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

Helia Collins	:	
	:	
v.	:	**A.A. No. 11 - 137**
	:	
Department of Labor & 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 on this 22nd day of June, 2012.

By Order:

/s/
Melvin Enright
Acting 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. Helia Collins 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. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. 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 was affected by error of law and was not supported by substantial evidence of record; accordingly, I recommend that it be reversed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Helia Collins was employed as a manager for Advance America, a loan company, for twenty-two months. Her last day of work was April 11, 2011. She applied for employment security benefits and on May 12, 2011 the Director issued a decision holding that she was eligible to receive benefits because she had been terminated for reasons other than proved misconduct within the meaning of Gen. Laws 1956 § 28-44-18.

The employer filed an appeal, but it was not received by the Board of Review (for assignment to a Referee) until June 6, 2011 — after the applicable appeal period had expired. A hearing was held by Referee Stanley Tkaczyk on July 27, 2011 at which the claimant, two employer representatives and an employer agent appeared and testified. See Referee Hearing Transcript, at 1. Testimony was taken on two issues — (1) the apparent lateness of the employer's appeal from the decision of the Director; and (2) the misconduct which the employer alleged the claimant had committed.

In his August 16, 2011 Decision, the Referee made the following findings of fact on the late-appeal issue:

> On May 12, 2011 the Director issued the decision to all interested parties. The employer's agent transmitted the appeal on May 26, 2011. The appeal was entered into the postal service on that date. The fifteenth day of the appeal time period expired on May 27, 2011. For reasons

> unknown the Department did not receive the appeal until June 6, 2011 and considered it untimely.

Decision of Referee, August 16, 2011 at 1. He made further findings on the misconduct issue:

> The claimant worked for this employer for a period of twenty two months in the capacity of manager. A review of the video surveillance system on April 8, 2011 revealed that the claimant and the co-worker were clocking each other in when they were not physically present. Additional review during that particular week revealed additional events and also revealed that a loan had been issued to a customer without proper document paperwork completed at the time of issuing the loan. Based on these events, the claimant was terminated. The claimant denied the allegations.

Decision of Referee, August 16, 2011 at 1.

Based on these facts, Referee Tkaczyk made the following conclusions on the late-appeal issue:

> The evidence presented on this issue establishes that an appeal was transmitted through the postal service on May 26, 2011. The fifteenth day of the appeal time period expired on May 27, 2011. Therefore the appeal is considered timely.

Decision of Referee, August 16, 2011 at 2. He therefore found the employer's appeal was timely filed. Then — after quoting from section 28-44-18 and the leading Rhode Island case on the issue of misconduct, Turner v. Department of Employment and

Training, Board of Review, 479 A.2d 740 (R.I. 1984) — Referee Tkaczyk made the following conclusions on the allegations of misconduct:

> The weight (sic) the evidence presented supports the employer's allegation that the claimant and her co-worker were clocking in each other when the particular individual was not present. In addition, the evidence also establishes that the claimant did not follow proper protocol procedure as she issued a loan without proper documentary evidence at the time of issuance. The circumstances do constitute misconduct and benefits must be denied on this issue.

Decision of Referee, August 16, 2011 at 2. Accordingly, the Referee found that claimant was disqualified from the receipt of unemployment benefits.

Thereafter, a timely appeal was filed by claimant and the matter was reviewed by the Board of Review. On September 20, 2011, the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Ms. Collins filed a Complaint for Judicial Review in the Sixth Division District Court on October 5, 2011. A conference was held on February 29, 2012. A memorandum of law was received from Appellant; no memorandum has been received from the Appellee Board of Review.

