STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Nursing Placement, Inc.	:	
	:	
v.	:	**A.A. No. 11-076**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Suzanne Desmarais)	:	

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, 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 22nd day of November, 2011.

By Order:

/s/
Melvin Enright
Acting Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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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. In this administrative appeal Nursing Placement, Inc. urges that the Board of Review of the Department of Labor & Training erred when it found a former employee, Ms. Suzanne Desmarais, 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. Desmarais 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, a previous owner of the Nursing Placement, sold her interests to the employer in November of 2007. Per the sale agreement, she was kept on as an employee in a role that decreased over time. Her last day of work was November 14, 2010. She filed for unemployment benefits on January 8, 2011 and on February 7, 2011 the Director of the Department of Labor & Training allowed her claim, finding Ms. Desmarais had been discharged for non-disqualifying reasons under G. L. 1956 § 28-44-18. The employer filed a timely appeal and on April 28, 2011 a hearing was held before Referee Carol Gibson at which the claimant and an employer representative appeared and testified. See Referee Hearing Transcript, at 1.

In her May 2, 2011 decision, the Referee made the following findings of fact:

> 2. FINDINGS OF FACT:
>
> The claimant had sold her business to the employer in November 2007. As part of the sales agreement, the claimant became an employee of the company and entered into an employment contract with the new owner. The contract stipulated the claimant would be employed as an Office Manager and during the first year it gave specific days and hours the claimant was to work. During the second and third year of the contract the claimant was to work on an on-call basis, not to exceed twenty-four hours a week. The claimant last worked on November 14, 2010. The employer states it was mutually agreed the claimant would no longer perform services for the company as the transition was complete and the contract had ended. The claimant states she received a letter from the employer informing her that her services were no longer needed. The claimant filed her claim for Employment Security Benefits indicating she was discharged from her job.

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:

> * * * The right of an employer to discharge an employee is not at issue in this case. The sole issue is whether there is proved misconduct resulting in the termination. The testimony and evidence presented has established the

> claimant was working under a contract with the employer and she was discharged at the end of the contract. In the absence of evidence to establish misconduct, I must find that the claimant's termination is under other than disqualifying conditions and benefits may not be denied on this issue.

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, she affirmed the decision of the Director. Referee's Decision, at 2.

The employer filed a timely appeal on May 9, 2011 and the matter was reviewed by the Board of Review. Then, on June 10, 2011, 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 5, 2011, Nursing Placement 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

In cases in which an employer urges that a former employee should be disqualified from receiving unemployment benefits pursuant to § 28-44-18, the employer bears the burden of proving that (1) the claimant was involuntarily terminated (2) for misconduct. In this case Nursing Placement alleges no misconduct on the part of Ms. Desmarais; instead, it has urged that she was not fired, but quit at the end of a previously agreed contract period. Before this Court, the employer also urges that claimant should be disqualified because she has not made herself available for work, failing to show she has made a proper work search.

1. Claimant's Employment for the Purchasers of Her Business.

At the hearing held before the Referee, the employer's representative, Mr. Michael Bigney, was asked to explain how Ms. Desmarais came to be separated on November 10, 2010. He testified that after they purchased the business in 2007, Sue had a one-year services contract,[1] after which:

> * * * we kept Sue on for a while. And, at which point, we just, um, felt that you know the transition from the purchase had, um, smoothed out over time. And that, um, we didn't need Sue to be in the office any longer.

Referee Hearing Transcript, at 6-7. He denied there was any incident that caused her to be let go and state he had "no issues" with Sue. Referee Hearing Transcript, at 9, 11. To the

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[1] I believe that the fact that Ms. Desmarais's contractual employment period of one year was later extended takes this case outside the orbit of those cases in which courts have considered whether workers who apply for benefits at the expiration of a limited period position are disqualified from doing so — on a theory that they have left such employment voluntarily. See 76 Am. Jur. 2d Unemployment Compensation § 133 (2005). Apparently, a majority of cases have decided that this is not a disqualifying circumstance. Id. See also ANNOT., Unemployment Compensation: Termination of Employment, Known to Be For a Specific, Limited Duration, Upon Expiration of Period, As Voluntary, 30 A.L.R. 4th 1201 (1984).

contrary, Mr. Bigney described her separation as "almost a mutual decision" as a result of a "dialogue." Referee Hearing Transcript, at 10-11.

In response, Ms. Desmarais testified that her employment ended after she received a letter from Bigney stating that the contract was "done" and she was offered no new terms. Referee Hearing Transcript, at 15. She stated there were no issues as to her performance. Referee Hearing Transcript, at 16-17. She indicated she would have stayed on in some capacity. Referee Hearing Transcript, at 18-19.

Accordingly, the Board's finding that claimant was terminated, but not for proved misconduct, was indeed supported by the evidence and testimony of record. The Board — as it is empowered to do — credited this testimony. As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra at 4-5. The role of this Court is not to choose which set of testimony – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision is supported by substantial evidence of record.

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

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** 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.

Accordingly, the Board's finding that claimant was terminated but not for proved misconduct is supported by the record and cannot be successfully challenged.

2. The Employer's Position — Availability.

In its Memorandum, the Employer cites a series of cases in which this Court has held that a claimant seeking unemployment benefits must show that they are able and available for work and are seeking employment. See G. L. 1956 § 28-44-12. The principles invoked by the appellant are certainly sound. However, I do not believe this Court can address the Section 12 — Availability issue because it was not raised or considered below. And so, by application of the "raise or waive" rule, the issue was not preserved for appeal and no error can now be found. See State v. Nelson, 982 A.2d 602, 616(R.I. 2009). This, perhaps, is a consequence of the employer's decision to appear before the referee in this matter without counsel.

Nevertheless, I do acknowledge that the Department of Labor and Training has full authority under the Employment Security Act and the regulations promulgated there under to raise the section 12 issues whenever it concludes that Ms. Desmarais does not meet the section 12 standards of availability and sufficiency of job search. The Department has taken such action in many cases that have come before this Court, leaving this Court without doubt that it will do so regarding Ms. Desmarais if facts are brought to its attention justifying such action.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to grant claimant unemployment benefits because the employer did not satisfy its burden of proving that she was terminated for misconduct within the meaning of § 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.

/s/
Joseph P. Ippolito
Magistrate

November 22, 2011