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

Colleen B. Perry	:	
	:	
v.	:	**A.A. No. 2010 – 218**
	:	
Department of Labor and Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In the instant complaint Ms. Colleen B. Perry urges that the Board of Review of the Department of Labor & Training erred when it held that she was not entitled to receive employment security benefits because she had been discharged for proved 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. 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: Ms. Colleen B. Perry was in partial benefits status [which customarily occurs when a claimant had previously lost a full-time job under non-

disqualifying circumstances] and working part-time for the Spectator Management Group — operator of the Rhode Island Convention Center — as a banquet worker/captain. On March 27, 2010, she called her manager about one hour after she was scheduled to report for work to tell him she had overslept. She was told not to come in but directed instead to contact the human resources representative. She did so and was fired.

She filed for unemployment benefits and on April 29, 2010 the Director determined her to be disqualified from receiving unemployment benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since she had been terminated for proved misconduct — i.e., lateness. Claimant asserts she filed a timely appeal but later learned the Department had not received it; she therefore filed a second appeal on June 1, 2010, long after the fifteen-day appeal had expired.

A hearing was held regarding both issues before Referee Carl Capozza on September 9, 2010. On September 14, 2010, in his decision, the Referee held that:

(1) Ms. Perry's appeal would be allowed for "good cause" pursuant to Gen. Laws 1956 § 28-44-39(b);

(2) Ms. Perry was discharged for misconduct within the meaning of § 28-44-18 because (a) she was aware of the employer's progressive punishment policy regarding attendance issues and (b) because the "claimant had many other occasions prior to these incidents of lateness with regard to reporting to her assigned shifts." Decision of Referee, at 2.

(3) Referee Capozza also found that claimant was required to repay the Department for the benefits she received for the week ending March 27, 2010.

Ms. Perry appealed and her case was considered by the Board of Review. On October 4, 2010, a majority of the members of the Board of Review issued a decision in which the decision of the referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the referee's decision was adopted as the decision of the Board. See Decision of the Board of Review, October 4, 2010, at 1. The Member Representing Labor dissented, finding that claimant's oversleeping did not constitute willful misconduct. See Decision of the Board of Review, October 4, 2010, at 2. Finally, Ms. Perry filed a complaint for judicial review in the Sixth Division District Court.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act which authorizes a claimant to be disqualified from receiving benefits — Gen. Laws 1956 § 28-44-18, which 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, 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

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

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 it was clearly erroneous or affected by error of law.

ANALYSIS

The Referee considered three questions: (1) the late appeal, (2) the issue of misconduct, and (3) the issue of repayment. I need not consider the issue of the late appeal, since the employer has not sought review of this issue. But I will deliberate upon a further question, not considered by the referee: it is the issue of whether Ms. Perry — who was receiving partial benefits when she was fired — should be completely disqualified from receiving benefits or merely subjected to an offset diminishing her previous benefits. I shall commence on the issue of misconduct.

1. The Finding of Misconduct

As stated above, the Board adopted the referee's factual conclusion that claimant had been fired for a pattern of lateness, in the face of the employer's policy of progressive punishment. He further found that her lateness constituted misconduct within the meaning of section 18. I believe both the Referee's factual findings and his legal conclusion finding claimant disqualified are fully supported by the record.

At the hearing before Referee Capozza the employer's representative, Ms. Sandra Morin, testified that claimant failed to appear for work as scheduled at 5:30 and did not call in until 6:36. Referee Hearing Transcript, at 15. She explained the circumstances:

> REF: * * * did she provide any reason or excuse as to why she was late?
>
> EMP1: Just the defense that we have here when she called and that's also in your packet. Um, Colleen called the manager on duty on his cell, and stated she had just woken up and she would be in. Uh, then, Joe called her back and told her not to come in, the work was already done, and there wouldn't be anything for her to do.

Referee Hearing Transcript, at 17. Ms. Morin also introduced reports of claimant's prior disciplinary problems regarding lateness. Referee Hearing Transcript, at 16. She testified that claimant was fired for attendance issues. Referee Hearing Transcript, at 18.

