

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

DISTRICT COURT
SIXTH DIVISION

Roy Silveira, Jr. :
v. : A.A. No. 2012-0254
Department of Labor & Training, :
Board of Review :

DECISION

Hastings, J. This matter is before the Court on the complaint of Roy Silveira, filed pursuant to Rhode Island General Laws 1956 §42-35-15, seeking a judicial review of a final decision rendered by the respondent, Board of Review, Department of Labor and Training which upheld the finding of the Referee that the claimant, Roy Silveira was not entitled to receive employment security benefits.

FACTS AND TRAVEL OF THE CASE

Mr. Silveira was employed 21 months by Hot Rides Incorporated. He was the lead tow truck driver and he had possession of equipment belong to his

employer, specifically the lead cellular telephone used by police for contact. His last day of work was August 8, 2012. He filed a claim for Employment Security benefits on August 10, 2012. In a Department of Labor and Training Director decision, the claimant was allowed benefits. The employer filed a timely appeal to the Board of Review on September 14, 2012 and the matter was assigned to Referee Gunter A. Vukic for hearing. On October 9, 2012 an appeal hearing was held at which time the claimant and two employer witnesses appeared and testified.

In his decision dated October 12, 2012 the Referee made the following findings of fact:

The claimant was the lead tow truck driver and had certain employer equipment, including but not limited to the lead cellular telephone used by police for contact, in his possession at time of discharge. The claimant made a last-minute request to be taken off the on-call list so he could attend a Patriot's football game. The request was approved.

Claimant was contacted for a late morning assignment on the day of the football game and refused the assignment indicating he had been given the day off. The claimant was told to bring in the cellular telephone and truck keys. Claimant refused. The claimant later appeared at the employer's place of business with the local police officer demanding that the employer discharge him in the presence of the police officer before the claimant would return the company equipment. Claimant was discharged.

Employer was aware that the claimant had previously shared with at least one coworker his intention to separate from the employer in a manner that would allow for unemployment benefit collection.

Referee's Decision, at 1. Based on these findings, the Referee formed the following conclusions:

CONCLUSION:

* * *

The issue involved is whether or not the claimant was discharged from this job under disqualifying circumstances within the provisions of Section 28-44-18 of the Rhode Island Employment Security Act.

And in cases of termination, the employer bears the burden 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 met their burden.

The evidence supports that the claimant previously discussed with a coworker his intention to separate from the employer in a manner that would allow for benefit collection. A last-minute claimant request to be taken off the call list so that he could attend a Patriot's football game was approved. The dispute between the parties surrounds whether or not the claimant was given the full day off and not just the afternoon and evening so he could attend the football game. It is accepted that some disagreement or confusion might well have existed. However, the incident was used by the claimant to initiate a confrontation that resulted in his discharge when he refused not only to take the assignment but refused to return employer equipment. He questions the employer's right to have the equipment available to them when the claimant was out-of-state for the football game. While he may have many questions it does not negate the employer's right to demand the equipment and his obligation to cooperate.

Referee's Decision, at 2. Thus, the Referee determined that the Claimant was discharged for disqualifying misconduct under § 28-44-18 of the Rhode Island

Employment Security Act. Referee's Decision, at 2. Accordingly, Referee Vukic reversed the decision of the Director. Referee's Decision, at 3.

Claimant filed an appeal and on October 26, 2012, the Board of Review affirmed the Referee's decision, finding it to be a proper adjudication of the facts and the law applicable thereto. Board of Review Decision, at 1. Claimant filed a complaint for judicial review in the Sixth Division District Court on December 19, 2012.

I. APPLICABLE LAW

Under § 28-44-18 of the Rhode Island 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.” Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004). With respect to proven misconduct, § 28-44-18 provides, in pertinent part, as follows:

For the purposes of this section, “misconduct” shall be 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 which is fair and reasonable to both the employer and the employed worker. Section 28-44-18.

In Turner v. Department of Employment and Training, Board of Review (1984), the Rhode Island Supreme Court expanded upon and clarified the statutory definition, holding as follows:

“ ‘[M]isconduct’ * * * 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 employer’s interest or of the employee’s duties and employer’s interest 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.”

See Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984) citing Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). In cases of discharge, the employer bears the burden of proving misconduct on the part of the employee in connection with his or her work. Foster-Glocester Regional School Committee, supra, 854 A.2d at 1018.

II. STANDARD OF REVIEW

Judicial review of the Board’s decision by the District Court is authorized under § 28-44-52. The standard of review is provided by G.L. 1956

§ 42-35-15(g) of the Rhode Island Administrative Procedures Act (“A.P.A.”),

which provides as follows:

The court shall not substitute its judgment for that of the agency as to 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 constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon lawful 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 Gen. Laws 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.

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, 588, 410 A.2d 425, 428 (1980) (citing § 42-35-15(g)(5)). The Court will not substitute its judgment for that of an agency 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, 506, 246 A.2d 213, 215 (1968). “Rather, the court must confine itself to review of the record to determine whether ‘legally competent evidence’ exists to support the agency decision.” Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). “Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record.” Baker, 637 A.2d at 363.

III. ISSUE

The issue before the Court is whether the decision of the Board of Review in which claimant Silveira was found ineligible to receive benefits because he was discharged for proved misconduct was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law or made upon unlawful procedure.

IV. ANALYSIS

In cases of misconduct, the employer bears the burden of proving that the claimant engaged in conduct that evinces “such willful and wanton disregard of an employer’s interest as is found in deliberate violations 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 interest or of the employee’s duties and employer’s interest or of the employee’s duties and obligations to his employer.” Turner, supra, 479 A.2d at 741-42.

There is substantial evidence in the record that the claimant engaged in deliberate conduct in willful disregard of the employer’s interest. The Referee found the employer’s testimony to be credible. Included in the testimony and documentary evidence which formed the basis for the Referee’s conclusion was the fact that the claimant was the lead tow truck driver and he had certain employer equipment, including but not limited to, the tow cellular phone, slip books and truck keys. After the claimant was contacted for a late morning tow and refusing that tow, he was directed to surrender the equipment. Claimant refused. He later appeared at Hot Rides, Inc., 30 Veteran’s Memorial Parkway, East Providence, Rhode Island with the East Providence police demanding that

the employer fire him in the officer's presence before he would return the company equipment. He was discharged.

The employer as well as the claimant appeared and gave testimony at various times during the evidentiary hearings on this matter. In addition to oral testimony, the Board considered written evidence. There was ample probative evidence for the board to consider. There is a sufficient credible foundation for the referee's conclusion. Accordingly, the referee's finding (accepted by the board) that claimant's discharge was for proved misconduct in connection with his work within the meaning of section 18 is supported by the record and cannot be successfully challenged.

V

CONCLUSION

Upon careful review of the evidence, this court finds that the decision of the Board of review was not affected by error of law. *Gen Laws 1956 § 42-35-15(g)(3),(4)*. Neither was it 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, this Court holds that the decision of the Board be AFFIRMED.