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

Alexandra Balon	:	
	:	
v.	:	**A.A. No. 2023 – 076**
	:	
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 24th day of September, 2024.

By Order:

/s/
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. Alexandra Balon 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 because she was fired for proved misconduct, as provided in G.L. 1956 § 28-44-18. This matter has been referred to me for the making for Findings and Recommendations pursuant to G.L. 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 Board's decision be AFFIRMED.

I

Facts and Travel of the Case

A

The Claim and the Initial Decision of the Department

Ms. Alexandra Balon held the part-time position of Lower Associate with Macy's, the retail chain, for four years, until June 24, 2023. She filed an application for unemployment but, on August 3, 2023, 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 G.L. 1956 § 28-44-17, because she had left her position without good cause. *See Dec. of Director,* at 1; which may be found on page 40 of the electronic record (*ER*) attached to this case.

B

Proceedings Before the Referee

1

The Hearing

Claimant Balon filed an appeal and a telephonic hearing was conducted by Referee William Enos on October 17, 2022, at which the circumstances of Ms. Balon's separation were explored in greater detail. *See Ref. Hr'g Tr.* at 1; *ER* at 22. The Claimant appeared and the employer was represented by Jennifer Groenwold, acting as its agent, and Gina Mascia, who was its witness. *Ref. Hr'g Tr.* at 2. After the opening formalities, such as the administration of the testimonial oath to the witnesses and the

enumeration of the contents of the file that the Department had transmitted to the Board, the Referee asked Claimant to state the cause of her separation from Macy's. *Ref. Hr'g Tr.* at 4. She responded that she voluntarily left her part-time position after four years because "[she] didn't need to work there anymore." *Id.*

Ms. Mascia testified that Ms. Balon did not voluntarily separate from her position — but was terminated for violating company policy. *Id.* at 5. Ms. Mascia explained that the store was doing a routine package check of the employees' bags as they were leaving, when unpaid-for merchandise was found on Claimant. *Id.* at 6. They brought her in for a further interview, and she admitted that she had done it five times in the prior week and at least two times per week during the prior month. *Id.* Ms. Mascia testified that the price of the goods found that day was $578.47 and the total of all Ms. Balon's activities resulted in a shortage of $3,900.00. *Id.* at 6-7. Ms. Mascia then explained that Claimant gave a written statement as to her conduct and agreed to make restitution, as formalized in a promissory note. *Id.* at 7-8.

At this juncture, the Referee turned to Ms. Balon for a response; she admitted that what Ms. Mascia had stated was true and what she told the Department was not the truth; neither was her earlier testimony. *Id.* at 9. Finally, Ms. Balon testified that she took these things based on peer

pressure, and that she knew she could be fired for taking merchandise. *Ref. Hr'g Tr.* at 10-11.

2

The Decision

In his September 20, 2023 Decision, the Referee made Findings of Fact. He wrote:

> The claimant was a Lower Associate for Macy's Holding Retail LLC for four years last on June 24, 2023. The claimant stated that this was a part-time position, and it was a voluntary termination. On July 26, 2023, the claimant was interviewed by an adjudicator and stated that she gave a two week notice and worked out her notice without issue. The employer stated that she did not resign she was terminated for theft. The employer submitted evidence of an asset protection statement signed by the claimant on June 24, 2023, that showed the claimant admitted to taking unpaid merchandises over the course of months totaling $3,900.00. The employer submitted evidence of their policy showing that the claimant violated the expectations of conduct policy and was terminated.

Dec. of Referee, at 1; *ER* at 22. The Referee then made conclusions concerning the nature of Ms. Balon's separation. To begin with, he found that she did not quit but was discharged. And so, to determine whether Claimant should be disqualified for misconduct, he presented the statutory and caselaw definitions of misconduct, as stated in G.L. 1956 § 28-44-18 and the leading case construing it, *Turner v. Department of Employment and Training, Board of Review,* 479 A.2d 740, 741-42 (R.I. 1984). *Dec. of Referee,* at 2; *ER* at 23. After which, he turned to the circumstances of Ms. Balon's

claim for benefits. He stated:

> In cases of termination, the employer bears the burden to prove by a preponderance of credible testimony or that the claimant committed an act or acts of misconduct as defined by the law in connection with her work. For the purpose of establishing misconduct the claimant must know the policy. I find in this case that the claimant was aware of this policy.
>
> As a result, her actions were not in the employer's best interest. Therefore, the claimant is denied benefits under Section 28-44-18 of the Rhode Island Employment Security Act.

Dec. of Referee, at 2-3; *ER* at 23-24. And so, the Referee affirmed the decision of the Department disqualifying Claimant from the receipt of unemployment benefits — though under a different theory (that is, misconduct under § 28-44-18, not leaving without good cause under § 28-44-17). *Dec. of Referee,* at 3; *ER* at 24.

