STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Natasha Cortez	:	
	:	
v.	:	**A.A. No. 10 - 0175**
	:	
Department of Labor & Training, Board of Review	:	

ORDER

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 February, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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

SIXTH DIVISION

Natasha Cortez	:	
	:	
v.	:	A.A. No. 2010 – 175
	:	
Department of Labor and Training, Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In the instant complaint Ms. Natasha Cortez urges that the Board of Review of the Department of Labor & Training erred when it held that she was not entitled to receive employment security benefits because she had been discharged for proved misconduct. 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 for 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 and travel of the case are these: Ms. Natasha Cortez worked for the Garden City Treatment Center as a medical assistant for more than three years — until June 23, 2009. She applied for unemployment benefits but on August 25, 2009 the Director determined her to be disqualified from receiving benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since she was terminated for misconduct — specifically, texting [i.e., sending text messages] while on duty.

Complainant filed an appeal and a hearing was held before Referee Gunter A. Vukic on November 23, 2009. Claimant appeared with counsel as did two employer representatives. On December 9, 2009, the Referee held that Ms. Cortez was not disqualified from receiving benefits even though she had been fired, because misconduct had not been proven. In his written decision, the referee found the following facts:

> The claimant worked as a medical assistant at the Garden City Treatment Center. During the claimant's employment she had been subjected to a number of unprofessional and sexual remarks made by one of the practice doctors in the treatment center. The claimant brought this to the attention of the employer.
>
> The employer made it known on or about June 9, 2009 through notation in the daily report that the use of cellular telephones and texting during work hours was prohibited. June 22, 2009 the nursing supervisor became aware that nurse filed a complaint regarding the claimant's continued text messaging during the last shift worked. June 23, 2009 the supervisor met with the claimant with the intention of giving the claimant the first documented

written warning for the alleged June 19, 2009 misconduct. The nursing supervisor and the claimant had a personal relationship that extended beyond the workplace. During the disciplinary meeting a repayment of a loan from the supervisor was addressed by the supervisor.

The disciplinary meeting escalated to a verbal confrontation between the parties resulting in the claimant challenging the supervisor to fire her. A separation occurred with the claimant's belief that she had been discharged and the supervisor's belief that the claimant had resigned.

The June 19, 2009 texting incident was acknowledged by the claimant. The texting was between the claimant and a practice doctor who required the claimant via text messaging regarding patients and appointments. (Emphasis added).

Decision of Referee, December 9, 2009 at 1-2. Thus, claimant admitted texting, but swore it was done for business purposes. Based on the facts he had found, the referee arrived at the following conclusion:

* * *

In cases of termination, the employer bears the burden to prove by a preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in connection with her work. It must be found and determined that the employer has failed to meet their burden.

In the instant case, the separation occurred during a disciplinary meeting held June 23, 2009 between the nursing supervisor and the claimant. The parties had a personal relationship outside of work that contributed to emotional and confusing events surrounding the warning notice for alleged misconduct July 19, 2009. In a companion case, the claimant refused a rehire offer by the employer due to the claimant being exposed to unprofessional and sexual comments by a practice doctor. Although the claimant's reason for texting may not have been articulated during the emotional exchange, there is an expectation that the employer was aware of the fact that the claimant was instructed to text message a practice doctor on a regular basis yet failed to investigate or give consideration.

> It is found that the claimant was discharged under nondisqualifying circumstances in the instant case. (Emphasis added).

Decision of Referee, December 9, 2009 at 2-3. The employer then appealed.

On January 26, 2010 the Board of Review held a second hearing on the matter — not a de novo proceeding but one designed to give the parties an opportunity to present additional evidence and argument. See Board of Review Transcript, at 3. On September 2, 2010, a majority of the members of the Board of Review reversed the Referee and held that claimant was fired for proved misconduct — to wit, texting during work hours. The Board's Findings of Fact were brief:

> The claimant had worked for this employer for approximately four years. We find that the claimant was discharged for improperly using her telephone for the purpose of sending text during working hours in contravention of employer regulations.

Board of Review Decision, at 1. The Board's conclusion was similarly brief:

> The issue in this case is whether or not the claimant was discharged under disqualifying circumstances within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act.
>
> In order to impose a disqualification under the provisions of section 28-44-18, there must be proof that the person who was discharged committed an act of misconduct in connection with the work.
>
> The claimant's conduct in defiance of a legitimate employer regulation constituted misconduct.

Board of Review Decision, at 2. Accordingly, the Board found that claimant's texting to be conduct worthy of disqualification — implicitly rejecting her

explanation that she was texting one of the doctors in compliance with his instructions. Finally, Ms. Cortez filed a complaint for judicial review in the Sixth Division District Court.

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-

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

> 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.

ISSUE

The issue before the Court is whether the decision of the Board of Review (reversing the decision of the Referee) that claimant was disqualified from receiving benefits due to misconduct was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

ANALYSIS

At the outset, I should state my belief that the record in this case is deceptive — causing the case to appear more complex than it truly is. This misimpression may be attributed to the fact that the Board held a second hearing on the matter or the length of the referee's decision — in which he commented on ancillary issues of an emotional nature.[4] In truth, Ms. Cortez's matter is rather simple: she was fired for texting on duty in violation of the employer's policy[5]

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4 There were two: (1) an emotional meeting between claimant and a supervisor who is also a personal friend and (2) allegations that claimant had been harassed by a staff doctor.

5 The policy against texting does not seem unreasonable. As an employer, it has every right to keep its employees focused on their duties — especially when those duties include proving emergency medical care.

and was initially denied benefits; the referee, while not disputing the employer's rule against texting while on duty, found her texting not to be problematic because he credited her testimony that she was doing it at a doctor's direction — in order to obtain his opinion and then to update him on a patient's condition; when, on appeal, the doctor she named contradicted her testimony, the Board reversed. At this juncture, we shall discuss the specifics of the evidence and testimony.

At the Board hearing, the employer focused on claimant's earlier testimony — at the Referee's hearing — that she had to text the physician — Dr. Anthony Mechrefe, an orthopedist — so that Dr. Creighton could consult with him. See Referee Hearing Transcript, at 88-89. In rebuttal, the employer presented testimony that Dr. Creighton was not on duty on June 19, 2009 — or that week. See Board of Review Hearing Transcript, at 6-8. Next, the employer presented the testimony of another employee, who is also Dr. Mechrefe's sister, that during the evening of June 19, 2009 he was attending her wedding rehearsal dinner. See Board of Review Hearing Transcript, at 9-10. This witness also presented to the Board an affidavit from Doctor Mechrefe denying he received any text messages from claimant on June 19, 2009; attached to the affidavit were his cell phone records for the period in question — complete and unexpurgated. See Employer's Exhibit 1 and Board of Review Transcript, at 10-11. Evidently, the Board found this evidence most convincing and reversed the Referee's decision, finding claimant committed a willful breach of the employer's ban of workplace texting.

Pursuant to the applicable standard of review described supra at 6-7, 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.

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 her work — texting during work hours — is well-supported by the record and should not be overturned by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review in this matter is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is 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.

Joseph P. Ippolito
Magistrate
February 16, 2011