SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VIRGIN ISLANDS BOARD OF EDUCATION, **Petitioner,** **vs.** **GOVERNMENT OF THE VIRGIN ISLANDS DEPARTMENT OF LABOR/VIRGIN ISLANDS EMPLOYMENT SECURITY SERVICES, and BARBARA WILLIAMS-BROWN,** **Respondents.**	**CASE NO. ST-16-CV-616**

MEMORANDUM OPINION

Pending before the Court is Petitioner Virgin Islands Board of Education's appeal of a decision issued by an Administrative Law Judge ("ALJ") for the Virgin Islands Department of Labor. For the following reasons, the ALJ's decision will be affirmed in part and reversed in part, and this case will be remanded for further proceedings consistent with this Opinion.

FACTUAL AND PROCEDURAL HISTORY

Petitioner hired Respondent Barbara Williams-Brown in August 2015 to work as the Board's Director of Business and Finance. In December 2015, Nandi Sekou, the Chair of the Board at that time, directed Williams-Brown to apply for a credit card to make purchases on behalf of the Board. Patricia Schrader-Cooke, then Acting Executive Director for the Board, approved the directive; and, Williams-Brown opened a business credit account with American Express. Although it was a business account, the card listed

Williams-Brown's name and drew from her own credit.[1] Other cards were issued under the credit card account in the names of Sekou and Schrader-Cooke.[2]

In December 2015, Williams-Brown made a restaurant charge of $261.62 on the credit card in her name and made a charge of $272.55 for office supplies, for a total of $534.17.[3] Sekou and Schrader-Cooke also made charges on their cards for restaurants, office supplies, and air transportation.[4] The annual fee for the account was $450.00.[5]

In a January 15, 2016, meeting Williams-Brown notified the Board that she had been approved for a credit card.[6] In a subsequent Board meeting on January 29, 2016, Williams-Brown reported that she cancelled the credit card in her name upon learning that the Government did not have a credit card policy in place.[7]

In February 2016, the Board suspended Williams-Brown for opening the credit card account, for making charges on the credit card, and for unilaterally changing her employment status from exempt to classified and increased her salary without Board approval.[8] Then, on May 28, 2016, Petitioner terminated Williams-Brown for her "actions without Board approval that adversely impact the Board's finances and governance, including obtaining a credit card without Board approval and failing to disclose said

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[1] Hearing Transcript, at pages 101 and 108.
[2] It is not clear if the charges on the additional cards also drew from Williams-Brown's credit.
[3] See Exhibit J.
[4] Sekou's charges totaled $748.97 and Schrader-Cooke's charges totaled $180.88. See Exhibit J.
[5] In its brief, Petitioner asserts that the $450.00 fee was paid by the government and directs the Court's attention to Petitioner's Exhibit 1. However, Exhibit 1 is simply the credit card statement, and does not clarify how the $450.00 charge was paid.
[6] Hearing Transcript, at page 110.
[7] *Id.*, at pages 100 and 101. During the hearing before the ALJ, Williams-Brown stated that she did not feel "comfortable" because the card was "tied to [her] line of credit." *Id.* It is unclear whether Williams-Brown cancelled the card in her name or cancelled the entire credit card account.
[8] Hearing Transcript, at pages 47, 48, 55, and 56.

records to the Board once requested to do so, and generally not performing her duties as Director of Business and Finance."[9]

Williams-Brown sought unemployment insurance benefits, and an adjudicator for the DOL determined that Williams-Brown was not entitled to receive unemployment benefits because her termination was the result of her misconduct. The adjudicator found that Williams-Brown opened a credit card in her employer's name "without board approval" and made charges on it with "no viable explanations."[10]

Williams-Brown filed a timely appeal, and a hearing was held on August 27, 2016, before an ALJ, who reversed the decision of the adjudicator in a written opinion and order dated September 15, 2016. The ALJ found by a preponderance of the evidence that Williams-Brown applied for a credit card at the direction of Sekou with the approval of Schrader-Cooke, her superiors. The ALJ concluded that Williams-Brown actions did not constitute misconduct, and that she was entitled to unemployment benefits. Petitioner timely appealed that decision to this Court on October 14, 2016.[11]

STANDARD

The Appellate Division of the Superior Court has jurisdiction over this matter under 24 V.I.C. § 306(e)(1), which establishes that any person aggrieved by a final order of a hearing officer for the Department of Labor that had granted or denied a claimant's petition for unemployment compensation may obtain a review of that order by filing a petition for review in the Superior Court within 30 days of the date the order is issued. The Court

