STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Tracey Gear, Inc.	:	
	:	
v.	:	**A.A. No. 13 - 049**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(**Dennis L. McPhillips)**	:	

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 Honorable Court at Providence on this 16th day of December, 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

Tracey Gear, Inc.	:	
	:	
v.	:	**A.A. No. 13 – 049**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Dennis L. McPhillips)	:	

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. The Appellant, Tracey Gear, Inc., urges that the Department of Labor and Training Board of Review erred when it found its former employee, Mr. Dennis McPhillips, eligible to receive unemployment benefits — notwithstanding its assertion that he had been terminated for proved misconduct.[1]

Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by a provision of the

[1] See Gen. Laws 1956 § 28-44-18.

Employment Security Act[2] and the procedure that we follow in hearing such cases is that prescribed in the Rhode Island Administrative Procedures Act.[3] Finally, I note that this matter has been referred to me as District Court magistrate for the making of findings and recommendations.[4]

For the reasons stated below, I conclude that the decision issued by the Board of Review granting benefits to Mr. McPhillips is not clearly erroneous in light of the evidence of record and the applicable law; I therefore recommend that it be AFFIRMED.

I

Facts and Travel of the Case

Mr. McPhillips' thirty-one month employment tenure as a machinist for Tracey Gear ended on October 11, 2012. On November 29, 2012, a designee of the Director of the Department of Labor and Training ruled that he was eligible to receive benefits, based on findings that (1) he was fired (and had not quit, as the employer had reported) and (2) misconduct had not been shown;[5]

---

[2] See Gen. Laws 1956 § 28-44-52.

[3] See Gen. Laws 1956 § 42-35-15(g).

[4] See Gen. Laws 1956 § 8-8-8.1.

[5] See Claimant Decision, November 29, 2012 — Director's Exhibit 2.

from this decision the employer appealed. As a result, a hearing was scheduled before a referee employed by the Board of Review on January 8, 2013. Claimant appeared with counsel; Tracey Gear was represented by its Vice-President of Engineering — Mr. Douglas Tracey.

In his decision issued on January 9, 2013, Referee Stanley Tkaczyk found that, on Thursday, October 11, 2012, "… the claimant challenged the authority of the employer to question his performance." Referee's Decision, January 9, 2013, at 1. At this juncture, the Referee determined, the parties escalated the argument — resulting in Mr. McPhillips giving two-week's notice of resignation, which the employer ultimately accepted effective immediately. Id.

These findings of fact led Referee Tkaczyk to conclude that Mr. McPhillips's behavior in challenging the employer's right to review his work constituted insubordination, and that as a result he was suspended under disqualifying conditions. Referee's Decision, January 9, 2013, at 2. And this was the length and breadth of his resolution of the matter, for the Referee found the subsequent dispute involving the giving of notice and termination immaterial to the issue before the Court. Id. On this basis, he found Claimant was disqualified from the receipt of benefits pursuant to Gen. Laws 1956 § 28-44-18.

From this decision Claimant filed a timely appeal. The Board of Review chose not to conduct a new hearing, but reviewed the record of the proceedings before the Referee, as it is empowered to do by Gen. Laws 1956 § 28-44-47.

A majority of the Board formulated the following Findings of Fact regarding Claimant's separation:

> **2. FINDINGS OF FACT:**
>
> The claimant was employed as a machinist on the second shift. The employer became concerned over the time expended by the claimant in producing a certain product. The employer discussed the issue with the claimant. The discussion became intense with the result that the claimant was told to leave the premises. On the following Monday, the employer informed the claimant that the employment relationship ended. The claimant was not involved in any other incidents of similar conduct during his employment. The employer had not terminated another employee during the claimant's tenure. At the time of the discussion, the employer was working under maximum load to produce and deliver the product to its customers. At the time of the discussion, the claimant was not familiar with the machining of the certain tubing, being prepared for a customer.

Board of Review Decision, February 19, 2013, at 1. Based on these findings — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading Rhode Island case interpreting section 18 — Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740 (R.I. 1984) — the Board Referee formed the following conclusions regarding Mr. McPhillips'

eligibility for benefits:

> **3. <u>CONCLUSION</u>:**
> * * *
>
> We concur with the Referee's Conclusion; that the claimant was terminated. He did not leave his position
>
> A review of the record evidence before the Referee established that the employer was attempting to fulfill a customer order. It was important that production quotas be met. At the same time, the claimant was experiencing difficulties in producing the product. His difficulties were described in specific detail in the record of his testimony. It is clear from the record that the employer was under intense pressure to get the product out. The circumstances on this particular day prevented the employer from assisting the claimant with his difficulties. In this environment, on this day (the claimant's last day of work), words were exchanged. The words and situation resulted in the claimant's termination. The claimant agreed that he had a satisfactory working relationship with the employer.
>
> There is no or insufficient evidence that insubordination had been a prior issue with the claimant. The words used by the claimant were an isolated incident. The record showed a clearly frustrated employee who was having trouble. He was approached by the employer who was under intense pressure to meet production quotas. The words exchanged uttered by the claimant were not intended or uttered to cause disrespect or harm to the employer. The employer has not proved misconduct.

