STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Beth Dwares	**:**	
	:	
v.	**:**	**A.A. No. 12 - 153**
	:	
Department of Labor & 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, 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 REVERSED.

Entered as an Order of this Court at Providence on this 8th day of January, 2014.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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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. In this case Ms. Beth Dwares urges that the Board of Review of the Department of Labor and Training erred when it found her to be disqualified from the receipt of unemployment benefits due to misconduct pursuant to Gen. Laws 1956 § 28-44-18.

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. But I shall not address the merits of the Board's finding of misconduct;

instead, I shall focus on Ms. Dwares' assertion that the Board's decision was formulated upon an unlawful procedure. See Gen. Laws 1956 § 42-35-15(g)(3). And, for the reasons that follow, I believe the procedure employed at the hearing conducted in this case was indeed improper; I must therefore recommend that the decision rendered by the Board of Review in this case be vacated.

I

FACTS AND TRAVEL OF THE CASE

The travel of the instant case may be briefly stated: Ms. Dwares worked for Rhode Island Hospital for eighteen years as a Registered Nurse. On July 22, 2011 she hurt her back in a non-work injury. The next day she reported for work; however, the pain medicine she had been given for her injury was insufficient and she took some additional pain medication that she retrieved from the hospital's medication system. She became incoherent and had to be treated in the hospital's emergency room. Due to her actions she was terminated.

She applied for benefits but a designee of the Director of the Department of Labor and Training issued a decision finding her to be disqualified from receiving further benefits because she was fired for proved

misconduct as defined in Gen. Laws 1956 § 28-44-18. See Decision of Director, October 27, 2011, at 1, contained in the record as Exhibit D2. She appealed from this order and a hearing was scheduled before Referee John Costigan on December 6, 2011.

Claimant appeared alone, without counsel, but the employer did not appear at all. The hearing consisted of the Referee questioning the Claimant. And, through the testimony he elicited from her, he proved to his own satisfaction that Ms. Dwares had committed misconduct; accordingly, the Referee found her to be ineligible to receive unemployment benefits, pursuant to § 28-44-18.

Ms. Dwares appealed and the Board of Review considered the matter. In a decision dated February 10, 2012, a majority of the members of the Board of Review held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto; as a result, the majority affirmed the decision of the Referee. However, the Member Representing Labor dissented, commenting that the medication that the Claimant had taken had clouded her judgment; he therefore found her actions were not made in willful disregard of the employer's interests.

Ms. Dwares then filed a complaint for judicial review in the Sixth

Division District Court. The case was denominated 6AA-2012-056. Then, on May 14, 2012, this Court (through the undersigned) remanded the case for further consideration. The Court highlighted both the burden of proof issue and the impairment issue. See ORDER, dated May 14, 2012 in 6AA-2012-056.

Upon remand, the Board of Review set the matter down for further hearing; Claimant, now assisted by counsel, again appeared; once again, the employer did not. See Board of Review Hearing Transcript, June 26, 2012, at 1. The hearing consisted of a colloquy between counsel and the Members of the Board, no additional testimony was taken.

In their July 19, 2012 decision, a majority of the members of the Board of Review again found Claimant disqualified from the receipt of benefits. See Decision of Board of Review, July 19, 2012, at 1-2. The majority expressed no qualms about the Referee's conduct in this case — taking up, as he did, the cudgel on behalf of the Hospital. They fully considered her testimony at the Referee hearing and found her disqualified from the receipt of benefits.

The Member Representing Labor again dissented, noting the employer's failure to satisfy its burden of proof and the medical impairment issue.

Finally, on August 10, 2012, Claimant Dwares filed a new complaint for judicial review in the Sixth Division District Court. A conference was held by

the undersigned on October 17, 2012 at which a briefing schedule was set. Helpful memoranda have been received from the Board of Review and Ms. Dwares.

