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

Kristian Coutu	:	
	:	
v.	:	**A.A. No. 14 - 112**
	:	
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 hereby REVERSED for the reasons specified in the attached opinion.

Entered as an Order of this Court at Providence on this 22nd day of June, 2015.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

__/s/_____
Jeanne E. LaFazia
Chief Judge

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

Kristian Coutu	:	
	:	
v.	:	**A.A. No. 2014 – 112**
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Department of Labor and Training,	:	
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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. For the second time Mr. Kristian Coutu comes before this Court seeking to set aside a final decision of the Board of Review of the Department of Labor and Training which held that he was not entitled to receive unemployment benefits because he was terminated for proved misconduct. His first effort ended in June of 2014 when this Court remanded this case to the Board for the making of more detailed findings — its first set having been found insufficiently specific. Responding to this order, the Board issued a second decision, from which Mr. Coutu now

appeals.

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 second decision issued by the Board of Review is clearly erroneous in view of the reliable, probative and substantial evidence of record and is contrary to law; I must therefore recommend that the Board's decision be REVERSED.

I
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 employment security benefits 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 indeed

terminated for proved misconduct.

The Claimant appealed and the matter was reviewed by the Board of Review. On April 25, 2013, the 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.

Mr. Coutu filed a timely complaint for judicial review in the Sixth Division District Court on May 15, 2013 and the case was assigned A.A. No. 13-086. The matter was the subject of a conference conducted by the undersigned on October 22, 2014, at which a briefing-schedule was set. Thereafter, memoranda were received from the parties. However, the Court, in its June 4, 2014, decision, did not reach the question at the heart of the case — i.e., whether Mr. Coutu had committed misconduct — because, while the Board found that Mr. Coutu was discharged for a violation of a company policy, it did not specify which policy was violated; accordingly, we remanded the case "… for the making of additional findings and conclusions." See K. Coutu v. Department of Labor and Training, Board of Review, A.A. No. 13-086, at 11 (Dist.Ct. 06/04/2014).

Because the Court did not require a new hearing, the Board proceeded to issue a new decision, on July 8, 2014. In its written Decision, the Board made Findings of Fact, which are quoted here in their entirety:

> The claimant worked as a Senior Case Manager for eleven years. The employer became aware of certain documentation issues involving services and the billing for services. The employer called the claimant to a meeting to discuss the issues. The claimant came to the meeting without his computer. During the meeting, the employer asked the claimant to go to his upstairs cubicle and bring the computer down so that the employer and claimant could retrieve the documentation. The claimant left the meeting and did not return. Later the claimant called the employer and left a voicemail to set up a time that he could return the computer. The employer returned the call the following day and informed the claimant he was terminated.

Decision of Board of Review, July 8, 2015 at 1. Based on these facts — and after quoting from Gen. Laws 1956 § 28-44-18 — the Board pronounced the following conclusions:

> * * *
> The record of proceedings established that the claimant was instructed to go to his upstairs office cubicle and return with his computer to the meeting. The employer and staff awaited his return. The claimant went home and left a voicemail for this employer as to when he could drop off the computer. The claimant's actions constitute insubordination. He was aware that the employer was waiting for him to return to the meeting. He took no steps to inform the employer that he did not have the computer at work. The claimant's version of events is not credible. His testimony is that he did not know where his computer was until he arrived at home. The claimant did not

> comply with a reasonable request by the employer: that he return to the meeting with his computer. Instead he left his work place without notice to the employer. The claimant's actions were intentional and deliberate so as to be in willful disregard of the employer's interest. The employer has proved misconduct.

Decision of Board of Review, July 8, 2015 at 2. And so, on this basis, Mr. Coutu was again denied unemployment benefits by the Board of Review.

As we can see, the Board did not — as it was directed to do — specify the exact company rule (or rules) Claimant violated; instead, it shifted to a new basis of misconduct — insubordination, founded on the Claimant's failure to turn-in his company laptop computer when directed to do so. Believing himself aggrieved by this ruling, Mr. Coutu filed a second complaint for judicial review in the Sixth Division District Court on July 31, 2014.

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. —** … 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, 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]

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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, 246 A.2d 213 (1968).

3 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).

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.

IV
ANALYSIS

The Board of Review's post-remand decision eschewed all talk of double-billing for sessions with clients and false billing, which its first decision had focused on. See Decision of Referee, March 14, 2013, at 1, adopted as the decision of the Board of Review on April 25, 2013. Instead, it centered on an event that occurred during Mr. Coutu's meeting with

management about those issues: when Claimant was directed to retrieve his Gateway notebook computer from his cubicle, he left the meeting and, when he could not find it in his cubicle, he did not return to the meeting. Instead, he went home. He did not inform the employer that he was leaving the workplace.

