STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Joel Samo	:	
	:	
v.	:	**A.A. No. 15 - 041**
	:	
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 16th day of July, 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

Joel Samo	:	
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Department of Labor and Training,	:	
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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. Joel Samo 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 because he was terminated for 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 AND TRAVEL OF THE CASE

The facts and travel of the case are these: Claimant was employed for eight years as a materials handler by the Moore Company in Westerly. His last day of work was October 28, 2014. He filed a claim for unemployment benefits but on December 4, 2014, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-18 — based on a finding that he was discharged for proved misconduct.

Mr. Samo filed an appeal and a hearing was held before Referee William Enos on January 21, 2015. The next day, the Referee held that Mr. Mueller was disqualified from receiving benefits because the employer had proven that he was discharged for misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> Claimant worked as a material handler for The Moore Company for eight years last on October 28, 2014. The employer terminated the claimant for violating the company policy concerning excessive absences even after he was placed on final written warning. The employer introduced evidence that showed that the claimant had been previously warned. The employer stated that the claimant was a good worker when he would show up for work. The claimant argues he had a lot of personal things going on and did miss a lot of days. The claimant argued that the

> final absence was because of the death of his uncle who lived out of town.

Decision of Referee, January 22, 2015 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case on disqualification for misconduct, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Referee pronounced the following conclusions:

> * * *
> The claimant was terminated for violating company policy concerning excessive absences. The claimant was on a final warning, therefore I find that sufficient evidence has been provided by the employer to support that the claimant's actions were not in the employer's best interest. Therefore, I find that the claimant was discharged for disqualifying reasons under the above Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, January 22, 2015 at 2. The Claimant appealed and the Board of Review reviewed the matter.

On March 23, 2015, the Board of Review, through a majority of its members, affirmed the decision of the Referee and held that misconduct had been proven. The Board found the decision of the Referee to be a proper adjudication of the facts and the law applicable thereto and adopted the Referee's decision as its own. Decision of Board of Review, March 23, 2015, at 1. But, it is also worth noting that the Member Representing Labor dissented,

finding that misconduct had not been proven, since Claimant was needed at his uncle's out-of-state funeral. Decision of Board of Review, March 23, 2015, at 2.

Mr. Samo filed a complaint for judicial review of the Board's decision in the Sixth Division District Court on April 20, 2015.

II
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. —** … 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, 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, 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.

Traditionally, only deliberate conduct that was in willful disregard of the

employer's interest could constitute misconduct under the Employment Security Act. See Gen. Laws 1956 § 28-44-18. However, a number of years ago the legislature amended § 28-44-18 to permit, in the alterative, a finding of misconduct to be based on the violation of a rule promulgated by the employer —

> … "misconduct" is defined as … 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. …

Gen. Laws 1956 § 28-44-18 as amended by P.L. 1998, ch. 401, § 3. Note the elements of the new standard: (1) the rule must be violated knowingly, (2) the rule must be reasonable, (3) the rule must be shown to be uniformly enforced, and (4) the employee must not have violated the rule through incompetence.

The particular ground of misconduct alleged in the instant matter, absenteeism, has been the subject of many prior District Court decisions. This Court has long held that tardiness may constitute misconduct within the meaning of § 18. This is consistent with the national rule. ANNOT., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674.

III
STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases —.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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, 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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[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 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
ANALYSIS
A
Factual Review

The hearing conducted by Referee Enos began — after the customary housekeeping matters were attended to (such as the administration of the oath to the witnesses, Referee Hearing Transcript, at 1-2; the enumeration of exhibits that had been transmitted from the Department as part of the record, Referee Hearing Transcript, at 2-3; and, an explanation from the Referee as to the order of proof, Referee Hearing Transcript, at 4-5) — with testimony from Mr. Samo explaining why his appeal from the decision of the Director was filed late. Referee Hearing Transcript I, at 3-4. These preliminaries accomplished, the testimony on the issue of misconduct began.

The employer presented two witnesses — Mr. Dan Johnson, Shift Supervisor, and Ms. Karen McGrath, its Human Resources Coordinator. Referee Hearing Transcript, at 1.

1

Testimony of Ms. McGrath

Ms. McGrath testified that The Moore Company is a textile manufacturer in Westerly and that Mr. Samo had been with the firm for eight years. Referee Hearing Transcript, at 7. She told Referee Enos that on Wednesday, October 29, 2014, Mr. Samo called her, saying he was in New York for a funeral. Referee Hearing Transcript, at 5. Asking her to inform his supervisor, Mr. Johnson, Claimant stated he would be at work on Thursday. Id. He promised to bring a note from the funeral home. Id.

