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

Marie T. DeSpirito	:	
	:	
v.	:	A.A. No. 12 - 060
	:	
Department of Labor and 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 11th day of July, 2012.

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 Ms. Marie T. DeSpirito urges that the Board of Review of the Department of Labor & Training erred when it found her 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 Ms. DeSpirito ineligible 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 as a certified nursing assistant (CNA) by South County Hospital for approximately eight years until she was discharged on August 30, 2011. She filed for unemployment benefits but on November 28, 2011 the Director of the Department of Labor & Training denied her claim, finding Ms. DeSpirito had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on January 11, 2012 a hearing was held before Referee Carl Capozza at which the claimant and two employer representatives testified. See Referee Hearing Transcript, at 1.

In his January 13, 2012 decision, the Referee made findings of fact, which are presented here in their entirety:

> **2. FINDINGS OF FACT:**
> The claimant had been employed for approximately eight years as a certified nursing assistant (CNA) until her last day of work, August 30, 2011. Based on information obtained by the employer and an investigation, it was determined that the claimant, during her shift, previous thereto, used her cell phone for text messaging while attending to her duties. During a short period of time, the claimant had engaged in approximately eleven incidents of exchanging text messages with another associate. The claimant was aware that use of cell phones on the employer's premises was prohibited, according to policy and advisories provided by the employer. Because it was determined

> that her actions were an intentional violation of its policy after having received prior warnings from her employer regarding her conduct, the employee (sic) made the decision to discharge the claimant. The other associate employer (sic) with whom the claimant had engaged in the messaging was also disciplined but not discharged since she had no prior warnings.

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 of termination the burden of proof to show misconduct by claimant in connection with her work rests solely upon the employer. Based on the credible testimony and evidence presented in this matter, I find that the claimant's actions, which caused her discharge, were an intentional violation of the employer's policy with regard to inappropriate use of her cell phone while on final warning and, therefore, misconduct in connection with her work. Under these circumstances it is determined the claimant was discharged for disqualifying reasons and not entitled to benefits as previously determined by the Director.

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

The claimant filed a timely appeal on January 20, 2012 and the matter was reviewed by the Board of Review. Then, on February 17, 2012, 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 March 12, 2012, Ms. DeSpirito 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 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. In practical terms, Ms. DeSpirito was fired for sending text messages (texting) on her cellular telephone during working hours — which, the employer alleges, was a violation of a work rule about which the claimant had been repeatedly advised.

In this matter the employer presented telephonically the testimony of Ms. Julie Parrillo, the nurse manager of South County Hospital, who testified that claimant was fired on September 2, 2011 because on her last day of work, August 30, 2011, Ms. DeSpirito had been text messaging another employee while assigned to monitor two patients; this, the employer urged, violated several of its policies. Referee Hearing Transcript, at 6-7. Ms. Parrillo learned of this activity because the recipient of her messages, a CNA named Brianna Giorgio, felt they were disturbing and threatening. Referee Hearing Transcript, at 8-9. When confronted by Ms. Parrillo, Ms. DeSpirito conceded

she was aware she was not permitted to use her cell phone in patient areas and further explained that she did so in anger because " * * * Brianna had reported her for (sic) a few weeks earlier for an incident that led to Marie receiving a final written warning and suspension." Referee Hearing Transcript, at 10-11. Ms. DeSpirito also indicated that she had not initiated the texting with Ms. Giorgio but had in fact responded to a text message from her. Referee Hearing Transcript, at 16.

Ms. Parrillo explained the claimant was not discharged due to the contents of the text per se, but because she put patients at risk by not continually monitoring them the way she should have. Referee Hearing Transcript, at 14. She explained that Ms. DeSpirito had received prior warnings on January 22, 2010, March 17, 2010, and August 16, 2011. Referee Hearing Transcript, at 15. Ms. Parrillo testified that Ms. Giorgio claimed that she had texted Ms. DeSpirito in an attempt to ameliorate their relationship. Referee Hearing Transcript, at 17. Ms. Parrillo explained that Ms. Giorgio was disciplined but not terminated because it was her "first offense." Id.

In response, claimant testified that the incident in question occurred on Sunday, August 28, 2011 into Monday, August 29, 2011. Referee Hearing Transcript, at 24. She testified she was performing "sitter" duties and did have a cell phone in her possession. Id. She explained that she had her phone with

her because her sister had lost power in Hurricane Irene and was going to text her when her power came on. Referee Hearing Transcript, at 28-29.

Ms. DeSpirito related that after Ms. Giorgi initially texted her they had a running text message discussion of thirteen messages, which started at 11:46 p.m. and ended at 2:28 a.m. Referee Hearing Transcript, at 25. She told Referee Capozza that the initial message was Ms. Giorgi thanking her for sitting for her. Referee Hearing Transcript, at 31. She explained that the texting occurred in between attending to the needs of the patient. Referee Hearing Transcript, at 26, 33-34.

On the basis of the record before him Referee Capozza found that claimant's behavior met the proved misconduct standard. Clearly this decision was supported by reliable and substantial evidence of record. A review of the phone records shows that on the shift in question she sent and received over a dozen messages. There is no question that this conduct was not a mere aberration or a series of inadvertencies but actions which demonstrate an intentional course of conduct which was in dereliction to the patient's needs and contrary to the employer's policies and interests.

Pursuant to the applicable standard of review described supra at 6-7, 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 — perhaps by focusing myopically on the fact that no specific rule was violated. In my view, the weight of the evidence supports the Board's finding of misconduct — that claimant violated her employer's cell phone policy and failed to apply herself exclusively to her duties. While the quantum of time she spent texting may not have been numerically great, this must be weighed against the importance of the function she was performing.

Accordingly, applying this standard of review and the definition of misconduct enumerated in Turner, supra, I recommend that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection with her work — i.e., failing to diligently perform her entrusted duties — is well-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" 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 rendered in this case by the Board of Review be affirmed.

/s/
Joseph P. Ippolito
Magistrate

July 11, 2012