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

Jessica H. Pepper	:	
	:	
v.	:	**A.A. No. 12 - 033**
	:	
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 21st 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. Jessica H. Pepper 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. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. 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. Jessica H. Pepper was employed for eighteen years as a certified nursing assistant (CNA) by 735 Putnam Pike Operations until August 6, 2011. She applied for employment security benefits immediately but on October 27, 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 # A2.

Complainant filed an appeal, and a hearing was held before Referee Carl Capozza on November 30, 2011 at which the claimant and an employer representative appeared and testified. See Referee Hearing Transcript, at 1. In his December 1, 2011 Decision, the Referee made the following findings of fact:

> The claimant had been employed for approximately eighteen years as a certified nursing assistant (CNA) until her last day of work, September 16, 2011. On or about August 6, 2011 it was reported that the claimant had misappropriated an associate's credit card and used the same for personal use. During the course of an investigation, the claimant admitted to the misappropriation. The claimant was criminally charged on September 6, 2011, pleaded nolo to the charge and received probation. The claimant, in the meantime, made restitution. As a result of the investigation, the employer determined to discharge the claimant because of the misappropriation, but the claimant was allowed to resign in lieu of termination.

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

> In cases of termination the burden of proof to show misconduct by claimant in connection with her work rests solely upon the employer.

> Based on the credible testimony and evidence of record, it is determined that the employer has met that burden by a preponderance of the evidence. The claimant duly acknowledged the misappropriation of the credit card belonging to an associate and misusing the same. Theft of property belonging to a co-worker has been determined misconduct under the statute and under these circumstances, I find that the claimant was discharged for misconduct in connection with her work and therefore, cannot be allowed benefits.

Decision of Referee, December 1, 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 January 27, 2012, a majority of the members of the Board of Review 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. Pepper filed a Complaint for Judicial Review in the Sixth Division District Court on or about February 6, 2012.

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.

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 her 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

[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).

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]

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.

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

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

In this case there is no factual dispute — the claimant admitted she stole her co-worker's credit card and used it. The only issue to be addressed is a legal one: Is stealing from a co-worker misconduct in connection with one's work as defined in section 28-44-18. The Dissenting Opinion (of the Member Representing Labor) suggested that stealing from a co-worker (as opposed to stealing from the employer) might not meet the statutory standard — although he deemed the act "egregious." I disagree and believe the decision denying benefits is legally sound.

Theft from a co-worker has long been considered misconduct by this Court. In Pennine v. Department of Employment and Training, Board of Review, A.A. No. 93-105, (Dist. Ct. 1/31/94)(Cappelli, J.), this Court held that a commission sales person who charged returns to her colleagues — thereby lowering their commissions instead of hers — committed misconduct. Slip op. at 7. Involving as it does the invasion of the victim's privacy — i.e., through a taking from her purse, I view the theft in this

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[3] Id.

case as being more direct, more personal, and therefore more egregious than that reviewed in Pennine.

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 — theft from a co-worker — is well-supported by the record and should not be overturned by this Court.

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 21, 2012