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

Joel Wyrostek	:	
	:	
v.	:	**A.A. No. 11-73**
	:	
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-16.2 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, 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 17th day of August, 2011.

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

Montalbano, M. This matter is before the Court on the complaint of Mr. Joel E. Wyrostek seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor and Training, which held that Mr. Wyrostek was not entitled to receive employment security benefits and that the claimant was subject to a recovery under the provisions of § 28-42-68 of the Rhode Island Employment Security Act. This matter was referred to me on July 12, 2011 for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-16.2. After review of the entire record, I find that the decision of the panel should be affirmed and I so recommend.

FACTS & TRAVEL OF THE CASE

The claimant was employed for ten years and two months by the employer, COXCOM INC. (hereinafter "Cox"). His last day of work was May 4, 2010. He filed a claim for Employment Security benefits on January 20, 2010. The Director determined that the claimant was discharged under disqualifying circumstances under the provisions of section 28-44-18 of the Rhode Island Employment Security Act. The Director further determined that the claimant was overpaid for the weeks ending January 30, 2010[1] through July 24, 2010 and the week ending August 7, 2010, and that claimant was subject to a recovery under the provisions of section 28-42-68 of the same Act. The claimant filed a timely appeal of the Director's decision on October 5, 2010, and, on February 9, 2011 a hearing was held before referee Nancy Howarth at which time the claimant and two employer representatives testified telephonically.

In her March 3, 2010 decision, the referee made the following findings of fact:

> 2. FINDINGS OF FACT:
>
> The claimant was employed as a sales and service technician by the employer. The claimant was arrested on January 1, 2010 and charged with strangulation and the risk of injury to a child. He was placed on a six month unpaid suspension beginning January 5, 2010. Since the claimant's job required him to work in customers' homes (sic). The employer's policy provides that off duty conduct which results in criminal charges is grounds for immediate discharge. The claimant's job required him to work in customers' homes. In cases such as the claimant's the employee was given six months to get the charges

[1] Pursuant to company policy, claimant was placed on a six-month unpaid suspension starting January 5, 2010 pending resolution of felony domestic violence charges after the completion of a domestic violence program in Connecticut, because his job as a service technician requires him to work in customers' homes.

> dismissed. The claimant had acknowledged in writing that he had received a copy of the policy. The claimant was given six months to have the charges expunged from his record. If the matter was dismissed within that time the claimant's employment would continue. Documentation from a court support family services counselor which was provided by the employer indicates that the claimant was to be placed in a family violence education program. If he had successfully completed the program the charges would have been dismissed by the court and the claimant would have no record regarding the matter. According to the claimant, he completed the program. However, the judge stated that not enough time had passed to expunge the charges. However, the claimant has presented no evidence to substantiate his statement. The claimant was discharged on July 5, 2010, since criminal charges against him were not dismissed. Other employees had been discharged under similar circumstances. When he filed his claim for Employment Security benefits the claimant failed to notify the Department that he had been suspended and subsequently terminated.

Referee's Decision, at 1-2. Based on these findings, and after quoting the Standard of Misconduct found in RIGL 28-44-18, the Referee made the following conclusions:

> * * * The burden of proof in establishing misconduct in connection with the work 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 had an opportunity to retain his job, but failed to complete the program which would allow him to do so. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, at 2. Therefore, the Referee determined that the claimant's termination was under disqualifying conditions within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 2. Accordingly, she affirmed the decision of the Director (Referee's decision, at 2), and found that the claimant was disqualified from receiving benefits because he was

properly terminated for misconduct under Gen. Laws 1956 § 22-44-18 of the Rhode Island Employment Security Act.

The employee filed a timely appeal and the matter was reviewed by the Board of Review. On June 1, 2011 the Board of Review issued its decision adopting and incorporating by reference the factual findings of the appeal tribunal (Referee), and affirmed the conclusions of the Referee as to the applicable law. Decision of Board of Review, at 1.

The Board Member representing Labor, Mr. Nathaniel Rendine, dissented as follows:

> * * * The employer did not prove misconduct. The record showed that the claimant was arrested but not convicted. He may have had a resolution to his legal difficulties, but it is not shown in the record. An arrest without more does not establish misconduct, under the Rhode Island Employment Security Act. A policy which provides for a termination on an arrest, without reference to some reliable evidence as to the underlying facts, regardless of the amount of time, is not reasonable.
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> Decision of Board of Review, at 2.

