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

David Hershey	:	
	:	
v.	:	**A.A. No. 6AA - 2012 - 00078**
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-16.2 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 at Providence on this 4th day of January, 2013.

By Order:

__/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

____/s/_____
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Montalbano, M. Mr. David Hershey 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. 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.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are as follows: David S. Hershey (hereinafter referred to as "Claimant") was employed by Anchor Subaru LLC (hereinafter referred to

as "Employer"). Claimant was employed by Employer as a car salesman for approximately nine (9) months.

On or about January 17, 2011, Claimant requested permission to take the following two (2) days off in order to work on a personal car project. Claimant was granted the time off. Referee Hearing Transcript, at 12. Claimant finished working on January 17, 2011, and after the service department had closed at approximately 8:00 p.m., Claimant took a tool belonging to a mechanic employed by Employer. Id. Claimant believed he was borrowing the tool from Josh Thibeau. Claimant had previously borrowed tools from Mr. Thibeau approximately five (5) to ten (10) times. Board of Review Hearing Transcript, at 18. Claimant actually took the tool, from another mechanic's toolbox, a Jefferson Saucier. Board of Review Hearing Transcript, at 6 (referencing Claimant's sworn testimony from Referee Hearing Transcript, at 12).

On or about January 18, 2011, Mr. Saucier came to work to find that he was missing a tool from his toolbox. Mr. Saucier asked the other mechanics and salesmen if they had borrowed or seen the tool. Mr. Saucier reported the missing tool to his supervisor, Chris Benoit. Mr. Benoit requested his IT employee to review the security camera video tapes, and Claimant was seen on tape taking the tool. Board of Review Hearing Transcript, at 12.

That same day, while Claimant was working on his project, Claimant received a phone call from Mike Strode, a fellow salesman, asking him if he had borrowed any tools. Board of Review Transcript, at 30. Salesmen frequently borrow small tools such as screwdrivers or small socket sets from one another for purposes of securing or

removing license plates. Id. Because Claimant believed that Mr. Strode was talking about a tool that salesmen would normally borrow, Claimant responded in the negative to the question about borrowing tools. Id; see also Referee Hearing Transcript, at 12.

Claimant returned to work on or about January 21, 2011. Upon returning to work, Claimant returned the missing tool to the service station. Board of Review Transcript, at 31. Claimant did not attempt to conceal the tool while walking into the building. Id. While returning the tool, the mechanics in the service area appeared to be angry with Claimant. Claimant was called into Mr. Benoit's office to be asked some questions regarding the tools. Board of Review Hearing Transcript, at 26. Claimant returned to work and completed that day.

The next day, Claimant was called into his sales manager's office and was handed a piece of paper. Claimant was told that he had a choice as to whether to sign a resignation or to be terminated for theft of property. Claimant signed the resignation paper. Referee Hearing Transcript, at 14.

Claimant applied for employment security benefits on September 16, 2011. On October 17, 2011, the Director issued a decision stating that the Claimant's actions constituted misconduct and therefore he was not eligible for benefits under § 28-44-18 of the Rhode Island Employment Security Act (the Act).

Claimant filed a timely appeal, and a hearing was held before Referee William Enos on January 10, 2012. Employer's Counsel and Claimant were present at the hearing. On January 13, 2012, Referee Enos determined that Claimant was terminated for proven misconduct, thus affirming the Director's decision denying benefits.

On January 25, 2012, Claimant filed a timely appeal with the Board of Review, the Chairman of the Board sitting for the Tribunal (hereinafter the "Board"). A hearing was held on February 27, 2012. Claimant's Counsel, Claimant, Robert Benoit (Employer Representative), and Employer's Counsel were present at the hearing. The Board issued a decision on March 9, 2012 affirming the Referee's decision. In affirming the decision the Board determined that Claimant was disqualified from receiving benefits because Claimant had been terminated under disqualifying circumstances under § 28-44-18 of the Act.

Thereafter, on April 5, 2012, Claimant filed a timely appeal to the District Court. This matter has been referred to me for the making of findings and recommendations pursuant to Rhode Island General Laws 1956 § 8-8-16.2.

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 interest 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 the law.

