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

Jan Co., Inc.	:	
	:	
v.	:	**A.A. No. 13 - 108**
	:	
Department of Labor & Training,	:	
Board of Review	:	
(Russell Davis)	:	

O R D E R

This matter is before the Court pursuant to § 8 -8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 21st day of July, 2014.

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. Jan Co., Inc. 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 a former employee of the firm, Mr. Russell R. Davis, Jr., was entitled to receive employment security benefits because misconduct was not proven. 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 is supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Russell Davis was employed for seven years as a maintenance supervisor by Jan Co until November 26, 2012. He applied for employment security benefits immediately but on January 8, 2013 the Director issued a decision holding that he was ineligible to receive benefits because he had engaged in misconduct within the meaning of Gen. Laws 1956 § 28-44-18.

Complainant filed an appeal, and a hearing was held before Referee John Palangio on February 21, 2013 and April 2, 2013 at which the claimant and other witnesses appeared and testified. See Referee Hearing Transcript I, at 1. In his April 3, 2013 Decision, the Referee made the following findings of fact:

> Claimant was a maintenance supervisor for Janco for seven years last on November 26, 2012. The claimant was a supervisor of two other maintenance staff. Their job was to maintain several dozen restaurants in the southeastern New England area. The claimant spent his day traveling to and from restaurants, supply companies, the administrative office of Janco, and various other locations. The claimant would fill out a time card and a separate form titled "maintenance time record." In addition, the claimant was instructed to round off his time to the nearest half-hour or hour when reporting his time worked on the timecard.
>
> On September 9, 2011 the claimant received a written warning. This warning was for the claimant not accounting for all time being charged

against any location or job.

Subsequent to that warning, the employer installed a GPS device within the claimant's company vehicle. However, the time card, maintenance time record, and all other procedures with regard to the claimant's job and his reporting of time remained the same.

In November 2012, the employer reviewed claimant's maintenance time record, his weekly time card and the GPS report from the claimant's vehicle. As a result of that investigation, the claimant was terminated for theft of company time.

Decision of Referee, April 3, 2013 at 1. Based on these facts, the Referee — after quoting from section 28-44-18 and the leading case in this jurisdiction on the subject of misconduct, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740 (R.I. 1984) — made 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 his work.

The testimony of the employer was that upon review of the GPS report, the claimant had counted his time at home as work time, had counted the time after the claimant had arrived home as work time and had not appropriately accounted for his entire day on his maintenance time record for several days in 2012.

The testimony of the claimant was that he received permission from his employer to store work materials at his home. The claimant explained that the reason for this practice was to save time of the claimant making an extra trip in the morning or at the end of a shift to work rather than proceeding directly from his home to the first site that needed to be maintained. In addition, the claimant maintained a maintenance time record, which he would list his work activity for the day.

There were several days reviewed at this hearing that the employer had charged the claimant with misrepresenting his time worked. The claimant was able to reasonably explain his whereabouts during those

> days, including working at home loading and unloading materials.
>
> After the September 9, 2011 warning, the employer failed to institute any changes in the routine of the claimant as he reported his time worked. The maintenance time records were incomplete at best. However, there does not appear to be a difference in the way the claimant had reported his time on these records at any time during his employment. In addition, the employer, after the September 21, 2011 warning did not institute any new safeguards, procedures, or different methods that the claimant would account for and report his time worked.
>
> The employer in this case has failed to show that the actions of the claimant exhibited misconduct by deliberately misrepresenting his time worked for the company. As a result, Unemployment benefits are granted under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, April 3, 2013 at 2-3. Accordingly, the Referee found that misconduct had not been proven and Claimant should not be disqualified from the receipt of unemployment benefits. Thereafter, a timely appeal was filed by the employer and the matter was reviewed by the Board of Review. In a decision dated May 30, 2013, 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 not disqualified from receiving employment security benefits; the decision of the Referee was thereby affirmed. Jan Co., Inc. filed a Complaint for Judicial Review in the Sixth Division District Court on or about June 25, 2013.

II
APPLICABLE LAW

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 R.I. Gen. Laws § 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 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

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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, 506, 246 A.2d 213 (1968).

[3] Id.

> 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.

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

In this case the employer, Jan Co alleged that Mr. Davis committed misconduct by falsifying his time records.

A
The Evidence of Record

At the hearing conducted by Referee Palangio in this case, Ms. Janice Mathews, Vice-President of the employer, testified in support of its effort at proving Mr. Davis was fired for misconduct. Referee Hearing Transcript I, at 9 et seq. In

fact, she began by testifying that she fired Mr. Davis on November 26, 2012 "for falsifying time records." Referee Hearing Transcript I, at 9.

She related that management had first looked into the issue during 2011; this review was prompted by instances where Claimant would say he was at a restaurant at 9:00 but the manager of that restaurant would say he got there at 10:30. Referee Hearing Transcript I, at 10. So, they looked at the store cameras, and then compared what they observed with his payroll submissions; doing so, they found a discrepancy. Id. They then sat down with Mr. Davis and gave him a warning notice on September 9, 2011. Referee Hearing Transcript I, at 10-13.

The testimony then jumped ahead to October of 2012. Referee Hearing Transcript I, at 17. At that time, once again, restaurant managers were complaining that Claimant was not at their stores when he was supposed to be. Referee Hearing Transcript I, at 18. They sat down with him once again, apparently to no resolution. Referee Hearing Transcript I, at 18. Jan Co then installed GPS devices into two vans that its employees used to travel to its many locations. Id. These devices can be used to track the vehicles on a computer on a "real time" basis or by generating a report at the end of a day. Referee Hearing Transcript I, at 19-20. The employees were not told that these devices had been installed. Referee Hearing Transcript I, at 20.

After another complaint came in on October 26th, the firm began to monitor Claimant's daily travels; they found what they believed to be discrepancies. Referee

Hearing Transcript I, at 21.[4] For example, the records for October 26, 2012 showed he only worked 7½ hours, not eight. Referee Hearing Transcript I, at 22-23.[5] The next day they examined, the 29th, Jan Co determined he worked 7 hours. Referee Hearing Transcript I, at 24. The same for the next work day — November 1st. Referee Hearing Transcript I, at 25.

Then, on November 5, 2012, Jan Co concluded he worked 7½ hours. Referee Hearing Transcript I, at 27. On November 7, 2012, the company credited him for 6 hours. Referee Hearing Transcript I, at 27-28. Finally, on November 8, 2012, Jan Co gave him credit for 4 hours worked, in contrast to his claim of 6 hours. Referee Hearing Transcript I, at 28-29. After a hiatus in her testimony in which she explained the records she was working from,[6] Ms. Mathews resumed her enumeration of the time discrepancies.

She explained that on November 9th, Mr. Davis was found to have made two stops at rest stops, resulting in 59 minutes of lost time to the company. Referee

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[4] The employer did not monitor his comings and goings in real time; instead, Mr. Benoit, Jan Co's head of security, prepared summaries at the end of each day. Referee Hearing Transcript I, at 31-32. Over the objection of Claimant's counsel, these summaries were admitted as business records. Referee Hearing Transcript I, at 43-44.

[5] The company credited Mr. Davis from the time he reached his first assignment of the day to the moment he left his last — even though some were a rather ambitious commute, such Randolph, Massachusetts and Willimantic, Connecticut. Referee Hearing Transcript I, at 22.

[6] See supra n. 4.

Hearing Transcript I, at 47. On November 12th, he worked until about 3:00, but signed out at 3:30 p.m. — a 30-minute discrepancy. Referee Hearing Transcript I, at 47-48. The same 30-minute discrepancy was also noted for November 16, 2012. Referee Hearing Transcript I, at 49-50.

Ms. Mathews then spoke about November 19, 2012. The GPS showed he got to the Randolph, Massachusetts Burger King at 6:19 a.m. Referee Hearing Transcript I, at 51. But he signed in at 5:30 a.m. Id. He left the restaurant at 11:30 a.m. and was home at 2:30 p.m. Referee Hearing Transcript I, at 52-53.

On November 20, 2012, Claimant reported that he left his home at 7:00 a.m., but he actually left at 6:10. Referee Hearing Transcript I, at 53. Although he arrived at the first location at 7:00 a.m., he reported 7:28. Id. He got home at 4:00 p.m. According to Ms. Mathews, this was a discrepancy of 15 minutes. Id.

