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

Amanda L. Mendonca	:	
	:	
v.	:	**A.A. No. 12 - 001**
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8 -8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court on this 1st day of March, 2012.

By Order:

__/s/_____
Melvin Enright
Acting Chief Clerk

Enter:
____/s/_____
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. Ms. Amanda L. Mendonca filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor & Training, which held that she was not entitled to receive employment security benefits based upon proved misconduct. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Amanda L. Mendonca was employed

as a customer service phone representative by Sovereign Bank for about three years until July 29, 2011. She applied for employment security benefits immediately but on September 6, 2011 the Director issued a decision holding that she was ineligible to receive benefits because she had engaged in misconduct within the meaning of Gen. Laws 1956 § 28-44-18. See Department's Exhibit # 2.

Complainant filed an appeal, and a hearing was held before Referee Nancy L. Howarth on October 12, 2011 at which the claimant and an employer representative appeared and testified. See Referee Hearing Transcript, at 1. In her October 18, 2011 Decision, the Referee made the following findings of fact:

> The claimant was employed as a business customer service phone representative by the employer. The claimant's duties included answering inbound calls regarding business customers' service issues. Based upon random audits of the calls, the employer determined that the claimant had frequently transferred calls to other departments, rather than responding to the customers' inquiries herself, although she was capable of addressing the customers' issues. The claimant had received a previous warning regarding such conduct. She was terminated on July 29, 2011 for failure to follow the employer's instructions regarding servicing of customers' calls.

Decision of Referee, October 18, 2011 at 1. Based on these facts, the Referee — after quoting from section 28-44-18 — made the following conclusions:

> The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has sustained its burden. The credible evidence and testimony presented at the hearing establish that the claimant transferred calls to other representatives rather than answering them herself, as required. I find that the claimant's actions constitute a knowing violation of a reasonable and uniformly enforced policy of the employer and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, October 18, 2011 at 1. Accordingly, the Referee found that claimant was properly disqualified from the receipt of unemployment benefits.

Thereafter, a timely appeal was filed by the employer and the matter was reviewed by the Board of Review. In a decision dated December 5, 2011, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Ms. Mendonca filed a Complaint for Judicial Review in the Sixth Division District Court on or about January 3, 2012. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** 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. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an

> individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. 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. (Emphasis added).

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> '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 degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving through a preponderance of evidence that the claimant's action, in connection with his work activities, constitutes misconduct as defined by law.

III. STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> (g) 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 of 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.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

3 Id.

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV. ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) 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.

V. ANALYSIS

The Board adopted the Referee's factual conclusion that claimant had been fired for failing to handle service calls correctly — and that doing so constituted misconduct within the meaning of section 28-44-18. Specifically, the Referee found that claimant committed misconduct because her "… actions constitute[d] a knowing violation of a reasonable and uniformly enforced rule or policy …." Decision of Referee, at 2. This finding clearly refers to

that portion of section 28-44-18 — quoted and highlighted supra, at 4 — which broadens[4] the statutory definition of misconduct so as to encompass actions which are not patently wrong (or, to borrow a phrase from the criminal law, malum in se) but which violate a promulgated work rule.

And certainly this is the case here. What Ms. Mendonca was accused of doing was not evil or inherently harmful to the employer's best interests. She did not, for instance, hang up on the customers. Or insult them or treat them in a patently odious way that was likely to offend. She delayed their service. In sum, she did not assist the customers correctly, the manner that had been prescribed by the employer's service protocol.

At the hearing before Referee Howarth, the employer presented one witness — Ms. Ndidi St. Franc, the Manager of Business Customer Service — in its effort to satisfy its burden of proof on the issue of misconduct. Referee Hearing Transcript, at 2. Ms. St. Franc testified that the Bank learned through call monitoring that claimant was not answering phone queries but transferring them back into the service call queue. Referee Hearing Transcript, at 10. In fact, in July of 2011, claimant transferred 675 calls in this way. Referee Hearing Transcript, at 15. Typically, she would answer the calls and say "[P]lease hold, and I'll have somebody help you." Id. She would then transfer them back into the support queue. Referee Hearing Transcript, at 11.

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[4] The cited language was added to section 28-44-18 somewhat recently — in 1998. See P.L. 1998, ch. 368, § 3.

The fact that this was not proper procedure was discussed with claimant previously — on December 28, 2010. Id. Indeed, Ms. St. Franc testified that it was never proper procedure to send a call back into the queue. Referee Hearing Transcript, at 12. To the contrary, if a caller had a question that a service representative could not answer, the representative was to get assistance from the support system. Referee Hearing Transcript, at 12.

Ms. Mendonca protested that the calls she sent back into the queue were only those that she did not know how to answer. Referee Hearing Transcript, at 18 et seq. Even if true, this assertion provides her with no defense in light of the employer's testimony that there was a support-line in place for her [and other customer service representatives] to get assistance. Claimant acknowledged she was aware of the procedure. Referee Hearing Transcript, at 19. This is really the work-rule she violated — not obtaining assistance in the proper way.

Pursuant to the applicable standard of review described supra at 5-6, the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result.

Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant

was discharged for proved misconduct in connection with her work — failing to respond to customer service calls appropriately — is well-supported by the record and should not be overturned by this Court.

Based on the foregoing, the Board was certainly within its sound discretion to find that claimant knowingly breached the employer's uniformly enforced rule that its employees must respond to customer service calls in an appropriate manner and without sending them back into the service queue. See Gen. Laws 1956 § 28-44-18, quoted supra at pages 3-4.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

MARCH 1, 2012