

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.**

**DISTRICT COURT  
SIXTH DIVISION**

**Brent C. Robin**

:  
:  
:  
:  
:  
:

v.

**A.A. No. 14 - 028**

**Department of Labor and Training,  
Board of Review**

**ORDER**

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 22<sup>nd</sup> day of January, 2015.

By Order:

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen C. Waluk  
Chief Clerk

Enter:

\_\_\_\_\_/s/\_\_\_\_\_  
Jeanne E. LaFazia  
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

Brent C. Robin :  
v. : A.A. No. 2014 – 028  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** Mr. Brent C. Robin 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 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.

**I**  
**FACTS & TRAVEL OF THE CASE**

The facts and travel of the case are these: On September 26, 2013, Mr. Brent C. Robin was terminated from his position on the management team of the Dave & Buster's restaurant at the Providence Place Mall, where he had worked for twenty-five months. He filed a claim for unemployment benefits, but on November 18, 2014 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 misconduct.

The Claimant filed an appeal and a hearing was held before Referee Gunter A. Vukic on December 17, 2013. Mr. Robin testified, as did the General Manager of the Providence restaurant, Mr. James Chiarello. The next day, the Referee held that Mr. Robin was disqualified from receiving benefits because the employer proved misconduct. In his written decision, the Referee made Findings of Fact, which are quoted here in their entirety:

I find by preponderance of credible testimony and evidence the following findings of fact:

Claimant was a member of the restaurant management team and familiar with the fairly extensive and specific employer policies and procedures, including but not limited to the fraternization policy.

After a management team interviewed a female prospect claimant told the general manager that the candidate is the sister of his friend and he and the candidate live in the same building. He volunteered that the two had no relationship and do not “hang out.” Based on available information the employer proceeded and hired the candidate. Claimant’s voluntary disclosure satisfied a portion of the fraternization policy.

The claimant and the new hourly employee live in a single-family ranch house. Sometime later a second hourly employee began residing in the same ranch house with the claimant and the female hourly employee. The second employee’s occasional stays became frequent enough each week to be considered a residence. Claimant did not advise the employer. Both hourly employees were under the supervision of the claimant.

Manager discovery, on or about September 25, 2013, resulted in the claimant notifying the general manager that he and two hourly employees were going on a Cancun vacation with friends. He would keep pictures off Facebook.

Several months apart, several hourly employees complained the claimant was giving preferential treatment to the female hourly employee. Although the preferential treatment was not confirmed and based on the employer’s understanding that the claimant did not reside with any hourly employee he and the female employee were counseled.

After full discovery of the facts the claimant was discharged for violating the fraternization policy.

Decision of Referee, December 18, 2014 at 1-2. 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:

\* \* \*

Claimant was familiar with the policies and procedures. As part of management he had the responsibility to enforce policy. Policy manual, page 26 [D1/11), details “four overriding considerations that should apply before fraternizing with your staff.” The claimant, in whole or in part, violated each of the four. The more credible testimony supports that the claimant misled his supervisor regarding the living conditions between himself and the employee. There was no gain for the general manager to knowingly allow a member of his management team to violate the fraternization policy. Employee complaints had already created dissension. Claimant evidenced his knowledge of the policy when he volunteered the information that he and the female employee live in the same building. Claimant never advised the employer when the second hourly employee began residing with him. This information then became a “surprise” [D1/11) to management. Although the claimant was aware of the policies he gave no notice to the employer he was vacationing with two hourly employees. This information was withheld from the employer for several months before the vacation. He only volunteered this information once a member of management became aware and advised him accordingly. This type of off work fraternization is clearly addressed in the written policies.

Months before the vacation and some time before the second hourly employee began residing with the claimant he was aware that hourly employees were complaining and questioning his objectivity. Absent the co-manager suggestion there is no evidence or testimony that the claimant intended to seek approval or disclosed the Cancun vacation. He acknowledged the likelihood of employee discord when he referred to Facebook pictures.

