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

SIXTH DIVISION

Todd A. Ottilige	:	
	:	
v.	:	**A.A. No. 10-150**
	:	
Department of Labor and Training, Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this administrative appeal Mr. Todd A. Ottilige urges that the Board of Review of the Department of Labor & Training erred when it found him disqualified from receiving employment security benefits pursuant to Gen. Laws 1956 § 28-44-18 of the Rhode Island Employment Security Act. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to G.L. 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to G.L. 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review finding claimant disqualified from receiving benefits based on the circumstances of his termination from the employ of Calson Corporation 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.

FACTS & TRAVEL OF THE CASE

Claimant had been employed by Calson Corporation as a construction foreman for four years until he was discharged on September 18, 2009. He filed for unemployment benefits and on January 13, 2010, the Director of the Department of Labor and Training found him to be disqualified from the receipt of unemployment benefits, finding that Mr. Ottilige had been terminated for proved misconduct pursuant to Gen. Laws 1956 § 28-44-18. The Director's Decision included an order of repayment for unemployment benefits received to that point. Claimant filed a timely appeal and on April 2, 2010 a hearing was held before Referee William G. Brody at which the claimant and two employer witnesses appeared and testified. See Referee Hearing Transcript, at 1.

The Referee's May 17, 2010 decision included the following Findings of Fact:

> The claimant had worked for this employer as a foreman on a construction crew for approximately four years. He was discharged. The claimant's discharge became as a result of his poor attitude toward his supervisors, expressed both to his supervisors and to third parties who dealt with the employer.

Referee's Decision, May 17, 2010, at 1. Based on these findings, and after quoting from section 28-44-18, Referee Brody made the following Conclusions:

> The claimant's conduct with respect to his supervisors lack the appropriate discipline and respect required in an employment situation. His treatment of his supervisor and his comments to the third party constitutes insubordination and misconduct within the meaning of the Act.

Referee's Decision, May 17, 2010, at 2. Thus, the referee determined that the claimant was discharged under disqualifying circumstances within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 2. Accordingly, he affirmed the decision of the Director. Id.

The claimant filed a timely appeal and the case was reviewed by the Board of Review. On June 18, 2010, a majority of the Board found that the Referee's decision was a proper adjudication of the facts and the law applicable thereto and it adopted the Referee's Decision as its own. See Decision of Board of Review, at 1. The Member Representing Labor dissented. See Decision of Board of Review, at 2. Finally, Mr.Ottilige filed a complaint for judicial review in the Sixth Division District Court.

APPLICABLE LAW

Under § 28-44-18 of the Rhode Island Employment Security Act, "an employee discharged for proven misconduct is not eligible for unemployment benefits if the employer terminated the employee for disqualifying circumstances connected with his or her work." Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004). With respect to proven misconduct, § 28-44-18 provides, in pertinent part, as follows:

> For the purposes of this section, "misconduct" shall be 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 which is fair and reasonable to both the employer and the employed worker. * * *

The Rhode Island Supreme Court has adopted a general definition of the term, misconduct, holding as follows:

> " '[M]isconduct' * * * 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 employer's interest or of the employee's duties and employer's interest or 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."

Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984)(citing Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 [1941]). In cases of discharge, the employer bears the burden of proving misconduct on the part of the employee in connection with his or her work. Foster-Glocester Regional School Committee, 854 A.2d at 1018.

STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under § 28-44-52. The standard of review is provided by G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> The court shall not substitute its judgment for that of the agency as to 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 constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon lawful 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."

The scope of judicial review by this Court is also limited by Gen. Laws 1956 § 28-44-54, which in pertinent part provides:

> The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules shall be conclusive.

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. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980)(citing § 42-35-15(g)(5)). The Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). "Rather, the court must confine itself to review of the record to determine whether "legally competent evidence" exists to support the agency decision." Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993)(citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d at 363.

ANALYSIS

I. Misconduct

The Referee's decision included sparse findings of fact and brief conclusions of law. As a result, it has been necessary for me to review the record with greater effort than is customary to insure a full understanding of the record. After doing so, it is completely clear that to me that Mr. Ottilige was fired for his treatment of his supervisor and comments made to third parties. And, without endorsing the brevity of the Referee's decision or the employer's failure to present percipient witnesses to Mr. Ottilege's alleged misconduct at the hearing below, I have concluded, after an examination of the entire record certified to this Court by the Board of Review and the memoranda submitted by the parties, that the Referee's decision finding claimant was discharged for proved misconduct is supported by substantial evidence of record and is not clearly erroneous.

At this juncture, I shall summarize the testimony received by the Referee:

Alfred Calcagni, Vice-President of Calson Construction Corporation, testified that claimant was assigned by Calson to a project at Rhode Island Resource Recovery, where he was supervised by Michael Miranda. See Referee Hearing Transcript, at 5-6. He presented two allegations of misconduct against Mr. Ottilige.

The first was that he represented himself as the site supervisor for Calson to the project manager for Resource Recovery, which was in fact Mr. Miranda. Referee Hearing Transcript, at 6. On cross-examination, Mr. Calcagni indicated the comment

was made to "Inga" — to whom he'd spoken on numerous occasions — in December of 2008. Referee Hearing Transcript, at 8.

The second was a comment he made to the owner of the gravel pit where he called Mr. Miranda a "shyster."[1] Referee Hearing Transcript, at 7. He placed this incident at the "beginning of September maybe." Id. Mr. Calcagni stated that after the discharge he asked claimant why he would use such a word. Id.

Mr. Miranda testified that claimant would tell everybody " * * * that he was the boss and I wasn't and not to listen to me and just, this was a day in and day out thing." See Referee Hearing Transcript, at 9. Not only did Mr. Miranda learn this from the people claimant spoke to, but he confronted claimant directly — and was rebuffed. Id.

Claimant testified that he worked as Mr. Miranda's "direct employee" and would check in with him during the day. Referee Hearing Transcript, at 10. He stated that a week before he was fired he spoke to "Alfred" — presumably, Mr. Calcagni — and asked to be able to run his own job. Referee Hearing Transcript, at 13. Mike said he was disappointed in this. Id. He said that the only thing he said to Inga [of Resource Recovery] was that he [i.e., claimant] was the foreman and he was responsible because he [presumably, Mr. Miranda] wasn't there on site. Referee Hearing Transcript, at 14.

Claimant also spoke to the allegation that he slandered Mr. Miranda. He indicated that in the beginning of September the owner of the pit from which Calson was drawing material — whom he identified as "Ed" — spoke to him in early

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1 According to the American Heritage Dictionary, "shyster" is a slang word for "an unethical, unscrupulous practitioner, especially of law." (4th ed. 2000).

September because he was concerned about "product count." Referee Hearing Transcript, at 14. Although this was not explained, it seems claimant was implying Ed thought he was being shorted on the count. Specifically, he was unhappy with the count he was getting from Mike [Miranda]. Id. A Calson truck driver who was present suggested he get the count from the drivers and claimant suggested he speak to Alfred Calcagni. Referee Hearing Transcript, at 14-15. Claimant spoke to Mr. Calcagni. Referee Hearing Transcript, at 15. Claimant admitted using term "shyster" in the conversation with "Ed" but denied it was directed at Mr. Miranda; to the contrary, he testified he told "Ed" there's a "shyster" in every business but not Calson. Referee Hearing Transcript, at 17.

As the brief review of the testimony adduced at the hearing demonstrates, the employer did not produce a percipient witness who heard the comments which led to Mr. Ottilige's termination. Contained in the record — in Director's Exhibit 1 — are two statements which Calson presented to the Department which are most probative as to the second — *i.e., the slander* — allegation.

The first statement — dated 11/25/09 — is from Russell Martin, the operator of a tractor-trailer dump who works as an independent contractor for Calson. In his statement, he indicated that when working at the Resource Recovery job claimant indicated that the drivers should not listen to Mike Miranda because he was in charge; he also used a profane epithet toward Mr. Miranda. See Director's Exhibit 1, at 9. Regarding the second allegation Mr. Martin's statement includes a statement that in

early September of 2009 he heard claimant say to Ed — "Ed, be careful of that Mike, he's a shyster." Id.

The second statement [dated 11/25/09] was from Mike Trusty, also an independent-contractor driver. He too verifies that the term "shyster" was said by claimant in reference to Mike Miranda. See Director's Exhibit 1, at 12.

While Gen. Laws 1956 § 42-35-10(a) provides that the rules of evidence shall be followed in administrative proceedings, Board of Review cases are specifically exempted from this provision rule by Gen. Laws 1956 § 42-35-18(c)(1). Nevertheless, it has been the Board's longstanding practice to require first-hand witnesses to meet the burden of proving misconduct. Given the importance of unemployment benefits to claimants who well may be in economic distress after losing a position, this procedure is entirely reasonable.

Nevertheless, a majority of the Board approved the Referee's deviation from the general rule in this case. While they chose not to explain their rationale [or issue a full decision], I think the answer may be this: While it may be entirely appropriate to hold firm to the first-hand witness rule when the potential percipient witnesses are employees of the employer-respondent, it is harder to enforce when they are self-employed persons, like Mr. Martin and Mr. Trusty.[2] The statements these gentlemen

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2 Or, for that matter, the employees of a separate firm.

submitted were specific and precise; indeed, they were more cogent than the testimony of the Calson officials whose testimony was predominantly vague and off-the-mark.[3]

I further believe that the claimant's conduct in this case meets the definition of misconduct found in § 28-44-18 as interpreted in Turner, supra, at 3-4. Insulting his supervisor, calling his honesty into question, undoubtedly jeopardized Calson's relationship with its contractor and was therefore adverse to Calson's interests and inconsistent with the standards of behavior Calson had every right to expect from its foreman.

The decision of the Board 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. Based on the above cited testimony and evidence of record demonstrating that claimant violated the store manager's specific instructions not to contact any store employees, I must find that the Board's decision that the claimant's conduct —in particular, calling Mr. Miranda a "shyster" constituted "misconduct" under § 28-44-18 is supported by substantial evidence of record and was not clearly erroneous.

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3 As stated above, a firm desirous of disqualifying a terminated employee from the receipt of benefits should plan on sending employees with first-hand knowledge of the event in question to the referee hearing; since the employer bears the burden of proving misconduct, counsel to present its case lucidly is usually helpful as well.

2. Repayment

Without citation to the appropriate section of law — Gen. Laws 1956 § 28-42-68 — the Referee found claimant to be subject to an order of repayment for unemployment benefits he received before the Director's decision was issued on January 13, 2010. He did so based on the following brief finding:

> When applying for benefits the claimant represented that he had been laid off.

Decision of Referee, May 17, 2010, at 1. He then made the following conclusion:

> In that the claimant misrepresented the reason for the end of his job, it would not defeat the purpose of the Act to require repayment as ordered by the Director.

Decision of Referee, May 17, 2010, at 2.

At the hearing, the employers provided no testimony regarding what, if anything, claimant was told when he was fired by Calson. Also, the Department presented no evidence regarding the manner in which claimant applied for his claim. Claimant testified — without contradiction — that on Friday, September 18, 2009, Mike appeared where he was working and handed him his check and told him that he was " * * * no longer needed." Referee Hearing Transcript, at 19, 20, 24. However, claimant conceded he did say he was laid-off when he applied for benefits, which he felt was correct. Referee Hearing Transcript, at 23. I draw no inference of deception because claimant repeated this statement when he was contacted by the Department's interviewer on November 25, 2009. See Director's Exhibit 1, at 1. In that same statement, Mr. Ottilige also described, extensively and forthrightly, the incidents with

Mr. Miranda and with the customer. Id. On this record, we simply do not know what claimant said to the Department when he applied for benefits. Accordingly, I find there is no proof that claimant deceived the Department or its interviewer. Therefore, I recommend that the order of repayment be vacated.

CONCLUSION

After a through review of the entire record, this Court finds that the Board's decision to deny claimant unemployment benefits under § 28-44-18 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g)(5)(6). Accordingly, I recommend that the decision of the Board be affirmed on the issue of claimant's disqualification for misconduct but vacated as to the order of repayment.

Joseph P. Ippolito
Magistrate

January 19, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Todd Ottilige	:	
	:	
v.	:	**A.A. No. 10 - 0150**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

ORDER

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, 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 19th day of JANUARY, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge