

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

**DISTRICT COURT
SIXTH DIVISION**

Marina Giron

:

v.

:

A.A. No. 15 - 064

:

**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 17th day of March, 2016.

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

Marina T. Giron :
 :
v. : A.A. No. 2015 – 064
 :
Department of Labor and Training, :
Board of Review :

FINDINGS & RECOMMENDATIONS

Ippolito, M. Ms. Marina Giron 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 her former employer proved that she was fired for 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 nor affected by error of law; I therefore recommend that the decision of the Board of Review be AFFIRMED.

I

TRAVEL OF THE CASE

The travel of the case is this: Ms. Marina Giron worked for Belmont Marketplace Inc., until January 6, 2015. She filed a claim for unemployment benefits but on March 30, 2015, a designee of the Director of the Department of Labor and Training 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 appeal¹ and a hearing was scheduled for May 11, 2015 before Referee William Enos. Claimant appeared, accompanied by counsel and a witness. Two representatives of the employer also appeared. The next day, the Referee held that Ms. Giron was disqualified from receiving benefits because she had been fired for misconduct. In his written Decision, the Referee made findings of fact on the issue of misconduct, the core of which is presented here —

¹ Claimant's appeal was filed late; however, the Referee allowed the late appeal. Since the employer did not file a cross-appeal, the Board of Review did not comment on the issue. Consequently, neither shall I.

... The employer terminated the claimant for tampering with the time clock on January 6, 2015 and stealing time. The employer argued that the claimant had a coworker punch in for her while she stopped for coffee. The employer had the time clock on surveillance video but did not produce the evidence. The claimant argued that she did not have anyone punch in for her on January 6, 2015. ...

Decision of Referee, May 12, 2015 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:

...
Although I heard conflicting testimony, I find from the first hand testimony of the claimant and the lack of evidence from the employer that misconduct was not proven. Based on this conclusion, I find the claimant is entitled to Employment Security benefits under Section 28-44-18 of the above Act.

Decision of Referee, May 12, 2013 at 2-3. From this decision the employer appealed.

On June 19, 2015, a majority² of the members of the Board of Review, acting on the basis of the record made by the Referee, reversed the decision of the Referee — and found that misconduct had been proven.

² The Member Representing Labor filed a brief dissenting opinion. Decision of Board of Review, at 2.

The Board of Review made its own Findings of Fact —

The claimant was employed as a Produce Packer. On January 6, 2015, the claimant's time card showed that she was checked into work at 4:22 am. The employer's wholesale manager observed the claimant and two co-workers report to work. The two co-workers punched in at the time clock. The claimant did not punch in. The time cards showed that the claimant punched in at 4:22 am. The co-workers punched in at 4:49 am. The employer has a policy that every worker reporting for work is to punch in at the time clock. The claimant was aware of the policy. The employer terminated the claimant for violating the policy.

Decision of Board of Review, June 19, 2015 at 1. Based on these facts — and after quoting from Gen. Laws 1956 § 28-44-18 — the Board pronounced the following conclusions:

...

The burden is on the employer to prove misconduct by a preponderance of the evidence.

The employer established that the claimant did not arrive at the work place until 4:49 am. However, her time card showed that she checked in at 4:22 am. The credible evidence leads to the reasonable conclusion that the claimant had arranged for another co-worker to punch in. The claimant's actions are intentional and in willful disregard of the employer's interest. Her actions also violate a reasonable and uniformly enforced rule of the employer. After consideration of the entire record, the employer's evidence is sufficient to prove misconduct.

Decision of Board of Review, June 19, 2015 at 2. Finally, Ms. Giron filed a complaint for judicial review in the Sixth Division District Court on July 1, 2015.

II APPLICABLE LAW

Under § 28-44-18 of the Rhode Island Employment Security Act, “an employee discharged for proven misconduct is not eligible for unemployment benefits if the employer terminated the employee for disqualifying circumstances connected with his or her work.”³ 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. ... 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.

³ Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

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, 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.⁴

⁴ Foster-Glocester Regional School Committee, ante, 854 A.2d at 1018.

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.’”⁵ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on

⁵ Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) quoting Gen. Laws 1956 § 42-35-15(g)(5).

questions of fact.⁶ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁷

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.

⁶ Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

⁷ Cahoone, 104 R.I. at 506, 246 A.2d at 215. Also, D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV ANALYSIS

The instant case has proceeded up the three steps of the administrative process that is jointly maintained by the Department of Labor and Training and its Board of Review. At each level — the Director, the Referee, and finally, the Board of Review — the fact-finder has been required to decide whether the Employer’s evidence was persuasive. However, in this action for judicial review, our role is not to select the administrative decision which we find most perceptive or astute, but solely to examine the decision of the Board of Review to determine whether it is clearly erroneous in light of the facts of record. Of course, before we can opine on this question, we must determine what those facts are.