Claimant displayed intentional and substantial disregard for his employer’s best interests. Claimant manipulated and withheld information.

Claimant was discharged under disqualifying reasons.

Decision of Referee, December 18, 2014, at 2-3. The claimant appealed and the Board of Review deliberated on the matter.

On February 14, 2014, the Board of Review, by majority vote, affirmed the decision of the Referee and held that it constituted a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, February 14, 2014 at 1. As a result, the Board adopted the decision of the Referee as its own. Id. Finally, Mr. Robin filed a complaint for judicial review in the Sixth Division District Court on February 24, 2014.

## II APPLICABLE LAW

Under § 28-44-18 of the Rhode Island Employment Security Act, “an employee discharged for proven misconduct is not eligible for unemployment benefits if the employer terminated the employee for disqualifying circumstances connected with his or her work.”<sup>1</sup> 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

---

<sup>1</sup> Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

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.<sup>2</sup>

### 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

---

<sup>2</sup> Foster-Glocester Regional School Committee, supra n. 1, 854 A.2d at 1018.

unless its findings are ‘clearly erroneous.’ ”<sup>3</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>4</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>5</sup>

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.

---

<sup>3</sup> 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).

<sup>4</sup> Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>5</sup> Cahoone v. Board of Review of Department 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).

## 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

The instant case has proceeded up the three steps of the administrative process that is jointly maintained by the Department of Labor and Training and its Board of Review. At each level — the Director, the Referee, and finally, the Board of Review — Claimant has been denied benefits based on a finding of proved misconduct. But our role is to examine the decision of the Board to determine whether it is clearly erroneous in light of the facts of record.

### A Factual Review

#### 1

#### Testimony of Mr. Chiarello

At the initial hearing before the Referee the employer presented one witness — Mr. James Chiarello, the restaurant's General Manager. Mr. Chiarello explained that Mr. Robin was discharged for violation of the employer's

fraternization policy (though so described by Mr. Chiarello, it was really an anti-fraternization policy). Referee Hearing Transcript, at 7. Specifically, first, he was living in a one-family house with two hourly employees and secondly, he went on vacation with the same two employees. Id., at 7-8. Mr. Chiarello testified that he found out about the trip on the day before it began. Id., at 8. He denied Claimant's assertion that management was very much aware of the situation and presented letters from other managers (not in attendance) to that effect — i.e., denying they knew of Claimant's trip with two employees. Id., at 10-11.

Mr. Chiarello recalled that when the one of the employees, Ms. Stephanie Hergt, was hired, Claimant told him that she was the sister of his best friend, adding that they lived in separate units in a two-family house. Referee Hearing Transcript, at 13. Mr. Robin added that they did not “hang” together and “she’s like my little sister.” Id. In light of these representations, Mr. Chiarello told Claimant — “... it’s a non-issue. Okay. I got no problem.” Id.

And according to Mr. Chiarello, Claimant's relationship with Ms. Hergt remained a non-issue until early (January or February) of 2013, when one of the restaurant's employees called HR,<sup>6</sup> accusing Mr. Robin of favoring Ms. Hergt with regard to scheduling. Referee Hearing Transcript, at 13-14. As a result, Mr.

---

<sup>6</sup> Although this was not clarified at the hearing, I have assumed the term “HR” stands for “Human Resources.”

Chiarello did an investigation, during which Mr. Robin reiterated that he lived in the same building (upstairs, downstairs) as Ms. Hergt. Referee Hearing Transcript, at 14. Believing Mr. Robin, he concluded there was not an issue of favoritism. Id.

And the issue was not raised again until two days before Mr. Robin left for his trip to Mexico, which he takes annually with a large group of friends. Referee Hearing Transcript, at 14. Mr. Chiarello knew about the trip because Mr. Robin talked about it. Id. But two days before Claimant was to leave, Mr. Chiarello received a call from his regional manager, who said that multiple calls had come into the HR department about Mr. Robin — accusing him of fraternization and favoritism, alleging that he was going on vacation with two employees with whom he lives. Referee Hearing Transcript, at 14-15.

