STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Alexander Fraioli	:	
	:	
v.	:	**A.A. No. 11 - 155**
	:	
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 May, 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. Alexander Fraioli filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and 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 supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Alexander Fraioli was employed by South County Toyota as a sales representative for six months until July 8, 2010. Mr. Fraioli applied for employment security benefits but on August 6, 2010 the Director issued a decision that he was disqualified from receiving benefits because he quit without good cause within the

meaning of Gen. Laws 1956 § 28-44-17. See Director's Exhibit No. 2.

Claimant filed an appeal and a hearing was scheduled before Referee Nancy L. Howarth on December 1, 2010 at which the claimant failed to appear. As a result, the Director's decision was affirmed.

Claimant appealed from this decision and a further hearing was held before Referee Howarth on April 4, 2011. The claimant appeared with counsel and a witness; the employer was represented by counsel and two witnesses. The hearing addressed two issues: (1) the claimant's request for a new hearing and (2) the substantive issue of the reason for his separation. In her May 13, 2011 Decision, the Referee permitted a further appeal pursuant to Rule 13. On the substantive issues arising out of claimant's termination, Referee Howarth did not sustain the Director's finding that Mr. Fraioli quit without good cause. Instead, she found the following facts on question whether claimant was fired for misconduct:

> **2. Findings Of Fact:**
> * * *
> The claimant was employed as a sales representative by the employer. The claimant had received verbal warnings for tardiness. The claimant reported to work at 1:00 p.m. on July 5, 2010 although he was scheduled at 8:00 a.m. The claimant was no call, no show for a sales meeting on July 10, 2010. The employer considered the claimant voluntarily left his job that day.

Decision of Referee, April 4, 2011 at 1. Based on these findings, the Referee arrived at the following conclusions:

> **3. Conclusion:**
> * * *
> The evidence and testimony presented at the hearing establish that the claimant had received several verbal warnings regarding his tardiness. He was a no show, no call on July 10, 2010. As a result of the claimant's failure to report to work or notify the employer of his absence that day, he was discharged by the employer. I find that the claimant's action constitute

misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, April 4, 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 Mr. Fraioli and the matter was reviewed by the Board of Review. In a decision dated October 26, 2011, a majority of the members of the Board 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. The Member Representing Labor filed a Dissenting Opinion.

Mr. Fraioli filed an appeal within the Sixth Division District Court on or about November 14, 2011. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

II. 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.

The particular ground of misconduct alleged in the instant matter — repeated lateness — has been held to constitute misconduct justifying disqualification from the receipt of

benefits in District Court cases too numerous to cite. This has also been the view expressed nationally. ANNOT., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674. An unexplained absence from work — what in common parlance is known as being a "no call, no show" has been held to be a particularly egregious form of lateness/absenteeism. See Blazer v. Department of Employment Security, A.A. No. 88-30 (Dist.Ct. 8/25/88)(Moore, J.); Audette v. Department of Employment and Training, A.A. No. 91-126 (Dist.Ct. 12/11/91) (DeRobbio, C.J.).

III. 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 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 was supported by reliable, probative, and substantial evidence in the record or whether or not it

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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.

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?

V. ANALYSIS

A. Overview.

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. I make this finding despite my conclusion that the Referee's finding that Mr. Fraioli was a "No call, No show" — as stated supra, a particularly egregious form of lateness — is clearly erroneous. However, because the record contains substantial evidence that Mr. Fraioli was late on a number of occasions, I believe the decision of the Board denying benefits must be affirmed.

B. Summary of Testimony.

In the course of reviewing the transcript of the hearing held in this case I was struck by the fact that the evidence was not elicited in the sequence normally used in misconduct cases — the employer proceeds first to prove misconduct. In this case, perhaps because the case came to the Referee under section 17, the claimant was questioned first. See Referee Hearing Transcript, at 14 et seq. As a result, the employer's case was not presented in a logical and orderly manner.

The employer began its case with Ms. Susan Hamilton, its Office Manager, who testified that Mr. Fraioli never indicated to her he had Lyme Disease and that he worked four days during each of the weeks of July 4, 2010 and July 11, 2010; however, she acknowledged that she did not make out his schedule. Referee Hearing Transcript, at 2-3, 26-29.

