STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Kristen Dezotell	:	
	:	
v.	:	**A.A. No. 12 - 118**
	:	
Department of Labor and 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 ____ day of July, 2012.

By Order:

_____
Melvin Enright
Acting Chief Clerk

Enter:

_____
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. Ms. Kristen Dezotell 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 she was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making for 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. Kristen M. Dezotell worked for the Coastal Medical Inc. in medical billing for eleven years until she was terminated on March 15, 2011. She filed an application for unemployment in October. But, on November 28, 2011, the Director determined her to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee William Enos on February 2, 2012. On March 6, 2012, the Referee held that Ms. Dezotell was disqualified from receiving benefits because she was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in pertinent part:

> Claimant worked in Medical Billing for Coastal Medical for eleven years. Claimant's last day of work was March 15, 2011. The employer testified that the claimant asked for vacation time off and was denied. The employer testified that the claimant then came back into the office and gave them a doctor's note taking her out of work for the same time that she had been denied vacation time. The doctor's note also gave no specific medical reasons for her absence. The employer testified that the claimant was instructed to take the doctor's note into the Human Resources Director but instead she just left it with her

> supervisor and left. The employer testified that the claimant had a Las Vegas vacation planned and was going to go one way or another. The employer testified that the claimant did have a Workers' Compensation case pending. The claimant testified that she did go to Las Vegas even though she was sick, because she had paid good money to attend a concert and she was not about to miss it. The claimant testified that she had submitted a doctor's noted (sic) in the past and they never had any medical reasons on them.

Decision of Referee, March 6, 2012 at 1. Based on these facts, the Referee came to the following conclusion:

> * * *
> I find that the credible testimony and evidence presented by the employer that the claimant abused the company sick policy. Therefore, she was terminated under disqualifying circumstances. Based on this conclusion, I find the claimant is not entitled to Employment Security benefits under Section 28-44-18 of the above Act.

Decision of Referee, March 6, 2012 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On April 30, 2012, the Board of Review issued a decision in which the decision of the Referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, April 30, 2012, at 1.

Finally, Ms. Dezotell filed a complaint for judicial review in the Sixth Division District Court on May 29, 2012.

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

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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).

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.

ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) 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 Board adopted the Referee's factual conclusion that claimant abused her employer's sick leave policy and that doing so constituted proved misconduct. See Gen. Laws 1956 § 28-44-18. Accordingly, our first duty must be to examine the record to determine whether these allegations are

supported in the record. We note that the employer, in its effort to meet its burden of proof on this issue, presented two witnesses — Ms. Paula Rossi and Ms. Rita Cotter.

Paula Rossi, Director of Human Resources, testified that in January of 2011 Ms. Dezotell submitted a request for time off in March, which was denied, because it would have pushed her over the amount of time that can be advanced. Referee Hearing Transcript, at 7, 11. Claimant indicated that she was requesting the time because she had already purchased tickets for a concert in Las Vegas and the airline tickets to get her there and back. Referee Hearing Transcript, at 8. When she was told the leave could not be granted, claimant did not comment. Id. Neither did she appeal the issue through the grievance process. Id.

But, a day or so before the date of the trip, Ms. Dezotell turned in a doctor's note that she needed to be out of work. Referee Hearing Transcript, at 8-9. When the manager asked her to remain for a discussion, she simply left. Referee Hearing Transcript, at 9. Ms. Rossi sent Claimant a note asking her to clarify whether she was requesting FMLA leave or Workers' Compensation status but received no response. Id. When a second letter prompted a note from a second doctor that provided no explanation, the employer concluded the medical issue was a pretext and terminated Claimant

for abusing the sick-leave policy. Id. Finally, she testified that Ms. Dezotell did file for Workers' Compensation and that the Court ultimately ruled that there was no reason for her to have left that day. Referee Hearing Transcript, at 10.

Claimant testified next, explaining that in the Workers' Compensation case the judge decided that her problems related back to a 2009 work-related injury. Id. She said she was "really sick" in March — nauseous because of the pain. Referee Hearing Transcript, at 10-11. She explained that Dr. Zant "took [her] out" as of March 15th for the neck pain. Referee Hearing Transcript, at 13. She admitted that she went to Las Vegas to meet Jon Bon Jovi, adding that she was so sick she vomited on the plane. Referee Hearing Transcript, at 13-14, 19. She said she told Rita (Ms. Cotter) that she was ill. Referee Hearing Transcript, at 15.

At this juncture the hearing degenerated into debate-mode. First, Ms. Rossi explained that the employer had made many efforts to accommodate Claimant's needs, and that she was disappointed the Claimant had not come to her. Referee Hearing Transcript, at 15-16. In response, Ms. Dezotell stated that she did not know the pain was work-related. Referee Hearing Transcript, at 16. She then added that she did hand the note to her personally and did not walk out. Referee Hearing Transcript, at 17. Ms. Rossi adamantly refuted this. Referee Hearing Transcript, at 16-17.

At its core, the allegation against Ms. Dezotell was simply this — that she went on vacation in Las Vegas without first obtaining permission to be absent from her employer — which the employer had withheld due to a lack of medical justification. The Board's finding that her actions constituted misconduct are nonetheless well-supported by the evidence of record and the inferences to be drawn therefrom. Claimant went to Las Vegas without permission and without having provided medical documentation sufficient to justify her absence. What is more — she did so without making a proper request. As a result, on this record, I find that the Board was justified in finding that she was absent from work without proper justification — and for pleasure, not recuperation.

Pursuant to the applicable standard of review described supra at 5-7, the decision of the Board must be upheld unless it was, *inter alia*, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant was discharged for

proved misconduct in connection with her work — by traveling to Las Vegas without leave — is well-supported by the record and should not be overturned by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it 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.

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Joseph P. Ippolito
Magistrate

July _____, 2012