As a result, Mr. Chiarello spoke to Mr. Robin again. Referee Hearing Transcript, at 15. Claimant told him that he was indeed going on vacation with two employees; Stephanie Hergt and Joseph Lopes were taking the place of two people who had backed out. Referee Hearing Transcript, at 15-16. Mr. Chiarello responded that it was “crazy” to think that was okay. Referee Hearing Transcript, at 16. He told Mr. Robin he would get back to him. Id.

They spoke again the next day. Mr. Chiarello told him he should not go. Referee Hearing Transcript, at 16. He told him that if he was going to go, he should not stay in the same rooms or even the same hotel. Id. Later that same day Mr. Lopes and Ms. Hergt came into his office, crying because they believed Mr. Robin's position was in danger. Referee Hearing Transcript, at 17. He told them that Claimant knew the fraternization rule and "there really wasn't anything he could do." Id. Mr. Chiarello asked Ms. Hergt about the living situation. Id. She said that she and Ms. Lopes did live in the house. Id. He told them: "... that can't happen." Id.

Mr. Robin did go on the trip. And while he was away, Mr. Chiarello and his regional manager drove out to the residence. Referee Hearing Transcript, at 18. They discovered it was a ranch house; the last name "Hergt" was on the mailbox. Referee Hearing Transcript, at 18. After the vacation, he spoke to Mr. Robin again. He admitted that they live in a one-family house. Referee Hearing Transcript, at 18.

When asked by the Referee, Mr. Robin said HR had received two or three complaints. Referee Hearing Transcript, at 20. He said that Dave & Buster's has approximately 135 employees at that location. Id.

At the commencement of cross-examination, Mr. Chiarello stated that he, together with the HR department, made the decision to fire Mr. Robin. Referee Hearing Transcript, at 20. Later, he explained that Mr. Robin was fired because of his living situation and the vacation and the fact that he thought there was nothing wrong with it. Referee Hearing Transcript, at 31. On this last point, he testified that Mr. Robin sent him an e-mail upon his return, evincing the attitude that anything he did was not a big deal. Referee Hearing Transcript, at 31.

Regarding Dave & Buster's fraternization rule, Mr. Chiarello conceded that there is no absolute bar to having a relationship, so long as the participants notify their manager and try to transfer. Referee Hearing Transcript, at 21. And, as far as he knew, Mr. Robin and Ms. Hergt did not have a relationship. Id.

With regard to their living arrangements Mr. Chiarello flatly and firmly denied that he knew that Mr. Robin and Ms. Hergt lived in the same residence, insisting that he had been told that they lived in two separate apartments. Referee Hearing Transcript, at 24. He also denied he ever told Ms. Hergt to tell everybody she lives in duplex. Referee Hearing Transcript, at 23. But he conceded that when Ms. Hergt was hired, he did not ask Mr. Robin to explain their living arrangements in writing. Referee Hearing Transcript, at 27. Mr. Chiarello agreed that, notwithstanding the complaints to HR, he never

uncovered any favoritism shown by Claimant to the two employees in question. Referee Hearing Transcript, at 28, 30.

Later, on supplemental cross-examination, Mr. Chiarello denied that he assured Mr. Robin that, if he went on the trip, he would merely receive a “write-up” and not be fired. Referee Hearing Transcript, at 73-74.

## 2

### **Testimony of Ms. Hergt**

At this point, the Referee — at the request of counsel for Mr. Robin — contacted Ms. Hergt, who was at work, on her mobile phone. Referee Hearing Transcript, at 34. With her consent, she was sworn-in as a witness. Referee Hearing Transcript, at 36.

Ms. Hergt began by confirming that when she was hired at Dave & Buster’s she informed management that she previously worked with Mr. Robin and another manager, Ms. Amoral. Referee Hearing Transcript, at 36. Later, probably in the summer (of 2013), when people were talking about her living arrangements, he told her to tell people she lived in a duplex, which she agreed to do. Referee Hearing Transcript, at 38. While she did not know if he was under the impression that she lived in a separate unit, she assumed he knew they lived in the same house. Id. She said that when she went for her interview, Brent told her that he would speak to the manager about their living arrangements. Referee

Hearing Transcript, at 39. But she did not know what he actually said. Referee Hearing Transcript, at 40. And so, when Mr. Chiarello told her to tell people she was living in a duplex apartment, she did not know whether he knew otherwise. Referee Hearing Transcript, at 41. In any event, Mr. Chiarello never asked her to clarify the matter. Referee Hearing Transcript, at 42.

On cross-examination, she said that she was prepared to resign prior to going on vacation in order to save Mr. Robin's job. Referee Hearing Transcript, at 42-43. But she was told doing so would not affect the outcome of Brent's predicament. Referee Hearing Transcript, at 43. She said she had prepared a letter of resignation, as had Mr. Lopes, who was also willing to resign to save Mr. Robin's job. Referee Hearing Transcript, at 44.

Ms. Hergt explained that the house where she and Mr. Robin live is owned by her father. Referee Hearing Transcript, at 45. She said Mr. Robin moved in because he is best friends with her brother. Referee Hearing Transcript, at 46. She did not recall whether she or Mr. Robin was the first to move in. Id. She said that Mr. Lopes was a friend who had lived with her previously (at a different residence) before she worked for Dave & Buster's; he moved into this address after she began to work there and after he (Mr. Lopes) was working there. Referee Hearing Transcript, at 46-47.

**Testimony of Mr. Robin**

After the call to Ms. Hergt was ended, Mr. Robin testified. Referee Hearing Transcript, at 49 et seq. He began by stating that he had been employed as a manager at Dave & Buster's for approximately two years and two months. Referee Hearing Transcript, at 49.

Claimant then recalled the day Ms. Hergt was hired. He said she spoke to two other managers and then to Mr. Chiarello. Referee Hearing Transcript, at 50. Mr. Robin said that he spoke to Mr. Chiarello and told him that they lived together, although "... she pretty much lives in the basement." Id. He denied he ever suggested that the house was a duplex. Id. And, Mr. Robin said he would never have lied to help Ms. Hergt get a job. Referee Hearing Transcript, at 51.

His attention was then drawn to the time when employees were accusing him of favoritism. Referee Hearing Transcript, at 51. He said he recalled speaking to Mr. Chiarello at that time. Id. He quoted Mr. Chiarello as saying he "kind of squashed it" and that he told the employees "... that I was aware that you guys were living together in the same house. But you guys have to make sure, you know, you're presenting it the right way." Referee Hearing Transcript, at 52. This later comment meant that they should tell people the house was a duplex or like an in-law. Referee Hearing Transcript, at 52-53. He said he had never

mentioned Mr. Lopes' presence at the house because he was only staying over a couple of nights per week. Referee Hearing Transcript, at 53-54.

Regarding the vacation, Mr. Robin testified that Mr. Lopes decided to join the trip about four weeks out. Referee Hearing Transcript, at 56. When he learned (about a week before the trip) that Mr. Lopes had not informed Mr. Chiarello that he was going away with him, Mr. Robin sent Mr. Chiarello an e-mail. Referee Hearing Transcript, at 54-55, 58. Mr. Robin said he would have told him earlier but Mr. Chiarello was working at a new Dave & Buster's in New York. Referee Hearing Transcript, at 55.

According to Mr. Robin, Mr. Chiarello told him he could not condone his taking the trip in such circumstances. Referee Hearing Transcript, at 58. After further discussion, he told Claimant that — if he were to go — he should not stay in the same hotel as everyone else. Referee Hearing Transcript, at 59. Even if he did that, he was likely to get a “write-up” when he returned. Id.

