STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Michael J. Beagan	:	
	:	
v.	:	**A.A. No. 2013 - 133**
	:	
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 4th 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 AND R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Michael J. Beagan urges that the Board of Review of the Department of Labor and Training erred when it determined he was ineligible to receive unemployment benefits because he was discharged for proved misconduct. Jurisdiction for appeals from decisions of the 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 supported by reliable, probative, and substantial

evidence of record and is not clearly erroneous; I therefore recommend that the Decision of the Board of Review be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Michael J. Beagan worked for Albert Kemperle, Inc. for four years as a delivery driver until he was fired on March 7, 2013. He filed an application for unemployment benefits but on April 22, 2013 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.

Mr. Beagan filed an appeal and a hearing was held before Referee William Enos on May 29, 2013. In his June 4, 2014 decision, the Referee held that Mr. Beagan was disqualified from receiving benefits because he was terminated for proved misconduct. The Referee found the following facts:

> The claimant worked as a driver for Albert Kemperle, Inc. for 4 years and 3 months, last on March 7, 2013. The employer terminated the claimant for violating the company policy concerning insubordination. The claimant was upset about new company policy changes concerning abuse of time off and driving accidents in company vehicles. The claimant was inciting coworkers in his office and also in the Connecticut office against the policy changes creating a lot of ill-will. The employer introduced evidence that showed the claimant was posting derogatory comments about his supervisor on Facebook that named his supervisor. The claimant stated that he was terminated

> because he complained about not being paid 2.5 hours of overtime per week.

Decision of Referee, June 4, 2013 at 1. Based on these facts, Referee Enos came to the following conclusion:

> The claimant was terminated for violating the company policy concerning insubordination, therefore, I find that sufficient credible testimony 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 under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, June 4, 2011 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On August 2, 2013, a majority of the members of the Board of Review found that the decision of the Referee was 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 2, 2013, at 1.

Finally, Mr. Beagan filed a complaint for judicial review in the Sixth Division District Court on August 4, 2013. Then, on October 16, 2013, a status conference was held in the case; a briefing schedule was set. Helpful memoranda have been received from Claimant Beagan and the employer, Albert Kemperle, Inc.

II
APPLICABLE LAW
A
Misconduct Generally

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.

B

Social Media Misconduct

Mr. Beagan asks this Court to reverse the Board of Review's decision denying him benefits in light of this Court's ruling in Laura Corrieri v. Department of Labor and Training Board of Review, A.A. No. 10-114, (Dist.Ct. 12/02/10). In Corrieri, an insurance company employee posted on Facebook a

scandalous picture of the company's television spokeswoman. This Court reversed the decision of the Board of Review denying benefits, for although the Court accepted the Board's finding that the claimant's actions in re-posting the picture were offensive, it was decided they were not sufficiently connected to her work to trigger a section 18 disqualification. See Corrieri, supra at 9-10. In allowing benefits, the Court noted, inter alia, that Ms. Corrieri posted the picture — which was not created by her — on her personal Facebook account and that this was done from her personal computer while she was on maternity leave. There was no indication whatsoever that she transmitted the picture into the company's computer network. See Corrieri, supra, at 10-12.

This Court had a second occasion to consider whether a posting on Facebook constituted disqualifying misconduct under section 18 in Daniel S. Northup v. Department of Labor and Training Board of Review, A.A. No. 12-004, (Dist.Ct. 07/09/12). In Northup the claimant was an engineer for an international firm based in Germany who while attending a training session at a subsidiary company in Taiwan, was offended by the unfriendly behavior of two German colleagues. See Northup, supra at 8-9. He responded making a posting from his company-issued laptop computer to his personal Facebook account expressing his displeasure — in offensive terms including ethnic references. Northup, supra at 8. Because he had given one of his targets access to his

Facebook account by "friending" him, this message came to the attention of company executives — who found it "hateful." Northup, supra at 8. As a result, Mr. Northup was terminated. Northup, supra at 9. This Court upheld the denial of benefits, finding the posting was connected to his employment because (1) it was made on a company trip on a company computer and (2) was visible to at least one of the objects of Claimant's ire. Northup, supra at 11-12.

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 does not warrant an extension of eligibility by this court to

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1 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).

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).

> 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) that claimant was discharged for proved misconduct within the meaning of section 28-44-18 of the Rhode Island General Laws 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

In the Tragedy of Hamlet, Prince of Denmark, the Lord Chamberlain, Polonius, gives parting advice to his son Laertes, who is returning to the university. Among the advice he gives is the following —

> Give every man thy ear, but few thy voice,
> Take each man's censure, but reserve thy judgment.

William Shakespeare, Hamlet, Prince of Denmark, Act I, sc. 2. It is undoubtedly fortunate for the stockholders in today's social media companies that 400 years after these lines were written they are honored more in the breach than in the observance. And so, in this case, for the third time in recent years, we have

occasion to determine whether items posted on Facebook disqualify a claimant from receiving unemployment benefits.

We begin our analysis by noting that during his time at Kaemperle Mr. Beagan had alienated his supervisor, Mr. Morancey, who thought he was a rabble-rouser. And, according to Mr. Morancey, whom we have no reason to doubt on this point, he was fired because of the posting he allegedly made after he pleaded for (and was granted) another chance on the morning of March 7. In Mr. Morancey's mind, this gave him two reasons to fire Mr. Beagan — (1) insubordination, because the posting was insulting to him and (2) violation of a safety rule, because he concluded Mr. Beagan had posted it while driving his company truck. Our duty is to examine both of these theories to see if misconduct was proven. But before I perform this analysis, I shall undertake a review the factual record in the case.

A

Factual Review

In denying his claim for benefits, the Referee (and, by implication, the Board of Review) relied on the testimony given by Mr. Henry Morancey, the Branch Manager, who testified that he was the person who terminated Mr. Beagan. As background, Mr. Morancey stated that —

> … Mike was with us for approximately four years. So, I mean, for the most part, he was an okay employee. He was on time, pretty

> punctual, and didn't take much time out. Uh, but … in the years that he was employed with us, ah, me and him had butted heads quite a few times. You know, and he took a couple of personal stabs at me through the years, which I didn't — I didn't take personal. I just — I didn't treat him any differently. I — I managed. …

Referee Hearing Transcript, at 13. With this half-hearted endorsement on the record, Mr. Morancey explained that the troubles began with Mr. Beagan when the company instituted new branch policies and procedures. Referee Hearing Transcript, at 6. Mr. Beagan was given an opportunity to read it over and after he did so he expressed reservations, particularly as to the new accident policy, and did not want to sign it. Id. Claimant expressed these concerns to other employees, causing a "ruckus." Referee Hearing Transcript, at 7.

But, after the policy was explained to him in greater detail, Mr. Beagan signed it. Referee Hearing Transcript, at 7. But before he did so, he and Mr. Morancey "had words" and Mr. Beagan "took a couple of personal shots" at Mr. Morancey, which caused him to consider firing Claimant; indeed, he began to draw up the paperwork necessary to discharge him. Referee Hearing Transcript, at 7-8. But when Mr. Beagan was informed of this, he admitted he was insubordinate and apologized. Referee Hearing Transcript, at 8. As a result, Mr. Morancey agreed to give him one more chance. Id. And so, he was returned to his duties making deliveries. Id.

However, during the conversation with Mr. Morancey, Mr. Beagan had commented that Mr. Morancey could not read what Claimant had written on his Facebook page — implying it was very negative. Referee Hearing Transcript, at 9. That piqued Mr. Morancey's curiosity and so, several hours later, he logged-on to Claimant's Facebook account (with assistance) and saw several comments referencing him — though not by name. Referee Hearing Transcript, at 9. The most recent, which Mr. Morancey concluded was posted after he agreed to give Appellant another chance, read —

> It's a good thing my boss doesn't take things personal and want to know, like, if I write shit about him. I sometimes forget that despite the fact that he walks and talks like a real person, he isn't a real boy, Gepetto (phonetic)."

Referee Hearing Transcript, at 10. He read other postings into the record, as well. Referee Hearing Transcript, at 10-12.

