STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Desire Gomez	:	
	:	
v.	:	**A.A. No. 13 - 124**
	:	
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 5th day of June, 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. Ms. Desire Gomez 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. This matter has been referred to me for the making for 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; I therefore recommend that the decision of the Board of Review be

affirmed.

I
FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Desire Gomez worked for Autozone for five years until she was terminated on March 6, 2013. She filed a new application for unemployment but on April 18, 2013, 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 appeal and a hearing was held before Referee John R. Palangio on May 13, 2013. The same day, the Referee held that Ms. Gomez was not disqualified from receiving benefits because the employer had failed to prove misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> Claimant was a manager for Autozone in Providence for five years last on March 6, 2012. The claimant performed a transaction on a product. The customer returned the product the same day. The claimant realized toward the end of the day that she had not completed the transaction in the computer, reflecting the returned product. That left the register $210 short for the day. The claimant secured the register sales for the day in a locked box, and planned to correct the problem the next morning.
>
> The employer realized that the receipts from the claimant's register were not in its normal location the next morning. At

> that time the claimant realized that she could not successfully complete the transaction from the day before, and offered the store manager the $210 from her own funds.
>
> During this investigation, the employer discovered that the claimant had sold a battery to a co-worker under a commercial account, thereby granting that employee a substantial discount. As a result of these two incidences, the claimant was terminated.

Decision of Referee, May 13, 2013 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:

> * * *
>
> In cases of termination, the employer bears the burden to prove by preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in connection with her work.
>
> The testimony of the claimant was that she had realized at the end of the day that her drawer did not balance as a result of an incomplete transaction she performed. The claimant further stated that as a result of this issue, she chose to balance the account the next morning. Finally, the claimant testified that she sought and received permission from the owner of the commercial account to use that account to purchase a battery for a co-worker.
>
> The employer testified that the claimant violated a company policy by not properly completing a transaction, and not properly balancing her register at the end of her shift. However, the employer does acknowledge that the $210 in question was as a result of an incomplete transaction and no actual dollars were missing from the register.

> The employer in this case has failed to show that the actions of the claimant exhibited misconduct. The claimant should have balanced her accounts before leaving for work on the night of the incident. However, there was no evidence presented that the claimant was attempting to steal money or to act with wrongful intent towards her employer. In addition, the employer did not provide evidence that the claimant had not contacted the owner of the commercial account in question when purchasing a battery for a co-worker. As a result, there is no misconduct in connection with the claimant's termination from this employer. The claimant is eligible for benefits under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, May 13, 2013 at 2-3. The employer appealed and the Board of Review held a new hearing on June 24, 2013.

On July 8, 2013, the Board of Review reversed the decision of the Referee and held that misconduct had indeed been proven. Although the Board indicated in its decision that the Referee's findings of fact were affirmed, the Board made the following additional findings, which are quoted here in their entirety:

> On February 16, 2013 the security company (armored car) came to pick deposits from the Employer. One of the deposits (a/k/a drop) was missing from the drop safe. The missing deposit was from the commercial department. The claimant is manager of the commercial department. The claimant had not made the deposit/drop in the safe. The previous day the claimant had attempted to process a return item, but had not completed the process. As a result, the deposit was not made to the drop safe. The claimant's handling of the return item and deposit violated the employer's rule: namely, place the funds in the drop safe with annotation that the deposit is short. The employer investigated the handling of the deposit.

> During the investigation, the employer learned that the claimant had sold a battery to an employee using a commercial account. The claimant was aware of the employer's policy that employees were not to purchase items for their own use using a commercial account. The claimant was terminated from employment because of the violation of employer policies. The employer has terminated other employees who have violated the employer's rule regarding the handling and reporting of funds, and the sale of products to employees at discount.

Decision of Board of Review, July 8, 2013 at 1-2. The Board then announced the following conclusions:

> The Board rejects the Referee's conclusion. The record (including Referee's hearing) established that the claimant failed to comply with the Employer's policy governing the processing of deposits and the sale of products to employees. Her explanation of a sale of a battery to an employee using a commercial account is not credible. While it is understandable that the claimant may have had difficulty in processing a return item at the end of the day, she failed to notify her store manager of the situation. As a result, the following day the employer is expending considerable effort in determining what happened to one of the deposits/drops to be picked up by the armored car. Not only did her actions violate reasonable employer rules, her failure to notify the store manager, regarding her difficulty in closing out her register, was an intentional and deliberate act harming the employer's interest. The employer has proved misconduct.

Decision of Board of Review, July 8, 2013 at 1-2.

Finally, Ms. Gomez filed a complaint for judicial review in the Sixth Division District Court on July 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 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 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

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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 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). Also D'Ambra v. Board of Review,

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.

Dept. 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) 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

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 — Ms. Gomez's claim was originally denied by the Director; then, the Referee allowed benefits; and finally, the Board of Review found misconduct to be proven and reinstated the Claimant's disqualification.

Although inconsistent, each decision appears fully rational, at least when viewed in isolation. As previously set forth, the allegation here was that Ms. Gomez breached two rules that Autozone had established regarding financial matters.

A
Factual Review

At the initial hearing before the Referee the employer presented three representatives — (1) Mr. Lewis Usher, Ms. Gomez's store manager; (2) Ms.