When he did return, he e-mailed Mr. Chiarello, asking if he needed to come into work early to provide a statement — but he received no response. Referee Hearing Transcript, at 60. When he went in early for his first scheduled shift, Mr. Chiarello told him he would be terminated. Referee Hearing

Transcript, at 60-61. Finally, Claimant denied he ever intentionally lied to his employer. Referee Hearing Transcript, at 62.

Mr. Robin was then asked by Mr. Chiarello whether he was informed (repeatedly) about Dave & Buster’s fraternization policy; he acknowledged he was. Referee Hearing Transcript, at 62-63. The General Manager then inquired whether he had “specifically” asked him about the living arrangements. Referee Hearing Transcript, at 64. Mr. Robin responded that he did not recall “specifically.” Id. The Claimant denied Mr. Chiarello had asked him whether it was a two-family house. Id. But Mr. Robin conceded that he had assured his manager that he (Mr. Robin) did not “hang out” with Ms. Hergt. Referee Hearing Transcript, at 65. Mr. Chiarello did not receive an answer when he asked Mr. Robin to reconcile that statement with the fact that he had (admittedly) vacationed with her in the past. Id. But he admitted that Ms. Hergt had been on three of the last five trips he ran. Referee Hearing Transcript, at 69.

Mr. Robin told the Referee that he did not inform management of Mr. Lopes’s presence in his residence because he was only staying there a few nights per week, and was really a transient, living out of a backpack. Referee Hearing Transcript, at 70. He explained that, in his view, the rationale for the fraternization rule was avoiding preferential treatment, though he did

acknowledge, while responding to questions posed by the Referee, that considerations of employee morale and discipline were also involved, even if preferential treatment is not actually given. Referee Hearing Transcript, at 71-73.

**B**  
**Rationale**

Mr. Brent Robin, the Claimant in this case, was terminated for violations of his employer's fraternization rule, Mr. Robin urges adamantly that the employer was fully aware of both his living arrangements and his vacation plans — and how they involved workers at Dave & Buster's. The employer's representative, Mr. Chiarello, denied any such knowledge. The Board of Review, adopting the decision of Referee Vukic, credited Mr. Chiarello's testimony and found that Mr. Robin's behavior, by his actions and particularly what he failed to communicate, did constitute proved misconduct, as defined in § 28-44-18.

Mr. Chiarello's testimony enumerating what Mr. Robin told him was not inherently incredible or internally contradictory. Certainly, Mr. Robin's testimony contradicted Mr. Chiarello's. But it is uniquely the role of the Board to assess the credibility of witnesses.

Doing so, it concluded the manager's testimony was more credible than that of Mr. Robin. That testimony, if believed, was sufficient to support a finding

that Mr. Robin was not completely candid with his General Manager. It therefore found misconduct within the meaning of § 28-44-18 had been proven.

Now, the Member Representing Labor dissented from the Board's decision, finding that the employer's interests had not been harmed in any way. But while it may be true that no financial loss was shown, I believe harm was proven. I believe there was harm to the workplace environment at Dave & Buster's. That (at least) some employees were suspicious of Mr. Robin's actions is incontestable, given their calls to HR. Such suspicions, even if unfounded, can be poisonous in a workplace.<sup>7</sup>

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

---

<sup>7</sup> I should also point out that an alternative ground for a finding of misconduct against Mr. Robin is also present on this record — which is that Mr. Chiarello believed Mr. Robin deceived him regarding the true circumstances of his contacts with Ms. Hergt. I do not see how Mr. Robin could have continued in his position without enjoying the General Manager's confidence in his veracity. In my view it is axiomatic that members of a management team owe a duty of candor to their colleagues and superiors.

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., violating the employer's fraternization policy — is well-supported by the record and should not be overturned by this Court.

## VI 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

January 22, 2015

