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

Christine Biron	:	
	:	
v.	:	**A.A. No. 14 - 002**
	:	
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

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
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Christine E. Biron	:	
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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. Christine E. Biron 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 affected by error of law; I therefore recommend that the decision of the

Board of Review be REVERSED.

I
TRAVEL OF THE CASE

The travel of the case is this: Ms. Christine E. Biron worked for Albion Court, a nursing home, for 2½ years until July 22, 2013. She filed a claim for unemployment benefits but on September 24, 2013, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was scheduled for October 17, 2013. But, the Claimant did not appear. Quite simply, she got lost on her way. A new hearing was scheduled for November 7, 2014 before Referee William Enos. On this occasion the Claimant appeared but the employer did not. The next day, the Referee held that Ms. Biron was disqualified from receiving benefits because she had been fired for misconduct. In his written Decision, the Referee made Findings of Fact on the issue of misconduct, which are quoted here in their entirety —

> The claimant worked as a CNA/Activities Coordinator for Albion Court for 2.5 years, last on July 22, 2013. The claimant stated that a new management company took over and she has had problems with them ever since. The claimant stated that a

> coworker was calling her names and they had words. The claimant stated that she never said anything to the coworker in front of residents. The employer submitted evidence to the Department of Labor and Training showing that the claimant had prior warnings for unprofessional behavior toward coworkers on January 29, 2013, March 10, 2013 and June 14, 2013.

Decision of Referee, November 8, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee pronounced the following conclusions:

> …
> I find that the evidence submitted at the hearing showed that the claimant had been warned 3 times about unprofessional behavior toward her coworkers. Therefore, I find that sufficient credible testimony has been provided to support the claimant actions were not in the employer's best interest.

Decision of Referee, November 8, 2013 at 2. The claimant appealed and the Board of Review deliberated on the matter.

On December 11, 2013, the Board of Review unanimously affirmed the decision of the Referee — finding it to be a proper adjudication of the facts and the law applicable thereto; the Board adopted the decision of the

Referee as its own. Finally, Ms. Biron filed a complaint for judicial review in the Sixth Division District Court on January 10, 2014.

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 judgment for that of the Board as to the weight of the evidence on questions

[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).

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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[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
ANALYSIS

It is our customary practice in section 18 (misconduct) cases to begin our analysis of a decision of the Board of Review by recounting the evidence and testimony adduced at the hearing, so that we may determine whether the findings made by the Board are supported by reliable, probative, and substantial evidence. Of course, when we do so, we are making an assumption (express or implicit) that the Board's findings regarding the claimant's behavior are — if supported by the record — sufficient as a matter of law to constitute misconduct within the meaning of section 18. In most cases this issue of law is not subject to serious debate. But it is in the instant case. Indeed, I believe that the findings made by the Board of Review regarding Ms. Biron are inadequate to satisfy the section 18 definition of misconduct.[4]

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[4] I refer here (and throughout Part IV of this opinion) to the Board of Review and not the Referee who authored the decision below because the Board adopted the decision of the Referee as its own. Moreover, the issue I am addressing is, as said above, not one of fact but one of law — whether the findings embraced by the Board, even if true, are adequate to justify a finding of misconduct.

I do not reach the issue of whether the Referee committed procedural error by failing to hold the employer to its burdens of production or persuasion. See Beth Dwares v. Department of Labor and Training Board of Review, A.A. No. 12-153, slip op. at 9-11 (Dist.Ct. 01/08/2014).

When the Board of Review considers a claim for unemployment (either de novo or by review of the record) where misconduct has been alleged, its first task is to identify the conduct which triggered the Claimant's termination. In Ms. Biron's case, the Board of Review found only that —

> … The claimant stated that a coworker was calling her names and they had words. The claimant stated that she never said anything to the coworker in front of residents. The employer submitted evidence to the Department of Labor and Training showing that the claimant had prior warnings for unprofessional behavior toward coworkers on January 29, 2013, March 10, 2013 and June 14, 2013.

Decision of Referee, at 1. This review shows that the Board's findings are made up entirely of noting (1) that Claimant denied she committed any untoward behavior on her final day of work and (2) that the employer had submitted documentation as to prior warnings into the record. No findings were made as to Claimant's conduct on her last day of work (or whether it was good or bad).

Now on the basis of these findings (such as they were) the Board concluded that —

> … [We] find that the evidence submitted at the hearing showed that the claimant had been warned 3 times about unprofessional behavior toward her coworkers. Therefore, I find that sufficient credible testimony has been provided to support the claimant actions were not in the employer's best interest. …

Decision of Referee, at 2. Thus, the Board's only conclusion was that the Claimant had been warned previously about improper conduct. The Board made no comment regarding the events that transpired on her last day of work — whether they constituted misconduct or not. Nevertheless, on this basis Ms. Biron was disqualified from receiving benefits pursuant to § 18.

Quite simply, I find the Board's conclusions inadequate. Prior warnings that did not result in her termination cannot, by definition, be adjudged the basis for a finding that she was terminated for misconduct.

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. Applying this standard of review, I must recommend that this Court hold that the Board's decision was legally flawed. I therefore recommend it be REVERSED.

V
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is affected by error of law and was made on unlawful procedure. Gen. Laws 1956 § 42-35-15(g)(3),(4).

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

/s/
Joseph P. Ippolito
Magistrate

December 22, 2014