A Evidence of Record 1 Testimony of Ryan Flanagan

After Mr. Thomas Lake, Belmont’s Human Resources Manager, explained that Ms. Giron was fired because she and another employee were found to have “tampered” with the time clock, Referee Enos asked Mr. Ryan Flanagan, its Produce Manager, to explain what was discovered. Referee Hearing Transcript, at 12-13.

Mr. Flanagan told the Referee that he came in early on the morning in question, January 6, 2015. Referee Hearing Transcript, at 13, 18. One employee — whom he subsequently identified in Rosa Giron, Claimant’s cousin — was already there. Referee Hearing Transcript, at 13, 19, 30. He saw her at the time clock, appearing to be punching in. Referee Hearing Transcript, at 14. And so, Mr. Flanagan spoke to Ms. Giron,⁸ to find out why she was there so early, as her shift started at 5:00 am. Referee Hearing Transcript, at 13. Rosa said she came in early because she had an appointment at noon. Id. Mr. Flanagan told her that she could not change her schedule without his approval. Id. Later that morning, while the events leading to Claimant’s termination were unfolding, he checked Rosa’s time sheet, and found that Rosa had clocked in at 3:33 am. Referee Hearing Transcript, at 19.

At about 5:00 am, three more employees came in; but, the Wholesale Manager told Mr. Flanagan that only two (of the three) had punched-in. Referee Hearing Transcript, at 13.⁹ Mr. Flanagan then looked at the time

⁸ Henceforth, I shall refer to this lady simply as “Rosa,” to avoid confusion with Claimant. Of course, by doing so, I intend no disrespect.

⁹ This observer was only described as “someone” in Mr. Flanagan’s testimony; but, within the exhibits the employer submitted, he is identified to be the “Wholesale Manager.” See Memorandum from Mr.

sheets; and according to the time sheet, Claimant Marina Giron had punched-in before she was there. Id.¹⁰

Consequently, Mr. Flanagan spoke to Ms. Giron, and she admitted that Rosa had punched her in. Referee Hearing Transcript, at 14. As I noted ante, Mr. Flanagan thought he had seen Rosa punch-in; but it turned out that, in reality, he had seen her punching-in Claimant's sheet. Referee Hearing Transcript, at 14.

On cross-examination by Claimant's counsel, Mr. Flanagan conceded that he did not see Claimant and the other two workers (identified as Rosa Albina and Miley) arrive together. Referee Hearing Transcript, at 15-16. And although security cameras monitor the time clock area, Mr. Flanagan advised the Referee that the recording had not been saved. Referee Hearing Transcript, at 17. He also conceded that he never viewed the tape. Referee

Ryan Flanagan to Ms. Ellen Rego of DLT, March 26, 2015, on page 10 of Employer's Exhibit No. 1, and page 70 of Electronic Record attached to the instant case. See also E-mail Memorandum from Mr. Tom Lake to Ms. Ellen Rego of DLT, March 26, 2015, on page 7 of Employer's Exhibit No. 1, and page 67 of Electronic Record attached to the instant case.

¹⁰ In a memorandum Mr. Flanagan prepared for the DLT he concisely set out the timeline of the comings and goings at the Belmont on the morning of January 6, 2015. He got to work at 4:00 am; Ms. Rosa Giron was already there; Claimant arrived at work just before 5:00 am, with two co-workers, who were punched-in at 4:49 am. See Flanagan Memorandum, described ante n. 9, in Employer's Exhibit No. 1.

Hearing Transcript, at 17, 23. He thought doing so was unnecessary, since Claimant admitted what she had done. Referee Hearing Transcript, at 18. Mr. Flanagan concluded that Rosa, who came in at 3:33 am, had punched Claimant in an hour later, at 4:22. Referee Hearing Transcript, at 19-20. And, although Claimant was scheduled to start her shift at 5:00 p.m. each day, Mr. Flanagan had to admit, after viewing the time sheets for Claimant, that she had been regularly coming in at 4:30. Referee Hearing Transcript, at 21-22.

2

Testimony of Claimant Giron

Next, Claimant Giron began her testimony by indicating she was employed by Belmont as a produce packer. Referee Hearing Transcript, at 25. She testified that, when she started at the store, she worked from 6:00 am until 2:00 pm. Referee Hearing Transcript, at 26. She said that, when Mr. Flanagan became her boss, he told his employees they could start when they wanted and leave when they wanted. Id. His focus was on getting the work done. Id.

