**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**

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

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| **Colleen Klink** | : | |
| | : | |
| **v.** | : | **A.A. No. 10 - 0231** |
| | : | |
| **Department of Labor and 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 30th day of MARCH, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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| | | |
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| **Colleen Klink** | : | |
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| **v.** | : | **A.A. No. 10 - 231** |
| | : | |
| **Department of Labor and Training,** | : | |
| **Board of Review** | : | |

## FINDINGS & RECOMMENDATIONS

**Ippolito, M.** In this administrative appeal Ms. Colleen Klink urges that the Board of Review of the Department of Labor & Training erred when it found her disqualified from receiving employment security benefits because she was terminated for proved misconduct 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 Gen. Laws 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 her termination from the

employ of the Town of Lincoln 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 the Town of Lincoln as its Animal Control officer until October 15, 2009, when she was placed on administrative leave prior to her discharge. She filed for unemployment benefits but on April 5, 2010, the Director of the Department of Labor and Training found her to be disqualified from the receipt of unemployment benefits, noting that Ms. Klink had been terminated for proved misconduct pursuant to Gen. Laws 1956 § 28-44-18. Claimant filed a timely appeal and on September 8, 2010 a hearing was held before Referee Carl Capozza at which the claimant appeared with her attorney and the town was represented by its attorney and two witnesses. See Referee Hearing Transcript, at 1-3. By stipulation of counsel, no new testimony was taken but documentary evidence from previous proceedings was submitted. See Referee Hearing Transcript, at 3.

The Referee's September 21, 2010 decision included the following Findings of Fact, which, at the outset, are quite general but, at the close, became quite specific:

> In January 2009 the Lincoln Town Administrator appointed a Captain within the Lincoln Police Department to oversee and supervise the

> Animal Control Division and the performance and activities of the claimant with regard to divers (sic) deficiencies in the operation of the shelter including failure of compliance with state licensing requirements and policies.
>
> During the period from January through October, 2009, claimant's supervisor consulted with her regarding those deficiencies and outlining the same. Claimant was provided with considerable latitude and time to bring the shelter into compliance with his directives. Despite repeated verbal communications and warnings, claimant disregarded and continued to disregard those directives.
>
> In addition to her other duties, claimant was not up to date with monthly reports as required. In an effort to enable the claimant to bring those reports current, she was given additional compensable time to do so. Notwithstanding that additional time, claimant failed to provide up to date reports and when questioned provided no reasonable explanation.
>
> In addition, it was determined that claimant had completely disregarded her supervisor's directives regarding the requirement that applications for animal adoptions be reviewed by him prior to any denials.
>
> When those monthly reports were not received by the employer supervisor in October 2009 as directed, it was determined to terminate the claimant for insubordination regarding failure to follow her supervisor's directives.

Referee's Decision, September 21, 2010, at 1-2. Based on these findings, and after quoting from section 28-44-18, Referee Capozza formed the following conclusions:

> * * *
>
> In cases of termination, the burden of proof to show misconduct by claimant in connection with her work rests solely upon the employer. Based upon review and consideration of the documents, transcripts and exhibits submitted and findings derived there from,

> I find that the employer has met its burden of proof by a preponderance of the evidence. The claimant's continued failure to follow and implement policies and the directives of her supervisor exhibited an intentional and total disregard of her duties to her employer and, therefore, misconduct in connection with her work within the meaning of the above Section of the Act. Accordingly, it is determined that claimant was discharged for disqualifying reasons as previously determined by the Director under Section 28-44-18 of the Rhode Island Employment Security Act.

Referee's Decision, September 21, 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 November 4, 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, Ms. Klink 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

As stated above, some of the Referee's findings were general, some were specific. Generally, he found Ms. Klink failed to comply with her appointed supervisor's directives — which, if proven, could be deemed insubordination, a prototypical form of misconduct; specifically, he found she was not up-to-date on her monthly reports and had not complied with his directive that she present for review any denials of animal adoptions. The sole issue before the court in this case is whether these findings are clearly erroneous and whether they are supported by substantial evidence within the record.

