STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Joseph Cronk	**:**	
	:	
v	**:**	**A.A. No. 2011-146**
	:	
Department of Labor and Training,	**:**	
Board of Review and	**:**	
North Providence School Department	**:**	

JUDGMENT

This cause came before Clifton, J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board is reversed.

Dated at Providence, Rhode Island, this 4th day of April, 2012.

Enter: **By Order:**

/s/ **/s/**

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SIXTH DIVISION

Joseph Cronk,	:	
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Department of Labor and Training	:	
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North Providence School Department	:	

Decision

This matter is before the Court on the complaint of Mr. Joseph Cronk seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor & Training (the Board), which held that Mr. Cronk was not entitled to receive employment security benefits. This Court has jurisdiction over appeals from the Board under Gen. Laws 1956 § 28-44-52, and the standards of review utilized in administrative appeals apply. After reviewing the record and applying the appropriate standards, this Court holds that the Board's decision is clearly erroneous in light of the reliable, probative, and substantive evidence of the whole record.

I. Facts & Travel of the Case

Mr. Cronk was employed by the North Providence School Department for six years as a full-time custodian. (Ref. Tr., 7-8, June 27, 2011). At some time in 2010 Donna M. Ottaviano, the superintendent of schools in North Providence, became aware of incidents in the school where Mr. Cronk worked of property being found missing. Id. at 8. After learning of these incidents, Ms. Ottaviano contacted the North Providence Police and a sting operation was set up that lasted from December 10, 2010 into January

2011. Id. at 8-9. This operation involved leaving money in certain offices within the school where video cameras would capture anyone entering or leaving the office. Id. at 9.

Maria Morasco was one of the school employees involved in the sting operation. Id. at 15. Ms. Morasco was provided with $40 by the police, which she would leave under a Kleenex box on her desk each day when she left for the night. Id. She would then look to see if the money was there in the morning upon returning to work and put it away. Id. There was only one entrance to Ms. Morasco's office and the office was always locked.[1] Id. at 11. On January 6, 2011, Ms. Morasco reported that the $40 had been taken from her desk and police reviewed the footage from the security camera outside her office. Id. at 9. The only person shown in the video entering the office was Mr. Cronk. Id.

Ms. Morasco's office was an area that Mr. Cronk was required to clean every night as part of his duties as a custodian. Id. at 19. Mr. Cronk testified before the referee that he and the other custodians that worked during his shift were aware of the $40 and that they would often take their work breaks in Ms. Morasco's office. Id. at 18-19. Mr. Cronk also suggested that the money could have fallen into the trash can, which was located near where Ms. Morasco left the currency. Id. Mr. Cronk submitted into evidence a letter in which he reported items missing to the North Providence School Department.

Mr. Cronk was arrested and charged with misdemeanor larceny following Ms. Morasco's report of the missing money. North Providence Police Department Arrest Report, at 2. He was arraigned on January 20, 2011, where he pled not guilty and his case was filed. Mr. Cronk was suspended with pay and subsequently discharged from his employment; his last day of work was January 6, 2011. (Ref. Tr., 7, June 27, 2011).

[1] Mr. Cronk testified at the referee hearing that the door to Ms. Morasco's office was broken and that if it was not pulled shut, it would not lock. (Ref. Tr., 25, June 27, 2011).

On February 23, 2011, the director of the Department of Labor and Training issued a decision finding Mr. Cronk had been discharged for non-disqualifying reasons and that he was therefore entitled to receive unemployment benefits. Claimant Decision, February 23, 2011. The North Providence School Department appealed this decision and a referee hearing was held on June 27, 2011. The Referee's decision was delivered on July 8, 2011, reversing the Director and denying Mr. Cronk benefits. Decision of Referee, at 3. Mr. Cronk appealed to the Board, which affirmed the Referee in a decision delivered October 14, 2011. Decision of Board of Review, at 1. Mr. Cronk has now appealed the Board's decision to this Court.

