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

Lauri A. Lollar	:	
	:	
v.	:	**A.A. No. 11 - 136**
	:	
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 AFFIRMED.

Entered as an Order of this Court at Providence on this 25th day of January, 2012.

By Order:

___/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

PROVIDENCE, Sc. **DISTRICT COURT**
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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. Ms. Lauri A. Lollar 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 she 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 supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Lauri A. Lollar was employed by Helen Gravell as a pet groomer for about a year and ten months until May 12, 2011. Ms. Lollar applied for employment security benefits but on June 22, 2011 the Director issued a decision

that she was disqualified from receiving benefits because she was discharged under disqualifying circumstances (*i.e.,* proved misconduct) in accordance with General Laws 1956 § 28-44-18. See Director's Exhibit No. 2.

Claimant filed an appeal, and a hearing was held before Referee Carol A. Gibson on August 3, 2011 at which the claimant and employer appeared and testified. In her August 26, 2011 Decision, the referee found the following facts:

> **2. Findings Of Fact:**
> The claimant had worked for the employer, a pet grooming business, for a year and ten months as a groomer through May 12, 2011. During the time the claimant was employed, there had been issues with her being absent from work without notice to the employer. The employer states that the claimant was absent without notice on June 26, 2010 and April 16, 2011. The employer indicates that she verbally warned the claimant on April 16, 2011 that failing to report to work again without notice would result in her termination. The employer states that the claimant was expected to work at 9:00 a.m. on May 14, 2011 and that she had no knowledge that the claimant would be absent from work on that date. When the claimant had not reported to work by 9:30 a.m., the employer called and left a message for the claimant to contact her regarding her absence. The employer states that she had no contact from the claimant on that date. The claimant does acknowledge that she was absent without notice on June 26, 2010. The claimant does not recall the absence on April 16, 2011. The claimant states that in the final incident she had spoken to the employer on May 13, 2011 and indicated that she most likely would not be in work the next day. The claimant indicates that she was ill on May 14, 2011 and she did not receive the employer's message until 2:00 p.m. The claimant did not call the employer at that time regarding her absence. The employer discharged the claimant on May 16, 2011, when she reported to work.
> Decision of Referee, August 26, 2011 at 1.

Based on these findings, the Referee arrived at the following conclusions:

> **3. Conclusion:**
> * * *
> The burden of proof in establishing misconduct rests solely with the employer. In this case, the employer has sustained this burden. The evidence and testimony presented at the hearing establish that the claimant's actions in failing to report to work or contact the employer were not in the employer's bests (sic) interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.
> Decision of Referee, August 26, 2011 at 2.

Accordingly, the Referee found claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by Ms. Lollar and the matter was reviewed by the Board of Review. In a decision dated September 30, 2009, the Board unanimously found 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.

Ms. Lollar filed a pro-se Claim of Appeal and Petition within the Sixth Division District Court on or about October 3, 2011. 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 her work activities, constitutes misconduct as defined by law.

The particular ground of misconduct alleged in the instant matter — an unexplained absence from work — has been the subject of many prior District Court decisions. This Court has long held that unexplained absences may constitute misconduct within the meaning of section 18. See Williams v. Department of Employment Security, A.A. No. 82-162 (Dist.Ct. 9/30/83)(Higgins, J.); Blazer v. Department of Employment Security, A.A. No. 88-30 (Dist.Ct. 8/25/88)(Moore, J.); Audette v. Department of Employment & Training, A.A. No. 91-126 (Dist.Ct. 12/11/91) (DeRobbio, C.J.). These cases are in accord with the general rule accepted nationally. See 76 AM. JUR. 2d Unemployment Compensation § 89 (2005); ANNOT., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674.

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.' "[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 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

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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 Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

3 Id.

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 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. More precisely, was claimant disqualified from receiving unemployment benefits due to misconduct as provided by section 28-44-18?

ANALYSIS

For the following reasons I conclude that the Board's decision in this case was supported by substantial evidence of record and is not clearly erroneous.

In finding that claimant was terminated for failing to report for work without notice the Referee could rely on the testimony of the employer — Ms. Helen Gravell — who testified that Ms. Lollar was terminated because she failed to appear for work for on May 14th and failed to call-in. Referee Hearing Transcript, at 7.

Specifically, Ms. Gravell testified claimant was scheduled to work on May 14th but when the business opened at 9:00 a.m. Ms. Lollar was not there and she had no message from claimant. Referee Hearing Transcript, at 7, 8. Customers began to arrive, so she called claimant and left a message on her answering machine. Referee Hearing Transcript, at 7. But, Ms. Gravell never heard from claimant that day. Id.

Ms. Gravell stated that when Ms. Lollar appeared for work on May 16th, she was discharged for being a no-call, no-show on the 14th. Referee Hearing Transcript, at 9. She stated Ms. Lollar made a response and then left. Id. She said Ms. Lollar had been a no-call,

no-show on two previous occasions — June 26, 2010 and April 16, 2011. Referee Hearing Transcript, at 10. She said that after the second incident, she had a talk with claimant, expressing that she would be fired if it happened again. Referee Hearing Transcript, at 12-13. She conceded that all warnings were not documented. Referee Hearing Transcript, at 14.

Claimant conceded that she was a no-call, no-show on June 26, 2010. Referee Hearing Transcript, at 18-19. Additionally, she had no recollection of the April 16, 2011 incident. Referee Hearing Transcript, at 19-20. She then explained her version of the final incident, which was completely contradictory to the employer's story.

Ms. Lollar related that her son became sick at school on Thursday, May 12, 2011. Referee Hearing Transcript, at 20-21. She said that on Friday she called and told Ms. Gravell that she could not come in and that she probably was not coming in on Saturday. Referee Hearing Transcript, at 21. She amended this testimony to say she told Ms. Gravell she would definitely not be coming in on Saturday, although this comment was later made less absolute. Referee Hearing Transcript, at 20-21, 23. She added that on Friday evening she became sick and she slept away the day on Saturday. Id. Finally, Ms. Lollar also explained her substantial personal problems, which need not be specified here. Referee Hearing Transcript, at 22.

On redirect, Ms. Gravell refuted claimant's testimony that she had informed her that she would be out on Saturday. Referee Hearing Transcript, at 28.

Whether claimant failed to appear for work or call-in are questions of fact. As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra pp. 5-6 and Guarino, supra p. 6, fn. 1. In other words, the role of this Court is not to choose

which set of testimony – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision is supported by substantial evidence of record. Based on my review of the record, including the testimony given at the hearing before the Referee — which I have summarized — I do believe it is.

The scope of judicial review by the Court is also limited by Gen. Laws § 28-44-54, which in pertinent part provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, the Board's finding that claimant failed to appear for work and failed to call in to explain her absences is supported by the record and cannot be successfully challenged.

The Board also applied the correct principle of law – that unexplained absences may constitute misconduct. See precedents cited supra page 5. There is no evident reason on this record why this longstanding rule should not be applied in this case. Thus, I find there is no basis for this Court to disturb the Board's decision denying benefits to Ms. Lollar.

CONCLUSION

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

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

/s/
Joseph P. Ippolito
MAGISTRATE

JANUARY 25, 2012