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

Erica Lanigan	:	
	:	
v.	:	**A.A. No. 2010 – 0202**
	:	
Department of Labor and Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In the instant complaint Ms. Erica Lanigan 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 Gen. 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 substantial evidence of record is clearly erroneous; I therefore recommend that the Decision of the Board of Review be reversed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Erica Lanigan was employed by CVS for five years until her termination on May 3, 2010. She applied for unemployment

benefits the same day but the Director determined her to be disqualified from receiving unemployment benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-17, based on the finding that claimant had quit her position without good cause. Claimant filed a timely appeal and on September 1, 2010 a hearing was held before Referee Nancy Howarth. On September 21, 2010, in her decision, the Referee found the following facts:

> The claimant was employed as a pharmacy technician supervisor by the employer. She had received verbal warnings and one written warning for tardiness. On May 3, 2010 the claimant was scheduled to work at 9:30 a.m. She reported to work approximately ten to fifteen minutes after the start of her shift. The store manager met with the claimant and informed the claimant that if she was late one more time she would be terminated. The claimant's supervisor subsequently asked her what had happened in the meeting. The claimant was upset. The supervisor directed her to go home and calm down. The claimant called the supervisor later that day and questioned whether or not she had been terminated. The supervisor replied that it was not his decision to make. The claimant was scheduled for 9:00 a.m. the following day. Rather than reporting to work at her scheduled time she attempted to call the manager, to ask if she had been terminated. She was unable to reach him and left a message. The claimant spoke to the manager later that morning. He informed the claimant that she was no longer employed.

Referee's Decision, September 21, 2010, at 1. Based on these findings, the Referee summarily rejected the Director's finding that claimant quit her job. Referee's Decision, September 21, 2010, at 1. She therefore reversed the Director's decision that Ms. Lanigan was disqualified from the receipt of benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-17.

Instead, Referee Howarth found that Ms. Lanigan was fired for misconduct, and explained this determination in the following portion of the "Conclusion" section of her decision:

> The burden of proof in establishing misconduct rests solely with the

> employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant failed to report to work for her next scheduled shift, subsequent to receiving a final warning regarding tardiness. I find that this constitutes deliberate conduct in willful disregard of the employer's interest and, therefore, misconduct under the above section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, September 21, 2010, at 2. Accordingly, Referee Howarth found Ms. Lanigan was disqualified from the receipt of benefits pursuant to Gen. Laws 1956 § 28-44-18.

Ms. Lanigan appealed and her case was considered by the Board of Review. On October 4, 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. See Decision of the Board of Review, October 4, 2010, at 1. The Member Representing Labor dissented, finding that claimant acted reasonably by calling in to determine her status. See Decision of the Board of Review, October 4, 2010, at 2. Finally, Ms. Lanigan 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 authorizes a claimant to be disqualified from receiving benefits — Gen. Laws 1956 § 28-44-18, which 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.**
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> * * *
>
> (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]

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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.

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.

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 it was clearly erroneous or affected by error of law.

ANALYSIS

As stated above, the majority of the Board adopted the referee's factual conclusion that claimant had been fired for attendance issues, lateness and her failure to appear at all on her last scheduled day of work. She further found that claimant's pattern of lateness constituted misconduct within the meaning of section 18. Accepting the

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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).

Referee's factual findings without reservation or exception, I nonetheless find that her legal conclusion that claimant committed misconduct to be clearly erroneous.

Working exclusively from the Referee's findings, the events which led to claimant's firing from CVS may be enumerated as follows:

(1) On May 3, 2010, claimant arrived late for work and was warned by the store manager that future lateness might result in her discharge;

(2) Claimant was sent home by her supervisor because she was upset;

(3) When she called later in the day to confirm her status, she received no assurance from her supervisor that she was still employed;

(4) She did not report as scheduled in the morning but called her manager to learn her status.

It is clear from this chronology that Ms. Lanigan did not report on May 4th out of neglect, but out of a desire to confirm her status before she appeared. This was certainly not unreasonable. Doing otherwise may well have exacerbated her difficulties, and threatened her already tenuous position. The supervisor's failure to advise claimant that she was still employed proved beyond doubt that in the afternoon of May 3rd her career at CVS was in limbo. I find her failure to appear on May 4th was attributable not to neglect but to the reasonable exercise of caution.

Pursuant to the applicable standard of review described supra at 4-6, 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 if a reasonable fact-finder might have reached a contrary result. Nevertheless, because I find the Referee's decision [adopted by the Board] to be clearly erroneous in light of the facts found by the Referee, I must recommend it be set aside.[4]

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4 Claimant appends to her memorandum some material outside of the record in this case. The first is a copy of the decision rendered by Referee Stanley Tkaczyk in the related case of claimant's sister, Ms. Allison M. Lanigan, who was also terminated for lateness from CVS based on the same scenario. Referee Tkaczyk allowed benefits to Allison. See In re Allison M. Lanigan, No. 20102894UC (August 20, 2010)(Tkaczyk, Referee).

Claimant also provided a transcript of the hearing held by Referee Tkaczyk in Allison's case. He points to the store manager's testimony that the Lanigans were terminated because they walked off the job on May 3rd — and not because they failed to appear on May 4th. See Allison Lanigan Hearing Transcript, at 13. Thus, the very basis for Erica Lanigan's disqualification — as found by the referee — was utterly immaterial, according to the very person who fired her. Undoubtedly, this testimony would be sufficient *per se* to require a remand in the interests of justice. However, given my recommendation that the decision of the Board should be reversed on other grounds, I believe a remand for further consideration is unnecessary.

CONCLUSION

Upon careful review of the evidence, I find that the decision made by the Board of Review in this case is affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, I believe it to be 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 decisions of the Board of Review be REVERSED.

Joseph P. Ippolito
Magistrate

January 13, 2011

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PROVIDENCE, Sc. DISTRICT COURT

SIXTH DIVISION

Erica Lanigan	:	
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v.	:	**A.A. No. 10 - 0202**
	:	
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 REVERSED.

Entered as an Order of this Court at Providence on this 13th day of January, 2011.

By Order:

Melvin J. Enright
Acting Chief Clerk

Melvin Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge