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

Alina Phivilay	:	
	:	
v.	:	**A.A. No. 15 - 010**
	:	
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 1st day of June, 2015.

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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Alina Phivilay	:	
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Department of Labor and Training,	:	
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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. Alina Phivilay 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 supported by substantial evidence of record and was not affected by error of law; 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: Claimant was employed for five years by University Emergency Medical. Her last day of work was October 6, 2014. She filed a claim for unemployment benefits but on October 27, 2014, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-18 — based on a finding that she was discharged for proved misconduct.

Ms. Phivilay filed an appeal and a hearing was held before Referee Nancy L. Howarth on December 8, 2014. Claimant appeared and testified, as did three representatives of the Employer. The next day the Referee held that Ms. Philivay should not be disqualified from receiving benefits because the employer had not proven misconduct as that term is defined in § 28-44-18. In her written Decision, the Referee made Findings of Fact on the issue of misconduct, which are quoted here in their entirety:

> The claimant was employed as a data integrity clerk for the employer's medical practice. The claimant's responsibilities included insurance claims billing. Beginning in 2012 the

> claimant's work responsibilities increased substantially. The claimant repeatedly informed her supervisor and the practice manager that she was having difficulty performing her job duties, due to the large volume of work. The claimant was advised that she would have to work at a faster pace. At one point the work load was reduced and given to other employees. However, once she was able to perform her revised job duties she was again assigned to her original tasks. The claimant was absent from work, due to a leave of absence, from July 27, 2014 through October 5, 2014. During the claimant's absence the employer discovered 454 unbilled claims for the period of September 6, 2013 through June 20, 2014 on the claimant's desk. The claimant returned to work at the expiration of her leave on October 6, 2014. She was discharged.

Decision of Referee, December 9, 2014 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 not sustained its burden. There has been insufficient evidence and testimony presented at the hearing to establish that the claimant's actions constitute either deliberate behavior in willful disregard of the employer's interests or a knowing violation of a reasonable and uniformly enforced policy of the employer. Accordingly, I cannot find that the claimant's actions constitute misconduct under the above Section of the Act. In the absence of proved misconduct, benefits cannot be denied on this issue.

Decision of Referee, December 9, 2014 at 2. The employer filed an appeal to the Board of Review.

Then, on January 26, 2015, the members of the Board of Review conducted a hearing on the matter. Ms. Phivilay appeared, as did two representatives of the employer. Eleven days later, on February 6, 2015, the Board issued its decision, which reversed the Referee's decision in a split decision.

The majority of the Board found that misconduct had indeed been proven. The majority grounded this finding on the fact that several hundred claims were found in her desk —

> The Board concludes that the claimant's conduct in failing to disclose the status of some 454 secondary claims rises to the level of misconduct as defined in Section 28-44-18 of the Act. The claims were hidden in a drawer under other papers, encompassed a period of nine months and involved a substantial sum. Here actions were so negligent as to show a deliberate disregard of the employer's interest.

Decision of Board of Review, February 6, 2015, at 2. The Member Representing Labor dissented, attributing Claimant's actions to mere incompetence, which is not disqualifying. Decision of Board of Review, February 6, 2015, at 2.

Finally, Ms. Phivilay filed a complaint for judicial review of the Board of Review's decision in the Sixth Division District Court on April 23, 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. —** … For benefit years beginning on or after July 6, 2014, 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 earnings greater than, or equal to eight (8) times, his or her weekly benefit rate 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]

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,

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

> 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 the Board of Review began with the usual housekeeping matters, including — the identification of those present (the Claimant; Ms. Danielle Renzo, the Human Resources Director; and Ms. Lori Silvia, the Billings Operation Manager) and the administration of the oath to all witnesses. Board of Review Hearing Transcript, at 2-3. Counsel for the Board informed the parties that the Board had received the testimony taken before the Referee, so it would not be necessary to repeat that testimony.

Board of Review Hearing Transcript, at 4. These preliminaries done, the testimony commenced.

1

Board of Review Hearing: Testimony of Ms. Renzo

At the outset of her presentation, Ms. Renzo stated that the employer disagreed with the Referee's findings and, in addition, felt that they were not able to give their "full statement" at the prior hearing. Board of Review Hearing Transcript, at 4. She indicated that the crux of the case for the employer was the 454 claims hidden under a box of envelopes in Ms. Phivilay's bottom desk drawer, which should have been mailed out to the insurance company. Board of Review Hearing Transcript, at 4-5.

Ms. Renzo said that these claims were not being held up by bad addresses, as was discussed at the prior hearing, since that task had been outsourced to a collection agency in April of 2014. Board of Review Hearing Transcript, at 5-6.

She indicated that another alleged problem in processing the claims that was raised at the earlier hearing — the addition of a new location — was also what we might call a red herring, since that office did not open until October of 2014. Board of Review Hearing Transcript, at 5-6.

In answer to a question posed by the Chairman, Ms. Renzo confirmed that the claims in question had a monetary value of about $20,000.00. Board of Review Hearing Transcript, at 6. She indicated that, when they located these billings, they had to reassign staff to address them; moreover, the employer lost money due to the untimeliness of its submissions. Id.

Responding to a question put by the Member Representing Labor, Ms. Renzo explained that Ms. Phivilay was the sole employee handling "secondary claims" — which she defined as a claim that has not been paid in full by the insurance company with primary responsibility, when there is an insurer with secondary responsibility. Board of Review Hearing Transcript, at 6-7.[4] She confirmed that, because the process was delayed, the employer was unable to collect a certain amount of funds. Board of Review Hearing Transcript, at 8.

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[4] Ms. Renzo gave an example of the way this process works —

> … so if you have Medicare and Blue Cross Blue Shield it is getting it off to Blue Cross Blue Shield that we are speaking of. So we would get the payment from Medicare, transfer it to the responsibility of Blue Cross, print the claim and attach Medicare's payment summary and mail it.

Referee Hearing Transcript, at 7.

2

Board of Review Hearing: Testimony of Ms. Phivilay

Claimant testified that, due to a car accident she was involved in on July 26, 2014, she was on FMLA leave[5] until October 6, 2014 — the day she got back, which was also the day she was fired. Board of Review Hearing Transcript, at 8-9. Ms. Phivilay told the Board that she had a substantial amount of work every day and that she told her superiors about the work in her desk. Board of Review Hearing Transcript, at 9. Indeed, she indicated that her supervisor knew "exactly" how many cases she had. Board of Review Hearing Transcript, at 9-10.[6]

3

Board of Review Hearing: Testimony of Ms. Lori Silvia

Ms. Silvia, the Billings Manager, countered that the documents all related to the period prior to her accident, some dating back to September of 2013. Board of Review Hearing Transcript, at 10. Ms. Silvia denied that

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[5] Claimant testified before the Referee that she had been receiving Temporary Disability Income (TDI). Referee Hearing Transcript, at 6.

[6] She explained that a lot of the claims were from Neighborhood Rhode Island because they weren't going through electronically and had to go through as paper claims. Board of Review Hearing Transcript, at 9.

management knew she had claims in her drawer. Board of Review Hearing Transcript, at 11. To the contrary, according to Ms. Silvia, they would ask her each day how her week was coming; and, if she needed help, they would pull someone to help. Id.

4

Testimony from the Referee Hearing

Because the testimony taken by Referee Howarth at the hearing she conducted was considered by the Board, we should, at least generally, describe those proceedings. The hearing began, as is custom, with the identification of witnesses and the marking of exhibits. Referee Hearing Transcript, at 2-8. Then the Referee explained the process (such as the burden of proof and the order of proof) to the parties. Referee Hearing Transcript, at 8.

The Referee then called upon Ms. Phivilay to explain the reason why her appeal was apparently late, which she did. Referee Hearing Transcript, at 8-11.[7]

[7] In her December 9, 2014 decision, Referee Howarth ruled that Claimant's appeal was not, in fact, late. Decision of Referee, at 1.

