



Dennis Ponte :  
 :  
v. : A.A. No. 2014 – 023  
 :  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** Mr. Dennis Ponte 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 because he was discharged for proved misconduct. 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 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.

## I

### FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Dennis Ponte was employed as a security guard by the RI Bureau of Investigations (RIBI) for one year, until he was terminated on October 7, 2013. He filed a claim for unemployment benefits and on November 5, 2013, a designee of the Director of the Department of Labor and Training determined him to be eligible to receive benefits.

The employer filed an appeal and a hearing was held before Referee William Enos on December 3, 2013. Three days later, the Referee held that Mr. Ponte was disqualified from receiving benefits because the employer proved he had been terminated for misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

Claimant worked as a security guard for RI Bureau of Investigation for 1 year, last on October 7, 2013. The claimant was discharged for violating the company policy concerning failure to follow procedures. The employer testified and submitted evidence that showed that the claimant had been previously warned and put on a 90 day probationary period when he again violated company policy concerning making inappropriate comments to 2 female clients while on duty. The claimant stated that the incident that he was warned for was for going above and

beyond cleaning a cluttered closet for the client. The claimant stated that the incident that he was warned for making inappropriate comments to 2 female clients he was just making a joke and everyone laughed.

Decision of Referee, December 6, 2013 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:

\* \* \*

In cases such as this, the burden of establishing proof to show misconduct by claimant in connection with his work rests solely upon the employer. That burden has been met.

I find that the credible testimony and evidence submitted at this hearing showed that the claimant was discharged for violating company policy concerning failure to follow company procedures. Therefore, I find that sufficient credible testimony has been provided to support the employer's position that the claimant was discharged for proven misconduct.

Decision of Referee, December 6, 2013 at 2. The claimant appealed and the Board of Review deliberated on the matter.

On January 24, 2014, the Board of Review unanimously affirmed the decision of the Referee and held that it constituted a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, January 24, 2014 at 1. As a result, the Board adopted the decision of the Referee as its own.

Id. Finally, Mr. Ponte filed a complaint for judicial review in the Sixth Division District Court on February 14, 2014.

## II 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.** — ... For benefit years on and after July 1, 2012 and prior to July 6, 2014, 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 greater than, or equal to, his or her weekly benefit rate 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.

(Emphasis added). 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.

### 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.’”<sup>1</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

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<sup>1</sup> 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).

fact.<sup>2</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>3</sup>

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.

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<sup>2</sup> Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>3</sup> Cahoone v. Board of Review of Department 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).

#### **IV ISSUE**

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.

#### **V ANALYSIS**

The instant case has proceeded up the three steps of the administrative process that is jointly maintained by the Department of Labor and Training and its Board of Review. After prevailing in the ruling of the designee of the Director, Claimant Ponte has been denied benefits — based on findings of proved misconduct — in the decisions of Referee Enos and the Board of Review. The task before this Court is to determine whether the decision of the Board of Review is clearly erroneous in light of the facts of record and the applicable law.

#### **A Factual Review**

At the contested hearing before the Referee the employer presented one witness — Mr. Michael Brugnoli, its Senior Vice-President. Referee Hearing

Transcript, at 1, 2. Mr. Brugnoli explained to Referee Enos that Mr. Ponte was discharged as a result of a series of violations of the employer's rules and protocols when employed as a security officer at a client's premises. Referee Hearing Transcript, at 5-6. He counted them off — being where he should not be, cleaning things, using the phone, and others. Referee Hearing Transcript, at 6. And at Mr. Ponte's final assignment, at a drug rehabilitation program, these rules were particularly to be followed especially strictly — particularly the rule against use of the telephone. Id.

In August of 2013 — because he allowed someone through the employees' entrance of the client's premises — Mr. Ponte was placed on 90-days probation, which meant that any further violations of RIBI's rules could result in termination. Referee Hearing Transcript, at 6-7; see also Employer's Exhibit No. 2. Mr. Brugnoli described it as being, more or less, a "last chance agreement." Then, in October, Mr. Ponte made what were perceived as inappropriate remarks within the hearing of client personnel. Referee Hearing Transcript, at 8. As a result, he was discharged. Id. At this point, the employer rested.

Claimant Ponte then began his testimony. Referee Hearing Transcript, at 8. He began by explaining the incident in March at the Codac facility. Id. He

was in his patrol vehicle when a gentleman approached him, claiming to have an appointment with the building superintendent, inquiring where that person's office was. Referee Hearing Transcript, at 9. Since it was a "secure" building, Mr. Ponte believed he could not let the gentleman in, so he escorted him to the superintendent's office. Referee Hearing Transcript, at 9. Taking Claimant aside, the superintendent expressed his great displeasure (in no uncertain terms) that he had brought the person to his office. Id. Claimant apologized and promised he would not do so again. Id.

He described the second incident, at Alco, thusly. One night he was bored, there was nothing going on, and so he opened a closet door. As he described it, it was a total hazard. Referee Hearing Transcript, at 10. So, he cleaned the closet to have something to do, though he conceded — "I know it's none of my business." Id.

Finally, he gave his perspective on the final incident. He said that, on the night before, he and his wife were watching a show where the security guard at a restaurant was turning the male clients away, but was frisking the female clients intensively and immodestly. Referee Hearing Transcript, at 11. He told this story to his trainer. Referee Hearing Transcript, at 12. Apparently, two female workers heard this story and said "wow" — at which point Claimant

responded: “Well, I guess I just have to frisk you.” Id. And according to Mr. Ponte, they all laughed. Id. But later, he was called into the office and told he had made an inappropriate comment. Referee Hearing Transcript, at 12.

On questioning by Mr. Brugnoli, Mr. Ponte conceded he had been given orientation training by RIBI at its corporate offices, particularly how to deal with female employees of RIBI’s clients, including the rule that RIBI personnel do not talk to clients. Referee Hearing Transcript, at 17-18. Neither should they get involved with clients’ private property. Referee Hearing Transcript, at 18.

Claimant acknowledged knowing that CODAC was a drug rehabilitation program. Referee Hearing Transcript, at 18. He also agreed he had attended classes in HIPAA’s medical privacy rules. Referee Hearing Transcript, at 19. And so he conceded that he should not be looking inside private enclosures at such a facility. Id. Mr. Ponte admitted that, when he told the story within the earshot of personnel he called them girls. Referee Hearing Transcript, at 19.

## **B**

### **Rationale**

In this case the Board of Review, adopting the decision of Referee Enos, found that Claimant was terminated for proved misconduct. Before this Court, Mr. Ponte urges adamantly that the incidents in question were a result of what he calls his “idiosyncrasies” and not the result of any “wrongful intent or evil

design,” as required by the Turner standard. See Appellant’s Memorandum of Law, at 11. And so, he urges, he should not be disqualified for proved misconduct.

Now, even Mr. Brugnoli conceded that Mr. Ponte was a well-intentioned fellow. So, under a traditional view of misconduct — an intentional flouting of the employer’s interests — it might be difficult to find him disqualified under section 18. However, we need not reach this difficult question.<sup>4</sup> Instead, this case can be decided by focusing on a different theory of section 18 misconduct — whether Claimant was properly disqualified for violating the employer’s rules of behavior. The answer, I believe, is yes.

Whatever his subjective intent, the record is clear that Claimant could not confine his words and actions to that prescribed by his employer. He did not seem to grasp that while he worked at various locations he worked for RIBI, and owed that firm his fidelity. Of course, with just his various misadventures on the record, we might be constrained to assume that his behavior was attributable to some sort of misunderstanding, a kind of incompetence. However, as was drawn out on cross-examination, Mr. Ponte

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<sup>4</sup> We also need not consider whether Claimant’s story-telling efforts were so offensive as to constitute misconduct per se, notwithstanding his subjective intent.

knew the rules but chose not to adhere to them. Sadly (for he seems from this record to be a well-meaning fellow), in addition to costing him his position, his actions must also preclude him from receiving unemployment benefits.

Pursuant to the applicable standard of review described *supra* at 6-7, the decision of the Board of Review 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.*, failing to perform his duties in an appropriate manner according to the rules established by RIBI — is well-supported by the record and should not be overturned by this Court.

## VI 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.

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Joseph P. Ippolito  
Magistrate

January 30, 2015

