JONATHAN T. FRANCO Plaintiff - Appellant Vs. BOARD OF REVIEW, DEPARTMENT OF LABOR AND CHOBANI, INC. Defendants - Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3974-22T2 Civil Action On Appeal From Board of Review Decision Dated: July 27, 2023

BRIEF ON BEHALF OF APPELLANT JONATHAN T. FRANCO

Jonathan T. Franco
Appellant, Pro Se
62 Averell Drive
Morris Plains, New Jersey 07950
Tele: 973-738-2412

Dated: April 24, 2024

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PRELIMINARY STATEMENT

The Appellant, Jonathan T. Franco, appeals the Board of Review Decision dated July 27, 2023 which affirms the decision of the Appeal Tribunal mailed on March 30, 2022 finding that the Appellant is disqualified for benefits from November 1, 2020, based upon "available information" that the Appellant left his job voluntarily due to fear of contracting the Coronavirus and that there is "insufficient evidence" that the Appellant was at an increased risk of contracting COVID-19. See 1a. However, this reasoning is not factually supported because the Appellant never had the opportunity to see, address, or oppose the employer's questionnaire (BC3E Form), which forms the basis of the "*insufficient* evidence" or "*available* information" referred to in the January 7, 2022 determination. See 13T1.

The above resulted in a "unilateral" decision as the Appellant was not given any proper notice or the opportunity to defend against it. The January 7, 2022 Notice of Determination is the sole information mailed "after the fact" to the Appellant after the decision was made. See 14T1. Therefore, there was no *due process* afforded by the Department of Labor to the Appellant to address this matter. See 14T1. Accordingly, the July 27, 2023 Board of Review is grossly arbitrary and without merit. See 22a. This is the basis for the within Appeal.

STATEMENT OF FACTS

The Appellant, Jonathan T. Franco, became an employee of Chobani, Inc., which maintains its central headquarters in New York City, as of September 2018. See 5T1. The scope of the Appellant's work consisted of traveling, typically in a constant and predictable way, from one supermarket region to another in the vicinities of Bergen County in northern New Jersey and throughout Rockland County in New York. See 5T1 and 6T1. This was to ensure that the extensive Chobani, Inc., product stock lines were readily sufficient in the supermarket back end refrigeration systems and neatly displayed in the front end open refrigerated displays that are available for the supermarket customers' selections. See 6T1. Many of the supermarket locations where the Appellant worked were in those communities indisputably hardest hit with the coronavirus in Rockland County, New York. See 7T1. It is well published and has been the attention of national news that the highest rates of infection were in the communities of Rockland County, which the Appellant visited consistently to perform the scope of his work for Chobani, Inc. See 7T1. The supermarket locations for which the Appellant was responsible were in the Rockland County towns of Haverstraw, West Haverstraw, Garnerville, Stoney Point, New City and Monsee, plus many other supermarket locations in northern New Jersey in Bergen County, Morris County and Passaic County. See 7T1, 23T2, 16a and 30a.

As the Covid-19 pandemic increased in magnitude and ferocity, the Appellant was forced to *change* his "scope of work" and primarily work in small unventilated supermarket freezer boxes in the immediate proximity of supermarket employees, on a supermarket store to store basis, for varying periods of time during the employment work day. See 16a, 18a, 19a. There became a large number of supermarket employees inflicted with Covid-19 during this period who would be absent from the supermarket and who would previously have been able to transfer the Chobani dairy products from the freezer boxes to the supermarket store shelves. This was not a routine assignment of the Appellant's job requirements prior to the onset of the pandemic. See 31a, 5T1, 6T1, 9T1, 5T2, 8T2, 13T2 - 15T2. The Appellant's distinctive scope of work was dramatically altered due to the pandemic. See 13T2, 14T2. The pandemic's stranglehold caused a significant number of abnormal factors to arise, such as the fact that fewer and fewer workers continued to maintain their employment at the supermarkets as they had become infected with the Covid 19 virus. See 12T2. Because of the pandemic and the fierce rate of infection in these communities, the physical loading of Chobani, Inc. product lines onto the store shelves exacerbated the *gross lack* of social distancing and increased the Appellant's interaction with the supermarket employees as well as the patrons of each supermarket store. See 13T2. The additional scope of work, expanded solely by the pandemic, required the shelves to be stocked by the

Appellant during the time the supermarket patrons were making their selections of the Chobani refrigerated products. See 6T1, 9T1, 15T2, 16T2. This newly created interaction at the refrigerated stock location caused the Appellant to be in very close proximity to the patrons of each store. See 1T9. This occurred daily at each of the approximately thirty (30) supermarket locations that the Appellant was responsible for in his work. See 5T1.

The pandemic unequivocally caused a significantly abnormal disruption in the Appellant's daily scope of work as the Appellant's job responsibilities and work environment placed the Appellant at a much higher risk to contract the Covid 19 virus. See 6T1, 7T1, 9T1, 5T2. The pandemic caused Chobani, Inc. to react to the pandemic by summarily altering the scope of the Appellant's employment responsibilities, placing the Appellant in *harm's way* by significantly increasing the Appellant's risk of contracting Covid-19. See 6T1, 7T1, 9T1, 10T1, 16T2. The newfound proximity to the patrons and employees of each supermarket and the unventilated freezer box situation that the Appellant worked within placed the Appellant at a *heightened* risk of contracting Covid-19, directly *resulting in the Appellant becoming infected with the virus because of exposure to the many new abnormal environmental conditions forced upon the Appellant by Chobani, Inc. at the height of the pandemic*. See 8T1, 5T2. Moreover, these new conditions brought on by the pandemic were never part of the initial scope of work for which the

Appellant became employed. See 9T1, 12T2, 13T2, 14T2. Meager attempts by Chobani, Inc. to reduce the Appellant's exposure to customers (but not supermarket employees) by moving his start time from 7:30 a.m. to 4:00 a.m. were abandoned after a few weeks. See 13T2 and 14T2. In March of 2020, the Appellant began exhibiting symptoms of Covid-19. At that time, the Appellant had been visiting several retail supermarket locations in the Rockland County area of Monsey, New York, which was being reported in the news as containing numerous Covid-19 outbreaks.[1] See 7T1. The Appellant was seen by a local physician who advised that this unusual illness exhibited by his patients was of first impression to him. See 8T1. No testing, vaccines, or treatment for Covid-19 were available at that time. Nevertheless, the Appellant was infected by the virus, resulting in such "Long Covid-19" symptoms as a permanent loss of smell, at that early stage of the pandemic. Good cause existed. See 5T2.

PROCEDURAL HISTORY

This Appeal was filed by Jonathan T. Franco, as Appellant, Pro Se, by way of the filing of a Notice of Appeal dated August 23, 2023 and docketed on September 1, 2023 under Docket Number BR DKT00278316. See 2a. The Appeal was filed in response to the decision of the Board of Review mailed on July 27,

[1] https://www.nytimes.com/2020/04/08/nyregion/coronavirus-rockland-jewish-news.html

2023, which affirmed the Hearing Examiner's decision of March 30, 2022 that disqualified him from benefits *as of November 1, 2020.* See 1a and 10a. The subject benefits were provided to the Appellant exclusively from November 7, 2020 through September 18, 2021. See 12a.

By way of historical procedural context, the Appellant received, on or about January 7, 2022, the Department of Labor and Workforce Development's Deputy, Mr. T. Murray's determination that:

> "Based on available information, you left your job voluntarily due to fear of contracting the coronavirus. There is insufficient evidence that you were at an increased risk of contracting Covid-19. Therefore, your reason for leaving does not constitute a *good cause* attributable to the work. You are disqualified from benefits." See 1a and 12a.

Upon receipt of the decision of the Department of Labor and Workforce Development, the Appellant appealed Deputy Murray's January 7, 2022 determination on the basis that it is erroneous, arbitrary, an unreasonable application of the existing law, and a misunderstanding of the facts particular to this Appellant's scope of work and employment environment during a extraordinarily critical period of the pandemic. See 1a. The Deputy's misapplication of the *good cause* standard as it relates to this particular fact pattern and employment scenario fell short of its intended application for which this Appeal now comes before the Court.

After telephone hearings were held by the Appeal Tribunal Hearing Examiner, Tiffany Esposito, she issued a decision with a mailing date of March 30, 2022, which imposed a disqualification of benefits from *November 1, 2020* on the ground that the Appellant voluntarily quit his job without good cause attributable to the work. Ms. Esposito's decision of March 30, 2022 is arbitrary and unreasonable because of her erroneous application of the facts and the misapplication of the applicable laws of the State of New Jersey. See 10a. It must be noted that, in her decision, written above her final determination, the Examiner commented that the date of claim in this case is *October 31, 2021* and that the Pandemic Unemployment Assistance ("PUA") program ended effectively on September 4, 2021, so the Claimant, the Appellant, herein, would not be entitled to PUA benefits as the program had ended. She states further,

> "This Tribunal does not have jurisdiction to rule on any *prior dates of claim*" (emphasis added). See 12a.

But her decision does, in fact, rule on the first date of claim of November 2020 because benefits were paid beginning on November 7, 2020 based on that first claim, and it is those benefits from which the Appellant was disqualified. The Appellant ***never received benefits after September 18, 2021.*** He received only pandemic unemployment benefits available when that program still existed. Therefore, Ms. Esposito's decision to disqualify him from benefits received between November 1, 2020 and September 18, 2021, which is clearly *prior*

to October 31, 2021. See 10a. The Appellant was not approved for benefits under the October 31, 2021 claim. There is no contestable issue regarding the October 31, 2021 claim. The benefits for which the Appellant was disqualified and which are the subject of this Appeal were those paid beginning in November 2020. The contradiction in Ms. Esposito's decision has resulted in tremendous anguish on the part of the Appellant, as well as confusion on the part of the Department of Unemployment evidenced by the decisions that followed. Any duplicative attempt by the NJDOL to reclaim benefits from November 2020 is unconscionable and unprecedented. The affirmation of the Director's decision of January 7, 2022 (1a) and the Appellant's Appeal letter to the Board of Review (28a) and the July 27, 2023 Decision is the basis for this Appeal. (1a, 10a, 22a)

In addition, and of significant note, there are two fatal procedural errors that were made during the processing of the Appellant's two unemployment claims. These two errors were put on the record by the Appeal Tribunal Hearing Officer, Tiffany Esposito, during the hearings, which can be found in the Transcripts dated March 1, 2022 and March 30, 2022. See Transcripts T1 and T2.

The first procedural error is found at 11T1 and 12T1, which states, in part,

> "It looks like you had a prior claim dated November 1st, 2020. They never addressed the PUA on this claim. They never sent a determination. It looks like you actually collected unemployment benefits on that claim. And they never addressed your separation on that claim. They then when once you filed a new claim, that's when

> they addressed the separation, which is all out incorrect. It should have been done on the old claim. So, I've actually been in the process of emailing my supervisor, while we're on the phone because this is not the first time I've seen this. I just had one like this yesterday, so that needs to be corrected, number one." 11T1-12T1

The Examiner, Ms. Esposito, goes on to state at 11T1 and 12T1,

> "If I don't postpone today's hearing, it may be remanded back to the Unemployment Office to correct this determination, because, like I said, it should have been addressed on the old claim. On whether or not you qualified for the pandemic unemployment assistance, because it sounds like your separation was COVID related." See 11T1- 12T1.

In addition, at 13T1, the Examiner goes on to state,

> "So that's something that needs to be addressed with the Unemployment Office *first on the correct claim.*" 13T1

Furthermore, the Examiner states;

> "Sir, listen, in the interim let me verify your email. Hold on one second. Because like I said, I think this was *adjudicated incorrectly.*" 13T1

At the end of 13T1, the Examiner goes on to state,

> "Okay. So-so what I'm going to do is I'm going to speak to my supervisor in the interim about your case, because I think personally that it needs to be sent back to the Unemployment Office because I don't think this was adjudicated correctly. I will let you know and keep you updated if it's going to be sent back." See 13T1.

At 21T1, when questioned by the Appellant the Examiner responds,

> "I agree with you there. I agree with you there. **However, this to be honest with you, this kind of benefits him that they did it on the new claim because as of right now, he doesn't owe any refund."** 21T1

Ms. Esposito's discussion of the procedural error here as to the mishandling of the first claim is reflected in her decision discussed earlier in this Brief wherein she states that her decision covers *only the claim dated October 31, 2021.* However, she perpetuates the error by holding the Appellant disqualified for benefits received on the first claim filed in November 2020.