Patricia Vasquez, Regional Loss Prevention Manager; and (3) Mr. Donald Getchell, District Manager. Board of Review Hearing Transcript, at 8. Of these, the primary witness was Ms. Vasquez. Board of Review Hearing Transcript, at 12. She explained that Ms. Gomez was a full-time employee who was terminated at the direction of Mr. Charles Blaine, Regional Manager, on or about March 6, 2013. Board of Review Hearing Transcript, at 13. Mr. Getchell informed her of her termination, which was stated to be based on loss of confidence, violation of Autozone policy, particularly cash-handling policy. Id.

Ms. Vasquez explained that Claimant's transgressions came to her attention because she received a call from Mr. Usher that the commercial department bag was not in the daily deposit. Board of Review Hearing Transcript, at 14. In fact, the bag, which contained paper currency and coinage, was missing. Board of Review Hearing Transcript, at 16-17. Because it was the commercial department bag, Ms. Vasquez suggested that he speak to Ms. Gomez (and then call her back). Board of Review Hearing Transcript, at 19-20.

Ms. Gomez explained to Mr. Usher that she needed to process a return from the previous day; and she had left it in the box in her department. Board of Review Hearing Transcript, at 20-21. Ms. Gomez showed him the bag,

with the money in it. Board of Review Hearing Transcript, at 22. In fact, she said she had put $210 in to cover the return. Board of Review Hearing Transcript, at 23. He told her she should not have done that; instead, she should have done the drop and shown the loss. Id. In fact, the bag was not short because the item had been returned. Board of Review Hearing Transcript, at 24.

Later in the day, according to Ms. Vasquez, Claimant told Mr. Usher she had forgotten to process the return — which she called an "understandable" mistake. Board of Review Hearing Transcript, at 25. When she tried to do it in the morning it would not go through. Id. But she compounded the error by failing to notify her superior and, according to Claimant, she went to the bank so she could put $210 in. Id.

Ms. Vasquez stated there were security cameras but they were not reviewed. Board of Review Hearing Transcript, at 26.

It was at this juncture that the other issue, the employee commercial discount issue, came to light. Board of Review Hearing Transcript, at 27. Another employee at the store, Mr. Raphael Hernandez, was being questioned about delivering the motor mount (which was the part that was returned) when he spontaneously showed Mr. Usher a receipt for a battery that had been rung-in by Ms. Gomez. Id. When Ms. Vaquez questioned Claimant

directly about this matter, she admitting doing so — and she admitted knowing it was wrong. Board of Review Hearing Transcript, at 28. She told her she thought it would be all right because the holder of the commercial account consented. Board of Review Hearing Transcript, at 28.

At this point, Mr. Getchell received an e-mail to terminate her. Referee Hearing Transcript, at 29.

Ms. Vasquez added that other people in this very store have been terminated for the same conduct — i.e., misuse of commercial discounts. Referee Hearing Transcript, at 30. Mr. Usher added that, other than this, she was an "okay" employee. Board of Review Hearing Transcript, at 31.

Ms. Gomez then told the Referee her side of the story. Board of Review Hearing Transcript, at 32 et seq. She told how she forgot to do the return because they were so busy. Board of Review Hearing Transcript, at 33. But she said in the morning she called Autozone and reported what happened. Board of Review Hearing Transcript, at 35.

She explained how she came to sell a battery to a co-worker using a commercial account. Board of Review Hearing Transcript, at 37. Apparently it happened just after a snowstorm and the employee needed a new battery but he didn't have enough money, even with the employee discount. Board of Review Hearing Transcript, at 38. So she called the owner of the account and

he approved it — so long as the employee was paying cash. Board of Review Hearing Transcript, at 38. She said her manager knew and gave permission — so long as the account holder approved it. Board of Review Hearing Transcript, at 39-40. On cross-examination, she stated she did not reveal this allegation previously because she did not want to get Mr. Usher in trouble. Id.

Mr. Usher refuted this testimony; he testified that he told the employees that they were not to use commercial discounts. Board of Review Hearing Transcript, at 42-43. And Mr. Getchell made the further point that the customers cannot overrule Autozone policies. Board of Review Hearing Transcript, at 43. On cross-examination, she stated that this occurred in winter and the employee needed a new battery because his car was stuck. Board of Review Hearing Transcript, at 38.

B

Rationale

My review of the record in this case reveals what the core issues have been — and what they have not been.

This case has never been about the error Claimant made by not processing a merchandise return the same day it came in. That has always been treated as a simple mistake, even by Autozone management. Their concerns are really two. First, that she did not secure the commercial register

cash bag overnight. Without doubt, by failing to do so she risked her employer's financial interest. But, there is no reason to think she did this with an intentional disregard for her employer's interests. So, this too could be viewed as an instance of seriously poor judgment.

The issue of misusing commercial discounts for the sake of a fellow worker is, in my view, the more serious allegation. It is undeniable that she caused Autozone to suffer a direct financial loss, which is clearly not in the firm's best interests. In my view this behavior constitutes misconduct per se. Although Claimant testified to the contrary, Mr. Usher testified that he had spoken on this issue in unequivocal terms — indicating straightforwardly that it was not allowed — after a prior incident (one apparently not involving Ms. Gomez). The Board of Review was well within its authority to find Mr. Usher credible and the Claimant's version of events "not credible."

Pursuant to the applicable standard of review described supra at 8-9, the decision of the Board of Review must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Applying this standard of review

and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection with his work — i.e., giving a fellow-employee a commercial discount — is well-supported by the record and should not be overturned by this Court.

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious. 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

June 5, 2014