

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

Kim S. Noonan :
v. : A.A. No. 2015 – 076
Department of Labor and Training, :
Board of Review :

FINDINGS & RECOMMENDATIONS

Ippolito, M. Ms. Kim S. Noonan 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 she was not entitled to receive employment security benefits because she was fired for misconduct. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Applying the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is not clearly erroneous nor affected by error of law; I therefore recommend that the decision of the Board of

Review be AFFIRMED.

I

TRAVEL OF THE CASE

The travel of the case is this: Ms. Kim S. Noonan worked for East Side Clinical Lab for 3½ years, until April 2, 2015. She filed a claim for unemployment benefits but on May 8, 2015, a designee of the Director of the Department of Labor and Training determined that she was ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

Ms. Noonan filed an appeal and a hearing was scheduled and conducted on June 16, 2015 by Referee William Enos. Claimant appeared, accompanied by counsel. Two representatives of the Employer also appeared. The following day, June 17, 2015, Referee Enos held that Ms. Noonan was ineligible to receive benefits because she had been fired for misconduct; his written decision contained the following findings of fact:

The claimant worked as an Accountant for East Side Clinical Lab for 3.5 years, last on April 2, 2015. The employer terminated the claimant for violating the company policy concerning insubordination and the use of abusive or threatening language towards fellow employees. The employer introduced evidence that showed that the claimant had been warned before about her use of abusive and threatening language towards fellow employees. The

employer introduced evidence that showed that the claimant refused to train a coworker in payroll even though the CFO instructed her to do so. The last and final incident was when the claimant berating and threatened a coworker about taking an extended lunch. When the coworker explained that she was late coming back from lunch because she had a meeting on a private matter with HR. The claimant continued berating and threatening her coworker demanding to know what the meeting was about. The coworker was so upset she immediately called Human Resources telling the HR Director that she felt threatened and uncomfortable. The HR Director went to see the claimant and the claimant asked the HR Director “what are you doing here? This is none of your business.” During the meeting the claimant told the HR Director that “Good, I am glad I made her feel uncomfortable.” The claimant stated that the coworker just went to corporate to get weighed in for a contest. The claimant admitted that she may have spoken loudly but did not yell or scream and I certainly did not threaten anyone. The claimant admitted that she did tell the HR Director that it was none of her business because she asked a hypothetical question. The claimant stated that she was never told by the CFO to train her coworker in payroll.

Decision of Referee, at 1. And, after quoting extensively from § 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 articulated the following conclusions:

... I find that the claimant was terminated for violating the company policy concerning insubordination and the use of abusive or threatening language towards fellow employees which I find are for disqualifying reasons since the claimant’s actions were not in the best interest of the employer. Based on this conclusion, I find the claimant is not entitled to

Employment Security benefits under Section 28-44-18 of the above Act.

Decision of Referee, at 2. The Claimant appealed the Referee's decision to the Board of Review.

On July 22, 2015 — based solely upon a review of the record created by the Referee — the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto; the Board adopted the Referee's decision as its own. Accordingly, the decision of the Referee was affirmed. Finally, on August 21, 2015, Claimant Noonan filed a complaint for judicial review of the Board's decision in the Sixth Division District Court.

II APPLICABLE LAW

The Rhode Island Supreme Court has described the statutory provision upon which those claimants who have been fired for misconduct are disqualified from receiving unemployment benefits as follows:

Under § 28-44-18 of Rhode Island's 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.¹

Section 28-44-18 provides:

28-44-18. Discharge for misconduct. — ... For benefit years beginning on or after 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 earnings greater than or equal to eight (8) times his or her weekly benefit rate for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. ... 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 Turner v. Department of Employment and Training, Board of Review (1984),² the Rhode Island Supreme Court adopted a definition of the term

¹ Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1017-18 (R.I. 2004).

² Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984).

“misconduct” which it drew from an earlier Wisconsin case, Boynton Cab Co. v. Neubeck (1941)³:

‘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.⁴

The employer bears the burden of proving, by a preponderance of the evidence, that the claimant’s actions constituted misconduct as defined by law.⁵

³ Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941).

⁴ Turner, ante, 479 A.2d 741-42 (quoting Boynton Cab, ante, 237 Wis. at 259-60, 296 N.W. at 640).

⁵ Foster-Glocester Regional School Committee, ante, 854 A.2d at 1018 citing Technic, Inc. v. Rhode Island Department of Employment and Training, 669 A.2d 1156, 1158 (R.I. 1996).

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.

The Supreme Court of Rhode Island has stated that, on questions of fact (i.e., what was said or done), this Court "... is specifically prohibited from substituting its judgment for that of the agency on the weight of evidence on questions of fact."⁶ The further question of what circumstances may

⁶ Cahoone v. Board of Review of the Department of Employment

constitute misconduct in connection with one's work "is a mixed question of fact and law."⁷ However, a question of law is presented if the facts found by the Board of Review lead us to only one reasonable conclusion.⁸

This Court must affirm the Board's decision unless "substantial rights of the appellant have been prejudiced"⁹ — either because the Board's decision is "clearly erroneous"¹⁰ or "arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."¹¹ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.¹² In

Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

⁷ D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1040-41 (R.I. 1986)(Noting that whether the Claimant had good cause to quit his position under § 28-44-17 is a mixed question of fact and law); Rhode Island Temps, Inc. v. Dept. of Labor and Training, Board of Review, 749 A.2d 1121, 1128 (R.I. 2000)(Whether the Claimant had good cause to refuse suitable work under § 28-44-20 is a mixed question of fact and law). Accord, Rocky Hill School v. Dept. of Employment and Training, Board of Review, 668 A.2d 1241, 1243 (R.I. 1995).

⁸ Id.

⁹ Cahoone, ante, 104 R.I. at 506, 246 A.2d at 215 quoting Gen. Laws 1956 § 42-35-15(g).

¹⁰ Cahoone, 104 R.I. at 506, 246 A.2d at 215 quoting § 42-35-15(g)(5).

¹¹ Cahoone, 104 R.I. at 506, 246 A.2d at 215 quoting § 42-35-15(g)(6).

¹² Cahoone, ante, 104 R.I. at 506-07, 246 A.2d at 215.

sum, so long as the decision of the Board is supported by legally competent evidence, this Court must affirm.¹³

Our Supreme Court declared 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.

¹³ Foster-Glocester Regional School Committee, *ante*, 854 A.2d at 1012. “Legally competent evidence is defined as ‘such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.’” Foster-Glocester, *id.*, (citing Rhode Island Temps v. Dept. of Labor and Training, Board of Review, 749 A.2d 1121, 1125 (R.I. 2000) quoting Center for Behavioral Health v. Barros, 710 A.2d 680, 684 (R.I. 1998)).

IV 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. At each level — the Director, the Referee, and finally, the Board of Review — the fact-finder has decided that the Employer’s evidence was persuasive. However, in this action for judicial review, it is not our role to judge anew whether the employer’s proof was persuasive, but only to examine the decision of the Board of Review to determine whether it is clearly erroneous in light of the reliable, probative, and substantial evidence of record. Of course, before we can opine on this issue, we must determine what the facts are.

A

Evidence of Record

1

Testimony of Lauren Merritt

Ms. Lauren Merritt, East Side’s Human Resources Manager, testified first. She explained that on April 2, 2015, she received a call from an employee who was assigned to the Rolfe Square location — Ms.

Danielle Lyckland¹⁴ — who was crying, and who reported that she had had an altercation with Claimant Noonan, her co-worker, when she returned to the office from lunch.¹⁵ As a result, Ms. Merritt responded immediately to Rolfe Square.¹⁶

When she arrived at the Rolfe Square location, Ms. Merritt found that Ms. Noonan was at lunch and that Ms. Lyckland was upset.¹⁷ Ms. Lyckland explained that she had been at the main laboratory on Risho Avenue and that, while there, she had heard that there was a contest; so she went in (to human resources) to sign up for it, which had led to a discussion with her (i.e., Ms. Merritt) about a private matter.¹⁸ And when she returned back to Rolfe Square, Ms. Noonan wanted to know why her lunch break had taken so long.¹⁹ But when Ms. Lyckland responded that she was talking to HR about a private matter, this answer did not satisfy Claimant, who pressed her for more information — repeatedly, and at

¹⁴ I have spelled this woman's name as I found it in a memorandum she wrote which may be found on page 71 of the electronic record attached to this case. In the hearing transcript, it is spelled "Ridland." See Referee Hearing Transcript, at 6.

¹⁵ Referee Hearing Transcript, at 6.

¹⁶ Id.

¹⁷ Referee Hearing Transcript, at 7-8.

¹⁸ Id.