It is on the basis of this behavior that claimant was disqualified from the receipt of benefits by the Board of Review. It termed his actions "insubordination." In order to evaluate the strength of this finding, we shall review the testimony and evidence presented on this issue.

A

The Facts of Record

1

Testimony Presented by the Employer

Mr. David Boscia, Gateway's program manager, testified that, as a result of a telephone call from a client of Mr. Coutu's (and of Gateway, obviously), certain questions arose regarding whether Claimant had provided certain services for his clients and whether he had prepared the appropriate reports concerning those services.

Accordingly, on December 12, 2012, Claimant was summoned to a meeting with some members of Gateway's management team, including

Mr. Boscia. Referee Hearing Transcript, at 6-7, 12. During the discussion, Mr. Coutu suggested that there might have been something wrong with his Gateway notebook computer. Referee Hearing Transcript, at 7. And so, they asked Claimant to turn in his computer so he could have the computer experts examine it. Referee Hearing Transcript, at 7-8, 10-11, 14.[4] Mr. Coutu then left the meeting, presumably to go up to his desk to get his computer; but, he never returned; he left the building. Referee Hearing Transcript, at 8. Mr. Boscia testified that Mr. Coutu did not inform them that he did not have the computer with him that day. Referee Hearing Transcript, at 11, 16-17.

According to Mr. Boscia, Mr. Coutu was dismissed because of two issues — he billed customers twice and he billed for time that he did not spend with them. Referee Hearing Transcript, at 13-14. During his testimony, Mr. Robert Gentile, Gateway's Human Resources Manager, said the decision to fire Mr. Coutu (instead of suspending him) was made by the vice-president for all adult services. Referee Hearing Transcript, at 29.

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[4] During the hearing, Ms. Lisa DeCiantis (a Gateway "Team Leader") confirmed that, for a certain time, Gateway was having problems with their computers not saving materials — apparently for storm-related reasons. Referee Hearing Transcript, at 20-22.

2

Mr. Coutu's Testimony

Mr. Coutu testified that he had been employed by Gateway for eleven years. Referee Hearing Transcript, at 39. Much of Mr. Coutu's testimony was concerned with describing problems that he and others had experienced with the Gateway computer system in 2012; and relating that Mr. Boscia was made aware of these problems. Referee Hearing Transcript, at 32-34.

Regarding the events of December 12, 2012, Mr. Coutu testified that he knew he was suspended and that his superiors wanted his computer to be examined. Referee Hearing Transcript, at 40. And so, he went up to his office to get the computer — but it was not there. Id. He then went out to his car, but could not find it there either. Id. Claimant then placed a call to Mr. Gentile (whom he called 'Bob"); but, since Claimant did not have Mr. Gentile's cell phone number he had to call his work line, which was not answered; and so he left a voicemail. Referee Hearing Transcript, at 41. He went home and found the computer there. Id. It was then about 4:00 p.m. Id.

He then called Bob (apparently for the second time) to let him know the computer was at his house and to set up a time when he could bring the computer in. Referee Hearing Transcript, at 42. The next day Mr. Gentile called, and left a message that it was "imperative" that Mr. Coutu call him as soon as possible. Referee Hearing Transcript, at 43. Claimant did so, and was told he was terminated. Id. When he asked why, Mr. Gentile told him that he would not discuss the matter over the phone, but he could come in for a discussion. Referee Hearing Transcript, at 43, 46-47. He subsequently received a letter of termination. Referee Hearing Transcript, at 44. Mr. Coutu testified that he tried to return the employer's property, including the notebook, but was unable to set up a meeting. Referee Hearing Transcript, at 44. Eventually, in January, Mr. Gentile called to set up a meeting, but he kept proposing times which Mr. Coutu "couldn't do." Referee Hearing Transcript, at 45.

B

Position of the Board of Review and the Parties

1

The Position of the Board

As noted above, in its post-remand decision, the Board of Review found Mr. Coutu had committed misconduct, in the nature of

insubordination, when he failed to present his notebook computer when directed to do so at the meeting called to discuss issues of billing and documentation. See Decision of Board of Review, July 8, 2015 at 2, quoted ante at 4-5. In doing so, it abandoned the theory of the case it had earlier embraced — i.e., that Claimant had violated a known company policy, apparently one regarding billing practices. See Decision of Board of Review, April 25, 2013 adopting Decision of Referee, March 14, 2013, as its own. And, proceeding on the insubordination theory, it failed to answer the precise question posed by this Court when it remanded the case to the Board — which policy of Gateway did Mr. Coutu violate? See K. Coutu v. Department of Labor and Training, Board of Review, A.A. No. 13-086, at 8-11 (Dist.Ct. 06/04/2014).

