**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**

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

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| **Michelle E. Keegan** | : | |
| | : | |
| **v.** | : | **A.A. No. 13 - 130** |
| | : | |
| **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 REVERSED.

Entered as an Order of this Court on this 5th day of June, 2014.

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.** Ms. Michelle E. Keegan 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 she was not entitled to receive employment security benefits based upon proved misconduct. Jurisdiction for appeals from a decision of the Department of Labor 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 not supported by substantial evidence of record and was affected by error of law; accordingly, I recommend that it be reversed.

## I
## FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Michelle E. Keegan was employed by the Zamburano Unit of the Eleanor Slater Hospital for over ten years as a janitor until she was terminated on December 5, 2012 for repeated instances of tardiness. She applied for employment security benefits on March 5, 2013 but on March 27, 2013 a designee of the Director of the Department of Labor and Training decided that she was disqualified from receiving benefits due to misconduct as provided in Gen. Laws 1956 § 28-44-18. See Department's Exhibit No. 2.

Claimant filed an appeal and hearings were scheduled before Referee John R. Palangio on April 25, 2013 and May 23, 2013. However, on both occasions Ms. Keegan failed to appear. The Referee issued a decision on May 23, 2013 dismissing Claimant's appeal for want of prosecution. See Referee's Decision, May 23, 2013, at 1. Ms. Keegan filed a timely appeal on May 28, 2013 and the matter was set down for hearing before the full Board of Review on June 24, 2013. At that time the full Board of Review considered both the substantive issue (of misconduct vel non) and the procedural issue (of

whether she should be allowed to reopen her appeal after failing to appear twice).

On July 8, 2013 the Board of Review issued a decision addressing both questions. On the procedural issue, the Board decided to allow her to reopen her appeal, finding that she missed the hearings due to illness. Decision of Board of Review, July 8, 2013, at 1. Regarding the misconduct issue, a majority[1] of the members of the Board made the following Findings of Fact regarding the Claimant's termination:

> The Board finds that the claimant was employed as a janitor for over ten years. The employer had a policy which barred excessive absenteeism. The claimant violated the policy. The claimant was terminated on December 5, 2011. The claimant, with the assistance of her collective bargaining agent, executed a Last Chance Agreement on March 4, 2012. The claimant's termination was reduced to a 30 day suspension. After her reinstatement, the claimant's absenteeism exceeded the employer's policy during the period of May 14 through November 17, 2012. The claimant was terminated on December 28, 2012.

Decision of Board of Review, July 8, 2013 at 1. Based on these findings, the Board pronounced the following conclusions:

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[1] The Member Representing Labor dissented, finding that Claimant "left" her position for good cause — her illness. He thus analyzed her termination under section 28-44-17. He further made the point that her eligibility for benefits would have to be further examined to see if she was available for work in the period after her termination. Decision of Board of Review, July 8, 2013 at 2 (Dissent).

> The Board concludes that the claimant's failure to comply with the terms and conditions of the Last Chance Agreement constitutes a violation of a reasonable employer rule. The employer established misconduct under Section 28-44-18 of the Act.

Decision of Board of Review, July 8, 2013 at 1. Accordingly, the Referee found Claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18. Id., at 2.

Ms. Keegan filed an appeal within the Sixth Division District Court on August 8, 2013. On October 16, 2013, the undersigned conducted a conference at which a briefing schedule was set. The Claimant and the Employer have filed helpful memoranda. The Board of Review notified this Court that it had decided not to submit a memorandum in this case.

## 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 — excessive absenteeism — 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.' "[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 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

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[2] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

[3] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

[4] Id.

> 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
## DISCUSSION

The Zamburano Unit of the Eleanor Slater Hospital, a component of the Department of Behavioral Health, Developmental Disabilities, and Hospitals, terminated Ms. Keegan's employment due to repeated instances of lateness. Nevertheless, I do not believe the record supports a finding of "misconduct" as that term is defined in section 18. And so, after explaining

my reasoning in greater detail, I shall recommend that the Board's decision denying benefits be reversed.

**A**

**Review of Testimony**

The employer's representative at the hearing conducted by the Board of Review was Ms. Michelle Fournier, its Labor Relations Analyst. Board of Review Hearing Transcript, at 5 et seq. She testified that Claimant was discharged pursuant to the Last Chance Agreement she executed. Board of Review Hearing Transcript, at 6.[5] In that agreement she agreed to enter into the employee assistance program for alcohol substance abuse issues. Board of Review Hearing Transcript, at 7, 13. She also agreed that if her absenteeism continued in violation of the hospital's policy she would be terminated —and she agreed she would not contest such a termination. Board of Review Hearing Transcript, at 8. And this eventuality came to pass. In December of 2012 she was terminated because she had amassed total leave of 113 hours (paid and unpaid) within a six-month period, significantly in excess of the hospital's 76 hour policy. Id. Claimant was discharged for violating paragraph

[5] The Last Chance Agreement rescinded her prior (March of 2012) termination and substituted in its place a thirty-day suspension, effective February 3, 2012. Board of Review Hearing Transcript, at 6-7.

16 of the last chance agreement, relating to excessive absenteeism. Board of Review Hearing Transcript, at 13.

