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

Frank Rossi	:	
	:	
v.	:	**A.A. No. 2023 – 001**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

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

After a de novo review of the record 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.

Entered as an Order of this Court at Providence on this 20th day of June, 2024.

By Order:

/s/
Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND **DISTRICT COURT**
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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. Mr. Frank Rossi 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 fired for proved misconduct, as provided in G.L. 1956 § 28-44-18. This matter has been referred to me for the making for Findings and Recommendations pursuant to G.L. 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 Board's decision be AFFIRMED.

I
Facts and Travel of the Case
A
The Claim and the Initial Decision of the Department

Mr. Frank M. Rossi, a seventeen-year employee of the Rhode Island Department of Transportation (RIDOT), held the position of foreman within its Maintenance Division, until August of 2022, when he was discharged for failure to submit to a drug test. He filed an application for unemployment but, on September 8, 2022, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to the provisions of G.L. 1956 § 28-44-18, because he was terminated for proved misconduct. *See Decision of Director,* at 1; which may be found on page 76 of the electronic record (*ER*) attached to this case.

B
Proceedings Before the Referee
1
The Hearing

Claimant Rossi filed an appeal and a hearing was held before Referee John Palangio on October 17, 2022, at which the circumstances of the discharge of Mr. Rossi were explored in greater detail. *See Referee Hearing Transcript,* at 1; *ER* at 10. The Claimant appeared, assisted by counsel, and the employer was represented by its Human Resources Administrator, Mr. Seth Crosby. *Id*. at 1, 4; *ER* at 10, 13.

When Mr. Crosby's testimony began, the Referee asked him to describe the duties of a foreman in the Department of Transportation's Highway and Bridge Maintenance Division. *Id*. at 11; *ER* at 20. He said that Mr. Rossi would be responsible for supervising field operations which are conducted on a daily basis, and to be responsible, with regard to those matters, for the employees, the property, the fleet management, and the safety of the public. *Id*. He added that it is a condition of employment that every foreman hold a commercial driver's license from the Division of Motor Vehicles. *Id*. at 12; *ER* at 21. When prompted, he testified that the Claimant's last day of physical work was July 14, 2022 and his date of termination was August 16, 2022. *Id*.

Next, Claimant's formal termination letter, which was sent to Mr. Rossi on August 12, 2022 by Pamela Moscarelli, Deputy Personnel Administrator for the Department of Administration, was read into the record by the Referee. *Id*. at 13-20; *ER* at 22-29. The letter, which was entered into evidence as the Department's Exhibit No. 1, may be found in the electronic record of the case, at 71-75.

After which, and while still under examination by the Referee, Mr. Crosby stated that the Department's random drug-testing policy for CDL drivers was conveyed to Mr. Rossi repeatedly during his tenure at the DOT;

he also noted that Mr. Rossi had been tested in the past. *Referee Hearing Transcript,* at 21; *ER* at 30.

Mr. Crosby stated that only alcohol use was at issue — and not the misuse of any other drug. *Id*. at 21-22; *ER* at 30-31. It may also be noted that, on July 14th, Claimant was also given a urine test, which was clear for all other drugs. *Id*. at 24; *ER* at 33.

The witness also testified that when Mr. Rossi was sent home on July 14th, he was told that, to return to work, he would need to take a return-to-duty test. *Id*. at 22 *ER* at 31. But, on July 19th, he refused to take both the breathalyzer and the urine test. *Id*. at 25; *ER* at 34. Before concluding his examination by the Referee, Mr. Crosby stated that when Mr. Rossi interviewed for his position (highway field operation supervisor) in 2018, he was asked what the consequences would result from an employee's refusal to take a random drug test; he answered that it would be termination from employment, though Mr. Crosby himself was not one of the interviewers. *Id*. At this juncture, the Employer's second witness, Ms. Amy D'Alessandro added that Mr. Rossi, in his supervisory role, had a duty to ensure compliance with the drug and alcohol testing program. *Referee Hearing Transcript,* at 26; *ER* at 35.

Upon questioning by counsel for Mr. Rossi, Mr. Crosby stated that the urine tests that DOT uses do not detect alcohol. *Id.* at 28; *ER* at 37.

Moreover, the witness did not know whether urine tests for alcohol were available to the DOT if one were to be requested. *Id.* Then, counsel asked if the agency kept records of the testing performed in this case — records it is required to maintain by 49 C.F.R. § 40.333. *Id.* Mr. Crosby responded that "[w]e have the records from his alcohol testing form that would satisfy the requirement I presume." *Id.* at 29; *ER* at 38. Mr. Crosby did not know the name of the breathalyzer device used in Mr. Rossi's case. *Id.* at 29; *ER* at 38. And when counsel asked questions about the procedure followed when the test was administered, Mr. Crosby indicated that Ms. D'Alessandro was the person who would know. *Id.* at 30-31; *ER* at 39-40.

When Ms. D'Alessandro was asked if she could supplement Mr. Crosby's answers regarding the manner in which the test was administered to Mr. Rossi, she referred Claimant's Counsel to the full State of Rhode Island Policy and Procedures for Drug and Alcohol Testing of Commercial Drivers' License Holders. *Id.* at 31-32; *ER* at 40-41.

At this point, Mr. Rossi began to testify under questioning from his Counsel. *Referee Hearing Transcript,* at 32; *ER* at 41. He said that he began working at the Department of Transportation on December 25, 2005. *Id.* He started as a driver but when he was terminated, he had become a foreman. *Id.*

Counsel then focused Mr. Rossi's attention to the events of the night of July 13, 2022. Mr. Rossi stated that on that occasion he was working out of the mid-state garage, a facility that does not have clean drinking water. *Id*. at 33; *ER* at 42. Consequently, he uses mouthwash to maintain oral hygiene. *Id*. And he did so on the morning of July 14th. *Id*. at 34; *ER* at 43.

Claimant Rossi then confirmed that, on July 14, he took a breathalyzer test, as he had done three of four times before. *Id*. However, he stated that the procedure used on that date was different from that used in his prior experiences, in that the breathalyzer tube was not in a sealed bag. *Id*. at 35; *ER* at 44. They also asked him to give a urine specimen, which he gave, though he never saw the test results. *Id*. at 35-36; *ER* at 44-45. Then Claimant testified that on the Nineteenth, he asked to have the State Police administer a urine test. *Id*. at 36; *ER* at 45.

At this juncture Mr. Rossi discussed a letter from a licensed therapist indicating that he was compliant with certain treatment he had received. *Ref. Hr'g Tr*. at 36-37; *ER* at 45-46. He denied he ever had a drink on the job or had been intoxicated on the job. *Id*. at 37; *ER* at 46. He denied he was under the influence during the morning of July 14th. *Id*. Mr. Rossi further denied that he violated any reasonable and uniformly enforced rule of public policy and that he was honest in all his communications with the

Department. *Id*. He stated that he would have undergone the testing process on July 19th if it had been done under proper procedures. *Id*. at 38; *ER* at 47.

The Referee then posed a few additional questions. In response, Claimant admitted that he was aware that a random drug test could be administered at any time. *Id*. But he denied being aware that a refusal would trigger a termination. *Id*. at 39; *ER* at 48. Mr. Rossi also denied knowing that his first test result would have triggered a retesting prior to his return to work. *Id*. He thought he would merely be suspended for a time and then be allowed to return to work. *Id*. at 39-40; *ER* at 48-49. The fact that a refusal would result in his termination was not explained to him when he was hired or when he was promoted. *Id*. at 40; *ER* at 49. Finally, answering a question posed by Mr. Crosby, Mr. Rossi denied that when he interviewed for his current position, he was asked what consequences would be visited upon an employee who refused to submit to an alcohol test. *Id*. at 41; *ER* at 50.

2

The Decision

a

The Findings Made by the Referee

In his October 18, 2022, Decision, Referee Palangio made Findings of Fact. *Dec. of Referee,* at 1-2; *ER* at 57-58. He began this section of his Decision by finding that Mr. Rossi was aware that his position entailed receiving random drug tests. *Id*. at 1; ER at 57. That same policy provided that a refusal would result in termination. *Id*. Next, he related the events of July 14th:

> On July 14, 2022, at 8:20 AM after working since 8:45 PM on July 13, 2022, uninterrupted, the claimant was given a random breath test to determine if he was below the 0.019 (BAL) threshold. The claimant registered a 0.034 level (Termination Letter, Page 9/ Director's Exhibit #1).
>
> A second test was administered at 8:37 AM, which again registered the claimant's (BAL) above the limited (Termination Letter, Page 9/Director's Exhibit #1).
>
> The claimant who had been on shift for twelve straight hours, failed two alcohol drug tests while working on a state site. Per policy, the claimant was removed from the site for a minimum of twenty-four hours (Termination Letter, Page 10/Director's Exhibit #1).
>
> The claimant was then told, per the policy he could resume work once he passed a resume to duty alcohol test (Termination Letter, Page 10/Director's Exhibit #1).

