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

Robert G. Sullivan	:	
	:	
v.	:	**A.A. No. 2013 - 109**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

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

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

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is 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 AND R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Robert G. Sullivan urges that the Board of Review of the Department of Labor and Training erred when it determined he was ineligible to receive unemployment benefits because he was discharged for proved misconduct. Jurisdiction for appeals from decisions of the 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 reliable, probative, and substantial

evidence of record and is not clearly erroneous; 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: Mr. Robert G. Sullivan worked for Lenscrafters, Inc., for two years as an optical manager of a Lenscrafters shop within a Sears store, until he was terminated on January 25, 2013. He filed an application for unemployment benefits and on March 4, 2013 the Director determined him to be eligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since it had not been proven that he was terminated for misconduct.

The employer filed an appeal and a hearing was held before Referee William Enos on April 4, 2013. In his April 8, 2013 decision, the Referee held that Mr. Sullivan was disqualified from receiving benefits because he was terminated for proved misconduct. The Referee found the following facts:

> The claimant worked as an optical manager for Lenscrafters for 2 years, last on January 25, 2013. The claimant was discharged for violating the company's policy and procedures concerning balancing and keeping accurate records of his store's finances. The employer stated that the claimant was missing many daily envelopes and they are by company policy to be kept in the store for at least 90 days. The employer submitted evidence that showed that the claimant's store, that he served as manager, was $9,424 short or unaccounted for due to lack of the proper paperwork.

> The claimant stated that his cash registers always balanced and if they didn't it was because of the computer system that went down. The claimant showed this hearing officer a reconciliation envelope from the store dated January 9, 2013 as an example but when questioned by the employer's counsel, the claimant admitted that the envelope should have been at the store and it is this same breach of company policy that he was terminated for.

Decision of Referee, April 8, 2013 at 1. Based on these facts — and after quoting from § 28-44-18 and the leading Rhode Island case regarding disqualification for misconduct, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984) — Referee Enos came to the following conclusion:

> I find that the credible testimony and evidence submitted by the employer at this hearing showed that the claimant was discharged for violating the company's policy and procedures concerning balancing and keeping accurate records of the store's finances. Therefore, I find that sufficient credible testimony has been provided to support the employer's position that the claimant was discharged for proven misconduct.

Decision of Referee, April 8, 2013 at 2. Claimant appealed and the matter was considered without a further hearing by the Board of Review. On May 30, 2013, the members of the Board of Review unanimously found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, May 30, 2013, at 1.

Finally, Mr. Sullivan filed a complaint for judicial review in the Sixth Division District Court on June 27, 2013. Then, on August 21, 2013, a status conference was held in the case; a briefing schedule was set. A helpful memorandum was received from Claimant Sullivan; the Department has declined to submit a memorandum. Accordingly, I have proceeded to submit this opinion without further delay.

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. —** 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 by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

III
STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases. —**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

[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).

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

[3] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV
ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) that claimant was discharged for proved misconduct within the meaning of section 28-44-18 of the Rhode Island General Laws 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
DISCUSSION

A
Factual Review

In support of opposition to Mr. Sullivan's efforts to receive unemployment benefits, Lenscrafters presented the testimony of two witnesses — (1) Lindsay Biernacki, its Regional Sales Manager, and Joseph Tanucci (2) Regional Manager For Asset Protection. Referee Hearing Transcript, at 2-3.

Ms. Biernacki testified first regarding the circumstances that led to Claimant's termination. Referee Hearing Transcript, at 7 et seq. She explained that she and Mr. Tanucci went to the shop on January 15, 2013 to do a training visit for the Luxottica brand, when they discovered "… a number of incidents in recent time in January where the proper cash handling procedure as well as opening and end of the day procedures were not being followed." Referee

Hearing Transcript, at 7. She then showed Referee Enos an "end of the day envelope," upon which each shop has to reconcile every day. Referee Hearing Transcript, at 8. And it is important that this be done correctly, because, since the Lenscrafters shop was operating in a host environment — as a store within a store, each sale had to be entered into two separate registers. Id. So, at the end of the day, the two registers have to match. Id. Ms. Biernacki explained that the instructions on the envelope walk the employee through the steps necessary to perform a proper reconciliation. Referee Hearing Transcript, at 8-9. She also testified that each location must keep 90 days' worth of envelopes in the shop. Referee Hearing Transcript, at 10.

