STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Pawtucket Day Nursery	:	
	:	
v.	:	**A.A. No. 12 - 210**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Napoleon DeBarros)	:	

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, 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 REVERSED.

Entered as an Order of this Court at Providence on this 29th day of April, 2013.

By Order:

/s/
Stephen C. Waluk
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. The Pawtucket Day Nursery 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 its former employee, Mr. Napoleon DeBarros, was entitled to receive employment security benefits based upon the employer's failure to prove 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. This matter has been referred to me for the making of

findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Applying the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is clearly erroneous in light of the reliable, probative, and substantial evidence of record; accordingly, I recommend that it be reversed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Napoleon DeBarros was employed by the Pawtucket Day Nursery as janitor for 20 years until May 18, 2012, when he was discharged. At the time of his termination he was working a "split shift" — early mornings and late afternoons. He applied for employment security benefits but on June 7, 2012 a designee of the Director of the Department of Labor and Training issued a decision holding that he was ineligible to receive benefits because he had engaged in misconduct — specifically, using a school computer for personal use. See Department's Exhibit No. D2. In fact, although it was not mentioned in the decision, the Claimant had admitted using the school's computer to access "adult" web sites.

Complainant filed an appeal, and on July 12, 2012 Referee Gunter Vukic held a hearing, at which the Claimant and three employer representatives appeared and testified. See Referee Hearing Transcript, at 1. In his July 13, 2012 decision, the Referee explained that Mr. DeBarros' activities came to light after an IT

professional was called in to address computer problems the school was experiencing. Decision of Referee (July 13, 2012), at 1. A virus was discovered which was traced to a pornographic web-site. Id. When advised of this development, the school administrators hand-delivered a memorandum to all employees advising them that personal use of the computers was strictly prohibited. Id. Upon receiving his copy of the memorandum, Mr. DeBarros approached the school's director and admitted he had used the computer on multiple occasions to access adult web-sites in January, February, and March (of 2012). Id. He was then discharged. Id.

Based on these facts, which are not in dispute, the Referee — after quoting from Gen. Laws 1956 § 28-44-18 and the leading case interpreting that provision, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984) — pronounced the following conclusions:

> * * * There is no dispute that the claimant improperly used the employer computer system on numerous occasions between January and March 2012, and that use contributed to computer virus being introduced. His action was in clear violation of the employer policy and irrespective of the material viewed; his action was against the best interest of his employer. The employer decision to decision to discharge the claimant, particularly since the employer is licensed through the State of Rhode Island to provide childcare services, is not in question, although nothing has been provided to support the termination was mandated under State of Rhode Island regulations.
>
> The record is void of any disciplinary action during the 20 year

> employment. The employer issued a specific memo addressing computer use and the fact that they had identified misuse without identifying a perpetrator. The claimant immediately came forward and admitted his improper computer use several months earlier. This isolated violation by a janitor of 20 years is an isolated event that occurred during his long term of employment and does not rise to a level of misconduct that would deny benefits.

Decision of Referee (July 13, 2012), at 2-3. Thus, the Referee found that, when placed in the context of his long and unblemished record of service, Claimant should be allowed benefits notwithstanding his admission of misconduct.

Thereafter, a timely appeal was filed by the employer and the matter was reviewed by the Department of Labor and Training Board of Review. A hearing was held on September 6, 2012, at which Claimant and an employer representative testified; the employer was represented by counsel. In a decision dated September 14, 2012, a majority of the members of the Board of Review determined that the findings of fact made by the Referee were accepted, except that (1) the Board rejected the Referee's finding that Claimant's activities were an isolated incident and (2) the Board made an additional finding that Claimant was a "very good worker." Decision of Board of Review (September 14, 2012), at 1.

The Board of Review then stated its conclusions, first considering whether Claimant had committed what we may denominate misconduct per se, and second, whether he had violated a known and uniformly enforced work rule. See Gen.

Laws 1956 § 28-44-18.

The Board began by focusing on the Claimant's mental state, finding that he did not intend to harm the employer's interest. Decision of Board of Review (September 14, 2012), at 1. It quoted him as attributing his misbehavior to the fact that " * * * [he] was going through some tough times." Id. From this point the Board went on to note that it did not appear that Claimant's job performance suffered as a result of his nocturnal misadventures, adding that it was not clear whether he accessed the computer during work times or his break times. Decision of Board of Review (September 14, 2012), at 2.

The Board of Review then found that the employer had not shown that the nursery's rule barring personal use of computers was uniformly enforced. Decision of Board of Review (September 14, 2012), at 2.

The Pawtucket Day Nursery filed a Complaint for Judicial Review in the Sixth Division District Court on or about October 12, 2012. A conference was held by the undersigned on December 18, 2012 at which time a briefing schedule was set. The appellant has filed a brief for the assistance of the Court; the appellee has informed the Court that it shall not. The case is therefore ready for adjudication.

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 her work activities, constitutes misconduct as defined by law.

III. 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 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

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 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.

> 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 (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.

V. ANALYSIS

A.

In this case the facts are not in dispute. Accordingly, it is not necessary at this juncture to reiterate the specifics of Mr. DeBarros' misbehavior. Our only task is to determine whether the Board of Review's decision was clearly erroneous in light of the reliable, probative and substantial evidence of record. And after reflection and deliberation, I must state — with some misgivings — that I believe the Board's decision fails to meet this standard. I shall, therefore, recommend the

decision of the Board of Review be reversed and Mr. DeBarros be disqualified.

I express regret in making this recommendation because, after reviewing the record, I find that in many ways Mr. DeBarros' conduct to have been quite admirable in several ways. First of all, he worked for this employer for twenty years and established an unblemished record. Certainly, both his longevity and his record of good service are to be lauded. And then, when he realized he had caused the computer problem, he came forward. His honesty brought him humiliation and termination — consequences which were objectively foreseeable. For the foregoing reasons, I am entirely sympathetic with the Board's desire to allow him to receive unemployment benefits that will mitigate the financial loss he has endured. Nevertheless, I believe the Board of Review decided his case wrongly.

B.

When a Claimant admits misbehavior there are generally only two issues which stand between that Claimant and disqualification — (1) Were his misdeeds an unprecedented or isolated incident? And, (2) Were they done with an intent to harm or a wanton disregard for the interests of the employer? Generally, conduct which is isolated, evincing a momentary instance of bad judgment, or which is not perpetrated maliciously will not trigger disqualification.

Of course, the Board of Review rejected the Referee's finding that

Claimant's use of the computer to get on the internet was an isolated instance of bad judgment. And while it may have been an uncharacteristic lapse in judgment it would strain credulity to find actions undertaken several times a month for several months to fall within the definition of an *isolated* instance of misconduct. And so I must agree with the Board of Review's decision to reject this theory in Mr. DeBarros' situation.

That leaves us with one final theory to consider — whether Mr. DeBarros acted with the intent necessary to sustain an allegation of proved misconduct under section 28-44-18? The Board found he did not. But I must disagree.

I view the case through the following prism — On more than a few occasions the Claimant used his employer's computer to log-on to questionable web sites. And, his actions resulted in a virus infecting the employer's equipment. By his actions he jeopardized the safety of the employer's equipment. Like an employee who drove a company sedan onto an off-road trail, Mr. DeBarros took the equipment to a place where it should not have been. The harm that resulted was entirely foreseeable, as was the expense to fix the problem, which was apparently substantial. See Board of Review Transcript, at 20.

But the Board of Review did not even comment on this aspect of the case. When considering whether the employer endured a financial loss in this case, it

focused solely on the issue of whether he went on-line on his time or on the employer's. Although this was an appropriate question, there were clearly other financial implications to this incident, which were entirely overlooked.

C.

Pursuant to the applicable standard of review, described supra at 7-9, the decision of the Board of Review 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.

Nevertheless, applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board of Review's finding that Claimant had not committed proved misconduct in connection with his work is clearly erroneous and is not well-supported by the record and should be overturned by this Court.

VI. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was affected by error of law. Gen. Laws 1956

§ 42-35-15(g)(3),(4). Further, it is 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 REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

APRIL 29, 2013