**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**

**PROVIDENCE, Sc.** **DISTRICT COURT**
**SIXTH DIVISION**

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| **Floyd Black** | : | |
| | : | |
| **v.** | : | **A.A. No. 13 - 152** |
| | : | |
| **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 AFFIRMED.

Entered as an Order of this Court at Providence on this 5th day of November, 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.** Mr. Floyd Black 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 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 clearly erroneous; I therefore recommend that the decision

of the Board of Review be affirmed.

## FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Floyd Black worked for Janco Inc at one of its Burger King restaurants for twelve years until he was terminated on January 24, 2013. He filed an application for unemployment benefits but on April 4, 2013, 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 John Costigan on June 4, 2013. Claimant appeared at the hearing, as did a representative of the employer, Mr. Peter Gendreau. On June 5, 2013, the Referee held that Mr. Black 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:

> * * *
> The claimant had worked for the employer for twelve years. His last day of employment was January 24, 2013. He was discharged for voiding register sales and taking the money for his own use. The employer became aware of losses of product and using their surveillance camera system discovered the claimant's theft. The employer issued a complaint with the Providence Police Department and also confronted the claimant. The claimant admitted that he had

> taken the money. The claimant confirmed his admission to the employer.

Decision of Referee, June 5, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — the Referee pronounced the following conclusions:

> * * *
> The burden of proof in establishing misconduct rests solely with the employer. In this case that burden has been met. Testimony and evidence presented establishes that the claimant committed an act of misconduct in connection with the work when he voided sales and stole the funds from the employer. The claimant's actions were misconduct not in the employer's best interest and, as a result, he is not entitled to benefits.

Decision of Referee, June 5, 2013 at 2. The Claimant appealed and the matter was considered by the Board of Review. On July 25, 2013, the members of the Board unanimously held that the decision of the Referee was 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 25, 2013, at 1.

Finally, Mr. Black filed a pro-se complaint for judicial review in the Sixth Division District Court on September 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:

> **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.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on

[1] 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).

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:

> * * * 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, 246 A.2d 213 (1968).

[3] 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).

## 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 stealing from the cash register by means of an artifice — i.e., by voiding sales receipts (making it look as if customers had cancelled their sales, which they hadn't) and then removing the amount voided from the cash drawer. Without doubt, this may be viewed as embezzlement; as a result, such conduct must be viewed as misconduct per se. 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.

At the hearing before Referee Costigan the employer, Janco, was represented by Peter Gendreau, its District Manager. Referee Hearing Transcript, at 10 et seq. He testified that Mr. Black, who was a supervisor, had worked for Janco for twelve years, until he was terminated on January

24, 2013 because he had taken money from the registers. Referee Hearing Transcript, at 10-11. He explained that the company's curiosity was triggered because, over the course of a couple of months, its systems showed product was missing (specifically, buns and patties). Referee Hearing Transcript, at 12. As a result, the office did a video review of the restaurant. Id.

The video review showed Mr. Black voiding orders where the food was given to the customers. Referee Hearing Transcript, at 12. Although he never saw Mr. Black taking the money, the Claimant admitted he had done so when Mr. Gendreau questioned him. Referee Hearing Transcript, at 12, 17. Mr. Black said his conduct was caused by an emergency. Referee Hearing Transcript, at 12, 17.

Mr. Gendreau also pointed out that a void could only be done by a manager. Referee Hearing Transcript, at 16.

When Mr. Black testified he admitted to removing the money. Referee Hearing Transcript, at 22. He told the Referee that he was in dire financial straits to the extent that his electricity was going to be turned off. Referee Hearing Transcript, at 24-25. Mr. Black further related that he felt he had been ill-treated by the company, that he had done work for which

he had not been paid. Referee Hearing Transcript, at 27-28. Also, he had been dropped from salaried management to a part-time supervisor, with no diminution in duties. Referee Hearing Transcript, at 29-30.

Given the presence of the foregoing evidence on the record, there is simply no issue that Mr. Black committed misconduct. He admitted to it. An employee, even if he feels he has been ill-used, cannot take recourse by dipping into the till. There are other remedies and options that may be explored.

And so, I believe the foregoing circumstances are more than sufficient to prove misconduct as it is defined in section 18. For these reasons, I must conclude that the Board of Review did not err 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 not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is also not 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 AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

November 5, 2013