UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2260

September Term, 2013

KATARZYNA HAYNESWORTH

v.

LONZA WALKERSVILLE, INC., et al.

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: July 17, 2015

Katarzyna Haynesworth, appellant, appeals the judgment of the Circuit Court for Baltimore City that upheld the administrative ruling of the Board of Appeals of the Maryland Department of Labor, Licensing and Regulation which denied Mrs. Haynesworth's claim for unemployment benefits relative to the termination of her employment at Lonza Walkersville, Inc. ("Lonza Walkersville"), one of the appellees in this appeal. The Department of Labor, Licensing and Regulation is also an appellee, and has filed a brief in this matter.

QUESTIONS PRESENTED

Appellant presented the following questions in her brief:

1. W[h]ether the evidence indicate [sic] that claimant was terminated in violation of claimant's FMLA rights.

2. W[h]ether the claimant followed the normal notification required when requesting an FMLA job protection.

3. Whether Wanda Routz[ah]n was authorized to issue a request for medical information be provided to her within two days substantiating FMLA request.

4. W[h]ether the claimant may be disciplined for gross misconduct due to absenteeism while on an approve [sic] leave of absence under FMLA."

Although appellant has raised four questions relative to the federal Family and Medical Leave Act, the sole question decided by the administrative agency in this case is whether appellant was disqualified from receiving unemployment benefits because of Maryland Code (1991, 2008 Repl. Vol.), Labor and Employment Article ("LE"), § 8-1002(b), which states: "An individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if unemployment results from discharge . . . as a disciplinary measure for behavior that the Secretary finds is gross misconduct in connection

with employment." The permitted scope of judicial review of such administrative rulings is expressly limited by statute in LE § 8-5A-12(d), which states:

> (d) Scope of review. – In a judicial proceeding under this section, findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if:
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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.

Consequently, the only issue open for this Court's review is whether the Board of Appeals's decision was legally correct and supported by substantial evidence. *Department of Labor*, *Licensing, & Regulation v. Hider*, 349 Md. 71, 77–78 (1998); *Baltimore Lutheran High Sch. Ass'n v. Employment Sec. Admin.*, 302 Md. 649, 662 (1985). Because our charge is to review the administrative decision itself, we review only the evidence that was in the record before the Board of Appeals. *Wisniewski v. Department of Labor, Licensing & Regulation*, 117 Md. App. 506, 515-17 (1997). We conclude that there was substantial evidence to support the Department's finding of disqualifying misconduct — namely, inadequate responses to the employer's requests for information relative to the employee's prolonged absence — and there was, therefore, no reversible error in the ruling denying appellant's claim for unemployment benefits.

FACTS AND PROCEDURAL HISTORY

On November 12, 2012, appellant was terminated from her position as a Research Associate II at Lonza Walkersville, a large biotechnology corporation with facilities in Walkersville, Maryland. Appellant's application for unemployment benefits was initially

approved. But Lonza Walkersville appealed the initial determination that appellant was entitled to unemployment benefits, and asserted that appellant had been discharged for failing to provide the employer information regarding her absence from work, which persisted even after appellant was warned, by Lonza Walkersville's Human Resources Department ("HR"), that it needed her to contact HR directly regarding her intent to be absent from work.

On February 11, 2013, the parties appeared before a hearing examiner for an evidentiary hearing on the employer's appeal of the initial benefit determination. In a decision issued on February 21, 2013, the hearing examiner found that appellant had been discharged for "gross misconduct," a term defined in LE § 8-1002(a)(1) to mean "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 interest of the employing unit; or
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> (ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations; . . . .

The hearing examiner found the following facts, which the Board of Appeals also adopted:

> The claimant, Katarzyna Haynesworth, worked for Lonza Walkersville, Inc., from July 21, 2008, through September 28, 2012. The claimant earned $47,343.14 per year while working full time as a research associate II.
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> The claimant went home early on the last day of work due to illness. Over the next several days, she called out to her supervisor to confirm that she was still ill. On October 3, 2012, the supervisor called the claimant and confirmed that she only had 4 hours of vacation available. The supervisor also informed the claimant that she would need to present a doctor's note justifying her absence when she was ready to return. The claimant continued to call out to her supervisor every day for approximately the next six weeks. She would call at 8 AM and leave a voice mail for the supervisor. She never spoke to the supervisor again.