Turning to the events of January 6, 2015, she said she went to work by car; moreover, no one car-pooled with her that day. Referee Hearing Transcript, at 27. Claimant said she entered the store at the front, and

clocked-in on the front timeclock. Id. She said she clocked-in at 4:22. Referee Hearing Transcript, at 27-28. She left her lunch in the kitchen and went to work in the packing room. Referee Hearing Transcript, at 29.

Ms. Giron said she became aware that she was being accused of having someone else punch her in by Mr. Flanagan at around 11:00 am. Referee Hearing Transcript, at 29. He told her she was fired. Referee Hearing Transcript, at 30. So she went to see Mr. Siravo, the store's owner. Referee Hearing Transcript, at 30. He told her she could come back in two weeks. Referee Hearing Transcript, at 31.

Mr. Lake asked Claimant whether they had a meeting, after she spoke to Mr. Siravo, during which she admitted she had someone else punch her in. Referee Hearing Transcript, at 36. She denied it. Id. Ms. Giron also denied saying it was unfair for her to be terminated over ten minutes. Id.

3

Testimony of Claimant's Husband

Claimant Giron's husband, Mr. Santiago (whose first-name was not given in the transcript) also testified. Referee Hearing Transcript, at 33. He said that he tried to call the store to get an explanation. Id. he said that, on the 13th, Mr. Lake called him back. Id. Mr. Lake said she could file for unemployment benefits. Referee Hearing Transcript, at 14. Mr. Santiago

said that, when she applied for benefits, they selected “lack of work” because she had not yet been terminated. Referee Hearing Transcript, at 35.

B

Positions of the Parties

1

Appellant’s Position

At the opening of her October 26, 2015 Memorandum of Law, Appellant Giron presents three points of argument; they are —

1. There is no support in the record evidence for the Board’s factual finding that the Employer’s wholesale manager observed the Claimant reporting to work at 4:22 am.
2. Even if there were evidence in the record of the wholesale manager’s observations relative to the claimant’s arrival time, then reversal would remain warranted on due process grounds as the claimant was not afforded an opportunity to confront her accuser. The wholesale manager was not a witness at the hearing. Nor did the employer submit a written statement from the wholesale manager.
3. The Hearing Officer premised his decision on a credibility determination. The Board’s, none of whose members had an opportunity to assess the witnesses first hand, reversal of that determination without explanation is improper.

Appellant’s Memorandum of Law, at 1. Later in her memorandum, Appellant expounds upon each of these points.

a

**Appellant's First Argument —
The Board of Review's Findings Have No Support in the Record**

Under this heading Ms. Giron urges that the Board of Review's finding — that she did not arrive at work until 4:49 am — is without support in the record. Appellant's Memorandum of Law, at 6.

She begins by quoting the following portion of Board's findings —

The employer's wholesale manager observed the claimant and two co-workers report to work. The two co-workers punched in at the time clock. The claimant did not punch in.

Appellant's Memorandum of Law, at 6 (quoting from Decision of Board of Review, at 1). And then the following sentence of the Board's Conclusion:

The employer established that the claimant did not arrive at work until 4:49 am.

Appellant's Memorandum of Law, at 6 (quoting from Decision of Board of Review, at 2).¹¹ Appellant Giron then asserts that these statements are unsupported because the store's wholesale manager — who allegedly saw the three ladies enter — did not testify; instead, his observations came in

¹¹ Appellant actually misquotes the Board, inserting a 4:22 arrival time in lieu of the 4:49 am arrival time that the Board found. I have no doubt this error was unintentional, coming, as it does, within a splendid memorandum, distinguished by its structure and clarity.

exclusively through hearsay — through Mr. Flanagan in a written statement and his testimony, and through an e-mail written by Mr. Lake. Appellant’s Memorandum of Law, at 6-8. And Ms. Giron argues that even if these statements are credited, they only prove that Claimant passed by the time clock “in proximity” to two other workers who punched-in — and not that she was arriving at that time. Appellant’s Memorandum of Law, at 8-9.

b

**Appellant’s Second Argument —
The Board’s Reliance on Hearsay Violates Due Process of Law**

In support of her second argument — that the Board of Review’s reliance on hearsay statements as the sole foundation of its finding of misconduct violates due process of law — Appellant cites a case decided by the United States Supreme Court, Greene v. McElroy, 360 U.S. 474, 496 (1959), a case decided by this Court, Abbruzzese v. Department of Labor and Training, Board of Review, A.A. No. 12-125 (Dist.Ct. 10/10/12) and several sister state cases. Appellant’s Memorandum of Law, at 9-11. Factually, she urges that there is no proof that the wholesale manager ever made a statement to anyone. Appellant’s Memorandum of Law, at 11. And if he (or she) did, it constituted hearsay upon hearsay or totem-pole hearsay. Id.

