agency for it to correct its error.[5] She asserts that the "correct remedy . . . is rescission of the disciplinary action and, in the case of a termination, a reinstatement."

DLLR similarly contends that the circuit court erred when it remanded the case to DLLR to comply with SPP § 11-106. Its assertion of error, however, is on a different ground.

[5] There is no contention, for good reason, that this ruling is not an appealable final judgment. Where, as here, the circuit court remands a case to an agency, *following* judicial review, and instructs the agency to revise its decision "in light of the court's construction of the law, the remand order is a final appealable judgment." *See Metro Maint. Sys. South, Inc. v. Milburn*, 442 Md. 289, 301-04 (2015) ("[A] remand after a circuit court has conducted judicial review that precludes the parties from further contesting (continued . . .)

DLLR contends that the court's ruling was erroneous because ALJ Hurwitz' finding, that DLLR fully complied with SPP § 11-106 prior to terminating Ms. Greene's employment, is supported by substantial evidence in the record. It asserts that the appointing authority, Assistant Secretary McGlone, did not need to personally "meet with Ms. Greene or consider mitigating circumstances" because Mr. Blow was delegated authority to act as the appointing authority. It notes that the regulations grant the appointing authority the "prerogative to delegate in writing the authority to act on the appointing authority's behalf to any other employee or officer under the appointing authority's jurisdiction," which was the case here. DLLR asserts, therefore, that it fully complied with SPP § 11-106, and this Court should reverse the circuit court's decision with instructions to affirm the administrative decision.

Under the State Personnel Management system, an "appointing authority" may take disciplinary actions against an employee, including terminating the employee's employment, without prejudice. SPP § 11-104(6)(i); COMAR 17.04.05.01A(2) and B. SPP § 11-106(a)[6] sets forth the procedure for imposing sanctions:

> (a) *Procedure*. – Before taking any disciplinary action related to employee misconduct, an appointing authority shall:
>
> (1) investigate the alleged misconduct;
>
> (2) meet with the employee;
>
> (3) consider any mitigating circumstances;
>
> (4) determine the appropriate disciplinary action, if any, to be imposed; and

(. . . continued) or defending the validity of the agency's decision in that court – and leaves nothing further for the court to do – is a final judgment.").

[6] *See also* COMAR 17.04.05.04D

(5) give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.

An appointing authority may "acquire knowledge of misconduct of an employee directly, *i.e.*, personally, or indirectly, through imputation of the knowledge of an agent." *McClellan v. Dep't of Pub. Safety and Corr. Svcs.*, 166 Md. App. 1, 24 (2005). The appointing authority "shall consider mitigating circumstances when determining the appropriate discipline." COMAR 17.04.05.02B. And, an agency must complete these procedures within 30 days after an appointing authority acquires knowledge of an employee's alleged misconduct. SPP § 11-106(b); COMAR 17.04.05.04E.

Pursuant to COMAR 17.04.01.04A(5), an appointing authority "shall have exclusively reserved to them the . . . general prerogative . . . to: (5) Delegate in writing the authority to act on the appointing authority's behalf to any other employee or officer under the appointing authority's jurisdiction." An appointing authority "shall notify the Secretary of any delegation of authority by providing the Secretary a copy of the delegation." COMAR 17.04.01.04D.

Here, Mr. Blow testified that he was acting as the "designator" assigned to represent the Secretary. Ms. Greene contends, however, that this testimony was not sufficient to show that Mr. McGlone delegated his authority to Mr. Blow because there was no evidence that the delegation was in writing.

As DLLR notes, "'[i]n the absence of evidence to the contrary, administrative officers will be presumed to have properly performed their duties.'" *Foley v. K. Hovnanian at Kent Island, LLC*, 410 Md. 128, 163 (2009) (quoting *Johnstown Coal & Coke Co. v.*

Dishong, 198 Md. 467, 474 (1951)). Here, Mr. Blow testified that he had been designated to act on Mr. McGlone's behalf, and Ms. Greene never questioned Mr. Blow about this issue, or provided any evidence that the delegation of authority to Mr. Blow was not properly in writing.[7] Under these circumstances, the ALJ was permitted to presume that DLLR complied with the procedural requirements.

There was substantial evidence in the record to support a finding that DLLR complied with SPP § 11-106(a) before terminating Ms. Greene's employment. The circuit court erred in vacating the ALJ's decision.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO AFFIRM THE ADMINISTRATIVE DECISION. COSTS TO BE PAID BY APPELLANT.

[7] It was only after the testimony had concluded that counsel for Ms. Greene made the argument that a delegation of authority had to be in writing.