> On October 5, 2012, Ms. Angie Harris, Benefits Administrator for the employer, called the claimant and left her a voice mail message. The claimant was asked to contact Ms. Harris regarding her status. The claimant never returned this call. On October 8, 2012, Ms. Harris, on behalf of the claimant, initiated the process for the claimant to apply for FMLA or short term disability. The employer uses a third party for such matters, Matrix Absence Management.
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> By October 17, 2012, the claimant had not contacted Ms. Harris or Matrix regarding either form of a leave of absence. On October 19, 2012, the employer sent the claimant a letter by certified mail. This letter advised the claimant that she needed to speak directly with her supervisor, not just leave messages, and that she needed [to] contact Ms. Wanda Routzahn, Head of Human Resources, regarding her situation. The claimant refused to sign for the letter and it was returned to the employer. On October 26, 2012, Matrix sent the claimant a letter reminding her that she had not processed or had her doctor process her documentation for leave. She was given 30 days to do so.
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> On November 2, 2012, the employer sent the claimant a second letter warning the claimant that, due to her lack of meaningful communication with the employer, lack of medical documentation to substantiate her absence, and failure to respond to attempts by the human resources department to reach her, she was risking discharge. The claimant was given until November 7, 2012 to contact the human resources department or risk discharge. The letter was delivered by FedEx on November 5, 2012. The claimant, due to her illness, chose to abdicate responsibility for dealing with this matter to her husband. Her husband believed that since the letter came from human resources and not from the claimant's direct supervisor, that it should be ignored. He believed that the human resources department was "outside the chain of command" and therefore irrelevant.
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> On November 12, 2012, having not heard back from the claimant, Ms. Routzahn discharged the claimant.

Appellant noted an administrative appeal to the Department's Board of Appeals, which issued a decision on June 5, 2013, adopting the hearing examiner's findings of fact and conclusions of law, and affirming the determination that appellant had been terminated

for gross misconduct. The Board of Appeals explained that the hearing examiner's denial of benefits was appropriate for the following reasons:

> In the Instant case, the claimant left work on September 28, 2012 due to illness. For a period of 6 weeks, the claimant continued to call her supervisor at 8:00 a.m. each morning leaving a message that she was still ill and that she would not be present at her job. **Despite being advised on October 5, 2012 that she needed to contact the employer's human resources department concerning her continued absence, the claimant ignored repeated requests from the human resources department.**
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> The claimant insisted that she was not supervised by the employer's human resources department, but that her supervisor was her direct boss and therefore, human resources had no authority over her job duties, responsibilities and absences. The claimant testified that if the supervisor wanted to speak with her directly, the supervisor should have made the effort to return her phone calls.
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> The claimant insists that the employer's human resources department should have made additional efforts to inform the claimant earlier that her job was in jeopardy because of her continued absence. **The employer's human resource department made continuous attempts to contact the claimant and the claimant refused to speak directly with human resources because they were "outside the chain of command."** The claimant made no effort to make personal contact with her immediate supervisor or the employer's human resources department.
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> **It defies logic that an educated individual would not know and understand that a supervisor would also be supervised by the human resources department.** The employer's human resources department sets policies, both for sick leave, attendance, disability, and administers the employer's policies. **The fact that the claimant absolutely refused to return the calls or correspondence from the employer's human resource department is unreasonable and insubordinate. The claimant's refusal to contact the employer as instructed caused her to be discharged.**
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> The claimant failed to notify human resources, even after receiving correspondence that her job was in jeopardy. The claimant was discharged for repeated absenteeism which constitutes gross misconduct.

(Emphasis added.)

On July 3, 2013, appellant filed a petition for judicial review in the Circuit Court for Baltimore City. Thereafter, on July 18, 2013, Lonza Walkersville reinstated Mrs. Haynesworth to her previous position, and paid her all back pay and benefits that she would have received had she been employed during the period covered by her claim for unemployment benefits, *i.e.*, December 22, 2012 (the first day after the date on which she received authorization from her doctor to return to work) through July 18, 2013 (the day she was reinstated). Lonza Walkersville filed a motion in the judicial review case, and asked the circuit court to accept evidence of the reinstatement and compensation paid to Mrs. Haynesworth. The employer's motion was unopposed, and the court granted the request to supplement the record with that information. But the court did not dismiss the judicial review proceeding as moot because, even though appellant had been made whole financially by receiving more compensation from the employer as back pay than the amount of the unemployment benefits that she was denied, it was unclear to the court whether the disqualification based upon gross misconduct might have collateral impact under LE § 8-1002(c)(2), which provides that the disqualification shall continue "until the individual is reemployed and has earned wages in covered employment that equal at least 25 times the weekly benefit amount of the individual." It remains unclear to us, also, whether the financial compensation already provided to appellant makes this case fully moot. Accordingly, we shall assume, as the circuit court did, that the case is not entirely moot.

