STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Carmine S. Campagnone, Jr.	:	
	:	
v.	:	**A.A. No. 12 - 065**
	:	
Department of Labor & 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 8th day of June, 2012.

By Order:

/s/
Melvin Enright
Acting Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Carmine S. Campagnone Jr.	:	
	:	
v.	:	**A.A. No. 2012 – 065**
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Department of Labor and Training,	:	
Board of Review	:	

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. In the instant complaint Mr. Carmine S. Campagnone Jr. urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive employment security benefits because he had been discharged from his previous position for proved misconduct.

Jurisdiction for appeals from decisions 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 for 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: Mr. Carmine S. Campagnone Jr. worked as a certified food manager for Darlington Memory Lane, an assisted living facility for five and a half weeks until April 12, 2011. He filed an application for unemployment benefits on November 3, 2011 but the Director determined him to be disqualified from receiving benefits, pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since he was terminated for misconduct — *i.e.,* failing to adhere to the employer's scheduling protocols.

Claimant filed an appeal and a hearing was held before Referee Carol A. Gibson on January 26, 2012. On January 30, 2012, the Referee held that Mr. Campagnone was disqualified from receiving benefits because he was terminated for proved misconduct. In her written decision, the Referee found the following facts:

> The claimant had worked for the employer, an assisted living facility, for five and a half weeks as a certified food safety manager through April 12, 2011. During the period the claimant was employed, he had been warned regarding his performance and his attitude on the job. Prior to the separation, the employer became aware that the claimant was working unauthorized overtime. The employer's policy requires that employees working six or eight hours have a half hour break or meal time and the thirty minutes are automatically deducted from the work hours. The claimant signed acknowledging receipt of this policy. The claimant states that he disagreed with the employer's policy and felt it was illegal. As a result, the claimant would work additional hours to make up for the half hour which

> was being deducted. The claimant did not consult with the employer about this practice or what he should do if he did not take a scheduled break on a workday. On April 12, 2011, the employer viewed video taken in the facility and witnessed the claimant watching television for an hour and twenty-two minutes while he was on work time. The claimant was away from his normal work area and this was unscheduled overtime for which he was not working. The claimant states that he was taking three half hour breaks to account for time he believed the employer was taking away from him. The claimant was discharged for taking unauthorized breaks and working unauthorized overtime to make up for his unpaid thirty minute breaks.

Decision of Referee, January 30, 2012 at 1. Based on these facts, the referee came to 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 establishes that the claimant's actions were a violation of policy and were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied in this matter.

Decision of Referee, January 30, 2012, at 2. Claimant appealed and the Referee's decision was reviewed by the Board of Review. On March 15, 2012, the Board of Review issued a unanimous 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, March 15, 2012, at 1. Mr. Campagnone filed a complaint for judicial review in the Sixth Division District Court on March 19, 2012.

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. —** 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. (Emphasis added).

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.

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 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

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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).

> 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.

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 Board adopted the Referee's factual conclusion that Claimant had been fired for violating the employer's scheduling protocol regarding break times — and that doing so constituted misconduct. Mr. Campagnone does not dispute that he stayed for overtime in order to compensate himself for his unpaid breaks, but explained his reasons for doing so. At this point I shall review the testimony presented by both sides.

At the hearing before Referee Gibson, the employer presented two witnesses in support of its effort to satisfy its burden of proof on the issue of misconduct. The first was Kendra Ricci, who explained that Mr. Campagnone worked for her company — which operates an assisted living home specializing in Alzheimer's/Dementia care — for five and a half weeks as a "Certified Food Safety Manager." Referee Hearing Transcript, at 10-11. The employer discovered, by

means of video monitoring, that on April 8th the Claimant had not departed the premises at the end of his shift (8:00 p.m.) but had remained — and watched television in the activities room for one hour, twenty-two minutes — while on the clock. Referee Hearing Transcript, at 12-14. As a result of this incident, Mr. Campagnone was discharged. Referee Hearing Transcript, at 18. When confronted on this point, he explained that he stayed late because he had not been able to take his half-hour unpaid meal break. Referee Hearing Transcript, at 24. Ms. Ricci told the Referee that the half-hour break was required by federal law. Referee Hearing Transcript, at 25. Ms. Ricci explained that when, due to special circumstances, employees could not take their breaks, they were reimbursed. Referee Hearing Transcript, at 35-36.

Previously, Mr. Campagnone had been counseled regarding a failure to clean the kitchen to specifications after he served the late meal. Referee Hearing Transcript, at 20-21. He received a warning on this point. Referee Hearing Transcript, at 23-24.

When he was confronted on the Saturday, Claimant said he had stayed late because he could not take his breaks; he added that he had been performing work functions. Referee Hearing Transcript, at 29-30. When told that he had been watching television he denied it. Referee Hearing Transcript, at 30. Ms. Ricci told him he was fired. Referee Hearing Transcript, at 31.

The second and final witness on behalf of the employer was Ms. Bubis. Referee Hearing Transcript, at 38 et seq. She indicated that when Mr. Campagnone was hired he was informed of the policy on breaks. Referee Hearing Transcript, at 39-40. She also saw the video, which showed Claimant watching television, for an hour and twenty-two minutes. Referee Hearing Transcript, at 40-41. In answer to a question from the Referee, Ms. Bubis indicated Mr. Campagnone never questioned her regarding the policy on breaks. Referee Hearing Transcript, at 41.

The Referee then heard the testimony of Mr. Campagnone. Referee Hearing Transcript, at 43 et seq. He acknowledged that he read (and signed) the employer's policies and procedures when he was hired. Referee Hearing Transcript, at 44. Mr. Campagnone expressed the opinion that the employer's policy was illegal — in the sense that assisted living institutions are exempt from any such requirement. Referee Hearing Transcript, at 44-45. Mr. Campagnone conceded that, notwithstanding his understanding of the law, he had agreed to the conditions of employment when hired. Referee Hearing Transcript, at 46-47.

Regarding the circumstances of the last day, he explained that he was making up for three breaks he had not taken. Referee Hearing Transcript, at 49. He admitted he had not brought the issue to the attention of the employer and asked for authorization to stay for overtime. Referee Hearing Transcript, at 50.

Pursuant to the applicable standard of review described supra at 5-6, 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 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 — remaining on the clock without authorization — is well-supported by the record and should not be overturned by this Court. There is no question that Claimant — who felt aggrieved by the employer's policy regarding breaks — failed to adhere to it. But in my view Claimant's actions involved more than a mere *de minimis* breach of a scheduling policy. Claimant's actions had financial implications.

Mr. Campagnone submitted time cards that were inaccurate — indicating that he was working when he was not. This would have caused an economic loss to Darlington Memory Lane in terms of overtime pay. He could have sought alternative redress for his grievance but did not — instead he acted unilaterally and deceptively, to his own benefit and to the detriment of Memory Lane. Based on the foregoing, the Board was certainly within its sound discretion to reject Claimant's assertion that his actions were justified.

VI. CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review considered herein is 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; 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 8, 2012