[9] Termination letter, at page 1.
[10] ALJ's Order, at page 1.
[11] Petitioner titled its appeal as a writ of review. On October 24, 2016, this Court granted Petitioner's writ of judicial review, noting that it was really an appeal under 24 V.I.C. § 306.

reviews the Commissioner's factual determinations under the "substantial evidence rule"[12] and legal findings are "afforded plenary review."[13]

ANALYSIS

An insured worker shall not be disqualified from receiving unemployment compensation "unless … the Commissioner of Labor finds that … [the worker] was discharged for misconduct connected with [her] most recent work."[14] Virgin Islands courts have defined "misconduct" under the statute as "an act of wanton or wilful disregard of an employer's interests, a deliberate violation of the employer's rules, a disregard for the standards of behavior which an employer has the right to expect from an employee, or negligence indicating an intentional disregard of the employer's interest or of employee's duties and obligations to the employer."[15]

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[12] 24 V.I.C. § 70(b). See also *Tip Top Constr. v. Dep't of Prop. & Procurement*, 1999 V.I. LEXIS 23, *14-15, 41 V.I. 72, 80, 1999 WL 603818 (V.I. Terr. Ct. 1999) ("When authorized to do so, the Court reviews administrative determinations under the substantial evidence rule. Under th[is] rule, a decision by an administrative agency or by an administrator, will not be set aside if it is based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); see also *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Villafane v. Bryan,* 2001 V.I. LEXIS 8, *13, 43 V.I. 149, 156, 2001 WL 883557 (V.I. Terr. Ct. 2001) (the court's task is to determine ... whether the agency's findings are supported by substantial evidence on the record"); *Perry v. Government Employees Service Commission*, 1981 U.S. Dist. LEXIS 9338, 18 V.I. 524 (D.C.V.I. 1981); *Port Norris Exp. Co., Inc. v. I.C.C*, 697 F. 2d 497 (3rd Cir. 1982) (the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence).

[13] See *Bryan v. Fawkes*, 61 V.I. 201, 226, 2014 V.I. Supreme LEXIS 42, *36 (VI. 2014) ("when reviewing a territorial administrative agency's decision, 'we exercise plenary review over any issue of law'") (quoting *Prosser v. Public Servs. Comm'n of the U.S.V.I.*, 56 V.I. 391, 401 (V.I. 2012)). See also *Williams-Jackson v. Pub. Emps. Relations Bd.*, 52 V.I. 445, 450 (V.I. 2009); *V.I. Pub. Servs. Comm'n v. V.I. Water & Power Auth.*, 49 V.I. 478, 483 (V.I. 2008) (applying plenary standard of review to resolve jurisdictional dispute between two Virgin Islands administrative agencies). "Plenary review means applying the same legal standard as the trial court to the same record." *Henry v. Dennery*, 55 V.I. 986, 991 (V.I. 2011).

[14] 24 V.I.C. § 304. The statute lists other grounds for disqualification from benefits that are not relevant to this matter.

[15] *Jackman v. Heyliger*, 20 V.I. 536, 538-539, 1984 U.S. Dist. LEXIS 10667, *4-5 (D.V.I. 1984).

On appeal, Petitioner challenges the ALJ's determination that Williams-Brown did not commit misconduct by opening the credit card account without approval by a majority vote of the Board.[16]

The ALJ had reasoned that opening the credit account "related to the 'internal operations' of the day-to-day functioning of the Board" and did not require a majority vote.[17] While the ALJ did not discuss his method for distinguishing an action that falls in the category of internal operations from an action that requires approval by the majority of the Board, the Court finds that the ALJ's conclusion was not in error.

The bylaws of the Board indicate that the Board "delegates to the Executive Director or designee the authority to carry out Board decisions and make and carry out any decisions which it delegates."[18] Notably, the Executive Director or designee "shall serve as the chief executive officer [CEO] of [the] Board."[19] In addition, the bylaws state that the Director of Business and Finance "plans and develops operating procedures which support the goals and objectives of this agency … [and] consults regularly with the Executive Director in developing the general philosophy and operational matters."[20]

Based on the bylaws, the Court concludes that the Board of Education has a "general corporate structure," wherein the "governing board[] is the purveyor[] of policy, while the CEO oversee[s] day to day operations."[21]

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[16] As will be discussed later in this Opinion, Petitioner raises other grounds of misconduct on appeal.
[17] ALJ Opinion, at page 3.
[18] Bylaws-Virgin Islands Board of Education, at page 7.
[19] *Id.*
[20] *Id.*, at page 51.
[21] *V.I. Gov't Hosps. & Health Facilities Corp. v. Gov't of the V.I.*, 2006 V.I. LEXIS 13, *30, 47 V.I. 430, 445 (V.I. Super. Ct. 2006).

