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

Kathleen Perry	:	
	:	
v.	:	**A.A. No. 11 - 064**
	:	
Dept. 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, 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 3rd day of AUGUST, 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
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Kathleen Perry	:	
	:	
v.	:	**A.A. No. 11-064**
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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 Ms. Kathleen Perry urges that the Board of Review of the Department of Labor & Training erred when it found her disqualified from receiving 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 claimant disqualified from receiving benefits based on her termination from the employ of Shaw's Supermarkets 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 Shaw's Supermarkets as a cashier for almost ten years until she resigned in the face of termination on January 2, 2011. See Referee Hearing Transcript, at 5. Her last day of work had been December 30, 2010. See Referee Hearing Transcript, at 6. was discharged on December 30, 2010. She filed for unemployment benefits but the Director of the Department of Labor & Training denied her claim, finding Ms. Perry had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on April 13, 2011 a hearing was held before Referee Carol A. Gibson at which the claimant and two employer representatives — appeared and testified. See Referee Hearing Transcript, at 1.

In his July 13, 2010 decision, the Referee made the following findings of fact:

> 2. FINDINGS OF FACT:
> The claimant had worked for the employer, Shaw's Supermarket, for approximately nine and a half years through December 30, 2010. The claimant was last employed as a cashier. The loss prevention department identified questionable activity on the claimant's associate discount card and they conducted an investigation into the matter. It was determined the claimant was scanning her card for customers which applied her 15% associate discount to their purchases. The claimant had signed a policy on October 1, 2008 which informed her this card could only be used by herself and family members living in her household. The claimant acknowledged signing the policy and giving the discount to customers. The claimant was suspended on December 30, 2010 while the results of the investigation were finalized. Sometime on or around January 10, 2011 the claimant was given the option to resign or be discharged due to the policy violation. The claimant resigned in lieu of discharge. She did not have the option of remaining employed.

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 all cases of discharge the burden of proof to show misconduct in connection with the work rests solely with the employer. Testimony presented by both parties in this matter is credible. The testimony reveals the claimant scanned her associate discount card for customers. This was a violation of the employer's policy and as a result the claimant was separated. I find that the employer has met their burden and demonstrated the claimant's actions were not in the employer's best interest. Accordingly, benefits must be denied in this matter.

Referee's Decision, 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 3. Accordingly, she affirmed the decision of the Director. Referee's Decision, at 3.

The claimant filed a timely appeal on April 24, 2011 and the matter was reviewed by the Board of Review. Then, on June 7, 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, June 7, 2011, at 1. On June 14, 2011, Ms. Perry 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. * * * (Emphasis added).

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 Gen. Laws 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

Ms. Perry resigned in the face of a termination for violating the store's written policy on the use of her employee discount card. See Referee Hearing Transcript, at 6-7. She was accused of giving the discount to customers. The employer's representative, Ms. Nicole Sedona, entered the policy — and Ms. Perry's October 1, 2008 acknowledgement — into evidence at the hearing before the referee. See Referee Hearing Transcript, at 7. The policy warns that violation of the policy will result in termination. See Referee Hearing Transcript, at 8. Ms. Sedona testified that she and the loss prevention manager interviewed claimant, who was accompanied by her alternate union steward, on December 30, 2010. See Referee Hearing Transcript, at 9. She testified that claimant admitted using the card for customers with whom she had become friendly. See Referee Hearing Transcript, at 10. After the hearing claimant was suspended; later she was told she would be terminated. Id. She then accepted the

option of quitting. See Referee Hearing Transcript, at 11. It was later determined that just under $500 in sales had been wrongfully put on the card. See Referee Hearing Transcript, at 13.

At the hearing, Ms. Perry testified that she thought the card could be used for friends and family. Referee Hearing Transcript, at 16. She then admitted that she signed the policy and that she used it for people outside her household. Referee Hearing Transcript, at 17.

This is a difficult case, an unfortunate one. Given the amount of sales in question, and given that the discount only applied to store brands, and given that the discount was 15%, the amount lost by Shaw's through Ms. Perry's transgression was likely not more than $50.00. And, certainly nothing she did put any money directly into her pocket — although there was some discussion of gasoline rewards being earned. To the contrary, she may have engendered good will for the store with the customers she aided. So, it would not be fair to think of her transgression as stealing in any sense.

However, under § 28-44-18, benefits may also be denied based on an employee's violation of a company policy, so long as it is reasonable and uniformly enforced. It seems Shaw's discount card policy meets this standard. This Court has long given special deference to policies established by employers regarding the handling of funds. Shaw's is entitled — in my view — to establish its own policies regarding discount cards. Employees fail to adhere to such a policy at their peril. Finally, there is nothing in this record to indicate the policy has not been uniformly enforced; it is also clear Ms. Perry had notice of the policy.

On findings of fact and as to the weight of the evidence, this Court shall not substitute its judgment for that of the administrative agency. Substantial rights of the claimant have not been prejudiced. Based on the above cited testimony and evidence of record demonstrating that claimant violated the employer's policy on the use of its employee discount card, I must find that the Board's decision that the claimant's conduct constituted "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 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.

/s/
Joseph P. Ippolito
Magistrate

August 3, 2011