After reading this material, Mr. Morancey terminated Mr. Beagan for two reasons — (1) the material he posted on Facebook and (2) the fact that he must have sent it from the company truck while driving. Referee Hearing Transcript, at 13, 31.

Mr. Beagan began his testimony by explaining the background of his friction with Mr. Morancey. Claimant testified that he was making a delivery in Hartford (on a Monday he thought) when he got the news regarding the change

in policy regarding accidents. Referee Hearing Transcript, at 17-18. He indicated when he got back he mentioned it briefly to Mr. Morancey, but not in a dramatic way. Referee Hearing Transcript, at 18. He went back to Hartford on Wednesday and when he returned Mr. Morancey asked him — "Are you going to continue to rebel or are you going to sign this?" Referee Hearing Transcript, at 18-19. And that began the discussion of the new accident policy. Referee Hearing Transcript, at 19. After Mr. Morancey explained that termination was not mandated when employees had accidents — the policy using the permissive "may" instead of the mandatory "shall" — he agreed to sign it. Referee Hearing Transcript, at 20-21. Mr. Beagan also raised concerns about overtime; he believed he was not being paid for a half-hour per day. Referee Hearing Transcript, at 21-24.

He then turned to the events of March 7th. He testified that he was informed by Mr. Morancey that he was to be terminated. Referee Hearing Transcript, at 24. At this juncture he told his manager that he did not want to make an issue of the overtime. Referee Hearing Transcript, at 25. He pleaded with Mr. Morancey not to fire him because he complained about the overtime policy and talked to other employees about it. Referee Hearing Transcript, at 25-26. Instead, he got his first written warning. Referee Hearing Transcript, at 26.

He went out and made his deliveries. Referee Hearing Transcript, at 26. When he got back, he was told he was fired for making Facebook posts. Referee Hearing Transcript, at 26-27. He denied he ever made a post with Mr. Morancey's name. Referee Hearing Transcript, at 27, 29. He denied he ever made posts while out on the road. Referee Hearing Transcript, at 29.

Claimant said his Facebook was private, access being limited to his "Facebook friends." Referee Hearing Transcript, at 46-47. He denied the posting was offensive. Referee Hearing Transcript, at 46.

As quoted above, in his Findings of Fact Referee Enos found that the employer terminated Claimant for violating the company policy on insubordination. Referee Decision, at 1. In light of the foregoing, I must find that this is partly true. Mr. Morancey testified that he was fired for making a posting after he was placed on the last-chance written warning, — and for making that posting from a company vehicle. No policy regarding insubordination was introduced.

Also on this point, the Referee found that "[t]he employer introduced evidence that showed the claimant was posting derogatory comments about his supervisor on Facebook that named his supervisor." Id. This is also partly true. While evidence was introduced that Claimant made insulting postings about his supervisor or boss, it is also clear that individual was never referenced by name.

See Employer's Exhibit 2, admitted at Referee Hearing Transcript 28 but, in fact, discussed passim.

B

Discussion – Applying the Facts to the Law

Let us begin at first principles. Claimant was fired because he made a Facebook posting after he was given a chance to save his position.[4] According to Mr. Morancey, by doing so Mr. Beagan violated two rules — (1) the content of the posting was insubordinate and (2) employees are not allowed to use personal electronic devices in company vehicles.[5] But the Referee found only that Claimant was fired due to a violation of the employer's policy on insubordination. Moreover, the Referee did not itemize exactly what conduct violated this policy. Instead, he merely found that Claimant's actions were not in the employer's best interests. And so, we will have to reconstruct the decision and the record in order to determine if it was clearly erroneous or contrary to law on both the insubordination and phone-use issues.

To begin, when evaluating a case for a potential section 18 disqualification, we must answer three fundamental questions:

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[4] See Referee Hearing Transcript, at 31.

[5] I acknowledge that the Referee failed, without explanation, to consider the second reason proffered by the employer in support of its assertion that Claimant was fired for misconduct — i.e., the posting from the truck. I shall

(1) Does the Claimant's conduct, if proven, constitute misconduct?

(2) If so, were those alleged actions connected with his work?

