STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Keith A. DiMuccio	:	
	:	
v.	:	**A.A. No. 10 - 0224**
	:	
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 4th day of April, 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

Keith A. DiMuccio	:	
	:	
v.	:	A.A. No. 2010 – 224
	:	
Department of Labor and Training, Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In the instant complaint Mr. Keith A. DiMuccio urges that the Board of Review of the Department of Labor & Training erred when it held that he was not entitled to receive employment security benefits because he 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.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Keith DiMuccio worked as an electrical apprentice for Total Construction Services for twenty-six months until December 31, 2009. He filed an application for unemployment benefits on May 3, 2010. On May 28, 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 respond to an emergency service call.

Complainant filed an appeal and a hearing was held before Referee Nancy Howarth on September 7, 2010. On September 15, 2010, the Referee held that Mr. DiMuccio was disqualified from receiving benefits because he was terminated for proved misconduct. In her written Decision, the referee found the following facts:

> The claimant was employed as an electrical apprentice by the employer. He was on call on the night of December 31, 2009. The claimant received a call from a maintenance person for an apartment building which was owned by Picerne Properties. It was extremely cold that night. The maintenance person stated that the boiler was not working properly, and that the flash code on the boiler indicated that there was a problem with the airflow. The claimant informed him that the employer did not carry that part in stock, although the employer did actually have the part. However, the claimant did not look for it. The maintenance person replied that if the claimant did not have the part he did not need to service the boiler until the following day. Therefore, the claimant did not respond to the call since he believed that the maintenance person would not be there to let him into the building. The employer's procedure required that the service person must respond to all calls by traveling to the customer's premises. If they were unable to gain access to the

> building they were to leave a card to indicate that they had been there.
> The employer had serviced thirty buildings with four-thousand units for Picerne Properties for many years. This represented approximately fifty percent of the employer's business. The following morning the claimant's supervisor discovered that the claimant had not responded to the call the previous night. He contacted the customer and indicated that he would be right there. The customer informed him that they had gotten someone else to repair the boiler. Approximately three weeks later the customer cancelled all business with the employer. The claimant was terminated on January 2, 2010, for violation of the employer's policy. Any employee would have been terminated for such a violation.

Decision of Referee, September 15, 2010 at 1. 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 sustained its burden. The evidence and testimony presented at the hearing establish that the claimant violated the employer's policy when he failed to respond to a customer's call for service. I find that the claimant's actions constitute a knowing violation of a reasonable and uniformly enforced policy of the employer and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, September 15, 2010, at 2. Claimant appealed and the matters were reviewed by the Board of Review. On October 20, 2010, the Board of Review issued a unanimous 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, October 20, 2010, at 1. Mr. DiMuccio filed a complaint for judicial review in the Sixth Division District Court on November 19, 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. (Emphasis added).

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.**
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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]

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

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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).

> 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 referee's factual conclusion that claimant had been fired for failing to respond to an emergency service call — and that doing so constituted misconduct. Mr. DiMuccio does not dispute that he in fact did not respond to the call, but explained his reasons for not doing so. At this point I shall review the testimony presented by both sides.

At the hearing before Referee Howarth, the employer presented two witnesses in its effort to satisfy its burden of proof on the issue of misconduct. The first was Joseph Forte, who explained that his company provided heating service to other companies. Referee Hearing Transcript, at 6. He also indicated that his company had a firm policy, discussed at meetings, that if there is a call, you go out, without exception. Referee Hearing Transcript, at 6-7. Failure to do so results in immediate termination. Referee Hearing Transcript, at 6.

Focusing on the incident that led to claimant's termination, Mr. Forte stated that on December 30, 2009, at about 1:00 a.m., a call came indicating that certain tenants of the Picerne Properties had no heat. Referee Hearing Transcript, at 7. According to Mr. Forte, Mr. DiMuccio was on call and he never went out. Referee Hearing Transcript, at 8. Mr. Forte indicated he learned of the incident the next day, when he called Picerne Properties to make sure everything was all right; he was told not to come out to fix the problem, because they had gotten someone else. Referee Hearing Transcript, at 9. He further explained that his firm lost the account as a result of claimant's inaction. Referee Hearing Transcript, at 9.[4] In response, claimant was terminated the next day. Referee Hearing Transcript, at 11. Mr. Forte stated he has fired other employees for the same reason. Referee Hearing Transcript, at 11-12.

Mr. Donald DiMuccio — the claimant's uncle — also testified for the employer. He testified that the claimant told him the Picerne maintenance man who reported the heating problem told him [i.e., claimant] not to come out — because there was an issue of the proper part being available. Referee Hearing Transcript, at 18-19. The elder Mr. DiMuccio explained that because there was no heat "the

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4 Mr. Forte testified that the Picerne account involved servicing 30 buildings and constituted half of his business. Referee Hearing Transcript, at 10. He clarified that he lost the account several weeks later. Referee Hearing Transcript, at 14. At this point I shall indicate that it is no part of my analysis that this incident caused the loss of the contract; I do certainly find that claimant's actions imperiled the employer's relationship with Picerne Properties.

whole building was put in jeopardy 'cause it could have froze." Referee Hearing Transcript, at 21.

The claimant, Mr. Keith DiMuccio, testified that he had worked for this employer for about eight years overall, two years the last time. Referee Hearing Transcript, at 25-26. Claimant then gave his version of the events that led to his termination. Referee Hearing Transcript, at 27 et seq. He stated that after he got the call from the maintenance man indicating that the boiler was down, he called Joe Forte Jr. — the son of the employer's witness. Referee Hearing Transcript, at 27. At Mr. Forte's direction, he told the maintenance man to hit the black reset button. Referee Hearing Transcript, at 28. Unfortunately, this procedure failed to restore heat. Referee Hearing Transcript, at 28. Then, the maintenance man read him the flash code, which revealed the problem to be in the air flow sensor. Id. Claimant then told the maintenance man that the firm did not carry that part. Id. Although he said he would be glad to come out, the maintenance man responded he did not want claimant to come out if he would not be able to fix the problem. Referee Hearing Transcript, at 29. Finally, claimant explained that the next morning Mr. Joseph Forte Sr. suspended him for one week and, at the end of that period, terminated him. Referee Hearing Transcript, at 31.

Claimant DiMucccio admitted that — in hindsight — he should have gone out. Referee Hearing Transcript, at 33. But, he insisted the Picerne employee was "adamant" not to come out unless he could fix it, to come out in the morning

instead. Id. And on cross-examination by Mr. Forte, he admitted that "who's ever on call gets terminated if they don't respond." Referee Hearing Transcript, at 35.

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.

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 — failing to respond to a service call — is well-supported by the record and should not be overturned by this Court. There is no question that claimant did not respond to Picerne Properties on December 30, 2009. The only question is whether he did so in circumstances that were excusable, not evincing a willful disregard of the employer's interests.

Based on the foregoing, the Board was certainly within its sound discretion to reject claimant's assertion of that he failed to respond to the call under excusable circumstances — i.e., that he was dissuaded from going out by the Picerne maintenance man. Instead, there was ample evidence on the record from which the Board could find that claimant knowingly breached the employer's uniformly

enforced rule that its employees must respond to service calls without fail. See Gen. Laws 1956 § 28-44-18, quoted supra at page s 3-4.

VI. CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review considered herein is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, they are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor are they 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

April 4, 2011