In her testimony, Ms. Perry countered that she was late because she had endured an incident in the middle of the night which involved calling an ambulance for a friend who was staying with her family. Referee Hearing Transcript, at 19-20. She speculated she might have hit the snooze button. Id. Ms. Perry also questioned whether the employer's policy on attendance was uniformly enforced. Referee Hearing Transcript, at 27-28.

Quite simply, the Referee (and the Board) found the testimony presented on behalf of the employer to be the more persuasive. Pursuant to the applicable standard of review described supra at 4-6, 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 if a reasonable fact-finder

might have reached a contrary result. Because there is substantial evidence to support the Board's ruling, it must be upheld – according to the mandates of § 42-35-15(g).

Legally, it cannot be doubted that claimant's failure to appear on time for a shift constitutes conduct which would be adverse to the employer's best interests. Such scheduling problems have long been held to constitute grounds for findings of proved misconduct, across the nation. See 76 Am. Jur. 2d Unemployment Compensation § 89 (2005). Clearly, the claimant's pattern of lateness was, in the language of the Rhode Island Supreme Court, in "disregard of [the] standards of behavior which the employer has the right to expect of his employee" and of a "carelessness or negligence ...or recurrence ...to show an intentional and substantial disregard of the employer's interest." Turner, 479 A.2d at 741-42. Applying this standard of review and the definition of misconduct enumerated in § 28-44-18 and interpreted 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 her work — her instances of lateness — is well-supported by the record and should not be overturned by this Court.

In the typical case where a claimant appeals from the denial of benefits our inquiry would end here: with claimant disqualified from receiving benefits until she had earned a certain amount of wages. But, as stated above, claimant was not working full-time at the Convention Center; instead she was collecting benefits based on her termination from a full-time position, offset by her Convention Center wages. So then, what should be the effect of claimant being discharged from her part-time position? Should it be full disqualification, or partial? I shall consider this question in the next section.

2. The Offset Issue.

As stated above, on April 29, 2010, the Director, based on the finding of misconduct, determined claimant Perry to be disqualified from receiving unemployment benefits because she had been terminated from her part-time position at the Convention Center for misconduct; in the ruling she was specifically told — "This disqualification will end when you have at least (8) weeks of covered employment after week ending 03/27/10 and in each of those eight weeks, you have earnings equal to or greater than $148.00." Decision of Director, Exhibit A2, at 1. This language is repeated, almost verbatim, in the decision of Referee Capozza — "She is, therefore, denied Employment Security benefits for the week ending March 27, 2010 and until she has had at least (8) weeks of work and in each of said weeks has earned an amount equal to or greater than $148.00." See Decision of Referee, September 14, 2010, at 3. Based on this phraseology being used, it appears that these decisions ruled claimant to be *entirely, not partially,* disqualified from receiving benefits.

And so, we must inquire: Is this total bar to the receipt of benefits correct? I believe not. For the reasons that follow, I conclude that a claimant who receives partial unemployment benefits [*viz*, benefits based on the loss of a full-time job offset by part-time earnings] who then loses a part-time job for misconduct should not generally be completely disqualified from receiving benefits. Doing so would be contrary to the manner in which part-time earnings are treated in similar circumstances.

a. Offset Case Precedents.

First, the Rhode Island Employment Security Act provides that a claimant who is laid-off from a full-time position who is working part-time may collect benefits, subject to an offset

based on the worker's part-time earnings. See Gen. Laws 1956 § 28-44-7. This provision was applied to Ms. Perry's claim in this very case in the period prior to her termination from the Convention Center.

Secondly, this Court has held that a worker who is laid-off from a full-time position who then quits a part-time position may also collect benefits, subject to an offset for that income voluntarily forgone. See Craine v. Department of Employment and Training, Board of Review, A.A. No. 91-25, (Dist.Ct.6/12/91) (DeRobbio, C.J.)(Claimant lost a full-time job, then took leave from part-time job; *Held,* partial benefits would be awarded pursuant to ' 28-44-7). The rule of Craine provides that although the claimant has left his part-time position in circumstances which would have, if viewed in isolation, triggered a disqualification under section 28-44-17 [Leaving Without Good Cause], he is not fully disqualified.