2

The Position of Claimant Coutu

Appellant Coutu argues that there is "not one shred of evidence" that Gateway fired him because he failed to return his computer. See Appellant's Second Memorandum of Law, at 2. He urges that the Board abused its discretion by finding that Claimant was fired for that reason. See Appellant's Second Memorandum of Law, at 3-5.

3

The Position of Gateway Healthcare

Responding to these arguments, Gateway argues that Mr. Coutu's factual position — that his termination was not related to his failure to return his computer — is belied by Mr. Gentile's testimony that Mr. Coutu's suspension was changed to a termination after it became clear he was not going to return the computer. See Gateway Healthcare's Reply Memorandum of Law, at 5.[5]

Gateway also asserts that the Board's new findings did not violate due process principles because no new testimony was taken. See Gateway Healthcare's Reply Memorandum of Law, at 6.

On the other hand, Gateway argues that the issue is also baseless because the Board of Review is not limited to instances of misconduct found by the Referee. See Gateway Healthcare's Reply Memorandum of Law, at 7 citing Hackett v. Murray, 508 A.2d 649, 651 (R.I. 1986). As a statement of law, this is certainly true. In fact, the Board can either decide a

[5] While I generally refrain from commenting on the positions of the parties as I enumerate them, I am compelled to note that this argument is a classic example of the logical fallacy, Post hoc ergo propter hoc (Latin: "after this, therefore because of this"). See Black's Law Dictionary 1285 (9th ed. 2009).

case coming before it by reviewing the record created before the Referee or by conducting a whole new hearing. See Hackett v. Murray, 508 A.2d at 651, citing Gen. Laws 1956 § 28-44-47.

C

Discussion

Clearly, Appellant feels himself to be the victim of administrative chicanery. He expected the proceedings on remand would focus on specifying the Gateway policy he was alleged to have broken; instead, the Board opted to decide the case on an alternative theory — insubordination.

The Board's action (in switching theories) has undoubtedly left Mr. Coutu with the feeling that he just watched a magician pull a rabbit out of his hat. His expectations of what would occur upon remand were entirely dashed. But this Court's mandate does not include joining the Claimant in expressing surprise, consternation, or even pique, even if justified. We are here to focus on the only question that is truly before us is — Does the Board's decision pass legal muster? For the reasons I shall set forth in Part IV-C-3 of this opinion, post, I conclude it does not.

1

Due Process Consideration — Fairness

We shall examine this question from several angles. First, I do agree with Gateway that the case cited by Claimant — Camille v. Board of Review, Department of Employment Security, 557 A.3d 1234 (R.I. 1989) is distinguishable. In that case, when considering Ms. Camille's appeal, the Board opted to conduct a new hearing, but it announced, at the start of that hearing, that no new evidence would be permitted to be introduced, a procedure that is authorized by Gen. Laws 1956 § 28-44-47. Camille, 557 A.2d at 1235. However, as the hearing proceeded, the employer was indeed allowed to introduce new evidence; but Ms. Camille was not. Id. The Supreme Court held that the due process notion of fairness (i.e., that all parties be treated alike) was indeed violated. Id.

Here, the Board conducted no post-remand hearing. Neither side was allowed to introduce new evidence. The Board decided the case solely on the basis of the previously created record. And so, both sides were treated alike. As a result, in my view, the due process notion of fairness was not implicated here.

2

Due Process Considerations — Notice

Claimant also urges that it was a violation of due process for the Board to adopt the new rationale for disqualification (that is, insubordination), because he had "no notice that the status of the computer would become an issue." See Appellant's Second Memorandum of Law, at 6. In this statement, Claimant has raised for our consideration a second due process issue — a lack of notice.[6] But, for the reasons I shall now set forth, I do not believe the Board of Review violated the notice requirements of the due process clause when it decided that Mr. Coutu was guilty of disqualifying insubordination by failing to immediately turn-in his notebook computer when directed to do so.

To begin with, let me state that, at least factually, the Board's discussion of the notebook computer issue in its post-remand decision should not have taken Mr. Coutu by complete surprise. After all, the Referee had stated in his Findings of Fact that Claimant was asked to produce the company laptop and that he never did so. Decision of Referee,

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[6] The United States Supreme Court has, for over forty years, declared minimum due process to consist of notice and the opportunity to be heard. See Morrissey v. Brewer, 408 U.S. 471, 480-90 (1972).

March 14, 2013, at 1. As a result, his behavior vis à vis the computer had been subjected to a great deal of scrutiny at the hearing conducted by Referee Enos; and Mr. Coutu addressed the issue, explaining his efforts to retrieve his computer at some length. See Referee Hearing Transcript, at 40-42 and synopsis of Claimant's testimony on this point, ante at 12-13.

In addition, Gateway argues that the issue is legally baseless because the Board of Review is not limited to instances of misconduct found by the Referee. See Gateway Healthcare's Reply Memorandum of Law, at 7 citing Hackett v. Murray, 508 A.2d 649, 651 (R.I. 1986). As a pure statement of law, this is certainly true. In fact, the Board can either decide a case coming before it by reviewing the record created before the Referee or by conducting a whole new hearing. See Hackett v. Murray, 508 A.2d at 651, citing Gen. Laws 1956 § 28-44-47.

And this principle may also be drawn from our Supreme Court's decision in Technic, Inc. v. Rhode Island Department of Employment and Training, 669 A.2d 1156 (R.I. 1996), in which the owner testified that the claimant had been terminated for three reasons — (1) he sold drugs at Technic, (2) he stole slivers of gold from Technic, and (3) 600 ounces of gold had disappeared from claimant's work area, though they had no

conclusive evidence that he had taken it. Technic, 669 A.2d at 1158. The referee assigned to the case found that "it was obvious" that the claimant was actually discharged for the loss of the 600 ounces of gold (and, by inference, not the other two stated reasons, and that, on that point, misconduct had not been proven; as a result, the claimant was found eligible to receive unemployment benefits. Id. The Board of Review and the District Court affirmed. Id. The Supreme Court reversed, finding that evidence had been presented substantiating the first two allegations of misconduct enumerated above. Technic, 669 A.2d at 1159-60.

Now, the teaching of Technic is clear — the Board may (and should have in that case) find misconduct on grounds rejected by the Referee. But, the Court in Technic took pains to emphasize that the allegations it found to have been proven had been stated by the employer as having been reasons for the claimant's discharge. Technic, 669 A.2d at 1159-60.[7]

[7] And that, in my view, is the key difference between Technic and the instant case — as we shall see, Gateway never claimed that it fired Mr. Coutu because he committed insubordination by not returning his notebook computer.

3

A Disqualification for Misconduct Must Be Grounded on that Behavior which Precipitated the Claimant's Discharge

We come now to the argument made by Appellant Coutu that I do find to possess merit — that Gateway did not fire Mr. Coutu for failing to return his notebook computer. As I construe § 28-44-18, a claimant can only be disqualified for proved misconduct if that behavior was in fact the reason for his or her discharge. Now, I must admit that, to my knowledge, our Supreme Court has never accepted (or rejected) this principle. Nevertheless, for two reasons, I believe that this is, in fact, the proper reading of § 28-44-18 — the first of these arises from a reading of the statute itself; the second is based on the interpretation given to misconduct-disqualification statutes nationally. But before I flesh out my analysis on the issue, I shall pause to set forth the evidence of record on the question — Why did Gateway fire Mr. Coutu?

a

Factual Predicate

In considering this question — i.e., whether Gateway terminated Mr. Coutu for failing to return his notebook computer — I shall reference the

two only occasions[8] upon which Gateway's representatives have spoken about this issue. As we shall see, they are consistent in their message — that Mr. Coutu was fired for reasons other than failing to return his notebook computer.

I first turn to a document contained in the administrative record that is created by the Department of Labor and Training for each unemployment claim — the so-called "DLT 480" form. It is on this form that we find synopses of the telephone interviews done by the Department's adjudicators before the Department issues its eligibility determination. See Department's Exhibit D1. In the "Employer Statement" given in this case, Mr. Robert Gentile states that "He was terminated for violation of company policy. He billed customers twice and billed for time he didn't spend with them." Id., at 2.

The second occasion on which the employer's representatives spoke to this issue was the hearing before Referee Enos. There, Claimant's program manager, Mr. David Boscia, spoke definitively regarding the grounds for Mr. Coutu's termination: he was dismissed because of two

[8] Obviously, I do not consider Gateway's memorandum as being probative on this issue. The arguments of counsel are not evidence,

issues — he billed customers twice and he billed for time that he did not spend with them. See Referee Hearing Transcript, at 13-14, summarized ante at 11. Later in the hearing, Mr. Gentile, Gateway's Human Resources manager, confirmed that his failure to return the computer was not a factor in the decision to fire Mr. Coutu. See Referee Hearing Transcript, at 29, quoted in Appellant's Second Memorandum of Law, at 5. And so, the evidence on the question is uniformly consistent — Mr. Coutu was not fired for failing to return his computer or any other form of insubordination.

