STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **DISTRICT OURT**
SIXTH DIVISION

STEPHEN HASKELL	**:**	
	:	
v.	**:**	**A.A. No. 2012-74**
	:	
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 reversed.

Dated at Providence, Rhode Island, this 23rd day of May, 2013.

Enter: By Order:

/s/ /s/

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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"). Stephen Haskell ("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 S&S Transmissions ("Employer") as a mechanic from approximately September 1, 1999 until June 27, 2011. Claimant filed for, and began receiving, unemployment benefits after his separation date. A decision by the Director of the Department was issued on August 15, 2011, stating that although the Claimant's job performance may have made him an unsatisfactory employee, there was insufficient evidence to establish that the Claimant had been discharged from his employment for a disqualifying reason under the Act, that of misconduct, and that Claimant should therefore be allowed to continue to receive unemployment benefits. Employer subsequently appealed this decision in September of 2011.

A hearing in the matter was held on September 20, 2011 before Referee Kathleen Connell. Neither side was represented by counsel. Scott Szczupak, owner of S&S Transmission, testified on behalf of the business, along with manager Mark Ventura. The remaining auto technician/mechanic for Employer, Michael Sullivan, appeared, but offered no testimony. Claimant was the sole witness on his own behalf.

Based on the evidence and testimony of the witnesses, the Referee for the Board of Review made the following findings of facts in its decision, mailed on January 5, 2012:

> The claimant had been suffering through some personal issues with his family and as such his level of work was deteriorating. It was through the credible testimony of the employer and the employer's witnesses that the claimant's attitude had deteriorated drastically. Through the claimant's own testimony he stated that he did not know if he could continue working anymore. However, he continued to show up and was approached by the manager and the owner several times to improve his attitude and his work. The owner had safety issues due to the nature of the work which was fixing cars.[1]

The Referee then reversed the decision of the Director, finding that Claimant had indeed been discharged for misconduct and that Claimant was therefore denied the receipt of unemployment benefits. In reaching this conclusion, the Referee stated:

> Under case law misconduct includes a standard of behavior which the employer has the right to expect of his or her employee. Given that he [Claimant] was approached several times about that standard of behavior and he failed to adjust to [sic], his action [sic] rise to that level of behavior.[2]

Claimant appealed the Referee's Decision to the Board of Review on January 7, 2012. The Board then issued its Decision on February 29, 2012, sustaining the decision of the Referee. Claimant subsequently appealed the decision to the District Court on March 26, 2012.

[1] Decision of the Referee, January 5, 2012 at 1.
[2] *Id.* at 2.

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 R.I.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 R.I.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 and the Referee concluded that the Employer had established proof of misconduct by a preponderance of the evidence. In reaching this conclusion, the Referee considered the testimony at hearing of the Employer, Mr. Szczupak ("Szczupak"), and his manager, Mr. Ventura ("Ventura"), as well as that of the Claimant. Neither the Employer nor the Claimant appeared with counsel and the resultant hearing was therefore more akin to a conversation between the witnesses.

The Employer stated that he had been in business for twenty-one years and that the Claimant had been employed with him for ten of those years.[3] At some point in time, Claimant's job performance became a concern.[4] Claimant had informed Szczupak at the time that he was having personal problems and wasn't sure if he could keep working; Szczupak told him to let him know when this would be, since he had a small business that he needed to keep running.[5] Things then went downhill. Szczupak stated "lately his work has gotten real bad."[6] According to Szczupak and Ventura, he was taking too long to complete his jobs.[7] Szczupak told Claimant a few times to "pick up the pace," but that his work "got worse and worse."[8] Szczupak testified that he began having safety concerns as well, since Claimant was responsible for fixing people's vehicles.[9] Eventually he "had no other choice but to let him go."[10]

Ventura supplemented the testimony of the Employer, stating that, rather than directly telling Claimant that he was taking too long to complete his work, he would try to ask "nicely" and "gently" about a job's status, since Claimant had become difficult to speak with and every communication could turn into a confrontation.[11] In addition, Claimant would hand in incomplete paperwork.[12] Ventura told him around fifty times that Claimant needed to focus and be productive, to no avail.[13] Essentially, Szczupak and Ventura stated that for years, Claimant had more good days than bad, which made it worthwhile to keep him on