The second fatal procedural error the Examiner states at 13T1 to 14T1,

> "No, I don't have access to the unemployment documents that they originally filed" (referring to Chobani, Inc. 's Questionnaire). "It looks like they sent an E what we call an E adjudication link. So it was like a questionnaire that they would have sent to Jonathan questioning on why he was no longer working for Chobani. Chobani sent in, Chobani sent in - like the form that the Employer gets is called BC3E, and they basically just write why the Claimant is no longer working there. So, they - there is a remark dated September 24th, 2021, that they received information from the Employer stating that the Claimant left for personal reasons. However, the issue was never resolved on the first claim, which it should have been. It should have been resolved on the old claim, and it never was. So, you know, going on months later, they then decided to enter the determination on the new claim. So, you know. That *needs to be corrected.*" See 13T1 to 14T1.

The Examiner goes on to state at 13T1 and 14T1 that,

> "Procedurally, they normally are required to confront the Claimant with the Employer's information. I, you know, I can't explain what's happened here because I really don't know. You know, but that's unfortunately that's why we - I mean, fortunately, that's why we have the appeal process." 14T1

At 13T1 as stated by the witness,

> "My son never saw the letter questionnaire." And also,
> "He was never able to respond to it to rebut such, a, you know, a comment made by Chobani." 13T1

The proper procedure would be for the Claimant/Appellant to respond to the "Questionnaire" and *to rebut any claim* made by Chobani, Inc. However, as can be seen in 13T1 and 14T1, such a procedural error is fatal, as **no** Questionnaire was ever provided to the Claimant/Appellant, which disregards the due process rights of this Appellant. The Appellant had no ability to respond to his employer's claims since no such Questionnaire was ever presented and provided as a condition precedent to the Appellant. See 13T1 and 14T1.

Consequently, the Appellant's within Appeal seeks the Appellate Court's review of the Board's July 27, 2023 decision which resulted in the Requests for Refund of Unemployment Benefits in the amounts of $27,450.00, beginning November 7, 2020 through and ending September 9, 2021, and $11,590.00, beginning May 15, 2021 through and ending September 18, 2021, and respectfully requests that these determinations be overturned. Moreover, the dates of benefit payments totalling $11,590.00 are the exact same dates listed in the determination totalling $27,450.00. The Appellant is being ordered to return a double amount of benefits for those duplicate dates. See 36a through 44a. The basis for the Claimant/Appellant to receive the unemployment benefits is based upon *good cause* which has been shown by this Claimant/Appellant.[2]

[2] Transcript 1 - 03/01/2022 & Transcript 2 - 03/30/2022

APPELLATE ISSUES TO BE REVIEWED

There are several separate issues for Appellate review in this matter. These issues are, to wit: 1) The review of the Department's basis for determining that the Appellant voluntarily quit his job *without good cause*; 2) The review of the preponderance of the evidence standard as it relates to the burden of proof for the Appellant to show *good cause* for his departure from his employment during to the Covid-19 Pandemic; 3) The review of the legal standard and applicable case law for which an employer is to provide a safe work environment for its employees during the Covid-19 Pandemic relative to the Appellant's work environment; 4) A review of the Board of Review error in making its determination relative to the disqualification of unemployment benefits of the Appellant; 5) A review and analysis of the following issues: a) The Examiner's statements made on the Record on March 1, 2022 and March 30, 2022 regarding misfeasance on the part of the NJDOL and b) The errors committed by the NJDOL, the Deputy Director, and the Appeal Tribunal's arbitrary decision of March 30, 2022. See T1 and T2 as hearing testimony from the March 1, 2022 and March 30, 2022 hearings.

This Appeal is now ripe for consideration since the Deputy's initial decision mailed December 28, 2021 and the Board of Review's affirmation of the initial dated July 27, 2023 are both gross miscarriages of justice. See 1a and 10a. The Board's affirmation of July 27, 2023 did not analyze the facts in this case. The

facts that should be considered are the Appellant's unhealthy work environment and the conditions and abnormal scope of work changes that were put upon the Appellant. Additionally, the basis of the unemployment qualification standard, such as "good cause" and the burden of proof upon the Appellant, needs to be considered and properly applied in making a proper, fair and equitable determination. The Board of Review's decision is remiss in its consideration and application of the facts in this case, and its analysis of the factual background is arbitrary and capricious as good cause existed for the Appellant's departure. See 15a. Furthermore, and perhaps most critically, two fatal procedural errors were made during the processing of the Claimant's two claims. These two errors were put on the record by the Appeal Tribunal Hearing Officer, Ms. Esposito, and are discussed in the March 1, 2022 and March 31, 2022 transcripts. See 12T1 through 14T1. See also the Board of Review decision dated July 27, 2023 at 22a and the Appellant's Notice of Appeal at 24a.

1) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE APPELLANT VOLUNTARILY QUIT HIS JOB WITHOUT GOOD CAUSE.

The New Jersey Supreme Court has defined "good cause" as the presence of a meritorious [claim] worthy of judicial determination…and the absence of any contumacious conduct. See O'Connor vs. Altus, 67 N.J. 106, 129 (1975). Good cause is a legally sufficient reason for a ruling or other action by a Judge. Good

cause is often the burden placed on a litigant by the Court to show why a request should be granted or an action excused. Citing Cornell Law School Legal Information Institute. (Cornell Law School Publication 2022)

Black's Law Dictionary (1979) defines *good cause* as a substantial reason amounting in law to a legal excuse for failing to perform an act required by law. The phrase *good cause* depends upon circumstances of an individual case, and finding of its existence is less largely in discretion of an officer or Court to which the decision is committed. It is a relative and highly abstract term, and its meaning must be determined not only by the verbal context of the Statute in which the term is employed but also by the context of action and procedure involved in the type of case presented." Blacks' Law Dictionary defines reasonable as, to wit: fair, proper, or moderate under the circumstances. See Black's Law Dictionary 1293 (8th ed. 2004).

Under the New Jersey Administrative Code SubSection 12:17-11.4, for purposes of this subchapter, "good cause" is defined as

> "any situation over which the Claimant did not have control or which was so compelling as to prevent the Claimant from accepting work. In order to establish good cause, the Claimant must have made a reasonable attempt to remove the restrictions pertaining to refusal."

The Appellant has satisfied this legal standard. The Appellant allowed Chobani a period of eight (8) months, from March through November 2020, to provide the

adequate and necessary remediation of the unsafe and unhealthy work environment for the Appellant. The Appellant discussed the unhealthy work conditions with his Supervisor and advised the Human Resource department that he became infected in March of 2020. However, the Appellant's concerns were met with no alternative work for the Appellant nor any changes to the work place environment, which became increasingly dangerous as the demands placed upon the Appellant by the employer abnormally changed the scope of work brought on by the pandemic. In the instant matter, the Appellant has demonstrated *good cause* as can be seen in the Appellant's March 1, 2022 Transcript, which is now included as 5T1 to 10T1.

The good cause standard established by New Jersey law is found in,

> "the presence of a meritorious [claim] worthy of judicial determination…and the absence of any contumacious conduct…" See O'Connor vs. Altus, 67 N.J. 106, 129 (1975).

The March 1, 2022 Transcript (T1) demonstrates the good cause reasons for the Appellant's detachment from employment as such good cause stemmed from the *world changing* Covid-19 pandemic during the subject period of employment with Chobani, Inc. Some of the examples of good cause for which the Appellant was forced to detach from his employment are, but are not limited to: 1) The Appellant's comorbidity and health as the Appellant did contract the Covid-19 virus during his period of employment with Chobani, Inc.; 2) The physical work environment located in a geographic territories of Rockland County, New York and

northern New Jersey, which had the highest rate of infection; 3) The change in the scope of the Appellant's work and daily routine as reflected in the work and conditions caused by the pandemic; 4) The fact that the Appellant's mother was diagnosed with cancer and father had several health comorbidities, which caused great concern to the Appellant as the Appellant frequently cared for his parents on an as needed basis and eventually moved in with them on a permanent basis. 27a.

2) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE APPELLANT'S CIVIL BURDEN OF PROOF, KNOWN AS A PREPONDERANCE OF EVIDENCE, WAS NOT MET BY THE APPELLANT.

In civil cases, as well as administrative hearings, a party must prove its claim by a preponderance, defined as superiority in weight, force, importance, etc., of evidence. In legal terms, a *preponderance of evidence* means a party has shown that its version of the facts causes damages, or fault is more likely than not, as in personal injury and breach of contract matters. This standard is the most straightforward to meet and applies to all civil cases unless otherwise provided by law. The preponderance of the evidence is defined by the greater weight of the evidence required in a civil lawsuit for the trier of fact to decide in favor of one side or the other. The preponderance is based on the more convincing evidence and its probable truth or accuracy, and not the amount of evidence. Thus, one

clearly knowledgeable witness may provide a preponderance of evidence over a dozen witnesses with hazy testimony. See The People's Law Dictionary.

It is well adopted that the preponderance refers to

> "The evidentiary standard necessary for a civil case. Proving a proposition by the preponderance of the evidence requires demonstrating that the proposition is more likely true than not true." See Cornell Law School Legal Information Institute.

In New Jersey, the General Provision and Standard Charge adopted by the New Jersey Courts defines the term: *preponderance of the evidence* means that amount of evidence that causes you to conclude that the allegations are probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true. In addition, see the legal dictionary for the definition. See "Preponderance of the Evidence." Merriam-Webster.com Legal Dictionary, Merriam-Webster found at https:// www.merriam-webster.com /legal/preponderance%20of%20the%20evidence.

The burden of proof consists of two parts. First, the Claimant/Appellant herein must put forth evidence such as witness testimony, documents, or objects that are called the burden going forward. Then the Defendant's (Employee - Chobani) burden is to refute the case presented by the Plaintiff (Appellant) with its own evidence. In this instant matter, the Appellant never had the opportunity to review the employer's questionnaire, as addressed in this brief, that the Employer

and the Unemployment Office should have initially submitted to the Claimant for his response. Furthermore, there has never been any rebuttal from the Employer as to the statement of facts made by the Appellant and the good cause justification to depart from employment due to the Covid-19 pandemic and its detrimental health effects upon the Appellant and his immediate family. [3] All of the underlying facts presented by the Appellant justify that the standard of proof known as a *preponderance of the evidence* has successfully been met by the Appellant. See testimony throughout both underlying transcripts at T1 and T2.

3) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE EMPLOYER DID MEET THE STANDARD TO PROVIDE A SAFE WORK ENVIRONMENT DURING THE COVID-19 PANDEMIC FOR ITS EMPLOYEE, THE APPELLANT.

The New Jersey Department of Labor and Workforce Development Website that was established during the Covid-19 Pandemic states that a New Jersey worker experiencing any of its Covid-19 scenarios would likely be eligible for Pandemic Unemployment Assistance. Among the scenarios that are good cause for such assistance are as follows, in part: Quit his or her job as a direct result of COVID-19. The underlying circumstances in this matter are directly attributable to

[3] On February 2, 2022, as the Appellant's mother had recently been diagnosed with cancer, as such he required a rescheduling of the hearing with Ms. Esposito. An email was sent by the Appellant to Ms. Esposito that requested the rescheduling of the hearing. Later that same day, Ms. Esposito responded and advised that the hearing would be rescheduled to a future date.

the coronavirus, which formed the basis for which the Appellant is no longer employed by Chobani, Inc. See 10a and 22a.

The New Jersey Unemployment Benefits and Rights website states, in part, that safety or health violations are examples of *good cause*. The Appellant stated throughout the March 1, 2022 and March 30, 2022 Transcripts (T1 and T2) that good cause existed for the Appellant to leave his employment based upon the following, but not limited to: 1) Safety and health concerns of the Appellant and his family, and 2) The Pandemic caused the Appellant's scope of work to abnormally change, creating a severely unsafe work environment. The standard to be applied under the Unemployment Benefits and Rights publication regarding a *change* in the *scope of work* is considered "new work," which occurred in this instance. Not only did the work environment become overwhelmingly untenable to the Appellant because of the pandemic, but the scope of work *abnormally* changed because of the way the pandemic put a stranglehold on the everyday lives and work habits of the public at large. Examples of the Appellant's workplace environment and his scope of work changes are set forth throughout the Appellant's testimony. 12T2 to 19T2.