¹⁹ Id.

escalating volume, and ultimately standing over her, pointing.²⁰ And when Ms. Lyckland told the Claimant that she was making her “very uncomfortable,” she said — “Good. I want you to be uncomfortable.”²¹ Claimant then left for her lunch hour.²² It was at this point that Ms. Lyckland called Ms. Merritt.²³

When Claimant Noonan returned to her office, she immediately asked Ms. Merritt — “Why are you here? You have no business being here. This is none of your business.”²⁴ The Human Resources Manager countered that it was her business.²⁵ She asked Ms. Noonan the reason for such a confrontation.²⁶ Claimant then got louder and louder, saying — “I don’t care that I made her uncomfortable. She needs to be uncomfortable. She can’t take a long lunch.”²⁷ With this, Ms. Merritt concluded that she could not leave the two workers there together.²⁸ And so, she sent Ms.

²⁰ Id.

²¹ Referee Hearing Transcript, at 7-8.

²² Referee Hearing Transcript, at 8.

²³ Id.

²⁴ Referee Hearing Transcript, at 8, 35.

²⁵ Referee Hearing Transcript, at 35.

²⁶ Referee Hearing Transcript, at 8.

²⁷ Id.

²⁸ Id.

Noonan home with instructions to meet with her and the Chief Financial Officer (CFO), Mr. Accinno, on Monday.²⁹

But, because Mr. Accinno was away, the Monday meeting was postponed until Tuesday.³⁰ Now, as it happened, the CFO had already intended to meet with Claimant when he returned from vacation, due to a prior confrontation with another co-worker and refusing to do work she regarded as not within her job description (regarding training Danielle).³¹ Ms. Noonan reiterated her statement that she was glad that she had made Ms. Lyckland feel uncomfortable.³² Ms. Merritt also testified that Claimant was terminated for unprofessional behavior and insubordination.³³

Next, Ms. Merritt answered questions posed by Claimant's counsel.³⁴ First, she denied that Eastside had a formal progressive discipline policy.³⁵ Neither did it have a sunset provision for disciplinary findings.³⁶ Ms. Merritt, who had joined the firm in September of 2014,

²⁹ Referee Hearing Transcript, at 8-9.

³⁰ Referee Hearing Transcript, at 9.

³¹ Referee Hearing Transcript, at 9-10.

³² Id.

³³ Referee Hearing Transcript, at 12.

³⁴ Referee Hearing Transcript, at 13.

³⁵ Id.

³⁶ Id.

testified that Claimant had a prior incident dating back to March of 2014, but nothing after that was reflected in writing (until the April 2, 2015 confrontation at issue), though co-workers had expressed dissatisfaction with Claimant.³⁷

Ms. Merritt reiterated that, in the incident which occurred just before the CFO had gone on vacation — regarding her failure to train Danielle — Claimant had failed to follow the CFO's instructions.³⁸ And, on a different occasion, she had received an oral counseling (memorialized in writing) for disparaging a co-worker on a conference call. Referee Hearing Transcript, at 36 citing Employer's Exhibit No. 2.

2

Testimony of Mr. David Accinno

The second witness for the employer was its Chief Financial Officer (CFO) — Mr. David Accinno.³⁹ He began his testimony by speaking about the earlier incident in which Claimant was given a written warning for insubordination.⁴⁰ He testified that, in the written warning that he gave her, he had also warned her about the manner in which she addressed and

³⁷ Referee Hearing Transcript, at 13-16.

³⁸ Referee Hearing Transcript, at 17.

³⁹ Referee Hearing Transcript, at 18 et seq.

⁴⁰ Referee Hearing Transcript, at 11.

treated her co-workers.⁴¹ Later, under questioning by Claimant’s attorney, Mr. Accinno stated he could not recall the exact nature of Claimant’s insubordination, but recalled that he had asked Claimant to bring Danielle “up to speed” when she was hired.⁴²

Mr. Accinno then described another incident, which occurred just before he had gone on vacation, relating to a new payroll process that was being installed.⁴³ Ms. Noonan had forgotten to upload the file on-time.⁴⁴ As a result, Mr. Accinno told her that it had to be done by Wednesday.⁴⁵ Three weeks later it happened again.⁴⁶ Claimant was written up — but he waited until after his vacation to address it with her.⁴⁷ So, he took that duty away from her.⁴⁸ And he also expected Ms. Noonan to explain the system to the other employee.⁴⁹

⁴¹ Id.
⁴² Referee Hearing Transcript, at 18.
⁴³ Id.
⁴⁴ Id.
⁴⁵ Id.
⁴⁶ Id.
⁴⁷ Referee Hearing Transcript, at 19.
⁴⁸ Id.
⁴⁹ Referee Hearing Transcript, at 20.