Id. at 1-2; *ER* at 57-58. The Referee then addressed the doings of July 19th —

> On July 19, 2022, the claimant appeared and ready to resume work. The claimant when asked to submit to a drug test allowing him to return to work, refused. He was then terminated per the employer policy on August 16, 2022.
>
> Please note: the claimant was also administered a urine test on July 14, 2022, which he passed. The claimant refused to submit to the urine test on July 19, 2022. As explained to the claimant at the time, the urine test was preformed to test for other (non-alcohol) controlled substances.

Dec. of Referee, at 2; *ER* at 58. The Referee then recounted how, at a pre-disciplinary proceeding, Claimant's counsel conceded that his client did not contest most of the information contained in the disciplinary letter he received. *Dec. of Referee,* at 2; *ER* at 58 (citing Termination Letter, Page 10/Director's Exhibit #1).

Finally, the Referee reported two elements of Mr. Rossi's testimony at the hearing conducted on the previous day. *First*, Claimant ascribed his alcohol reading to the use of mouthwash — an assertion which the Employer "refuted" in its termination letter. *Id.* Second, Claimant did not trust either the test being conducted on the Nineteenth of July nor the person conducting it. *Id*.

b

The Conclusions Made by the Referee

The "Conclusions" section of the Referee's decision began by defining the term "misconduct," as it is employed in G.L. 1956 § 28-44-18

and the leading cases construing it, *Turner v. Department of Employment and Training, Board of Review,* 479 A.2d 740, 741-42 (R.I. 1984). *Dec. of Referee,* at 2-3; *ER* at 58-59. After which, he turned to the circumstances of Mr. Rossi's claim for benefits. He stated:

> I Find in this case the employer has shown, through a preponderance of evidence that the actions of the claimant exhibited misconduct in connection to his work. Simply offered, I do not find the testimony of the claimant credible. On its own it may be reasonable that the claimant could have used mouth wash just minutes before a random drug test. However, he was administered two that morning, several minutes apart. It does not seem reasonable for him to fail two tests by simply using mouth
> wash. However, this incident was not the reason the claimant was terminated. The claimant had the opportunity to prove the events of July 14th were a complete anomaly. He was given the chance to submit to a second alcohol and drug test on July 19th. His reaction was to refuse the test that morning. It is not reasonable or credible for the claimant to refuse the second test when his job was on the line. It is not reasonable nor credible that the claimant, who was a seventeen-year veteran of DOT, did not know the policy that a refusal would lead to
> termination. The claimant successfully had a promotion to supervisor in 2018 and reviewed all policies and procedures as part of the interview process, per standard operating procedure. The claimant's assertion that he had "no idea" about the policy on July is simply not credible.
>
> Finally, the claimant testified he did not trust the person who administered the test nor the test itself on July19th. Again, by the claimant's own admission he passed "several" drug tests in the past without incident. The claimant did not credibly articulate what changed in the July 19, 2022, test. Why, when never having an issue

> with the drug test or the person administering it in seventeen years of employment, did he not trust this one? The claimant did not offer a plausible reason.
>
> As a result, I find the claimant showed intentional and substantial disregard of the employer's interest, by first failing an alcohol test, and then refusing to take a second test in an effort to be reinstated. By being over the acceptable (BAL), the claimant put himself, the RIDOT and any member of the public he could have come in contact with at risk for injury and liability; Benefits are denied under Section 28-44-18 of the Rhode Island Employment Security Act.

Dec. of Referee, at 3-4; *ER* at 59-60. And so, the Referee affirmed the decision of the Department to disqualify Claimant from the receipt of unemployment benefits. *Dec. of Referee,* at 4; *ER* at 60.

C

Proceedings Before the Board of Review

Mr. Rossi then sought review by the Board of Review, which did not conduct a new hearing; instead, the Board decided the case on the basis of the record developed by the Referee, as it has the authority to do under G.L. 1956 § 28-44-47. Employing this procedure, the Chairman of the Board of Review, sitting alone,[1] affirmed the Referee's decision, finding it to be a proper adjudication of the facts and the law applicable thereto; the Referee's decision was adopted as the decision of the Board. *See Decision of Board of Review,* December 8, 2022, at 1; *ER* at 2. Finally, Claimant filed the instant appeal to this Court on January 3, 2023.