**Appellant’s Third Argument —
The Board’s Reversal of the Referee’s Findings Warrants Reversal**

Appellant begins her third argument by noting that the case essentially involved a credibility determination. Appellant’s Memorandum of Law, at 12. She then urges that, while the Board is not bound to accept the findings of the referees they employ, its freedom to do so is not “unfettered.” Appellant’s Memorandum of Law, at 13. According to Appellant, if the Board of Review rejects a referee’s findings, they must explain why it did so. Id. And, she alleges, the Board did not do so in this case. Id.

Appellee’s Position

The Board of Review’s Memorandum is briefer and less structured than that of Claimant Giron. In its opening section, the Board asserts that its decision in Ms. Giron’s case was not dependent on inadmissible hearsay; to the contrary, it urges that its decision can be sustained solely on the basis of Claimant’s statements, which are deemed to be non-hearsay under Rule 801(d)(2)(A) of the Rhode Island Rules of Evidence. Appellee’s Memorandum of Law, at 1-2.

Later, in the “Argument” section of its Memorandum, the Board points out that it is authorized to consider hearsay testimony. Appellee’s Memorandum of Law, at 4, citing Foster-Glocester Regional School Committee, ante at 5 n. 3, 854 A.2d at 1017-22 and Gen. Laws 1956 § 28-44-44. The Board also reiterated its opening argument — that Ms. Giron’s admissions were non-hearsay. Appellee’s Memorandum of Law, at 4 citing RI Rule of Evidence 801(d)(2)(A).

At the close of its Memorandum, the Board (as Appellee) also argues a point not noted in its decision (or that of the Referee) — that Mr. Flanagan testified that he saw Rosa punching the time clock at 4:22. Appellee’s Memorandum of Law, at 4-5 citing Referee Hearing Transcript, at 19, 31. As stated ante, he learned that Rosa had punched herself in at 3:33. Appellee’s Memorandum of Law, at 5 citing Referee Hearing Transcript, at 20. The Board argues that this evidence, together with Claimant’s admission that Rosa punched her in, was sufficient to prove that Claimant had committed misconduct. Appellee’s Memorandum of Law, at 5.

C
Discussion

To give each of Appellant’s and Appellee’s arguments due consideration, we shall address them seriatim.

1

Appellant’s Hearsay Argument

We begin with Appellant’s first argument — that Belmont failed to prove that she falsified her time-clock arrival time (4:22 am) — because it never proved that she did not arrive until 4:49 am, based upon its failure to present the testimony of its “Wholesale Manager” (who purportedly saw her arrive at this later time). Of course, Appellant concedes that the wholesale manager’s observation was entered into the record through the testimony of Mr. Flanagan and a statement he sent to DLT, which was entered into the record as part of Employer’s Exhibit No. 1. But, Appellant urges, this evidence was insufficient, because the surrounding circumstances of the Wholesale Manager’s observations were not provided.

Appellant argues that Mr. Flanagan’s invocation of the Wholesale Manager’s statement to him was vague; in particular, he was quoted as saying that he saw Claimant (and two other employees) pass the timeclock, and not that he saw them arrive (on the grounds through whatever means

of conveyance brought them there). And so, according to Claimant, his statements (as presented to the Referee by Mr. Flanagan) do not disprove that Appellant arrived at 4:22 am.

I disagree. Drawing from Mr. Flanagan's testimony, and his memorandum to DLT (and the hearsay statements included within each), the Board was within its authority to draw the inference (albeit the permissive inference) that Ms. Giron arrived at about ten minutes before 5 am. Mr. Flanagan had been there since 4:00 am. Ms. Giron was part of his team. If, as she claimed, she had been at work since 4:22 am, how had Mr. Flanagan not seen her? If she was there, she obviously had spent her time in a way that did not deserve compensation, and was guilty of another type of misconduct.

2

Appellant's Due Process Argument

I must also reject Appellant's second argument. Mr. Flanagan was at the center of the incident, a witness to all but one of its components. He had seen Rosa punch the time clock at 4:22 (although he did not know the import of that observation when he made it). And he heard Appellant's admission personally. So, Belmont's proof of misconduct was not solely based on hearsay — and Appellant's citations are inapposite.