II. APPLICABLE LAW

A. Late Appeal Issue.

The time limit for appeals from decisions of the Director is set by subsection (b) of Gen. Laws 1956 § 28-44-39, which provides

> (b) Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and of any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended. The director, on his or her own motion, may at any time within one year from the date of the determination set forth in subdivision (a)(1) of this section reconsider the determination, if he or she finds that an error has occurred in connection with it, or that the determination was made as a result of a mistake, or the nondisclosure or misrepresentation of a material fact.
>
> (Emphasis added)

Note that while subsection 39(b) includes a provision allowing the 15-day period to be extended (presumably by timely request), it does not specifically indicate that late appeals can be accepted, even for good cause. However, in many cases the Board of Review (or, upon review, the District Court) has permitted late appeals if good cause was shown.

B. Misconduct Issue.

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** 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 of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title 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. 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 through a preponderance of evidence that the claimant's action, in connection with her work activities, constitutes 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] Stated differently, the

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

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

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 and applying 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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[3] Id.

IV. 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.

V. ANALYSIS

A. The Late Appeal Issue.

Ms. Collins' first assignment of error is procedural — she asserts that the Board erred in finding that the employer filed a timely appeal from the decision of the Referee. Although it was not received until June 6, 2011, the employer averred that it had been mailed on May 26, 2011 — the day before the appeal period expired.[4] On this issue the Referee held: "The employer's agent transmitted the appeal on May 26, 2011. The appeal was entered into the postal service on that date." Referee's Decision, at 1. Ms. Collins urges that this finding was without support in the record.

The evidence of record on this issue was undoubtedly meager. It came solely from the testimony of Ms. Erica Pace, the employer's agent, who stated that:

* * *

[4] It may be noted in passing that the employer has not urged it had good cause to file a late appeal. Its position is that its appeal was timely.

> AGT: Uh, we, uh, filed the appeal on May 26th. And it was mailed to, uh, the Rhode Island, uh, Central Adjudication Unit on May 26, 2011. Um, and it looks like, uh, we had sent you over a screen print which shows that the letter was printed, the date and the time. And the Specialist being myself. And it was sent from the mail center Xerox printer on May 26, 2011 to the Rhode Island, uh, Central Adjudication Unit. And the address there.
>
> REF: Was it sent regular, registered, or what?
>
> AGT: Regular mail.

Referee Hearing Transcript, at 9.[5]

Acknowledging this testimony, Ms. Collins nonetheless submits that it was inadequate to prove the appeal was in fact mailed on May 26th. Appellant's Memorandum of Law, at 6. She argues that the employer's testimony was only competent to prove that the appeal letter was sent to the printer — not that it was printed, not that it was placed in an envelope, and not that it was deposited into the Unites States postal system.

I believe Ms. Collins' position is correct. Quite simply, Ms. Pace did not assert any direct knowledge of when the appeal was mailed. Her testimony in this area was entirely conclusory. Testimony that an appeal was prepared is clearly insufficient; in order to satisfy its burden, the employer needed to provide evidence that an appeal

[5] The screen print referred to in Ms. Pace's testimony is not contained in the record. Ms. Pace's testimony must therefore be considered uncorroborated by documentary evidence.

was in fact posted on or before the expiration of the appeal period.[6] Because I believe such evidence was not provided, I must conclude that the Board's decision on this issue is not supported by substantial evidence of record. Accordingly, I recommend that the Board's decision be vacated, the employer's appeal be deemed stricken, and the decision of the Director (granting benefits) be reinstated.

Of course, this recommendation, if accepted, would be sufficient to dispose of the case. However, in the interests of providing this Court with the most complete report regarding the instant case, I shall also address claimant's second claim of error.

B. The Misconduct Issue.

Ms. Collins' second assignment of error relates to the substantive issue of misconduct — she urges that the employer failed to prove that (1) she and a co-worker were "clocking" each other out and (2) she had put through a loan without the proper paperwork.

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[6] In the absence of direct evidence that the employer's appeal was posted, the employer could have, in the alternative, presented testimony and evidence regarding the manner in which the mail center operated. This is known as proof of habit and custom. By this method, the employer could have met its burden of proving the appeal was in fact mailed in a timely fashion. Cf. State v. Stella Mae Young, 447 A.2d 390, 392-93 (1982). Note — the admissibility *vel non* of such evidence is now considered pursuant to Rule 406 of the Rhode Island Rules of Evidence (Effective October 1, 1987).

Ms. Pace's testimony cannot be considered to have fulfilled this role, since she did not endeavor to describe how their "mail center" worked; she particularly failed to describe whether the "mail center" enters correspondence into the U.S. Postal Service system on the same day it is printed.

Of course, the first question to be addressed in any review of a claim of misconduct is whether the allegation is sufficient. In other words, is the allegation, if proven to be true, one which would meet the statutory standard of misconduct found in section 18. In my view, the allegation that the claimant and a co-worker were "clocking" each other out would meet this standard, involving as it does an allegation of financial irregularity, potentially causing financial harm to the employer. So, I believe the allegation is legally sufficient to trigger a section 18 disqualification.

And so, we reach the second question which must be considered in a misconduct case: Was the allegation proven? I believe it was not.

First of all the testimony of the employer's witness — Ms. Helen Skaleris, the employer's Divisional Director of Operations — was rather confusing. The Referee had to admonish the witness to be clear about whom she was speaking. Referee Hearing Transcript, at 12. Nonetheless, we are able to discern that on April 11, 2011 she observed — by means of the surveillance system — that Ms. Collins had left the Providence "store" at 5:30 p.m. Referee Hearing Transcript, at 12-13.[7] From this she concluded that they must have shared passwords. Referee Hearing Transcript, at 12. She also found that she "must have" forgotten to do paperwork for a loan. Referee Hearing Transcript, at 13.

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[7] While the witness described what she saw on the video, she did not submit it into evidence.

Ms. Collins disputed these allegations. She testified that she was there, in the back, trying to determine the reason for a shortage. She explained that her employee — Jessica — who had left for the day unexpectedly without punching out, had come back to help her find the problem. Referee Hearing Transcript, at 18-19. Ms. Collins explained that the discrepancy was caused by the failure to enter a repeat customer's loan into the computer. Referee Hearing Transcript, at 18-19. She further explained that, when the source of the problem was discovered, the customer returned and signed the paperwork outside the office — since she was not allowed to admit him after business hours. Referee Hearing Transcript, at 18-19.

Ms. Collins also explained that, as the manager, she had the ability to "deassign" Jessica's drawer and did not needed to "share" passwords with her. Referee Hearing Transcript, at 19. She also responded to Ms. Skaleris' allegations that on other occasions she had left the office but failed to clock out properly; Ms. Collins conceded that, on occasion, she was indeed out of the office — but testified that she was doing marketing, meeting with "business partners," as she was expected to do. Referee Hearing Transcript, at 20.

Thus, Ms. Collins not only disputed the facts Ms. Slaeris had alleged, she disputed the inferences Ms. Skaleris drew from those facts. And, Ms. Skaleris did not respond to or rebut her testimony. Neither did the employer present the videotape

Ms. Skaleris described, either in its case-in-chief or in rebuttal. The employer's representatives did not explain its failure to do so. There was no indication it was not readily available.

Pursuant to the applicable standard of review described supra at 5-6, the decision of the Board 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.

Reviewing this record, and while fully acknowledging that the Board has discretion to admit hearsay, I believe the Referee's reliance on hearsay in these circumstances constituted error, as the employer simply failed to prove its case to the standard of reliable, probative and substantial evidence. See Joseph Cronk v. Department of Labor and Training Board of Review, A.A. No. 11-146 (Dist.Ct. 4/4/12)(W. Clifton, J.). I therefore find that the Board's finding that claimant was discharged for proved misconduct in connection with her work is insufficiently supported by the evidence of record and must be overturned.

VI. CONCLUSION

Therefore, regarding both the late appeal issue and the misconduct issue, I recommend that this Court find that the decision of the Board of Review was affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

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

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 22, 2012