Prior to the Pandemic, the Appellant did *not* need to remove the Chobani products from the cramped, unventilated freezer boxes of the supermarkets assigned to the Appellant. The fact is that the cramped freezer boxes where the

Chobani products were previously delivered caused the Appellant to interact, in exceedingly tight freezer boxes, with supermarket employees. No "social distancing" could be achieved during the height of the Pandemic. In addition to the freezer box interaction scenario, the shelving of the Chobani products could not be achieved with the proper "social distancing" as the supermarket customers were in close contact with the Appellant as he was shelving products, causing further safety and health concerns to him. See 5T1, 6T1, 7T1, 8T1 and 13T2, 14T2, 15T2. The workplace environment was significantly compromised, and Chobani, Inc. did nothing to eliminate the risks to the Appellant or the health concerns at hand. Moreover, *no suitable work* replacement was ever offered to the Appellant although the Appellant continued to work from March 2020, the first time of his COVID infection, through November 1, 2020. See 6T1 and 9T2 to 10T2 17T2.

During this critical period of the pandemic, Chobani, Inc. made little effort to provide precautionary measures relative to the Appellant's various unhealthy workplace environments concerns, which the Appellant complained of numerous times to his supervisor and others at the Human Resource Office.

The lack of commitment to take such precautionary measures is in direct contradiction to the Center for Disease Control (CDC) guidelines. The key purpose of the guidelines was to protect workers and to physically distance them from people (workers or customers) -- generally at least six (6) feet of distance is

recommended, although this is not a guarantee of safety, especially in *enclosed or poorly ventilated* spaces. In the Appellant's workplace, which consisted of various supermarket freezer boxes, these boxes were *cramped* and *without proper* ventilation. The Appellant and other supermarket workers could *not* possibly social distance while working in the cramped freezer boxes. During the stocking of the refrigerated section with Chobani products for customer or end use purchasers, no such social distancing was available to the Appellant as the supermarket's customers, who were brave enough to shop at the supermarket during this period of the pandemic, were in direct spatial proximity to the Appellant's immediate work space. It is well known that maintaining physical distance at the workplace for such workers was and has been an important control to limit the spread of Covid-19. See Section 4:31 of the OSHA guidelines, and it had been well established to social distance throughout the time of the pandemic. *None of these reasonable precautions* were implemented nor even considered by Chobani, Inc in any discussion with the Appellant. Additionally, no suitable alternative work was ever offered to the Appellant.

The only remedial implementation by Chobani, Inc. was to provide a cloth face mask and hand sanitizer to this employee as inadequate protection against the widespread Pandemic and the new *scope of work* for this Appellant. See 7T1. That was the extent of the actions of Chobani, Inc. for the protection of the Appellant.

Clearly, the inability to protect the Appellant was the failure of Chobani, Inc. to protect some of its *most vulnerable* employees. Oddly, during a period of the pandemic, Chobani chose to close its Manhattan office for its Manhattan employees, giving those individuals the ability to work remotely from home. No such accommodation occurred for this Appellant/employee and no such suitable alternative work was ever offered by the employer. 5T1, 6T1, 7T1, 11T1, 12T1.

During a March 2020 conference call with the Appellant, his direct manager, and fellow team members, the Appellant expressed his concern that there should be equal protection for Chobani, Inc.'s New York City employees, whether they worked in the Manhattan headquarters or in the role and perform the scope of work of the Appellant, which was outside of Manhattan. At that time, the Manhattan headquarters closed down to allow the Manhattan headquarters employees to work remotely. See 17T2. Chobani, Inc.'s closing of the Manhattan headquarters due to the pandemic was a gross inequity in that it protected its Manhattan employees but not the Appellant, who was forced to work in grossly unsafe conditions during this period of the pandemic. The response to the Appellant's concerns during the conference call from the direct manager at the time was ***silence***, as Chobani, Inc. *was never able to provide any justification* for making one group of New York City - based employees fully remote and allowing other employees, such as the Appellant, to continue their significantly high risk employment at high risk

locations. Chobani, Inc. *chose to ignore the Appellant's valid concerns regarding the lack of social distancing and the unhealthy conditions of the work environment, and no accommodation of any sort was provided nor was any alternative work provided.* See 9T1 and 10T1.

Prior to the March conference call referred to in the above paragraph, the Appellant informed his direct manager at Chobani, Inc. that he was not feeling well. The Appellant was told to seek medical advice. On March 9, 2020, the Appellant visited with Dr. Richard J. Schweitzer, MD at the Mountain Lakes Medical Center located in Mountain Lakes, New Jersey, to discuss the Appellant's chief complaint, which was that the Appellant was *not feeling well.* See 27a. At that time, in March of 2020, the Covid-19 Pandemic had just begun affecting and infecting the United States as well as other parts of the globe. At that time, there was *no available medical testing* as the pandemic had just begun the early stages of infecting the United States. See 27a. It is well documented that the State of New Jersey and the State of New York each had one of the *highest rates* of infection during the initial onslaught of the pandemic throughout the continental United States. See New Jersey State Health Assessment Data (NJSHAD) reported during the year of 2020. In fact, at the time of his medical visit, Dr. Schweitzer was displeased that the Appellant had entered his offices with the virus. See 27a.

The Appellant's examination by Dr. Schweitzer is further proof that the Appellant had been infected by the virus as the Appellant exhibited many of the symptoms of Covid-19 that were being diagnosed during the duration of the pandemic. See 27a. Based upon the Appellant's contaminated workplace environment and the lack of precautions that should have been implemented by Chobani, Inc., the Appellant became infected with the virus during the early stage of the Pandemic. See 5T2 to 7T2. At no time in the early stage of the Pandemic, that is, particularly in March of 2020, was there any requirement that a doctor's note was a condition precedent to obtaining pandemic unemployment insurance benefits nor was there any means of testing for the coronavirus. Also, vaccination protection was unavailable at that time. See 6T2 and 27a.

It is undisputed that the Appellant did visit a medical doctor who, at that early stage of the Pandemic, was unaware of the pernicious effect of the virus and could not foresee the serious magnitude of the Covid-19 virus and its health effects upon the public at large. See 27a. When the Appellant discussed the doctor's findings and health concerns, the Appellant's direct manager put the Appellant in touch with a representative of the "People Team," which is the name given to Chobani, Inc.'s Human Resources department, in order to discuss the course of action at that point. See 8T1. Human Resources told the Appellant that,

> "you need to use paid time off allotment (vacation days) to quarantine, rather than use sick days"

as would normally be customary in the event an employee becomes ill. The advice given to the Appellant regarding the use of vacation days instead of sick time further demonstrates the misfeasance, malfeasance and negligence of Chobani, Inc. in failing to follow proper safety protocol and procedure. See 8T1. Furthermore, ever since March 2020, when the Appellant first contracted the virus, the Appellant's sense of smell has been severely diminished, and *long term Covid* has continued to interfere with the health of the Appellant. See 12T2.

4) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE EMPLOYEE/APPELLANT SHOULD BE DISQUALIFIED FOR UNEMPLOYMENT BENEFITS.

Based upon the facts and circumstances of the Appellant's employment with Chobani, Inc., it is clear, without any counter proof offered by Chobani, Inc., that the Appellant left the employment voluntarily with *good cause* undeniably existing for such an employment departure. Throughout the period of receipt by the Appellant of unemployment benefits, the Appellant was never provided any justification offered by Chobani, Inc., to question the Appellant's eligibility. No Department of Labor BC3E Form (Questionnaire at 13T1) was ever provided to the Appellant although it should have been as a condition precedent to a denial. See 12T1 and 13T1. An applicant for unemployment benefits will be disqualified from receiving New Jersey unemployment benefits if the Department of Labor

finds that he or she left work voluntarily and *without* good cause attributable to work. If the applicant can show that he or she had quit his or her job *with* good cause attributable to work, he or she *will be eligible* for unemployment benefits. In order for an applicant to meet the standards imposed by the State's Department of Unemployment, each case must be considered by the *factual circumstances* and decided on a *case by case* analysis. A broad brush stroke analysis would be arbitrary and unjustified. In the Appellant's case, he has shown that his departure from his employment was for good cause as it was sufficiently justifiable that the Appellant left his employment because of the most compelling reason the State has ever encountered, which is that the Covid-19 pandemic was of such nature and magnitude that the virus infected the entire planet. In this instance, the Appellant was compelled to leave Chobani, Inc. as he was working in the communities that early on had the highest rate of infection. See 6T1. Because of the change in the scope of work of the Appellant, coupled with the unhealthy work environment, the Appellant did become infected with the virus. See 27a and 5T1 to 7T1.

Certain compelling reasons to voluntarily leave employment with *good cause* attributable to the work include, but are not limited to, 1) Having to terminate the employment to avoid acting illegally; 2) Immoral reasons; and 3) Work in a dangerous or unhealthy environment. As set forth in this Brief, the reason that the Appellant left his employment was that the workplace environment

conditions became so unsafe and unhealthy that the Appellant needed to take action to eliminate his exposure in the untenable workplace environment. See 12T2, 13T2 and 14T2. No precautionary or remedial actions were taken by Chobani, Inc., to adequately protect the Appellant except for gloves and paper masks. See 5T2. This meant departing the workplace because the Appellant was, as the result of the pandemic, working in small, cramp freezer boxes that had little, *if any* ventilation; there was *no* social distancing between those supermarket employees who worked in the freezer boxes; he had to work without the required social distances between the Appellant and customers who visited the virus infected supermarkets; he had to travel and work in such areas as Rockland County, New York and northern New Jersey supermarket locations that were experiencing the *highest* rate of viral infection during the onset of the pandemic; and Chobani, Inc. altered the scope of employment due to the pandemic without providing any reasonable accommodations, as no alternative work was offered, and showed no concern for the Appellant's health and welfare. See 7T2 and 13T2. As further set forth in this Brief, because of the heightened risk of contracting Covid-19, the Appellant became infected as the direct result of exposure to the unhealthy workplace conditions that were forced upon the Appellant by his employer at the height of the pandemic. See 5T2 and 27a.

The Department of Unemployment's disqualification of benefits letter dated July 31, 2023, and the affirmance of the Appeal Tribunal dated March 30, 2022 are both unjust, arbitrary and unreasonable, based upon its lack of consideration of the compelling factual evidence and specific circumstances as well as the particular abnormal scope of work of the Appellant's employment. See 36a and 10a. Also see 22a as the affirmance of the Board of Review's March 30, 2022 Appeal Tribunal decision. See 10a. Moreover, it is an error of law based upon his compelling reasons for leaving the employment, as *good cause* is evident throughout this factual scenario. Therefore, there should be no justifiable reason for the disqualification of benefits due to the Appellant. See 1a, 10a and 22a.

5) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING BASED UPON A REVIEW AND ANALYSIS OF THE FOLLOWING ISSUES: a) THE HEARING EXAMINER'S STATEMENTS MADE ON THE RECORD ON MARCH 1, 2022, AND ON MARCH 30, 2022 REGARDING NJDOL MISFEASANCE, AND b) THE ERROR COMMITTED BY THE DEPARTMENT OF UNEMPLOYMENT, THE DEPUTY DIRECTOR, AND THE APPEAL TRIBUNAL'S DECISION OF MARCH 30, 2022.

On March 1, 2022, the Hearing Examiner, Ms. Esposito stated,

> "They then when once you filed the new claim, that's when they addressed the separation, which is all out incorrect. It should have been done on the old claim. So I've actually been in the process of emailing my supervisor, while we are on the phone because this is

> not the first time I've seen this. I just had one like this yesterday, so that needs to be corrected, number one." 11T1.

The Examiner goes on to state,

> "Okay Great. Sir, listen, in the, in the interim let me verify your email. Hold on one second. Because, like I said, I think this was adjudicated incorrectly. So, I have Jon Tullio Franco at gmail.com." 12T1. However, no such correction was made.

Furthermore, the Examiner goes on to state on March 1, 2022,

> "Okay. So - so what I'm going to do is I'm going to speak to my supervisor in the interim about your case, because I think personally that it needs to be sent back to the Unemployment Office because I don't think it was adjudicated correctly. I will let you know and keep you updated if it's going to be sent back." See 12T1, 13T1 and 14T1.

However, the Appellant never heard back from Ms. Esposito regarding the issue she had raised and which is referred to above. Ms. Esposito then raised an issue even though, at the time the Appellant was infected with Covid-19 in March 2020, there had *not been* any legal or state requirement implemented regarding medical information. See 11T1. She requested the Appellant to produce "medical documentation" of the illness during the onset of the virus in March of 2020. See 11T1. Ms. Esposito stated further,

> "Unfortunately they do want something in writing to state that you were at high risk or you reside with someone who was very immunocompromised, you know, that type of thing. So, they do want something in writing." See 11T1 and 13T1.

The Appellant has provided, on more than one occasion throughout the

course of the Appellant's prior submissions regarding the entirety of the within appeal process, a copy of the medical proof of the Appellant's visit to Dr. Schweitzer on March 9, 2020, which is provided as in 27a. In addition, at 4T1, the Examiner, Ms. Esposito goes on to say,

> "Hopefully he can get some type of medical documentation stating, you know, that due to either his mother's medical condition or his own medical condition, that he should have remained home, you know because he - he would be considered high risk." See 4T1.