And, in Palazzo v. Department of Labor and Training, Board of Review, A.A. No. 10-55 (Dist.Ct. 10/19/2010), this Court extended the holding in Craine to a claimant who, while collecting benefits because of the loss of her job as a medical technician, was then fired from her position at Dunkin Donuts over attendance issues. This Court held in that the wages Ms. Palazzo lost due to her termination for cause would be treated as an offset from her ongoing benefits. From this holding we may infer a broader rule: that one who is eligible for benefits based on the loss of a full-time job will not be totally disqualified if she then separates from a part-time job under disqualifying circumstances. Thus, the Craine rule was extended to include section 18 cases in Palazzo.

b. Application of the Offset Rule to Claimant.

Thus, at first glance, it appears that Ms. Perry's situation should be deemed to fall within

the ambit of this Court's holdings in Craine and Palazzo. Claimant Perry was collecting partial unemployment benefits in the period up to the date [3/27/10] of her termination from the Convention Center. Referee Hearing Transcript, at 8-9, 23. But, there is one unanswered question remaining, the answer to which may cause her situation to be distinguished from Palazzo. While Ms. Palazzo was employed part-time in a different field from that in which she had previously held full-time employment, it is unclear in what field Ms. Perry had been previously employed. The decisions of the Director, the Referee, and the Board do not mention the claimant's prior employment. Neither is it revealed in the transcript of the hearing held by Referee Capozza. I am concerned that Ms. Perry's prior full-time employment may have been with the Convention Center.

Should the Palazzo holding apply if the part-time work lost through misconduct is with the claimant's previous full-time employer? I believe not. A finding of misconduct can rightfully be held to justify the termination of the entire relationship. In contrast, Ms. Palazzo's discharge from Dunkin Donuts had no relevance to her prior technical employment. Applying this rule, my recommendation is as follows: Ms. Perry's full-time benefits should continue, unabated to their natural exhaustion or other legal termination, offset by the part-time earnings she lost through to her own fault and misconduct, ***so long as her prior claim was not based on work at the Convention Center!*** This matter should be referred by the Board to the Director for a calculation of the appropriate offset, if any.

3. The Overpayment and Restitution Issue.

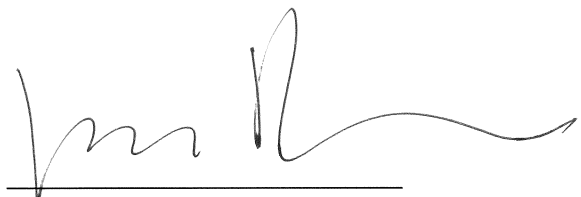
The referee addressed the issue of whether claimant was overpaid during two weeks: (1) the week ending March 27, 2010 and (2) the week ending April 3, 2010. Referee Capozza found

that her failure to report her discharge during the first week was excusable — since she had not yet received formal notification of her termination; he found that she was at fault for the latter week — since she had received notification by that time. I believe this finding is well-supported by the record. Therefore, this Court finds that the Referee's decision, which the Board later adopted as its own, is supported by reliable, probative, and substantial evidence on the whole record.

CONCLUSION

Upon careful review of the evidence, I find that the decision made by the Board of Review in this case was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4) on the issues of misconduct. Further, the Board's decision 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 on the issue of disqualification. As explained in this opinion, I further recommend that the matter be referred by the Board to the Director for a determination of whether the claimant was collecting benefits based on prior employment with the Convention Center or whether it was based on full-time work with a different employer. If Ms. Perry's prior claim was based on work at the Convention Center, she may be deemed fully disqualified; if it was based on work with a different employer she may continue to collect on that claim, subject to an offset for the wages she lost through her termination from the Convention Center.



Joseph P. Ippolito
Magistrate
January 13, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Colleen B. Perry	:	
	:	
v.	:	**A.A. No. 10 - 0228**
	:	
Department of Labor & 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 and the matter remanded to the Board of Review for referral to the Director for the calculation of the offset described in the attached opinion.

Entered as an Order of this Court at Providence on this 13th day of January, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge