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

Advanced Communication, Inc.	:	
	:	
v.	:	**A.A. No. 12 - 045**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Collin B. Chapin)	:	

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 REVERSED.

Entered as an Order of this Court on this 21st day of September, 2012.

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. Advanced Communication, Inc. 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. Collin M. Chapin, 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 not supported by substantial evidence of record and was affected by error of law; accordingly, I recommend that it be reversed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Collin M. Chapin was employed by Advanced Communications at one of its "Wireless Zone" stores for six months until October 28, 2010, when he was discharged. He applied for employment security benefits but on December 8, 2010, the Director issued a decision holding that he was ineligible to receive benefits because he had engaged in misconduct — specifically, unprofessional comments made toward a supervisor during a meeting. See Department's Exhibit No. 2.

Complainant filed an appeal, and on April 18, 2011 Referee Stanley Tkaczyk held a hearing, at which the claimant and an employer representative appeared and testified. See Referee Hearing Transcript, at 1. In his April 20, 2011 Decision, the Referee made the following findings of fact:

> The claimant had worked for this employer a period of six months through October 28, 2010. On October 27, 2010 the claimant left the shift early without authorization. On October 28, 2010 he arrived at the worksite, presented an apology to his supervisor, which was accepted. The claimant voiced his opinion regarding the employer's management skills. After his apology was accepted the

> claimant was encouraged to share his opinion in an open forum among other employees. After his opinion was presented in the open forum the employer then terminated the claimant because of that opinion.

Decision of Referee, April 20, 2011 at 1. Based on these facts, the Referee — after quoting from Gen. Laws 1956 § 28-44-18 — made the following conclusions:

> The right of an employer to discharge an employee is not at issue in this case. The sole issue is whether or not there is evidence of proved misconduct resulting in the termination. The burden of establishing proved misconduct rests solely upon the employer. Although the employer seeks to enter the event of October 27, 2010 as grounds for termination, the evidence and testimony establishes that after that event the claimant offered his apology and the apology was accepted. The claimant was not terminated as a direct result of the event of October 27, 2010. Instead he was actually terminated because he voiced his opinion in an open forum after being encouraged to do so by his supervisor. That circumstance does not constitute misconduct and benefits may not be denied on this issue.

Decision of Referee, April 20, 2011 at 2. Accordingly, the Referee found that claimant was wrongly disqualified from the receipt of unemployment benefits because his comments did not constitute proved misconduct. The Referee excluded from consideration the event of the prior day — Claimant's early and unauthorized departure from work.

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 June 16, 2011, at which two additional employer representatives

testified. In a decision dated June 21, 2011, the members of the Board of Review unanimously held 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 entitled to receive unemployment benefits; the Decision of the Referee was thereby affirmed.

Advanced Communication filed a Complaint for Judicial Review in the Sixth Division District Court on or about July 19, 2011. The case was denominated A.A. No. 11-089. A conference was held by the undersigned on October 12, 2011; in an order dated October 19, 2011, the decision of the Board was vacated. The Court held that the Board's decision was inadequate as a matter of law, because, although the Board had held a hearing on the matter, it had made no findings of fact regarding the testimony and evidence it received.

Pursuant to the Court's order, the Board of Review issued a new decision on January 27, 2012. In that decision the Board once again adopted the Referee's findings, but also made the following supplemental findings of fact:

> After giving his apology to the supervisor, the claimant was invited to an open staff meeting. His status as an employee was to be decided by the general manager later that day, after the supervisor consulted with the general manager. The claimant actively participated in the staff meeting. After the meeting, his remarks, along with the supervisor's observations regarding the meeting, were reported to the general manager. The claimant was terminated by the general manager.

Decision of Board of Review, January 27, 2012, at 1. Then, the Board presented its conclusion:

> The Referee's conclusion that the claimant was terminated for his remarks at a staff meeting is reasonable based on the testimony before the Board and the Referee. The testimony before the Board consisted of the employer's supervisor. The general manager testified before the Referee. The general manager is the person who terminated the claimant. The supervisor's testimony established that he had not been terminated prior to the open staff meeting, in which he was invited to attend. The preponderance of the credible evidence from the entire record established that the claimant was terminated because of his conduct\remarks at the staff meeting. There is insufficient evidence to show that the conduct\remarks were deliberate actions intended to harm the employer's interests under Section 28-44-18 of the Act.

Decision of Board of Review, January 27, 2012, at 2. Accordingly, the Board re-affirmed its prior ruling that claimant was not discharged for proved misconduct and was thus eligible to receive benefits. Although the Board found his walking off the job had not been excused, it nonetheless found it was not the cause of his termination.

Then, on February 20, 2012, the employer filed its complaint in the instant case. 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 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

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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.

> 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 most cases under section 18 the Board must consider a single factual issue: the claimant is alleged to have done X — Did the claimant do it? However demanding the resolution of that question may be, it remains a single question. Of course, if the question is answered in the affirmative, the Board must then consider a second legal issue: Does that behavior constitute proved misconduct?

In this case, we have an extra step of analysis: we must consider two instances of potential misconduct — (1) Claimant's walking off the job and (2) his behavior at the meeting. The Referee found that the events of October 27th played no part in Claimant's discharge. His apology for walking off the job had been

accepted — the matter was closed; instead, he was discharged for his rude behavior at the meeting, which — in the Referee's opinion — did not constitute proved misconduct. This ruling, whether or not metaphysically correct, at least has the virtue of consistency.

However, the Board's ruling varies slightly but significantly. The Board held that — although the supervisor accepted Claimant's apology — Mr. Chapin's future had not been resolved, but was yet to be determined by the general manager. Notwithstanding this finding — which put the issue of walking off the job "in play" — the Board concluded that Claimant was discharged for his behavior at the meeting. Thus, the Board implied without stating that the incident of October 27th was not the basis for Mr. Chapin's discharge.

To this finding the Appellant-Employer adamantly takes exception, urging that the evidence of record demonstrates that Mr. Chapin was discharged by the employer because of both incidents — primarily the first, walking off the job. See Plaintiff-Employer's Brief, at 7-13. It further urges that walking off the job is conduct which constitutes proved misconduct. Finally, the Appellant-Employer urges that the Board erred in finding him eligible to receive employment security benefits. To determine the propriety of these assertions, we shall now review the facts of record.

B.

As part of its efforts to oppose Mr. Chapin's claim for benefits at the hearing before Referee Tkaczyk, the employer presented Mr. David Moone, its General Manager, who terminated Claimant. At the outset of his testimony, he concisely explained the circumstances of Mr. Chapin's termination:

> REF: Now, was he discharged?
>
> EMP: Ah, Collin had walked off his shift the day before.
>
> REF: Yeah.
>
> EMP: Ah, then came into work his next scheduled shift. Um, I had a meeting that morning with a client, I believe it was Saturday. Ah, once I was finished with what I was doing, I then gave him a call and, ah, told him he was no longer with the company, ah, both due to the actions that had led up to that, um, what I felt was poor behavior, ah, and in addition to that, the primary reason was leaving the, leaving the job before the shift was over. (Emphasis added).

Referee Hearing Transcript, at 7. Thus, according to Mr. Moone, he fired Mr. Chapin primarily because he had walked off the job.

He indicated he acted after speaking to Ms. Erica Boffi, the store manager. Referee Hearing Transcript, at 8-9. Ms. Boffi told him that Claimant had left at 1:20. Id., at 9. He agreed, after reviewing an e-mail sent by Ms. Boffi, that the next day Claimant came in and apologized. Id., at 11-12. On the basis of this record, the Referee allowed benefits.

At the hearing before the Referee, Mr. Chapin testified that the day after he walked off the job, he did apologize to Erica Boffi — who indicated he was still employed. Referee Hearing Transcript, at 14. He also discussed other concerns with Ms. Boffi, which she raised at the meeting which was then in progress. Id., at 15. He confirmed that about three hours later he received a phone call from Mr. Moone, who fired him, saying that "he didn't appreciate my comments I had made previously." Id., at 16.

At the further hearing before the Board of Review, the record was supplemented by the testimony of Kristin Moone, Operations Manager. She confirmed that she had spoken to the DLT telephone adjudicator in November of 2010 but denied that she had told the Department that Mr. Chapin was fired because of comments he made. Board of Review Hearing Transcript, at 7.

The Board also heard from Erica Boffi, who, at the time of these events, was the Manager of the Wireless Zone store where Claimant was employed. Board of Review Hearing Transcript, at 8. Ms. Boffi told the Board that she had concluded Collin had to be fired because he walked out one day in the middle of his shift. Board of Review Hearing Transcript, at 9. She identified a contemporaneous e-mail she had sent to Kristin Moone. Board of Review Hearing Transcript, at 11. See October 27, 2010 e-mail from Erica Boffi to Kristin Moone.

She indicated she did not have the authority to fire Mr. Chapin and so she had spoken to Mr. Moone. Board of Review Hearing Transcript, at 13.

Ms. Boffi also testified regarding the meeting she had with Collin Chapin on the day after he walked off the job. She testified he apologized for being rude but felt management was "unprofessional." Board of Review Hearing Transcript, at 13. She told Mr. Chapin she "appreciated" his apology but she still had to speak to Mr. Moone regarding his employment status, and that she would get back to him. Board of Review Hearing Transcript, at 15. She allowed Mr. Chapin to speak at the meeting and she testified that she did speak to Mr. Moone. Board of Review Hearing Transcript, at 16.

In my view the decision of the Board of Review is clearly erroneous in light of the testimony and evidence of record presented to the Board and the Referee. According to Mr. Moone, he fired Mr. Chapin primarily because he walked off the job. And, Ms. Boffi testified that she told Mr. Chapin when he returned that his apology did not absolve him from any penalties that might be imposed for leaving work early and that Mr. Moone would make that decision. In light of these first-hand statements, the Board's finding that Claimant was fired solely for the statements made at the meeting must be viewed as being contrary to the evidence of record.

C.

Having concluded that Mr. Chapin was primarily fired for walking off the job, I must now consider whether that conduct is sufficient to constitute proved misconduct.

Appellant-Employer cites a series of cases in which this Court has held that walking off the job before the end of one's shift may constitute proved misconduct. See Appellant's Brief, at 9. These citations are indeed accurate; of course, there are cases that hold that walking off may not constitute misconduct if it was done under circumstances that may be fairly excused. E.g. Whitman v. Department of Employment and Training, Board of Review, A.A. No. 94-294 (Dist.Ct. 1/24/95) (DeRobbio, C.J.)(Denial of benefits reversed where claimant left early to take college exam and took a short lunch hour to make up for his early departure). Mr. Chapin never justified his early departure on October 27th in any fashion.

Applying these principles of law to the instant case, I believe that Claimant's actions in walking off the job before the end of his shift were in intentional disregard for the employer's best interests since — even in the absence of special circumstances — his departure frustrated the employer's scheduled staffing for its

store. Accordingly, I must agree with Appellant that by walking off the job Mr. Chapin committed proved misconduct.

D.

Pursuant to the applicable standard of review, described supra at 7-8, 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.

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'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

SEPTEMBER 21, 2012