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

R.I. Temps, Inc.	:	
	:	
v.	:	**A.A. No. 10-0163**
	:	
Department of Labor & Training,	:	
Board of Review	:	
(Michael F. Wittliff)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this administrative appeal R.I. Temps urges that the Board of Review of the Department of Labor & Training erred when it found a former employee, Mr. Michael F. Wittliff, 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 Mr. Wittliff 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 RI Temps for eight months until he was discharged on December 15, 2009. He filed for unemployment benefits but on February 22, 2010 the

Director of the Department of Labor & Training denied his claim, finding Mr. Wittliff had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on May 5, 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 7, 2010 decision, the Referee made the following findings of fact:

> 2. FINDINGS OF FACT:
>
> The claimant had worked for this employer for approximately eight months. He was discharged after allegations that he had engaged in an altercation with a co-worker. The only direct evidence of the interaction between the claimant and the co-worker is the testimony of the claimant. The claimant indicates that he never touched the co-worker.

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 misconduct had not been proven and the claimant was not 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 reversed the decision of the Director. Referee's Decision, at 2.

The claimant filed a timely appeal on June 9, 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 29, 2010, RI Temps 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 Board 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 Mr. Wittliff only because he found the employer had not met its burden of proof as to these allegations.

It should be noted that RI Temps sent only one witness to the referee's hearing: Mr. Scott Seaback, its President. See Referee Hearing Transcript, at 2. Mr. Seaback had no personal knowledge of the incident. He expressed surprise that claimant was denying the allegation. See Referee Hearing Transcript, at 6.

In response, Mr. Wiitliff denied that he assaulted the co-worker and stated that he "flicked" the man's hat off because the gentleman was grabbing his [i.e., claimant's] arm. See Referee Hearing Transcript, at 4-5. He said –

> I never touched him, but I flicked his hat. His hat did not fall off his head. I felt at the time that that was the least restrictive force that I could use in order to get him to let go of my arm. I have been trained as a reserve sheriff. And as a clinical psychologist I'm well astute in the resolutions of conflict. And when he wouldn't let go and I had no further support, I did not touch him. But I wanted to get his attention to get him to let go. And I flicked his hat.

Referee Hearing Transcript, at 5.

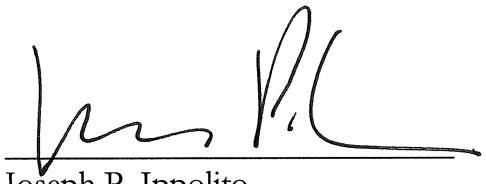
Thus, the Referee had to weigh Mr. Wittliff's denial of wrongdoing under oath against Mr. Seaback's incredulity. Although the employer referred to letters he had received from claimant regarding the incident, none were presented as evidence. Referee Hearing Transcript, at 6. And, given Mr. Seaback's professed astonishment at claimant's denials, it may be noted that Mr. Wittliff told the same story to the Department's interviewer in January, more than three months earlier. See Director's Exhibit 1, at 1.

Given the state of the evidence in this case, the Referee was well within his sound discretion to find that claimant failed to meet its burden of proof as to misconduct. And since the employer presented virtually no evidence, it is not necessary to invoke the rule, long adhered to by the Board and this Court, that witnesses with first-hand knowledge are generally necessary to meet an employer's burden of proving misconduct.

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

RI Temps, Inc.	:	
	:	
v.	:	**A.A. No. 10 - 0163**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	
(Michael Wittliff)	:	

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