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

Scott Cameron	:	
	:	
v.	:	**A.A. No. 09 - 191**
	:	
Department of Labor & 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 16th day of August, 2011.

By Order:

___/s/_____
Melvin Enright
Acting 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, Magistrate Mr. Scott Cameron returns to this Court for further consideration of his claim for unemployment benefits, which was denied for a second time after this matter was remanded to the Board of Review of the Department of Labor & Training for consideration of additional issues which were presented on the record but not discussed in the Board's earlier decision. See Scott Cameron v. Department of Employment & Training Board of Review, A.A. 09-55 (Dist.Ct. 9/3/09). Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. 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 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.

FACTS & TRAVEL OF THE CASE

The facts of the case and the travel up to the point of remand were fully presented in this Court's earlier published decision and need not be repeated here.

After remand, the Board scheduled the matter for a hearing on October 13, 2009. Present were: the claimant and his counsel and the employer's representative, Mr. Robert Johnson. Thereafter, the Board issued a further decision in which the Board made the following findings:

> * * *
> The employer's testimony before the Board was that a check was drawn for the payment of wages to the claimant's girlfriend but went unissued when the employer became aware of the claimant's actions regarding his working his girlfriend's hours.
>
> The Board concludes that based on previous testimony, and the claimant's and the employer's additional testimony at the hearing, KIK Products, the client company, was not being serviced by the employer when the claimant's supposed training of his girlfriend took place. The actions of the claimant rise to the level of misconduct under Section 28-44-18 of the Rhode Island Employment Security Act, and the Board reaffirms its decision of February 27, 2009.

Decision of the Board of Review, November 3, 2009, at 1. Thus, the Board found claimant had been terminated for proved misconduct — i.e., training his girlfriend at an improper time and place. The Member Representing Labor dissented from this conclusion. Decision of the Board of Review, November 3, 2009, at 2.

Claimant filed a new complaint for judicial review in the Sixth Division District Court on November 25, 2009.

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.

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 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.

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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). See also D'Ambra v. Board of Review,

ISSUE

The issue before the Court is whether the decision of the Board of Review that claimant was discharged for proved misconduct within the meaning of section 28-44-18 of the Rhode Island General Laws was made upon substantial evidence of record or otherwise affected by error of law.

ANALYSIS

We must begin by recalling the reason for this Court's remand. After indicating that the Board's finding that claimant had been terminated for working hours for which his girlfriend had been paid was not supported by substantial evidence of record, the Court further noted the Board had found other facts which might have been the basis for an alternative finding of misconduct — but concerning which it had not made a determination of misconduct vel non. This concerned alleged irregularities in the manner his girlfriend was trained.

And so, the Court remanded the case so the Board could determine whether the facts it had found would support an alternative basis for a finding of proved misconduct under section 18. The Court explained the issue to be considered on remand at length:

> * * * [W]e also have findings which were not evaluated as alternative grounds for a section 18 disqualification. These concerned issues regarding the young lady's hiring and training:
>
> > * * * on September 17, 2008 the claimant's girlfriend submitted an application for a position as a security guard. She was not authorized to begin working until she had completed a BCI check and a drug test. The claimant scheduled his girlfriend for

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Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

> training at a client's site in Cumberland on September 18 and September 23, 2008. She was also scheduled for training on September 20 and September 21, 2008 at the Port of Providence, although specialized off site training was required prior to training at the port. Based upon the previous conversation in which the claimant had requested that he be allowed to work some hours which would be credited to his girlfriend's account, the claimant's supervisor was suspicious. He investigated the situation and learned that the claimant's girlfriend had not completed the required BCI check and drug test. * * *
> Referee's Decision, February 27, 2009, at pp. 2-3.

> These findings are supplemented by Mr. Johnson's adamant statement that it was improper for Mr. Cameron to have trained his friend at a time when the business, KIK Products, was closed. Ref. Tr. at 21. Thus, we are left with this question – based on the foregoing is there an alternative basis in the record for a finding of misconduct?

Cameron, A.A. 09-55, September 3, 2009, at 6-7.

On remand, the Board evaluated the issue before it on the basis of the original record and the supplemental record of its proceedings on October 13, 2009, including the further testimony of Mr. Johnson. After doing so, the Board concluded that the defendant committed misconduct that merited disqualification when he trained his girlfriend improperly at a site that was not then being staffed by RIBI security (the employer). This finding was certainly supported by the record, especially the testimony of Mr. Johnson. Board of Review Transcript, October 13, 2009, at 7-8 [reaffirming his earlier testimony – see Referee Hearing Transcript, February 23, 2009, at 21].

Pursuant to the applicable standard of review described supra at 4-5, the decision of the Board 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. In this regard, it is important to keep in mind that deference must be given not just to the factual findings of the Board [i.e., what the claimant did or did not do] but also to the Board's findings as to the seriousness vel non of any misdeeds committed by the claimant.[4] In its remand decision the Board clearly concluded that Mr. Cameron's training of his friend at a time when RIBI was not servicing the client was a grave matter, requiring forfeiture of his ability to receive benefits.[5]

In my view the Board's decision is supported by the record and common sense. The mere presence of claimant and his trainee on a client's premises at an unauthorized time could give rise to issues ranging from allegations of trespass to liability concerns — in case of an accident. Accordingly, 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 — by failing to train the new employee in a proper manner — is supported by the record and should not be overturned by this Court.

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[4] In other words, the Board decides whether the claimant's transgressions were serious or trivial, a felony or a misdemeanor, a serious sin or venial.

[5] It is implicit that Mr. Cameron's transgression would be even graver if it were to be proven that he had not trained the young lady as he stated, but merely said he did. That would constitute fraud on his employer.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review denying benefits to claimant was not affected by an unlawful procedure or other 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

August 16, 2011