STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Cynthia Boss	:	
	:	
v.	:	**A.A. No. 13 - 168**
	:	
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 REVERSED.

Entered as an Order of this Court at Providence on this 22nd day of December, 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. Cynthia Boss 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. 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; I therefore recommend that the decision of the Board of Review be REVERSED.

I
FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: in February of 2013, after fifteen years of service as a teacher, Ms. Cynthia Boss was terminated from the employ of the Woonsocket Department of Education; in truth, she had not taught since January of 2012. She filed an application for unemployment benefits on March 28, 2013 and on June 7, 2013, a designee of the Director of the Department of Labor and Training determined her to be eligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-18 — based on a finding that misconduct (i.e., excessive unauthorized absence) had not been shown.

Woonsocket filed an appeal and a hearing was held before Referee Nancy L. Howarth on July 15, 2013 and July 18, 2013. On July 25, 2013, the Referee held that Ms. Boss was disqualified from receiving benefits because the employer had proven misconduct. In her written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> The claimant was employed as a resource teacher by the employer. She had been absent from work for an extended period, due to medical issues, through the end of the 2011-2012 school year. Orientation for the 2012-2013 school year was scheduled for August 27, 2012. On August 23, 2012 the claimant received a voicemail message from the employer which indicated that she must meet with the superintendent and provide a release from her doctor, prior to returning to work.

The claimant reported to orientation on August 27, 2012 without a release. After approximately one hour the claimant's supervisor advised her that she would not be allowed to begin working until she provided a medical release by August 28, 2013 and met with the superintendent. On August 28, 2013 the claimant faxed the employer a copy of a release dated June 25, 2012, which indicated that she would be able to return to her position when school began in the fall. However, she did not meet with the superintendent. The claimant called out on August 30 and August 31, 2012, due to illness. She subsequently filed a Workers' Compensation claim, alleging that she had suffered a work related injury on August 27, 2012, due to the stress of being asked to leave and not being allowed to work. The claimant has not been granted Workers' Compensation benefits and the claim is still pending.

On September 2, 2012 the claimant provided the employer with a doctor's note dated August 30, 2012, which that stated the claimant was advised to continue her leave of absence until further notice. The claimant had no paid sick leave available at that time and never requested unpaid leave. 2012.

On September 13, 2012 the superintendent sent a letter to the claimant informing her that, Pursuant to the collective bargaining agreement, the claimant would be required to undergo an independent medical examination before being permitted to return to work. She requested that the claimant meet with her as soon as possible to arrange the examination. The claimant did not respond. On December 11, 2012 the superintendent sent a letter to the claimant indicating that she would be recommending to the school committee that the claimant be discharged, since she had failed to report for work for 67 days of the current school year and was considered to be on an unauthorized leave. The claimant was discharged subsequent to a school committee meeting on February 13, 2013, since she remained out of work without authorization during the 2012/2013 school year and had failed to comply with the superintendent's instructions.

Decision of Referee, July 25, 2013 at 1-2. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — the Referee pronounced the following conclusions:

> * * *
> 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 return to work after a medical leave, despite the fact that she had no paid sick time available and had not requested an unpaid leave of absence. I find that the claimant's actions constitute deliberate behavior in willful disregard of the employer's interest and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, July 25, 2013 at 2. The Claimant appealed and the Board of Review reviewed the matter.

Then, after a hearing on September 17, 2013 that included argument but not testimony, a majority of the members of the Board of Review affirmed the decision of the Referee and held that misconduct had been proven. The majority found the decision of the Referee to be a proper adjudication of the facts and the law applicable thereto and adopted the Referee's decision as its own. Decision of Board of Review, September 24, 2013 at 1. The dissent by the Member Representing Labor took the view that,

from the evidence of record, Claimant's absences were attributable to illness and did not constitute misconduct.

Ms. Boss filed a complaint for judicial review of the Board's decision in the Sixth Division District Court on October 2, 2013. On December 11, 2013 a conference in the case was conducted by the undersigned, at which a briefing schedule was set. Helpful memoranda have been received from the Claimant and the school department.

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.

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, 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.

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. 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.

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]

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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

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 enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV
ANALYSIS
A
Factual Review

The hearing conducted by Referee Howarth began with the usual housekeeping matters — i.e., the administration of the oath to the witnesses

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R.I. 503, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review,

(Referee Hearing Transcript I, at 3-4), the enumeration of exhibits that had been transmitted from the Department as part of the record (Referee Hearing Transcript I, at 4-16), and a discussion of the order of proof. (Referee Hearing Transcript I, at 16-19). These formalities done, the testimony began.