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[1] The Chairman is permitted to do so by G.L. 1956 § 42-16.1-9.

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 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. 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" previously employed in *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 under § 28-44-18.

III
Standard of Review

The standard of review is provided by G.L. 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.' " *Guarino v. Department of Social Welfare,* 122 R.I. 583, 584, 410 A.2d 425 (1980) (citing G.L. 1956 § 42-35-15(g)(5)). The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact. *Cahoone v. Board of Review of the Department of Employment Security,* 104 R.I. 503, 246 A.2d 213 (1968). Stated differently, the Board's findings will be upheld even though a reasonable mind might have reached a contrary result. *Cahoone,* 104 R.I. at 506-07, 246 A.2d at 215 (1968). *See also D'Ambra v. Board of*

Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

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.

IV
Analysis

After a review of the entire record and the issues raised in the case at bar, I have concluded that the Decision of the Board of Review denying unemployment benefits to Mr. Rossi is supported by competent evidence of record; nor is the Decision clearly erroneous in view of the reliable,

probative, and substantial evidence of record. Also, the Decision is not made in violation of procedural or substantive law applicable to the case. Finally, the decision is neither arbitrary nor capricious.

Mr. Rossi's position, at its essence, and as presented in his memorandum, is quite straightforward. Appellant asserts that he refused to submit to the breathalyzer test (or, as it styles it — *requested a different test collector*) on July 19th because of a lack of faith in the proficiency of the test collector, based on deviations from proper procedure he observed during the July 14th testing session. *Appellant's Memorandum*, at 4-5. He avers that he did not anticipate that "raising these concerns" would be regarded as a refusal; nor did he know that refusing to submit to a breath test constituted grounds for termination. *Id*. at 5. And so, he argues that his actions could not be deemed to constitute misconduct under the definition of that term set forth in statute and in *Turner*.[2]

In defense of the Decision it rendered, the Board of Review argues that Claimant's refusal to submit to the breathalyzer was "a clear violation of the federal and state policies introduced by the Employer." *Appellee's Memorandum,* at 6. It adds that "… the Employer's testimony that Claimant knew of the consequences of his refusal both through his own training and because he was responsible to train others on the policies …" was credited by

[2] Claimant does not discuss the applicability *vel non* of the work-rule test.

the Referee. *Id*. And the Board reports that "Claimant offered no legal basis for his refusal but rather stated that he was not comfortable with the procedure." *Appellee's Mem*. at 6.

In addition, the Board of Review cites as precedent our decision in *Paul v. Department of Labor and Training, Board of Review,* A.A. No. 2019-006 (Dist.Ct. 08/14/2019), in which this Court affirmed the disqualification of a former bus driver for the Rhode Island Public Transit Authority (RIPTA) who refused to submit to a drug test in connection with his employment, which was found to be misconduct *per se* in light of the applicable federal and state regulations. *Id*. at 6 (citing *Paul*, slip op. at 11-12, particularly at n.2) (citing 49 C.F.R. § 40.261).

After reviewing the positions of the parties, it is the conclusion of this Court that the answer to the question presented in the instant case is dependent on the applicable federal and state regulations and policies, which were referenced during the administrative proceedings that were conducted by the Board. Specifically quoted in the August 12, 2022, termination letter issued by the Deputy Personnel Administrator to Mr. Rossi were (1) the *Policy and Procedures Guide for Drug and Alcohol Testing of Commercial Driver's License Holders Anti-Drug and Alcohol Misuse* and

(2) the *State of Rhode Island Substance Free Workplace Policy*. *See ER* at 71-75.[3]

In that same termination letter the Employer also invoked, without quotation, regulations issued pursuant to the Federal Motor Carriers Safety Act (49 C.F.R. Parts 382 and 40). These comprehensive regulations require the Rhode Island Department of Transportation, acting in the capacity of an employer, to maintain an alcohol and controlled substances testing program for its CDL drivers which complies with Part 40. *See* 49 C.F.R. § 40.11; 49 C.F.R. § 382.103(a)(1); 49 C.F.R. § 382.105.[4] Specifically, the regulatory scheme mandates that refusing a drug or alcohol test must incur the same consequences as failing a test; the same regulation defines a refusal broadly, bringing within its definition a failure to cooperate with any aspect of the testing process. *See* 49 C.F.R. § 40.261. Finally, the regulations also require the employer to promulgate the policies and procedures to which it will adhere in fulfilling the testing mandate. *See* 49 C.F.R. § 382.601.

And the State complied with this mandate by promulgating the aforementioned *Policy and Procedures Guide* which, as quoted in the

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[3] As earlier stated, *ante* at 3, the Termination Letter, part of the Department's Exhibit No. 1, was read into the record at the hearing conducted by the Referee. *See Referee Hearing Transcript,* at 13-20; *ER* at 22-29.

[4] *See also* 49 C.F.R. § 384.201.

termination letter, provides that an employee who refuses testing shall be terminated from state service. *ER* at 74-75. Taken together, these provisions have the force of law. Consequently, there can be no doubt that employees of the DOT who hold CDL licenses to perform their duties, commit misconduct *per se,* that is, misconduct as a matter of law, by refusing to take a breathalyzer test.

Returning to the case before us, we see that the Board, applying these regulations and policies, and by adopting the decision of the Referee as its own, disqualified Mr. Rossi from the receipt of unemployment benefits pursuant to § 28-44-18, because he refused to submit to a breath test. However, Mr. Rossi denied that he did so. He asserts that he was merely seeking an accommodation so that the test would be more accurate — principally by asking that the State Police administer the test. He denies that he intended to make a refusal.

However, the Referee found that he refused. And there is reliable evidence in the record to support this finding. On August 30, 2022, Mr. Rossi told the Department's adjudicator that —

> I was called by my Superintendent Dana Carlo to come for a test to be taken on 071922. I went in and saw it was the same person administering the test so I refused to take the test. I was then told to leave.

See DLT Form 480; *ER* at 63. He repeated this position ten days later when he filed an internet appeal from the decision of the Director. *See* Claimant

Internet Appeal Form; *ER* at 79. And so, the Board's finding that Claimant refused to submit to the breathalyzer is supported by competent evidence of record.

Next, let us consider Mr. Rossi's assertion that he should not be disqualified because he was justified in refusing the test because the individual administering the test failed to adhere to proper procedures. Appellant cites no cases directly on point which support his position; and this Court is aware of none. However, in the analogous situation wherein a motorist is charged with the civil offense of refusal to submit to a chemical test, such concerns are no defense. *See Vinal v. Petit,* 112 R.I. 787, 789, 316 A.2d 497, 498 (1974) (holding that a suspension for refusal may be sustained in the absence of proof that a certified breathalyzer operator was available to conduct the test if consent had been given). The logic of the Court's holding in *Vinal* was phrased succinctly by the South Carolina Supreme Court —

> The question of validity of test methods employed by a breath test operator does not arise until a test is given and its results are offered as evidence.

State v. Jansen, 305 S.C. 320, 322, 408 S.E. 2d 235, 237 (1991) (quoting *Ex Parte Horne,* 303 S.C. 30, 32, 397 S.E.2d 788, 789 (S.C. App. 1990)). And so, Mr. Rossi's concerns about the person who would have administered the test provide no safe harbor of justification from his disqualification for refusing to submit to a chemical test.

Finally, Mr. Rossi claims that he was not aware that a refusal would result in his termination and (potential) disqualification. About this assertion a brief comment will suffice. Quite frankly, on this point the testimony is in conflict. As presented *ante*, Mr. Crosby testified that during his interview for his supervisory position, Mr. Rossi correctly answered a question regarding the sanction for a refusal of a random alcohol breath test — that is, termination. Mr. Crosby's testimony undoubtedly constituted competent evidence upon which the Board could rely. Mr. Rossi denied this occurred. The Referee (and the Board by adopting his decision as their own) found his testimony on this point to be "simply not credible."

For the foregoing reasons, this Court finds that the decision of the Board of Review ought to be affirmed.[5]

[5] This outcome is generally consistent with the rulings of courts in our sister states, which have recognized that refusing to take a drug or alcohol test which was requested by one's employer may constitute misconduct justifying disqualification from the receipt of unemployment benefits. *See* 76 Am. Jur. 2d *Unemployment Compensation* § 98 (Feb. 2024 Update).

V
Conclusion

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. G.L. 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. G.L. 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision rendered by the Board of Review in this case be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

June 20, 2024