[3] Hearing Transcript, September 20, 2011, at p. 4
[4] It is unclear from the testimony for how long Claimant's conduct became an issue.
[5] Transcript, p. 5.
[6] Transcript, p. 5.
[7] Transcript, p. 5-7.
[8] Transcript, p. 5.
[9] Transcript, p. 7.
[10] Transcript, p. 5.
[11] Transcript, p. 6.
[12] Transcript, p. 11.
[13] Transcript, pp. 9-10.

the job; once the balance shifted to more bad days than good, and Claimant would not leave of his own accord, Employer had no other choice but to terminate his employment.

The Claimant testified on his own behalf, stating that he began experiencing personal problems due health issues in his wife's family, necessitating hospital visits, doctor appointments and the like.[14] He admitted that he was "kind of sluggish' and was unable to concentrate, frequently having to double-check his own work.[15] He became unapproachable. Claimant stated that he tried to be upfront with the Employer about his situation and felt that some of the jobs assigned to him were simply more complicated than others, requiring additional time.[16] Claimant essentially stated that he had been a good employee for many years, that he told the Employer what was going on, and did the best he could under the circumstances.

Over the years, the District Court has examined a number of incidents of alleged misconduct as defined by R.I.G.L. 1956 § 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 underlying conduct was criminal in nature; whether there were written policies and procedures; whether prior warnings were given to the claimant; and whether the conduct was simply inadvertent.

The Referee based her decision for the Employer on the concept that, under R.I.G.L. 1956 § 28-44-18, an employer has a particular standard of conduct that he or she has the right to expect from the employee. When an employer informs the employee that he or she is not fulfilling that standard and the employee makes no attempt to do so, the employee's

[14] Transcript, p. 12.
[15] Transcript, p. 12.
[16] Transcript, pp. 12, 13, 16.

conduct meets the statutory definition of "misconduct". In applying this interpretation to this situation, the Referee, and therefore the Board, essentially found that Claimant's failure to improve his job performance after being told to do so a number of times, and/or his apparent unwillingness to do so, was "conduct evincing such willful or wanton disregard of an employer's interests as is found deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee."[17]

This decision, however, does not take into consideration the full extent of the Rhode Island Supreme Court's clarification of the statutory definition of misconduct, as stated in Bunch.[18] It is this Court's opinion that the testimony of Szczupak and Ventura demonstrated dissatisfaction with the Claimant's recent job performance, which they themselves understood was due to Claimant's personal problems during this time. This dissatisfaction was due to Claimant's continued slow pace of work and, to a lesser degree, his irritability with his coworkers.[19] The question is not whether these issues with the Claimant's job performance were an appropriate basis for his termination, but whether they barred him from receiving unemployment benefits once that termination took place. Inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability or incapacity is not 'misconduct' disqualifying a claimant from receiving unemployment

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[17] Bunch, 690 A.2d at 337; *see also p. 3*.
[18] *Id; see also pp. 3*, *4*.
[19] At the hearing before the Referee, Szczupak, Ventura, and the Claimant, for what seemed to be the first time, discussed an issue concerning Claimant's prior permission to perform repairs and servicing on the weekends for family, a practice that subsequently ended after the business' move to a new location, but allegations that Claimant had misused this privilege were not cited as reasons for Claimant's termination. As such, this testimony was not considered in reaching either the Referee or this Court's decision.

benefits under the law.[19] This Court therefore finds that this Claimant's conduct on the job, while unsatisfactory, did not constitute misconduct under R.I.G.L. 1956 § 28-44-18.

Conclusion

Upon careful review of the evidence, I find that the decision of the Referee and as adopted by the Board of Review denying benefits to the Claimant is affected by error of law. Further, it is therefore clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. R.I.G.L. 1956 § 42-35-15(g).

The decision of the Board of Review is hereby reversed.

[19] *See* Bunch, 690 A.2nd at 337; *see also p. 3*.