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

Vinicio Villar Reyes	:	
	:	
v.	:	**A.A. No. 13 - 055**
	:	
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 1st day of October, 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. Mr. Vinicio Villar Reyes 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 he 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. Vinicio Villar Reyes worked for Calise & Sons Bakery for five years until he was terminated on September 25, 2012. He filed an application for unemployment but on December 28, 2012, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee Gunter A. Vukic on January 28, 2013. On January 31, 2013, the Referee held that Mr. Reyes was not disqualified from receiving benefits because the employer had failed to prove misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> I find by preponderance of testimony the following findings of fact:
>
> Claimant was terminated September 25, 2012 for alleged insubordination occurring on the overnight September 22, 2012 shift. An incident occurred between the claimant and his supervisor over the appropriate bread bag to be used. Coworkers were interviewed by the employer resulting in what the employer found to be credible allegations supporting the discharge.

Decision of Referee, January 31, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee pronounced the following conclusions:

> * * *
> In cases of termination, the employer bears the burden to prove by preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in connection with his work. It must be found and determined that the employer has failed to meet their burden.

Decision of Referee, January 31, 2013 at 2. The employer appealed and the Board of Review held a new hearing on March 14, 2013. Additional witnesses appeared on the employer's behalf.

On March 22, 2013, the Board of Review reversed the decision of the Referee and held that misconduct had indeed been proven. In its written Decision, the Board made the following Findings of Fact, which are quoted here in their entirety:

> The **findings of fact** contained in the January 31, 2013 decision by the Referee are affirmed and incorporated by reference as if fully set forth herein; provided that, with respect to any conflict, this decision shall be controlling. Additionally, the Board finds the following. In response to an appropriate inquiry from his supervisor regarding a routine job duty, the Claimant stated: "suck my dick."

Decision of Board of Review, March 22, 2013 at 1 (Emphasis in original).

The Board then announced the following conclusions:

> Having thoroughly reviewed the transcript of the hearing below and taken additional first-hand testimony from the Employer, the Board **concludes** that the Claimant was terminated for behavior constituting misconduct under Section 28-44-18 of the Act.
>
> Although the Claimant denied having made the statement in question, the Board does not find his testimony credible. Rather, the Board is persuaded by the testimony of the Employer's representatives. Thus, the Board concludes that the Claimant made the statement in question. The Board further concludes that, during the Employer's investigation, the Claimant admitted making the statement.
>
> In this case, the Board need not address whether the statement was part of a larger pattern of misconduct. Given the particular circumstances of the Claimant's workplace, the context in which the statement was made, and the specific content of the statement, the Board concludes that making the statement — even if it was an isolated incident — constitutes misconduct within the meaning of Section 28-44-18 of the Act.
>
> The January 31, 2013 decision by Referee is reversed.

Decision of Board of Review, March 22, 2013 at 1 (Emphasis in original).

Finally, Mr. Reyes filed a complaint for judicial review in the Sixth Division District Court on March 27, 2013.

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,

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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 Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

> 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 instant case followed a well-worn path through the administrative pasture that is jointly maintained by the Department of Labor and Training and its Board of Review. Like many cases where misconduct has been alleged, the claim was originally denied by the Director; then, because the employer failed to provide percipient witnesses at a hearing, the Referee allowed benefits; and finally, because the employer did provide additional witnesses at

a further hearing, the Board of Review found misconduct to be proven and reinstated the Claimant's disqualification.[4]

Although inconsistent, each decision appears fully rational, at least when viewed in isolation. As previously set forth, the allegation here was that Mr. Reyes committed insubordination toward a supervisor by uttering a profane remark.

The Referee found the employer's proof of this lacking because it only presented one witness, Mr. Anthony Capozzi, who was not present when the remark was allegedly made. Referee Hearing Transcript, at 8-15, passim. Mr. Reyes also testified and denied making the statement. Referee Hearing Transcript, at 18. Accordingly, the Referee found misconduct had not been proven.

Given a second opportunity to prove its case by the Board of Review, the bakery presented additional witnesses, including the object of the offensive remark, Mr. Daluz, who testified that the comment was indeed made to him by the Claimant. Board of Review Hearing Transcript, at 6. And a witness, a Mr. Sergio Mendez, testified that Mr. Reyes admitted to him that

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[4] Undoubtedly, this pattern will continue unabated until the Board of Review makes it clear that it will decline to grant new hearings to employers who have failed to present a substantial case at a Referee-level hearing.

he had made the offending statement. Board of Review Hearing Transcript, at 30-31.

Legally, it is long-settled that the use of profanity toward a supervisor — even on a single occasion — may constitute misconduct. E.g. Kirby v. Department of Employment Security Board of Review, A.A. No. 82-429 (Dist.Ct. 3/16/84)(Beretta, J.)(Denial of benefits affirmed, where claimant called his supervisor an utterly vulgar name) and Andrews v. Department of Employment Security Board of Review, A.A. No. 77-39 (Dist.Ct. 11/12/80) (DelNero, J.)(Disqualification affirmed, where claimant banged hand on desk and used profanity during discussion of his attendance record). The Board of Review found that Claimant uttered the offending remark and that it was sufficiently egregious to justify disqualification, even in the absence of evidence that he had uttered similar language on other occasions. Decision of Board of Review, March 22, 2013 at 2.

Pursuant to the applicable standard of review described supra at 6-8, 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. 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 his work — i.e., using offensive language toward a supervisor — 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.

/s/
Joseph P. Ippolito
Magistrate

October 1, 2013