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

Joseph Cicione III	:	
	:	
v.	:	**A.A. No. 2012-87**
	:	
Department of Labor and Training ,	:	
Board of Review	:	

JUDGMENT

This cause came before Gorman 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 affirmed.

Dated at Providence, Rhode Island, this 31st day of December, 2013.

Enter: By Order:

___/s/_____ _____/s/_____

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

Joseph Cicione III	:	
	:	
v.	:	**A.A. No. 2012-87**
	:	
Department of Labor and Training,	:	
Board of Review	:	

In this suit, plaintiff asks the court to reverse a decision of the Board of Review of the Department of Labor and Training finding him ineligible for unemployment benefits. This court has jurisdiction pursuant to §28-44-52 of the Rhode Island General Laws, 1956.

I. PROCEDURAL HISTORY AND FACTS

Mr. Cicione had worked for a credit union for more than six years, and was president and CEO of the institution when he was discharged in September, 2011. Following this termination, plaintiff applied for unemployment benefits. His application was denied by the Director of the Department of Labor and Training because Mr. Cicione had been fired for "proved misconduct" as defined in §28-44-18. The director's determination was appealed, and after a hearing before a referee, that decision was affirmed. Plaintiff then appealed to the Department of Labor and Training Board of

Review which adopted the findings and conclusions of the referee, again ruling that he was not eligible for benefits. The current case represents an appeal from the board's decision.

The testimony offered at the hearing before the referee and documents submitted by the parties, establish a number of facts that are not in dispute. The claimant had worked for the employer, a credit union, for over six years and was last employed as President and Chief Executive Officer. In that capacity, he reported directly to the board of directors. He last worked on August 12, 2011 when he was suspended with pay and was subsequently discharged on September 16, 2011. During a period of time between March 2010 and December of that year, the plaintiff arranged to have the credit union honor, and pay, over a million dollars in checks drawn on the credit union, even though there were insufficient funds in the member's business accounts to pay those amounts. Mr. Cicione described these checks as "overdrafts."

The employer in this case is a federally chartered and insured credit union. It is subject to supervision by the National Credit Union Administration (NCUA), and its operations must comply with the regulations promulgated by that agency. The credit union also has its own policies and guidelines relating to loans and processing of checks when there are insufficient funds to cover checks written by the account holder.

Section 723.8 of the Federal Regulations relating to federal credit unions, limits the amount one business may borrow. It states:

> Unless your Regional Director grants a waiver for a higher amount, the aggregate amount of net member business loan balances to any one member or group of associated members must not exceed the greater of:
>
> (a) 15% of the credit union's net worth or
>
> (b) $100,000.

The credit union's policy – Section 7215, captioned "OVERDRAFT PROTECTION (COURTESY PAY)", establishes a dollar limit and a repayment schedule. Section (4)(A) of the policy provides that "[t]he total dollar amount of all overdrafts the Credit Union will honor is not to exceed $100,000 (One Hundred Thousand Dollars), including fees at any given time." There is also a dollar limit on the amount of overdrafts permitted for a single member -- $3,000, and in some cases, $5,000, but another subsection states that these amounts may be exceeded in certain circumstances.

Section (5) of the policy statement sets out the procedure for repaying an overdraft:

> A member has 30 (thirty) calendar days (sic) from the day the advance was made, not to exceed 45 calendar days, to either deposit the funds or obtain an approved overdraft loan . . . from the Credit Union to cover each overdraft. If a member does not qualify for a loan under these policies and guidelines, the member may sign a promissory note to repay the overdraft at an interest rate not to exceed the maximum allowable rate . . . .

The business involved in writing the overdraft checks was a member of the credit union and plaintiff testified that it had three loans there. The first of these loans was made in July or August of 2009. One loan was secured by the borrower's accounts receivable. A second loan for a specific term was secured by the business's equipment, and the remaining loan was a $50,000 line of credit.

On July 9, 2010 Mr. Cicione wrote to the Regional Director of the National Credit Union Administration requesting a waiver to exceed the business loan limits set out in Section 723.8 of the Federal Regulations and allow it to loan up to 20% of the credit union's net worth to a single business. In a letter dated August 24, 2010, the regional director said that he was unwilling to grant the request. He explained that based on the most recent examination of the credit union he was concerned about the performance of the business loans already in place.

