STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Eric Ferrell	:	
	:	
v.	:	**A.A. No. 13 - 117**
	:	
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 27th day of September, 2013.

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. Eric D. Ferrell 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. 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. 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; accordingly, I recommend that it be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Eric D. Ferrell was employed by Charlesgate Nursing Center for thirteen years as a dietary aide until he resigned in the face of an immediate termination based on repeated tardiness on January 10, 2013. He applied for employment security benefits but on March 18, 2013 the Director of the Department of Labor and Training decided that he was disqualified from receiving benefits due to misconduct as provided in Gen. Laws 1956 § 28-44-18. See Director's Exhibit No. 2.

Claimant filed an appeal and a hearing was scheduled before Referee Nancy L. Howarth on April 18, 2013 at which the claimant and an employer representative appeared and testified. In her May 13, 2011 Decision, Referee Howarth found the following facts on question whether claimant was fired for misconduct:

> **2. Findings Of Fact:**
>
> The claimant was employed as a diet aide by the employer. He had received numerous verbal and written warnings regarding his tardiness. The claimant was suspended from November 7, 2012 through November 12, 2012 due to continued tardiness. At that time he was informed that another incident of tardiness would lead to termination. The claimant was frequently tardy due to childcare issues. He brought his young daughter to his fiancée's mother's house prior to work. However, she worked nights and did not return home until approximately 7:15 a.m. The claimant could not drop off his daughter until that time and was usually late for his 7:00 a.m. shift. The claimant did not explore other childcare options. The employer entered an agreement with the claimant's union to monitor his attendance during a four week period from November 13, 2012 through December 13, 2012. The claimant was late fifteen out of twenty shifts during that period. The

> claimant voluntarily resigned his job, in lieu of termination, on January 10, 2013.

Decision of Referee, August 29, 2013 at 1. Based on these findings, the Referee pronounced the following conclusions:

> **3. 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 was tardy an excessive number of times, despite numerous prior warnings. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, August 29, 2013 at 2. Accordingly, the Referee found Claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by Mr. Ferrell and the matter was reviewed by the Board of Review. In a decision dated June 11, 2013, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Mr. Ferrell filed an appeal within the Sixth Division District Court on July 5, 2013. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; 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 through a preponderance of evidence that the claimant's action, in connection with his work activities, constitutes misconduct as defined by law.

The particular ground of misconduct alleged in the instant matter — repeated tardiness — has been held to constitute misconduct justifying disqualification from the receipt of benefits in District Court cases too numerous to cite. This has also been the view expressed nationally. 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 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)

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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 Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

[3] Id.

that a liberal interpretation shall be utilized in construing and applying 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.

IV. 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 as provided by section 28-44-18?

V. ANALYSIS

A. Overview.

For the following reasons I conclude that the Board of Review's decision in this case was supported by substantial evidence of record and is not clearly erroneous. As I shall explain, I arrive at this conclusion on the grounds that Mr. Ferrell was repeatedly

late for work. I therefore recommend that the Board's decision denying benefits be affirmed.

B. Summary of Testimony.

The first witness for the employer was Mr. Mark Boissel, the Food Service Director and Claimant's direct supervisor. Referee Hearing Transcript, at 3 et seq. He began by testifying that he monitored Mr. Ferrell and found that, in a four-week period, he was late fifteen out of nineteen shifts. Referee Hearing Transcript, at 7. Mr. Ferrell was the subject of progressive discipline, culminating in a five-day suspension in November of 2012. Id. At that time he was warned that if his lateness continued, he would be terminated. Referee Hearing Transcript, at 8-9. He was then monitored for another four-week period, during which he was late thirteen out of twenty shifts. Referee Hearing Transcript, at 12. As a result, he was separated on January 10, 2013. Referee Hearing Transcript, at 11.

Mr. Ferrell then testified. Referee Hearing Transcript, at 15 et seq. He began by indicating he had been employed by Charlesgate since 2000. Referee Hearing Transcript, at 15. He stated, quite frankly, that he had no disagreement with Mr. Boissel's testimony. Referee Hearing Transcript, at 16. He explained that his tardiness was caused by a childcare issue — the person with whom he left his young daughter, his fiancée's mother, often did not get in from work until 7:15 a.m., which caused him to be late for the start of his shift. Id. He stated he tried to work things out at home

but he just did not have sufficient resources. Referee Hearing Transcript, at 18. For instance, he and his fiancée tried paying for daycare, but they were not making enough to enable them to continue in this way. Referee Hearing Transcript, at 19. In answer to a question from the Referee, he stated he never explored the option of taking a bus to work. Referee Hearing Transcript, at 22.

C. Resolution.

Whether a claimant failed to appear for work on-time or failed to call-in to report an absence are questions of fact. But, in this case, many key facts are not in dispute. Mr. Ferrell did not deny he was often late for work, but instead took the opportunity at the hearing to explain why he was often tardy. Certainly, his explanation was understandable from a human point of view, but, it was insufficient as a matter of law. As has often been stated, the employment security system was established to assist those who are unemployed through no fault of their own. Mr. Ferrell's circumstances do not justify benefits; to the contrary, as it would be utterly unfair for this claim to be granted and potentially affect the employer's unemployment tax rate, as Charlesgate and its management seem to have been (from a reading of this record) entirely patient with Mr. Ferrell, giving him more than reasonable time to remedy the situation.

D. Summary.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws 1956 § 42-35-15(g), supra at 5-6 and Guarino, supra at 6, fn. 1. In other words, the role of this Court is not to choose which version of events – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision, in light of the evidence of record, is clearly erroneous. Based on my review of the record, including the testimony given at the hearing before the Referee — which I have summarized — I believe it is not.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court 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 be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 27, 2013