STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Manuel Urena	:	
	:	
v.	:	**A.A. No. 15 - 013**
	:	
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 11th day of June, 2015.

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. Manuel Urena 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 July 18, 2014, Mr. Manuel Urena was terminated from his position as a technician for Future Technologies, Inc., a company whose business consisted of connecting and disconnecting cable television and internet services to the customers of Cox Communications. He had held this position for four years. Mr. Urena filed a claim for unemployment benefits on July 25, 2014, but on September 24, 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 November 3, 2014. Mr. Urena testified, as did the employer's Operations Manager, Mr. Gerald Rodrigues. Two days later, the Referee held that Mr. Urena 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:
>
> The employer is under contract to Cox Communications to provide subcontractor services, including but not limited to service disconnections. The claimant's immediate manager worked

> approximately 6 years with the claimant at a previous employer providing similar services.
>
> Cox Communications randomly audits fieldwork done by subcontractors to ensure proper and appropriate subcontractor employee work pertaining to the federally regulated technical and sophisticated duties.
>
> Job orders are electronically transmitted to the installers. Identification tags for specific transactions and unique tools are provided to the installers. Disconnects are done on telephone poles and at building sites. Completed work is immediately transmitted electronically to the employer and identify the installers' unique code and appropriate job codes.
>
> Cox Communications auditors were on-site randomly auditing the claimant's recorded disconnects the same day of the disconnect. Four of the seven claimant disconnects reported by him were not disconnected, did not have the unique terminator stops/traps installed nor were the required and unique tags attached or removed.
>
> The discovery resulted in a random Cox audit of recent work reported by the claimant as completed. Approximately 6 additional violations were discovered. The employer had their own supervisors do site visits to confirm the Cox discoveries that were supported by photographs and documentation. The discovery by Cox results in an immediate stop of work assignment to the installer and jeopardizes the employer contract. Cox Communications is the sole employer client.
>
> January 13, 2012 claimant signed the cable theft policy acknowledging his understanding that violation of the policy would result in immediate termination and prosecution where appropriate. It is noted that the claimant and his manager had a long-standing and apparently satisfactory working relationship with at least two companies.

Decision of Referee, November 5, 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:

> * * *
> 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 met their burden.
>
> Credible testimony and evidence support that the process of installation and disconnects is sophisticated and technical. Activities are under control of the FCC and violation could result in action by that agency as well as jeopardizing the employer's Cox Communications contract.
>
> Claimant position that customers or their personal agents are able to reverse his work is not found credible considering the Cox discovery of four misrepresented job completions the same day the claimant allegedly disconnected. The discovery appears to have been at scattered sites in different towns and in at least one case required not only the expertise and equipment but climbing a telephone pole. The absence of the proper tagging routine was left unexplained by the claimant. The question of monetary gain by the claimant remained unanswered. Employer did not allege that but cited that as an example of discoveries in the past with others in the industry. The issue is more that the work contracted for and billed by the employer is left undone and cable theft by the user continues. The claimant or any installer is paid to provide service billed for and is expected to immediately electronically communicate to the satisfaction of the employer and contractor.

Decision of Referee, November 5, 2014, at 2-3. The claimant appealed and the Board of Review considered the matter.

On December 19, 2014, the Board of Review unanimously 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, December 19, 2014 at 1. As a result, the Board adopted the decision of the Referee as its own. Id. Finally, Mr. Urena filed a complaint for judicial review in the Sixth Division District Court on February 26, 2015.

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."[1] Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** … For benefit years beginning on or after July 6, 2014, 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 earnings greater than or equal to eight (8) times his or her weekly benefit rate 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,

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

> 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.[2]

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.' "[3] The Court will not substitute its

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[2] Foster-Glocester Regional School Committee, ante at 5, n. 1, 854 A.2d at 1018.

[3] 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).

judgment for that of the Board as to the weight of the evidence on questions of fact.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

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.

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

[5] 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. Rodrigues

At the initial hearing before the Referee the employer presented one witness — Mr. Gerald Rodrigues, the employer's Operations Manager. Referee Hearing Transcript, at 9, 11 et seq. He began by explaining why Mr. Urena was

discharged. Referee Hearing Transcript, at 11. In a nutshell, Mr. Urena was fired because he reported he had finished jobs terminating customers' cable service when he had not done so. Referee Hearing Transcript, at 11-12.

Mr. Rodrigues explained how this conduct came to light. Referee Hearing Transcript, at 12 et seq. He explained that Future Technologies does work on a contract basis for Cox Communications, connecting and disconnecting cable service to Cox's customers. Referee Hearing Transcript, at 16. When Future Technologies' technicians complete a job, they report that fact through a website called ETA Direct. Referee Hearing Transcript, at 12.[6]

Mr. Urena's conduct came to light when, at random, Cox's quality control technicians checked on one of the jobs he had reported completed in the ETA system. Referee Hearing Transcript, at 13. They found that the job had not been done physically, at the pole. Referee Hearing Transcript, at 13. And so, they checked additional jobs he had reported completed, finding that they too had not been done. Referee Hearing Transcript, at 14.