1

Testimony of Ms. Lombardo

At the initial hearing before the Referee on July 15, 2013, the employer presented one witness — Ms. Kathleen Lombardo. Referee Hearing Transcript I, at 1, 3, 16 et seq. Under questioning from the employer's counsel, she began her testimony by indicating that during the 2012-2013 school-year, Ms. Boss was employed by the Woonsocket Department of Education as a special-education teacher, but she did not teach. Referee Hearing Transcript I, at 20. In fact, she had been on family medical leave from January through August of 2012. Referee Hearing Transcript I, at 21; Referee Hearing Transcript II, at 21.

Ms. Lombardo testified that notice was given to Ms. Boss, both by e-mail and by telephone on August 23, 2012, that she would not be allowed to resume her teaching duties unless she first presented a doctor's note declaring

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Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

that she was medically fit to do so. Referee Hearing Transcript I, at 21, 38.[4] According to Ms. Lombardo, the notice gave Claimant until August 28, 2012 to submit such a document. Referee Hearing Transcript I, at 39. And, according to Ms. Lombardo, Claimant did receive a letter (that went to all teachers) telling her to report to a job fair/orientation on the 27th of August. Referee Hearing Transcript I, at 39-40 and Claimant's Exhibit No. 6.

Nevertheless, Ms. Boss attended (and participated in) the orientation for teachers held on August 27, 2012. Id.[5] As it happened, Claimant was the senior bidder on a resource teaching position. When she reported this fact to Superintendent of Schools, Ms. Giovanna M. Donoyan, Ph.D., she told Ms.

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[4] At the hearing before the Referee, Claimant played a recording of the message left by the Secretary. Unfortunately, much was unintelligible to the transcriber of the hearing — "(inaudible) this Donna from (inaudible) she wants to know if you are returning to work, (inaudible) and the length of time that you are out, at (inaudible) thank you." Referee Hearing Transcript I, at 43-44. In any event, Ms. Lombardo conceded (during cross-examination) that there was nothing about the need for an independent medical examination in the phone message. Referee Hearing Transcript II, at 2-3.

[5] Ms. Lombardo reports that she was unaware that Ms. Boss was in attendance until late in the morning, when she gave her a form to apply for a position. Referee Hearing Transcript I, at 21; Referee Hearing Transcript II, at 6. She testified she told Claimant at that time that she still had to provide her "full release" and to meet with the superintendent. Referee Hearing Transcript II, at 6.

Lombardo she wanted to meet with Ms. Boss before she returned to work; they also recalled that —as of that moment — they had not received her medical release. Referee Hearing Transcript I, at 53. And so, when Ms. Lombardo told Claimant she was a successful bidder, Referee Hearing Transcript I, at 52; Referee Hearing Transcript II, at 19, she also told her she would not be allowed to return to work until she met with the superintendent. Referee Hearing Transcript I, at 52.[6] Later that day, Ms. Boss reported to her new school building; at the behest of the school administration, her principal told her she could not remain on the premises because she had not yet presented a doctor's note regarding her fitness for work. Referee Hearing Transcript I, at 22-23; Referee Hearing Transcript II, at 6.[7] At this she took offense. Referee Hearing Transcript I, at 23.

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[6] Ms. Lombardo testified that Claimant could not come back to work "[b]ecause she never provided medical evidence that she could return to work." Referee Hearing Transcript I, at 30. On cross-examination, Ms. Lombardo conceded that a similar note Claimant had submitted in February of 2012 (from her physician, Penelope A. Yanni, M.D/Ph.D.) was sufficient to justify her absence. Referee Hearing Transcript I, at 48-51 and Employer's Exhibit No. 2, at 1. From her letterhead, it appears Dr. Yanni is engaged in a psychiatry/psychology practice.

[7] Such a note was presented by Ms. Boss the next day, August 28, 2012. Referee Hearing Transcript I, at 23 Referee Hearing Transcript II, at 9-10. But the school department observed that it was dated June 25, 2012. Referee Hearing Transcript I, at 25.

At this point everything changed. Ms. Boss ceased her efforts to return to work. The stalemate on this issue became moot. She reversed her position and took the position that she could not return to work.

On August 30, 2012 she presented another note from her doctor recommending that "she continue her leave of absence until further notice." Referee Hearing Transcript I, at 24-26; Referee Hearing Transcript II, at 11-12; and Claimant's Exhibit No. 3.[8] And she did not teach thereafter.

In her absence, her duties were performed by a substitute teacher. Referee Hearing Transcript I, at 29.

During her testimony, Ms. Lombardo repeatedly cited Woonsocket's desire that Ms. Boss undergo an independent medical examination. For instance, Ms. Lombardo told the Referee that Ms. Boss was informed in a September 12, 2012 letter that she would be required to submit to an evaluation by an independent physician. See Referee Hearing Transcript I, at 45-46; Referee Hearing Transcript II, at 14; also, Employer's Exhibit No. 3.

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[8] Technically, Ms. Boss was not on a leave of absence when this note arrived. Referee Hearing Transcript I, at 26, 28. She had used up all her sick time as of April of 2012. Referee Hearing Transcript I, at 27-28; Referee Hearing Transcript II, at 8-9, 21. Although, it appears that "the computer" gave her some "up front" sick days. Referee Hearing Transcript II, at 36.

But, she omitted to point out that this was set out as a prerequisite to her return to work, not as a justification for her absence from work.[9] She also stated Ms. Boss had been requested to do so the previous spring. Referee Hearing Transcript I, at 28.

Ms. Lombardo testified Ms. Boss never submitted herself for examination by an independent doctor. Referee Hearing Transcript I, at 29-30, 53 and Referee Hearing Transcript II, at 31.[10] She also opined that the school department did not "accept" that she was unable to work. Referee Hearing Transcript I, at 30. And she confirmed that a member of the school department's staff called the office of Ms. Boss's physician to confirm the substance of the doctor's note. Referee Hearing Transcript I, at 51. Also in

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[9] The relevant sentence is this — "Accordingly, pursuant to Section 6-12.02 of the collective bargaining agreement, you will be required to undergo an examination before being permitted to return to your duties." September 13, 2012 Letter from Superintendent Donoyan to Cynthia Boss, Employer's Exhibit No. 3, at 2. And Dr. Donoyan's linkage of this requirement to reinstatement was undoubtedly intentional, since she acknowledged receipt of Dr. Yanni's August 30, 2012 letter.

[10] On cross-examination she conceded that the school department never provided Ms. Boss with contact information for a particular physician. Referee Hearing Transcript II, at 13-15. And, on both direct and redirect examination she explained that the school department has the right under the collective bargaining agreement to request an independent medical examination if there has been a long absence due to illness. Referee Hearing Transcript I, at 28; Referee Hearing Transcript II, at 28-29.

the record is a January 22, 2013 letter from Dr. Yanni which confirmed Ms. Boss's inability to work. See Claimant's Exhibit No. 3, at 3.

Then, in December, Ms. Boss was given a notice of a termination hearing, which was ultimately held on February 13, 2013. Referee Hearing Transcript I, at 26-27. The letter it referenced — as the sole reason for her proposed termination — her absence from work. Referee Hearing Transcript II, at 23. Eventually, the School Committee ended her employment in their service because they needed a teacher in the classroom, and that, having given her "ample time," there was no anticipated end to her medical leave. Id. In answer to a question from the Referee, she confirmed that Ms. Boss was terminated because she was out on unauthorized unpaid leave. Referee Hearing Transcript I, at 53. The Claimant was terminated on February 26, 2013. Referee Hearing Transcript I, at 31.[11]

In response to a question from the Referee Ms. Lombardo testified that — if she had requested an unpaid leave of absence — it might not have been granted because she did not request it at the expiration of her FMLA leave. Referee Hearing Transcript I, at 31-33.

2

Testimony of Cynthia Boss

Next, the Claimant, Ms. Cynthia Boss, testified. Referee Hearing Transcript II, at 37 et seq. She stated that she had been working for the Woonsocket School Department since 1996. Referee Hearing Transcript II, at 37. At the time of her termination she was a "resource teacher." Id.

She testified that she could not comply with the voicemail she received from the school department on Thursday, August 23, 2012 — requiring her to present, by August 28, 2012, a new note from her physician indicating she was fit to return to work — because the time granted her to comply with the request was simply insufficient. Referee Hearing Transcript II, at 45. (She noted her doctor did not have office hours on Fridays. Id.)

Ms. Boss said she was indeed ready to return to work in the fall term of 2012. Referee Hearing Transcript II, at 56-57. And so, she went to the orientation, believing that she had until the next day — August 28, 2012 — to submit her note. Referee Hearing Transcript II, at 45. But then, that

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[11] The School Committee's action was subject to approval by the Woonsocket budget commission, which was then active. Referee Hearing Transcript I, at 31.

afternoon, when she was working at a particular school, the school's principal came in and told her that the superintendent said that she had to leave the school grounds immediately; and, according to Ms. Boss, "… she walked me off like a prisoner in front of all the staff." Referee Hearing Transcript II, at 48. After this, she went home and cried. Id. But, she felt she was abused. Referee Hearing Transcript II, at 59. Apparently, this incident affected her health, for, on August 30, 2012, she sent in a new note from her physician indicating that he was unable to return to work. Referee Hearing Transcript II, at 57-58, 64 and Claimant's Exhibit No. 3.

Ms. Boss testified that the incident caused her debilitating stress. Referee Hearing Transcript II, at 57, 59. As a result, she was prescribed an increase in her medication. Referee Hearing Transcript II, at 62. It resulted in her being bedridden. Id. And she briefly described the physical manifestations of her illness. Id. In short, she was incapacitated. Referee Hearing Transcript II, at 63.[12] But, management of the Woonsocket school department apparently had their doubts, for her doctor informed her that Ms.

[12] Claimant testified she was mostly incapacitated through February of 2013. Referee Hearing Transcript II, at 69.

Lombardo's office called her on several occasions to confirm the validity of the notes she had submitted. Referee Hearing Transcript II, at 49.

Claimant denied she was ever given contact information with which to set up an appointment with another doctor. Referee Hearing Transcript II, at 51, 65. Nor, she conceded, did she ever contact the School Department to acquire such information. Referee Hearing Transcript II, at 66.

B

Positions of the Parties

1

Position of Claimant

Claimant Boss denies that the record contains any evidence of misconduct on her part. Brief of Claimant Cynthia Boss, at 12 et seq. Legally — and this is the nub of her position — she argues that missing work due to illness, without more, is not misconduct. Brief of Claimant Cynthia Boss, at 14-17. Factually, she urges that there is no evidence that her assertion of illness was not true. Id., at 14-15.

2

Position of the Woonsocket Department of Education

Woonsocket, after citing the standard of review applicable to the instant case, argues in its brief that Ms. Boss's failure to comply with the

reasonable preconditions it had set to her return to duty constituted misconduct. Brief of the Woonsocket Department of Education, at 5. It further urges that the Referee (and the Board of Review) implicitly found the employee was not too sick to work. Id., at 6.

C

Discussion

As we related above, the Referee grounded her finding of misconduct on Claimant's extended and unauthorized absence from work, presumably due to illness. For convenience's sake, let us restate the Referee's 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 return to work after a medical leave, despite the fact that she had no paid sick time available and had not requested an unpaid leave of absence. I find that the claimant's actions constitute deliberate behavior in willful disregard of the employer's interest and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee Decision, at 2 (Emphasis added). The Referee's meaning is easily discerned — Ms. Boss was disqualified because of absences due to her purported illness in excess of her earned and allotted paid sick time. Ms. Howarth found Claimant's continued absence to "… constitute deliberate behavior in willful disregard of her employer's interest. …" Id. And so, it is

this one finding concerning which we must make two determinations: (1) is the conduct alleged sufficient to constitute misconduct under the Act? And if it was, (2) did the employer prove the allegation?

1

The Allegation — Extended Absences

This Court has long held that unexcused absences can constitute proved misconduct as that term is defined in § 28-44-18 and the Turner case. Of course, to constitute misconduct the absences must be volitional — attributable to willfulness, not a physical or mental inability.[13]

And absences due to bona fide illness do not per se trigger a § 18 disqualification; this Court has long held that absences due to illness constitute misconduct only where there is an aggravating factor — such as a failure to call-in to the employer[14] or a failure to provide the employer with medical documentation.[15] Neither of these situations is alleged here.

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[13] In support of this principle see Cogean v. Department of Employment and Training Board of Review, 658 A.2d 528, 530 (R.I. 1995)(Nursing home employee not found guilty of proved misconduct where she refused instruction to distribute patients' medicines at that moment where she had to attend to her own medical needs regarding her diabetes).

[14] E.g. Yesterday's–Newport v. Department of Employment Security Board of Review, A.A. No. 85-103, at 4-5 (Dist.Ct.10/03/89)(Cappelli, J.)(Award

Similarly, bona fide illness has long been deemed a good cause to quit a position; as a result, those who voluntarily leave the service of their employers due to illness are not disqualified under § 28-44-17.[16] But, does that mean that the unemployment taxes of employers must support their former workers who terminated employment not at their instigation or desire? No, it generally does not.