At the outset, we must note that the record to be examined in this case is atypical. While most appeals from the Board of Review contain a record comprised of a transcript of a hearing and a few exhibits, the record in Ms. Klink's matter is voluminous, including approximately fifty exhibits and five volumes of transcripts. This atypical record is the result of an unusual procedure: the parties stipulated to the record of the related arbitration. See Referee Hearing Transcript, at 3. As a result, the record contains materials which are not customarily found in proceedings of the Board of Review.

Although hearsay is admissible at Board hearings, the practice of the Board has been to receive it with great caution. See Gen. Laws 1956 § 42-35-18. This is especially true in misconduct cases, in which the employer must bear

the burden of proof; in misconduct cases the Board has generally insisted on the testimony of witnesses with first-hand knowledge. In the instant case these policies were bypassed. Accordingly, one finds in the instant record a multitude of reports and other items of correspondence, many of which contain assertions of wrongdoing committed by Ms. Klink. All were received as evidence; as such, they were available to be accorded such weight as the referee [and the Board] deemed appropriate.

Moreover, as stated above, the transcript of the testimony from the prior proceeding — the five-day union grievance arbitration arising from her termination — was voluminous. A cadre of witnesses was called by the Town: T. Joseph Almond, the Town Administrator; Captain Raymond Bousquet of the Lincoln Police Department, who was given oversight responsibilities regarding the shelter; Joanne McManus, Town Personnel Director; Kathleen Furtado, a town resident; Louann Noreau, the Assistant Animal Control Officer during Ms. Klink's tenure; Kendra Nault, a volunteer at the shelter; Karen Petersen, of the Department of Environmental Management (DEM), who coordinated shelter licensure and reporting requirements; Marisa Davis, who performed shelter inspections for DEM; and David Holden, the Pawtucket Animal Control Officer, who previously worked for the RISPCA.

Ms. Klink testified and she called one witness, Ms. June Ann Grant, a volunteer at the shelter.

The exhibits in the record paint a most unflattering portrait of the claimant — regarding her conduct vis à vis her subordinates, her superiors, and the public. The complaints about her were so numerous that they reached the Town Administrator. Arbitration Hearing Transcript I, at 29-31.

But Referee Capozza did not focus on these factors in making his decision; instead, he based his finding of misconduct on the allegations of insubordination:

> ... The claimant's continued failure to follow and implement policies and the directives of her supervisor exhibited an intentional and total disregard of her duties to her employer and, therefore, misconduct in connection with her work within the meaning of the above Section of the Act. ...

Referee's Decision, at 2. A series of documents and testimony, which the referee found to be credible, supported this conclusion. I shall now enumerate a small sample of these items.

Firstly, the claimant admitted that she had fallen behind on her required monthly reporting of the disposition of impounded animals to the Department of Environmental Management. See Arbitration Hearing Transcript V, dated August 25, 2010, at 5. There was conflicting testimony regarding how far behind the reporting had fallen. The claimant testified that she started to fall

behind in 2008; however, agency personnel testified that they had not received reports dating as far back as to 2006. See Id. and see Arbitration Hearing Transcript IV, at 26-27. In any event, Captain Raymond Bousquet of the Lincoln Police Department was assigned to oversee the shelter's operations in early 2009 due to the ongoing concerns regarding the operation of the shelter. In a February visit to the shelter, he was informed of the backlog in the monthly reporting. See Arbitration Hearing Transcript I, April 12, 2010 at 92. Subsequently, the claimant was instructed to make getting caught up on the monthly reports a priority. She was additionally granted five hours of overtime for the specific purpose of completing the monthly reports and extinguishing the backlog. See Arbitration Hearing Transcript I, April 12, 2010 at 106. While she did work the overtime hours, the claimant did not extinguish the backlog in the monthly reporting prior to her termination date. See Arbitration Hearing Transcript I, April 12, 2010 at 106-111.

