

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

DISTRICT COURT
SIXTH DIVISION

Jeffrey Slater

v.

Department of Labor & Training,
Board of Review

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:

A.A. No. 2012-253

JUDGMENT

This cause came before Gorman, J. on Administrative Appeal, and upon review of the record and memoranda of counsel, and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board of Review is affirmed.

Dated at Providence, Rhode Island, this 9th day of December, 2014.

Enter:

By Order:

_____/s/_____

_____/s/_____

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DECISION

Plaintiff in this case, asks the court to reverse a decision of the Department of Labor and Training, Board of Review finding that he was fired for proven misconduct and therefore, ineligible for unemployment benefits. This court has jurisdiction pursuant to Gen. Laws 1956 §§ 42-35-15 and 28-44-52.

I. PROCEDURAL HISTORY AND FACTS

Plaintiff was a corrections officer at the Central Falls Detention Facility Corporation, which is responsible for housing federal prisoners, until his termination from that job in 2012. He sought unemployment benefits, and that request was initially granted by a representative of the Director of the Department of Labor and Training who determined that there was “no evidence of misconduct in connection with [claimant’s] work.” Decision mailed August 3, 2012. The employer appealed, and following an evidentiary hearing, a referee ruled that the evidence showed Mr. Slater had engaged in proven misconduct making him ineligible for benefits under Gen. Laws 1956 § 28-44-18. In his findings of fact, the

referee stated that the director's decision was mailed to the employer on August 3, 2012. He further found that:

The employer filed their (sic) appeal on August 20, 2012, beyond the fifteen [day] appeal period. The employer had been in contact with a representative from the Department of Labor since August 8, 2012 with regard to their (sic) appeal. The representative from the Department of Labor had asked the employer to provide documentation regarding the case, and [advised] that the decision of the director would be re-determined. The employer did provide that documentation, but beyond the fifteen day appeal period.

The Human Resources Director for the employer testified that she exchanged telephone calls with a representative of the Department of Labor and Training concerning the decision finding Mr. Slater eligible for unemployment benefits. In a voice mail message left for the Human Recourses Director on August 8, the Department of Labor and Training official stated that "we are in the process of doing a re-determination," and asked to be called back. The call was returned, but the individuals continued to "play phone tag." Ref. Hearing, at 15-17. Because she had not been able to talk to the Department of Employment officer, on August 14, the Human Resources Director testified that she left a voice mail message with the details of the employer's claims. The Human Resources Director stated that when she did not hear back from the Department of Labor and Training, she forwarded the appeal on August 20.

In his conclusions, the referee stated that "[t]he employer has established that they (sic) performed due diligence in contacting the department with regard to their(sic) case. I find that the claimant is entitled to file an appeal out of time under the above section [§ 28-44-39(b)] of the act."

The referee then considered the merits of the appeal. He found that plaintiff was discharged for proven misconduct and therefore ineligible for benefits under § 28-44-18.

The referee made the following findings of fact:

The claimant was a correctional officer for Central Falls Detention Center for two years last July 10, 2012. The claimant was on Family Medical Leave (FMLA) from April 12, 2012 until May 28, 2012. The claimant asked for and received a doctor's note faxed to his home on May 25, 2012 allowing him to return to work with no restrictions. (Cite omitted) The claimant faxed that doctor's note to the employer on May 25, 2012. The employer called the claimant for clarification on the date the claimant was cleared to return to work. The doctor's note that the claimant faxed had a date that appeared on the fax to be suspicious to the employer. The claimant returned the employer's call and informed them that the date on the note read May 29, 2012. The employer had also contacted the doctor's office directly. The doctor's office faxed a copy of the doctor's note. (Cite omitted) The date on that note clearly read May 28, 2012. The warden of the facility authorized an investigation regarding the discrepancy between the dates on the two doctor's notes. A formal investigation was conducted. The claimant had altered the doctor's note he submitted to his employer. The claimant was terminated for this incident.

The employer appealed the referee's determination to the Department of Labor and Training, Board of Review which affirmed the decision. The board member representing labor filed a dissenting opinion stating that that because the appeal of the director's decision was filed late, that appeal should have been denied.

II. DISCUSSION

A.

As has been emphasized by this and other courts, the purpose of all tribunals is to decide cases based on their merits. Of course, this must be done within procedural parameters to avoid chaos and ensure finality. Time limits for filing appeals from the Director of the Department of Labor and Training are controlled by statute. Plaintiff

contends that the employer in this case failed to file its appeal within the time required under the Employment Security Act, and that both the referee and the board erred in addressing the merits of the employer's appeal. The relevant section of the statute, § 28-44-39(b), states that:

Unless the claimant or any other interested party¹ who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended.