On November 21, 2012, Claimant's starting-time was correct. Referee Hearing Transcript I, at 54. Apparently, so was his end-time. Id.

As a result of this inquiry, Ms. Mathews, with her human resources person, spoke to Mr. Davis and went over the discrepancies with him. Referee Hearing Transcript I, at 55. He denied everything; he wanted to see the cameras, which Ms. Mathews would not allow. Id. He said that sometimes he did e-mails at home. Referee Hearing Transcript I, at 60. He also said he had permission from Mr.

Kimatian to take an hour off on November 8, 2012. Referee Hearing Transcript I, at 61.

At the conclusion of her direct examination, she indicated that the decision to terminate Mr. Davis's employment with Jan Co was made by her and Mr. Janickes. Referee Hearing Transcript I, at 62-63. A factor in the decision to terminate was the fact that Mr. Davis had a previous warning. Referee Hearing Transcript I, at 63.

On cross-examination, Ms. Mathews conceded that there was no company manual for the maintenance staff regarding how to fill-in maintenance logs and the like. Referee Hearing Transcript I, at 64-67. She also explained that when Mr. Davis was terminated she did not share any of the documents with him. Referee Hearing Transcript I, at 71.

She also indicated that maintenance workers, like Mr. Davis, did not have their own computers, but shared desks at the headquarters. Referee Hearing Transcript I, at 72-73. She confirmed that Claimant sometimes did work for the Janickes. Referee Hearing Transcript I, at 73.

Mr. Davis, she testified, was on 24-hour call. Referee Hearing Transcript I, at 74. She explained that Mr. Davis was expected to respond to emergencies on the weekend. Referee Hearing Transcript I, at 74. To do this, he had to check his e-mail for information — but he could also receive phone calls. Referee Hearing Transcript I, at 73-74.

Counsel for Claimant Davis drew her attention to November 5, 2012. Referee Hearing Transcript I, at 81 et seq. According to the GPS, he arrived at store 4654 at 6:39 a.m. and left at 6:52. Referee Hearing Transcript I, at 82. But according to the maintenance record Claimant filled out, he arrived at 6:30 and left at 7:00 a.m. Referee Hearing Transcript I, at 83. But it was signed by a store manager, not Mr. Davis. Referee Hearing Transcript I, at 84-85. Then she was asked about the next stop, store 5793 — where the GPS had him arriving at 8:56 a.m. and leaving at 10:54, but the maintenance log had him coming at 8:30 and leaving at 11:00. Referee Hearing Transcript I, at 85-86. From this entry, she conceded that Mr. Davis's entries were "rounded-off." Referee Hearing Transcript I, at 86. Ms. Mathews could not identify the signature next to this entry. Referee Hearing Transcript I, at 86-87.

Mr. Davis then testified.[7] Throughout his testimony, he stated and restated that he filled out his time reports in the manner he was told to by his first supervisor, Mr. Al Cairo, to round off to the nearest half-hour. Referee Hearing Transcript I, at 88-89; Referee Hearing Transcript II, at 18-19. Later in his testimony he added that he was never told to alter how he did it — for instance, to record his times to the minute. Referee Hearing Transcript II, at 24, 28. He asserted his two employees mark their cards the exact same way. Referee Hearing Transcript II, at 28.

[7] He began his testimony near the end of the first hearing day and continued on the next. Referee Hearing Transcript I, at 88 et seq.

At the beginning of the second day of hearing, records from the employer's GPS system were entered into evidence. Referee Hearing Transcript II, at 2-5. And see Employer's Exhibit No. 6. Also, the Claimant's time cards and maintenance records were re-introduced in a new exhibit in chronological order. Referee Hearing Transcript II, at 6-11. And see Employer's Exhibit No. 7.