However, at that time period, there were no PUA requirements regarding the need for a "medical writing" when applying for pandemic benefits. At no time during the processing of the Appellant's pandemic unemployment benefits claims was he required to provide any written medical information. As of that early stage of the Pandemic, when the Appellant was infected in March of 2020, medical personnel had no clinical diagnostics available to them to scientifically find the Covid-19 virus among the initial people infected. See 9T2. The Appellant fell into that category. Furthermore, there was no vaccine available for many months after the initial onset of the virus. See 6T2.

The Appellant did speak with the Human Resource team at Chobani, Inc. regarding the doctor visit, the Appellant's illness, the effects upon the Appellant's health, and the need to quarantine for two weeks. However, the Appellant was met with the Human Resource team saying that, to wit:

> "it was basically my call whether I wanted to quarantine or not. If I wanted to quarantine, I would be forced to use paid time off (PTO) days, which are vacation days rather than sick days, which they do a lot at Chobani. You technically have an unlimited amount of sick days, but for whatever reason, my Employer decided despite my symptoms of a virus during the pandemic that I was not allowed to use my sick days." See 6T2, 7T2.

The Appellant should not have been told to use his paid time off for the two week quarantine period but was forced to do so. See 6T2 and 7T2.

At 7T2, the Examiner, Ms. Esposito, questioned the Appellant and asked,

> "March 16th and November 1st in 2020. At any point in time, did you report to the Employer that you felt that the working conditions were unsafe?" The Appellant replied, "Yes, that's correct, I did." See 7T2.

The Examiner went on to ask the Appellant,

> "And who did you report to?" The Appellant responded, "I reported to my direct manager. It was a gentleman by the name of Casey Sloane." See 7T2.

The Examiner then asked,

> "Okay. And what - what specifically did you report?" See 7T2.

The Appellant responds,

> "Well, I followed up with him essentially on the conference call that I referred at the prior hearing, which was that I did not understand why it was that my New York City Headquarters counterparts were granted the opportunity to stay at home and self-isolate at home, do remote work. While employees in my role who were at a much, you know, higher risk by being out in several stores per day, being in those very busy grocery stores were not afforded that opportunity." See 7T2 and 8T2.

Once again, the Examiner asked and the Appellant responded,

> "Okay. So did you ever ask to be transferred to a different position that would allow you to work from home?" See 8T2.
> "Only - only on the - in the original onset, which was March 9th through 16th period did I have that kind of discussion with anybody that was probably more a discussion with someone directing in the HR Department." See 8T2.

When asked by the Examiner the Appellant responded,

> "What ultimately happened to make you decide to leave the job?"
> "Well, ultimately, nothing changed fundamentally about my role." The Appellant went on to state, "As I am sure you would agree, we all knew very, very little about this virus, how serious it was. But at that point in October of 2020, I felt that I had accrued enough information, just as anyone else would have at that time about the virus. You know, the risk factors, you know, the kind of environment that the virus thrives in which, as you know, as I stated, would be an environment similar to a dairy aisle and dairy box." See 8T2.

The Appellant's work environment and scope of work were undeniably a hotbed for the virus to thrive. Chobani, Inc. provided no accommodation to the Appellant although the Appellant complained to his direct supervisor and Human Resource representative. The Appellant responds at 8T1 to the Examiner's question,

> "So, I knew that I had to quarantine, and it was the safe thing to do. And yet Chobani essentially ignored my concerns and said, you know, it's up to you. It's up to you if you want to take paid time off."

Additionally, when asked by the Examiner at 9T1, the Appellant responded,

> "In the beginning in March 2020, Chobani was aware, was well aware of the risks being posed by Covid 19. And the reason I say that is because they - there's two things here. They fundamentally changed the nature of my role (scope of work). And what I mean by that is I began waking up at 3:00 a.m in the morning and going to four stores per day throughout the morning rather than the typical six. And the reason they did that is because they wanted us to avoid exposure to customers. So they were well aware that there was a risk being posed by the virus. And not only that, while I was in these stores, I was not expected not to carry out my role in the described manner when I first, you know, joined the company. All I was expected to do was pack out products onto the shelf. So, I was packing yogurt onto the shelf. I was constantly in these dairy boxes, taking products out of these boxes and then putting them on the shelves. So, my role fundamentally changed as the result of Covid. And, in addition to that, in March 2020, when we were being told about what to expect, how things were going to change, I vividly remember a conference call with my manager and other members of my team, which were the New York team, which consisted of about a dozen people, I would say. So, there were a dozen people on the call. And I vividly remember saying to my manager so that all my peers could hear my concerns and what my concern was, and I said to them, I know obviously you're going to make decisions about our group. You're going to make decisions about the New York City headquarter employees. And I fully expect, based on the available information, the available science that we were hearing at that time, that whatever determination is made about the New York City headquarter employees would be the same decision made about those of us who are out in the field going to these stores." See 9T1.

The Appellant went on to state, at the top of 10T1,

> "And I'll never forget the silence that was met by that concern. It was - it was as if you could hear a pin drop. There was clearly no expectation that that kind of concern would be raised. My manager had – had no rebuttal to that, really. And it was essentially like, you know, we'll see. And of course, what ended up occurring to little surprise was that the New York City headquartered employees were told that they could stay at home, and they could work remotely, whereas the rest of the group was told to carry on as normal, other than the change of time which of course was something they did not

> want to continue for too long a period. It probably lasted about eight weeks before we got back on a schedule of, you know, I was waking up at 7:00 again rather than 3:00, and I was out in stores for the rest of my day, which would typically be till 4:00 in the afternoon."

The Transcript testimony of the Appellant cited throughout this Brief and the facts and circumstances at hand clearly are in deep contrast to the decision of Ms. Esposito on March 30, 2022, and the Board of Review Decision of July 27, 2023. See 10a to 13a. The March 30th decision of the Appeal Tribunal states in part,

> "In this case, the impetus of the Claimant's resignation was due to his fear of another COVID-19 outbreak."

This statement is factually and scientifically erroneous. See 12a.

When the Appellant left the employ of Chobani, Inc., the pandemic was only approximately nine (9) months old. The pandemic lasted for *several* years. The Appellant never stated in the underlying Transcripts that he was in fear of "another outbreak" as the outbreak or pandemic was a continuing one of global significance. The subject Decision goes on to state, to wit:

> "While the Appeal Tribunal understands the claimant's concerns, there has been no evidence presented to indicate that the employer failed to follow safety procedures or protocol regarding Covid-19." See 11a.

Once again, this statement is factually incorrect. The Appellant has demonstrated throughout his testimony before the Examiner that the employer took no true action to provide any workplace safety or express any concern for the

well being of the Appellant, nor was any alternative work type opportunity ever offered by Chobani, Inc. See 18a and 19a. The Appellant has demonstrated that unhealthy workplace conditions created by his different supermarket work environments existed during the pandemic that were adverse to his health and safety. See 17a, 18a, 19a and 20a. Also see 5T2, 6T2, 8T2, 12T2, 13T2, 14T2 and 15T2. This has been shown on numerous occasions in the testimony of the Appellant as well as highlighted in this Brief. The Appeal Tribunal's decision goes on to state that, to wit:

> "the claimant addressed his concerns about social distancing during a conference call in 03/2020; he denied ever addressing his concerns further with human resources or the corporate officer prior to leaving the job." See 11a.

This is an incorrect conclusion and a misunderstanding of the Appellant's testimony by the Tribunal that can be found on the record. See 11a. The Appellant did, in fact, speak to his manager, giving a two week notification that the situation became untenable, unhealthy and unsafe as his concerns were voiced, once again, regarding the scope of work and the unhealthy conditions, to which the Manager never provided any kind of response, whatsoever, to the Appellant. See 11T2. The Appellant left his employ for good cause. See 7T2, 8T2 and 9T2.

Also, the Appellant did discuss with both the direct supervisor, Mr. Sloane,

and administrators of the human resource office have a myriad of concerns. This can be seen in the 6T2, 7T2 and 8T2. The Tribunal decision states that the Appellant *never addressed his concerns* further with human resources or the corporate officer prior to leaving the job. This is arbitrary and incorrect as can be seen by the testimony of the Appellant. At the 7T2, the Appellant states that,

> "I reported to my direct supervisor, Mr. Sloane." The Appellant also states that "Well, I followed up with him essentially on the conference call that I referenced at the prior hearing, which was that I did not understand why it was that my New York City counterparts were granted the opportunity to stay home and self-isolate at home or do remote work. While employees in my role who were at a much higher risk by being out in several stores per day, being in these very busy grocery stores were not afforded that opportunity." See 7T2 and 8T2.

When asked about whether the Appellant asked to be transferred to a different position that would allow him to work at home, the Appellant responded,

> "Only - only on the - in the original onset, which was that March 9th through 16th period (during Appellant's quarantine) did I have that type of discussion with anybody." See 8T2.

Although the Appellant asked for remote home work during his illness quarantine period, there was never any response from human resources nor the Appellant's direct supervisor, Mr. Sloane. No transfer to remote work was given. 7T2 and 8T2.

Furthermore, the Tribunal erroneously states that the Appellant did not give Chobani, Inc. the opportunity to rectify the situation prior to the employee leaving the job. See 11a. The Appellant voiced his concerns during the conference

call detailed above, received no response, then worked for approximately eight months in the same unsafe conditions with no changes made by his employer to protect him before he finally provided a two week notice, and even then, Chobani, Inc. offered nothing to the Appellant. See 8T2, 9T2 and 11T2.

The Appeal Tribunal states in its Decision mailed on March 30, 2022,

> "An employee must do what is reasonable and necessary in order to preserve his employment and *allow the employer an attempt to rectify the situation, prior to leaving the job.*" See a11.

The Appellant continued to work for eight months, then provided a two week notice to his Manager who provided *no response* to the Appellant's concerns about the scope of work and the unhealthy work environment. See 10T2 and 11T2. During those eight months and that particular two week notice period, Chobani, Inc. did not take any remedial steps to rectify the concerns of the Appellant or provide suitable work. See also, 16a, 17a, 18a, and 19a. The workplace environment was unsafe to the Appellant. The need to work in cramped freezer boxes without proper ventilation forced him to work outside of the initial "scope of work" in an environment for the virus to proliferate. No safety precautions were taken by Chobani, Inc., to alleviate this significant health problem. See 15a and 16a. The testimony of the Appellant at 8T2 clearly states,

> "Yeah, I probably, I think it was a *two week* notice that, you know, I contacted my direct manager and I had - I had a different direct manager at the time, but of course I contacted him and notified him that I was putting

in a two week notice." See 8T2.

During the eight months between March and November, 2020 nothing changed on the part of the employer as no remedial action occurred so that the Appellant could work in a safe, healthy and appropriate environment during the pandemic. 11T2.

In addition to the two week notice given by the Appellant to his manager and the ensuing discussion regarding the reasons for leaving his employ with Chobani, Inc., most significantly, the Appellant worked for Chobani, Inc. from the time of his initial infection with the Covid-19 virus in early March, 2020 *through* November, 2020, which gave the employer a *tremendous* period of time in which to take remedial action or offer alternative work to the Appellant. As Ms. Esposito incorrectly claimed in her March 30, 2022 Decision. See a11. None of these types of proactive precautions or remedial work were implemented by Chobani, Inc. throughout the pandemic laden period of March 2020 through November 2020 to assist the Appellant. Furthermore, during this period of time, from March through November of 2020, the Appellant was infected with the virus for a second time. See a11. Finally, the Tribunal decision goes on to state,

> "There has been no evidence presented to indicate that the working conditions were abnormal or adversely affected the claimant's health in any way." See 2a, 3a and 15a to 19a.

The decision verbiage of the Tribunal is erroneous and without merit. Such a position is in total disregard of the facts and circumstances of the Appellant's

particular scope of work. See 2a, 3a as well as 15a to 19a. Therefore, the July 27th decision of the Board of Review is arbitrary and without merit. See 22a.

First, the Appellant did become infected with Covid-19. It has been explained, on numerous occasions throughout the transcript, that the Appellant visited Dr. Schweitzer on March 9, 2020 when the Appellant became ill. See 27a. The Appellant's symptoms were, as classified months after March 2020 infection, classic Covid-19 symptoms. Therefore, Covid-19 adversely affected and continues to affect the Appellant's health, so much so that the Appellant's sense of smell continues to be adversely impacted as this sense has been dramatically diminished. Long term symptoms such as what the Appellant is currently faced with have been described as "Long Covid." See 12T2.

Second, the employer temporarily changed the work schedule to 4:00 a.m. work start instead of a 7:00 a.m. work start, which was the time the Appellant was to begin work when he was originally hired. See 9T1, 10T1 and 18a. This schedule change lasted for only approximately *eight weeks* and then returned to the original schedule at a start time of 7:00 a.m. See a18. Chobani, Inc. knew that the unhealthy work environment had become so highly problematic due to the pandemic that a schedule change might help the employees avoid the highest risk of infection in the morning work hours. However, this new schedule changed after the *eight week "trial period"* when Chobani thought it was *no longer in the best*

interests of the company to begin work at 4:00 a.m. and returned its employees to the original work schedule. See a18 and 10T1. Therefore, Chobani, Inc.'s attempt at remediation of the employees' unhealthy work environment was a feeble attempt. See 10T1 and 11T1.

Therefore, the suggestion that there was no evidence presented to indicate that the working conditions were abnormal or adversely affected the Claimant/ Appellant's health in any way is erroneous and without a scintilla of justification. See 10T1. The Appellant has, on numerous occasions, demonstrated the details of the unhealthy work environment, the lack of social distancing, the location of the supermarkets concentrated in the highest rate of infection, and the change of the scope of work, as can be seen throughout the March 1, 2022 (T1) and March 30, 2022 (T2) transcript testimony of the Appellant. See 6T1, 7T1, 8T1, 9T1 and 10T1. The Appellant has demonstrated good cause throughout his hearing testimony and throughout the Brief. The reasons for the Appellant's departure from Chobani, Inc. are self-evident as his employer did not take the necessary precautionary steps it was expected to during the pandemic and disregarded the fact that this Appellant was compelled to work in the highly infected work environment. See 8T1and 9T1. Each case must be decided upon a fact specific analysis, and this case, based upon the totality of the underlying facts and circumstances, satisfies the requirements of good cause.

THE APPLICABLE CASE LAW

In the matter of Yardville Supply Co. vs. Board of Review, 114 N.J. 371, 374, the Court held that the Unemployment Compensation Law Courts have recommended that "The Act is to be liberally in favor of allowable benefits." Based upon the facts submitted in this Appeal, it is clear that the Appellant has satisfied the basis on which Yardville is predicated. Furthermore, in the matter of Battaglia vs. Board of Review, 14 N.J. Super. 24, 27 (App. Div. 1951), the Court held that, "The purpose of the Act is to provide some income for the worker earning nothing, because he is out of work through no fault or act of his own."

In this case, the Appellant did not choose to become unemployed by acts that were within his control. He was an employee at will whose employer had dominion and control over the scope of work, and he was to do each day as his employer requested. As the facts have been detailed and the good cause has been described above, the Appellant was forced out of employment with Chobani, Inc., and Chobani, Inc. should not have challenged his right to unemployment benefits. Furthermore, the Appellant has never been provided a copy of the challenge made by Chobani, Inc. to his receipt of unemployment benefits.

In the matter of Zubrycky vs. ASA Apple, Inc., 381 N.J. Super. 162, 168 (App. Div. 2005), the Court stated,

> "The Act protects those who voluntarily quit their jobs for good cause attributable to their work." See Zubrycky.

Here, the fact that the Appellant contracted the Covid-19 virus early on during the pandemic is indicative that the working conditions in which his employer, Chobani, Inc. caused him to work were detrimental to his health and welfare. The Examiner erred in her decision as the good cause described under N.J.S.A. 43:21-5(a) requires consideration of **all** relevant factors. All such relevant factors are highlighted in this Appeal. See Frazee vs. Board of Review, 207 N.J. Super. 1953. The determination of whether good cause exists for an employee to leave a job, entitling the employee to benefits, requires a *discrete balancing and evaluation of all factors* rather than a *mechanistic approach*. Therefore, the arbitrary decision of the Deputy, Mr. T. Murray, the Examiner, Ms. Esposito, and the subsequent arbitrary and capricious July 27th Board of Review determination that the Appellant's reasons to resign did not satisfy the holding found in Frazee were clearly erroneous as *such factors clearly did satisfy the definition of good cause* and the holding in Frazee. Moreover, an individual who leaves work for several reasons, *one of which constitutes good cause* attributable to such work, shall not be disqualified for benefits. See N.J.S.A. 12:17-9.1(d). See also, Self vs. Board of Review 182 N.J. Super 361.

The facts and circumstances of the Appellant's work history are uncontroverted as his former employer had dominion and control over every aspect of the scope of his work. By way of significant emphasis, Chobani, Inc. modified

the Appellant's work schedule, which lasted for a mere *eight week* period. See 18a and 9T1. Yet, the pandemic lasted for years throughout our country as well as the entire globe. After that eight week period of changing the time schedule to reduce the Appellant's interaction with the patrons of the various supermarkets at which the Appellant worked, there were no further safety provisions provided by Chobani, Inc. during the period of the Appellant's employment. Safety of the employee *was not prioritized* by the company. It can be stated that the modified schedule provides clear evidence that Chobani, Inc. was aware that the work conditions heightened the Appellant's risk of being infected with the Covid-19 virus. See 18a. This fact alone satisfies the *good cause* requirement for the Appellant's departure from Chobani, Inc. The Appellant was left to his own devices with which to protect himself from the virus-fueled pandemic, the likes of which have not been seen for over a century. See 10T1.

It is the Appellant's position, therefore, that Chobani, Inc. failed to provide the proper protection to the Appellant. The abbreviated precautionary attempt by Chobani, Inc. and subsequent failure to take any action to ensure his well being resulted in the Appellant's departure from his employment. See 12T2. The Appellant suffered two separate Covid-19 infections during the period of his employment, which have resulted in permanent negative effects in that *Long Covid* has significantly diminished the Appellant's sense of smell and has created

respiratory and sinus issues as well for which the Appellant is now being medically treated. See 12T2.

Additionally, the Appellant demonstrates by the totality of facts, circumstances, and law as set forth throughout the past and current filings, that there are certain procedural grounds upon which this Appeal must be considered. The basis for such Appellate analysis is that there are technical/procedural improprieties requiring further factual consideration that have been egregiously disregarded that justify the finding of error in both the Deputy's determination and the Appeal Tribunal's determination.

The Examiner, Ms. Esposito, clearly stated during each hearing on March 1, 2022 and March 30, 2022 (T1 and T2) that there exist two major procedural errors committed by the New Jersey Department of Labor ("NJDOL") that occurred during this process, to wit:

- At no point in time was the Appellant *ever provided* with the opportunity to see Chobani, Inc.'s claim that he resigned for reasons unrelated to Covid-19, nor was he provided the opportunity to respond to that claim. He was merely told that Chobani, Inc. had submitted a response to a questionnaire that triggered the removal of his unemployment benefits. In fact, he was told during a phone call to the NJDOL's office that he would have an opportunity to respond to

Chobani, Inc.'s questionnaire responses. Instead, he received a decision disqualifying him from collecting unemployment benefits. See 12T1, 13T1 and 14T1. See 1a and 10a.

- If there were any issues with the Appellant's unemployment claims, the normal and correct procedure would have been for the NJDOL to make note of those issues on the first claim, rather than the second. Significantly, during the first telephone hearing on March 1, 2022, the Examiner required that he provide her with a letter from a doctor stating that he should quit his job due to Covid-19. At no time during the application process to receive unemployment benefits was he required to provide such documentation. This applies to both his original claim in November 2020 and the subsequent claim in October 2021. The Examiner acknowledged on the record that these two procedural errors *should have* been corrected during the processing of the first claim. They were not. **The second claim was not approved. It was never approved and no payment benefits were issued for the second claim since PUA had expired on September 4, 2021. No payment benefits were provided to the Appellant from October 2021 as the very last payment made to the Appellant was on September 18, 2021.** In the Appeal Tribunal's decision of March

> 30, 2022, the Examiner states that the date of claim upon which **her decision was based was October 31, 2021. That claim was not approved.** Although she states that the Tribunal does not have jurisdiction to rule on any prior dates of claim, **her decision, in fact, rules that the Appellant is disqualified for benefits as of 11/01/2020, which is the date of the first, *prior*, claim.** In the first claim, benefits were paid to the Appellant through ***no fault*** *of the Appellant*. Repayment of any kind under these circumstances would be unconscionable as payments made pursuant to the first claim were, indeed, proper for all reasons stated herein. See 2a, 3a, 15a to 21a.

Upon consideration of the above set of facts, the Examiner erred, and her decision is arbitrary, capricious and unreasonable because of her failure to consider the consequences of the Appellant's testimony. See a10. Furthermore, the July 27, 2023 determination of the Board of Review was made in error as well as it is arbitrary, capricious and unreasonable in light of the underlying factual scenario. See 39a. It should be noted that in the two separate appeal tribunal hearings between the Appellant and the Examiner, Chobani, Inc., did not have any representative appear to examine the Appellant's reasons for departure of his employment nor to defend its own belief as to why the Appellant was compelled to depart, which is clearly demonstrative proof that the Appellant's former employer

does not have any justification whatsoever for its initial challenge of the Appellant's claim for pandemic unemployment benefits. See 5T. The Appellant never received the BC3E. See T13.

In Inside Radio/Radio Only, Inc., vs. Board of Review 204 N.J. Super. 296, 299-300 (App. Div. 1985), the Court affirmed the Board's determination that the employee was entitled to unemployment compensation. In that case, the employee's duties forced her to work 60 to 80 hours a week, to forgo meals and obtain medical care for fatigue, nutritional problems and mild depression. Id at 299. As such, the employee in Inside Radio had no reasonable alternative other than to leave her position. Id 298. In the instant matter, the Appellant was compelled to leave his employment because of similar conditions as stated in Inside Radio. Such similar conditions of employment compelled the Appellant to work in an unhealthy work environment as the scope of work caused by the pandemic was forced upon the Appellant and was disregarded by Chobani, Inc. These extraordinarily unsafe "*new workplace*" conditions placed upon the Appellant caused the Appellant's depression. See 27a. The Appellant had been taking medication for depression as can be seen by a review of Dr. Schweitzer's office visit summary, which supports the Appellant's concerns regarding his health, the statewide pandemic, his Covid-19 infection and the lack of precautions taken by his employer to keep the Appellant safe. See 27a.

In a Court proceeding such as this, the test is not whether an Appellate Court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs. *Charatan v. Board of Review*, 200 N.J. Super. 74, 79, 490 A.2d 352 (App.Div. 198 5) (citations omitted); *see also Greenwood v. State Police Training Ctr., 127 N.J. 500*, 513, 606 A.2d 336 (1992). In this case, however, the Tribunal's findings are unreasonable, arbitrary and not supported by credible evidence as the Appellant has shown, throughout his testimony and proofs, that he acted with good cause to leave his employ with Chobani, Inc. In addition, in the first claim, as stated above, benefits were paid to the Appellant through ***no fault*** *of the Appellant.* Therefore, there is justification to set aside such findings, which are being appealed on the grounds demonstrated throughout this matter. See 11T1, 12T1 and 13T1.

As the instant Court is aware, unless a Court finds that the agency's action was arbitrary, capricious, or unreasonable, the agency's ruling should not be disturbed. See *In re Warren*, 117 N.J. 295, 296, 566 A.2d 534 (1989). The Court reasoned that the Court can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy. *George Harms Constr. v. Turnpike Auth.*, 137 N.J. 8, 27, 644 A.2d 76 (1994). Under that standard, the scope of judicial review of an agency's action is restricted to four inquiries:

(1) whether the agency's decision offends the State or Federal Constitution;

(2) whether the agency's action violates express or implied legislative policies;

(3) whether the record contains substantial evidence to support the findings on which the agency based its action; and

(4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. See [*George Harms Constr., supra*, 137 N.J. at 27, 644 A.2d 76 (citing *Campbell v. Department of Civil Serv.*, 39 N.J. 556, 562, 189 A.2d 712 (1963); *In re Larsen*, 47 N.J. Super. 564, 570, 86 A.2d 430 (App.Div.)]

The Appellant relies upon the *fourth* section of the above cited case, George Harms Constr. v. Turnpike Auth., 137 N.J. 8, 27, 644 A.2d 76 (1994), as the Tribunal, the Examiner and the Deputy reached conclusions that could not be substantiated under the relevant factually specific background of this case. The Appellant testified that he was exposed to the virus on a daily basis and Chobani, Inc. did not remediate the dangers faced by the Appellant. See 10T.

Here, the Appellant needed protection from involuntary unemployment due to the unhealthy and unsafe work conditions brought on by the pandemic.

Furthermore, the purpose of the Act is to provide some income for the worker earning nothing, because he is out of work *through no fault or act of his Own.* See *Yardville, supra,* 114 N.J. at 375, 554 A.2d 1337.

The Examiner and the Deputy did not correctly consider this case with particularity on a "fact specific" basis with the abnormal and uncontrolled pandemic as its backdrop.

CONCLUSION

The reasoning supporting the subject decisions are simply incongruent with the relevant facts of the case affecting the Appellant's ability to remain employed. It is the Appellant's position that viewing the totality of facts and circumstances, with the focus on the particularity of the *type of work* performed by the Appellant under the stranglehold of the pandemic, would lead a reasonable person to a different conclusion. It is respectfully submitted that, based upon all of the significant and material errors evidenced by the statements of the Examiner, the arbitrary and unreasonable decisions made throughout, and the testimony of the Appellant regarding significant procedural defects as well as the particular facts as presented herein, the decisions of the Board of Review Deputy must be reversed on substantive and procedural grounds that are supported by the facts at hand and the case law to be applied in this matter, as this Appeal should be granted.

DATED: April 24, 2024

Jonathan T. Franco, Pro Se

State of New Jersey

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO Box 112
TRENTON, NJ 08625-0112

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

June 28, 2024

VIA ECOURTS
Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
R.J. Hughes Justice Complex
PO Box 006
Trenton, NJ 08625

Re: Jonathan Franco v. Board of Review, Department of Labor and Chobani, Inc.
Docket No.: A-3974-22T2

Civil Action: On Appeal from a Final Decision of the Board of Review Denying Unemployment Benefits

Letter Brief on Behalf of Respondent, Board of Review
On the Merits Of the Appeal

Dear Mr. Orlando:

Please accept this letter brief pursuant to Rule 2:6-2(b) on behalf of Respondent, Board of Review, on the merits of this appeal.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Appellant Jonathan Franco worked as a Retail Execution and Sales Specialist for Chobani, Inc. ("Chobani") from September 2018 through November 1, 2020, when he voluntarily resigned, offering no reason for that resignation. (1T4-5; 2T3-4; 2T16; Aa10).[2] As a Retail Execution and Sales Specialist, Franco travelled daily to grocery stores within his assigned region to discuss and promote the sale of Chobani's dairy products to the store managers. (1T5-6; 2T4). A principal part of Franco's job duties while at the grocery stores

[1] The Procedural History and Counterstatement of Facts are closely related and are being presented together for the convenience of the court.

[2] "Ab" refers to Appellant's brief; "Aa" refers to Appellant's appendix; "1T" refers to the hearing transcript of March 1, 2022; "2T" refers to the hearing transcript of March 30, 2022.

was to retrieve the Chobani products from the dairy boxes in the stores and display the products on the grocery store shelves to increase their visibility and maximize sales. (1T5; 2T14).

In March 2020, Franco became ill and went to his local urgent care facility in Mountain Lakes, New Jersey for treatment. (2T4-5; Aa10). Because this was at the early phase of the pandemic, there was no testing available to determine whether Franco had contracted COVID-19, even though some of his symptoms were COVID-like. Ibid. The health care provider treated Franco for allergies and Franco remained out of work for one week. (Aa10; Aa27). Except for that one bout of illness, Franco testified that he did not become ill again with COVID-like symptoms up through November 2020 when he resigned his job with Chobani. (1T8).

Chobani provided the employees with hand sanitizer, masks, and gloves to protect them from COVID-19. (1T5-6; Aa10). However, Franco testified that he was concerned about his position because he had to work in freezer boxes, which were small and therefore did not facilitate physical distancing from other workers. Ibid. Franco said he discussed his concerns with Chobani in March 2020 and Chobani changed his work schedule to allow him to be in the grocery stores earlier so he would not have close contact with the employees

and customers. (1T8-9; 2T13; Aa10). But Franco became dissatisfied with having to be up at 3:00 a.m. to be in his first store by 4:00 a.m. and, after eight weeks, Chobani elected to return Franco to his pre-COVID work start time of 7:30 a.m. (1T9; 2T12-13; Aa10-11). Franco never asked Chobani to continue with or go back to the temporarily changed work schedule after that. (2T14).

In November 2020, Franco left his job; he testified at the hearing that he left because he was fearful of another outbreak of the COVID-19 virus. (2T16; Aa11). Franco was never advised by a medical professional to remain home due to any medical condition that put him at high risk of contracting and becoming seriously ill from the virus, or because he resided with someone who was immunocompromised. (1T9-10; 1T12; 2T5; 2T8; Aa11).

Franco filed an initial claim on November 1, 2020, and was paid benefits for the weeks ending November 7, 2020, through September 18, 2021, when payments ended. (Aa41-44).[3] For reasons unclear on this record, Franco filed

[3] Franco's appendix includes a copy of a July 19, 2023 notice of determination from his first claim filed November 1, 2020. (Aa36). The notice advised Franco that he was disqualified for benefits because he left work voluntarily on November 3, 2020, and there was insufficient evidence that he was "at an increased risk of contracting COVID-19." Ibid. It does not appear that Franco appealed that determination. This appeal involves only the July 27, 2023 decision of the Board of Review related to the October 31, 2021 claim. (Aa22; Aa26). Although there was also a request for refund subsequently mailed to Franco (Aa39-44), that refund request is also not before the court in this appeal.

a second claim for unemployment benefits on October 31, 2021. (Aa1).

On December 28, 2021, in response to that second claim for benefits, the Deputy Director of the Division of Unemployment Insurance ("Deputy") mailed a determination to Franco, denying his second claim and imposing a disqualification for benefits from November 1, 2020, because Franco left work voluntarily without good cause attributable to the work. Ibid. The Deputy further determined that Franco provided insufficient evidence that he was at an increased risk of contracting COVID-19. Ibid.

On January 7, 2022, Franco appealed this determination to the Appeal Tribunal ("Tribunal"), and participated in a telephone hearing on March 1 and 30, 2022. (Aa10; 1T; 2T). While Franco contended that his employment ended due to a COVID-19 related reason, he provided no proof that Chobani failed to follow safety procedures or that the working conditions affected his health adversely. (Aa11-12). In fact, Franco testified that Chobani provided and he was still using masks, hand sanitizer, and gloves up to November when he left his job. (2T11). Franco had mentioned to his supervisor that the New York City headquartered employees were able to work remotely and he was not afforded that same opportunity. (1T8-9; 2T6-7; 2T16; 2T22).

On March 30, 2022, the Tribunal affirmed the Deputy's determination,

holding that Franco left work voluntarily without good cause attributable to the work as of November 1, 2020, and he was therefore disqualified from benefits. (Aa11). Since the Pandemic Unemployment Assistance ("PUA") program had ended on September 4, 2021, and Franco's claim was filed on October 31, 2021, the Tribunal also determined that Franco was not entitled to PUA benefits and that it did not have jurisdiction to rule on any prior dates of claim. (Aa12).

Franco appealed the Tribunal's decision to the Board of Review ("Board") on March 30, 2022. (Aa15-21). In a decision mailed on July 27, 2023, the Board affirmed the decision of the Tribunal. (Aa22).

This appeal of only the July 27, 2023 decision followed.

ARGUMENT

THE BOARD CORRECTLY DETERMINED THAT FRANCO WAS DISQUALIFIED FOR UNEMPLOYMENT BENEFITS BECAUSE HE LEFT WORK VOLUNTARILY WITHOUT GOOD CAUSE ATTRIBUTABLE TO THE WORK.

The issue in this case is whether Franco was properly disqualified from unemployment benefits because he voluntarily left work without good cause attributable to the work. The burden of proof rests upon Franco to establish his right to unemployment compensation. Brady v. Bd. of Rev., 152 N.J. 197, 218 (1997).

The New Jersey Unemployment Compensation Law ("UCL") provides, in pertinent part, that an individual shall be disqualified for benefits:

> For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works eight weeks in employment . . . .
>
> [N.J.S.A. 43:21-5(a).]

"[T]he primary objective of the UCL is to provide a cushion for the workers of New Jersey 'against the shocks and rigors of unemployment.'" Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 581 (1991) (quoting Provident Inst. for Sav. v. Div. of Emp. Sec., 32 N.J. 585, 590 (1960)). It does this by providing income to the worker who is out of work through no fault of his own. Brady, 152 N.J. at 212. Accordingly, an individual who has "left work voluntarily without good cause attributable to such work" is disqualified from benefits under the UCL. N.J.S.A. 43:21-5(a).

An employee who has left work voluntarily has the burden of proving that he did so with good cause attributable to the work. Brady, 152 N.J. at 218; Self v. Bd. of Rev., 91 N.J. 453, 457 (1982). "While the statute does not define 'good cause,' our courts have construed the statute to mean 'cause sufficient to justify an employee's voluntarily leaving the ranks of the employed and joining the

ranks of the unemployed.'" Domenico v. Bd. of Rev., 192 N.J. Super. 284, 287 (App. Div. 1983)(quoting Condo v. Bd. of Rev., 158 N.J. Super. 172, 174 (App. Div. 1978) (additional citations omitted)). "'[G]ood cause attributable to such work' means a reason directly related to the individual's employment, which was so compelling as to give the individual no choice but to leave the employment." N.J.A.C. 12:17-9.1(b).

An employee's justification for leaving work must be considered according to "ordinary common sense and prudence." Domenico, 192 N.J. Super. at 288. The decision must be reasonable under the circumstances and not based on "imaginary, trifling and whimsical" reasons. Ibid. Employees must "do what is necessary and reasonable in order to remain employed." Ibid.

The Coronavirus Aid, Relief, and Economic Security ("CARES") Act expanded eligibility for and payment of unemployment benefits for certain categories of individuals who may have been adversely affected by COVID-19. Sullivan v. Bd. of Rev., Dep't of Labor, 471 N.J. Super. 147, 153 (App. Div. 2022). Under the CARES Act, an individual is eligible for PUA if they are ineligible for regular unemployment compensation or pandemic emergency unemployment. Ibid. If true, an individual then must provide self-certification that they are unavailable or unable to work because of one of the following

COVID-19 qualifying reasons identified in Section 2102(a)(3)(A)(ii)(I):

> (aa) the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
>
> (bb) a member of the individual's household has been diagnosed with COVID-19;
>
> (cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
>
> (dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
>
> (ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
>
> (ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
>
> (gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
>
> (hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;

> (ii) the individual has to quit his or her job as a direct result of COVID-19;
>
> (jj) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
>
> (kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section.
>
> [15 U.S.C. § 9021 (a)(3)(A)(ii)(I).]

As explained above, Franco was not paid under this Act because the program had ended before he filed his claim. (Aa12).

Here, Franco contends that he left his job for good cause because his employer failed to "provide the adequate and necessary remediation of the unsafe and unhealthy work environment for the Appellant." (Ab14-15; Ab20-21; Ab27). However, Franco provided no proof that Chobani failed to follow safety precautions. (Aa11-12). In fact, Franco admitted that Chobani provided the employees with hand sanitizer, cloth masks, and gloves to protect them from COVID-19. (1T6). And Chobani did adjust Franco's schedule so that he could be in the grocery stores at hours when he would have more limited interactions with the employees and customers. (1T8-9; 2T13; Aa10). However, Franco did not like having to be up by 3:00 a.m. to be in his first store by 4:00 a.m., and after about two months, the company returned him to his original 7:30 a.m. start

time. (1T9; 2T12-13; Aa10-11).

Franco claims that he discussed the unhealthy work conditions with his supervisor, and also advised the Human Resources department that he became ill from COVID-19 in March 2020. (2T8-9; Ab15; Ab20). However, Franco's COVID-19 diagnosis was never confirmed by testing or other medical documentation, and Franco never specifically requested any adjustment to his work arrangements. (2T14; Aa11). And Franco was upset that, unlike the Chobani's New York City headquartered employees, he was not able to work remotely. (1T8-9; 2T6-7; 2T16; Ab22). However, Franco did not mention any concerns or complaints when he submitted his resignation letters. (2T16).

Franco next argues that he had comorbidities, he resided with his parents who were immunocompromised, and he was working in an area of New Jersey that had the highest rate of COVID-19 infection at the time. (Ab15-16; Ab19). But, again, Franco could not be considered for PUA benefits because his claim was filed outside of the eligibility window for PUA. (Aa12).