Within a general corporate structure, matters relating to opening a business credit card account are usually administrative or operational. In the private sector, for instance, it is common for employees to have and use company credit cards to conduct the day-to-day operations of a business.[22] Similarly, government credit cards are often issued to federal governmental employees for official government purposes.[23]

Considering that the decision to issue a credit card to an employee often appears to be an operational decision made by the CEO or his designee, and not a policy decision requiring a vote of the board of directors, the ALJ's conclusion that Williams-Brown needed only the approval of Sekou and Schrader-Cooke to open the credit card account is not unsound. The bylaws are silent regarding opening a credit card account, creating an ambiguity that should be resolved in Williams-Brown's favor. In the absence of a clear provision in the bylaws concerning credit cards, there is insufficient evidence in the record

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[22] See, e.g., *Club Chalet Homeowners' Ass'n v. Matthews*, 2012 Tenn. App. LEXIS 655, *2, 2012 WL 4101678 (Tenn. Ct. App. Sept. 19, 2012) ("the Property Manager was responsible for the day-to-day operations of the Employer, including its day-to-day financial matters. She was issued a company credit card with her name on it."); *Garza v. State*, 2010 Tex. App. LEXIS 6742, *2-3, 2010 WL 3279392 (Tex. App. Corpus Christi Aug. 17, 2010) (director's "duties included 'running the day-to-day operations of the business' [and a company credit card[] [was issued] to [the director]"); *Morgan v. Ramby*, 2008-Ohio-6194, P6, 2008 Ohio App. LEXIS 5166, *3, 2008 WL 5052777 (Ohio Ct. App., Warren County Dec. 1, 2008) (employee "used his National City Bank Visa to cover expenditures for day-to-day operations of United. The company acquired an additional credit card ... which [the employee] ... also used for United's day-to-day operations").

[23] See, e.g., *Meneese v. United States Postal Serv.*, 1998 U.S. App. LEXIS 789, *1-2 (Fed. Cir. Jan. 20, 1998) (postal worker with "sole control of all of the facility's financial operations" was "issued [a] ... credit card" and agreed "to use the card for official business purposes only"); *Monohon v. Potter*, 2007 U.S. Dist. LEXIS 10177, *2-3, 2007 WL 527498 (W.D. Wash. Feb. 14, 2007) ("A government credit card is required for the position of Criminal Investigator"); *United States v. Christy*, 18 M.J. 688, 689, 1984 CMR LEXIS 4065, *1 (N-M.C.M.R. 1984) ("The appellant was issued a Government credit card for the purpose of purchasing gasoline for Government vehicles used in connection with official business related to the Marine Corps Reserve unit to which he was assigned"); *McFarlane v. Chao*, 2007 U.S. Dist. LEXIS 99188, *13 (S.D.N.Y. Mar. 13, 2007) ("because the OFCCP requires employees to charge travel and hotel expenses to a government credit card, the agency issued plaintiff a government credit card for use in paying for travel arrangements").

to support a finding that Williams-Brown committed misconduct by opening the credit card account under the directive of Sekou and the approval of Schrader-Cooke. Consequently, the Court will affirm the portion of the ALJ's decision determining that Williams-Brown did not commit misconduct by opening a credit card account in the Board's name.

Notwithstanding, the ALJ committed reversible error when he limited his analysis of Williams-Brown's "misconduct" to her act of opening the credit card account. The termination letter states that Williams-Brown was terminated for "actions without Board approval that adversely impact the Board's finances and governance, including obtaining a credit card without Board approval and failing to disclose said records to the Board once requested to do so, and generally not performing her duties as Director of Business and Finance."

Generally, when it precedes a list, the word "including" signifies that the list is "illustrative" and is "not exclusive."[24] It follows then that, by its use of the word "including," the termination letter does not contain a specification of every action of Williams-Brown that was done "without Board approval that adversely impact the Board's finances and governance." Indeed, the record contains evidence of other unapproved actions on the part of Williams-Brown that may have adversely impacted the Board's finances and governance.