Having reviewed the factual record on this point, we may now proceed to address the legal issue.

b

The Statutory Language

As we quoted the statute ante, at 6, § 28-44-18 bars unemployment benefits to —

> … an individual who has been discharged for proved misconduct connected with his or her work[.]

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whether made in open court or in a memorandum.

Thus, the disqualification is operative only if the claimant was disqualified for proved misconduct. So then, what does "for" mean in this context? May the claimant be disqualified if he or she committed misconduct, even if those bad acts were not the reason for his discharge? I believe this question must be answered in the negative.

In my view, it is perfectly clear that in this context "for" means "because of." This view is supported by at least two of the prominent general dictionaries,[9] and, more significantly, this meaning has been endorsed in an opinion of our Supreme Court (albeit an aged one).[10] And "… when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings."[11] Applying this doctrine, we are led to

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[9] See Webster's Third New International Dictionary of the English Language, (2002) at 886, wherein the definition of the preposition "for" is given thusly "… **8 a :** because of <shouted for joy> **:** on account of <decorated for bravery> <do it for my sake> and The American Heritage Dictionary (5th edition) at 685: "… **7.** As a result of; because of; jumped for joy."

[10] See Desjourdy v. Mesrobian, 52 R.I. 146, 158 A. 719 (1932), in which the Court, citing the "Wesbter's New International Dictionary" held the phrases "because of" and "on account of" to be synonymous with the word "for," which was used in the statute being construed.

[11] State v. Diamante, 83 A.3d 546, 548 (R.I. 2014) citing Accent Store

the ineluctable conclusion that a claimant can only be disqualified under § 18 if the termination was based on the misconduct that has been proven.

c

The National Rule

Moreover, this construction — i.e., that a § 18 disqualification may only be applied if the claimant was terminated for the misconduct that was proven — is, in fact, the general rule, according to the legal encyclopedists; for instance, the Second Edition of the American Jurisprudence states the rule as follows:

> An employer's burden of proof with regard to misconduct includes the burden to prove that the alleged misconduct was in fact the reason for the employee's discharge. This burden is not satisfied by showing incidents of misconduct during the course of employment if the employee was not discharged because of those incidents.

(Emphasis added – footnotes omitted). 76 AM. JUR. 2d Unemployment Compensation § 71.[12]

Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996), DeMarco v. Travelers Ins. Co., 26 A.3d 585, 616 (R.I. 2011), and Sidell v. Sidell, 18 A.3d 499, 504 (R.I. 2011).

[12] American Jurisprudence cites the following three cases as exemplars of the principle — Chase v. District of Columbia Department of Employment Services, 804 A.2d 1119 (D.C. 2002); Landy & Zeller, Attorneys at Law v. Commonwealth of Pennsylvania Unemployment

4

Resolution of this Issue

Having concluded that one may only be disqualified pursuant to § 28-44-18 for proved misconduct if the misconduct found was the reason for the discharge, it follows that the Board (and the Referee and the Department) must find such a nexus in every case in which they find a § 18 disqualification. However, the Board did not make such a finding in Mr. Coutu's case. And so, the Board's decision could be declared to be legally infirm on that basis alone.

Nevertheless, it is not necessary for us to render this decision merely on issues of form. On the basis of the uncontradicted testimony of record, we must find that Mr. Coutu was not fired for insubordination arising out of his failure to return the computer he possessed to Gateway. And so, I

Commission Board of Review, 110 Pa. Commw. 183, 531 A.2d 1183 (1987); and Randle v. Administrator, Louisiana Office of Employment Security, 499 So. 2d 488 (La. Ct. App. 2d Cir. 1986).

The other American legal encyclopedia, the Corpus Juris Secundum, treats the rule in a single sentence:

> An employee is not ineligible for benefits on the ground of discharge for misconduct where he or she has been discharged for another reason.

(footnote omitted) 81 C.J.S. Social Security and Public Welfare § 408 citing Jones v. Appeal Board of Michigan Unemployment

conclude that, on this basis, the post-remand decision of the Board was contrary to law.

V
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 REVERSED.

/s/
Joseph P. Ippolito
Magistrate

June 22, 2015

Compensation Commission, 332 Mich. 691, 52 N.W.2d 555 (1952).