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

Thomas Lewis	:	
	:	
v.	:	**A.A. No. 11 - 077**
	:	
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 REVERSED.

Entered as an Order of this Court on this 30th day of January, 2012.

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, M. Mr. Thomas Lewis filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor & Training, which held that he was not entitled to receive employment security benefits based upon 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. 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 and was affected by error of law; accordingly, I recommend that it be reversed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Thomas Lewis was employed as a teacher by the Providence School system for about ten years until December 14, 2009. He

applied for employment security benefits but on March 16, 2010 the Director issued a decision holding that he was ineligible to receive benefits because he had engaged in misconduct within the meaning of Gen. Laws 1956 § 28-44-18. See Director's Exhibit # 2 in A.A. No. 10-213.

Complainant filed an appeal, and a hearing was held before Referee William G. Brody on June 14, 2010 at which the claimant — who was represented by counsel — and an employer representative appeared and testified. See Referee Hearing Transcript, at 1. In his August 19, 2011 Decision, the referee found that claimant — in contravention of an agreement to do so — failed to comply with the School Department's "reasonable" request that he participate in an employee assistance program (EAP). Decision of Referee, August 19, 2011 at 1. The referee held that this failure constituted proved misconduct as defined in section 28-44-18. Decision of Referee, August 19, 2011 at 2. Accordingly, the referee found that claimant was properly disqualified from the receipt of unemployment benefits.

Thereafter, a timely appeal was filed by the employer and the matter was reviewed by the Board of Review. In a decision dated September 23, 2010, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Assisted by counsel, Mr. Lewis filed a Complaint for Judicial Review in the Sixth Division District Court on or about October 22, 2010, which was denominated A.A. No. 10-

213. On March 9, 2011, the Court held a conference with counsel and on March 22, 2011 entered an order in which it was held that the Board's decision was erroneous in that the claimant did not execute an agreement in which he consented to be placed on leave without pay status.[1] Because the Court had also been informed that claimant had returned to work after one year, the case was remanded for the Board to consider whether there was cause for a one-year suspension.[2]

The Board held a further hearing on May 2, 2011. In its June 8, 2011 Decision the Board made the following Findings of Fact:

> **2. FINDINGS OF FACT:**
>
> The claimant worked as a library resource teacher. The claimant was a member of the collective bargaining unit. Since January 18, 2007 the claimant had been in with psychiatrist treatment for depression. On April 3, 2009, the employer placed the claimant on administrative leave with pay. At that time, the employer directed the claimant to utilize the services of the Employee Assistance Program (EAP). The employer referred the claimant to the EAP in order to obtain an evaluation of fitness for his employment as a library resource teacher. No grievance was filed with regard to the employer's action of April 3, 2009. During the period between April and December 2009, the employer and claimant had several discussions and meetings regarding the claimant's utilization of the EAP. The claimant did not make use of EAP to obtain an evaluation for fitness because of his concern about the privacy of his medical records. On or about December 9, 2009, the employer suspended the claimant without pay effective January 14, 2010 because the claimant had

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1 Although not fully explained in this Court's March 22, 2011 Order, the implication of this predicate fact was that claimant could not be deemed responsible for violating the provisions of an agreement to which he had not consented — specifically, the provision of the agreement that required him to cooperate with the EAP — contrary to the findings of the Referee (and the Board).

2 Unemployment law treats a suspension like a termination and one who is suspended can collect benefits unless disqualified for misconduct (or otherwise).

not utilized the services of the EAP. On January 4, 2011, the claimant presented a letter of fitness to the employer.

Based on these findings, the Board came to the following Conclusions, which are presented here in abbreviated form:

> **3. CONCLUSION:**
>
> * * * The employer wanted a letter of fitness from LifeWatch EAP. The medical information would be sent to LifeWatch with a letter of fitness, based on the medical information, sent to the employer. There is no showing that the underlying medical information was to be sent to the employer. Board Exhibit #11, in the record of proceedings, is a January 4, 2011 letter of fitness. As a result of this letter, the claimant was rehired. Considering all the meetings, discussions and legal advice during 2009, it is difficult to understand why a similar letter, or the preparation for such a letter, could not have been started or completed between April 2009 and December 2009. The only conclusion that we can arrive at is that the claimant was not cooperative and wished to thwart the employer's effort to obtain a letter of fitness. The claimant was on leave with pay for almost nine months for the purpose of making substantial progress toward a letter of fitness. The employer's policy that the claimant provided the evaluator with the medical documentation necessary to generate a letter of fitness was reasonable. * * *

Based on these findings the Board found the claimant disqualified for misconduct.

On July 6, 2011, Mr. Lewis filed a new complaint for judicial review in the Sixth Division District Court. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; 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 through a preponderance of evidence that the claimant's action, in connection with his work activities, constitutes misconduct as defined by law.

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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.' "[3] The Court will not substitute its judgment for that of the Board as to the

[3] 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).

weight of the evidence on questions of fact.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

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 and applying 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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4 Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

5 Id.

ANALYSIS

I. BACKGROUND.

Given the extended travel of this case, I believe it is necessary to step back and view the case from a wide angle — in other words, far enough back so we can focus on the whole forest, not just the trees.