Within the Employment Security Act is a provision, § 28-44-12, which disqualifies claimants who are unable to work from receiving unemployment benefits. So, while a claimant who is physically or mentally unable to work will not be disqualified under § 28-44-18, he or she may still be disqualified under § 28-44-12. It is for this reason that we have two other programs to assist those who are unable to work for medical reasons — (1) workers' compensation, which aids workers who are injured on the job, and (2)

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of benefits reversed where Claimant did not find replacement or even notify employer).

15 E.g. Ewing v. Department of Employment and Training Board of Review, A.A. No. 93-232, at 8-9 (Dist.Ct.06/29/94)(DeRobbio, C.J.)(Denial of benefits affirmed where Claimant failed to provide employer with medical documentation justifying absence).

16 E.g. Heller v. Department of Employment Security Board of Review, A.A. No. 81-405, at 5-6 (Dist.Ct.04/30/85)(DelNero, J.)(Disqualification

temporary disability insurance, which aids those who are suffering from non-work-related illnesses and injuries.

2

The Proof — Extended Absences

In my view, after reviewing the transcript of the very long hearing conducted by the Referee in this case, I believe the consequential facts of this case may be simply stated —

Claimant was out on sick leave at the end of the 2011-2012 school-year. But as the new school-year approached, Claimant intended to return to work at the start of the fall term. To that end, she attended the orientation session Woonsocket held for its teachers on August 27, 2012. However, she was directed to leave (in her view, rudely escorted out) because she had not yet submitted a note from her physician stating that she was fit to return to her teaching position — even though she was given until the following day (August 28th) to submit that note.

Now, at this point Ms. Boss's previously stated desire to return to work evanesced, because her doctor reversed her position and stated, in a note

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reversed where there was sufficient evidence that medical documentation was provided to the employer).

submitted on September 02, 2012, that Claimant was no longer able to return to teaching. It appears this change in her status was attributable to the events of August 27, 2012. In any event, at this point, her compliance vel non with Woonsocket's preconditions for her to return to work (such as submitting a note and meeting with the Superintendent) became immaterial. They served only in the role of "red herrings." The sole remaining issue was whether Claimant justified her absence from work.

Claimant presented notes from her physician, a Doctor Yanni, justifying her absence during the fall 2012 term. A note of this same type was accepted by Woonsocket during the prior school-year. And we know that the School Department called on several occasions to check on her medical status. Opposing Dr. Yanni's expertise was mere innuendo.

3

Rationale

Notwithstanding the length of the transcript and the contentiousness exhibited during the hearing, I believe the issue before the Court is straightforward — Was Claimant properly disqualified from receiving unemployment benefits due to misconduct because she was absent from work

due to illness? Based on the facts outlined above, I believe the answer to this question must be no.

In the uncontradicted opinion of her physician, Claimant was unable to return to her position in the Woonsocket school system during the fall of 2012 school term. The school department did not even contest the validity of her illness. See Board of Review Transcript, at 17-18. To the contrary, its position is that — after an employee is out a certain amount of time — the employer must be able to terminate and the employee should be deemed ineligible to collect benefits. That may be true, and the Claimant may be properly disqualified, but not pursuant to section 18, for there is no proven misconduct.

So, the decision of the Board of Review in this case must be set aside. Nevertheless, as explained above, before affording Ms. Boss benefits, the Department is entitled to determine whether she met the Availability requirements of § 28-44-12 during the relevant portion of her benefit year.[17]

Pursuant to the applicable standard of review described supra at 5-7,

[17] See synopsis of the telephone interview with Claimant conducted by the adjudicator on April 18, 2013 in Department's Exhibit No. 3, at 5 (Form DLT 480). Surprisingly, the Referee cut off any discussion of her capability

the decision of the Board of Review 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. Nevertheless, applying this standard of review and the definition of misconduct enumerated in § 28-44-18, I must conclude that the Board's adopted finding that Claimant was discharged for proved misconduct in connection with her work — i.e., her extended absence — is clearly erroneous in light of the reliable, probative and substantial evidence of record.

V
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Furthermore, it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 §

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to return to work in early 2013. Referee Hearing Transcript II, at 70. As a result, the Department will have to confront the issue de novo.

42-35-15(g)(5). Accordingly, I recommend that the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

December 22, 2014