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

Robert Mehrer	:	
	:	
v.	:	**A.A. No. 6AA - 2012 - 00011**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-16.2 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 27th day of August, 2012.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Montalbano, M. Mr. Robert Mehrer filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits based upon proved misconduct. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

FACTS & TRAVEL OF THE CASE

Robert Mehrer (hereinafter referred to as "the claimant") was employed by SAT Enterprises/Wickford Diner (hereinafter referred to as "employer") for thirteen years. His

last day of work was July 2, 2011. He filed for employment security benefits, but on July 17, 2011, the Director of the Department of Labor and Training denied the claim after finding that the claimant was discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal, and a hearing on that appeal was held on September 20, 2011 before Referee Paul Whelan (hereinafter referred to as "Referee"). At the hearing, the claimant, the claimant's counsel, and a representative of the employer appeared and testified.

In his September 20, 2011 decision, the Referee made the following findings of fact:

> The claimant worked as a cook for the employer on and off for approximately thirteen years. The claimant's last day of employment was July 2, 2011. The employer testified that on that date the owner of the establishment was called by a fellow employee who stated that the claimant was outside smoking cigarettes in front of the building contrary to policy and the restaurant smelled of smoke as a result of that. The employer also testified that the claimant had been verbally warned not to smoke in front of the building and was also warned regarding his argumentative and confrontational behavior and the incident on July 2, 2011 also included the claimant engaged in argumentative and confrontational behavior with employees as well as customers. The claimant testified that he had gone outside in the front of the building to look at the area for possible areas to sell merchandise for the upcoming art festival and while he was outside he did smoke a cigarette. Upon his return he was told by two fellow employees that the restaurant smelled of smoke. He testified that he went to customers inside the restaurant to inquire if they smelled the smoke as well. When the owner of the restaurant came to the establishment he was told, "as of now you no longer work for this company." When the claimant asked what that meant as far as his unemployment situation goes, the owner stated, "as of this moment you don't work here anymore."

Decision of the Referee, at 1. Based on these findings, the Referee made the following conclusions:

> * * *
> In order to impose a disqualification under the provisions of Section 28-44-18, there must be proof that the person who was discharged committed an act of misconduct in connection with the work… I find that the claimant engaged in misconduct as defined under the statute in that the claimant engaged in argumentative and confrontational behavior as well as smoking in a non-designated area all of which are detrimental to the employer's best interest. Benefits cannot be allowed in this matter.

Decision of the Referee, at 3. Thus, the Referee determined that the claimant was discharged under disqualifying reasons within the meaning of § 28-44-18 of the Rhode Island Employment Security Act. The Referee also determined that as a result of the claimant's statement to the Department that he was laid off and not discharged, the claimant was responsible for an overpayment as required by Gen. Laws § 28-42-68. Decision of the Referee, at 3. Accordingly, Referee Whelan affirmed the decision of the Director.

The claimant filed a timely appeal on October 25, 2011, and the matter was reviewed by the Board of Review (hereinafter referred to as "Board"). The Board did not conduct an additional hearing, but instead chose to consider the evidence submitted to the Referee pursuant to Gen. Laws. 1956 § 28-44-47. In its decision, dated December 22, 2011, the Board affirmed the Referee's decision and adopted it as their own. Decision of Board of Review, at 1. On January 6, 2012, the claimant filed a timely appeal to this Court for judicial review.

APPLICABLE LAW

A. The Misconduct Issue

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42-44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is 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 that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interest 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 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.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by the law.

B. The Overpayment Issue

This case also involves the application and interpretation of Gen. Laws 1956 § 28-42-68, which provides:

> **28-42-68. Recovery of erroneously paid benefits.**— (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapter 42 – 44, of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the unemployment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest thereon at the rate set forth in subsection 28-43-15. That sum shall be collectible in the manner provided in subsection 28-43-18 for the collection of past due contributions. All interest received hereunder shall be credited to the unemployment security interest fund created by subsection 28-42-65.
>
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 – 44 of this title.

STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under R.I. Gen. Laws § 28-44-52. The standard of review which the District Court must apply is set forth under Gen. Laws 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the 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 of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful 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 limited by § 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)).

Stated differently, this 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.

ISSUE

A. The Misconduct Issue

The first issue before the Court is whether the decision of the Board of Review that claimant was disqualified from receiving benefits due to misconduct was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

B. The Overpayment Issue

The second issue before the Court is whether the claimant was overpaid Employment Security Benefits and subject to recovery under the provisions of Gen. Laws 1956 § 28-42-68.

