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

Memorial Hospital of Rhode Island	:	
	:	
v.	:	**A.A. No. 10-155**
	:	
Department of Labor & Training,	:	
Board of Review	:	
(Maria Gomes)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this administrative appeal Memorial Hospital of Rhode Island urges that the Board of Review of the Department of Labor & Training erred when it found a former employee, Ms. Maria Gomes, eligible to receive employment security benefits pursuant to G.L. 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 Ms. Gomes eligible to receive benefits to be 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 Memorial Hospital as a certified nursing assistant for ten years until she was discharged on January 7, 2010. She filed for unemployment benefits

but on March 16, 2010 the Director of the Department of Labor & Training denied her claim, finding Ms. Gomes had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on May 24, 2010 a hearing was held before Referee William G. Brody at which the claimant and an employer representative appeared and testified. See Referee Hearing Transcript, at 1.

In his June 9, 2010 decision, the Referee made the following findings of fact:

> 2. FINDINGS OF FACT:
>
> The claimant had worked for this employer as a certified nursing assistant for approximately 10 years. She was discharged after it was reported that the claimant was found sleeping while on duty. No direct evidence of that allegation was presented to the referee.

Referee's Decision, at 1. Based on these findings, and after quoting the standard of misconduct found in section 28-44-18, the Referee made the following conclusions:

> * * * In cases such as this the burden of establishing proof of misconduct is on the employer. That burden has not been met.

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

The claimant filed a timely appeal on June 10, 2010 and the matter was reviewed by the Board of Review. Then, on July 1, 2010, the Board of Review unanimously affirmed the referee's decision, finding it to be an appropriate adjudication of the facts and the law applicable thereto and adopted the referee's decision as its own. See Decision of Board of Review, at 1. On July 30, 2010, Memorial Hospital 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

It cannot be questioned that the allegations against claimant were serious. If proven, they would certainly justify claimant's disqualification from the receipt of benefits. The referee allowed benefits to Ms. Gomes only because he found the employer had not met its burden of proof as to these allegations.

It should be noted that the Hospital sent only one witness to the referee's hearing: Ms. Jean Forcelli, its Recruitment Coordinator. See Referee Hearing Transcript, at 2. She testified that Ms. Gomes was found sleeping by two nurses at a time when she was monitoring a patient who required constant observation. See Referee Hearing Transcript, at 4. She did not name the nurses.

In response, Ms. Gomes denied these allegations. See Referee Hearing Transcript, at 5-6.

This Court has long held that witnesses with first-hand knowledge are generally necessary to meet an employer's burden of proving misconduct. But, we need not revisit the propriety of this rule in this case, since the testimony presented falls far short of any reasonable standard. Ms. Forcelli was not a percipient witness; neither did she relate that she

had spoken to the nurses in question directly; neither did she name them. To the contrary, she presented mere rank hearsay — concerning which we cannot determine the degree of its remoteness. The referee was well within his authority and discretion to find her testimony to be without probative value.

In its Memorandum, the Hospital urges that the Referee and the Board should've done more extensive fact-finding — and by doing so filled in the gaps in the employer's case, such as the identity of the nurses who saw claimant asleep. I believe this argument is unpersuasive for two reasons.

Firstly, as to the Referee, this allegation is wrong because it disregards the neutrality that all hearing officers much demonstrate. It is not the Referee's role to present the employer's case. Secondly, as to the Board, this argument is misplaced because the Board declined to hold a further hearing. Instead, it relied on the record of the proceedings before the referee, which it is fully authorized to do by Gen. Laws 1956 § 28-44-47.

Ultimately, by failing to present appropriate witnesses, the Hospital was penny-wise and pound-foolish.

Based on the limited testimony presented at the hearing before the Referee, I must find that the Board's decision that the employer failed to prove claimant committed "misconduct" under § 28-44-18 is supported by substantial evidence of record and was not clearly erroneous.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to grant 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.

Joseph P. Ippolito
Magistrate

January 11, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Memorial Hospital	:	
	:	
v.	:	**A.A. No. 10 - 0155**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	
(Maria Gomes)	:	

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 11 day of JANUARY, 2011.

By Order:

Melvin J. Enright
Acting Chief Clerk

Melvin Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge