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

Paul A. Tremblay	:	
	:	
v.	:	**A.A. No. 12 - 200**
	:	
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 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 on this 27th day of November, 2012.

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. Mr. Paul A. Tremblay 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 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: Mr. Paul A. Tremblay was employed for twenty-six years as a custodian by the Providence Journal Company until May 2, 2012. He applied for employment security benefits immediately but on May 29, 2012 the Director issued a decision[1] holding that he was ineligible to receive benefits because he had engaged in misconduct within the meaning of Gen. Laws 1956 § 28-44-18.

Complainant filed an appeal, and a hearing was held before Referee John Palangio on July 26, 2012 at which the claimant appeared and testified. See Referee Hearing Transcript, Appeal No. 20123380, at 1. In his July 26, 2012 Decision, the Referee made the following findings of fact:

> Claimant was a custodian for the Providence Journal Company for twenty six years last on May 2, 2012. On April 23, 2012, the claimant's supervisor discovered a loaded gun inside the claimant's backpack which was on top of the refrigerator in a break room in the Providence Journal building. That supervisor called the Providence police. The

[1] The Director actually issued two decisions that day. Case number 1223871 concerned the misconduct issue at the Providence Journal. (At the Board of Review level this was No. 20123380). Director's case number 1222051 concerned his termination from the employ of the North Providence School Department — based on the incident at the Journal. (At the Board of Review level this became case No. 20133379). This second issue will be considered infra at 11.

> police interviewed the claimant and discovered that the claimant did not have a license to carry a firearm in the state of Rhode Island. The claimant was arrested and charged with carrying a pistol without a license, which is a felony.

Decision of Referee, July 26, 2012 at 1. Based on these facts, the Referee — after quoting from section 28-44-18 and the leading case in this jurisdiction on the subject of misconduct, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740 (R.I. 1984) — made the following conclusions:

> 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 his work.
>
> The claimant testified to owning a .22 caliber pistol. The claimant also testified that he had never obtained a license to carry a firearm within the State of Rhode Island which is a requirement under Rhode Island law. The claimant also testified that he brought his loaded gun into work at the Providence Journal building.
>
> The employer in this case has a reasonable expectation to maintain the safety of all employees within their facility. That safety could not have been assured when the claimant brought a loaded gun into work. Further, the claimant never obtained a license to carry that gun. Finally, the claimant never disclosed to his employer that he had a loaded gun in his possession within the Providence Journal Company.
>
> The employer has shown that the claimant exhibited willful or wanton disregard of the employer's interest by the dangerous act of bringing in an unlicensed loaded gun into a workplace. Therefore, Unemployment benefits are denied under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, July 26, 2012 at 2. Accordingly, the Referee found that claimant was properly disqualified from the receipt of unemployment benefits. Thereafter,

a timely appeal was filed by Claimant Tremblay and the matter was reviewed by the Board of Review. In a decision dated September 11, 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.

Mr. Tremblay filed a Complaint for Judicial Review in the Sixth Division District Court on or about October 11, 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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the

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[2] 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).

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

findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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

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[4] Id.

V. ANALYSIS

A. The Misconduct Issue — The Providence Journal Decision.

In this case the employer, the Providence Journal Company, alleged — and the Referee and the Board each found — that Mr. Tremblay committed misconduct by bringing a weapon onto its property. Mr. Tremblay does not deny the allegation. Because it is uncontestable that carrying a weapon onto his employer's property may constitute misconduct, the only issue is whether the allegation was sufficiently proven. I believe it was.

1. Facts of Record — The Claimant's Testimony.

Claimant Tremblay testified that he was fired on May 2, 2012, after twenty-six years of service, by the Providence Journal's Human Resources administrator — Tom McDonough. Referee Hearing Transcript, Appeal No. 20123380, at 6-7.

He then addressed the events of his last day of work. He put his cooler and backpack on top of a refrigerator in the fourth floor copy room. Referee Hearing Transcript, Appeal No. 20123380, at 8. He carries a six-pack of soda in the cooler and snacks in the backpack. Referee Hearing Transcript, Appeal No. 20123380, at 8-9. He indicated that, according to his supervisor, the backpack fell off the refrigerator and a .22 caliber pistol was discovered. Referee Hearing Transcript, Appeal No. 20123380, at 10. He admitted it was loaded. Referee Hearing Transcript, Appeal No. 20123380, at 10.

Mr. Tremblay said he had forgotten the gun — which he had obtained for his protection after a break-in — was in the backpack. Referee Hearing Transcript, Appeal No. 20123380, at 10-11. He indicated he was not aware he needed a permit to carry a weapon. Referee Hearing Transcript, Appeal No. 20123380, at 12-13.

2. Rationale.

Quite frankly, this case requires no intricate analysis. Claimant admitted he brought a loaded pistol onto his employer's premises without its permission and without a license, which is potentially punishable as a felony under Rhode Island law. See Gen. Laws 1956 § 11-47-5. In my view this admission was sufficient, unto itself, to support a finding of misconduct. See Technic, Inc. v. Rhode Island Department of Employment and Training et al., 669 A.2d 1156, 1160 (R.I. 1996)(Supreme Court sustained District Court's decision that claimant's theft of 600 ounces of gold was unproven; however, benefits were denied based on, inter alia, claimant's statement to a third party that he had previously taken slivers of gold from employer). The bringing of a dangerous instrumentality onto the employer's premises and leaving it unmonitored in a knapsack — whether or not felonious — constitutes, proved misconduct within the meaning of section 28-44-18. See also Technic Inc, supra, id. (Testimony that Claimant sold marijuana on firm's premises constituted misconduct).

In my view, bringing a loaded weapon onto the employer's premises — and then leaving it unattended — constitutes misconduct; and this is true whether or not the claimant had any intention to brandish it or display it. Such behavior is decidedly not in the employer's best interests, exposing the employer to liability had the gun discharged or been found by a person with malevolent intentions. I therefore find that the Board of Review's decision holding that Mr. Tremblay was disqualified from receiving benefits was not clearly erroneous in light of the reliable, probative, and substantial evidence of record.

Pursuant to the applicable standard of review described supra at 5-6, 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 is well-supported by the record and should not be overturned by this Court.

B. The North Providence Claim.

In a second decision — entirely derivative of the Referee's decision in the matter arising at the Providence Journal company — Referee Palangio found that Mr. Tremblay ought to be disqualified from the receipt of unemployment benefits based on his loss of a part-time position he held with the North Providence School Department. Mr. Tremblay had worked for the North Providence School Department as a substitute custodian for four weeks, last on April 17, 2012. When the School Department's officials read in a Providence Journal story that Mr. Tremblay had been arrested and charged with a felony, he was removed from the substitute list. Referee's Decision, No. 20123379, July 26, 2012, at 1.

Referee Palangio found the School Department terminated Mr. Tremblay because he violated a known rule of the School Department — i.e., not being arrested for a felony. Referee's Decision, No. 20123379, July 26, 2012, at 2. The Referee further found the enforcement of this rule was necessary to insure the safety of the schoolchildren of North Providence. Referee's Decision, No. 20123379, July 26, 2012, at 2. Accordingly, he found Mr. Tremblay to be disqualified from the receipt of benefits pursuant to § 28-44-18. Referee's Decision, No. 20123379, July 26, 2012, at 3.

However, I do not believe we must consider the delicate question of whether being charged with a crime is itself proof of misconduct. As stated above in

subsection A, Mr. Tremblay admitted he brought a loaded firearm into his workplace without a license and without the employer's consent. Referee Hearing Transcript, Appeal No. 20123380, at 10; Referee Hearing Transcript, Appeal No. 20123379, at 16.

Common sense and experience tells us that custodians have unfettered access into school buildings which empowers them to bring items of all sorts into a school building; the school administration must have faith that the men and women they hire would not do so. By Mr. Tremblay's actions, he destroyed whatever faith North Providence had developed in him during his four weeks' employment. As a result, "[his] ability to carry out the duties of [his] office was not only impaired, but totally extinguished by such conduct." Bunch v. Board of Review, Department of Employment and Training, 690 A.2d 335, 338 (R.I. 1997).[5] I therefore conclude that his actions constituted proved misconduct within the meaning of section 18.

[5] The Bunch case concerned the possession, at home, of a controlled substance by the Superintendent of the Training School. While I concede she held a far more prestigious position than that held by Mr. Tremblay, I believe that insofar as we are concerned with the physical safety of the student body, the principle to be applied is no less applicable.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decisions of the Board of Review finding claimant disqualified were not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, they were 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 both decisions of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

NOVEMBER 27, 2012