The circuit court conducted a hearing appellant's petition for judicial review on December 9, 2013, after which the court filed an order that affirmed the decision of the Board of Appeals. This timely appeal followed.[1]

STANDARD OF REVIEW

In *Thomas v. Department of Labor, Licensing & Regulation*, 170 Md. App. 650, 657-58 (2006), we elaborated upon the standard of appellate review in a case such as this, which is governed by LE § 8-5A-12(d), quoted above. We said in *Thomas*:

> "Under this statute, the reviewing court shall determine only: '(1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision.'" *Department of Labor*, *Licensing, & Regulation v. Hider*, 349 Md. 71, 77-78, 706 A.2d 1073 (1998) (quoting *Baltimore Lutheran High Sch. Ass'n v. Employment Sec. Admin.*, 302 Md. 649, 662, 490 A.2d 701 (1985)). We "'may not reject a decision of the Board supported by substantial evidence unless that decision is wrong as a matter of law.'" *Hernandez v. Dep't of Labor, Licensing, & Regulation*, 122 Md. App. 19, 23, 711 A.2d 243 (1998) (quoting *Hider,* 349 Md. at 78, 706 A.2d 1073). "The test for determining whether the Board's findings of fact are supported by substantial evidence is whether reasoning minds could reach the same

[1]As we noted above, the questions framed by appellant with respect to the FMLA have nothing to do with the ruling by the hearing examiner and the Board of Appeals regarding unemployment benefits. Those questions are based upon the fact that an FMLA claim may have been approved *after* the time she was terminated by the employer. Whether such a claim may have been approved after her termination has no bearing on the agency's determination that appellant's refusal to respond to communication from her employer about her absence led to her firing, constituted gross misconduct in connection with the work, and rendered her ineligible for benefits. The circuit court observed: "I see an implicit [argument] which is that because Ms. Haynesworth was later approved for FMLA back at the time Employer was requiring her to report to the Employer and that that excused her from doing so." The circuit court commented that even an employee who is on FMLA leave has an obligation to respond to an employer's reasonable request for status updates. The circuit court said: "I'm not aware of anything in FMLA that would preclude the Employer from asking an employee or directing an employee to furnish information to the Employer."

conclusion from the facts relied upon by the Board." *Hider*, 349 Md. at 78, 706 A.2d 1073 (citing *Baltimore Lutheran*, 302 Md. at 661- 662, 490 A.2d 701).

We further stated in *Department of Economic and Employment Development v. Taylor*, 108 Md. App. 250, 261-63 (1996):

> Our review of the Board's findings of fact is deferential. In the absence of fraud, **our inquiry is whether the findings are supported by substantial evidence and are reasonable, not whether they are right**. *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 515, 390 A.2d 1119 (1978). We examine the agency's findings of fact to determine whether they are supported by "substantial evidence" in light of the record as a whole — that is, whether a reasoning mind could have made those findings from the evidence adduced. *Singletary v. Maryland State Department of Public Safety and Correctional Services*, 87 Md. App. 405, 416, 589 A.2d 1311 (1991). **We will not engage in our own fact finding**, however. *Board of Trustees of the Employees' Retirement System of the City of Baltimore v. Novik*, 87 Md. App. 308, 312, 589 A.2d 976 (1991), *aff'd*, 326 Md. 450, 605 A.2d 145 (1992). Instead, **the tasks of drawing inferences from the evidence and resolving conflicting evidence are exclusively the province of the Board**. *Prince George's Doctors' Hospital, Inc. v. Health Services Cost Review Commission*, 302 Md. 193, 200-02, 486 A.2d 744 (1985). A reviewing court must also take care not to substitute its judgment for the expertise of the Board. *Westinghouse Electric Corp. v. Callahan*, 105 Md. App. 25, 34, 658 A.2d 1112 (1995).
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> In contrast, our review of the Board's decisions on issues of law is not deferential. *Columbia Road Citizens' Association v. Montgomery County*, 98 Md. App. 695, 698, 635 A.2d 30 (1994). Thus, "the reviewing court may substitute its judgment for that of the agency." *Liberty Nursing Center, Inc. v. Department of Health and Mental Hygiene*, 330 Md. 433, 443, 624 A.2d 941 (1993). On issues of statutory construction, we will afford substantial deference to an agency's construction of a statute that it is charged with administering. *Westinghouse,* 105 Md. App. at 37, 658 A.2d 1112. Nevertheless, an administrative agency is not authorized to disregard the terms of a statute when that statute is clear and unambiguous. *See Sugarloaf Citizens Association v. Northeast Maryland Waste Disposal Authority*, 323 Md. 641, 663 n. 1, 594 A.2d 1115 (1991); *Bosley v. Dorsey*, 191 Md. 229, 239, 60 A.2d