Secondly, claimant also admitted that in 2007 and 2008, the animal shelter operated without the proper licensing from the State. See Arbitration Hearing Transcript V, August 25, 2010 at 7-8. This was confirmed by a DEM official. See Arbitration Hearing Transcript IV, June 14, 2010 at 11, 19. When questioned regarding the licensing procedure, the claimant testified that she did send an application for a license to the Department of Environmental

Management as required for the issuance of a license, but conceded that she did not follow-up when she received no response from that agency. See Arbitration Hearing Transcript V, August 25, 2010, at 8-10. She further testified that normally an inspection is conducted by the Department of Environmental Management prior to the issuance of the license, but that in 2007 no one from that agency came to conduct the inspection. See Id., at 9. The claimant then admitted she did not follow up with the agency and that it was due to her oversight that the facility failed to renew its license. See Arbitration Hearing Transcript V, dated August 25, 2010 at 103. She further testified that she was aware that her job description required her to comply with all State laws, including the licensing provision, and that she was unaware that the shelter was operating without a license until it was brought to her attention in late 2008. See Id., at 104. This testimony was implicitly contradicted by a DEM official, Ms. Petersen, who testified that she called to remind Lincoln they were not licensed in January and February of 2007 and wrote a letter in June. See Arbitration Hearing Transcript IV, June 14, 2010 at 11-17.

Thirdly, the Town was also concerned about the length of time animals were spending at the shelter. on June 10, 2009 Captain Bousquet sent a written notice implementing a new procedure regarding the denial of adoption applications. See Town Hearing Exhibit 13. The new procedure required that

any application for adoption that was subject to denial was to be forwarded to him prior to notifying the applicant of the decision. See Id. There is no evidence in the record that this procedure was ever followed; however, there is evidence of a specific incident where this directive from her supervisor was not followed, where a citizen's adoption application was torn up and thrown away on an allegedly discriminatory basis, rather than forwarded to Captain Bousquet per his directive. See Town Hearing Exhibit 6A.

Fourthly, on May 1, 2003, Ms. Klink received a written reprimand from the Director of Personnel which documented that more than three months prior to the notice, the claimant had been directed to formulate protocols and procedures for the handling of such issues within the unit, but to that date had failed to do so. See Town Hearing Exhibit 16A. A second written notice from the Director of Personnel, dated the same day, directed the claimant to immediately begin drafting a written manual of protocols and procedure policy for the shelter. See Town Hearing Exhibit 16B. While the claimant has averred that she was unable to formulate any policies or procedures due to the fact that she "did not know how to go about doing it," the same notice also encouraged the claimant to contact the Director himself if she needed any help getting started with the draft of the policy manual. Id. Moreover, when a memorandum sent to the claimant by her supervisor inquired about the policies and

procedures she had been asked to formulate and implement, she did not reply that she did not know how to formulate them nor did she ask for assistance in doing so. Rather, her response was "I ACO Colleen am trying to get everything written and typed at this time." See Town Hearing Exhibit 8. The record is devoid of any evidence to suggest that the claimant ever approached the Director or any other supervisor with any questions related to how to start drafting the policy manual or concerning how to go about formulating and implementing the procedures she had been instructed to develop. As of the date of the claimant's termination no procedure or policy manuals had been drafted.

Fifthly, in 2005, the Town implemented a smoke free workplace policy, prohibiting smoking in all Town facilities and vehicles. On April 15, 2005, the claimant signed an acknowledgement that she was aware of and understood the Town's smoking policy. See Town Hearing Exhibit 29. On September 1 of the same year, the claimant received a written reprimand from the Director for failing to follow the Town's smoking policy while driving the Animal Control vehicle. See Town Hearing Exhibit 30. The same notice also chastised the claimant for her "failure to follow instructions" and acknowledged the continued existence of a "lack of professionalism" in her interaction with the public and with other shelter employees and supervisors. Id.

Finally, the hearing transcript is replete with testimony from Captain Bousquet regarding his repeated instruction to the claimant that she clean and maintain the office and public areas of shelter. See Arbitration Hearing Transcript I, dated April 14, 2010, at 91. There is no evidence in the record to suggest that the claimant ever complied with this mandate.

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 the quantum and quality of the evidence of record which demonstrate that the claimant continually disregarded directives from her supervisors and failed to implement and follow policies and procedures as instructed, I must find that the Board's decision that the claimant's conduct — in particular, her continued failure to become current on the reports to DEM, her failure to follow the directives of her supervisors to draft protocol and procedure manuals as instructed, her failure to maintain the shelter's license, to implement policies on animal adoption, to implement and follow the Town's smoking and harassment policies, and her continued disregard of her supervisor's instruction to clean

and maintain the office and public areas of the shelter — constituted "misconduct" under § 28-44-18 is supported by reliable, probative and 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 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.

Joseph P. Ippolito
Magistrate

March 30, 2011