Factually, we see that the School Department, concerned about Mr. Lewis' mental health, noticed him that it would have a disciplinary hearing on his fitness to continue in its employ. However, that hearing never took place. Instead, the union, but not Mr. Lewis, agreed that he could be placed on administrative leave until a report on his fitness could be obtained. Referee Hearing Transcript, June 14, 2010, at 12. As a result, Mr. Lewis was indeed placed on unpaid administrative leave. For a long time, Mr. Lewis did not fully cooperate with that process; later he did and was reinstated.

After being placed on administrative leave, Mr. Lewis applied for unemployment benefits. At the first hearing before Referee Brody, the School Department presented testimony concerning claimant's lack of cooperation with its request that he undergo a psychological review by the Lifewatch agency. See Referee Hearing Transcript, June 14, 2010, passim. Specifically, it was revealed that although Mr. Lewis did meet with Lifewatch personnel, he failed to grant Lifewatch access to his personal psychiatrist's records. Referee Hearing Transcript, at 10. The Board of Review — affirming the Referee — found that Mr. Lewis' failure to cooperate with the request that he undergo a psychiatric examination constituted misconduct.

In the first appeal, this Court concluded that such a finding was baseless, because failing to agree to such an evaluation was not inherent misconduct, and Mr. Lewis had not entered into a special agreement to do so. Accordingly, this Court remanded the case to the Board of Review — giving the Department an opportunity to present evidence that Mr. Lewis had committed misconduct that would justify his being denied benefits during the year he was suspended without pay.[6] But, on remand, the sole witness presented by the School Department was Ms. Brenda Marquee, an administrator in human resources, who appeared on behalf of the School Department without the assistance of counsel.[7] And her testimony focused on the same allegation — claimant's alleged failure to fully satisfy the tenets of the Memorandum of Agreement (MOA) by failing to cooperate with the EAP review — even though he never signed the MOA. Board of Review Hearing Transcript, May 2, 2011, at 20, & passim. Nothing new was presented.

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[6] Certainly, this Court contemplated that at the further hearing the School Department would present to the Board of Review the evidence it had planned to present at the disciplinary hearing that had been noticed. The Board understood this. As a member of the Board commented — "It's up to the school board * * * to do that." Board of Review Transcript, May 2, 2011, at 5.

[7] At this juncture I should perhaps note that the School Department had been represented before this Court by counsel, who fully participated in the conference which resulted in the order of remand in A.A. No. 10-213. The fact that the School Department appeared before the Board without counsel may well explain its failure to seize the opportunity to present evidence of misconduct.

II. THE LEGAL ISSUE BEFORE THE COURT.

At the outset, I must comment that it may well have been reasonable for the school department to inquire into Mr. Lewis' health. It may well have been unreasonable for Mr. Lewis to decline to cooperate. Such a failure to cooperate may well have provided the School Department with grounds to remove Mr. Lewis from his duties or to terminate him. But of course, that is not the issue before us. The issue before this Court is whether he was suspended for proved misconduct within the meaning of § 28-44-18. If he was, he was properly disqualified from receiving benefits; if misconduct was not proven, the Board's denial of benefits was erroneous.

The Board of Review — on two occasions — embraced the theory proffered by the School Department that claimant committed misconduct by unreasonably refusing to submit to his employer's request for psychiatric testing. For the reasons that follow, I believe his failure to cooperate fully with the Department's review did not constitute disqualifying misconduct under section 18.

Generally, it is my view that such a refusal — at least in the absence of a special agreement by the employee to consent to such an examination — does not meet the statutory standard of conduct in willful disregard of the employer's interests. See Gen. Laws 1956 § 28-44-18, quoted supra at 5. Neither does such a failure to cooperate meet the Turner standard of intentional or wanton disregard of the employer's interests. See Turner, quoted supra at 6. Finally, I am aware of no case decided by this Court or the Rhode Island Supreme Court in which the failure to cooperate with such an examination formed the basis

of a finding of misconduct under § 28-44-18. Neither am I aware of any case from one of our sister states which may be said to be on point.

However, research has revealed a category of misconduct cases which is somewhat analogous to the instant case — these are cases in which an employer seeks an employee to take a polygraph test. See 76 AM. JUR. 2d Unemployment Compensation § 100. The general rule seems to be that refusal to take a polygraph is not misconduct except when the employee has specifically agreed to do so in an employment contract. See Vaughan v. Shop & Go, Inc., 526 So. 2d 91, 93-94 (Fla. 4th DCA 1987) cause dismissed 526 So. 2d 75 (Fla. 1988). Applying this rule by analogy to the case sub judice, I must conclude Mr. Lewis did not commit misconduct.[8]

Admittedly, it is well-settled that this Court is not authorized to substitute its judgment for that of the Board of Review on factual matters. See Gen. Laws § 42-35-15(g), supra pp. 5-6 and Guarino, supra p. 6, fn. 1. Nevertheless, I conclude that the claimant did not commit misconduct within the meaning of section 18 and the Board's finding to the contrary is incorrect as a matter of law. I therefore find that there is a basis for this Court to disturb the Board's decision denying benefits to Mr. Lewis.

[8] Neither did the Department prove — or endeavor to prove — that claimant was not "available" for work in the sense that he was not mentally able to perform in his position. See Gen. Laws 1956 § 28-44-12.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was 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 or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

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

/s/
Joseph P. Ippolito
MAGISTRATE

JANUARY 30, 2012