The employer argues rather persuasively that the court should consider the appeal as being filed in a timely manner because the fifteenth day fell on a Saturday, August 18, a day when the Department of Labor and Training is closed, and therefore the time must be extended to the next "business" day, Monday, August 20, which was the date the appeal notice was filed. In support of this contention, the employer offers the provisions of § 25-1-5 which includes the following:

If any state or municipal administrative offices, or any branch, division, or independent agency of the state or municipality shall close on any Saturday pursuant to the provision of this section,² any act which would be required to be performed on any Saturday at or by the administrative office, or any branch, division, or independent agency of the state or municipality, if the administrative office, branch, division, or independent agency of the state or municipality were not closed, shall be performed on the next succeeding business day No liability of loss of rights of any kind shall result from the failure to perform any of those acts while closed on Saturday.

¹ Subsection (c) explains that "interested party" includes the employer or employing unit involved in the matter.

² The section authorizes certain offices to be closed on Saturdays.

The final sentence of this statute furnishes strong evidence that the legislature intended to protect persons from possible adverse consequences based on a failure to do something while the office involved was closed.

Plaintiff argues that it is generally known that the Department of Labor and Training is closed on Saturdays, except for limited activity initiated by the department; that the court should take judicial notice of this fact; and therefore, the circumstances presented here fall within § 25-1-5, and the appeal was timely. Rule 201(b) of the Rhode Island Rules of Evidence provides that:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Mr. Slater has not challenged the plaintiff's contention that the Department of Labor and Training was not open on Saturdays for the purpose of receiving appeals to the Board of Review.

The employer also cites a recent opinion where the state Supreme Court reversed a decision dismissing an appeal from the Department of Labor and Training because the appeal was not filed within the 30 day period set forth in the Administrative Procedure Act.³ McAninch v. State of Rhode Island Department of Labor and Training, 64 A.3d 84 (R.I. 2013). In that case, the 30th day fell on the Saturday of the Columbus Day weekend, and the filing did not occur until the next business day which was the following Tuesday. The Superior Court justice reasoned that the time prescribed under the statute controlled even

³ Section 42-35-15(b) provides that a party seeking judicial review of an administrative decision could file a "complaint . . . within thirty (30) days after mailing notice of the final decision of the agency . . ."

though Rule 6(a) of the Superior Court Rules of Civil Procedure specifically states that in calculating time periods, “[t]he last day of the period is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday.”

In reviewing the Superior Court decision, the Supreme Court acknowledged that it had held that laws prescribing time limitations and procedures were “to be strictly construed” *Id.* at 88 [cites omitted], but went on to say:

[T]his does not mean that the timeframes set forth in those statutes are utterly inflexible. See *id.* at 13 (holding that “the Superior Court has the equitable authority to determine whether the statute providing for judicial review of an administrative decision pursuant to §42-35-15(b) should be tolled in appropriate circumstances”).

Ibid. In its analysis, the Rhode Island Supreme Court also considered Rule 80(b) of the Superior Court Civil Rules which addresses the timing of administrative appeals, and Rule 81 which identifies instances in which the rules do not apply. The court then found that the civil rules rather than the statute controlled, and the appeal was timely.

In support of its contention that its appeal to the Board of Review should be deemed timely, plaintiff also asks the court to consider the “good cause” provision found in § 28-44-30(b) of the Employment Security Act, which reads:

Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director . . . the determination is final; provided that for good cause shown the fifteen (15) day period may be extended.

While the subsection allows the 15 day period to be extended, the wording suggests that the request for additional time would be made before the last day. The statute does not

expressly authorize the acceptance of late appeals. However, as noted in earlier District Court decisions, “in many cases the Board of Review (or, upon review, the District Court) has permitted late appeals if good cause is shown.” Gabriel v. Department of Labor and Training, Board of Review, A.A. No. 12-221, Slip op. at 6 (Dist. Ct. 12/19/12). See also, White v. Department of Labor and Training, Board of Review, A.A. No. 12-145, slip op. at 5 (Dist. Ct. 9/20/12).

It is axiomatic that the party seeking the benefit of the “good cause” exception to the 15 day appeal rule has the burden of proof to support a late filing. Here, the employer offered evidence showing that between August 8 and August 14, it contacted the Department of Labor and Training several times attempting to provide information relating to Mr. Slater’s claim, and that a “re-determination” had been mentioned in one of the voice-mail messages left by the Department of Labor and Training officer. Id. At 16.

The court is persuaded that the employer in this case made reasonable efforts to alert the Department of Labor and Training that it was contesting the Director’s finding of eligibility for Mr. Slater, and the record contains substantial evidence to support the Board of Review’s allowance of an appeal filed two days beyond the 15 day time limitation. Although this issue has been decided based on § 28-44-39(b) and it is not necessary to look further at § 25-1-5, the court notes that the latter statute offers strong support to the employer’s argument that the appeal was filed on time.

B.

The merits of plaintiff’s appeal are less complicated, and, for the most part, the facts are not in dispute. Mr. Slater was out of work on medical leave and was cleared to return

with no restriction. The note from his doctor was faxed by the plaintiff to the employer. It contained a return to work date of May 29. Because the Director of Human Resources for the employer thought the number looked like it had been altered, she had the doctor's office fax a copy directly to her. The doctor's fax showed that the return date was May 28. This discrepancy prompted an inquiry by the employer, and, eventually the firing of plaintiff.

Plaintiff acknowledges there are differences in the two notes from his doctor. Ref Hearing, at 89. No specific findings were made by the referee, but an examination of the two notes (Employer Exs. 5 and 6) indicate that the right side of the bottom loop of the 8 found in the note faxed directly from the doctor's office to the employer was missing in the copy sent by plaintiff, so only the top loop and a straight line remained, making it appear to be a 9.

Mr. Slater argues that the employer "never made a finding that [Mr. Slater] himself intentionally altered the document." Brief of the Claimant-Appellant, at 11. It is true that there is nothing to show who made the changes in the doctor's note or how the alteration was effected. But plaintiff testified that he picked the note up from the doctor's office and he faxed it to his employer because he wanted the correction facility to "receive a copy right away." Id. At 58-59. After faxing the document, he said he telephoned his employer to make sure it received the note. Ibid. He also testified that when the Human Resources Director left a phone message saying that the return date was "unreadable to her," he called her back leaving a voice-mail message that the return date was "5/29." Id. At 61-62. There is no suggestion that anyone other than the plaintiff handled the message from the doctor's office prior to the time it was faxed from his home to the employer. And even if it had been

sent by another person, Mr. Slater had the original note and he left a telephone message stating that the date was May 29.

With these facts in mind, the court must determine whether the board of review erred when it ruled that plaintiff's actions constituted "proven misconduct" under § 28-44-18.⁴ The Rhode Island Supreme Court considered what activities might fall within this statute in Turner v, Department of Labor and Training, Board of Review, 479 A.2d 740, 741-742 (R.I, 1984). Quoting from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-260, 296 N.W. 636, 640 (1941) our court said:

"[M]isconduct" . . . is limited to conduct evincing such willful or wanton disregard of the 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 interests 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.

Because this case involves a single incident, the court must be satisfied that it is the type of conduct reflecting "such a 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

⁴ The relevant portion of this section provides:

28-44-18, Discharge for misconduct – An individual who has been discharged for proved misconduct connected with his or her work shall be ineligible for . . . benefits 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.

a right to expect of his employee.” Here, the employer provided its employees, including plaintiff, with written standards for its workers. Policy 608 provides that “[a] correctional officer or employee shall not make or submit any false or inaccurate reports or knowingly enter or cause to be entered into any facility books or records or reports, any inaccurate, false or improper information.” (Dir. Ex. 1)

The Deputy Warden at the detention facility testified that there is “zero tolerance” for conduct relating to the alteration or falsification of records. Ref. Tr. at 42-43. He further explained that this was necessary because officers may have to testify in state or federal court proceedings, and their credibility could be challenged. Id. at 43. In his testimony, Mr. Slater said that he knew his employer was going to rely on the doctor’s note he submitted. And he agreed that as a correctional officer, truthfulness and accuracy were indispensable in all official reporting, whether for personal or business matters. Id. at 77

While it might appear to be a severe penalty for a single act designed to secure an additional day of leave, under the circumstances of this case, the court believes that the conduct clearly falls within the statute.⁵ The board’s finding that plaintiff was responsible for the submission of an altered document is based on the referee’s hearing and relies on determinations concerning the credibility of witnesses and the resolution of factual questions.

Under the Rhode Island Administrative Procedure Act, in reviewing the decision of an administrative tribunal, the court “shall not substitute its judgment for that of the agency

⁵ Plaintiff argues that he did not use the extra day of leave to do anything special, and would have no motive to alter the return date. However, his reason for the falsification is not relevant. The issue is whether he did this, and the question of why he did it does not enter the equation.

as to the weight of the evidence on questions of fact.” § 42-35-15(a) After a careful review of the record in its entirety, the court finds that the board’s decision is supported by reliable, probative and substantial evidence. Therefore, the decision of the board is affirmed.