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

Kristian Coutu	:	
	:	
v.	:	**A.A. No. 13 - 086**
	:	
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 REMANDED for further proceedings consistent with the attached opinion.

Entered as an Order of this Court at Providence on this 4th day of June, 2014.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
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Kristian Coutu	:	
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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. Mr. Kristian Coutu 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 he was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is insufficient in one or more particulars; I must therefore

recommend that the decision of the Board of Review be remanded for further proceedings.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Kristian Coutu worked for Gateway Healthcare as a senior case manager for eleven years until he was terminated on December 12, 2012. He filed an application for unemployment immediately and on January 30, 2013, the Director determined him to be eligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was not terminated for proved misconduct.

The Employer filed an appeal and a hearing was held before a Referee on March 12, 2013. On March 14, 2013, the Referee reversed the Director's decision and held that Mr. Coutu was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> The claimant worked as a Senior Case Manager for Community Counseling for 11 years, last on December 12, 2012. The claimant was discharged for violating the company policies. The claimant billed clients twice and also billed for time that he didn't spend with clients. The employer brought the claimant in for counseling and asked that he produce the company laptop which would have verified either way the

> billing situation. As of the hearing, 3 months later, the claimant has never returned the company's laptop, cell phone and keys. The claimant stated that he did not violate the company policies or bill clients for time not spent with them. He said it was a glitch in the employer's computer program. When questioned by the Referee, the claimant stated that he has not yet returned the company property because he is working part time and has young children and hasn't had the time.

Decision of Referee, March 14, 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:

> * * *
> I find from the credible testimony from the employer submitted at this hearing showed that the claimant was discharged for violating known company policy. 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, March 14, 2013 at 2.[1] The Claimant appealed and the matter was reviewed by the Board of Review. On April 25, 2013, the

[1] The generality of these conclusions requires me to note that Gen. Laws 1956 § 28-44-46 requires the Referee to make specific findings and conclusions. See also Gen. Laws 1956 § 42-35-12 and East Greenwich Yacht Club v. Coastal Resources Management Council, 118 R.I. 559,

members of the Board of Review issued a unanimous decision in which the decision of the Referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board.

Finally, Mr. Coutu filed a timely complaint for judicial review in the Sixth Division District Court on May 15, 2013.

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. —** … For benefit years beginning on or after July 12, 2012, 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 greater than or equal to his or her weekly benefit rate 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,

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568-69, 376 A.2d 682, 686-87 (1977).

> 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.

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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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

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[2] 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).

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

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

> 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.

ANALYSIS

In a case such as this, where misconduct has been alleged, the District Court's role is to examine the record to see if it supports the findings made by the Board of Review. But this process can only work when the Board makes findings that are not vague or conclusory but specific. This practical necessity is recognized within the Employment Security Act in two sections — (1) § 28-44-52, in which the Board is required to issue a written decision that includes "findings and conclusions," and (2) § 28-44-46, which requires an appeal tribunal[5] to provide findings and conclusions.[6]

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[5] In Rhode Island, the appeal tribunal is a one-person hearing officer known as a "referee."

[6] The latter provision comes into play in the instant case because the Board of Review adopted the Referee's decision as its own. As a result, any infirmities present in the Referee's decision become its own.

In this case I believe the conclusions made by the referee in this case are fatally vague. See also Gen. Laws 1956 § 42-35-12 and East Greenwich Yacht Club v. Coastal Resources Management Council, 118 R.I. 559, 568-69, 376 A.2d 682, 686-87 (1977). As a result, I believe the Court cannot proceed to fully adjudicate Mr. Coutu's appeal; instead, I shall recommend the instant case be remanded to the Board of Review for the making of more comprehensive conclusions.

As stated above, supra at 3, the conclusion section of the Referee's decision mostly consists of quotations from § 28-44-18 and the leading case on the issue — Turner. Then, after declaring that the employer has the burden to prove misconduct (which is quite true), he stated:

> * * *
> I find from the credible testimony from the employer submitted at this hearing showed that the claimant was discharged for violating known company policy. 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, March 14, 2013 at 2.[7] Thus, the Referee found the claimant was discharged for violating a company policy. That's fine, it tells

[7] The generality of these conclusions requires me to note that Gen. Laws 1956 § 28-44-46 requires the Referee to make specific findings and

us why Gateway fired him — because, in the employer's view, he violated a company policy. But even if we read this, and I do not, as referring to something more than the employer's subjective view, it does not convey which policy he broke — i.e., the precise nature of the misconduct —a matter about which we must not guess. The allegations made against Claimant in this case can be viewed anywhere on a range running from submitting inaccurate documentation (on the less culpable end) to intentional fraud (on the most culpable end of the scale, potentially criminal conduct). And the employer acknowledges that multiple policy violations were alleged. See Employer's Memorandum, at 6-7. We (and Mr. Coutu) should know upon what basis he was disqualified.[8]

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conclusions. See also Gen. Laws 1956 § 42-35-12 and East Greenwich Yacht Club v. Coastal Resources Management Council, 118 R.I. 559, 568-69, 376 A.2d 682, 686-87 (1977).

[8] In my view the procedural issue I raise fully ripens into a problem because the employer, in its memorandum, asserts that it did not need to prove double-billing. Employer's Memorandum, at 6. Instead, it relied on "discrepancies" in his documentation. Id.

As a result, the prejudice to Claimant is patent — fraud (or larceny of any type) has generally been viewed as serious misconduct, one instance of which can justify disqualification. On the other hand, issues of poor documentation are more amenable to being viewed as instances of unintentional poor performance. See quotation from Turner, supra at 5-6. Since Claimant has urged this Court to invoke this principle, and view any failings on his part in that light, it is vital we be clear what was

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review was made upon unlawful procedure. Gen. Laws 1956 § 42-35-15(g)(5).

Accordingly, I recommend that the decision of the Board of Review be REMANDED for the making of additional findings and conclusions.

/s/
Joseph P. Ippolito
Magistrate

June 4, 2014

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found. See Appellant's Memorandum, at 5.

It is also important for the Court be able to exclude issues that were not a basis of the Referee's decision. For instance, the employer alleges that when Claimant was instructed to surrender his Gateway laptop he left the building. Employer's Memorandum, at 7. This conduct could well be viewed as insubordination. But Claimant urges that the issue was not before the Referee. Appellant's Memorandum, at 5-6. In light of the attention that was paid to this issue in the Referee's findings, I believe it to be important to clarify whether this issue affected the Referee's decision.