<u>Board of Review Decision</u>, February 19, 2013, at 2. Thus, while the Board of Review agreed with the Referee's ruling that Claimant was fired, it departed from his decision, finding that misconduct sufficient to trigger the disqualification found in section 28-44-18 had <u>not</u> been proven. Accordingly, the Board reversed the decision of the Referee.

The employer — Tracey Gear, Inc. — filed a complaint for judicial review in the Sixth Division District Court on March 18, 2013.

II

Applicable Law — Disqualification For Misconduct

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.

III

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.' "[6] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[7] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[8]

The Supreme Court of Rhode Island directed in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d

---

[6] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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

[8] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review of

595, 597 (1964), that a liberal interpretation shall be utilized in construing and applying 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.

IV

Issue

The issue before the Court is whether the decision of the Board of Review 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. More precisely, was Claimant McPhillips properly deemed eligible to receive unemployment benefits because he was discharged from his position in the absence of proved misconduct pursuant to § 28-44-18?

---

the Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

V

Analysis

As stated above, the Board of Review found that Claimant McPhillips was discharged from Tracey Gear for behavior not amounting to misconduct; in doing so, it reversed a Referee's decision that misconduct had been proven. Of course, Tracey Gear has asserted since the time of the incident that Claimant quit and was not fired. And so, before this Court, it finds itself in the awkward position of having to champion the Referee's ruling that Claimant was fired for misconduct.

And, as we stated above in Part III, supra, the District Court's role in this litigation is limited. While we may fully consider issues of substantive and procedural law, we cannot review the evidence and testimony of record to determine how we would have ruled ab initio. Instead, we are confined to determining whether the Board of Review's decision was clearly erroneous in light of the reliable, probative, and substantial evidence of record — not an easy standard to surmount. Nevertheless, it is on this ground that Tracey Gear attacks the Board's decision granting benefits to Mr. McPhillips.

A

Discharge For Misconduct — The Factual Record.

In this case, we must review a tragedy in which a worker lost his position and income and his employer lost his valued services. The testimony of the key players can be blended seamlessly on many points — the subject of the argument (Claimant's rate of production), where it took place (the shop floor), when it took place (the afternoon) and surprisingly, to a great extent, the words each used — the only serious division in the two versions of what transpired came on the question of whether claimant quit or was fired.

The first witness to testify at the hearing conducted by Referee Tkaczyk was Mr. Douglas Tracey, Tracey Gear's Vice President of Engineering. Referee Hearing Transcript, at 2, 5 et seq. Before describing the events of October 11, 2012, he provided background regarding Claimant's place in the company. Mr. Tracey testified that Mr. McPhillips worked second shift — 4:00 p.m. to 2:00 a.m. — which was an unsupervised shift. Referee Hearing Transcript, at 5. And so, if there was a question about the quality or volume of the work that was done on the second shift, he would speak to the worker (or workers) involved the next day, to find out what the problem might have been; and

according to Mr. Tracey, with regard to Mr. McPhillips, such discussions had always been conducted civilly. Referee Hearing Transcript, at 6, 14.

But this day was different, for when Mr. Tracey questioned Mr. McPhillips about his productivity in making a certain item of tubing[9] he became defensive — and then aggressive. Referee Hearing Transcript, at 7. According to Mr. Tracey, "[h]e basically told me I didn't have the right to question what he did the night before." Referee Hearing Transcript, at 7, 12. Not appreciating this attitude, Mr. Tracey told Mr. McPhillips to punch out, to take the weekend to "cool off," and that he would see him on Monday. Referee Hearing Transcript, at 7, 12. By this point, both parties were angry. Referee Hearing Transcript, at 15. And so, as Claimant walked away, he indicated that "I've had it with this place, you can consider this my two-week notice." Referee Hearing Transcript, at 7, 13.

A few minutes later, not wanting to lose his services, Mr. Tracey asked Mr. McPhillips if he was certain he wanted to quit. Referee Hearing Transcript, at 8, 13. But, when the conversation got heated again, he accepted his

---

[9] The testimony of Mr. Tracey and Mr. McPhillips — taken in toto —makes it clear that this was a relatively new product and they were still working through the best way to fashion the product. E.g. Referee Hearing Transcript, at 19.

resignation. Id.[10] Then, on Monday, when Claimant called in to ask if he could serve out his two-week notice, Mr. Tracey declined. Referee Hearing Transcript, at 9, 17-18.

On cross-examination, the employer flatly denied that Claimant asked Mr. Tracey whether he wanted his resignation. Referee Hearing Transcript, at 10-11.

Mr. McPhillips also testified. Referee Hearing Transcript, at 19 et seq. He told the Referee that — when Mr. Tracey questioned him — he responded substantively regarding the intricacies of the job and the difficulties in cutting the tubing. Referee Hearing Transcript, at 19-20. And during this conversation Mr. Tracey was also speaking, intermittently, to another employee. Referee Hearing Transcript, at 21. Then, Mr. Tracey commented that the job took too long. Id. Mr. McPhillips responded by pointing to the pieces on the machine and saying — "Doug, what do you think?" Id.