With this background, Ms. Biernacki returned to the narrative of the specific allegations against Mr. Sullivan. Referee Hearing Transcript, at 9-10. She testified that many reconciliation envelopes were missing — i.e., he did not have 90 days of envelopes in hand. Referee Hearing Transcript, at 10. Also, some others were not properly filled out. Id.

This can be problematic because if a transaction is not properly rung into the optical shop register the customers' glasses will not be ordered; and if it is not properly rung into the Sears register the employer cannot be sure the goods were paid for. Referee Hearing Transcript, at 11-12, 21-22. She testified that the employer gravitated toward terminating Mr. Sullivan for these miscues because

this was the fourth time within a year these issues had been brought to Claimant's attention. Referee Hearing Transcript, at 13. In fact, three different audits were done in 2012. Id. And, according to Ms. Biernacki, there was, over that period, a total monetary loss of $ 9,524.00. Id. She called this a "host variance difference." Id.

Ms. Biernacki reviewed the findings of the audit for June of 2012, specifying in detail each paperwork transgression. Referee Hearing Transcript, at 14-15. She indicated that Claimant was advised on proper procedures by Kim Wiley, Mr. Tanucci's predecessor. Referee Hearing Transcript, at 15-16, 26. She then did the same for a subsequent audit regarding the month of May, 2012 Referee Hearing Transcript, at 16-17. Further training on procedures was then arranged. Referee Hearing Transcript, at 18.

Finally, Ms. Biernacki indicated that in March of 2012 problems from January and February were discovered and discussed. Referee Hearing Transcript, at 20.

Then, it was Mr. Sullivan's turn to testify. Referee Hearing Transcript, at 22 et seq. He stated he had most of the envelopes. Referee Hearing Transcript, at 23. He stated that there was a problem envelope created by another individual who worked in the shop. Referee Hearing Transcript, at 23-24. He was told by Kim, the prior asset manager, to coach the employee. Referee Hearing

Transcript, at 24-25. Mr. Sullivan indicated that no one ever came to audit his shop. Referee Hearing Transcript, at 26-27. They would be requested to send along envelopes for certain days. Referee Hearing Transcript, at 23.

Mr. Sullivan adamantly denied there was any cash missing. Referee Hearing Transcript, at 28. On the other hand, he did admit that he did not have the full 90 days' worth of envelopes. Referee Hearing Transcript, at 29.

He also stated that the optical shop register would go down a lot, and prevented reconciling the two registers. Referee Hearing Transcript, at 33. Also, it would not charge the sales tax. Id.

On redirect Ms. Biernacki denied that the Sears system crashed. Referee Hearing Transcript, at 35.

B

Analysis – Applying the Facts to the Law

Let us begin with the basics. Claimant was not disqualified because of any defalcation on his part — or anyone's part. The employer did not prove theft or try to prove theft. They did show, uncontrovertibly, that if the two registers were not properly reconciled there was a danger that funds would not be properly allocated between Lenscrafters and Sears. And the employer provided evidence and testimony tending to show that the paperwork in the shop he managed was not always done correctly. And Claimant did concede that the 90

reconciliation envelopes were not in the shop ready to be inspected when his supervisors arrived on that fateful day in January. But these are accusations very different from theft.

It is clear, from the findings he made, that Referee Enos fully credited the testimony of the Lenscrafters executives who testified. As enumerated above, they stated that the financial paperwork was not done properly. We may also conclude, inferentially, that he found Mr. Sullivan's explanations insufficient. This is the role of a Referee — to make findings of credibility. And this he did.

While there may have been problems with computer systems and junior employees, there remained a logical basis for the Referee to conclude that the financial paperwork of the shop managed by Mr. Sullivan was not done correctly, after the issue was repeatedly raised with him, and its importance stressed. From these facts the Board of Review, which adopted the Referee's decision as its own, could well find misconduct on Mr. Sullivan's part.

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review denying benefits to claimant is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, 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),(6).

Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

_____/s/_____
Joseph P. Ippolito
Magistrate

July 21, 2014