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

Matthew Deery	:	
	:	
v.	:	**A.A. No. 13 - 184**
	:	
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 27th 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. Mr. Matthew Deery 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. 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: Mr. Matthew Deery worked for Electric Boat for twenty-five months until he was terminated on May 9, 2013. He filed an application for unemployment but on June 28, 2013, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee Nancy L. Howarth on August 28, 2013. Two days later, the Referee held that Mr. Deery was disqualified from receiving benefits because the employer had proven misconduct. In her written Decision, the Referee made Findings of Fact on the issue of his termination, which are quoted here in their entirety:

> The claimant was employed as a sheet metal mechanic by the employer. The employer's policy prohibited writing of graffiti and provided that such conduct could result in disciplinary action, up to and including termination. The claimant was aware of the policy. On May 9, 2013 the claimant's supervisor observed him writing graffiti on a submarine. The claimant was suspended without pay, pending investigation. Two human resources representatives met with the claimant. The claimant

> admitted that he had written the graffiti. He was discharged on May 22, 2013 for violation of the employer's policy.

Decision of Referee, August 30, 2013 at 1. 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 hearing establish that the claimant wrote graffiti, although he was aware that this conduct was prohibited. I find that the claimant's actions constitute a knowing violation of a reasonable and uniformly enforced policy of the employer and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, August 30, 2013 at 2. The Claimant appealed and the Board of Review reviewed the matter.

On October 22, 2013, 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; moreover, it adopted the Referee's decision as its own. Decision of Board of Review, October 22, 2013 at 1.

Finally, Mr. Deery filed a complaint for judicial review in the Sixth Division District Court on November 4, 2013. On February 19, 2014 a conference in the case was conducted by the undersigned, at which a briefing schedule was set. On March 26, 2014 Claimant filed his brief, which I have found most helpful, in a timely manner; on May 19, 2014 the employer decided it would not submit a brief in this matter. As a result, I have proceeded to decide Mr. Deery's case without further delay.

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, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

III
STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d

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 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.

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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). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

IV
ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

V
ANALYSIS

The instant case has proceeded up the three steps of the administrative process that is jointly maintained by the Department of Labor and Training and its Board of Review — Mr. Deery's claim has been denied at each level. As previously set forth, the allegation here was that Mr. Deery breached a rule that Electric Boat had established banning writing graffiti on its materials.

A
Factual Review

At the initial hearing before the Referee the employer presented two representatives — (1) Mr. Buterbaugh, Senior Human Resources Representative, and (2) Ms. Barbara Davis, also a Human Resources Representative and Mr. Deery's direct supervisor. Referee Hearing Transcript, at 3.

Mr. Buterbaugh[4] testified that Claimant was terminated because, on May 9, 2013, he wrote graffiti on material being manufactured. Referee Hearing Transcript, at 21. While he did not witness this behavior, he was part of the Human Resource investigation. Id. It was, in fact, reported to human resources by Mr. Deery's supervisor, who witnessed it. Id.

Consistent with Electric Boat's procedure, Human Resources notifies the security unit, which undertakes an investigation. Id. He also testified that EB does not tolerate employees who write graffiti on components being manufactured. Referee Hearing Transcript, at 22. Mr. Deery, who had never been accused of any such conduct previously, was interviewed and admitted to the writing. Referee Hearing Transcript, at 22-23. Mr. Buterbaugh, who had worked at Electric Boat for 36 years, testified that he had been involved in this particular area of personnel relations for five years and in that time one person had been discharged for this cause. Referee Hearing Transcript, at 23-24.

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[4] A note of caution — At the outset of the hearing, it appears that Employer's Representative 1 is Mr. Buterbaugh and Employer's Representative 2 is Ms. Davis. Referee Hearing Transcript, at 3. Later, this appears to have changed. Referee Hearing Transcript, at 25.

Next, Ms. Davis testified. Referee Hearing Transcript, at 25 et seq. She also heard Mr. Deery admit he had done it. Referee Hearing Transcript, at 25.

Next, Mr. Deery testified that he began working for the employer on June 20, 2011 as a sheet metal mechanic and was suspended (pending his discharge) on May 9, 2013. Referee Hearing Transcript, at 26.

But when his attorney tried to question him about which shift he worked, the Referee disallowed the question. Referee Hearing Transcript, at 27. And when counsel protested, the Referee indicated to counsel that he would not be allowed to elicit testimony concerning anything prior to the last incident. Referee Hearing Transcript, at 28. Counsel specifically proffered that he wanted to bring out testimony that the employer's policy regarding graffiti was not uniformly enforced. Referee Hearing Transcript, at 29. At this point, Referee Howarth relented, and allowed counsel to proceed briefly on the issue. Referee Hearing Transcript, at 30.

Mr. Deery then testified that — on the second shift, which he worked from June of 2011 through January of 2013 — he saw many employees writing graffiti, and they were never written up. Referee Hearing Transcript, at 30. Instead, the supervisor would tell the workers to clean it up or erase it. Referee Hearing Transcript, at 31. As a result, he believed the policy was not

uniformly enforced. Id. The employer's representatives did not cross-examine Mr. Deery regarding this testimony or offer rebuttal testimony.

B

Discussion

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's action damaged the employer's product in any way or was in any way detrimental to its interests. So, under a traditional definition of misconduct, Mr. Deery could not be disqualified for his alleged (and admitted) graffiti-writing.

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.

In the instant case, I believe the employer proved all but the third of these prerequisites to disqualification — i.e., that the policy be uniformly enforced. Mr. Deery's testimony on this point was categorical and unrebutted: on the second shift such conduct was not punished.

This is not to challenge the veracity of the employer's witness who testified that one person had been terminated in the previous five years. It is perhaps true, unbeknownst to him, that the supervisors on the second shift did not enforce the rule as faithfully as did those working the day shift. In any event, it is clear that the statute's requirement of proof of uniform enforcement must extend to all shifts at a factory if it is to have any meaning.

Moreover, the Referee did not find Mr. Deery's testimony on this point to be incredible, which was within her discretion to do; instead, she simply ignored it.

Pursuant to the applicable standard of review described supra at 6-7, 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 his work — i.e., for violating a uniformly enforced and reasonable company rule — is clearly erroneous in light of the reliable, probative and substantial evidence of record.

VI
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 § 42-35-15(g)(5).

Accordingly, I recommend that the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

June 27, 2014