Moreover, to whatever extent Appellant's disqualification may have been based on hearsay testimony, it was undoubtedly properly admitted. While hearings conducted by the Board of Review are exempted from the evidentiary parameters expounded in the Rhode Island Administrative Procedures Act, Gen. Laws 1956 § 42-35-10, our Supreme Court stated, in Foster-Glocester Regional School Committee, ante, 854 A. 2d at 1018-19, that it provides "evidentiary guidelines" for use in Board hearings. Let us examine the pertinent provisions —

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.

(Emphasis added). And so, even those administrative adjudicators whose hearings are bound by the rules of evidence may admit evidence contrary to the rules, when necessary, so long as it is of the type "commonly relied upon by reasonably prudent men and women in the conduct of their affairs." Does a statement from one store manager to another about the comings and goings of an employee meet this test? Without doubt.

Appellant's Argument Regarding the Authority of the Board

Under this heading, Appellant argues that the Board of Review erred when it did not explain why it rejected the credibility findings of the Referee. Quite simply, it had no such duty. The Board's review is not limited to an analysis of the rectitude, vel non, of the Referee's decision; unless the Board adopts the Referee's decision as its own, the Board makes its own findings of fact and applies the law to those facts. Its independence is stated in Gen. Laws 1956 § 28-44-47:

Any party in interest, including the director, shall be allowed an appeal to the board of review from the decision of an appeal tribunal. The board of review on its own motion may initiate a review of a decision or determination of an appeal tribunal within fifteen (15) days after the date of the decision. The board of review may affirm, modify, or reverse the findings or conclusions of the appeal tribunal solely on the basis of evidence previously submitted or upon the basis of any additional evidence that it may direct to be taken.

(Emphasis added). The decision of the Referee was entitled to no deference from the Board. In the instant case, the Board's findings met the standards of the Administrative Procedures Act and § 28-44-47 regarding the explanation of its decision and findings.

The Board's Argument — The Employer's Proof Was Sufficient

When evaluating a case under § 18 regarding an allegation of misconduct, we must always inquire regarding (at least) two issues. First, was the allegation sufficient to justify disqualification? And second, was the allegation proven? In my opinion, both prongs of the misconduct test have been satisfied in Ms. Giron's case.

Firstly, the allegation — that Claimant tampered with her timecard readings — was sufficient under § 18. An allegation as to misconduct regarding falsifying a time card is generally always sufficient because it involves payment for time not worked. This is certainly true here.

Secondly, in my view, the employer's proof was not tenuous, as Appellant would have us believe, but ample. Let us set forth a timeline of the incident:

1. 3:33 am Ms. Giron's cousin Rosa punches in to work.
2. 4:00 am Mr. Flanagan arrives at work.
3. 4:22 am Marina Giron's time card reflects this arrival time. Mr. Flanagan sees Rosa Giron using the time clock in this time-frame.
4. 4:49 am The Wholesale Manager sees Marina Giron and two others pass the time-clock; Marina Giron does not use the time clock.

None of the foregoing is contested.¹² And to this we may add one additional fact: that Marina Giron and Mr. Flanagan did not see each other from 4:00 to 4:22 am. From the foregoing elements, drawing completely sensible inferences, a rational fact-finder could reasonably conclude that Appellant was punched-in early by her cousin. On this rationale, the Board's finding of misconduct must be affirmed.

But there is an additional piece of evidence presented by the employer that we have not yet mentioned — Appellant's admission. Appellant admitted Rosa had punched her in. If credited, her statements, taken alone, are sufficient to support a finding of misconduct.¹³ Taken together with the other elements of the timetable, the employer's proof must be deemed overwhelming. And so, I must recommend that the Board of Review's disqualification of Ms. Giron from the receipt of unemployment benefits, pursuant to Gen. Laws 1956 § 28-44-18, be affirmed.

¹² Appellant only contested Mr. Flanagan's statement that the Wholesale Manager saw the three arrive together, which is really not needed to affirm the Board's decision in the instant case.

¹³ There is no corpus delicti rule in administrative matters, as there is in criminal cases. Cf. State v. Halstead, 414 A.2d 1138, 1143-44 (RI 1980).

V
CONCLUSION

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws 1956 § 42-35-15(g), ante at 7 and Guarino, ante at 7, n. 5. In other words, the role of this Court is not to choose which version of events — the employer’s or the claimant’s — is more credible; instead, it is merely to determine whether the Board of Review’s decision, in light of the evidence of record, is clearly erroneous. And, for the reasons stated above, I believe the Board of Review’s decision is not clearly erroneous in view of the reliable, probative, and substantial evidence of 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
March 17, 2016