At a December 15, 2010 meeting of the credit union's Asset and Liability Committee (ALCO), the group focused on the financial condition of the business which had written the overdrafts. The plaintiff prepared detailed information showing for the period from April, 2010 through November, 2010, the money paid into its credit union accounts and the funds it received from the lender. This report documented that in April, the business wrote checks for $115,557.69 more than it paid into its accounts and had a negative

balance for that amount. In each of the eight months that followed, the business had a negative balance, with the "statement balance" for November showing a negative balance of $771,987.49. The page identifying the monthly transactions does not mention "overdrafts." A separate page which apparently was attached to the statistical report lists the accounts the business had with the credit union. This page showed that the PRIME SHARE account had a balance of $5.00; the OPERATING account had a balance of minus $389,194.02; the PAYROLL account had a balance of minus $382,793.13. In describing the loans extended to the business, six accounts are listed, with balances ranging from $4,935.68 to $424,472.25. The smallest balance was called "OVERDRAFT PROTECTION LOAN." It showed funds available as $64.32.[1]

The minutes of the December ALCO committee meeting prepared by plaintiff states, among other things, that the business in question had made deposits of "just over $1.7M" from April to November, and had "been granted outlays of just under $2.8M." The only indication that the committee discussed "overdrafts" is a reference that Dave Quinn, who is also a member of the board of directors, asked about the level of overdrafts "going forward," and inquired about what options were available. The committee agreed that the

[1] Mr. Cicione testified that the overdrafts were not secured loans.

plaintiff should continue to work with the business, and a plan would be fashioned to resolve the problem in the next quarter.

The person who was the Chairwoman of the Supervisory Committee, and a member of the board of directors, testified that in March of 2011, she received a call from a firm of outside auditors requesting that she come to their office. Once there, she learned that the credit union was overdrawn by $20,000,000 in its checking accounts. The Chairwoman of the Board of Directors of the credit union testified that in May, 2011, she learned for the first time that there were large overdrafts being made. Mr. Cicione was suspended in August while an additional investigation was being conducted, and his employment was terminated in September, 2011.

II. DISCUSSION

Before a person who has been fired can be deemed ineligible for unemployment benefits under §28-44-18, the employer must show that the worker was not merely unsatisfactory, but that his actions went beyond incompetence or isolated acts of negligence.[2] The Rhode Island Supreme Court in Turner v. Department of Labor and Training, Board of Review, 479A.2d 740, 741-742 (R.I. 1984) established the standard to be applied in

[2] The statute reads in relevant part:

> **§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 . . . benefits.

cases where a person was terminated from his job for "proved misconduct." There, the court, quoting a Wisconsin case, said that actionable 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 employees or in carelessness or negligence of such degree or recurrence as to manifest evil culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or the employee's duties and obligation to his employer. On the other hand mere . . . 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."[3]

The testimony and documents submitted to the referee at the hearing of this case clearly establish that the plaintiff acted in a manor that was contrary to the written policies of the credit union and inconsistent with the NCUA regulations. He admits that he allowed the overdrafts in question. While he may have done this with good intentions – to aid the growth of the credit union, his actions jeopardized the very existence of the employer. The chairwoman of the board of directors said that she was so concerned to learn

---

[3] It is significant that after the Turner decision, the statute was amended to include the following language:

> 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 the result of the employee's incompetence. Notwithstanding any other provision 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.

of the extraordinarily large overdrafts that she was afraid that the credit union might be taken over by the NCUA.

Mr. Cicione as President and CEO, had broad authority to act for the credit union. However, when his decisions resulted in extending over a million dollars in credit to a single business, he had an obligation to take reasonable steps to get the approval of the board of directors. Plaintiff contends that the board members knew or should have known what was being done. To support his argument, he relies heavily on a document he authored: the minutes of the December ALCO Committee meeting. Overdrafts are mentioned there, but at that point over one million dollars had already been provided through the overdrafts. The two board members who appeared as witnesses, insisted that they were unaware of the extensive overdrafts until an outside auditor raised the issue in March of the following year.[4] But even if the board learned of these unsecured loans in December, 2010 or at the monthly board meeting in January, 2011, he had already authorized hundreds of thousands of dollars in unsecured credit without notifying them or obtaining their approval.

When considering an appeal from an administrative tribunal, this court must defer to the hearing official on questions of fact and the weight to be

[4] A third board member – and a member of the ALCO Committee submitted an affidavit stating that he, too, did not learn of the overdrafts until sometime in 2011. However, the minutes of the December meeting use that term to describe a question that he asked.

given to fact witnesses. See §§28-44-54 and 42-35-15(g). It is clear that the hearing officer found the board members credible and did not believe that plaintiff met his obligation to consult with them before disregarding the credit unions written policies and committing large amounts of its funds to a single business.

III. CONCLUSION

After a careful review of the record in its entirety, the court is satisfied that there is substantial evidence to support the ruling of the board of review, and, therefore, its decision is affirmed.