(3) Finally, if the first and second questions are answered in the affirmative, were the allegations actions in fact proven?

After doing so, and for different reasons, I believe one of the allegations made against Mr. Beagan — the posting of an offensive Facebook entry — does in fact clear all three hurdles, although the second hurdle (connection to his work) barely so. As we shall see, as to that issue, this must be viewed as a very close case indeed.

1

The Insubordination Allegation

a

First of all, was the posting insubordinate? Mr. Morancey says that the posting was insubordinate. The posting, which Mr. Beagan did not deny making, read as follows —

> It's a good thing my boss doesn't take things personal and want to know, like, if I write shit about him. I sometimes forget that despite the fact that he walks and talks like a real person, he isn't a real boy, Gepetto (phonetic)."

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consider it nonetheless in order to avoid an unnecessary remand.

Is this message insubordinate? Since the employer's rule against insubordination has not been presented, we cannot turn there for assistance. As a result, we really have no choice but to turn to dictionary definitions.

The Ninth Edition of Black's Law Dictionary defines insubordination as either "a willful disregard of an employer's instructions" or "an act of disobedience to proper authority." Black's Law Dictionary 870 (9th ed. 2009). General dictionaries follow suit: the Webster's Third defines "insubordinate" as "unwilling to submit to authority." Webster's Third New International Dictionary 1172 (3rd ed. 2002); likewise, the American Heritage defines "insubordinate" as "not submissive to authority." American Heritage Dictionary 910 (5th ed. 2011). There is no allegation that Mr. Beagan was insubordinate in this sense.

But while the postings were not insubordinate in the usual sense, they were certainly insulting and demeaning. The administrative fact-finders could well conclude that the posting of such materials was utterly corrosive of the supervisor–employee relationship between Messrs. Morancey and Beagan, and that his continued employment by Kemperle was impossible. And I cannot declare, as a matter of law, that such a finding was wrong.

b

Was the Claimant's Posting Connected to His Work?

Now this is a very thorny question. Although they did not mention him by name, there is no doubt that the final posting, among others, was about Mr. Morancey. Mr. Beagan did not assert otherwise. But where is the connection to Kemperle? How was the employer (the company, not Mr. Morancey) harmed? How did the comments come into the workplace?

Of course, Mr. Beagan urges that his Facebook page was private — that his personal comments were separated from his workplace.

In its Memorandum, Kemperle urges that this claim is "disingenuous." Employer's Memorandum in Opposition, at 12. The employer reminds us that Mr. Morancey testified that he was able to sign on to Mr. Beagan's Facebook page with assistance of a "third party" whom he wished to remain "anonymous." Referee Hearing Transcript, at 9. From this fact, Kemperle argues that —

> … Morancey indisputably obtained access to Appellant's Facebook page by someone known to both men, who was, in all likelihood, another employee. …

Employer's Memorandum in Opposition, at 12. With this conclusion, I cannot agree, for it is unadulterated speculation, which has no place in litigation, even administrative litigation, where we deal with proof or the lack thereof. The

employer could have named the person who assisted him, but did not. It may well have been another employee of Kemperle.

The truth is that Mr. Morancey brought these comments into the workplace (or caused it to be done by another). Should his doing so provide the needed "connection" with the workplace? Generally I would say no. That would be inviting management to monitor their employees' social media accounts, which I believe would be a mistake.[6] But on the particular facts of the instant case, I must say yes.

To be frank — in my view Mr. Beagan baited Mr. Morancey into searching out his Facebook page. See Referee Hearing Transcript, at 9. At this point, Mr. Morancey had to leave his blissful ignorance behind and go looking to see if there was a problem. And while looking, he found the posting made about him earlier that morning — and others.

Now, I must concede that this is a rather slender reed upon which to base a finding that the postings were "connected" to his work. But after weighing the matter, I do not see how Mr. Morancey could have done otherwise. Once Mr. Beagan mentioned the postings Mr. Morancey had to look, and after looking, he

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[6] I concur with the dissent of the Member Representing Labor to this extent — I agree that it is in the nature of human beings to grumble about their work situations — to vent, as it were, at the dinner table. The best thing about dinner table talk is the fact that it instantly evaporates. Material on

saw, and having seen, he had, in my opinion, no choice but to terminate Claimant. As is often said, the unemployment system was enacted to aid those who lose positions through no fault of their own. Mr. Beagan was terminated because he could not forbear from making certain comments about his supervisor, and them mentioning them to for which he has no one to blame but himself.

c

Was the Posting Proven?