ANALYSIS

A. The Misconduct Issue

This Court has consistently held that an employer has the right to expect that its employees will comply with its policies when those policies are sensible. If an employee, aware of his employer's policies, intentionally violates his employer's policies then it will be considered misconduct under Gen. Laws 1956 § 28-44-18. This is because it would not be fair to the employer if unemployment benefits rewarded employees that intentionally violated sensible workplace policies. See e.g., Maloni v. Department of Labor & Training, Board of Review, A.A. No. 11-122 (Dist.Ct. 05/25/12) (Montalbano, M.) (holding that an employee's absence from work following a warning by her employer on the matter constituted misconduct); DeLuise v. Department of Labor & Training, Board of Review, A.A. No. 2012-095 (Dist.Ct. 05/29/12) (Ippolito, M.) (holding that an employee's repeated inappropriate conduct toward his co-workers after being warned constituted misconduct). The employer had made its sensible policies clear to the claimant, and the claimant consciously violated those policies; therefore, the decision of the Board denying the claimant's benefits must be affirmed.

According to the employer, the claimant was discharged for the following three reasons: The claimant behaved in an argumentative manner toward his co-workers; the claimant had a confrontational tone; and the claimant violated the employer's no-smoking policy. Referee Transcript, at 24. In addition, prior to the incident, the employer had warned the claimant about these three issues. Referee Transcript, at 07, 23-24. The Referee found that "the claimant engaged in misconduct as defined under the statute in

that the claimant engaged in argumentative and confrontational behavior as well as smoking in a non-designated area." Decision of the Referee, at 2. The Referee's Findings of Fact and Conclusion that the claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18, which were adopted as the decision of the Board, were supported by reliable, probative, and substantial evidence in the record, and was not clearly erroneous or affected by error of law.

The claimant suggests that the Referee's decision in this case should be reversed because it "completely relies upon the multiple hearsay testimony of the employer representative regarding whether claimant was 'argumentative and confrontational' on July 2, 2011." See Brief of Appellant, at 10. As this Court noted in Maloni v. Department of Labor & Training, Board of Review: "[T]he Board is not constrained by the Rules of Evidence and…evidence provided from secondary sources may be relied upon by the Board/Referee to support its conclusions." See Gen. Laws 42-35-9 and Gen. Laws 42-35-10. Our concern about hearsay or second-hand testimony is therefore inapplicable to our judicial review of the Board's final decision. See Depasquale v. Harrington, 599 A.2d 314 (1991); Maloni, at 8. In sum, the Board/Referee could have relied solely on the employer's testimony to reach its decision. However, the issue brought up by the claimant regarding hearsay is largely moot because in the case at bar the Board/Referee based its decision on more than just hearsay—the claimant provided direct testimony supporting the decision of the Referee.

The claimant himself testified that he had previously been warned not to take a break in front of the restaurant. Referee Transcript, at 36. The claimant testified that he

had been warned about his argumentative and confrontational behavior following an altercation with a co-worker on or about May 2011. Referee Transcript, at 30-33. The claimant testified that he had in fact smoked in front of the restaurant on the day of the incident. Referee Transcript, at 7. The claimant testified that he made his co-workers "agitated" on the day of the incident after he denied their claims that the restaurant smelled of smoke (i.e., he argued with them). Referee Transcript, at 40. In sum, the claimant's own testimony, supplemented by that of the employer, provided the Referee/Board with sufficiently reliable, probative, and substantial evidence to support its decision.

The scope of judicial review by the Court is also limited by Gen. 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 the claimant was discharged due to misconduct following his violation of the employer's no-smoking policy and his generally confrontational behavior is supported by substantial evidence on the whole record and must be upheld.

B. The Overpayment Issue

The Referee found that the claimant incorrectly informed the Department that he was laid off and not discharged and that an overpayment of benefits was made to him.

This Court agrees with the Board's decision that repayment of the overpayment of benefits is required by Gen. Laws § 28-42-68.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3)(4). Further, it is neither clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, nor is it arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5)(6). I further recommend that the Board's decision that claimant is liable for overpayment of benefits in this case be upheld.

Accordingly, I recommend that the decision of the Board be AFFIRMED.

__/s/_____
Joseph A. Montalbano
MAGISTRATE

August 27, 2012