Moreover, Franco was never advised by a medical professional to remain home because of the risk of contracting COVID-19 while on the job. (1T9-10; 1T12; 2T5; 2T8; Aa11). And despite the Tribunal postponing the hearing to allow Franco to get medical documentation to support his initial testimony that

he was advised by a medical professional to remain home, Franco never provided any such documentation. (2T8-9). In fact, Franco conceded he was never told by a medical professional to remain home because of his medical condition. (2T8). Franco argues on appeal that he merely believed his fear of contracting COVID-19 was a sufficient basis or good cause for him to leave his job. (Ab26). On the record presented, however, the Board correctly held that Franco left his job at Chobani without good cause attributable to the work. (Aa22).

Franco's remaining arguments lack merit. Franco claims he was denied due process because he never had the opportunity to review and provide a response to the questionnaire submitted by Chobani, which indicated that Franco left his job for personal reasons. (Ab17-18). Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. Kahn v. U.S., 753 F.2d 1208, 1218 (3d Cir. 1985). The basic requirements of procedural due process, therefore, are: (1) adequate notice and (2) an opportunity to be heard. U.S. v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987) (citing Goss v. Lopez, 419 U.S. 565 (1975)); Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 240 (2008) (citing Doe v. Poritz, 142 N.J. 1, 106 (1995)).

Here, Franco was provided notice by way of a written determination from

the Deputy, advising him that his application for benefits was denied because he voluntarily left work without good cause attributable to his work. (Aa1). And Franco was provided the opportunity to file an appeal from the Deputy's determination and meaningfully participate in a hearing to challenge the determination, which he did. Ibid. (Aa2-3; 1T; 2T).

While it appears on this record that Franco was not provided a copy of the questionnaire submitted by Chobani, this is not a fatal procedural or due process error. The hearing examiner explained to Franco during the first hearing that Chobani had sent in the "BC3E" employer form and that there was a "remark" in the system dated September 24, 2021, that the employer stated "the Claimant left for personal reasons." (1T12). Importantly, Chobani did not participate in the hearing, and the actual questionnaire was not before the Hearing Examiner. (1T13).

Moreover, during the Tribunal hearing, Franco was afforded ample opportunity to rebut the determination that he voluntarily left his job without good cause attributable to the work. (1T9-11; 1T13; 2T2; 2T5-6; 2T8-9). That he simply failed to do so, does not mean he was denied due process. In fact, Franco admitted during the hearing that he wrote a resignation letter to "multiple people" in the company, "offering [his] salutations, giving them a goodbye,

thanking them . . . for all their help during [his] time there." (2T16). When asked what reason he gave for resigning in those letters, Franco stated "I don't recall specifically offering, you know, a reason for my resignation. It was simply a notice saying that I was resigning." Ibid.

Franco next argues that there was no legal or State requirement for him to provide medical documentation to support his claim that he left his job due to a COVID-19 related reason at the time of his infection in March 2020. (Ab29). But Franco is mistaken. Since his claim was that he left his job due to COVID-19 (1T5; 2T2; 2T4), Franco was required to show that he left his job due to one of the prescribed COVID-19 related reasons under the CARES Act. 15 U.S.C. § 9021(a)(3)(A)(ii)(I). Thus, the Hearing Examiner asked Franco to provide medical documentation to show that he had been advised by a medical professional to remain home when he left his job in November 2020 due to, as he alleged, his own medical condition that put him at high risk of contracting COVID-19 and by him potentially passing COVID-19 on to his parents. (1T9-10; 2T4). But Franco never provided the medical documentation requested. (2T5; 2T8-9).

Finally, Franco argues in his brief that he suffered two separate COVID-19 infections during the period of his employment with Chobani. (Ab43). Yet,

when Franco testified before the Tribunal, he was asked if he had contracted COVID-19 other than the first instance in early March 2020, and he responded: "from March on to November when I left, I did not contract COVID again, to my knowledge, no." (1T8). Moreover, on this record, it cannot even be confirmed that Franco's illness in early March 2020 was COVID-19 because there was no testing available then. (2T4-5; Aa10).

Appellate courts have a limited role in reviewing the decisions of administrative agencies. Brady, 152 N.J. at 210. Agency decisions should not be disturbed unless they are "arbitrary, capricious or unreasonable" or "not supported by substantial credible evidence in the record as a whole." Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 71 (1985); Gloucester Cnty. Welfare Bd. v. N.J. Civ. Serv. Comm'n, 93 N.J. 384, 391 (1983). In addition, reviewing courts should "give 'due regard to the opportunity of the one who heard the witnesses to judge of their credibility'" and owe deference to an administrative agency's fact-finding. Clowes v. Terminex Int'l, Inc., 109 N.J. 575, 587 (1988) (quoting Close v. Kordulak Bros., 44 N.J. Super. 589, 599 (1965)); Doering v. Bd. of Rev., 203 N.J. Super. 241, 245 (App. Div. 1985).

A reviewing court should not examine the wisdom or desirability of an agency determination. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 29

(1981). "Though an independent de novo examination of the record might lead a reviewing court to an opposite conclusion, the court's obligation is to examine the record in order to determine whether the evidence and the reasonable inferences to be drawn therefrom could reasonably support the decision." Id. at 28-29; see also Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980); Clowes, 109 N.J. at 585 (1988).

On this record, the Board's decision holding Franco disqualified for unemployment benefits pursuant to N.J.S.A. 43:21-5(a) is correct, wholly in accord with governing statutes, and is amply supported by credible evidence in the record. Simply put, under New Jersey law, Franco did not take sufficient action to maintain his job; he voluntarily resigned, offering no reason for that resignation to his employer at the time. As the above demonstrates, the Board made a factual determination based on the credible evidence in the record to which this court should give appropriate deference. Because the Board's decision was not arbitrary, capricious, or unreasonable, it should be affirmed.

CONCLUSION

For these reasons, this court should affirm the Board's decision.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Kevin K.O. Sangster
Kevin K.O. Sangster
Deputy Attorney General
Attorney ID: 024992002
Kevin.Sangster@law.njoag.gov

Janet Greenberg Cohen
Assistant Attorney General
Of Counsel

cc: Jonathan Franco (via registered mail)
Chobani, Inc (via regular mail)

Jonathan T. Franco
Appellant, Pro Se
62 Averell Drive
Morris Plains, New Jersey 07950
Telephone: 973-738-2412

JONATHAN T. FRANCO **Appellant**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO. A-3974-22T2**
Vs.	**Civil Action**
BOARD OF REVIEW, DEPARTMENT OF LABOR OF LABOR AND CHOBANI, INC. **Respondent**	

REPLY BRIEF OF APPELLANT JONATHAN T. FRANCO

SUBMITTED BY:

Jonathan T. Franco, Pro Se

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

As this Court may recall, the Appellant, Jonathan T. Franco, appeals the Board of Review Decision dated July 27, 2023, which affirms the decision of the Appeal Tribunal mailed on March 30, 2022, finding that the Appellant is disqualified for benefits as of November 1, 2020, allegedly based upon "available information" that the Appellant left his job voluntarily due to fear of contracting the Coronavirus and "insufficient evidence" that the Appellant was at an increased risk of contracting Covid-19. See 1a. However, this reasoning is contrary to the case sensitive facts at hand. At the time of the Appellant's application for unemployment benefits, that is November of 2020, there were *no particular rules* to apply for Pandemic Unemployment Insurance (PUA) other than to complete a form required by the New Jersey State's Department of Unemployment Insurance, which the Appellant did timely complete. As illustrated in the New Jersey State Unemployment website, this was the sole requested documentation that was to be submitted by an applicant in order to receive unemployment benefits during the onslaught of the Covid-19 epidemic.

The Appellant's objective is to appeal the final decision in this underlying matter that will reverse the lineage of all prior decisions in this matter.

As previously stated in the supporting Brief, the Appellant never had the opportunity to see, address, or oppose the employer's questionnaire (BC3E Form)

that was provided to the employer, Chobani Inc., by the State Unemployment Agency despite having been told by a representative of the Department of Unemployment Insurance by phone that he would. The BC3E form is the questionnaire provided to the employer at the time an individual applies for unemployment benefits. However, the Appellant never had the opportunity to review or rebut any such statement made by the employer, which statement forms the basis of the "*insufficient* evidence" or "*available* information" referred to in the January 7, 2022 determination. See 13T1. This situation is tantamount to questioning and not knowing whether the BC3E response even pertains to the Appellant, herein. Consequently, without the Appellant knowing what the employer is representing to the Department of Unemployment in its BC3E response, the Appellant is faced with an unconscionable dilemma of not knowing the employer's allegations against him or even if the response inures to this individual employee. This is the *due process failure* that the Appellant is referring to throughout the Brief and that the Respondent mischaracterizes in its Reply Brief. Consequently, the Respondent has confused and mischaracterizes this issue.

The above resulted in a unilateral ex parte decision as the Appellant was not given any notice or the opportunity to defend against it. The January 7, 2022 Notice of Determination is the sole information mailed "after the fact" to the Appellant subsequent to such decision. See 14T1. Therefore, there was ***no*** *due process*

afforded to the Appellant by the Department of Labor to properly address this matter from the very beginning. See 14T1. Accordingly, the July 27, 2023 Board of Review decision is grossly arbitrary and without merit. See 22a. The Appellant has established the *good cause* reasons for his resignation for which Covid is the sole focus. The Respondent's "fear of Covid" is a non sequitur and misaligned with the actual facts and particular circumstances detailed by the Appellant in this matter. This factual scenario shapes the within Appeal.

COUNTERSTATEMENT OF FACTS

The Appellant, Jonathan T. Franco, became an employee of Chobani, Inc., which maintains its central headquarters in New York City, as of September 2018. See 5T1. The scope of the Appellant's work consisted of traveling, typically in a constant and predictable way, from one supermarket region to another in the vicinities of Bergen County in northern New Jersey and throughout Rockland County in New York. See 5T1 and 6T1. This was to ensure that the extensive Chobani, Inc., product stock lines were readily sufficient in the supermarket and neatly displayed in the front end open refrigerated displays that are available for the supermarket customers' selections. See 6T1. The Respondent's Counterstatement of Facts mischaracterizes the nature of the Appellant's resignation. The Appellant has shown *good cause* for such resignation evidenced by the underlying testimony and throughout the Appellant's Brief. In addition, the

Respondent is remiss in its statement that the "principal part of Franco's job while at the grocery stores was to retrieve the Chobani products from the dairy boxes and display the products on the grocery store shelves." This was ***not* the principal part** of the Appellant's job as this aspect **only came about during the Covid epidemic**. (1T5; 2T14) At *no time before the epidemic* was entering the freezer boxes, a "principal part of Franco's job." The Appellant's specific type and scope of work changed because of Covid as the Appellant was *forced to enter* the cramped freezer boxes, where no distancing was available, and be in close, constricted contact with store workers in a work environment that was a breeding ground for the virus. This all came about because the grocery store direct employees failed to come to work to do *their* customary job, which included the placement of the Chobani products in the grocer's dairy cases. The resulting burden became the Appellant's. Therefore, the scope of work dramatically changed as a result of the epidemic. (15T2,16T2)

During the time period when the Appellant's scope of work changed, which was at the beginning of the Covid epidemic, in or about March of 2020, the Appellant became ill and sought medical treatment. (4-5T2; Aa10) However, there was no Covid medical testing at that time because it was the early phase of the epidemic. At that early onset, *medical professionals were unaware of the health consequences and effects* of the virus. Medical professionals were *not advising* the

infected to remain home at the onset of the epidemic. There was no medical precedent for such viral infection. However, the Appellant's symptoms were what became known as classic Covid symptoms, namely respiratory issues and loss of taste and smell. In fact, the Appellant became infected with the virus on more than one occasion, and the "Long Covid" effect continues to cause ongoing respiratory problems and a significant loss of smell for the Appellant.

The Appellant discussed his concerns with management about the virus and the work environment. (17T2) Once the Covid-19 epidemic began, the employer changed the appellant's work schedule to a 4:00 a.m. start time. This was the *employer's effort* to prevent interaction between the grocery store workers and customers and the Appellant. (14T2) It is well noted that the Appellant's scope of work had been changed by the employer as the modified early start work schedule **was not** the work schedule at the time Appellant was hired. Nonetheless, the Appellant *did work according to the early start* scheduling during its implementation period. Suddenly, after approximately eight weeks, it was Chobani that *unilaterally changed* the work schedule as Chobani *abandoned the early start program* after the implementation period and returned the Appellant and other employees to their original work schedule. (14T2) However, the Respondent's Reply Brief mischaracterizes that the Appellant was dissatisfied with having to be up at 3:00 a.m. and at the store by 4:00 a.m. This statement is <u>factually false</u> and

disingenuous in an attempt to disparage the Appellant and misdirect the reviewing Court. It was Chobani that changed the work schedule back to the pre-Covid work schedule with a start work time at 7:30 a.m. This fact is uncontroverted as the Appellant's work schedule was changed by Chobani for an approximately eight week period and then again it was changed back to the pre-Covid work schedule. The Appellant *never hesitated* to follow the work scheduling of Chobani. The Respondent fails to state that the pre-Covid and during-Covid schedules *did not impair* the Appellant's ability to work as the schedule change occurred sometime in or about March 2020, and the Appellant resigned *many months* later in November of 2020, all the while carrying out the during-Covid changed scope of work.

Once again, as cited in the underlying arbitrary decision of the Appeal Tribunal in its March 30, 2022 decision (10a to 13a), citing the following under N.J.S.A. 43:21-5, "An employee must do what is reasonable and necessary in order to preserve his employment and allow the employer an attempt to rectify the situation, prior to leaving his job." Contrary to the Respondent's Reply Brief statement, the Appellant did everything possible to preserve his employment with Chobani, maintaining his employment from the onslaught of Covid during March of 2020 and working through to November of 2020. At that time, it became necessary for the Appellant to leave his employment due to overwhelming concern that the Appellant's health and welfare were continuing to be compromised due to

multiple infections caused by the virus as a result of the untenable work conditions that the employer failed to properly protect against. The employer was put on notice by the Appellant of his work environment as set forth in the Appellant's Transcript. (17T2) The initial scheduling change to begin the workday at 4:00AM was based upon the business decisions of Chobani in its attempt to slow the onslaught of Covid upon its employees. Yet, just weeks later, the employer switched back to the original start time despite the fact that there was no abatement of Covid's deadly impact and no vaccines at that time. It is evident that Chobani was quite aware of the challenges of the epidemic; however, it did nothing to protect the Appellant, who continued to work under environmentally unsafe work conditions that the Appellant was exposed to on a daily basis.

The employer failed to comprehensively respond to the needs of the Appellant, who was working in a uniquely compromised work environment. The Appellant must emphasize that plastic gloves and a cloth mask had little, if any, defense to the deadly virus. Yet the only protection offered by Chobani was, as stated above, cheap plastic gloves and ill fitting cloth face masks that were woefully deficient. In addition, at the beginning of the epidemic, there was little guidance from the State or Federal Government as to a "comprehensive protocol" for protection of employees working in compromised work environments. A case by case review is needed as the Appellant's situation is very fact sensitive and

cannot be pigeonholed in a broad stroke analysis of the circumstances and facts as was done by the prior arbitrary decisions of the Tribunal.

The Respondent's claim that, "the Appellant offered no proof that Chobani failed to follow safety procedures or the working conditions affected his health adversely" is a false narrative of the facts at hand. Throughout the transcript testimony and the Brief submitted, herein, the Appellant emphasized the adverse work environment that the March 4, 2022 Decision of the Appeal Tribunal arbitrarily and capriciously failed to acknowledge, resulting in the Board of Review decision mailed on July 27, 2023. The attendant facts regarding the work environment and the compromise to the Appellant's health were clear throughout. The cramped freezer boxes, with no air circulation and no ability to social distance, along with the fact that the cold environment was a breeding ground for the virus, made the ability to function in the "*new*" and "*altered*" scope of work untenable to the Appellant. In addition, the Appellant worked in those communities indisputably hardest hit with the coronavirus in Rockland County, New York. See 7T1. See 7T1, 23T2, 16a and 30a. The Appellant was infected by the virus.

As the Covid pandemic increased in magnitude and ferocity, the Appellant was forced to *change* his "scope of work" and primarily work in small unventilated supermarket freezer boxes in the immediate proximity of supermarket employees, on a supermarket store to store basis, for varying periods of time during the

employment work day. See 16a, 18a, 19a. There became a large number of supermarket employees infected with Covid-19 during this period who would be absent from their respective supermarkets and who were *directly responsible* to transfer the Chobani dairy products from the freezer boxes to the supermarket display shelves. The Chobani product transfer was *not a routine assignment* of the Appellant's job requirements *prior to the onset* of the pandemic. See 31a, 5T1, 6T1, 9T1, 5T2, 8T2, 13T2 - 15T2. The Appellant's distinctive scope of work was *dramatically altered* due to the pandemic. See 13T2, 14T2.

Although the Appellant did speak to his Supervisor and asked about whether there was an opportunity to work remotely, the Supervisor simply did not respond and offer any such alternative work opportunity. (8-9T1; 6-7T2; 16T2; 22T2) Yet the Appellant continued to work through November 2020.

ARGUMENT

1) THE BOARD OF REVIEW'S DECISION DISQUALIFYING THE APPELLANT FROM UNEMPLOYMENT BENEFITS IS ARBITRARY AND CAPRICIOUS AS THE APPELLANT DID NOT VOLUNTARILY LEAVE WORK WITHOUT GOOD CAUSE SHOWN

The instant Appeal is focused on the issue of whether the employee had shown *good cause* to voluntarily leave his employment based upon the attendant facts and circumstances of his particular workplace environment. The Appellant's actions were *reasonable and made in good faith* in light of the unique workplace

environment, and it is the Appellant's position that *good cause* has been shown. The Appellant qualified for unemployment benefits granted.

Here, the Appellant relies upon the New Jersey Supreme Court's definition of *good cause*. The Court held that it is the presence of a meritorious [claim] worthy of judicial determination…and the absence of any contumacious conduct. See O'Connor vs. Altus, 67 N.J. 106, 129 (1975). Good cause is a legally sufficient reason for a ruling or other action by a judge. Black's Law Dictionary (1979) defines *good cause* as a substantial reason amounting in law to a legal excuse for failing to perform an act required by law. The phrase *good cause depends upon circumstances of an* ***individual*** *case,* and finding of its existence is left largely in the discretion of an officer or Court to which the decision is committed. It is a relative and highly abstract term, and its meaning must be determined not only by the verbal context of the Statute in which the term is stated.

Under the New Jersey Administrative Code SubSection 12:17-11.4, for purposes of this subchapter, "*good cause*" is defined as

> "any situation over which the Claimant *did not have control or which was so compelling as to prevent* the Claimant from accepting work. In order to establish good cause, the Claimant must have made a reasonable attempt to remove the restrictions pertaining to refusal."

The Appellant has satisfied this legal standard. The Appellant allowed Chobani a period of eight (8) months, from March through November 2020, to provide the

adequate and necessary remediation of the unsafe and unhealthy work environment for the Appellant. The Appellant discussed the unhealthy work conditions with his Supervisor and advised the Human Resource department that he became infected in March of 2020. However, the Appellant's concerns were met with no alternative work for the Appellant nor any changes to the work place environment.

2) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE APPELLANT'S CIVIL BURDEN OF PROOF, KNOWN AS A PREPONDERANCE OF EVIDENCE, WAS NOT MET BY THE APPELLANT.

In civil cases, as well as administrative hearings, a party must prove its claim by a preponderance, defined as superiority in weight, force, importance, etc., of evidence. In legal terms, a *preponderance of evidence* is based on the more convincing evidence and its probable truth or accuracy, and not the amount of evidence. In this instant case, *there has never been any rebuttal from the Employer* as to the statement of facts made by the Appellant and the good cause justification to depart from employment due to the Covid pandemic and its detrimental health effects upon the Appellant and his immediate family. [1] All of the underlying facts presented by the Appellant justify that the standard of proof known as a

[1] On February 2, 2022, as the Appellant's mother had recently been diagnosed with cancer, he required a rescheduling of the hearing with Ms. Esposito. An email was sent by the Appellant to Ms. Esposito that requested the rescheduling of the hearing. Later that same day, Ms. Esposito responded and advised that the hearing would be rescheduled to a future date.

preponderance of the evidence has successfully been met by the Appellant. See testimony throughout both underlying transcripts at T1 and T2.

3) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE EMPLOYER DID MEET THE STANDARD TO PROVIDE A SAFE WORK ENVIRONMENT DURING THE COVID-19 PANDEMIC FOR ITS EMPLOYEE, THE APPELLANT.

The only remedial implementation by Chobani, Inc. was to provide a cloth face mask, plastic gloves, and hand sanitizer to the Appellant as inadequate protection against the widespread Pandemic and the new *scope of work* for this Appellant. See 7T1. That was the extent of the actions of Chobani, Inc. for the protection of the Appellant. Clearly, the inability to protect the Appellant, who was one of its *most vulnerable* employees, was squarely the failure of Chobani, Inc. It should be noted that during a period of the pandemic, Chobani chose to close its Manhattan office for its Manhattan employees, giving those individuals the ability to work remotely from home. *No such accommodation* occurred for this Appellant and no such suitable alternative work was ever offered by the employer. 5T1, 6T1, 7T1, 11T1, 12T1 The New Jersey Unemployment Benefits and Rights website states, in part, that safety or health violations are examples of *good cause*. The Appellant stated throughout the March 1, 2022 and March 30, 2022 Transcripts (T1 and T2) that good cause existed for the Appellant to leave his employment based upon the following, but not limited to: 1) Safety and health

concerns of the Appellant and his family, and 2) The pandemic caused the Appellant's scope of work to abnormally change, as described throughout his Brief, creating a compromised unsafe work environment. The standard to be applied under the Unemployment Benefits and Rights publication regarding a *change* in the *scope of work* is considered "new work," which occurred in this instance. Not only did the work environment become overwhelmingly untenable to the Appellant because of the pandemic, but the scope of work *abnormally* changed because of the way the pandemic put a stranglehold on the everyday lives and work habits of the public at large. Examples of the Appellant's workplace environment and his scope of work changes are set forth throughout the Appellant's testimony. 12T2 to 19T2.

4) THE BOARD OF REVIEW ERRED IN ITS DECISION AFFIRMING THE DEPARTMENT'S FINDING THAT THE EMPLOYEE/APPELLANT SHOULD BE DISQUALIFIED FOR UNEMPLOYMENT BENEFITS.

Based upon the facts and circumstances of the Appellant's employment with Chobani, Inc., it is clear, without any counter proof offered by Chobani, Inc., that the Appellant left the employment voluntarily with *good cause* undeniably existing for such an employment departure. In the case of Inside Radio/Radio Only, Inc., vs. Board of Review 204 N.J. Super. 296, 299-300 (App. Div. 1985), the Court affirmed the Board's determination that the employee was entitled to unemployment compensation. In that case, the employee's duties forced her to

work 60 to 80 hours a week, to forgo meals and obtain medical care for fatigue, nutritional problems and mild depression. Id at 299. As such, the employee in Inside Radio *had no reasonable alternative* other than to leave her position. Id 298. In the instant matter, the Appellant was compelled to leave his employment because of similar conditions as stated in Inside Radio. Such similar conditions of employment compelled the Appellant to work in an unhealthy work environment as the *new scope of work* caused by the pandemic was forced upon the Appellant and was disregarded by Chobani, Inc. These extraordinarily unsafe "*new workplace*" conditions placed upon the Appellant caused the Appellant's depressive disorder. See Medical Findings at 27a.

In a Court proceeding such as this, the test is not whether an Appellate Court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs. *Charatan v. Board of Review*, *200 N.J. Super. 74* , 79, 490 A.2d 352 (App.Div. 198 5) (citations omitted); *see also Greenwood v. State Police Training Ctr.*, *127 N.J. 500*, 513, 606 A.2d 336 (1992). In this case, however, the Tribunal's findings are unreasonable, arbitrary, and not supported by credible evidence as the Appellant has shown, throughout his testimony and proofs, that he acted with good cause to leave his employ with Chobani, Inc. In addition, in the first claim, as stated above, benefits were paid to the Appellant through ***no fault*** *of the Appellant*.

Therefore, there is justification to set aside such findings, which are being appealed on the grounds demonstrated throughout this matter. See 11T1, 12T1 and 13T1.

CONCLUSION

The reasoning supporting the subject Tribunal decisions are simply askew of the relevant facts of the case affecting the Appellant's ability to remain employed. It is the Appellant's position that viewing the totality of facts and circumstances, with the focus on the particularity of the *type of work* performed by the Appellant under the stranglehold of the pandemic, would lead a reasonable person to a different conclusion. It is respectfully submitted that, based upon all of the significant and material errors evidenced by the statements of the Examiner, Ms. Esposito, the underlying arbitrary and unreasonable decisions made throughout, and the testimony of the Appellant regarding both the significant procedural defects, as well as the attendant facts as evidenced throughout the Appellant's Brief and Reply Brief, the decisions of the Board of Review Tribunal must be reversed on both the substantive and procedural grounds that are supported by the facts at hand and the case law to be applied in this matter. This Appeal must be granted as the fact finder improperly failed in this fact sensitive matter.

DATED: July 25, 2024

Jonathan T. Franco, Pro Se