

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.**

**DISTRICT COURT  
SIXTH DIVISION**

**Karen St. Jean** :  
 :  
v. : **A.A. No. 2015 - 003**  
 :  
**Department of Labor and Training,** :  
**Board of Review** :

**ORDER**

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 28th day of August, 2015.

By Order:

/s/  
Stephen C. Waluk  
Chief Clerk

Enter:

/s/  
Jeanne E. LaFazia  
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT  
COURT  
SIXTH DIVISION

Karen St. Jean :  
v. : A.A. No. 2015 – 003  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** Ms. Karen St. Jean 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 because she was terminated for 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 supported by the reliable, probative, and

substantial evidence of record and was not affected by error of law; I therefore recommend that the decision of the Board of Review be AFFIRMED.

## I

### FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Claimant St. Jean was employed for more than three years by the Dexter Credit Union as a teller at its Scituate branch. Her last day of work was October 2, 2014. She filed a claim for unemployment benefits but on October 22, 2014, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-18 — based on a finding of proved misconduct.

Ms. St. Jean filed an appeal and a hearing was held before Referee John R. Palangio on November 18, 2014. In a decision published the same day, the Referee held that Claimant was disqualified from receiving benefits because the credit union had proven misconduct. In that decision, Referee Palangio made findings of fact, which are quoted here in their entirety:

The claimant was a bank teller for Dexter Credit Union for three plus years last on October 2, 2014. On September 30, 2014, the claimant waited on an elderly female customer (Employer's Exhibit's 1-6). The customer came to the bank to

cash a one hundred dollar check from her account. The customer had a detailed list of dollar denominations she wished to receive. The claimant presented the customer with the money. The customer left two bills on the desk area where the transaction occurred. The customer then turned and walked out of the bank leaving two ten dollar bills on the desk. The claimant then took the two ten dollar bills from the desk (Employer's Exhibit's 1-6).

The customer called the claimant later that day to report she was short twenty dollars of the one hundred she received from the bank that day. The claimant's manager overheard this conversation and asked the claimant to count her drawer. The claimant's drawer balanced to the dollar.

As a result of this incident, the employer reviewed video of the transaction with the customer. The video's still photos (date and time stamped) from that video (Employer's Exhibit's 1-6), shows the customer leaving two bills on the desk area where the transaction occurred. The video's still photos further shows the claimant leaving that money on the table for twenty six seconds until the customer leaves the bank, then retrieving the money.

The employers called local police to report this incident of theft. The claimant was terminated for theft.

Decision of Referee, November 18, 2014 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case construing that law, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 742-42 (R.I. 1984) — the Referee pronounced the following conclusions:

\* \* \*

In cases of termination, the employer bears the burden to prove by preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in connection with her work.

The testimony of the claimant was that the customer deviated from the list of dollar denominations she wanted and asked for a twenty for two ten dollar bills. The claimant had no explanation as to why the customer called later that day stating she was given eighty dollars and not one hundred dollars.

The credible testimony of both the Branch Manager and the Chief Operating Officer (C.E.O.) was that as a result of the Manger overhearing a complaint, an investigation was performed regarding this transaction. The video's still photo from that transaction show that the customer reached for a pile of bills on the desk area, and leave two bills on the desk. The stills also show the claimant not picking those bills up until after the customer leaves the bank. Finally, the C.E.O. testified that he personally received a complaint from the customer. That caused him to review the video and subsequently to call law enforcement.

I find in this case that the employer has presented a preponderance of evidence showing the claimant had taken twenty dollars left by a customer. The employer showed in detail the events of that transaction in still photos. The key photos are Employers Exhibits 2, 3, 4 and 5, which show the customer leaving money on the desk, and showing the claimant waiting twenty six seconds for the customer to close her purse and leave the bank before taking the money off the table. In addition, the claimant had no explanation as to why of all customers, this particular customer would call the same day and inquire about twenty dollars she felt the claimant did not give her.

As a result of the credible testimony of the employer and the evidence presented by the employer, I find the claimant exhibited misconduct by taking twenty dollars left by a customer. Unemployment benefits are therefore denied under

section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, November 18, 2014 at 2-3. The Claimant appealed and the Board of Review considered the matter.