2. Referee's Findings of Fact & Conclusion:

> **"**The claimant worked as a full-time bargaining unit custodian. December 6, 2010, North Providence police Detective Michelle Cyr received a complaint from a schoolteacher that she had good reason to believe her desk had been searched over the weekend. Further investigating by the detective resulted in information that there had been a number of occurrences where money had gone missing from various offices in the building. The occurrences were identified as having occurred during off school hours including the summer recess.
>
> December 10, 2010, the police and school officials began a sting operation. Various denominations of money were placed in locked offices that were located in front of security cameras.
>
> January 6, 2011, $40 was reported missing from a teacher's office locked the previous night. Police detectives viewed the security recording. The teacher was observed leaving at 2:18:04 p.m. on January 5, 2011. The only person recorded entering and leaving the locked office was the claimant. He entered at 4:58:24 p.m. on January 5, 2011 and left at 4:59:20 p.m. The teacher was recorded entering at 7:30:39 a.m. on January 6, 2011.
>
> The police interviewed the parties. Police confirmed the protocol used by the teacher and were satisfied with the credibility of the information provided. Claimant denied theft.

> Claimant previously received disciplinary action for taking product from the school cafeteria belonging to the service vendor.[2] The claimant was placed under arrest and arraigned January 20, 2011. The claimant was advised of his rights and waived a jury trial. The claimant's case was filed.
>
> The claimant was suspended and subsequently discharged." Decision of Referee, at 1-2.

After setting forth these findings of fact, the Referee then came to the following conclusion, and denied Mr. Cronk unemployment benefits:

> "[T]he preponderance of the evidence supports that, following a report of missing items and money, the police initiated a sting operation with the cooperation of the school officials that identified the claimant as the only party entering and leaving a locked office where placed money was found to be missing.
>
> The locked offices have limited access based on the restricted distribution of keys. The claimant was in possession of keys that would allow access to the locked offices. The claimant was not a suspect at the time the police began the investigation in spite of a previous disciplinary action against the claimant for his unauthorized taking of food product. It is noted that the claimant alleged he was given permission by a part-time cafeteria worker. It is also noted that the claimant failed to get permission from any supervisory staff.
>
> The preponderance of credible evidence supports misconduct on the part of the claimant that would deny benefits in the instant case." Id. at 3 (emphasis added).

The evidence presented at the administrative hearing before the Referee consisted of testimony from Ms. Ottaviano and Mr. Cronk, the North Providence Police Arrest Report in Mr. Cronk's case, various letters and pleadings filed in connection with the administrative process, a letter of reprimand from an incident in 2008, and a DVD

[2] Mr. Cronk was given a written reprimand on May 20, 2008 for, among other infractions, taking food and drinks from the cafeteria without paying for them. He claimed that he thought he could because he assisted the cafeteria workers and they told him that he could do so. (Ref. Tr., 13-14). The written letter of reprimand informed Mr. Cronk that he could not take any products out of the cafeteria inventory without first paying for them. North Providence School Department Letter, May 20, 2008, at 1.

containing the recording from the security camera outside Ms. Morasco's office. (Ref. Tr., 6, June 27, 2011).

Mr. Cronk appealed and the Board reviewed this case, issuing a decision on October 14, 2011. The Board found that "the findings of the Appeal Tribunal on the factual issues . . . [were] a proper adjudication of the law [and] facts." Decision of Board of Review, at 1. The Board affirmed the decision of the Referee with one member dissenting. Id. The dissenter stated, "[u]nder the law, misconduct must be proven not alleged. In this case, a 'sting' that was less than foolproof was set up which shows the claimant may have committed misconduct but did not prove misconduct. Therefore, benefits should be allowed." Id. (emphasis added).

II. Applicable Law

This case requires the Court to apply and interpret the following provision of the Rhode Island Employment Security Act, which specifically addresses an employee's dismissal for proven misconduct; Gen. Laws 1956 § 28-44-17, provides:

> "**Discharge for misconduct. –** For benefit years beginning prior to July 1, 2012, an individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 -- 44 of this title . . . For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 -- 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker."

