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

Victor Cromartie	**:**	
	:	
v.	**:**	**A.A. No. 12 - 044**
	:	
Department of Labor and 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 REVERSED.

Entered as an Order of this Court at Providence on this 27th day of September, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Victor Cromartie	:	
	:	
v.	:	**A.A. No. 2012 – 044**
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Department of Labor and Training,	:	
Board of Review	:	

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. Mr. Victor Cromartie filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making for 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 clearly erroneous in light of the reliable, probative and substantial evidence of record and was affected by error of law; I therefore recommend that the

decision of the Board of Review be reversed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Victor Cromartie worked for the NMG Warwick LLC as a night auditor at its Hampton Inn hotel for two years until he was terminated on October 12, 2011. He filed an application for unemployment but on November 17, 2011, the Director determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee William Enos on December 27, 2011. On December 28, 2011, the Referee held that Mr. Cromartie was disqualified from receiving benefits because he was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in pertinent part:

> Claimant worked as a Night Auditor for NMG Warwick, LLC for two years last on October 12, 2011. Employer testified and produced evidence that the claimant violated workplace rules by renting a room with a female using his employee discount without contacting a manager, left the front desk unattended during his shift and used the master key to enter the room. The claimant testified that he had used his employee discount before and he did leave a message for a manager asking permission to get the discount, but did not hear back from her. The claimant testified that he did leave the front desk to make his security

> check and did go to the room but was only gone for ten minutes.

Decision of Referee, December 28, 2011 at 1. Based on these facts, the Referee came to the following conclusion:

> * * *
> I find that sufficient credible testimony and evidence has been provided by the employer to support that the claimant's actions were not in the employer's best interest. Therefore, I find the claimant was discharged for disqualifying reasons under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, December 28, 2011 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On February 6, 2012, the Board of Review issued a decision in which the decision of the Referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, February 6, 2012, at 1.

Finally, Mr. Cromartie filed a complaint for judicial review in the Sixth Division District Court on February 23, 2012.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from

receiving benefits; 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 by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 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]

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 the Employment Security Act:

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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 Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

3 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041

> * * * 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.

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.

ANALYSIS

The Board adopted the Referee's factual conclusion that claimant abused his employer's employee discount policy and that doing so constituted proved misconduct. See Gen. Laws 1956 § 28-44-18. Accordingly, our first duty must be to examine the record to determine whether these allegations

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(R.I. 1986).

are supported in the record. We note that the employer, in its effort to meet its burden of proof on this issue, presented two witnesses — Mr. Jay Visnjic and Mr. Steven Campanelli. We shall begin by reviewing the testimony presented at the hearing.

A. Review of the Evidence and Testimony.

Mr. Visnjic, the General Manager, testified that Mr. Cromartie created a reservation for another individual, whose name is unknown, at the employee rate in violation of several particulars of the employee rate policy — specifically, that he did so without prior manager approval, without booking seven days in advance, and for a person who did not live 50 miles away from the inn. Referee Hearing Transcript, at 5-6. Mr. Visnjic also cited Claimant for leaving the front desk unattended for 12 minutes. Referee Hearing Transcript, at 6. Finally, he stated that Mr. Cromartie used a master key to open the guest room in violation of the inn's policies. Id.

During cross-examination by Claimant's attorney, Mr. Visnjic maintained that all special rates must be approved by a manager. Referee Hearing Transcript, at 7. However, he conceded that managers could deviate from the policy. Referee Hearing Transcript, at 41. He denied any knowledge of whether the room in question was let to a former employee or his aunt.

Referee Hearing Transcript, at 9-10. He further denied telling Mr. Cromartie — after an incident at the pool — that he should make rounds. Referee Hearing Transcript, at 10-11.

Mr. Visnjic stated that Mr. Cromartie was fired because, by leaving the front desk, he compromised the security of the cash drawer and the personal information about guests who were staying at the inn. Referee Hearing Transcript, at 12.

Next, Mr. Cromartie testified in support of his claim for benefits. He insisted that — after the incident at the pool a few months prior to his termination — he was specifically instructed by Mr. Visnjic to make rounds. Referee Hearing Transcript, at 13-14. He stated he often left the desk to help the "breakfast girl" make breakfast. Referee Hearing Transcript, at 20. He maintained that during the 12 minutes he was away from the front desk he was speaking to his aunt, who accompanied him to check the back door — which guests sometimes leave open. Referee Hearing Transcript, at 14-15. He stated he told someone he was leaving the desk — unfortunately, the name is listed as "(inaudible)" in the transcript. Referee Hearing Transcript, at 43.

He also spoke to the issues created by the room rental. He stated he rented the room to his aunt, who needed it at about 11:30 because of an early

flight. Referee Hearing Transcript, at 15-16. Mr. Cromartie testified there were at least 15 empty rooms that night. Referee Hearing Transcript, at 42. He testified he sought permission to use the employee rate from the office manager, Cheryl Allen, but could not get through to her, so he left a voicemail message. Referee Hearing Transcript, at 17. He denied he used the grand master key to open the room; instead, he made up a key that opened just his aunt's room. Referee Hearing Transcript, at 18-19.

Mr. Cromartie also spoke to the employee rate policy generally. When his attention was drawn to the particulars of the policy (i.e., the advance notice, 50-mile, pre-approval rules) he indicated that it was common practice for managers to approve employee-rate usage with a phone call. Referee Hearing Transcript, at 16. He usually called Cheryl Allen. Id. He insisted the 50-mile rule was not followed. Id. He denied intentionally doing anything wrong. Referee Hearing Transcript, at 22.

Claimant said he was fired by "Monica" — who had been his manager for a month or two — because he left the desk unattended and used the employee rate. Referee Hearing Transcript, at 19-21.

Just before the hearing closed, the Referee admitted a hearsay document, in which "Monica Rodriguez" described watching the video of the

foyer during Claimant's last night of work. Referee Hearing Transcript, at 44-46. Apparently meant to show Claimant was not diligent in his duties, it had no relevance to the issues before the Referee — (1) using the employee rate and (2) leaving the front desk unattended. Appropriately, the Referee did not rely upon this evidence.

B. Application of the Facts to the Law.

Having reviewed, at length, the testimony and evidence presented to the Referee, I must now apply the applicable law to the facts of the case in the manner required by the standard of review.

I believe that the Referee's finding that Claimant left the front desk unattended is supported by the record, as is his finding that Claimant used the employee rate for a room let by a family member without prior authorization. The question before the Court is — are these acts, taken and considered in the context they were committed, sufficient to meet the standard of misconduct established in § 28-44-18 and clarified in the Turner decision, supra.

The Referee concluded that — "… the claimant's actions were not in the employer's best interest." Referee's Decision, at 2. He therefore found that the Claimant was per se subject to disqualification from the receipt of

benefits under § 28-44-18. However, in my view, the test found in section 18 is more subtle than this simple syllogism.

The employer must show more than that the claimant's conduct was not in the employer's best interest — it must show the actions were committed in willful disregard of the employer's best interest. See § 28-44-18, supra, at 4. Regarding his leaving the front desk for 12 minutes at approximately 3:00 a.m., it seems to me this particular alleged breach of protocol was de minimis or nearly so. With regard to the use of the employee rate, it seems to me that Mr. Cromartie provided substantial evidence that he followed the protocol as it existed in fact and not on paper. Comparing his testimony with that of Mr. Visnjic, it seems that Mr. Cromartie was caught in the transition to a new, by-the-book, manager.[4]

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[4] After Claimant filed his appeal from the decision of the Referee to the Board of Review, he submitted an affidavit from Cheryl Allen (a 7-year employee and Claimant's Supervisor), in which she states that (1) the night auditor did have authority to book rooms at lower-than-advertised rates, (2) employee rates were extended to friends and family so long as there were sufficient extra rooms, (3) a Night Auditor could leave the front desk from time to time for various legitimate purposes, and (4) Claimant was a good employee who was trustworthy. See Plaintiff's Brief, at 9-10 summarizing Cheryl Allen's February 1, 2012 Affidavit. In my view this affidavit would be sufficient per se to justify an Order of remand to the Board for rehearing. If true, it undercuts the entirety of the employer's misconduct allegation. But remand is, of course, unnecessary in light of my recommendation of reversal.

Finally, as to both allegations, we may also invoke the comments of the Supreme Court in Turner, in which the Court excluded from the definition of misconduct those acts which constitute isolated, good faith, errors in judgment. See Turner, supra at 5 quoting from Boynton Cab v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). It appears to me that in both matters the inference to be drawn is that Mr. Cromartie was not shown to have acted in bad faith or deceit, but in conformity with previous practice.

C. Resolution.

Pursuant to the applicable standard of review described supra at 5-7, 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. Nonetheless, after accepting the Referee's factual findings, and applying the appropriate standard of review and the definition of misconduct enumerated in section 18 and Turner, supra, I must recommend that this Court hold that the Board's finding that Mr. Cromartie was discharged for proved misconduct in connection with his work

is not supported by the record and should be set aside by this Court. Claimant should therefore not be deemed disqualified from the receipt of benefits.[5]

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

September 27, 2012

[5] My recommendation that Claimant should be deemed eligible for benefits ought not to be taken as an implied criticism of his firing by this employer, which has every right to insist that its staff members comport themselves with the highest standards of behavior. My recommendation is based on the standard of proved misconduct found in Rhode Island's statutory and case law.