To show him what they had found, Cox sent Mr. Rodrigues photographs of the work that was not done. Referee Hearing Transcript, at 17. Mr. Rodrigues presented these photos to the Referee, explaining what they showed — that the

[6] Later in his testimony, Mr. Rodrigues stated that every technician is assigned an individual identification number. Referee Hearing Transcript, at 25.

service was still connected, that there was no "terminator" in the line, and there was no disconnect tag. Referee Hearing Transcript, at 18.[7] On that first day, there were four instances wherein disconnects reported to have been done by Mr. Urena were not. Referee Hearing Transcript, at 19. Mr. Rodrigues explained that Cox has a zero tolerance policy in this type of situation because of the potential for side payments[8] to the technicians from customers who did not want to be disconnected — or simple collusion among friends. Referee Hearing Transcript, at 19. And of course, once the technician reports the line to have been disconnected, the customer is no longer billed. Referee Hearing Transcript, at 20. And, subcontractors like Future Technologies are held to this standard because, from Cox's point of view, they really do not know if the technician is in cahoots with the customer or whether the subcontractor is intentionally false billing (for work not done). Referee Hearing Transcript, at 21.[9]

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[7] Mr. Rodrigues showed the Referee another device, called a trap, which is used when the customer only gets part of the service — such as internet access — but not others, such as cable television. Referee Hearing Transcript, at 22.

[8] Mr. Rodrigues mentioned a figure of fifty dollars — whether this is the going rate for such payola or simply a figure picked at random, we do not know. Referee Hearing Transcript, at 19.

[9] Upon questioning by the Referee, Mr. Rodrigues indicated that customers cannot restore service themselves (by undoing what a service technician has done) because they need a special locking terminator tool, which is inserted into the line. Referee Hearing Transcript, at 20.

As a result of this audit, Future Technologies was informed that Mr. Urena could no longer work on their system. Referee Hearing Transcript, at 27. Since Future Technologies had no other clients it had no other work for Claimant to do; and so, he was terminated. Id.[10]

When Mr. Rodrigues confronted Mr. Urena with the Cox allegations he responded that he did not bill for work he did not do. Referee Hearing Transcript, at 28.

2

Testimony of Mr. Urena

During his testimony, Mr. Urena indicated that the company understands that after its employees disconnect a customer's service, "another person can go and connect it." Referee Hearing Transcript, at 30. He stated that this was the first complaint he had received during the ten years he had done this work. Referee Hearing Transcript, at 31. And he denied he would risk his job for $50.00. Id.[11]

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[10] As soon as Mr. Rodrigues made this point, he added that Mr. Urena would have been terminated whatever Cox's view, since Future Technologies also had a zero tolerance policy. Referee Hearing Transcript, at 27.

[11] Mr. Urena also challenged Mr. Rodrigues' testimony regarding the special locking tool; he said it could be purchased at Home Depot. Referee Hearing Transcript, at 33.

Mr. Rodrigues offered a final comment that the photographs showed that the orange tag had not been removed; the technicians are required to remove them when performing a disconnection procedure — and replace them with a disconnect tag. Referee Hearing Transcript, at 18.

B

Rationale

In this case the Board had to choose from the two competing narratives that had been presented at the hearing before the Referee, which were: (a) Mr. Rodrigues' version — that the service had not been disconnected, and (b) Mr. Urena's version — that he did disconnect the services he declared complete (and someone must have reconnected it after he left). The Board chose the former, which was supported by the testimony of Mr. Rodrigues and the exhibits entered at the hearing.

Now, at this juncture we could simply indicate that Mr. Rodrigues' testimony constituted competent evidence that the Board had every right to rely upon, and recommend affirmance. But, quite frankly, I do not believe the evidence in this case was in equipoise or anything like it. To the contrary, I think the employer's case was very convincing, for the reasons I shall not set forth.

In the "Conclusions" portion of his decision, Referee Vukic made the point, at least inferentially, that the Claimant's position — that a person or

persons unknown must have reconnected the service after he left — is undercut by the circumstances of this case: first, the fact that the jobs had been dispersed geographically; second, the fact they were reconnected the same day; and third, that the service tag had not been removed. See Decision of Referee, quoted ante at 4. Therefore, in order to credit Mr. Urena's theory, the fact-finder would have to believe that four persons scattered about the area all had the ability to reconnect cable service on their own, that they were able to arrange for this within a few hours of the disconnection, and that all four persons replaced the (orange) service tag that Mr. Urena had removed. This theory not only strains credulity, it dissolves it. And so, the Board of Review had more than ample grounds upon which to find that Mr. Urena had reported jobs completed that he had not done. And since this conduct would have resulted in false billings to Cox by Future Technologies, it constitutes misconduct per se.

Pursuant to the applicable standard of review described ante at 5-7, 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, ante, 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., failing to perform services that he reported completed — 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

June 11, 2015