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

JOHN GOMES	:	
	:	
v.	:	**A.A. No.6AA-00091**
	:	
RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING BOARD OF REVIEW	:	

JUDGMENT

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

ORDERED AND ADJUDGED

The decision of the Board is affirmed.

Dated at Providence, Rhode Island, this 22nd day of March, 2013.

Enter:

By Order:

Stephen C. Waluk, Chief Clerk

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DECISION

WOODCOCK PFEIFFER, J. This is an administrative appeal from a final decision of the respondent, the Board of Review ("Board") of the Department of Labor and Training ("Department"). John Gomes ("Claimant") appeals the Board's decision denying his request to receive employment security benefits pursuant to G.L. 1956 § 28-44-18 of the Rhode Island Employment Security Act ("Act"). District Court jurisdiction is pursuant to G.L. 1956 § 28-44-52.

Procedural History and Facts

Claimant was employed by the City of Pawtucket Parks and Recreation Department as a laborer for approximately eight years. The City ended his employment via a formal letter of termination dated July 21, 2009, based upon Claimant's "misuse of city time and equipment."[1] Claimant subsequently filed a claim for employment security benefits on August 18, 2009, which was initially denied by the Director of the Department on November 23, 2009, based on Claimant's discharge from employment for "violation of policy regarding hours of work and the

[1] Exhibit 3; Letter from Angel S. Garcia, Personnel Director, to John Gomes (July 21, 2009).

use of city equipment."[2] The Authorized Representative for the Director stated that Claimant was therefore "discharged for disqualifying reasons" under G.L. 1956 § 28-44-18, since Claimant's actions were not in the Employer's best interests.[3]

Claimant appealed the Director's decision on December 1, 2009, and the matter was heard before a Referee on February 3, 2010. The Referee's decision, mailed on August 31, 2010, affirmed the Director's decision, and the Claimant next appealed to the full Board on September 10, 2010. In one of the first interesting quirks to this case, a de novo hearing was held by the Board on November 4, 2010, as the recording of the underlying hearing before the Referee was no longer available and could not be reviewed by the Board.

Seven witnesses testified before the Board: John Suslowicz and Barbara Jones, neighbors of the Claimant, and John Carney, the Director of Public Works, for the City of Pawtucket; Ronald Zarski and Charles Kelly, former co-workers of the Claimant, and the Claimant himself for the Claimant's case.

Based on the evidence and testimony of the witnesses, the Board of Review made the following findings of fact:

> The claimant worked performing maintenance duties for the employer's parks and recreation division. The employer's parks and recreation division does not have standard published policies regarding the computation or discharge of compensatory time or the taking of personal time on lunch or other employer authorized breaks from works [sic]. During the performance of his duties, the claimant would, on certain occasions, stop by his residence. His reasons for stopping at his residence, in many instances, were not related to the performance of his maintenance duties, or during authorized breaks or lunch breaks. His presence at his residence, on almost all occasions, was without notice to his employer and without the employer's permission. The claimant's presence at his residence, during work hours, was reported to his employer. After an investigation, and pre-termination hearing, on the allegations of misuse of employer equipment and time, involving the reported incidents, the claimant was terminated on July 21, 2009.[4]

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[2] Claimant Decision, November 23, 2009 at 1.
[3] *Id.*
[4] Decision of Board of Review, July 1, 2011 at 1.

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. R.I.G.L. 1956 § 28-44-18 provides in part:

> 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 of 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 employer and the employed worker.

The Rhode Island Supreme Court has further defined misconduct as "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 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." Bunch v. Bd. of

Review, Rhode Island Dept. of Employment and Training, 690 A.2d 335, 337 (R.I. 1997), *citing* Turner v. Dept. of Employment Security, 479A.2d 740 (R.I. 1984), *quoting* Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 640 (1941).

The burden of proving the employee's disqualification for unemployment compensation based on misconduct falls to the employer. Foster-Glocester Regional School Committee v. Bd. of Review, 854 A.2d 1008, 1018 (R.I. 2004). The employer therefore has a high standard to meet in proving an employee's 'intentional' misconduct versus his or her incompetence or negligence. This can best be shown when the actions of the employee violate the law or written policies of the employer, but this is not a prerequisite to proving misconduct and indeed may only provide reasons for termination. Essentially, the "behavior must deviate from some identifiable standard of behavior in a manner that goes beyond merely providing grounds for termination." Cordeiro v. DLT, R.I. District Court AA No. 08-146, 4-5 (March 24, 2009) (J. Clifton).

Standard of Review

Judicial review of the Board's decision by the District Court is authorized under G.L. 1956 § 28-44-52. The standard of review that the District Court must apply is set forth under G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act, which provides that:

> 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 scope of judicial review by this Court is limited by G.L. 1956 § 28-44-54, which in pertinent part provides:

> The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Regarding "such questions [of law], when more than one inference is possible, the 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. Dept. of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) citing G.L. 1956 § 42-35-15(g)(5).

Thus, this Court "does not weigh the evidence upon which findings of fact are based but merely reviews the record in order to determine whether there is legally competent evidence to support the administrative decision." Bunch, 690 A.2d at 337, *citing* St. Pius X Parish Corp. v. Murray, 557 A.2d 1214, 1218 (R.I. 1989). The District Court "may reverse such findings only in instances wherein the conclusions and the findings of fact are 'totally devoid of competent evidentiary support in the record,'" Bunch, 690 A.2d at 337 *citing* Milardo v. Coastal Resources Management Council, 434 A.2d 266, 272 (R.I. 1984), or in cases where one or more inference is possible. Guarino, 122 R.I. at 588, 410 A.2d at 428.