The second witness for the employer was Mr. Dan Mello, the claimant's supervisor at Tarbox.[4] Referee Hearing Transcript, at 29-37. He testified that lateness "might" have been the reason for claimant's discharge. Referee Hearing Transcript, at 31. Regarding the incident on July 10, 2010, Mr. Mello testified that after Mr. Fraioli missed the sales meeting someone (denoted "inaudible" in the transcript) indicated that "enough's enough." Referee Hearing Transcript, at 31, 37. As a result, when Mr. Fraioli called in, Mr. Mello told him "that they considered pretty much (inaudible) your job." Referee Hearing Transcript, at 32, 37. From this statement one may draw the inference that Mr. Fraioli's relationship with Tarbox was, from that moment, severed. Mr. Mello testified that Mr. Fraioli was *traditionally* late on Saturdays. Referee Hearing Transcript, at 33.

The employer's third and final witness was Mr. Raymond Clements, its General Manager. Referee Hearing Transcript, at 38-40. According to Mr. Clements, Mr. Fraioli never called in on the final Saturday; he thought they did not speak to Mr. Fraioli until Monday. Referee Hearing Transcript, at 39. He did not remember whether claimant had been warned the prior week. Id. He had a non-specific recollection that Tarbox considered terminating Mr. Fraioli earlier. Referee Hearing Transcript, at 40.

Mr. Fraioli, who had testified earlier,[5] testified that he overslept on the Saturday and

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[4] Note: Mr. Mello was no longer employed by Tarbox as of the date of the hearing — April 4, 2011.

[5] One cannot fault the Referee for commencing with the testimony of Mr. Fraioli, since the issue came to her under section 17. However, the claimant should not have been asked to respond to accusations of repeated lateness until the accusation had been properly established.

that when he called in — at about 9:30 to 10:00 a.m. — Dan Mello told him that he was fired. Referee Hearing Transcript, at 20. He conceded he had been warned earlier. Referee Hearing Transcript, at 17.

C. Explanation.

Whether claimant failed to appear for work on-time is a question of fact. Of course, the claimant was fired for being a no call, no show, which, to reiterate, is deemed the most egregious form of lateness. This is clearly not true. Both parties to the conversation — Mr. Mello and Mr. Fraioli — indicated it occurred on the Saturday. So, on this point, I believe the Referee's findings were incorrect, and unfair to claimant.

And so, I believe that we must consider whether Mr. Fraioli's general lateness was of such a pattern to constitute misconduct. I believe there is evidence in the record to support such a finding. Mr. Mello testified that Mr. Fraioli was *traditionally* late on Saturdays. Referee Hearing Transcript, at 33. This is an unusual choice of terms I think. I take this to mean he was late customarily[6], habitually, routinely, and regularly on Saturdays — the day when Tarbox had their sales meeting. But we may also consider the testimony of Mr. Fraioli.

Mr. Fraioli conceded that he had "received a couple of warnings" for lateness. Referee Hearing Transcript, at 17. Mr. Fraioli did not deny he had been late but insisted he was "never late by a lot." Id. As it happened, at the time of his termination, he was on a punishment schedule [of long hours] for being late. Referee Hearing Transcript, at 17-18. I believe this testimony, taken as a whole, provides reliable, probative, and substantial evidence

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[6] The second definition of "traditionally" found in the Webster's Third New World Dictionary (2002) at 2422 is "**2** : by tradition: CUSTOMARILY."

that Mr. Fraioli was repeatedly late, mostly on Saturdays. And from this fact we may infer that he was late for, or missed, sales meetings.

The only question remaining is whether Mr. Fraioli's repeated instances of lateness were committed under circumstances which would not constitute misconduct under section 18 and the definition of misconduct provided in Turner, supra at 3-4.

Mr. Fraioli asserted that his lateness was unintentional — attributable to the effects of Lyme disease. Claimant testified that he had informed his employers of his condition, but this was denied. In any event this excuse must fail because Mr. Fraioli provided no expert opinion that there was a nexus between his disease and his lateness. The only medical documentation provided merely confirmed the diagnosis and spoke to its symptoms generally — such as fatigue. The physician's letter did not purport to attribute Mr. Fraioli's lateness during the period in question to Lyme disease. See Letter of Lewis R. Weiner, M.D., Claimant's Exhibit 1.

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 at 5 and Guarino, supra at 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, in light of the evidence of record, is clearly erroneous. Based on my review of the record, including the testimony given at the hearing before the Referee — which I have summarized — I believe it is not.

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

MAY 25, 2012