It was at this point, according to Claimant, that Mr. Tracey "just flew off the handle." Referee Hearing Transcript, at 21-22. Mr. McPhillips then responded with words to the effect of you can't talk to me like that. Referee

---

[10] Mr. Tracey presented a statement from another machinist attesting that Mr. Tracey did give Mr. McPhillips an opportunity to rescind his resignation. Referee Hearing Transcript, at 9.

Hearing Transcript, at 22. And at this point Mr. Tracey sent him home. Id. Mr. Tracey continued to speak to him — still intermittently — and said something (not specifically revealed) that prompted Mr. McPhillips to ask — "What do you want?" "You want me to quit?" "Is that what you want?" " Do you want two weeks' notice?" Id.

Then, as he was leaving, Mr. Tracey engaged him again, talking about machinists. Referee Hearing Transcript, at 23. And when he told Claimant he was the slowest on the machines, Mr. McPhillips responded — "What, now you're trying to insult me?" Referee Hearing Transcript, at 23-24. And Mr. Tracey said — "Go home, you're done. Go home." Referee Hearing Transcript, at 24. However, according to Claimant, Mr. Tracey never accepted his resignation. Id.

Claimant Mr. McPhillips stated he called in on Monday and spoke to Mr. Tracey. Referee Hearing Transcript, at 26. He said — "Doug, you know, I'm coming in?" Id. And Mr. Tracey responded — "No, we're going to end this relationship right now." Id. In sum, Claimant denied that he — at any time — resigned. Referee Hearing Transcript, at 27.

Mr. McPhillips testified that these conversations took place at normal shop levels, due to noise. Referee Hearing Transcript, at 25.

B

Resolution of the Misconduct Issue

Tracey Gear urges that the Board of Review erred when it reversed the decision of the Referee finding Mr. McPhillips eligible to receive benefits due to the absence of proved misconduct as provided in § 28-44-18. See Appellant's Memorandum of Law, at 3.

Of course, the Board of Review could well have affirmed the Referee's decision[11] barring benefits to Mr. McPhillips. There was ample evidence in the record to support such a finding, which the Referee's decision capably enumerated. But, upon close examination of the Board's decision, we must realize that the Board did not take exception to any of the facts found by the Referee;[12] The majority of the Board's members simply found that those facts

---

[11] And, as always, we must keep in mind that the Referee had the opportunity (unlike the Board and this Court) to observe and evaluate the testimony given by Messrs. McPhillips and Tracey. But notwithstanding the Appellant's argument to the contrary (Appellant's Memorandum of Law, at 6), the Board of Review is specifically authorized to conduct its de novo review of a referee's decision without holding a further hearing — solely on the basis of an examination of the administrative record. See Gen. Laws 1956 § 28-44-47.

[12] In particular, the Board expressly agreed with the Referee's conclusion that Claimant did not quit but was fired.

were insufficient — when taken as a whole in their proper context — to prove misconduct as defined in § 28-44-18.[13]

The Board of Review's conclusions identified a number of factors it viewed as mitigating Mr. McPhillips' conduct on this occasion — that he had no prior history of such conduct and that this was an "isolated" incident, that he was "frustrated" by his difficulties performing the job at hand, that he did not "intend" to cause "disrespect or harm" to his employer, and that the employer was "under intense pressure" to fill the orders. See Decision of Board of Review, at 2, quoted supra at 5. To this list may be added one more factor which may have swayed the Board — that Mr. Tracey conceded that both parties became angry during the discussion. Referee Hearing Transcript, at 15.

When in viewed in light of the foregoing, the Board of Review undoubtedly acted within its sound discretion in finding that Mr. McPhillips did not act deliberately or in willful disregard of his employer's interests. Gen.

---

[13] The Board of Review's function in a misconduct case is not merely to determine the facts of the case, but to decide the import of those facts — particularly, whether the claimant's behavior constituted proved misconduct under section 18 and the Turner standard, supra Part II. One could say that the Board is empowered to decide whether the claimant's transgressions were a felony or a misdemeanor, a mortal or a venial sin.

Laws 1956 § 28-44-18, quoted supra at 6. Moreover, on this record the Board could well find that Mr. McPhillips' conduct on this occasion was uncharacteristic of him, an isolated instance of poor judgment. And so, the Board of Review's ruling in the instant case must be viewed as both logical and lawful, neither clearly erroneous factually nor contrary to law.

C

Summary

Pursuant to § 42-35-15(g), 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. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe.[14] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[15] Accordingly, I must conclude that the Board of Review's finding —

---

[14] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[15] Cahoone, supra n. 14, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 7-8 and Guarino, supra at 8, n. 6.

that the Claimant had not been terminated for proved misconduct — is not clearly erroneous in light of the reliable, probative, and substantial evidence of record. As a result, I must recommend that the decision of the Board be affirmed.

VI

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, the instant decision was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or 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

December 16, 2013