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

St. Barnabas Church	:	
	:	
v.	:	**A.A. No. 2010 – 186**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Alfred B. Echevarria)	:	

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. In the instant complaint St. Barnabas Church urges that the Board of Review of the Department of Labor & Training erred when it held that a former employee, Mr. Alfred B. Echevarria, was entitled to receive unemployment benefits. 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 not supported by reliable, probative, and substantial evidence of record and was clearly erroneous; I therefore recommend that the Decision of the

Board of Review be reversed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: For eleven months Mr. Alfred B. Echevarria worked as a sexton-maintenance person for St. Barnabas Church in Portsmouth until May 28, 2009. He filed an application for unemployment benefits on October 4, 2009. On January 15, 2010 the Director determined him to be disqualified from receiving benefits, pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since he was terminated for misconduct – *i.e.,* failing to diligently attend to his duties — which caused his time-cards to be inaccurate.

Complainant filed an appeal and a hearing was held before Referee Nancy Howarth on March 29, 2010. On June 11, 2010, the Referee held that Mr. Echevarria was not disqualified from receiving benefits because the employer had not sustained its burden of proving that claimant was terminated for proved misconduct. In her written Decision, the referee found the following facts:

> The claimant was employed as a sexton by St. Barnabas Church. The claimant had a one year contract for his services. The claimant's supervisor believed that he was not performing his job duties in a timely manner. The claimant is the owner of a contracting business. The supervisor suspected that he was devoting time to his business, rather than performing all of his job duties for the employer. The claimant did not have a definite schedule. He worked approximately thirty hours each week. He was required to fill out a time card each week. On May 11, 2009 the education coordinator wanted the claimant to clean a classroom. She looked for him in the parish hall and the boiler room. She was unable to find him and she did not see his truck, although she did not look in all areas of the buildings or grounds. During the week of May 11 through May 15, 2009 the claimant's supervisor and a maintenance person had both attempted

> to locate the claimant at different times, but were unable to do so. The claimant's supervisor observed that he had on his time card that he worked thirty hours that week. Since he could not be located at various times during that period the supervisor assumed that the claimant had not worked as many hours as he had reported and that he had falsified his time card. On May 28, 2009 the claimant was informed that the employer no longer required his services. He was paid through June 30, 2009, when his contract expired.
>
> When he filed his claim for Employment Security benefits, the claimant informed the Department of Labor and Training that he had been laid off.

Decision of Referee, June 11, 2010 at 1-2. Based on these facts, the referee came to the following conclusion:

> * * *
> The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has not sustained its burden. There has been insufficient evidence and testimony presented at the hearing to establish that the claimant falsified his timecards. I cannot find that the claimant's actions constitute deliberate behavior in willful disregard of the employer's interests and, therefore, misconduct under the above Section of the Act. In the absence of proven misconduct, benefits cannot be denied on this issue.
>
> The claimant is entitled to benefits and is not overpaid.

Decision of Referee, June 11, 2010, at 2-3. Claimant appealed and the matter was considered without further hearing by the Board of Review. On August 26, 2010, a majority of the members of the Board of Review issued a 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. Decision of Board of Review, August 26, 2010, at 1. The Member

Representing Industry dissented. Decision of Board of Review, August 26, 2010, at 2.

The employer filed a complaint for judicial review in the Sixth Division District Court on September 24, 2010.

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. —** 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.

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]

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

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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).

> 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. ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) 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.

V. ANALYSIS

The Board adopted the factual and legal conclusions enunciated by the Referee in her decision, in which she found that the employer had failed to prove that claimant committed misconduct by knowingly and intentionally submitting a false time card. In my view, the employer presented a great amount of evidence that the claimant's time cards were overstated regarding the amount of hours he had actually worked. But, the referee made no finding regarding the accuracy vel non of claimant's time cards; she simply found this evidence and testimony insufficient to prove that they were intentionally "falsified" or that he did anything in "willful disregard of the employer's interests" — which is the standard for proved

misconduct. See Referee's Decision, at 2. In my view, the Referee [and the Board on appeal] overlooked substantial and probative evidence of record — much of it without comment or discussion. I therefore find the decision below to be clearly erroneous and I recommend it be reversed by this Court.

A. Review of the Testimony.

At the hearing before Referee Howarth, the employer presented four witnesses in support of its effort to satisfy its burden of proof on the issue of misconduct.

The first witness was Mary Lou Proulx, Business Manager of St. Barnabas Church. Referee Hearing Transcript I, at 13. Ms. Proulx indicated that Mr. Echevarria was a part-time maintenance person whose job duties consisted of caring for the building and the grounds. Id. She indicated that claimant's schedule and the needs of the church were in conflict. Referee Hearing Transcript I, at 14. Cleaning jobs in particular were not being done. Id. She felt his work suffered because he was operating his own business. Referee Hearing Transcript I, at 15.

Ms. Proulx indicated claimant was paid bi-weekly. Id. She testified that on the time card dated May 22, 2009 — for the period May 11, 2009 to May 15, 2009 — he entered 6 hours worked each day. Referee Hearing Transcript I, at 17, 20. She indicated he was not there and could not be found. Referee Hearing Transcript I, at 18. She indicated he was fired for falsification of his timecard. Referee Hearing Transcript I, at 27.

On cross-examination, Ms. Proulx testified claimant would submit his timecard on the Tuesday of the second week of his pay period. Referee Hearing Transcript I, at 29. He would have to estimate the last three days. Referee Hearing Transcript I, at 30. She indicated there was no time clock, St. Barnabas was on the "honor" system. Referee Hearing Transcript I, at 31. She indicated on the Tuesday of the week in question he stormed out at 11:00 a.m., saying — "I am not working anymore." Referee Hearing Transcript I, at 33-34.

Mr. Lauro Rozul, the other maintenance man, testified that — for the week of May 11 to May 15 — claimant put down too many hours. Referee Hearing Transcript I, at 36-37.

When the hearing resumed on April 13, 2009, the first witness was Marcia Blackburn, Information Coordinator at St. Barnabas. She testified that during the week of May 11, 2009, they had classes on Monday and Wednesday at St. Barnabas. Referee Hearing Transcript II, at 4-5. She indicated she had to sweep up and empty garbage cans because she could not find Mr. Echevarria — even though she looked for him. Referee Hearing Transcript II, at 5. She noted that she also could not find his truck. Id. Although Ms. Blackburn said she never saw claimant on Monday and Wednesday, she conceded that there were some places she did not check. Referee Hearing Transcript II, at 9.

The employer also presented the testimony of Father Randolph Chew, Pastor at St. Barnabas. In an effort to rebut a prior written statement given by

claimant in which he indicated he might have been working on a project for the pastor at the rectory, Father Chew stated he knew of no such job. Referee Hearing Transcript II, at 15-16. For purposes of background, he explained how he would give instructions to Mr. Echevarria through a third party. Referee Hearing Transcript II, at 17.

Finally, Mr. Echevarria testified. He explained that he was paid bi-weekly and he would turn in his time record for the bi-weekly period on the Tuesday morning of the second week. Referee Hearing Transcript II, at 22. This required him to estimate the hours for the second week. Id. As a result, he sometimes worked extra hours. Referee Hearing Transcript II, at 23. When he raised the issue, Father Chew told him to leave when he had finished the hours he had booked. Referee Hearing Transcript II, at 23, 26.

Turning to the issue of his whereabouts during the week of May 11, 2009, claimant testified that he was powerwashing both of the rectory decks and cutting two acres of grass in an area that is out-of–sight. Referee Hearing Transcript II, at 27. He stated that he always worked his full hours. Referee Hearing Transcript II, at 29.

B. Decision.

Pursuant to the applicable standard of review described supra at 5-6, 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 case there was overwhelming evidence on the record demonstrating that claimant submitted a time card that was false. The evidence of Ms. Proulx and Ms. Blackburn — that they could not find claimant when they searched for him — was certainly material and probative. A person of average sensibilities would also have to take note of the testimony of his co-worker, Mr. Rozul. A person in his position would certainly be more aware of claimant's comings and goings than any manager.

To be fair, there were issues in the employer's case: (1) the fact that claimant's timecards were submitted before the end of the pay period, (2) the fact that claimant testified he had sometimes worked over his allotted hours, and (3) the fact that the search done by the ladies was conceded not to be absolute. Nevertheless, neither the Referee nor the Board made findings that the employer's witnesses were not credible. Accordingly, their testimony should have been accorded due weight.

For instance it is clear that the Referee gave diminished weight to the testimony of Ms. Proulx and Ms. Blackburn that they made substantial efforts to find claimant on multiple occasions and could not do so; this testimony should not

have been ignored. I believe that the testimony of Mr. Rozul, claimant's co-worker, was particularly reliable — to the point of being definitive. And, having shown his timecard to have been false, it is not credible to find that its falsity was unknown to claimant, whose general denials cannot be deemed persuasive in the face of this evidence.

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 it had not been proven that claimant had been discharged for misconduct in connection with his work — is clearly erroneous and should be overturned by this Court. I understand, of course, that since (1) the employer is a "reimbursable employer [i.e., a self-funding participant] in the unemployment benefit system and (2) the claimant cannot be ordered to return any benefits he has received over the course of many months pursuant to the decisions below, that this opinion can have little, if any, financial impact upon the parties. See Gen. Laws 1956 §§ 28-43-30 and 28-44-40. Nevertheless, I urge this outcome because I believe it to be correct in law and equity and consistent with the purposes of the Employment Security Act.

VI. CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review considered herein is affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is clearly erroneous in view of the reliable, probative and

substantial evidence on the whole record; it is also arbitrary and capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

April 27, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

St. Barnabas Church	:	
	:	
v.	:	**A.A. No. 10 - 0186**
	:	
Department of Labor & Training,	:	
Board of Review	:	
(Alfred B. Echevarria)	:	

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 decisions of the Board of Review is REVERSED.

Entered as an Order of this Court at Providence on this 27th day of April, 2011.

By Order:

_____/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge