

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

DISTRICT COURT

Lori J. Tierney

:

v.

:

A.A. No. 12 - 079

:

Department of Labor & Training,
Board of Review

:

:

ORDER

This matter is before the Court pursuant to § 8 -8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED except the Order of Repayment in Board of Review case number 20116029 is vacated.

Entered as an Order of this Court on this 27th day of July, 2012.

By Order:

_____/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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Department of Labor and Training, :
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FINDINGS & RECOMMENDATIONS

Ippolito, M. Ms. Lori J. Tierney 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 terminated for proved misconduct. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the

decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Lori J. Tierney was employed for ten months as a certified nursing assistant (CNA) by Whytebrook Retirement until September 13, 2011. She applied for employment security benefits immediately¹ but on December 8, 2011 the Director issued a decision² holding that she was ineligible to receive benefits because she had engaged in misconduct within the meaning of Gen. Laws 1956 § 28-44-18. See Department's Exhibit # D2.

Complainant filed an appeal, and a hearing was held before Referee John Palangio on January 19, 2012 at which the claimant and two employer representatives appeared and testified. See Referee Hearing Transcript, No. 20116029, at 1. In his January 19, 2011 Decision, the Referee made the following findings of fact:

Claimant was employed as a CNA for 10 months at WhyteBrook last on September 13, 2011. Claimant was observed by several staff entering work with slurred speech and smelling of alcohol. Claimant testified that she had consumed alcoholic drinks the night before but was not drunk

¹ Technically, Ms. Tierney did not file a new claim but reopened an earlier claim.

² The Director actually issued two decisions that day. Case number 1158813 concerned the misconduct issue. (At the Board of Review level this was No. 20116029). Director's case number 1158810 concerned a failure to report wages allegation. (At the Board of Review level this became case No. 20116029). This second issue will be considered infra at 12.

at the time of the incident.

Decision of Referee (No. 20116029), January 19, 2012 at 1. Based on these facts, the Referee — after quoting from section 28-44-18 — made the following conclusions:

In cases of termination, the employer bears the burden of proof to prove by preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in connection with her work. It must be found and determined that the employer has failed to meet their burden.

The two employers who testified at the hearing stated that they observed the smell of alcohol on the claimant's breath. They also observed unusual behavior. The claimant did admit to having Alcala drinks the night before, but denied showing up for work intoxicated.

The testimony of the employers is credible. Although the claimant admitted to consuming alcoholic beverages the night before, and admitted having alcohol on her breath, her claim that she was not intoxicated does not appear to be credible. There was no other reason for several employees to observe this behavior and report the same results, which was that the claimant was intoxicated at work.

The claimant had a responsibility not to be intoxicated while on duty. I find that her actions were harmful towards her employers. She is therefore, denied unemployment benefits under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, January 19, 2011 at 2. Accordingly, the Referee found that claimant was properly disqualified from the receipt of unemployment benefits. Referee also found that Ms. Tierney would be required to repay benefits she received.

Thereafter, a timely appeal was filed by Claimant Tierney and the matter was reviewed by the Board of Review. In a decision dated March 7, 2012, the Board of

Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Ms. Tierney filed a Complaint for Judicial Review in the Sixth Division District Court on or about April 9, 2012.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; Gen. Laws 1956 § 28-44-18, provides:

28-44-18. Discharge for misconduct. — 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 of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title 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.

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 through a preponderance of evidence that the claimant’s action, in connection with her work activities, constitutes misconduct as defined by law.

III. STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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.’”³ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.⁴ Stated differently, the findings

³ Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

⁴ Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁵

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 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 (adopting the decision of the Referee) was supported by reliable, probative, and

⁵ Id.

substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

V. ANALYSIS

A. The Misconduct Issue.

In this case the employer alleged — and the Referee and the Board each found — that Ms. Tierney committed misconduct by appearing for work in an inebriated state. Ms. Tierney denies the allegation. Because it is uncontestable that appearing at work while under the influence may constitute misconduct, the only issue is whether the allegation was sufficiently proven. I believe it was.

1. The Employer's Testimony.

Ms. Lisa Ricci testified that on September 13, 2011 she heard Ms. Tierney on the walkie-talkie and her speech was slurred. Referee Hearing Transcript, at 10. She brought the matter to the attention of her manager — Maryanne. Referee Hearing Transcript, at 11. Ms. Ricci indicated that — this incident excepted — Ms. Tierney was a good worker. Referee Hearing Transcript, at 15.

Ms. Annemarie Cardilli testified that when she was going in to work at about 7:00 A.M. she saw Ms. Tierney outside talking with a co-worker. Id. Her speech was slurred and she could smell alcohol on her. Id. She reported it to Dan Champagne the Maintenance Director. Referee Hearing Transcript, at 12.

The Referee also considered a statement from Maryanne Grace, the Manager, who indicated that when she called in Ms. Tierney, she admitted having a few drinks. Referee Hearing Transcript, at 13-14.

