STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Luis Estrella	:	
	:	
v.	:	**A.A. No. 12 - 235**
	:	
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 18th day of February, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

DISTRICT COURT

SIXTH DIVISION

Luis Estrella	:	
	:	
v.	:	**A.A. No. 2012 – 235**
	:	
Department of Labor and 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. Mr. Luis Estrella 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. This matter has been referred to me for the making for 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 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

The facts and travel of the case are these: Mr. Luis Estrella worked for the C Town Supermarket for eight months until he was terminated on August 6, 2012. He filed an application for unemployment immediately but on August 29, 2012, the Director determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee William Enos on September 25, 2012. On September 26, 2012, the Referee held that Mr. Estrella was disqualified from receiving benefits because he was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> Claimant worked as a deli worker for C Town Supermarket for eight months last on August 6, 2012. The employer testified that the claimant was terminated for refusing to perform his duties. The employer testified that the claimant was suspended on July 30, 2012 for fighting with a co-worker, and when he came back from the suspension, he asked for a raise. When he learned that no raise was

> forthcoming, he refused to do the ordering and sent a vendor to the manager to get his orders. The claimant testified that he did ask for a raise because he had a lot of responsibilities and deserved more money. The claimant testified that he told the vendor and the secretary that he would not be doing the ordering anymore.

Decision of Referee, September 26, 2012 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee pronounced the following conclusions:

> * * *
> I find that sufficient credible testimony and evidence has been provided by the employer to support that the claimant's actions were not in the employer's best interest. Therefore, I find that the claimant was discharged for disqualifying reasons entitled to benefits under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, September 26, 2012 at 2. The Claimant appealed and the matter was reviewed by the Board of Review. On November 14, 2012, the Board of Review issued a decision in which the decision of the Referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, November 14, 2012, at 1.

Finally, Mr. Estrella filed a complaint for judicial review in the Sixth Division District Court on November 20, 2012.

APPLICABLE LAW

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 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 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 law.

STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (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.

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.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

ISSUE

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[2] Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[3] Cahoone v. Board of Review of Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) 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.

ANALYSIS

The Board adopted the Referee's factual conclusion that Claimant committed proved misconduct by refusing to perform his duties. See Gen. Laws 1956 § 28-44-18. Accordingly, our first duty must be to examine the record to determine whether these allegations are supported in the record. We note that the employer, in its effort to meet its burden of proof on this issue, presented two witnesses — Mr. Hector Bueno, its President, and Mr. Leo Calderon.

Mr. Bueno explained to the Referee that he had been operating the supermarket since November of 2011. Referee Hearing Transcript, at 15.He stated that Mr. Estrella, who had been suspended for a week for fighting with a co-worker, returned to work on a Monday. Referee Hearing Transcript, at 7. At that time he refused to make an order with a vendor, which was among his previously established duties. Referee Hearing Transcript, at 7-9. He had previously told the secretary that he did not want to do the ordering any more. Referee Hearing Transcript, at 8.

So, when Mr. Bueno arrived at about 10:00 a.m. the secretary asked him who would be doing the ordering. Id. He responded *Luis*, but was told he didn't want to do it anymore. Id. He called Luis and told him that ordering was part of his job and, if he did not want to perform that function, he did not need him. Id.

Mr. Estrella testified that he told the vendor he would not be doing orders, since it was too much responsibility for his pay grade. Referee Hearing Transcript, at 9. He acknowledged he directed the vendor to the manager. Referee Hearing Transcript, at 13.

Legally, it is well-settled that refusal to perform one's duties is misconduct. To be sure, I infer from my reading of the transcript that Claimant did not view himself as being insubordinate. He seemed to feel that he was performing duties above his pay grade; he felt he was merely cutting back on those extra duties.

But, objectively, Claimant did not have the right to unilaterally change the duties he had been performing on an ongoing basis. Moreover, he did so without advance warning. Additionally, he involved a third-party vendor in his dispute. These factors show that Mr. Estrella did not handle the matter professionally.

But even a finding (which is beyond our jurisdiction) that Mr.

Estrella was objectively underpaid would not justify his refusal to perform his ongoing duties. Quite frankly, if he was dissatisfied, he had every right to seek alternative employment. Nothing in this record justifies his immediate separation from the C Town Supermarket without first securing a new position.

Pursuant to the applicable standard of review described supra at 5-6, 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. 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 — i.e., refusing to perform his previously established duties — is well-supported by the record and should not be overturned by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is also not 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).

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

/s/
Joseph P. Ippolito
Magistrate

February 18, 2013