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

Robert W. Saunders	:	
	:	
v.	:	**A.A. No. 12 - 180**
	:	
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 10th day of October, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
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Robert W. Saunders	:	
	:	
v.	:	**A.A. No. 2012 – 180**
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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. Robert W. Saunders 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.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Robert W. Saunders worked for A T & T Mobility Services for four years until he was terminated on May 5, 2012. He filed an application for unemployment immediately but on June 4, 2012, the Director determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee William Enos on July 11, 2012. On July 16, 2012, the Referee held that Mr. Saunders was disqualified from receiving benefits because he was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in pertinent part:

> Claimant worked in Sales for A T & T Mobility Services for four and a half years last on May 5, 2012. Employer testified and produced evidence that showed that the claimant had attendance and tardiness issues. The employer testified that the claimant had been progressively warned. The employer testified that the claimant had reached the seven-point max penalty because of his attendance within a ninety–day period and was discharged under disqualifying circumstances under the provisions of Section 28-44-18 of the Rhode Island Employment Security Act. The claimant testified that on the

> last day he was at a real estate office trying to sell services and was not late but in the field. The employer testified that the claimant did not get the prior approval per company policy for going on a call out of the office and was on personal business.

Decision of Referee, July 16, 2012 at 1. Based on these facts, the Referee came to the following conclusion:

> * * *
> I find that sufficient credible testimony and 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 entitled to benefits under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, July 16, 2012 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On August 30, 2012, 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. Decision of Board of Review, August 30, 2012, at 1.

Finally, Mr. Saunders filed a complaint for judicial review in the Sixth Division District Court on September 17, 2012.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically

addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from

Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

STANDARD OF REVIEW

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

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

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

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

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

> * * * 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.

ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

ANALYSIS

The Board adopted the Referee's factual conclusion that claimant abused his employer's attendance policy and that doing so constituted proved misconduct. See Gen. Laws 1956 § 28-44-18. Accordingly, our first duty must be to examine the record to determine whether these allegations are

supported in the record. We note that the employer, in its effort to meet its burden of proof on this issue, presented a witness — Mr. Michael Morgera.

Mr. Morgera explained AT&T's automated attendance system generally and how, in particular, transgressions cause "points" to be assessed — which, if they exceed 7 points over a 90–day period, can trigger termination. Referee Hearing Transcript, at 6–9. He further explained that the system automatically notifies the employee when a point (or part of a point) is assessed. . Referee Hearing Transcript, at 8–9, 14-15. He also explained that management undertakes personal warnings as well. . Referee Hearing Transcript, at 9–10, 14-15.

Prompted by a statement the Claimant made to the Director's adjudicator, the Referee asked Mr. Morgera about Mr. Saunders' last day. . Referee Hearing Transcript, at 10. Mr. Morgera explained that A T & T did not accept Claimant's statement — viz., that he was out of the office making a sales pitch for cell phones to a realtor — because he had not received advanced approval for the out-of-office meeting. Referee Hearing Transcript, at 10-12, 24-25. Mr. Morgera also pointed out that Claimant was meeting with the person to put a deposit on a home. Referee Hearing Transcript, at 10.

In support of his claim for unemployment benefits, Mr. Saunders also

gave testimony. Referee Hearing Transcript, at 16 et seq. He clarified that the issue of the sales call related to April 24, 2012 — not the date of his termination. Referee Hearing Transcript, at 18. He explained that under the regular manager he had a freer hand to get and close deals. Referee Hearing Transcript, at 18-19. He explained that when he questioned the assessment Mr. Morgera rejected his explanation. Referee Hearing Transcript, at 19.

Legally, it is well-settled that persistent tardiness and/or absenteeism is conduct that can be deemed to constitute proved misconduct. Factually, the Board could rely on the testimony of Mr. Morgera to find that Claimant did indeed have a pattern of lateness. As a result, on this record, I find that the Board was justified in finding that Mr. Saunders had a pattern of lateness.

Pursuant to the applicable standard of review described supra at 5-7, 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 though a reasonable fact-finder might have reached a contrary result. Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend

that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection with his work — a pattern of lateness — is well-supported by the record and should not be overturned by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

October 10, 2012