When an employer seeks to establish that a former employee is ineligible for unemployment benefits as a result of misconduct, the employer bears the burden of establishing the employee's misconduct by a preponderance of the evidence. Foster Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1017-18 (R.I. 2004). Our Supreme Court has said that,

> "'misconduct' . . . is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." Turner v. Dep't of Employment Security, 479 A.2d 740, 741-42 (R.I. 1984).

Although the Rhode Island Administrative Procedures Act (APA) generally requires administrative agencies to follow the rules of evidence as applied in civil cases, the Board is expressly excluded from this requirement. R.I. Gen. Laws §§ 42-35-18(c)(1), 42-35-10; Turner, 479 A.2d at 742. The legislative intent behind excluding the Board from the constraints of civil and APA evidentiary rules is to ensure the Board receives the broadest range of evidence possible before making a decision to grant or deny benefits. Turner, 479 A.2d at 743. The Supreme Court of Rhode Island has noted that the lack of evidentiary constraints is consistent with the legislative purpose of the Employment Security Act, which is to "protect against the ill effects of unemployment that occu[r] in depressed economic times." Id.

When a claimant appeals a decision of the Board to this Court, our jurisdiction is "confined to questions of law, and, in the absence of fraud, the findings of fact by the Board of Review, if supported by substantial evidence regardless of statutory or common

law rules, shall be conclusive." Gen. Laws 1956 § 28-44-54 (emphasis added). This Court's review of questions of fact in an appeal from the Board is governed by the provisions of § 42-35-15(g), which provides:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This Court cannot weigh the evidence, and may only review the record in order to determine whether legally competent evidence supports the administrative decision. Bunch v. Bd. of Review, 690 A.2d 335, 337 (R.I. 1997). The factual findings of the Board may only be reversed if this Court finds that they are devoid of competent evidentiary support in the record, "or from the reasonable inferences that might be drawn from such evidence." Id. (citing Guarino v. Dep't of Social Welfare, 410 A.2d 425, 428 R.I. 1980). The factual findings of the Board will be upheld even though a reasonable mind may have reached a contrary result. Cahoone v. Bd. of Review of the Dept. of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

The Employment Security Act is remedial legislation that requires this court to liberally construe its provisions in favor of the act's purpose, which "is to lighten the burden that now falls on the unemployed worker and his or her family." Gen. Laws 1956 § 28-42-73; Charlonne v. Cote, 96 R.I. 318, 319, 191 A.2d 276, 277 (1963). This liberal

construction does not, however, allow the Court to "enlarge the exclusionary effect o expressed restrictions on eligibility under the act. . . ." Harraka v. Bd. of Review, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964).

III. Issue

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was Mr. Cronk properly disqualified from receiving unemployment benefits because he was discharged for proven misconduct under sec. 28-44-17?

IV. Analysis

Mr. Cronk raises two issues with the Board's decision. He first argues that the North Providence School Department has failed to establish he was discharged for proven misconduct because they relied upon his criminal charges. Pl.'s Brief, at 9. Mr. Cronk contends that, in the absence of a trial and conviction, evidence that an individual is suspected of committing a crime that he has pled not guilty to is insufficient to establish proven or willful misconduct under sec. 28-44-18. Id. Mr. Cronk further argues that the Referee erred as a matter of law by relying solely on the police report in the absence of corroborating evidence. Id. at 12. In Mr. Cronk's view, the Referee's decision assumes facts that were not in evidence because Ms. Morasco, the teacher who reported the money stolen, did not testify. Id. at 11.

A. Criminal Charges as Evidence of Proven or Willful Misconduct under § 28-44-17.

The Court agrees with Mr. Cronk's argument that employee misconduct cannot be established by the mere arrest of an employee and the filing of criminal charges due to

the presumption of innocence in criminal cases. Although our Supreme Court has yet to directly confront this issue,[3] Mr. Cronk cites several District Court decisions in support of this argument. While not binding on this Court, these cases are instructive. Therefore, a review of the facts presented in these cases is warranted.

In Carlucci v. Dept. of Employment & Training, A.A. 95-103 (December 18, 1995), a correctional officer was discharged following an arrest for shoplifting that occurred while he was off duty. A.A. 95-103 at 1, 5. The director of the Department of Labor found that he was discharged under disqualifying circumstances, and the officer appealed. Id. at 2. This finding was affirmed by the Referee and the Board. Id. at 2-3. The officer then appealed to this Court, which reversed the Board. Id. at 7-8. The record in Carlucci established that the officer had pleaded nolo contendre to the misdemeanor charge against him and that the matter was filed. The employer did not present any substantive evidence that the officer had committed the crime of shoplifting. The only evidence presented was an inspector's report, the Code of Ethics and Conduct, and a newspaper article. Id. at 7. This Court found that evidence insufficient.

In Stanzione v. Dept. of Employment & Training, A.A. 93-219 (February 20, 1994) and Garafano v. Dept. of Employment & Training, A.A. 93-106 (February 1, 1994), public employees were discharged following indictments charging them with criminal activity in connection with their jobs. In each case, the only misconduct complained of was the indictment issued against each employee. A.A. 93-219 at 6; A.A. 93-106 at 7. The only evidence presented by the employers in both cases consisted of the indictments themselves and city regulations requiring the dismissal of employees who are

[3] Our Supreme Court did consider the issue of using nolo contendre pleas as evidence of guilt in an unemployment benefits case in Turner. The Court will refrain from a detailed discussion of the case here, because this decision will be addressed later in the decision.

indicted on a felony charge. A.A. 93-219 at 6; A.A. 93-106 at 7. This Court held that "[a] charge of a crime can never be considered as evidence or proof of any wrongdoing and can never be considered as proof of a violation of the standard of behavior expected of an employee by the employer." A.A. 93-219 at 6. The employer bears the burden of establishing work related misconduct by a preponderance of the evidence. Id.

The rule that can be discerned from these cases is that evidence of a criminal charge alone is insufficient to establish employee misconduct. This rule does not mean that an employer cannot establish employee misconduct due to alleged criminal activity with substantive evidence that the activity occurred. The employer simply cannot use the criminal charges alone as evidence. This view is consistent with the Supreme Judicial Court of Massachusetts' interpretation of the Commonwealth's employment security act.

In Massachusetts, when an employee is charged with criminal activity, the employee will not be disqualified from receiving unemployment benefits absent substantial evidence that he or she committed the alleged crime. See Wardell v. Dir. Of Div. of Employment Security, 491 N.E.2d 1057, 1059 (Mass. 1986) (finding deliberate misconduct had not been established when the Division of Employment Security relied solely upon employee's criminal charges absent corroborating evidence). The Supreme Judicial Court has expressly held that "[n]either an arrest nor a criminal charge provides adequate evidence that an alleged crime was committed." Santos v. Dir. Of Div. of Employment Security, 498 N.E.2d 118, 119 (Mass. 1986). Furthermore, even an admission of sufficient facts to establish an individual committed a crime in court without a subsequent finding of guilty is insufficient to disqualify an employee in the Commonwealth. Santos, 498 N.E.2d at 119; Wardell, 491 N.E.2d at 1059.

In Turner, the Supreme Court of Rhode Island took a similar approach to the Massachusetts Supreme Judicial Court in the context of a nolo contendre plea. In that case, the claimant, Turner, was an employee of the State Fire Marshal's Office and he was reported for selling fire door certificates. 479 A.2d at 740-41. Turner was charged criminally by the Rhode Island State Police and found guilty at the District Court level. Id. at 741. He appealed to the Superior Court seeking a trial de novo and pled nolo contendre. Id. He was then placed on one year probation and ordered to pay restitution. Id. While his appeal to the Superior Court was pending, Turner resigned from his position and applied for unemployment benefits, which were denied on the ground of proven misconduct. Id. The Supreme Court held that it was proper for the Board and the District Court to consider Turner's plea as evidence of his misconduct. Id. at 742-43. The court clearly noted, however, that it reached this conclusion because Turner was fully informed by the Superior Court justice in his criminal case that a plea of nolo contendre was an admission of guilt. Id. at 742 n.3.