C
Proceedings Before the Board of Review

Ms. Balon then sought review by the Board of Review, which did not conduct a new hearing; instead, the Board decided the case on the basis of the record developed by the Referee, as it has the authority to do under G.L. 1956 § 28-44-47. Employing this procedure, the full Board of Review affirmed the Referee's decision, finding it to be a proper adjudication of the facts and the law applicable thereto; the Referee's decision was adopted as the decision of the Board. *See Dec. of Bd. of Review* (October 23, 2023), at 1;

ER at 2. Finally, Claimant filed the instant appeal.

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 6, 2014, 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 earnings greater than, or equal to eight (8) times, 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" previously employed in *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 under § 28-44-18.

III
Standard of Review

The standard of review is provided by G.L. 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.' " *Guarino v. Dep't of Soc. Welfare,* 122 R.I. 583, 584, 410 A.2d 425 (1980) (citing G.L. 1956 § 42-35-15(g)(5)). The Court will not substitute its judgment for that of the Board as to the

weight of the evidence on questions of fact. *Cahoone v. Bd. of Review of the Dep't of Emp't Sec.,* 104 R.I. 503, 246 A.2d 213 (1968). Stated differently, the Board's findings will be upheld even though a reasonable mind might have reached a contrary result. *Cahoone,* 104 R.I. at 506-07, 246 A.2d at 215 (1968). *See also D'Ambra v. Bd. of Review, Dep't of Emp't Sec.,* 517 A.2d 1039, 1041 (R.I. 1986).

The Supreme Court of Rhode Island recognized in *Harraka v. Board of Review of the 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

After a review of the entire record and the issues raised in the case at bar, I have concluded that the Decision of the Board of Review denying unemployment benefits to Ms. Balon is supported by competent evidence of record; furthermore, the Decision is not clearly erroneous in view of the reliable, probative, and substantial evidence of record. Moreover, the Decision is not violative of procedural or substantive law applicable to the case. Finally, the decision is neither arbitrary nor capricious.

Quite simply, stealing from one's employer is patently misconduct. It is behavior that is clearly contrary to the employer's best interests and in complete disregard of those interests. What is more, it is a crime. The value of the merchandise which Claimant admitted stealing makes this offense potentially felonious. We must also note that the proof of Claimant's misconduct is overwhelming. Ms. Balon was found *in the act* of taking merchandise for which she had not paid. She not only confessed to it — but signed a promissory note to make restitution. And while, at the outset of the hearing she attempted a different approach, she ultimately admitted to the Referee that the allegations were true; and she did so under oath. In sum, the conclusion that she committed misconduct in connection with her employment at Macy's is ineluctable.

ADDENDUM

Having concluded that the Board's finding (*i.e.,* that Claimant was ineligible for unemployment benefits based on the circumstances of her discharge from her part-time position at Macy's) ought to be affirmed, I believe this Court must offer a few comments on the proper consequences of this decision. Quite simply — should it trigger a total or partial disqualification of Claimant Balon's right to receive benefits?

Well, this Court has long held that a claimant who (1) is receiving benefits from the loss of a prior position, who (2) accepts a part-time position, and who (3) subsequently quits that part-time position without good cause, is not *fully* disqualified from receiving benefits, but only *partially* disqualified. *See Craine v. Dep't of Emp't and Training, Bd. of Review,* A.A. No. 91-25, (Dist.Ct.6/12/91). This rule is an adjunct to the principle, set forth in G.L. 1956 § 28-44-7, that a claimant who is laid-off from a full-time position who is also working part-time may nonetheless collect benefits, subject to an offset based on the worker's part-time earnings. Subsequently, in *Palazzo v. Dep't of Labor and Training, Bd. of Review,* A.A. No. 10-55 (Dist.Ct. 10/19/2010) this Court extended the holding in *Craine* to those who, having been awarded benefits due to a separation from a full-time position, were discharged from a part-time position for misconduct; further benefits were allowed, subject to an offset for those wages lost due to misconduct. *Deletetsky v. Dep't of Labor and Training, Bd.*

of Review, A.A. No. 13-153, at 21-23 (Dist.Ct. 08/14/2014). It seems that these principles come into play in the instant case.

While Ms. Balon was working part-time at Macy's, she apparently was employed on a full-time basis at the Providence Community Health Center. *Ref. Hr'g Tr.* at 10. During the hearing, she stated that "my (inaudible) like unemployment is only from Providence Community Health Center." *Id.* So, it appears that Claimant is alleging that she has a claim based on her separation from PCHC and that claim is being affected negatively by her Macy's disqualification.

Of course, this Court cannot confirm the accuracy of that circumstance based on the record before us. This record concerns only her separation from Macy's. The most we can do in this context is to offer the following guidelines to the Department.

First, any claim predicated on her PCHC employment must stand or fall on its own merits. If she has been disqualified from receiving benefits and she has exhausted her administrative remedies, she certainly cannot receive any unemployment benefits. *But second,* if she is not disqualified in the PCHC claim, her Macy's disqualification does not work a total bar to benefits. She may collect in the PCHC claim subject to an offset for the weekly wages she would have earned at Macy's, had she not been discharged for misconduct.

V
Conclusion

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. G.L. 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. G.L. 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision rendered by the Board of Review in this case be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

September 24, 2024