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

Kurshid Siddiq	:	
	:	
v.	:	**A.A. No. 12 - 024**
	:	
Department of Labor & Training,	:	
Board of Review	:	
(Kenneth J. Zickendrath)	:	

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 28th day of March, 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 Mr. Kurshid Siddiq urges that the Board of Review of the Department of Labor & Training erred when it found his former employee, Kenneth J. Zickendrath, eligible 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. Zickendrath eligible 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 Zickendrath had been employed as a sales associate for Mr. Siddiq as a sales associate at his 7-11 convenience store franchise for two years until he was discharged on September 2, 2011. He filed for unemployment benefits but on October 17, 2011 the Director of the Department of Labor and Training denied his claim, finding Mr. Zickendrath had quit his position and was thereby disqualified from receiving unemployment benefits under Gen. Laws 1956 § 28-44-17. The claimant filed a timely appeal and on November 22, 2011 a hearing was held before Referee John Costigan at which only the claimant was present to testify. See Referee Hearing Transcript, at 1.

In his November 23, 2011 decision, the Referee made findings of fact, which are presented here in their entirety:

> **2. FINDINGS OF FACT:**
> The claimant had been employed as a sales associate for the employer for two years. He was a full-time worker and his scheduled shift was

> 11:00 p.m. to 7:00 a.m. His last day of employment was September 2, 2011. On his last day of work the claimant stated that he had overslept and had arrived approximately ten to fifteen minutes late for work. He clocked in and started to work. The assistant manager, on duty at the time, accused him of being intoxicated and instructed him to clock out and to not return to work. The claimant stated that he was not intoxicated, that the manger was upset, and he clocked out and left the job. He contacted the owner to discuss the matter and after a number of calls and messages met with him on September 12, 2011. The owner told the claimant that he could not make a decision as to whether or not to put him back to work. The employer has not contacted him to return to work as of this date.

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 conclusion:

> * * * The evidence presented established that the claimant did not voluntarily quit this job but was, in fact, removed from the assignment by the assistant manager. He was accused of being intoxicated and told to clock out and not to return. The claimant stated that he was not intoxicated. His follow-up attempts to resolve the situation with the employer have not been successful. In the absence of any rebuttal from the employer to the claimant's sworn testimony, I find the claimant did not voluntarily leave the job but was terminated by the employer. No evidence of misconduct has been presented and as a result benefits cannot be denied in this matter.

Referee's Decision, at 1-2. Accordingly, the Referee affirmed the decision of the Director. Referee's Decision, at 2.

Mr. Siddiq filed a timely appeal and the matter was reviewed by the Board of Review. Then, on December 27, 2011, the Board of Review (through its Chairman — Mr. Thomas J. Daniels) 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 January 24, 2012, Mr. Siddiq 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 § 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. Zickendrath was fired for reporting to work in an intoxicated state. There is certainly no question that stealing is the type of

conduct which, if proven, constitutes misconduct within the meaning of section 18. Accordingly, the only issue here is factual — Was it proven that Mr. Zickendrath appeared for work in an intoxicated state?

At the hearing before the Referee, Mr. Zickendrath testified that on his last day he was late. Referee Hearing Transcript, at 7. After he arrived he was fired by the Assistant Manager, who accused him of being intoxicated. Referee Hearing Transcript, at 7-8. The claimant denied that he appeared for work in an intoxicated state. Referee Hearing Transcript, at 11-15. The employer did not appear personally or otherwise present any evidence of misconduct. Accordingly, I am satisfied that the Referee's decision was supported by reliable, probative and substantial evidence of record that had been presented to him.

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. In my view, substantial, probative and reliable evidence — i.e., the uncontradicted testimony of Mr. Zickendrath — supports the Board's

finding that misconduct was not proven. 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 but not 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 grant 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

March 28, 2012