However, he did not appear for work the next day; instead, he called at 2:00 p.m. (one hour before his shift was due to start at 3:00 p.m.) and left a voicemail message in which he again stated that he would not be at work. Id. He stated he had a note from the funeral home. Id. In addition, he promised that he would be at work the next day — i.e., Friday. Id.

Ms. McGrath returned the call, and asked Mr. Samo for specifics. Referee Hearing Transcript, at 5. Claimant told her the deceased was his uncle and provided details of the services. Referee Hearing Transcript, at 5-6. He assured her he would be in on Friday the 31st. Referee Hearing Transcript, at 6.

Unfortunately, he was not. Referee Hearing Transcript, at 6. He called-in at 1:00 p.m., leaving a call-back number. Id. Ms. McGrath called Claimant and he told her he was returning from New York and would be late for his shift. Id. He again promised to present a note from the funeral home. Id. However, he never appeared for his Friday shift. Id. He also failed to appear for mandatory overtime on Saturday. Id.

Ms. McGrath confirmed that Mr. Samo had received a "final" warning regarding his attendance on July 1, 2014. Id., at 6-7. She described as being "notorious" regarding his attendance record. Id., at 7. Ms. McGrath also confirmed that Claimant had signed a statement indicating that he understood the company's employee handbook. Referee Hearing Transcript, at 7.

Finally, Ms. McGrath told Referee Enos that Claimant never provided a "note" from the funeral home, as he promised he would. Referee Hearing Transcript, at 10.

2

Testimony of Mr. Samo

Next, Mr. Samo testified. Referee Hearing Transcript, at 8 et seq. When asked to explain his behavior, he stated — "I don't know. I am just going through a hard time. It's been tough." Referee Hearing Transcript, at 8. He

added — "Yeah, I called out a lot, you know with issues, I called out a lot but um I did do my job good, you know." Id.[4]

Addressing the incident in question, he stated —

> Um, yeah, my uncle passed away and I had just gone through a hard time and yes I did call out a lot and I was going through a lot of hard times, but that in the stuff like that, and um. I called out and I was on a warning and then I was supposed to call out so I was fired.

Referee Hearing Transcript, at 9. Finally, he admitted he had not obtained a note from the funeral home. Referee Hearing Transcript, at 10-11.[5]

B

Rationale

The issue before the Court is straightforward — Was Claimant properly disqualified from receiving unemployment benefits because of absences from work. Based on the facts outlined above, I believe the answer to this question must be yes.

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[4] At about this juncture Mr. Johnson interjected that Mr. Samo was indeed a good worker but he had been required to call Mr. Samo into the office on several occasions to talk with him about his attendance. Referee Hearing Transcript, at 8-9.

[5] Obviously, the funeral parlor note would not have provided an excuse for his absence in the way a doctor's note does. But, it would have confirmed that he was there during the days in question.

The Member of the Board Representing Labor dissented from the Board's decision disqualifying Mr. Samo on the ground that Claimant had a valid reason to be absent from work — a death in the family. It seems to me that the Member was invoking the principle that it is the behavior which triggered termination that must justify disqualification, and not the over-all record of the Claimant.

For instance, there are an unfortunate number of employees who have an unfortunate record of absenteeism. Of this group, many have undoubtedly been subjected to disciplinary proceedings. — such as written warnings suspensions, up to the penultimate rung of the ladder, However, even a worker who is on the penultimate rung of the ladder, who is under a "final warning" or a "last-chance agreements," cannot be disqualified if his or her final absence was blameless, due to injuries suffered in a car accident or because the worker (or the worker's spouse) was giving birth. The employer certainly could go forward to terminate, but a § 18 disqualification could not be found in such circumstances.

If we assume (as we must since he never proffered proof)[6] that Mr. Samo missed work on Wednesday, October 29, 2014, because he was in New York for the funeral of his uncle, the Board of Review could well have applied the principle just set forth and found him eligible to receive unemployment benefits. However, missing work on Wednesday was just the beginning of this scenario.

Ms. McGrath testified that Mr. Samo told her — during the Wednesday call — that he would be in on Thursday; but he was not. He then told her he would be in on Friday; but was not. He then revised this to say he would be late for his Friday shift; but he never arrived. And although he told Ms. McGrath he had a note from the funeral parlor confirming his attendance, he testified he had not obtained one. Clearly, he misled her in this regard.

In sum, if Ms. McGrath's testimony is credited, the Board could well find that Mr. Samo misled her repeatedly during his trip to New York. Not even mourning justifies untruthfulness. And so, (and without factoring in Claimant's failure to appear for work on Saturday) the Board had ample basis upon which to find Mr. Samo committed disqualifying misconduct.

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[6] And because he never provided proof that he was in New York for a funeral, his disqualification could be based on his absences alone.

V
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). Furthermore, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(5). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

July 16, 2015