**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**

**PROVIDENCE, Sc.** **DISTRICT COURT**

**SIXTH DIVISION**

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| **Gregory Tikiryan** | : | |
| | : | |
| **v.** | : | **A.A. No. 2012 - 218** |
| | : | |
| **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 19th day of December, 2012.

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. Gregory Tikiryan 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. Gregory Tikiryan had been employed as an emergency room technician by his employer[1] for twenty years, until he was discharged on July 9, 2012, when his license was suspended by the Department of Health. After Mr. Tikiryan filed a claim for unemployment benefits, the Director issued a decision on August 15, 2012 in which claimant was determined to be disqualified from receiving benefits because he was terminated for proved misconduct, in accordance with Gen. Laws 1956 § 28-44-18.

Complainant filed an appeal and a hearing was held before Referee Nancy L. Howarth on August 30, 2012. On September 11, 2012, the Referee issued a decision holding that Mr. Tikiryan was disqualified from receiving benefits because he was terminated for proved misconduct:

> The claimant was employed as an emergency room technician by the employer. He held an emergency room technician license, which was required for the position. The claimant was not licensed to order prescriptions without authorization from a doctor. The doctor for whom the claimant had worked provided a written statement to the Rhode Island Department of Health indicating that the claimant phoned 26 fraudulent prescriptions for controlled substances to a pharmacy without authorization from the doctor under whose name in the prescription were ordered. As a result the claimant's license

[1] Mr. Tikiryan was employed by the same doctor at two institutions — (1) The Warwick Emergency Room and (2) the Newport County Medical Treatment Center. Referee Hearing Transcript, at 3-4, 10. This resulted in two decisions being issued at each level of administrative review.

> was suspended indefinitely on June 11, 2012, pending further order of the Department of Health.

Decision of Referee, September 11, 2012, at 1. Based on these facts, the Referee made the following conclusion:

> The burden of proof in establishing misconduct rests solely with the employer. In the instant case, the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant failed to maintain the license which was required in his position. I find that the claimant's failure to maintain his license was not in the employer's best interest and, therefore, constitutes misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, September 11, 2012, at 2. Upon appeal, the matter was heard by the Board of Review. On October 3, 2012, the members of the Board unanimously rendered a decision in which it held that the Referee's decision was a proper adjudication of the facts and the law applicable thereto. Accordingly, it adopted the decision of Referee Howarth — which denied claimant benefits — as its own. Decision of Board of Review, October 3, 2012, at 1.

Finally, Mr. Tikiryan filed a Petition within the Sixth Division District Court on October 22, 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:

> **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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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

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2 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).

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

4 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).

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 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. More precisely, was claimant disqualified from receiving unemployment benefits due to misconduct pursuant to section 28-44-18?

## ANALYSIS

The factual basis of this case is not in dispute: Claimant was employed jointly by the Warwick Emergency Room and Newport County Medical as an emergency medical technician. Doing so requires an emergency technician's license. Referee Hearing Transcript, at 10-11. When Claimant's license was suspended in June of 2012 he was discharged. Referee Hearing Transcript, at 8.

The law by which this case is governed is well-settled in the District Court. The District Court has repeatedly decided that failure to maintain a license necessary to perform one's employment duties constitutes misconduct.[5] This principle has been applied as to — *a driver's license*: Prochniak v. Department of

[5] In other cases the failure to gain or maintain a necessary certification has been viewed as a form of leaving without good cause. See Mourachian v. Department of Employment Security, A.A. No. 83-159, (Dist.Ct.9/14/84) (DelNero, J.). Under this theory as well the employee is barred from receiving benefits.

Employment & Training, Board of Review, A.A. No.03-63, (Dist.Ct.7/30/04) (DeRobbio, C.J.)(Claimant was rehired subject to reinstating his operator's license but was unable to do so; disqualification affirmed) and Walden v. Department of Employment & Training, A.A. No. 91-100 (Dist.Ct. 7/19/91)(DeRobbio, C.J.) (Principle accepted but benefits allowed where claimant was transferred to other duties and was then terminated one month later)]; *a nursing license*: Dardeen v. Department of Employment & Training, A.A. No. 92-306 (Dist.Ct.11/18/93) (DeRobbio, C.J.), and to *a teaching certificate*: McClorin v. Department of Employment & Training, A.A. No. 92-12 (Dist.Ct. 2/16/94) (DeRobbio, C.J.). As to driver's licenses suspended for traffic violations, this rule has been generally accepted nationally. See 76 AM. JUR. 2d Unemployment Compensation § 82 (2005) and ANNOT., Unemployment Compensation Claimant's Eligibility as Affected by Loss of, or Failure to Obtain, License, Certificate, or Similar Qualification for Continued Employment, 15 A.L.R.5th 653, §§ 6, 10 (1993). The Referee and the Board apparently accepted this principle as the governing rule of law and applied it to Mr. Tikiryan's circumstances.

Given that the facts and the law applicable to this case are clear, I can discern no error in the Board's decision finding Mr. Tikiryan to be ineligible to receive unemployment benefits.

## CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or 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

December 19, 2012