Quite simply, Mr. Beagan did not deny that he made the postings which were taken from his social media page.

d

Summary

For the forgoing reasons stated above, I find the Board of Review's decision that Claimant committed misconduct in connection with his work by making offensive postings about his superior is supported by reliable, probative, and substantial evidence of record. Accordingly, I recommend that it be upheld.

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social media sites does not have this most praiseworthy characteristic.

2

The Posting-From-the-Truck Allegation

a

Is Posting From a Truck Misconduct?

Yes. There is no question that the employer was entitled to enact and enforce such a rule. As we constantly hear in public service advertisements, texting (or posting) while driving is dangerous. Posting while driving a Kemplerle vehicle endangers the life of the driver, other motorists, and pedestrians, and puts Kemperle's property at risk.

b

Were the Claimant's Actions Connected to His Work?

If the Claimant was found to have made the last posting while in the company vehicle (and after the meeting with Mr. Morancey) in violation of a company rule this could well constitute per se misconduct as well as being misconduct for violating Kemperle's work rule.

c

Did the Employer Prove That Claimant Violated Its Policy on Use of Personal Devices In Company Vehicles

No. I do not believe it did. From my review of his testimony, it appears that Mr. Morancey was most upset that the final posting (in this record) was made by Claimant after gave a weepy, apparently contrite, apology — after which, he had given Mr. Beagan another chance. Did the employer prove it was

posted after their meeting? The Referee did not make a particular finding concerning when the final posting was made. So, once again, it falls to us to reconstruct the decision.

Mr. Morancey testified that he obtained the postings "several hours later," i.e., after his meeting with Claimant. And because his conversation with Mr. Beagan occurred several hours earlier, he concluded this was proof that the last posting was made after their meeting. This is not, in my mind, definitive proof of the fact. This record provides no information regarding the accuracy of the Facebook time indicators. Are they precise? We simply do not know. As I stated above, I believe that, based on its content, the posting was made after the meeting; and if the Facebook system is accurate to any degree, within a few minutes of its conclusion. But that does not prove it was made from inside the truck; it could have been made from any number of places before he entered the Kemperle vehicle — the loading dock, the parking lot, or from Claimant's personal vehicle, to name but a few.

In any event, because of the vagueness of the time-frame, and in light of Mr. Beagan's denial that he made the posting from his Kemperle truck, I do not believe the employer met its burden on this issue. Referee Hearing Transcript, at 29.

d

Summary

For the forgoing reasons I find the Board of Review's decision that Claimant committed misconduct by using an electronic device from its vehicle was not proven in light of the reliable, probative, and substantial evidence of record. Accordingly, it must be upheld.

C

Freedom of Expression Argument

Finally, Mr. Beagan urges that his actions could not constitute the basis for the denial of unemployment benefits due to the free speech protections afforded him by the first amendment to the United States Constitution. See Appellant's Memorandum of Law, at 11-14. He cites Sherbert v. Verner, 374 U.S. 398, 403 (1963) for the principle that the denial of unemployment benefits cannot be impacted by the claimant's first amendment rights to the free exercise of religion.[7] But in the arena of unemployment benefits this doctrine has been limited to the discussion of matters "of public concern." See Frigm v. Unemployment Compensation Board, 164 Pa. Cmwlth. 282, 291, 642 A.2d 629, 633 (1994). Quite simply, Mr. Beagan's comments about Mr. Morancey do not

[7] And, we in Rhode Island know that the first amendment is made applicable to the states under the fourteenth amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n. 1, 116 S.Ct. 1495, 134 L. Ed.2d 711

fall into that category. He may not therefore, interpose the first amendment as a defense to the denial of benefits.

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review denying benefits to claimant 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. 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 4, 2014

(1996).