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

Robert L. Braley	:	
	:	
v.	:	**A.A. No. 11 - 174**
	:	
Department of Labor & Training,	:	
Board of Review	:	

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 and the memoranda of counsel, 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 23rd day of December, 2011.

By Order:

_____/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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

Robert L. Braley	:	
	:	
v.	:	**A.A. No. 11-174**
	:	
Department of Labor & Training,	:	
Board of Review	:	

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 Mr. Robert L. Braley urges that the Board of Review of the Department of Labor & Training erred when it found him ineligible to receive 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 Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 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. Braley ineligible to receive benefits to be supported by reliable, probative and 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 as a driver/guard by Dunbar Armored Car Service for approximately three years until he was discharged on May 24, 2011. He filed for unemployment benefits but on May 26, 2011 the Director of the Department of Labor and Training denied his claim, finding Mr. Braley had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on August 9, 2011 a hearing was held before Referee William Enos at which the claimant and two employer representatives were present and testified. See Referee Hearing Transcript, at 1.

In his September 21, 2011 decision, the Referee made findings of fact, which are presented here in their entirety:

> **2. FINDINGS OF FACT:**
> Claimant worked as a driver/guard for Dunbar Armored car Service for three years last on May 24, 2011. Claimant filed a new claim for Employment Security benefits on May 26, 2011, effective May 29, 2011. Employer testified that the claimant was involved and admitted to the Smithfield Police for taking money from four deposits picked up by him totaling $1,150.00. The employer submitted a copy of the Smithfield Police Report, claimant's receipt for copy of employee handbook, copy of Dunbar Armored Car statement and a copy of notice of discharge. Claimant testified he was forced to plead guilty by the Smithfield Police and is innocent.

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:

> * * * I find sufficient credible testimony and evidence has been provided to support that the claimant confessed to the Smithfield Police Department that he was guilty of theft of deposits entrusted to him as an employee of Dunbar Armored Car. Therefore, I find that claimant was discharge for disqualifying reasons under Section 28-44-18 of the Rhode Island Employment Security Act.

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

The claimant filed a timely appeal on October 5, 2011 and the matter was reviewed by the Board of Review. Then, on November 16, 2011, the Board of Review 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 Board of Review Decision, at 1. On December 7, 2011, Mr. Braley filed a pro-se 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 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 section 28-44-52. The standard of review is enumerated by Gen. Laws 1956 § 42-35-15(g) of the Administrative Procedures Act ("A.P.A."), which provides:

> 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

The issue before the Court is whether the Board of Review's decision that claimant was terminated for proved misconduct was clearly erroneous. To put the matter as simply as one can, Mr. Braley was fired for stealing. There is certainly no question that stealing is the type of conduct which, if proven, constitutes misconduct within the meaning of section 18 — especially when, as here, it is alleged to have occurred on four occasions.

The only issue here is factual — before the Referee Mr. Braley denied he is guilty of theft and asserts he was coerced into confessing by the Smithfield Police. Referee Hearing Transcript, at 8 et seq. To satisfy its burden of proving Mr. Braley was fired for misconduct, the employer relied on a police statement — a Police

Narrative given by a Detective Douglas S. Cerce Jr. of the Smithfield Police Department. See Employer's Exhibit No. 1. In that narrative Detective Cerce states that on June 6, 2011, after being given his rights, Mr. Braley confessed to stealing money from pick-ups at the Footlocker store in Dartmouth, MA on four occasions, all Saturdays. Id. The narrative relates that Mr. Braley described in some detail how he perpetrated these acts. Id. He failed to explain one aspect of his crime — why he targeted the Footlocker store. Id.

Relying on this evidence, admittedly hearsay, and the supporting testimony proffered by the employer, Referee Enos found that misconduct had been proven. And, in my view, the statement was worthy of belief, containing strong indicia of credibility: it was more than a naked admission — it contained the details of his *modus operandi*. Accordingly, I am satisfied that the Referee's decision was supported by reliable, probative and substantial evidence of record.

But in addition to considering whether the evidence was sufficient to meet the employer's burden of persuasion, we must also consider whether a decision based on such evidence was legal. Or, more precisely — Is the Board authorized to base a finding of misconduct on hearsay evidence?

We begin from the premise that hearsay is admissible in Board of Review hearings. See Foster-Glocester Regional School Committee v. Department of Labor and Training Board of Review, 854 A.2d 1008, 1018-19 (R.I. 2004), noting Gen. Laws

1956 § 42-35-18(c)(1), exempts Board proceedings from the prohibition on hearsay contained in Gen. Laws 1956 § 42-35-10(a). In Foster-Glocester Regional School Committee, the Court determined that the Board of Review has broad discretion in determining what value to give to evidence. Foster-Glocester Regional School Committee, 854 A.2d at 1018-19. However, the Court found the Board abused its discretion by refusing to consider arbitration hearing transcripts presented by the School Committee. Id., at 1021. Conversely, I believe the Board acted within its sound discretion to rely upon the officer's statement regarding Mr. Braley's putative confession.

Pursuant to the applicable standard of review described supra at 6, 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. In my view, substantial, probative and reliable evidence — i.e., written synopsis of claimant's confession — supports the Board's finding of misconduct. Accordingly, applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant was discharged

for proved misconduct in connection with his work is supported by the record and should not be overturned by this Court.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board of Review'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." Gen. Laws 1956 § 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." Gen. Laws 1956 § 42-35-15(g)(5)(6). Accordingly, I recommend that the decision rendered in this case by the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate
December 23, 2011