STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Lionel Fernandez	:	
	:	
v.	:	**A.A. No. 2011 - 092**
	:	
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 23rd day of September, 2011.

By Order:

_____/s/_____
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, Magistrate Mr. Lionel Fernandez 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. This matter has been referred to me for the making of 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.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Lionel Fernandez had been employed as a social worker by the Janmat Housing Corporation as a teacher at the Elmwood Community School for approximately twenty-one months when he was discharged on September 11, 2010 because his employer learned that he did not possess a social worker's license — a requirement of his position. After Mr. Fernandez filed a claim for unemployment benefits, the Director issued a decision on November 10, 2010 in which claimant was determined to be disqualified from receiving benefits because he was terminated for proved misconduct, in accordance with General Laws 1956 § 28-44-18.

Complainant filed an appeal and a hearing was held before Referee Nancy L. Howarth on March 24, 2011. On May 9, 2011, the Referee held that Mr. Fernandez was disqualified from receiving benefits because he was terminated for proved misconduct:

> The claimant was employed as a social worker by Janmat Housing Corporation. At the time he was hired, he indicated that he was a licensed social worker. The Executive Director requested a copy of his license. The claimant failed to produce the license. He eventually admitted that he was not a licensed social worker. The employer advised the claimant that he must license [sic] to work in his position. This was a requirement of the State of Rhode Island Department of Education. The claimant was given until the beginning of the following school year, September 1, 2009, to obtain the license. When the school year began, the claimant had not passed the test for the license. The claimant did not obtain his license. The employer again extended the period for the claimant to obtain his license to the beginning of the school year of

> September of 2010. The claimant still had not obtained his license at that time. He was terminated on September 11, 2010 for failure to obtain a social worker's license.

Decision of Referee, May 9, 2011, at 1. Based on these facts, the referee made 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 credible evidence and testimony presented at the hearing establish that the claimant was required to obtain a social worker's license as a condition of his employment, and that he failed to do so. I find that the claimant's actions were not in the employer's best interests and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, May 9, 2011, at 2. Upon appeal, the matter was heard by the Board of Review. On June 21, 2011, the members of the Board unanimously rendered a decision in which it held that the referee's decision was a proper adjudication of the facts and the law applicable thereto. Accordingly, it adopted the decision of Referee Howarth — which denied claimant benefits — as its own. Decision of Board of Review, June 21, 2011, at 1.

Finally, Mr. Fernandez filed a Petition within the Sixth Division District Court on July 21, 2011; the appeal was numbered A.A. 2011-092.

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.

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.

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.' "[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 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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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).

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 pursuant to section 28-44-18?

ANALYSIS

In this case the facts heard by the referee are not in dispute: Claimant was employed by Janmat Housing at the Elmwood Community School. Referee Hearing Transcript, at 5-6. Doing so requires a social worker's license. Referee Hearing Transcript, at 11, 13, 20. Mr. Fernandez acknowledged he was notified of this requirement when hired. Referee Hearing Transcript, at 28. Claimant did not have such a license when hired[4] and was unable — despite making efforts — to obtain one.

The law by which this case is governed is well-settled in the District Court. The District Court has repeatedly decided that failure to maintain a license necessary to perform one's employment duties constitutes misconduct.[5] This principle has been

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[4] Indeed, according to one of the employer's witnesses, claimant represented that he did have such a license when he was hired. Making false or misleading statements during the hiring process can be a basis for termination when the falsehood is discovered. See Elmayan v. Department of Employment and Training Board of Review, 669 A.2d 1156, 1160 (R.I. 1996). The employer, generously, did not choose to pursue this theory but gave claimant an opportunity to remedy the situation.

[5] In other cases the failure to gain or maintain a necessary certification has been viewed

applied as to — *a driver's license*: Prochniak v. Department of Employment & Training, Board of Review, A.A. No.03-63, (Dist.Ct.7/30/04) (DeRobbio, C.J.)(Claimant was rehired subject to reinstating his operator's license but was unable to do so; disqualification affirmed) and Walden v. Department of Employment & Training, A.A. No. 91-100 (Dist.Ct. 7/19/91)(DeRobbio, C.J.) (Principle accepted but benefits allowed where claimant was transferred to other duties and was then terminated one month later)]; *a nursing license*: Dardeen v. Department of Employment & Training, A.A. No. 92-306 (Dist.Ct.11/18/93) (DeRobbio, C.J.), and to *a teaching certificate*: McClorin v. Department of Employment & Training, A.A. No. 92-12 (Dist.Ct. 2/16/94) (DeRobbio, C.J.). As to driver's licenses suspended for traffic violations, this rule has been generally accepted nationally. See 76 AM. JUR. 2d Unemployment Compensation § 82 (2005) and ANNOT., Unemployment Compensation Claimant's Eligibility as Affected by Loss of, or Failure to Obtain, License, Certificate, or Similar Qualification for Continued Employment, 15 A.L.R.5th 653, §§ 6, 10 (1993). The referee and the Board apparently accepted this principle as the governing rule of law.

Given that the facts and the law applicable to this case are clear, I can discern no error in the Board's decision finding Mr. Fernandez to be ineligible to receive unemployment benefits.

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as a form of leaving without good cause. See Mourachian v. Department of Employment Security, A.A. No. 83-159, (Dist.Ct.9/14/84) (DelNero, J.). Under this theory as well the employee is barred from receiving benefits.

REPAYMENT

Finally, claimant was ordered to repay $5,364.00 by the Director. In affirming this order, the Referee found claimant to have been at fault for this overpayment because he misrepresented the reason for his discharge, because he indicated that he had been laid off due to lack of work, not because of the license issue discussed above. Decision of Referee, May 9, 2011, at 3. In making this finding the Referee relied upon the claimant's own testimony, in which he admitted he told the Department he was laid off for lack of work. See Referee Hearing Transcript, at 30. The Referee apparently discredited claimant's testimony that he was not told why he was not being recalled for the fall term. Id. She apparently fully credited the employer representative's testimony that he was told that he could not come back without his license. See Referee Hearing Transcript, at 31.

And, in so finding, the referee correctly applied Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.

> * * *
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery would not defeat the purposes of the Act. Clearly, the case at bar is an instance where recoupment is well-justified in fact and law, based on claimant's misstatement.

CONCLUSION

Upon careful review of the evidence, I 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 of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

September 23, 2011