2. The Claimant's Testimony.

Claimant testified that she did have a couple of drinks the night before but stopped about 8:30 P.M. Referee Hearing Transcript, at 16. She insisted she was tired, not intoxicated. Referee Hearing Transcript, at 16. She could not explain why her colleagues testified that she was intoxicated. Referee Hearing Transcript, at 19. She could offer no alternative explanation for her demeanor. Referee Hearing Transcript, at 20.

Pursuant to the applicable standard of review described supra at 6-7, the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result.

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 her work —

appearing at work inebriated — is well-supported by the record and should not be overturned by this Court.

B. Repayment of Benefits Received.

Secondly, claimant was ordered to repay \$3,000.00 by the Director, pursuant to Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

(a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.

* * *

(b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title. (Emphasis added).

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery would not defeat the purposes of the Act. In my view “fault” implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one’s

duty to do what is right.⁶ To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless. With this in mind, let us review the decision ordering repayment.

When reviewing the Director’s order, Referee Palangio found that:

The claimant’s actions were not in her employer’s best interest. Her discharge was for disqualifying reasons. She is therefore subject to all of the overpayment as previously determined by the Director under Section 28-42-68 of the Rhode Island Employment Security Act.

Referee’s Decision, January 19, 2012, at 3. Accordingly, the Referee upheld the Director’s order of repayment. For the reasons that follow, I believe this Order is deficient on its face and must be set aside.

We must remember that the Director ordered repayment based on a finding that claimant had committed misconduct. He implied that because Ms. Tierney was disqualified from receiving benefits, she was automatically subject to a repayment order. However, that is not what section 28-42-68 states. To the contrary, as we have just noted supra, the Department must demonstrate fault in order to sustain a repayment order. See Gen. Laws 1956 § 28-42-68(b).

⁶ In the Webster’s Third New International Dictionary (2002) at 839 the first definition of fault applicable to human conduct defines “fault” as “**3**: A failure to do what is right. **a**: a moral transgression.” This view is longstanding. As Noah Webster stated in the first edition of his American Dictionary of the English Language (1828), “Fault implies wrong, and often some degree of criminality.”

But the Referee did not make a finding of fault — he did not even purport to do so. His order of repayment, which was affirmed by the Board of Review, is therefore defective on its face. Secondly, the Department presented no evidence at the hearing — in particular, there was no testimony regarding what claimant represented to the Department when she filed for benefits and how she allegedly deceived the Department. This Court will not infer the nature of those representations. In the absence of such proof the repayment order must be set aside; I so recommend.

VI. THE FAILURE-TO-REPORT-WAGES ISSUE

As I noted earlier, Ms. Tierney's claim for benefits based on her termination from Whytebrook was not an initial claim for benefits, but a re-opened claim.⁷ Perhaps prompted by its research into the misconduct issue, the Department found that when Ms. Tierney began working at Whytebrook, she was also collecting unemployment on the earlier claim. Of course, this is not improper per se. Recipients of unemployment benefits are allowed to work part-time and earn wages. However, they must inform the Department of their earnings, since they are offset against the benefits being received. This, the Department alleges, Ms. Tierney did not do.⁸

⁷ Apparently, the old claim arose from prior employment at Briarcliff Manor. Referee Hearing Transcript, January 19, 2012, BOR Appeal Number 20116028, at 9.

⁸ The Whytebrook representatives reported that Ms. Tierney began working there in

The Director's determination on this question was issued on December 8, 2011 — the same day the Director's misconduct determination was promulgated. Claimant appealed from this decision, and Referee Palangio held a brief hearing on January 19, 2012 on this issue as well — immediately after the close of the misconduct hearing.

The hearing was brief — the employer representatives testified that Claimant worked on various weeks from November of 2010 until February 26, 2011. Referee Hearing Transcript, January 19, 2012, BOR Appeal Number 20116028, at 6-8. Ms. Tierney testified that she received a lump sum payment on her earlier, Briarcliff claim, after she began working at Whytebrook. Referee Hearing Transcript, January 19, 2012, BOR Appeal Number 20116028, at 11.

In his January 19, 2012 decision on this issue (BOR Appeal No. 20116028), the Referee noted that those collecting benefits who work part-time must accurately report their wages to the Department, so that the calculation of partial benefits may be made. He found that Ms. Tierney did not do so and that she should make repayment pursuant to section 28-42-68. I must agree. Her failure to report wages was a patent violation of the rules of the program. Accordingly, I must recommend that this Court hold that she was properly deemed subject to a recalculation; I further recommend

late November of 2010. She collected benefits on the earlier claim until the week ending February 26, 2011. Referee Hearing Transcript, January 19, 2012, BOR Appeal Number 20116028, at 6-8.

that Claimant should be ordered to repay the difference between what she did collect and what she should have collected — if her partial benefits had been properly offset by the wages she earned at Whytebrook.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review finding claimant disqualified was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is 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 be AFFIRMED except that the Order of Repayment in Board of Review Case Number 20116029 is vacated. In Board of Review Case Number 20116028 Ms. Tierney's benefits are subjected to the offset for wages earned at Whytebrook.

_____/s/
Joseph P. Ippolito
MAGISTRATE

JULY 27, 2012