II

STANDARD OF REVIEW

The standard of review by which this court must consider appeals from the Board of Review is provided by Gen. Laws 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.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result[3]

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

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[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

[2] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[3] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

> 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.

III

ANALYSIS

In the vast majority of the unemployment appeals this Court considers each year, the issue presented is whether a Board decision granting or denying benefits[4] was clearly erroneous in light of the evidence of record under Gen. Laws 1956 § 42-35-15(g)(5). Occasionally, we confront an issue of law under Gen. Laws 1956 § 42-35-15(g)(4). But the issue in the case sub judice — whether the decision below was made on unlawful procedure — is rarer still. See Gen. Laws 1956 § 42-35-15(g)(4).

Appellant Dwares complains that her hearing before the Referee was unfair. Appellant's Memorandum of Law, at 3-5. As stated above, the hospital was not represented by witnesses or counsel. As a result, the "evidence" presented at the hearing entirely consisted of the answers that Claimant gave in

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[4] The main issues of disqualification presented in the District Court filings are disqualifications based on the following issues — whether the claimant was fired for proved misconduct, whether the claimant quit his or her prior position without good cause, whether the claimant was available for work and searched for work.

response to the questions posed by the Referee.[5] Ms. Dwares — who was not represented by counsel at the hearing — asserts that the Referee's actions violated "notions of fair play," denying her "substantial justice." Appellant's Memorandum of Law, at 4. She further asserts that the Referee had no authority to question her in this manner. Id., at 3.[6]

Of course, we need to rest any decision we make on more than a vague sense of unfairness. In order to set aside the Board's ruling we need to be able to attach such feelings to particular provisions of constitutional law, statutory law, or case law. After due consideration, I have concluded we must evaluate Ms. Dwares' complaint with reference to two distinct (but, in this case, interrelated) principles of administrative law — the first of which has its origins in case law, the second is of constitutional dimension. The first issue is whether the Referee interfered with the employer's burden of proof to show misconduct. The second is whether the Referee's action violated due process. Because I believe the Referee's actions violated both of these principles, I must

[5] By doing so he established that Ms. Dwares — on a day when she was overcome by pain — took some pain-killing drugs from the hospital's supply without authorization.

[6] Claimant specifically denies that such power is vested in the Referee by § 28-44-39(a)(1)(ii).

find that the administrative decisions in this case must be set aside.

A

The Employer Failed to Satisfy Its Burden of Proof

It is well-settled that the former employer bears the burden of proving that the person claiming unemployment benefits was terminated for proved misconduct. In Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008 (R.I. 2004), Justice (now Chief Justice) Suttell stated unreservedly:

> 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. … The employer has the burden of proof and must present evidence of the employee's misconduct. …

Foster-Glocester Regional School Committee, supra, 854 A.2d at 1018 (Citations omitted)(Emphasis added).[7] Note that the Court stated, in the conjunctive, that the employer has the burden of proof and must present evidence of misconduct. At first glance, this statement appears to be a redundancy, but I believe it is not.

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[7] On this second, emphasized point, the Court cited Technic, Inc. v. Rhode Island Department of Employment and Training, 669 A.2d 1156, 1158 (R.I. 1996). Foster-Glocester, supra, 854 A.2d at 1018.

To aid our understanding of the Court's declaration, let us begin by defining the terms used within it. Our Supreme Court had occasion to restate its notions of the term "burden of proof" — as it applies in civil cases — in DeBlois v. Clark, 764 A.2d 727 (R.I. 2001):

> The term 'burden of proof' embraces two different concepts. The first concept, which is often alluded to as the 'burden of persuasion,' refers to the litigants' burden of establishing the truth of a given proposition in a case by such quantum of evidence as the law may require. The burden of persuasion never shifts. The second concept refers to the 'burden of going forward' with the evidence, which shifts from party to party as the case progresses.

DeBlois, supra, 764 A.2d at 731 n. 2 (Emphases in original) quoting from Murphy v. O'Neill, 454 A.2d 248, 250 (R.I. 1983) citing Giblin v. Dudley Hardware Co., 44 R.I. 371, 375, 117 A. 418, 419 (1922). So, in context, it appears that the statement was intended to emphasize that the employer must go forward with evidence — that it specifically bears, not only the burden of persuasion, but the burden of production as well.[8]

As we noted above, the employer here, Rhode Island Hospital, failed to participate at any of the hearings conducted by the Board of Review, its

[8] The Court also noted in DeBlois that the terms 'burden of going forward' and the 'burden of production' are synonymous. DeBlois, supra, 764 A.2d at 732 n. 2.

Referee or before this Court, which has noticed the employer of all conferences. In its Memorandum, the Board seeks to excuse the Hospital's failure to participate in the administrative (and judicial) proceedings conducted in this case. It seems to imply that an employer's compliance with the Department's initial request for information precluded it being found in procedural default later in the process. Appellee Board of Review's Memorandum of Law, at 5-6.

But such a construction would entirely negate the Supreme Court's pronouncement in Foster-Glocester that the employer bears the burden of proof — in particular "the burden of going forward." Indeed, the Board further argues that if a Claimant declined to testify, the Director's decision would necessarily stand. Appellee Board of Review's Memorandum of Law, at 7. This position by the Board completely reverses the burden of proof in misconduct cases. And so, the Board's construction must be rejected; instead, we must find that the employer failed to satisfy its burden of going forward.

B

The Referee Acted Improperly By Questioning the Claimant

The second issue which must be considered is whether the Referee, by questioning her so extensively, violated Ms. Dwares' due-process rights. I have

concluded, after consulting pertinent case precedents, that this was improper.

I believe we may draw guidance on this point from the Rhode Island Supreme Court's decision in Davis v. Wood, 427 A.2d 332 (R.I. 1981). In Davis, the Supreme Court considered whether bias was shown by a DEM hearing officer's "limited questioning" of the DEM attorney. Davis, supra, 427 A.2d at 337.[9] Writing for the Court, Justice Kelleher expounded thusly:

> An administrative hearing officer is not required to assume a wholly passive role and may participate in the proceeding whenever necessary to the end that the hearing proceed in an orderly, expeditious fashion. He is free to interrupt witnesses and should do so on those occasions when it is necessary to seek a clarification of the testimony. But a hearing officer must be impartial and must not attempt to establish proof to support the position of any party to the controversy. Once he does so, he becomes an advocate or participant, thus ceasing to function as an impartial trier of fact. Such a transformation gives rise to a lack of fundamental fairness required by due process. NLRB v. Air Flow Sheet Metal, Inc., 396 F.2d 506, 508 (7th Cir. 1968); Tele-Trip Co. v. NLRB, 340 F.2d 575, 581 (4th Cir. 1965); see Blizzard v. Frechette, 601 F.2d 1217, 1222 (1st Cir. 1979).

Davis, supra, 427 A.2d at 337 (Emphasis added). Accordingly, it found the

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[9] In fact, this was one of two challenges to the conduct of the hearing officer. In the other, Appellant urged that it was improper for the DEM hearing officer to later appear for the Department as counsel when his decision was appealed to the Superior Court. Davis, supra, 427 A.2d at 336. The Court rejected the assertion that the hearing officer had unconstitutionally co-mingled the prosecutorial and adjudicatory functions, holding that — "His subsequent appearance in Superior Court as an adversary does not prove his bias at the earlier hearing." Davis, supra, 427 A.2d at 337.

hearing officer's attempt to clarify forthcoming testimony (i.e., questioning whether certain testimony would be presented) did not violate Davis' due-process rights. Id.

But a fair reading of the transcript of the hearing in the instant case shows us that the Referee here went much further. The Referee, in the absence of the employer, took up its cause and questioned Claimant until he was satisfied that misconduct was proven.[10] It would seem, therefore, that he violated the due-process fairness standards set out in Davis.

Now, when upon remand these issues were brought to the attention of the Board of Review, the majority declined to address them. The sentiment was expressed that — because the Employment Security Act administers an insurance program — these constitutional concerns are inapplicable. Board of Review Hearing Transcript, at 7. This position has been renewed in the Board's Memorandum. See Appellee Board of Review's Memorandum of Law, at 6-7. However, the holding in Davis has been applied to cases involving other matters involving fundamental interests, such as one's eligibility to receive

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[10] What is more troubling still is that the Referee did so by leading the Claimant down the proverbial garden path to self-incrimination. And he did so without pausing to remind her of her right not to do so, whether by formally reading the rights enumerated in Miranda v. Arizona, 384 U.S. 436 (1966) or by referencing them informally.

medical assistance (Medicaid)[11] and one's license to operate a driving school, which impacted the licensee's right to earn a livelihood.[12] In the latter case the Court found the hearing officer did not violate due-process standards by asking the Registry official to check its records regarding the name of the owner of the driving school that was on file.[13] In sum, I know of no case law exempting unemployment cases from these principles. And until such time as they have been limited (by statute or Supreme Court precedent), they would seem to be binding in all Rhode Island administrative hearings.

And the Board argues in its Memorandum of Law that Gen. Laws 1956 § 28-44-44 requires the Referee to make sure that the factual record is developed on all material issues. That is certainly so. However, for two reasons the wording of this statute is not determinative of the outcome here. First, the statute can be harmonized with the Court's holding in Davis, allowing the

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11 See Arnold v. Lebel, 941 A.2d 813, 819-20 (R.I. 2007)(discussing propriety of ex parte communications between hearing officer and Department of Human Services personnel).

12 See Larue v. Registrar of Motor Vehicles, 568 A.2d 755, 759 (R.I. 1990)(discussing both the bias issues and advocacy issues discussed in Davis, and citing Davis as to each, finding no violation of the applicant's due-process rights).

13 Id.

Referee to make sure the record is properly developed (by asking clarifying questions or suggesting a line of inquiry) without actually prosecuting the case himself or herself. And second, the holding in Davis is of constitutional dimension, grounded in the due process clause, and if the statute conflicts with a constitutional directive, the statute — not the constitution — must give way.

Before concluding, I would offer a few final comments. Over the years the District Court has shown that it well understands that its review of factual determinations of the Board of Review is limited. This Court is even more wary of attempting to micromanage the Board's policies and procedures. For that reason, this Court's first impulse was to remand the case to give the Board a chance to cure any error by providing the Claimant with a fair and impartial hearing. This it declined to do, and so we must address the issue directly.

We also understand that our recommendation may well result in benefits being received by this Claimant,[14] who committed acts which undoubtedly qualify as misconduct.[15] However unfortunate, this is necessarily the result

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[14] Claimant shall be considered eligible for benefits as of October 31, 2012; until that time she was under a disqualification under Gen. Laws 1956 § 28-44-12 (Availability). See Decision of Board of Review in No. 20115223. Note that her testimony in that matter is not tainted because the claimant bears the burden of proof under section 12.

[15] By this statement I do not mean to suggest that the Member

when a procedural error occurs. By its remand this Court provided the opportunity for any infringement of Ms. Dwares' rights to be cured, but the Board declined to take it. And so, because the procedure followed by the Board of Review in this case was unlawful, its decision must be vacated. Gen. Laws 1956 § 42-35-15(g)(3).

IV

CONCLUSION

Upon careful review of the record, I recommend that this Court find that the decision of the Board of Review was made upon unlawful procedure. Gen. Laws 1956 § 42-35-15(g)(3).

Accordingly, I recommend that the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

JANUARY 8, 2014.

Representing Labor's position, that Claimant should be deemed eligible for benefits because this was an unwillful and isolated instance of poor judgment on an occasion when her mind was befuddled by medications, is unreasonable.