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 decisions 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 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 that Claimant was disqualified from receiving benefits due to misconduct 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 issue before the Court is whether the Board of Review's decision that Claimant was terminated for proved misconduct was clearly erroneous. Quite simply put, Mr. Hershey was fired for stealing a torque wrench. There is certainly no question that stealing is the type of conduct which, if proven, constitutes misconduct within the meaning of Section 18.

The only issue here is factual – Mr. Hershey denied before the Referee and again before the Board that he was guilty of stealing the tool, maintaining that he borrowed the torque wrench from a toolbox he thought was assigned to a mechanic named Josh. Board of Review Hearing Transcript, at 18. The Claimant testified that he had borrowed tools in the past from Josh, but that in the case of the torque wrench in question he mistakenly borrowed the tool from the bay next to that assigned to Josh. Referee Hearing Transcript, at 12.

To satisfy its burden of proving Mr. Hershey was fired for misconduct, the Employer relied on a surveillance videotape as well as the hearsay testimony of the Employer's representative, Mr. Robert Benoit. Relying on this evidence, admittedly hearsay, and after weighing the credibility of Claimant's testimony, both the Referee and the Board found that misconduct had been proven. Whether or not the tool in question was stolen or borrowed from the wrong toolbox is a crucial question of fact in this case, and it was ultimately the function of the Board to weigh the credibility of the witnesses in deciding this question. The Board made the following Findings of Fact:

> FINDINGS OF FACT:
>
> The claimant worked as a salesman. From time to time, the claimant would approach one of the employer's mechanics for permission to use one of mechanic's tools for a personal project after hours and off premises; this borrowing occurred from 5 to 10 times from the same mechanic. On or about January 17, 2011, after service department hours, the claimant removed a long socket wrench and deep sockets from the tool box of another mechanic, without the latter's authorization. He told no one about his actions. The claimant was off from work the following two days. During this time the employer began to search for the missing tools. Upon his return to work, the claimant was asked by another salesman if he had any tools. The claimant responded in the negative. The employer asked

> the claimant about the missing tools and the claimant responded that he did not have them. The claimant later returned the missing deep socket set. He was ordered to resign or be terminated because he misled his employer about the missing socket set. The claimant resigned under threat of termination.

Decision of the Board of Review, at 1.

Clearly, the Board was correct in concluding that when the claimant took the tool, denied that he took the tool, and intentionally misled his employer when asked about the tool, the Claimant's actions were not in the best interest of his Employer. 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.

We note for the record that the Board is not constrained by the Rules of Evidence and that evidence provided from secondary sources may be relied upon by the Board/Referee to support its conclusions. See Gen. Laws 1956 § 42-35-9 and Gen. Laws 1956 § 42-35-10. It is true that a good portion of the Employer's evidence is hearsay; however, it should be restated that this Court's only concern is whether or not there is reliable, probative, and substantial evidence to support the Board's decision. Concerns about hearsay or second-hand testimony are inapplicable to our judicial review of the Board's final decision. See DePasquale v. Harrington, 599 A.2D 314, 316-17 (1991). Stated differently, the only concern for this Court is whether the Employer presented enough testimony and evidence that if believed would establish misconduct on the part of the claimant. In light of the Employer's testimony, the surveillance videotapes referred to in the Employer's testimony (see Board of Review Hearing Transcript, at 12), and the

testimony of Claimant, this Court finds that the Board had sufficient legally competent evidence to support its decision.

But, in addition to considering whether the evidence was sufficient to meet the Employer's burden of persuasion, we must also consider whether a decision based on such evidence was legal. Pursuant to the applicable standard of review described supra at 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. In my view, substantial, probative and reliable evidence — i.e., the testimony of both the Employer and the Claimant — supports the Board's finding of misconduct. Accordingly, 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 his work is supported by the record and should not be overturned by this Court.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board of Review's decision to deny claimant unemployment benefits under § 28-44-18 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Gen. Laws 1956 § 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by

abuse of discretion or clearly unwarranted exercise of discretion." Gen. Laws 1956 § 42-35-15(g)(5)(6). Accordingly, I recommend that the decision rendered in this case by the Board of Review be AFFIRMED.

_____/s/_____
Joseph A. Montalbano
Magistrate
January 4, 2013