At this juncture the examination of Mr. Davis resumed. Referee Hearing Transcript II, at 11. He explained how responsibility for maintenance at the many restaurants owned by the company (Burger King's, Newport Creamery's, Country Inn's and two country clubs) were divided among himself and his two co-workers. Referee Hearing Transcript II, at 12-13. He explained that he would meet with his first supervisor, Mr. Al Cairo, on a weekly basis. Referee Hearing Transcript II, at 12-13. He was succeeded by Mr. George Kimatian and then Mr. Jonathan Janickes. Referee Hearing Transcript II, at 14. The custom — under which he would meet with his supervisor on Friday — continued throughout. Referee Hearing Transcript II, at 15.

Generally, the activities of the maintenance group would be generated from work orders given to him on each last Friday of the month. Id. He would divide them up with regard to the person having responsibility for the particular restaurant. Referee Hearing Transcript II, at 17.

At this point Claimant discussed the daily log for October 26th. Referee Hearing Transcript II, at 19, 29 (Exhibit 7, at 3). He also spoke about August 26th. He specifically explained when he was coming back from the Franklin Burger King he ran into a major traffic accident that led to his being tied-up in traffic. Referee Hearing Transcript II, at 30-31. He had tried to explain this to his manager but, he "didn't want to hear it." Referee Hearing Transcript II, at 31.

Claimant testified that at the meeting he had on September 9, 2011, he was not given any guidance on how to keep his log in a better way. Referee Hearing Transcript II, at 33. It was still, round to the nearest half-hour. Id.

Claimant also testified that — although he worked overtime — he was not paid for it, because Mr. Jon Janickes said that there was no overtime for the maintenance department. Id. Instead, they would receive comp time. Referee Hearing Transcript II, at 34. And, they could not carry it over; they had to use it within the week. Id. And they were given comp time at a rate of one hour comp time for every hour of overtime worked, not, as Mr. Davis urged, one-half times the overtime hours worked. Referee Hearing Transcript II, at 34-35. In implementing this process, they were on the honor system. Id.

With regard to November 12th, he explained that he began his day by loading some boxes in the van and then picked up a door at Columbus Door for store 476 and installed it with a co-worker named "Patrick." Referee Hearing Transcript II, at

36-37. He also went to fix a piece of trim in Willimantic. Referee Hearing Transcript II, at 37. In total, he stated he worked from 7:00 a.m. to 3:30 p.m., but he did not get overtime even though it was Veterans' Day. Referee Hearing Transcript II, at 38. Instead, he got the day after Thanksgiving off, an hour per hour trade. Id.

Counsel and the Referee then decided to look at November 13th. Referee Hearing Transcript II, at 43-44. Mr. Davis then gave his itinerary for that day. Referee Hearing Transcript II, at 45-61. He was then asked about October 30, 2012. Referee Hearing Transcript II, at 62. He said he started out getting a water heater at the supplier and then, due to a power outage, went to Westerly to move product to the Wakefield store. Referee Hearing Transcript II, at 64-67.

Later, Claimant testified that the times displayed by the closed-circuit television system were not correct. Referee Hearing Transcript II, at 114. And he explained his understanding of how "travel time" worked at Jan Co. Referee Hearing Transcript II, at 128-29.

The hearing continued, with the Claimant being asked about his travels on particular days, until the proceeding degenerated into unintelligible disputation. Referee Hearing Transcript II, at 150.

B
Discussion

Our resolution of the instant case is governed by the standard of review, described supra in Part III of this opinion. So long as the findings of the Board of Review are supported by reliable, probative, and substantial evidence of record, they must be upheld by this Court.[8] We cannot interpose our own view of the evidence in the case.

Was there evidence from which a reasonable fact-finder could conclude Claimant's time records were false? Undoubtedly. But the record in this case also contained the testimony of the Claimant — in which he denied that he intentionally falsified his payroll records and explained his itinerary on a number of days. Apparently, the Board credited this testimony, which the members had every right and authority to do.

C
Summary

Pursuant to the applicable standard of review described supra at 7-8, 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

[8] My experience has been that this limitation on the role of the Court most often benefits the employer community; the instant case may be viewed as an

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 Turner, supra, I must recommend that this Court hold that the Board of Review's finding that Jan Co did not meet its burden of showing that Claimant was discharged for proved misconduct in connection with his work is well-supported by the record and should not be overturned by this Court.

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review finding claimant disqualified was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it was not 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 both decisions of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

JULY 21, 2014

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exception that proves the rule.