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

Contessa L. Brown	:	
	:	
v.	:	**A.A. No. 13 - 118**
	:	
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 10th day of September, 2013.

By Order:

____/s/_____
Stephen C. Waluk
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. Contessa L. Brown 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 she was not entitled to receive employment security benefits based upon proved misconduct. 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 not supported by substantial evidence of record; 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: Ms. Contessa L. Brown worked for the Bank of America as a claim analyst for six and one-half years until she was terminated on February 28, 2013. She filed an application for unemployment immediately but on April 1, 2013, the Director determined her to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before a Referee on May 9, 2013. On May 13, 2013, the Referee held that Ms. Brown was disqualified from receiving benefits because she was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> Claimant worked as a claim analyst for Bank of America for 6.5 years, last on February 28, 2013. The claimant was discharged for violating the bank's policies and procedures involving accessing personal information about a customer from the bank's database for her personal use. The claimant testified that she made a dumb mistake and knew it was against the bank's policies and procedures. The claimant told her supervisor what she had done and was discharged the same day.

Decision of Referee, May 13, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee pronounced the following conclusions:

> * * *
> I find from the credible testimony and evidence presented that the claimant was terminated under disqualifying circumstances. Based on this conclusion, I find that the claimant is not entitled to Employment Security benefits under Section 28-44-18 of the above Act.

Decision of Referee, May 13, 2013 at 2.[1] The Claimant appealed and the matter was reviewed by the Board of Review. On July 8, 2013, a majority of the members of 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, July 8, 2013, at 1. The Member Representing Labor filed a dissenting opinion.

Finally, Ms. Brown filed a complaint for judicial review in the Sixth Division District Court on July 16, 2013.

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:

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[1] The generality of these conclusions requires me to note that Gen. Laws 1956 § 28-44-46 requires the Referee to make specific findings and conclusions. See also Gen. Laws 1956 § 42-35-12 and East Greenwich Yacht Club v. Coastal Resources Management Council, 118 R.I. 559, 568-69, 376 A.2d 682, 686-87 (1977).

> **28-44-18. Discharge for misconduct. —** … For benefit years beginning on or after July 12, 2012, 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 greater than or equal to his or her weekly benefit rate 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 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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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:

> * * * 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

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[2] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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

[4] Cahoone v. Board of Review of Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

> 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 of Review adopted the Referee's factual conclusion that Claimant committed proved misconduct by violating the firm's policy on personal use of the employer's computers. See Gen. Laws 1956 § 28-44-18. Accordingly, our first duty must be to examine the record to determine whether these allegations are supported in the record. We first note that the employer failed to appear for the hearing before the Referee. Indeed, the only witness was Claimant Brown.

The hearing proceeded with the Referee questioning Ms. Brown,[5] who

[5] Given my recommendation regarding the lack of merit in the misconduct allegation, I need not decide whether the Referee's questioning of the witness violated her rights to due process. See Davis v. Wood, 427 A.2d 332, 337 (R.I. 1981)("An administrative hearing officer is not required to assume a wholly passive

explained that she had been working at Bank of America since 2006 and was, at the end of her tenure, working as a claims analyst, dealing with merchants. Referee Hearing Transcript, at 5. She stated that she was discharged after she revealed (unilaterally) to her supervisor that she had accessed a customer's data file, which she described as a "dumb mistake." Id. To be precise, she accessed a customer's file to find out the customer's phone number so she could call him or her. Referee Hearing Transcript, at 6. This admission resulted in Ms. Brown being immediately terminated. Referee Hearing Transcript, at 7. She also conceded that she knew this was against company policy. Referee Hearing Transcript, at 8.

I believe the foregoing circumstances are insufficient to prove misconduct as it is defined in section 18. Firstly, while I concede that her actions were evidence of a severe lapse of judgment, I do not believe they were in "willful disregard" of the employer's interest. If they were, she would not have, sua sponte, informed her

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role and may participate in the proceeding whenever necessary to the end that the hearing proceed in an orderly, expeditious fashion. He is free to interrupt witnesses and should do so on those occasions when it is necessary to seek a clarification of the testimony. But a hearing officer must be impartial and must not attempt to establish proof to support the position of any party to the controversy. Once he does so, he becomes an advocate or participant, thus ceasing to function as an impartial trier of fact. Such a transgression gives rise to a lack of the fundamental fairness required by due process." (citations omitted)). Davis, 427 A.2d at 337. And see Gen. Laws 1956 § 28-44-44: "A reasonable opportunity for a fair hearing shall be promptly afforded to all interested parties …."

supervisor. Secondly, let us consider whether her actions were in violation of a uniformly enforced rule or policy of the bank. Since the bank sent no witness to the hearing, it never established that the policy regarding computer misuse was uniformly enforced. Thus, this second theory of misconduct was not satisfied. For these reasons, I must conclude that the Board of Review erred when, adopting the decision of the Referee, it found that disqualifying misconduct had been proven.

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 also clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(5).

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

/s/
Joseph P. Ippolito
Magistrate

September 10, 2013