691 (1948); *Baines v. Board of LiquorLicense Commissioners for Baltimore City*, 100 Md. App. 136, 141, 640 A.2d 232 (1994).

(Emphasis added.)

DISCUSSION

I. Substantial evidence

Because we are obligated to apply a deferential view of the evidence presented during the agency hearing, it is not our prerogative to reevaluate the facts and reweigh the evidence. Consequently, even if appellant can point to evidence in the record that could have supported findings of fact in her favor, our mission is to consider only whether there was substantial evidence in the record to support the findings made by the hearing examiner (which were adopted by the Board of Appeals). *See Taylor, supra*, 108 Md. App. at 261. We conclude that there was evidence that supports the findings of fact made by the hearing examiner and adopted by the Board of Appeals.

Appellant, on the advice of her husband, who was handling business matters for her during her illness, decided that she did not need to contact Ms. Routzahn or anyone in Lonza Walkersville's human resources department, despite acknowledging their request that she do so, because appellant and her husband had concluded that Ms. Routzahn was outside of appellant's "chain of command." The hearing examiner and the Board of Appeals found that this deliberate refusal to respond to requests to contact the employer's HR department met the statutory definition of disqualifying conduct because it was "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." LE § 8-1002(a)(1)(i). We agree that the evidence is sufficient to permit a reasonable person to make that finding of fact.

The evidence showed that appellant did not return to work after she went home sick on September 28 (and did not report for work again until December 22, over a month after she had been told she was terminated). She did call and leave voicemail messages for her supervisor every morning thereafter, saying she would not be in to work that day, but she never called in and actually spoke to the supervisor again. She never called anyone in the employer's HR department to discuss her extended absence. She did not contact Ms. Routzahn as she was asked to do. Through her husband, she refused to accept delivery of a letter the employer's HR department sent to her home via certified mail, and the envelope was returned to the employer unopened. A followup letter dated November 2, 2012, which the employer's HR department had delivered via Federal Express, was not returned, but it produced no response from appellant or her husband even though the letter stated: "To date, we have not received any documentation or notification from you substantiating your reasons for being absent from work." The letter warned: "If we do not hear from you by Wednesday, November 7th, we will have no choice but to terminate you for abandonment from your position at Lonza." Appellant did not deny receipt of this letter. But neither appellant nor her husband complied with the employer's demand that she contact her employer's HR department by November 7. And the only explanation for that insubordinate conduct that appellant proffered was that she and her husband had contacted other personnel at the

company and did not feel that they should have to contact someone in the HR department who was not in appellant's "chain of command." Under the circumstances, it was not reversible error for the hearing examiner and the Board of Appeals to conclude that appellant's obstinate refusal to respond to the letter from Lonza Walkersville's HR department was "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," which constitutes "gross misconduct" as defined in LE § 8-1002(a)(1)(i).

