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

Michael Henderson	:	
	:	
v.	:	**A.A. No. 14 - 115**
	:	
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 REMANDED for further proceedings consistent with the attached opinion.

Entered as an Order of this Court at Providence on this 11th day of June, 2015.

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. Michael A. Henderson 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 insufficient in one or more particulars; I

must therefore recommend that the instant case be remanded to the Board of Review for further proceedings.

I
FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Michael Henderson worked for Monro Muffler for almost four years, finishing his tenure as a store manager. He was terminated on November 7, 2013 and filed a claim for unemployment benefits on November 20, 2013. A designee of 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.

Mr. Henderson filed an appeal and a hearing was held before Referee Nancy L. Howarth on June 4, 2014. On June 6, 2014, the Referee affirmed the Director's decision and held that Mr. Henderson was terminated for proved misconduct. In her written Decision, the Referee made the following Findings of Fact on the issue of misconduct:

> The claimant was employed as a store manager by the employer. On November 5, 2013, the claimant's supervisor was conducting an inspection of the claimant's store. There was a vehicle on a lift that had been taken apart. The claimant

> stated that the vehicle needed new brakes, including rotors and drums. The supervisor observed that there was no work order for this job in the computer. On the following day the supervisor returned to the store and discovered that the claimant had charged only approximately $320 for the brake-repairs. This job normally would have cost $1,100 to $1,200. The supervisor questioned the claimant. The claimant indicated that the customer had been unwilling to pay the cost of the job. The claimant then replaced the other parts at no cost, since the technician who performed the work was the uncle of the customer's fiance. The claimant was suspended on November 7, 2013, pending investigation. He was discharged on November 10, 2013 for providing unauthorized discounts to a customer.

Decision of Referee, June 6, 2014 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 the instant case, the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, June 6, 2014 at 2. The Claimant appealed and the matter was considered by the Board of Review. On July 18, 2014, the members of the Board of Review issued a unanimous 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.

Finally, Mr. Henderson filed a timely complaint for judicial review in the Sixth Division District Court on August 14, 2014.

II
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 on and after July 1, 2012 and prior to July 6, 2014, 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" previously pronounced in a decision of the Wisconsin Supreme Court —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.

III
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] Alternatively, 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

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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).

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

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

> 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.

IV
ANALYSIS

In a case such as this, where misconduct has been alleged, the District Court's role is to examine the record to see if it supports the findings made by the Board of Review. But this process can only work when the Board makes findings that are not vague or conclusory but specific. This practical necessity is recognized within the Employment Security Act in two sections — (1) § 28-44-52, in which the Board is required to issue a written decision that includes "findings and conclusions," and (2) § 28-44-46, which requires an appeal tribunal[4] to provide findings and conclusions.[5]

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[4] In Rhode Island, the appeal tribunal is a one-person hearing officer known as a "referee."

[5] The latter provision comes into play in the instant case because the

In this case I believe the conclusions made by the Referee in this case were both vague and incomplete. 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). The fatal flaw is that the Referee failed to address the Claimant's defense — which was that, as store manager, he had the authority to compromise the bill pursuant to Monro's "No One Walks" or "NOW" policy.[6] As a result, I believe the Court cannot proceed to fully adjudicate Mr. Henderson's appeal; instead, I shall recommend the instant case be remanded to the Board of Review for the making of more comprehensive conclusions.[7]

As stated above, ante at 3, the conclusion section of the Referee's decision mostly consists of quotations from § 28-44-18. Then, after

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Board of Review adopted the Referee's decision as its own. As a result, any infirmities present in the Referee's decision become its own.

[6] By this comment I do not mean to suggest that this explanation proffered by Claimant is credible — or not. These are questions entirely within the dominion and expertise of the Board of Review.

[7] Now, it is true that, in the "Findings" section of her decision, the Referee found that the Claimant was discharged "for providing unauthorized discounts to a customer." That's fine, it tells us why Monro fired Mr. Henderson. But it does not inform us whether the Referee believed he gave an unauthorized discount. And that is something that we (and Mr. Henderson) are entitled to know, in order

declaring that the employer has the burden to prove misconduct (which is quite true), she stated:

> * * *
> In the instant case, the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, June 6, 2014 at 2. These conclusions were entirely generalized, providing no insight into the instant case.

V
THE REPAYMENT ISSUE

Because I am recommending remand, I shall defer any consideration of the repayment issue until a later point in time. I do not believe the Referee's findings and conclusions on this issue carry the infirmities of vagueness or insufficiency.

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to properly perform our function.

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review was made upon unlawful procedure. Gen. Laws 1956 § 42-35-15(g)(5). Accordingly, I recommend that the decision of the Board of Review be REMANDED for the making of additional findings and conclusions.

/s/
Joseph P. Ippolito
Magistrate

June 11, 2015