Finally, the Supreme Court of Rhode Island recognized in Harraka v. Bd. of Review of Dept. 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.

> * * * [E]ligibility 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 on the unemployed worker and his family.' G.L. 1956 § 28-42-73. The legislature having 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.

Issue

The sole issue before this Court is whether the Board's decision that Claimant was discharged for reasons of misconduct in connection with his work, within the meaning of G.L. 1956 § 28-44-18 of the Rhode Island Employment Security Act, was supported by reliable, probative, and substantial evidence on the whole record or whether or not it was clearly erroneous, arbitrary or capricious, or characterized by abuse of discretion or a clearly unwarranted exercise of discretion.

Analysis

In this case, the Board of Review concluded that the City had established proof of misconduct by a preponderance of the evidence. The primary basis for this finding was the testimony by Complainant's neighbors, a couple living diagonally across the street, who alerted Carney to the Complainant's alleged misuse of City vehicles and his many visits to his personal residence during the course of his work days.[5] The couple, who watched the conduct for six

[5] Jones testified that they lived in two different houses on the street during the time in question, both near Complainant's residence. Bd. Hearing Transcript, at 8.

years,[6] stated that they finally decided to speak to Complainant's supervisor after observing the Claimant on a day in the beginning of July arrive at his home during a work day with a City garbage ("crusher") truck, not his normal City vehicle, where he picked up a television set that had been sitting on the sidewalk in front of his home, along with an article of oversized trash from another nearby neighbor.[7]

Beyond the July incident, the neighbors were unable to testify to any specific times or dates when the other observations were made.

Jones testified that:

The Complainant would "go in his house five or six times a day, just, just pull up and go in. He'd come out. He'd, he'd be back in an hour or so. Uh, always, always home." [8]

This would happen "Monday through Friday".[9]

"[E]very week or so he'd come and pick up his own trash. He'd pick up bureaus. * * * And we always thought that was so funny because he owns a pickup truck."[10]

This "[c]ontinually happened for six years, continually. And it's very difficult to separate when you see something all the time."[11]

Suslowicz, Jones' husband, was somewhat more circumspect in his testimony, but indicated that he saw Claimant returning home during the work day "at least weekly."[12]

Carney testified to his role in handling the couples' complaint and Claimant's subsequent termination. Claimant's immediate supervisor, Joseph Wilson, did not testify before the Board due to a medical issue, but Carney stated that Wilson had admonished Claimant for returning to

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[6] Jones, Bd. Hearing Transcript, at 13. Suslowicz seemed to indicate that the time period was two years, but it is unclear whether he was referring to their occupancy of the current house, at 43, 44.
[7] Bd. Hearing Transcript, at 11, 12, 31, 42.
[8] *Id,* at 17.
[9] *Id.*
[10] Bd. Hearing Transcript, at 18, 19.
[11] *Id.*, at 31.
[12] *Id.*, at 41

his home on one occasion without permission to pick up some medication,[13] and that there was a "kind of unwritten rule" against permitting employees to return to their home during their 20-minute coffee breaks.[14]

During the presentation of his case, the Claimant was able to establish that there were no written policies in place addressing the use of City trucks by employees or banning returning home during breaks and lunches,[15] that there were apparently no complaints regarding Complainant fulfilling his job duties in a timely fashion,[16] and that he was actually on vacation in Cape Verde for 45 days, prior to July 2009, during which time Jones had testified that Claimant had been working and returning home to his residence.[17]

In its decision, the Board concluded the following:

Notwithstanding that we have some reservations regarding how the claimant could have made the number of visits and spent the amount of time at his residence, as alleged, without effecting his work performance, nevertheless, we find there is sufficient credible evidence in the record to establish that the claimant made a substantial number of personal trips during times which were not on his regular work/lunch break or exceeded the break time. In addition, the record established that he used the employer's vehicle or equipment (to be dropped off at his residence) for personal reasons without the expressed or tacit approval of his employer. To be clear, not each and every visit to his residence constituted misconduct. However, from the number of visits described in the testimony, there were a substantial number that were personal and those visits collectively constituted misconduct.[18]

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[13] Bd. Hearing Transcript, at 50, 51.
[14] *Id.*, at 56.
[15] *Id.*, at 66, 73.
[16] *Id.*, at 67, 68, 72.
[17] Id., at 94, 95.
[18] Decision of Bd. of Review, July 1, 2011 at 2.

One member of the Board's three-member panel dissented.[19]

Over the years, the District Court has examined a number of incidents of alleged misconduct as defined by G.L. § 28-44-18, handing down decisions that generally are fact-driven. The Court has considered many factors in upholding or reversing the Board's decisions, including whether the conduct was criminal; whether there were written policies and procedures; whether prior warnings were given to the claimant; and whether the conduct was simply inadvertent.

Upon review of the transcript, this Court can only reiterate those concerns raised in the dissent, as well as those raised by the Board itself in its decision against the Claimant, as noted above. That being said, this Court must be mindful of the standard of review to be applied in these instances, as outlined above in G.L. § 42-35-15. 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 in Turner, *supra*, this Court holds that the Board's ruling that the Claimant was discharged for proved misconduct in connection with his work is well-supported by the record and cannot be overturned by this Court.

Conclusion

Upon careful review of the evidence, I find that the decision of the Board of Review denying benefits to the Claimant is not affected by error of law. 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).

The decision of the Board of Review is hereby affirmed.

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[19] *Id.*, at 3.