After reviewing these cases, this Court concludes that Mr. Cronk is correct in his assertion that evidence showing an employee was charged criminally, but that he pled not guilty cannot, in the absence of a finding of guilt, establish misconduct by itself. See Santos, 498 N.E.2d at 119. However, unlike the District Court cases cited by Mr. Cronk, the fact that Mr. Cronk was arrested and charged with larceny was not the only evidence presented in favor of a finding of misconduct. The North Providence School Department presented substantive evidence of Mr. Cronk's alleged wrongful activities. This evidence included security camera footage showing him enter Morasco's office, testimony regarding the facts of the police investigation from Superintendent Ottaviano, and a

police report that provided further information regarding the investigation. Therefore, this Court must consider the sufficiency of the additional evidence. In reviewing this evidence, we will address Mr. Cronk's allegation that the Referee erred as a matter of law in relying solely on the police report.

B. The Sufficiency of the School Department's Substantive Evidence

All reports produced by the North Providence Police Department in connection with Mr. Cronk's case were admitted as exhibit 1 at the referee hearing. Within the police reports is a narrative for Detective Michelle Cyr. In this narrative, Detective Cyr describes how she was made aware of several incidents of theft occurring at the school on December 6, 2010. The detective's narrative notes that only the school custodians and a few other people have keys to the offices in which the thefts had occurred. Detective Cyr then described the setup of the sting operation:

> "I borrowed money from the petty cash fund at the school and placed it in a few offices which I [sic] have good camera angles. I put $20.00 in Ms. Pellegrino's right bottom drawer in the bag with costume jewelry and $5.00 in ones in her top drawer of her desk. Neither is visible unless the drawers are opened. In addition, another $40.00 was left attached to an envelope on the desk of the office Mrs. Maria [Marasco]. Again, not immediately visible, but placed on a window shelf amongst other papers." Narrative for Detective Michelle A Cyr, at 1.

A supplemental narrative of Detective Cyr is also included within exhibit 1, which describes how the detective became aware of the missing $40 on January 6, 2011. The detective then described what she saw on the security camera,

> "I checked the camera system, in which there is a clear unobstructed view of her [Morasco's] office. I see Mrs. Morasco leaving her office at 2:18:04pm on January 5, 2011. She then returned to her office on January 6, 2011 at 7:30:39am. During this span of time the only person to enter her office at all was one of the custodians, Joseph Cronk. He entered at 4:58:24pm and left at 4:59:20pm. No one else entered her office. Also, there are no other access doors to her office other than the one that is on

the camera." Supplemental Narrative for Detective Michelle A Cyr, at 1, January 18, 2011.

Ms. Morasco's statement to Detective Cyr following the discovery of the missing money was also admitted into evidence. In this statement, Ms. Morasco unequivocally states that she left the money out every night when she left work and that the evening of January 5, 2011 when the money was stolen was no different. Ms. Morasco told the detective that she left her office at 2:18pm on January 5th and returned at 7:30am the next morning. Neither Ms. Morasco nor Detective Cyr appeared at the referee hearing to corroborate the statements in this report.

The only testimony presented by the school department was that of Superintendent Ottaviano. Ms. Ottaviano confirmed that she became aware of incidents of theft occurring in the school late in 2010 and that she reported this conduct to the police, namely Detective Cyr. (Ref. Tr., 8, June 27, 2011). She testified that the police set up a sting operation in which money was left in locked offices with security cameras located near them. Id. at 9. Ms. Ottaviano confirmed that Ms. Morasco was involved in the sting operation and that she would leave $40 out on her desk each night before leaving her office and that she would check to see if the money was there the next morning. Id. at 15. The employer testified that the money was left out the night of January 5th and found missing January 6th. Id. at 9, 16. Ms. Ottaviano also confirmed that the police viewed the security camera footage and that Mr. Cronk was the only individual seen entering Ms. Morasco's office that evening.[4] Id. at 10.

Ms. Ottaviano testified that there was only one entrance to Ms. Morasco's office, that the door to that office was always locked, and that only Ms. Morasco and the

[4] The DVD containing the security camera footage was admitted as part of exhibit 1, but it does not appear that the Referee viewed the video for himself before making his decision.

custodians who cleaned the office had keys. Id. at 11, 25. Mr. Cronk testified that the door would not lock unless the door was physically pulled shut. Id. at 25. There was also testimony that Mr. Cronk was responsible for cleaning Ms. Morasco's office every night, and that he and other custodians were aware of the money on Ms. Morasco's desk because they would take breaks in her office. Id. at 17, 18-21.

In a case like the one at bar, the employer must establish an employee's misconduct by a preponderance of the evidence. Foster Glocester, 854 A.2d at 1017-18. This burden requires the employer to produce evidence that although "not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY 1220 (8th Ed. 2004). Hearsay evidence may be submitted by an employer to meet this burden. R.I. Gen. Laws §§ 42-35-18(c)(1), 42-35-10; Turner, 479 A.2d at 742. However, the Board is given wide discretion in determining the proper weight to afford hearsay evidence. See Foster Glocester, 854 A.2d at 1018-20 (holding the Board erred when it admitted a hearsay arbitration transcript, but failed to "exercise its independent discretion and determine . . . the weight of the evidence.").

The Court sees no error in the decision of the Referee and the Board to rely on the hearsay evidence presented by the North Providence School Department. This evidence is credible and probative of the facts in issue here. However, the question of whether this evidence meets the employer's burden here still remains. In making this determination the case of Technic, Inc. v. R.I. Dept. of Employment & Training, 669 A.2d 1156 (R.I. 1996) is instructive because the evidence presented is similar to the evidence in Mr. Cronk's case.

In Technic, an employee was discharged from his job for three reasons, namely: "the disappearance of 600 ounces of gold, the sale of drugs, and the theft of slivers of gold." 669 A.2d at 1159. Although the Supreme Court of Rhode Island found there was insufficient evidence to support the allegation regarding the 600 ounces of gold, the court found that the evidence on the sale of drugs and theft of slivers of gold was sufficient. Id. at 1159-60. The evidence presented on the second two allegations in Technic consisted of hearsay statements made to the claimant's employer that the claimant had sold drugs to another employee, and statements given as part of a police investigation into the missing gold slivers. Id. at 1160. The first statement from the police investigation was from another employee of Technic, who reported that he had seen gold in the claimant's car and that the claimant told him the gold was from work. Id. The second statement came from another employee of Technic, who stated he drove the claimant to a pawn shop to sell slivers of gold. Id.

Like the record in Technic, the record before this Court in Mr. Cronk's case consists of witness statements given to police and hearsay testimony corroborating those statements. Id. This Court does have direct testimony regarding the facts surrounding the sting operation set up by the North Providence Police and the fact that Mr. Cronk was seen on videotape entering the office where the $40 was stolen from. However, the evidence in this case is much less conclusive than the evidence presented in Technic. The sum of the reliable, probative, and substantial evidence of the whole record in this case does not establish by a preponderance of the evidence that Mr. Cronk stole the money. It merely establishes that he was cleaning an office he was assigned to clean as part of his job duties.

This Court holds that the decision of the Board affirming the Referee is clearly erroneous in light of the reliable, probative, and substantial evidence, on the whole record. The employer has not met its burden of establishing employee misconduct by a preponderance of the evidence in this case. Therefore, the decision of the Board is reversed and Mr. Cronk's unemployment benefits must be reinstated.