During the hearing, Board Chairman Mary Moorhead testified that another reason Williams-Brown was terminated was because charges were made on the credit card that

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[24] See *United States v. Ledlin (In re Mark Anthony Constr.)*, 886 F.2d 1101, 1106 (9th Cir. Wash. 1989) ("includes" or "including" demonstrates that Congress "intended to make the list of [terms] illustrative rather than exhaustive" (citations omitted)). See also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012) ("[T]he word include does not ordinarily introduce an exhaustive list....").

the Board saw "no reason for," indicating that Williams-Brown may have misused the credit card for her own benefit.[25] Petitioner presented evidence at the hearing that Williams-Brown made a charge on the credit card to cover a dinner that was not attended by Board members. While Petitioner indicated that it was customary for the Board to provide food at board meetings,[26] the record indicates that no board meeting occurred on December 22, 2015,[27] the date a dinner at Room with a View was charged to the card, casting into doubt the propriety of that charge.

The bylaws establish that a "board member should not subordinate the education of children and youth to any partisan principle, group interest, or the member's own personal interest."[28] In addition, the bylaws state that one of the duties of the Director of Business & Finance is to "plan[] and develop[] operating procedures which support the goals and objectives of this agency."[29]

The Court finds that Williams-Brown's job description[30] required her to effectuate the ethical objectives of the Board, which included overseeing the Board's finances and not misusing government funds. Accordingly, the ALJ committed reversible error when he

[25] Hearing Transcript, at page 20.
[26] *Id.*, at pages 75 and 76.
[27] Hearing Transcript, at pages 31 and 32. In the transcript, counsel questions Moorhead about a charge on December 12, 2015, at Room with the View, but it appears that counsel was misreading Exhibit 1 when she pursued this line of questioning. Exhibit 1 only contains a charge at Room with the View on December 22, 2015.
[28] Bylaws, at page 17.
[29] *Id.*, at page 51.
[30] Williams-Brown's job description was a part of the bylaws. Hearing Transcript, at page 117.

failed to make findings of fact regarding whether Williams-Brown committed misconduct when she used the business credit card in the manner indicated.[31]

In addition, Moorhead testified that another issue that factored into the Board's decision to terminate Williams-Brown's employment was evidence that Williams-Brown unilaterally changed her employment status from exempt to classified[32] and increased her salary.[33] Board Chairman Mary Moorhead testified that, when Williams-Brown was hired, the majority of the Board voted that Williams-Brown's position was exempt.[34] Moorhead also stated that the Board members did not authorize Williams-Brown's status change to classified and that this decision required approval of a majority of the board members.[35]

There is authority in the Virgin Islands that the Legislature intended to vest Petitioner with the necessary powers to carry out the duties stated in 17 V.I.C. § 21, in which case Petitioner was impliedly granted the authority to recruit, hire, promote and discharge personnel.[36] In addition, the bylaws do not suggest that the Board delegated these

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[31] Considering that the card drew from Williams-Brown's credit, the ALJ should also make findings of fact as to how the credit card bill was paid. Williams-Brown's testimony suggests that she submitted the credit card bills to the staff accountant, and the bills were paid by the Government. See Hearing Transcript, at pages 126-129. However, since the questioning was in the conditional tense—counsel questioned, and Williams-Brown answered, using the words "would have" to describe the procedure for paying the credit card bills – it is unclear how the bills were actually paid. At other points in the hearing, the line of questioning suggests that the credit card statements were paid from the Board's First Bank account (see Hearing Transcript, at pages 35-36) or through the Government's ERP system (see Hearing Transcript, at page 132). Even assuming, *arguendo*, that Williams-Brown paid the bills with her own funds, in that instance the ALJ should have determined whether the expenditures were justified given that the Board's name was on the credit card account and the Board could be liable to cover these expenditures if Williams-Brown failed to pay the bills.

[32] Exempt and classified status enjoy different benefits under the VI Code. See 3 V.I.C. § 451, et seq.

[33] See Hearing Transcript, at pages 17-19, 55 and 56. See also Petitioner's Exhibit 3 (Williams-Brown's NOPA).

[34] Hearing Transcript, at page 55.

[35] *Id.*, at pages 55 and 56.

[36] 7 V.I. Op. Att'y Gen. 314, 315.

powers to the Director of Business and Finance so that she could unilaterally change her employment status or increase her salary. As a consequence, the ALJ must make findings of fact on the issue whether Williams-Brown actually changed her employment status and increased her salary, and, if so, whether that constitutes misconduct.

As a result, the ALJ's ruling is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

An Order consistent with this Opinion shall follow.

Dated: March 17, 2017.

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella H. George
Clerk of Court ____/____/____

for by:
Donna D. Donovan
Court Clerk Supervisor 3/21/17