Mr. Accinno said that, before he went away, he had decided that he would not fire Ms. Noonan based on the payroll incident.⁵⁰ Instead, it was the (final) incident with Ms. Lyckland that prompted him to fire her.⁵¹ He based his decision upon the fact that he had spoken to her previously about making other co-workers feel uncomfortable — and told her that she would have suffered greater consequences if he had concluded that her behavior was intentional.⁵²

At this juncture counsel began to inquire about the final incident. After asking whether the company's workers could take two-hour lunches — and receiving a negative response — counsel asked Mr. Accinno what Claimant should have done while she was waiting for Ms. Lyckland to return.⁵³ He responded that, if she was upset, she should have conveyed that to him or to human resources.⁵⁴ Mr. Accinno indicated that he had not received complaints that Ms. Lyckland had previously taken long lunches.⁵⁵

⁵⁰ Referee Hearing Transcript, at 20.

⁵¹ Referee Hearing Transcript, at 20-21.

⁵² Referee Hearing Transcript, at 21.

⁵³ Referee Hearing Transcript, at 22-23.

⁵⁴ Referee Hearing Transcript, at 23.

⁵⁵ Id.

Testimony of Claimant Noonan

Ms. Noonan began her testimony by explaining that she and Ms. Lyckland were accountants, who worked jointly to complete their assigned tasks.⁵⁶ The numbers and complexity of their duties required them to work overtime — at least one hour on Saturdays — for which they were not compensated, because they were on salary.⁵⁷

Regarding the incident in question, Ms. Noonan testified that, before she left, Ms. Lyckland told her that she was going over to the corporate office to get weighed-in for a contest, promising to return before the end of her lunch hour. But Ms. Lyckland didn't — she did not return until she had been gone for two hours.⁵⁸

When Ms. Lyckland got back to the office, Claimant asked her where she had been, and she said human resources.⁵⁹ She then reminded Ms. Lyckland that, because she had taken a two-hour lunch, they would

⁵⁶ Referee Hearing Transcript, at 24.

⁵⁷ Referee Hearing Transcript, at 24-25. According to Ms. Noonan, Danielle did not call until 15 minutes before she returned. See Referee Hearing Transcript, at 24.

⁵⁸ Referee Hearing Transcript, at 24-25.

⁵⁹ Referee Hearing Transcript, at 25.

have to work more overtime.⁶⁰ Ms. Lyckland then said she that had to talk to human resources about a personal matter.⁶¹ Claimant denied threatening Ms. Lyckland and yelling at Ms. Lyckland.⁶² And she testified that Danielle was neither crying nor shaking.⁶³

And after this conversation, Ms. Noonan went to lunch, since it was four o'clock.⁶⁴ And when she got back, Ms. Merritt was there; and they talked about what had happened.⁶⁵ According to Ms. Noonan, Ms. Merritt asked her whether she would have said the same things in front of the secretary.⁶⁶ And she replied that it was not a scenario that exists, and added — “none of your business.”⁶⁷ Ultimately, she was sent home.⁶⁸

Ms. Noonan indicated that her next communication with management was at the (following) Tuesday meeting with Ms. Merritt and

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Referee Hearing Transcript, at 25-26.

⁶⁴ Referee Hearing Transcript, at 26.

⁶⁵ Referee Hearing Transcript, at 27.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

Mr. Accinno, at which time she was terminated.⁶⁹ Ms. Noonan told Referee Enos that she was told that she was being fired because of the incident with Ms. Lyckland, and not because of the prior insubordination.⁷⁰

Ms. Noonan also spoke about an incident which had led to her first written warning while employed at East Side Clinical Lab — the alleged incident of insubordination.⁷¹ She explained that it had happened during a period when she did not have a second full-time accountant working with her.⁷² According to Claimant, she was essentially doing the work of two experienced accountants.⁷³ Nevertheless, when Ms. Noonan refused Mr. Accinno's direction to perform a task for him because she was in the middle of an accounting task of her own, she was written up for insubordination.⁷⁴

⁶⁹ Referee Hearing Transcript, at 28.

⁷⁰ Id. He said she might have been fired for insubordination, but he never actually told her to train Danielle on payroll. Id.

⁷¹ Referee Hearing Transcript, at 29.

⁷² Referee Hearing Transcript, at 29-30.

⁷³ Referee Hearing Transcript, at 29.

⁷⁴ Referee Hearing Transcript, at 30, 32.

Ms. Noonan also responded to the allegation that she had refused to train Ms. Lyckland on the payroll system, which was new.⁷⁵ She explained that Ms. Lyckland did not have the proper software to perform the necessary tasks.⁷⁶ So, she contacted the appropriate corporate office to get her the software.⁷⁷ Nevertheless, she conceded that she did not show Danielle, in a step-by-step manner, how to use it.⁷⁸ According to Mr. Accinno, she refused to do so.⁷⁹

Ms. Noonan also provided her point-of-view regarding the incident in which she was accused of having spoken ill of a co-worker during a conference call. She said that she simply answered, in a frank manner, a question that had been posed by a colleague from the corporate office regarding the ability of a local employee to implement a new program.⁸⁰

⁷⁵ Referee Hearing Transcript, at 32.

⁷⁶ Referee Hearing Transcript, at 31.

⁷⁷ Id.

⁷⁸ Referee Hearing Transcript, at 32.

⁷⁹ Referee Hearing Transcript, at 34.

⁸⁰ Referee Hearing Transcript, at 38.

B
Discussion

1

The Acceptance of Hearsay

As counsel for Claimant argued in his summation, Ms. Lyckland did not testify at the hearing conducted by Referee Enos.⁸¹ Her version of events was presented in the testimony of the management witnesses and in a memorandum that she had written — all of which are hearsay.⁸² And while her live testimony would have been preferable — so that the Referee could have judged her demeanor for himself — there is no question that this hearsay testimony was properly admitted.

Hearings conducted by the Board of Review are exempted from the evidentiary parameters expounded in the Rhode Island Administrative Procedures Act.⁸³ But, as our Supreme Court articulated in Foster—

⁸¹ Referee Hearing Transcript, at 40.

⁸² This memorandum was received into evidence as part of Employer's Exhibit No. 1. Within the Rhode Island Rules of Evidence, hearsay is defined thusly — “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” RI. Rule of Evidence 801(c).

⁸³ See Gen. Laws 1956 § 42-35-10.

Glocester Regional School Committee,⁸⁴ Gen. Laws 1956 § 42-35-10

provides “evidentiary guidelines” for use in Board hearings —

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.

And so, even those administrative adjudicators whose hearings are bound by the rules of evidence may admit evidence contrary to the rules, when necessary, so long as it is of the type “commonly relied upon by reasonably prudent men and women in the conduct of their affairs.” Does a statement from an employee to a manager about what transpired on the employer’s premises satisfy this test? I think it does. We may therefore conclude that no error was committed in the admission of (and consideration of) hearsay evidence.

⁸⁴ Foster–Glocester, 854 A. 2d at 1018-19.

2

The Authority of the Board

One might also question the procedure that the Board employed in reviewing this case. It did not conduct its own hearing; nor did it make its own findings and conclusions, but adopted those of the Referee as its own. While jarring at first glance, we must realize that the Board acted lawfully in doing so.

The Board of Review is granted the authority to follow this course of procedure in Gen. Laws 1956 § 28-44-47:

Any party in interest, including the director, shall be allowed an appeal to the board of review from the decision of an appeal tribunal. The board of review on its own motion may initiate a review of a decision or determination of an appeal tribunal within fifteen (15) days after the date of the decision. The board of review may affirm, modify, or reverse the findings or conclusions of the appeal tribunal solely on the basis of evidence previously submitted or upon the basis of any additional evidence that it may direct to be taken.

And so, the Board's decision in the instant case met the standards of § 28-44-47 regarding the explanation of its decision and findings.

3

The Employer's Proof Was Sufficient

When evaluating a case under § 18 regarding an allegation of misconduct, we must always inquire regarding (at least) two issues. First,

was the allegation sufficient to justify disqualification? And second, was the allegation proven? In my opinion, both prongs of the misconduct test have been satisfied in Ms. Noonan's case.

Firstly, the allegation — that Claimant acted unprofessionally in the dealings with a co-worker — was sufficient under § 18. Such a confrontation can be disqualifying because it can affect the efficient operation of the Employer's business. Such conduct is therefore against the Employer's interests. Secondly, insubordination can constitute proved misconduct because it is a denial of the supervisor-worker relationship, of the supervisor's authority. So, it is my view that these allegations — if supported by convincing evidence and testimony — were more than sufficient to constitute proved misconduct and satisfy its burden of proof. That being stated, I do not mean to imply that the instant case turns on the fact-finder's estimation of the credibility of the witnesses. It does not.

Generally speaking, the Employer's and Claimant's versions of the events under examination in this case do not stand in diametric opposition to each other. To the contrary, they are generally in harmony⁸⁵ — Ms.

⁸⁵ The most significant variance between the two versions of events came in their descriptions of Ms. Lyckland's reaction to Ms. Noonan's interrogation: the Employer's magnifying, the Claimant's minimizing.

Noonan does not argue that the allegations against her are entirely fabricated. Instead, she urges, regarding each of the allegations made against her, that her actions were entirely justified.

Let us turn to the (final) incident which precipitated Ms. Noonan's termination. No person could fail to be sympathetic to Claimant's quandary. Ms. Lyckland left for her lunch hour, saying she would return in one hour. However, she did not return until two hours had passed. She only called fifteen minutes before she got back. By the time Claimant got to take her lunch hour, it was late in the afternoon. On that basis alone, Ms. Noonan had every right to be perturbed.

In addition, Ms. Lyckland's absence was likely to have a continuing effect on Claimant. Ms. Noonan explained — and these comments were not challenged by Mr. Accinno — that they worked in tandem. And since unpaid Saturday overtime was already built into their work week, it may be rationally deduced that the extra hour Ms. Lyckland was absent would have necessitated additional overtime for both of them. Ms. Noonan also had every right to be agitated for this reason.

Nevertheless, the nature and extent of her reaction is subject to reasonable criticism. It appears — from her satisfaction with the outcome

— that she intentionally provoked an uproar with Ms. Lyckland. And so, I do not doubt that a finding of disqualifying misconduct could be rested solely on Claimant’s behavior toward Ms. Lyckland. But, in my view, it is the insubordination allegation which is the more damaging to Ms. Noonan’s claim for benefits.

In order to evaluate this allegation, we must first establish a definition for the term — “insubordination.” For guidance on this question we may turn to several of the leading dictionaries — legal and lay. The Ninth Edition of Black’s Law Dictionary defines insubordination as either “a willful disregard of an employer’s instructions” or “an act of disobedience to proper authority.”⁸⁶ General dictionaries follow suit: the Webster’s Third defines “insubordinate” as “unwilling to submit to authority.”⁸⁷ Likewise, the American Heritage defines “insubordinate” as “not submissive to authority.”⁸⁸ Clearly, Ms. Noonan’s behavior — telling Ms. Merritt she had no right to look into the conflict — fits into these definitions perfectly.

⁸⁶ Black’s Law Dictionary 870 (9th ed. 2009).

⁸⁷ Webster’s Third New International Dictionary 1172 (3rd ed. 2002).

⁸⁸ American Heritage Dictionary 910 (5th ed. 2011).

Instead of seeking redress from the Human Resources Manager⁸⁹ — who bore some responsibility for the incident — Ms. Noonan told Ms. Merritt that the controversy was none of her business. In addition to being impertinent, this statement was patently untrue — it is indisputably the prerogative (and province) of a human resources officer to investigate a quarrel between employees — particularly one which is staffed by professionals such as accountants.

In sum, I believe I must find that the Board of Review was well-justified in concluding that Ms. Noonan's comments to Ms. Merritt constituted insubordination — insubordination that was corrosive to the relationship between Ms. Noonan and her superiors — particularly since it occurred after she had already been admonished for being directly insubordinate to Mr. Accinno. Quite simply, after this second incident of insubordination, her continued service in a position of sensitivity and trust might well have been impossible.

And so, I cannot declare, as a matter of law, that the Board's finding that Claimant was discharged for proved misconduct was wrong.

⁸⁹ After all, Ms. Merritt bore some responsibility for the incident; she could have (at the very least) instructed Ms. Lyckland to call Ms. Noonan to inform her that she would be late.

The evidence supporting it was ample. I must therefore recommend that the decision rendered by the Board of Review in this case disqualifying Ms. Noonan from the receipt of unemployment benefits be affirmed.

V
CONCLUSION

Acting pursuant to the applicable standard of review set forth in Part III of this opinion, and for the reasons stated above, I must conclude that the Board of Review's decision is not clearly erroneous in view of the reliable, probative, and substantial evidence of record. Gen. Laws 1956 § 42-35-15(g)(5). It is, in my estimation, supported by legally competent evidence of record. Substantial rights of the Appellant have not been violated. Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

_____/s/
Joseph P. Ippolito
MAGISTRATE
April 29, 2016