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 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, 741-2 (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 a 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.

Failure to comply with a company policy, when the employee is admittedly aware of the policy, constitutes misconduct within the meaning of § 28-44-18. See Chartier v. Dept. of Employ't & Training, 673 A.2d 1078, 1080 (R.I. 1996)(an employee's refusal to follow employer's instructions to refrain from a personal relationship with a former patient qualifies as disqualifying misconduct); cf. Cardoza v. Dept. of Employ't & Training Bd. Of Review, 669 A.2d 1165 (R.I. 1996)(District Court reversing decision and granting benefits because employee was never warned that his behavior deemed "misconduct' by the company would lead to termination).

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law. See Foster-Glocester Regional School Committee v. Board of Review, 854 A.2d 1008 (R.I. 2004).

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.

* * *

(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.'"[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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 legislative policy does not warrant an

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2 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).

3 Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

4 Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

> 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 that claimant was disqualified from receiving benefits due to misconduct and that claimant was subject to a recovery 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.

ANALYSIS

The claimant's employer, Cox, has an employment policy in which it can terminate an employee "immediately" for "unethical or illegal conduct in the course of employment or off-duty conduct that results in a criminal charge or conviction." Decision of Referee, at 1. The claimant had acknowledged in writing that he had received a copy of this policy. Id. After the claimant was charged with two felonies on January 1, 2010 (including risk of injury to a child and second degree strangulation), his employer, Cox, did not immediately discharge him, but placed him on a six month unpaid suspension in order to allow the claimant time to complete a family violence program and have his record expunged. Id. The record indicates that Mr. Wyrostek asserts he completed the family violence program, but the judge did not expunge his record at the time because "not enough time had passed." Decision of Referee, at 1-

2. At that time, Cox terminated the claimant's employment on July 5, 2010 since the criminal charges had not been dismissed. Decision of Referee, at 2.

The claimant's behavior which resulted in criminal charges being filed against him adversely affected the best interests of his employer, especially since he committed a "knowing violation of a reasonable and uniformly enforced rule or policy of the employer." Gen. Laws § 28-44-18. The employer, Cox, has met its burden of proof that the claimant's behavior qualifies as "misconduct" under the statute, because it directly violates a reasonable company policy of which claimant was admittedly aware. See Chartier v. Dept. of Employ't & Training, 673 A.2d 1078, 1080 (R.I. 1996). The employer's policy is particularly reasonable because service technicians, such as the claimant, work inside customers' homes on a daily basis and therefore violent behavior cannot be tolerated. Decision of Referee, at 1. The record indicates that the employer has also enforced this policy uniformly as other employees had been discharged under similar circumstances. Decision of Referee, at 2. In St. Pius X Parish Corp. v. Murray, 557 A.2d 1214, 1217 (R.I. 1989), the Rhode Island Supreme Court held that "[e]very employer has a right, to some extent, to govern its employees through the establishment of performance standards and rules of conduct the violation of which may be grounds for dismissal." The employer has the right to expect reasonable standards of behavior which would preclude engaging in acts of domestic violence outside of the workplace, especially where an employee's job requires him to enter customers' homes. The claimant has neither produced evidence of completion of the required family violence education program, nor has

he produced any evidence of a resolution in the Connecticut Court (by either expungement or dismissal) of the very serious domestic violence charges against him.

This Court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Thus, the findings of the agency must be upheld, even though a reasonable fact-finder might have reached a contrary result.

CONCLUSION

Upon thorough review of the entire record, this Court finds that the Board's decision to deny claimant unemployment benefits under § 28-44-18 of the Rhode Island Employment Security Act and its determination that the claimant was overpaid and subject to a recovery under the provisions of section 28-42-68 were not "clearly erroneous in view of the reliable, probative and substantial evidence of the whole record." § 42-35-15(g)(5). Neither was said decision "arbitrary capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion." § 42-35-15(g)(6).

Accordingly, I recommend that the decision rendered by the Board of Review in this case be AFFIRMED.

/s/
Joseph A. Montalbano
MAGISTRATE

August 17, 2011