Ms. Keegan responded, explaining that she was sick, which then brings on depression, which caused her to be absent. Board of Review Hearing Transcript, at 9.[6]

**B**

**Analysis**

The facts and circumstances of Ms. Keegan's termination are perfectly clear. Claimant was discharged for excessive absenteeism. Claimant stated her absences, which she did not deny, were caused by certain illnesses from which she suffered — an attribution which the employer did not contest. Neither did the employer question that she had sought assistance for her condition through the employee assistance program.

To stave off an earlier termination, Ms. Keegan had agreed to a Last Chance Agreement which put her into a strict-liability or no-fault status regarding her absenteeism. To explain, Ms. Keegan agreed that if she continued to be excessively absent she would be terminated — an action she would not contest. Sadly for her, Ms. Keegan's absenteeism did continue, and

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[6] At this juncture the Chairman asked the employer's representative if Ms. Keegan called-in when she was absent; the answer was she did, except once. Board of Review Hearing Transcript, at 9-10. An immaterial discussion of her eligibility for family-leave followed. Id., at 10, 12, 15.

she was fired.

Now, neither party in this case questions the right of Ms. Keegan and her employer to enter into such a pact. And the hospital's right to terminate Ms. Keegan pursuant to this agreement is not at issue. The only issue is whether the violation of her Last Chance Agreement disqualifies her from receiving unemployment benefits.

These questions (termination vs. right to benefits) are separate and distinct. Rhode Island law has long recognized that a proper basis for termination may not constitute a basis for disqualification from the receipt of unemployment benefits. And nothing in the last chance agreement purported to alter her statutory right to employment security benefits.

Traditionally, only deliberate conduct that was in willful disregard of the employer's interest could constitute misconduct under the Employment Security Act. See Gen. Laws 1956 § 28-44-18. I do not find in the evidence of record the slightest allegation that Claimant was absent for any reason but genuine illness, the effects of which were sufficient to prevent her from reporting for work. So, under a traditional definition of misconduct, Ms. Keegan could not be disqualified for her many absences.

However, a number of years ago the legislature amended § 28-44-18 to permit, in the alterative, a finding of misconduct to be based on the violation

of a rule promulgated by the employer —

> … "misconduct" is defined as … 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. …

Gen. Laws 1956 § 28-44-18 as amended by P.L. 1998, ch. 401, § 3. Note the elements of the new standard: (1) the rule must be violated knowingly, (2) the rule must be reasonable, (3) the rule must be shown to be uniformly enforced, and (4) the employee must not have violated the rule through incompetence. I believe several, if not all, of these elements were not satisfied in the case of Ms. Keegan's termination.

First, it is questionable whether Ms. Keegan violated the rule on absences "knowingly." Webster's Third defines "knowingly" as "in a knowing manner esp. with awareness, deliberateness, or intention." Webster's Third New International Dictionary 1252 (3rd ed. 2002). Undoubtedly, Ms. Keegan knew she was absent more than the rule permitted, but did she do so with intention. I hardly think so.

Second, in the abstract a rule prohibiting excessive absences is certainly reasonable, so long as it proscribes absences not beyond an employee's control. I do not believe a rule can be deemed reasonable (for unemployment purposes) if it proscribed absences caused by a force majeure — such as an absence caused by one of our northeast hurricanes. Neither should absences

caused by illness be treated as such. An employer cannot, by publishing a rule, change the nature of the human condition (particularly our vulnerability to illness) any more than a king can hold back the tides.[7]

Third, the employer's representative did not aver that the rule was uniformly enforced, which was, to reiterate, an element of its proof.

Fourth and finally, Ms. Keegan's inability to appear at work due to illness is certainly a kind of incompetence. This is not the way we usually use the term in the employment setting, which is to question a worker's skills, as in "John makes many spelling errors when he types." But the Ninth Edition of Black's Law Dictionary is broader, defining incompetence as "the state or fact of being unable to do something." Black's Law Dictionary 833 (9th ed. 2009). And so, I believe her absences due to illness fairly come within the ambit of this element. Based on the application of this company-rule standard to the facts of Ms. Keegan's case, I do not believe she can fairly be said to have been discharged for misconduct within the meaning of section 28-44-18.

[7] I refer here to the story told of King Canute, who in the eleventh century ruled an empire consisting of England, Denmark, and Norway. Apparently, one day, the flattery of his courtiers became so excessive and intolerable that he marched down to the shore followed by his retinue and ordered the tide to stop coming in. Its failure to cease demonstrated to all present that he was not omnipotent, and he knew it. See Adonis to Zorro, the Oxford Dictionary of Reference and Allusion, at 71 (3rd ed. 2010).

## VI
## CONCLUSION

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 6-7. 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. But here there was really no factual dispute — Claimant exceeded the allowable amount of absences due to illness. And so, I believe the Board's decision is clearly erroneous in view of the reliable, probative and substantial evidence. Gen. Laws 1956 § 42-35-15(g)(5).

Accordingly, I recommend that the decision of the Board be REVERSED. The Department should note that her eligibility is subject to a showing that she satisfied the availability requirements of § 28-44-12.

/s/
Joseph P. Ippolito
MAGISTRATE

June 5, 2014