On December 19, 2014, the members of the Board of Review unanimously affirmed the decision of the Referee and held that misconduct had been proven. The Board found the decision of the Referee to be a proper adjudication of the facts and the law applicable thereto and adopted the Referee's decision as its own. Decision of Board of Review, December 19, 2014 at 1.

Ms. St. Jean filed a complaint for judicial review of the Board's decision in the Sixth Division District Court on January 14, 2015. A conference with counsel for Claimant and the Board of Review was conducted by the undersigned on April 22, 2015.

## **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 beginning on or after 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 earnings greater than or equal to eight (8) times 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.

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. Neubeck, 237 Wis. 249, 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.

Traditionally, only deliberate conduct that was in willful disregard of the employer’s interest could constitute misconduct under the Employment Security Act. See Gen. Laws 1956 § 28-44-18. However, a number of years ago the legislature amended § 28-44-18 to permit, in the alternative, a finding of misconduct to be based on the violation of a rule promulgated by the employer —

... “misconduct” is defined as ... 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. ...

Gen. Laws 1956 § 28-44-18 as amended by P.L. 1998, ch. 401, § 3. Note the elements of the new standard: (1) the rule must be violated knowingly, (2)



the rule must be reasonable, (3) the rule must be shown to be uniformly enforced, and (4) the employee must not have violated the rule through incompetence.

### 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.’”<sup>1</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>2</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>3</sup>

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

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<sup>1</sup> 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).

<sup>2</sup> Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>3</sup> Cahoone v. Board of Review of Department 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).

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

### A Factual Review

The hearing conducted by Referee Palangio began with the usual housekeeping matters, including — the administration of the oath to the witnesses (Referee Hearing Transcript, at 5) and the enumeration of exhibits that had been transmitted from the Department as part of the record (Id., at 6-9). These preliminaries done, the testimony began.

#### 1 Testimony of Mr. Angell

Mr. Stephen Angell, the Chief Executive Officer for Dexter, began his testimony by answering several “background” questions posed by the Referee. He confirmed that Ms. St. Jean had been employed by the Credit Union at its Scituate branch for over three years. Referee Hearing Transcript, at 9. She was terminated on October 2, 2014 by him (Mr. Angell) at a meeting at which Ms. Amanda Simpson and another colleague, Ms.

Barbara Medberry, were present — along with the Claimant. Referee Hearing Transcript, at 10-11. At that time, Mr. Angell told Claimant she was being terminated for theft of customer funds on September 30, 2014. Referee Hearing Transcript, at 11. At this juncture, the Referee ended his examination of Mr. Angell. Id.

In response to the first question asked by counsel for the employer, Mr. Angell gave a narrative of the incident and the credit union's response

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... My understanding as it had been brought to my attention by Ms. Simpson and Ms. Medberry contemporaneous with the theft was that Ms. St. Jean, um, stole from the actual counter of the Credit Union during the transaction with the customer, two bills, which I later learned were two \$10.00 bills from the customer, it was a \$100.00 transaction. I had asked Ms. Medberry and Ms. Simpson to conduct follow-up activities with respect to balancing the cash drawer, um, checking the ledger at the end of the day and things of that nature and also um to pull the security, the managers have access to the security tape, to review the security tape, and to put their thoughts today as well as to contact the customer to see what her recollection of the transaction was and to pull that information together for my review. All of that information was pulled together for my review and I actually then physically reviewed the digital tape, if you will, of the transaction from which we produced still image.

Referee Hearing Transcript, at 12-13.

Counsel then asked Mr. Angell to tell the Referee what the security video of the transaction showed. Referee Hearing Transcript, at 13. He stated that it showed an elderly woman entering the branch with a check drawn on her account for \$100.00; she also had a list of denominations that she wanted in return. Referee Hearing Transcript, at 14. Ms. St. Jean received the bills from the machine which dispenses it (called a cash recycler) and presented most of them to the customer; two bills were held off to the side. Referee Hearing Transcript, at 14-15.

Counsel then introduced a series of still photographs taken from the video. See Employer's Exhibits 1-6, admitted Referee Hearing Transcript, at 15-21. Mr. Angell then testified that that the Scituate Police were called and responded; they made a report. Referee Hearing Transcript, at 23-24.

Mr. Angell then told the Referee that he met with Ms. St. Jean and told her that they believed she had stolen from a customer — namely, Ms. Carlone. Referee Hearing Transcript, at 24-25. Claimant then became agitated and was told to leave; they then decided, based on the evidence they had developed, to terminate her. Referee Hearing Transcript, at 25.<sup>4</sup> A letter

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<sup>4</sup> At his point he identified Dexter's employee code of conduct, and a separate document enumerating policies and procedures for tellers, which Claimant had signed acknowledging receipt, and which contained various

was sent to Ms. St. Jean informing her of that decision. Referee Hearing Transcript, at 31-32.

At the conclusion of his testimony, Mr. Angell told the Referee that when Claimant was directed to leave the premises, she went to her teller station. Referee Hearing Transcript, at 32. She not only retrieved her pocket book, but from the second drawer she retrieved what appeared to be a ladies' wallet. Id.

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**Testimony of Ms. Amanda Simpson**

The next witness for the employer was the Branch Manager of the Credit Union at its Scituate location — Ms. Amanda Simpson. Referee Hearing Transcript, at 33 et seq.

After she identified herself, Ms. Simpson's attention was immediately drawn to the incident in question. She stated that she saw Ms. Carlone enter the bank and be waited on by a teller. Referee Hearing Transcript, at 33. She then heard a phone call; she saw that Ms. St. Jean was on the phone. Id. When she inquired what was going on, Claimant told her that Ms. Carlone

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pertinent provisions. Referee Hearing Transcript, at 26-30. However, I join with the Referee in affirming that — "... you don't need a policy to say not to steal." Referee Hearing Transcript, at 26.

called to say that she was missing two bills. Referee Hearing Transcript, at 34. Ms. St. Jean told Ms. Simpson that she informed Ms. Carlone that she didn't have anything. Id. As it happened, Ms. Simpson had heard Claimant tell Ms. Carlone that she did not leave any money. Id.

Ms. Simpson then told Ms. St. Jean to count her drawer to see if it balanced. Referee Hearing Transcript, at 35. Ms. St. Jean did so and reported that her drawer balanced. Id. The next day Ms. Simpson viewed the video of the transaction, and saw that when Ms. Carlone "scooped" the bills she left two behind. Id. After the customer left, Ms. St. Jean picked up the bills. Id.<sup>5</sup>

In response to a question from Referee Palangio, Ms. Simpson indicated that there was no indication on the video — which was very clear — that Ms. St. Jean ever called out to Ms. Carlone. Referee Hearing Transcript, at 35. Ms. Simpson then testified that if a credit union member left cash behind, she would expect that the teller would try to get the customer's attention before the customer left the branch; and, failing that, the teller should report the incident to her. Referee Hearing Transcript, at 37. Ms. Simpson added that this policy was well-known by the tellers. Id.

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<sup>5</sup> It may be worth mentioning that the testimony recited in this paragraph came as Ms. Simpson read from a report she had prepared on the incident. Referee Hearing Transcript, at 34-35. It was marked as

Finally, Ms. Simpson confirmed several points for the Referee — first, that she heard Ms. St. Jean’s telephone conversation with Ms. Carlone; second, that she was present when Ms. St. Jean balanced her drawer; and third, that the drawer had balanced with the cash recycler. Referee Hearing Transcript, at 38-39.

Ms. St. Jean then exercised her right to pose a question to Ms. Simpson, namely —

Did Ms. Carlone, when you talked to her on the phone, ever state to you that she had asked for a twenty dollar bill instead of the two tens and that is why the two tens were sitting on the counter?

Referee Hearing Transcript, at 40. Ms. Simpson responded in the negative. Referee Hearing Transcript, at 41.

Later, after Ms. St. Jean’s testimony concluded, Referee Palangio propounded a few more questions to Ms. Simpson. Referee Hearing Transcript, at 50 et seq. The first concerned Ms. St. Jean’s telephone conversation with Ms. Carlone. Ms. Simpson quoted Claimant as telling her that Ms. Carlone had said that she was missing two ten-dollar bills — to which Ms. St. Jean responded that she told Ms. Carlone that she did not have any extra bills. Referee Hearing Transcript, at 50. Ms. St. Jean did not

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Employer’s Exhibit No. 9.



tell (or “remind”) Ms. Carlone that she had traded the two tens for a twenty. Id. Moreover, she did not tell that to Ms. Simpson.