The Referee then called upon Ms. Silvia to set out the conduct that the employer relied upon in alleging disqualifying misconduct on Claimant's part. Referee Hearing Transcript, at 12. She indicated that on about August 5, 2014, while Claimant was out on leave, they were looking in her desk for refund envelopes when they saw 453 un-mailed items, so-called secondary claims for reimbursement. Referee Hearing Transcript, at 12-13. These items, about $20,000.00 worth of claims, were dated from September of 2013 through June of 2014. Referee Hearing Transcript, at 14.

Ms. Renzo described this incident as the last straw. Referee Hearing Transcript, at 15. According to Ms. Renzo, management had communicated the importance of the secondary claims; and had been told they were all caught up. Referee Hearing Transcript, at 15. Ms. Phivilay, who was a "data integrity clerk," was the subject of prior warnings. Referee Hearing Transcript, at 16.

Ms. Renzo told the Referee that Ms. Phivilay had received prior warnings for being unable to complete her duties in a timely fashion. Referee Hearing Transcript, at 16. The warning, dated April 22, 2014, included suggestions regarding ways she could improve her output. Referee Hearing

Transcript, at 17. One of these suggestions was that all secondary claims be sent out within 24 hours. Id.[8]

The Referee turned to Ms. Phivilay and asked her whether she disagreed with the employer's testimony. Referee Hearing Transcript, at 20. She responded no — but indicated she would like to make a statement. Referee Hearing Transcript, at 20. And she did. Referee Hearing Transcript, at 21.

Ms. Phivilay indicated that the workload had increased during the last two years she had worked for the employer, especially in the area of bad addresses — of which there were hundreds each day. Referee Hearing Transcript, at 21-23.[9] But while she insisted that she kept her supervisors informed of the volume of work she was handling, she was not sure that they knew how old some of the material was. Referee Hearing Transcript, at 24-25.

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[8] At this juncture Ms. Renzo reminded the Referee that some of the secondary claims found in her desk dated back to September of 2013. Referee Hearing Transcript, at 17.

[9] Claimant explained that the (secondary) insurance company would return claims if the patients' addresses were incorrect. Referee Hearing Transcript, at 25, 28-29.

B

Rationale

In my view, the Board of Review's decision finding that Ms. Phivilay was guilty of misconduct — by failing to properly advise her supervisors at University Emergency Medical regarding the age of (and the quantity of) secondary claims she had in her custody — was well-supported by the evidence of record.

The Board of Review had every right to rely on the employer's testimony that they had not been informed she was holding so many old claims in her desk; and, if the Board accepted this testimony, it could find that Claimant affirmatively secreted the claims in her desk to avoid criticism of her productivity. The Board's conclusion can also be said to be supported by Claimant's inability to assure the Referee (when asked) that she had kept them so informed of the age of the claims she was holding.

And, in determining that Claimant's failings caused real harm to the employer's interests, the Board could also rely on the employer's testimony that their failure to submit claims to the secondary insurers in a timely manner (due to Claimant's lack of frankness) resulted in some of them going unpaid — due to the claims being submitted after the window for submission had

closed. So, real dollars were lost by University Medical. Accordingly, the Board was fully justified in finding Claimant's actions were in disregard of the employer's best interests and were, in fact, financially injurious.

On the other hand, I do not mean to imply that the alternative construction put on the Claimant's actions (by the Member Representing Labor and the Referee) was patently unreasonable — i.e., that Claimant was trying her best but was simply not able to keep up with the volume of tasks assigned to her. However, that is not the question before us. As stated above, the question is whether the Board's finding was supported by competent evidence of record. And I believe it certainly was.

Pursuant to the applicable standard of review described ante at 7-9, 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 and the definition of misconduct enumerated in § 28-44-18, I must conclude that the Board's finding that Claimant was discharged for proved misconduct in connection with her work — i.e., hording secondary claim forms until they became stale and valueless — is not 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 not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Furthermore, 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). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

June 1, 2015