In *Department of Economic and Employment Development v. Propper*, 108 Md. App. 595 (1996), this Court affirmed the denial of unemployment benefits based upon a finding of gross misconduct where the employee had chosen to "repeatedly work erratic hours," even after having been warned by the employer that such conduct was unacceptable. In our opinion in that case, discussing the statutory disqualification for gross misconduct, we observed:

> There are no hard and fast rules for determining what constitutes "deliberate and willful" misconduct. *Department of Economic and Employment Development v. Owens*, 75 Md. App. 472, 477, 541 A.2d 1324 (1988). "The important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Department of Economic and Employment Development v. Jones*, 79 Md. App. 531, 536, 558 A.2d 739 (1989). In its determination of whether a claimant has committed gross misconduct, DEED looks not only for "substandard conduct" on the part of the claimant, but also "for a wilful or wanton state of mind accompanying the . . . substandard conduct." *Employment Security Board v. LeCates*, 218 Md. 202, 208, 145 A.2d 840 (1958), quoting SANDERS, DISQUALIFICATION FOR UNEMPLOYMENT INSURANCE, 8 Vand.L.Rev. 307, 334 (1955). DEED considers "two interrelated questions" in this determination:

> "1. Did the employee's conduct show deliberate and willful disregard of the standards of behavior that the employer has a right to expect? and
>
> "2. Did the conduct show gross indifference to the employer's interest?"
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> *Department of Economic and Employment Development v. Hager*, 96 Md. App. 362, 373-74, 625 A.2d 342 (1993).

> Maryland courts have sustained findings of gross misconduct in a variety of fact situations. *See, e.g.*, *Hager, supra* (claimant refused, without meaningful explanation, to accept a transfer to a night shift); *Jones, supra* (claimant was repeatedly absent from work and tested positive for drugs after promising to remain drug-free); *Owens, supra* (claimant was discharged after he threatened to kill his supervisor); *Painter v. Department of Employment Training*, 68 Md. App. 356, 511 A.2d 585 (1986) (claimant, while on sick leave, failed to notify her employer that her physician had released her to return to work); *Employment Security Board v. LeCates*, 218 Md. 202, 145 A.2d 840 (1958) (claimant used a company truck without permission, was involved in an accident, and did not report the accident until being confronted by his employer and the police).

Id. at 609-10.

Here, appellant does not dispute that she deliberately and wilfully did not respond to the November 2 request that she contact the HR department by November 7. Such conduct supports the agency's finding that appellant was disqualified from receiving unemployment benefits. Other cases have held that an employer may reasonably expect that an employee who is out sick will keep the employer informed of her status and when she might return. *See, e.g.*, *Painter*, *supra*, 68 Md. App. 356, 359 (1986) ("Clearly, it is in the employer's interest to be kept informed of the health and well being of employees in order that the business may be conducted as efficiently as possible.").

Accordingly, we agree with the circuit court's conclusion that the agency's findings of facts were supported by substantial evidence, and the denial of benefits on the basis of gross misconduct pursuant to LE § 8-1002(a) was not an error of law.

II. Procedural issues

In her brief, appellant also raises three procedural issues that were the focus of her oral arguments in the circuit court. We agree with the circuit court's conclusion that these issues provide no basis for disturbing the ruling of the Board of Appeals.

a. Exclusion of evidence

At the hearing before the hearing examiner, during the direct examination testimony of Ms. Routzahn, the witness made reference to an e-mail dated November 30, 2012. The hearing examiner interrupted Ms. Routzahn, and explained to the witness: "Anything that happened after your [sic] discharged her [on November 12] would not be relevant." On appeal, appellant asserts that this was error because the November 30 e-mail "is relevant because it corrects the record." Appellant did not make that argument to the hearing examiner, and even if she had, it would not have been an abuse of discretion for the hearing examiner to limit the witness's testimony to events that transpired prior to appellant's termination.

b. Denial of subpoena

At the beginning of the hearing before the hearing examiner, the appellant pointed out that she had "requested the documents to be subpoenaed and I never received —." The

hearing examiner responded that "the subpoena request was apparently denied." But, in her appeal of the hearing examiner's denial of benefits to the Board of Appeals, the denial of her subpoena requests was not among the issues she argued to the Board of Appeals. Consequently, the argument is not one that can be raised on appeal. *Dept. of Health v. Campbell*, 364 Md. 108, 123 (2001) ("[T]he reviewing court, restricted to the record made before the administrative agency, . . . may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.").

c. Audio recording of hearing before hearing examiner

Appellant also complains that, when she noted her administrative appeal to the Board of Appeals, she requested a copy of the audio recording of the hearing examiner's February 11, 2013, hearing. She did not receive a copy, and complains that that put her at a "disadvantage in preparing adequate arguments for the Board of Appeals." But, aside from this bald conclusory statement, she does not explain how the availability of the audio recording would have had a material impact on the outcome of her case. Accordingly, we are not persuaded that this was a material procedural error in the agency's handling of this claim.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.