### 3

#### **Testimony of Claimant St. Jean**

Next, the Claimant, Ms. Karen St. Jean testified. Referee Hearing Transcript, at 42 et seq. At the outset of her testimony, Referee Palangio attempted to clarify whether, when he met with her, Mr. Angell told her the reason why she was being terminated. Referee Hearing Transcript, at 42-43. According to the Department’s interviewer, Claimant said he had not. Referee Hearing Transcript, at 42. But, in her testimony, Ms. St. Jean conceded to the Referee that Mr. Angell had told her why she was fired — but he had not told her who (the victim was). Referee Hearing Transcript, at 43-44.

The Referee then showed Claimant the three photographs labeled Employer’s 1, 2, and 3, which showed the transaction with Ms. Carlone, step-by-step. Referee Hearing Transcript, at 44-45. He asked Ms. St. Jean what had happened to the two bills. Referee Hearing Transcript, at 45. She responded that she had put the two tens in the drawer. Id. She explained that Ms. Carlone had said she needed a twenty instead of the two tens.

Referee Hearing Transcript, at 46. She added that, after Ms. Carlone called her, she looked around her station and on the floor and even in the lobby. Id. After which, she counted her drawer. Id. In sum, Ms. St. Jean testified that she gave Ms. Carlone \$100.00. Referee Hearing Transcript, at 47.

In response to a question from Employer's counsel, Ms. St. Jean agreed that the bills she (ultimately) gave Ms. Carlone were at odds with the contents of the list the customer came in with. Referee Hearing Transcript, at 49. Again, this was due to the customer's desire to exchange two tens for a twenty. Id.

Finally, at the end of her testimony, Ms. St. Jean indicated that the item that she pulled out of her second drawer (when she was leaving) was her checkbook. Referee Hearing Transcript, at 54.

## **B**

### **Rationale**

The issue before the Court is factual and straightforward — Was the decision of the Board of Review which disqualified Claimant from receiving unemployment benefits (due to theft) clearly erroneous in light of the reliable, probative, and substantial evidence of record? Based on the facts outlined above, I believe the answer to this question must be no. As a result,

I must therefore recommend that the decision issued by the Board in this matter be affirmed.

We know two crucial facts in this case — (1) when Ms. Carlone left Ms. St. Jean's teller station there were two bills left on the counter, which Ms. St. Jean later picked up; and (2) Ms. St. Jean's drawer balanced. And, as it happens, two scenarios have been advanced that fit these facts. The Credit Union asserts that Ms. St. Jean took the two bills into her personal possession. Ms. St. Jean argues that somewhere in mid-transaction Ms. Carlone decided she wanted a twenty in lieu of the two tens.

The Board, embracing the decision of Referee Palangio, credited Dexter Credit Union's theory of the case. The conclusion that Claimant committed theft was supported by the testimony of the two employer witnesses, as to what they saw and heard, as to what Ms. Carlone told them, and what they saw on the video. Ms. Carlone's statements could also be drawn from the report of the Scituate Police. All this material was competent evidence upon which the Board of Review had every right to rely.

One seemingly minor point that I found highly probative was Ms. Simpson's testimony — unchallenged by Ms. St. Jean — that when Ms.

Carlone called to inquire about the two ten-dollar bills, Claimant did not respond by reminding her that she had traded the two tens for a twenty. This is most curious. The incident had just recently happened. Her memory should have been clear about that fact.

Of course, none of the foregoing means that the testimony of Claimant St. Jean was patently incredible. As recited ante at 8-10, the decision of the Board of Review 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. Applying this standard of review and the definition of misconduct enumerated in § 28-44-18, I must conclude that the Board's adopted finding — that Dexter Credit Union proved that Ms. St. Jean was discharged for conversion of customer funds — is not clearly erroneous in light of the reliable, probative and substantial evidence of record.

V  
**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). Furthermore, it is 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.

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/s/  
Joseph P. Ippolito  
Magistrate  
August 28, 2015

