STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Kenneth Ascoli	:	
	:	
v.	:	**A.A. No. 14 – 030**
	:	
Department of Labor and 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 AFFIRMED.

Entered as an Order of this Court at Providence on this 22nd day of December, 2014.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Kenneth Ascoli	:	
	:	
v.	:	**A.A. No. 14 – 030**
	:	
Department of Labor and Training,	:	
Board of Review	:	

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 Mr. Kenneth Ascoli urges that the Board of Review of the Department of Labor and Training erred when it held him to be disqualified from receiving unemployment benefits because it found that he had left his position without good cause as defined in Gen. Laws 1956 § 28-44-17. Jurisdiction for appeals from decisions of the Department of Labor 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 rendered by the Board of Review on the issue of eligibility was not clearly erroneous; I therefore recommend that the decision of the Board of Review be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Kenneth Ascoli was employed as a bartender for eight months by Marjan, Inc. until his last day of work — August 18, 2013. He filed for unemployment benefits and, on November 14, 2013, a designee of the Director issued a decision finding that Mr. Ascoli had been discharged in disqualifying circumstances within the meaning of Gen. Laws 1956 § 28-44-18.

Claimant appealed from this decision and, on January 6, 2014, Referee Nancy L. Howarth conducted a hearing on the matter. Claimant appeared without counsel, as did the business's manager. Two days later, the Referee issued a decision which reversed the Director's previous ruling. Referee Howarth made the following findings of fact:

> The claimant was employed as a bartender by the employer. When he was hired he was advised that he would also be assigned shifts as a greeter or service bartender. As a service bartender the claimant would make drinks for servers who were waiting on customers

> seated at the tables, rather than just attending to customers at the bar. He would receive a percentage of the servers' tips. The claimant initially accepted shifts as a service bartender, but then informed the employer that he did not want to work in this position. The employer did not assign him to work as a service bartender for some time. However, they eventually requested that the claimant perform those duties again. The claimant indicated that he was not willing to do so. Therefore, he was discharged as of August 18, 2013.

Decision of Referee, January 8, 2014, at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — the Referee pronounced the following conclusions:

> * * *
> The burden of proof in establishing misconduct rests solely with the employer. In the instant case, the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant failed to perform all the duties his position required. I find that the claimant's actions constitute deliberate behavior in willful disregard of the employer's interest and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, January 8, 2014 at 2. The Claimant appealed and the Board of Review reviewed the matter.

On February 12, 2014, the members of the Board of Review unanimously affirmed the decision of the Referee and held that misconduct had been proven. The Board found the Decision of the Referee to be a proper adjudication of the facts and the law applicable thereto; moreover, it adopted the Referee's decision

as its own. Decision of Board of Review, February 12, 2014 at 1. Finally, Mr. Ascoli filed a complaint for judicial review in the Sixth Division District Court on February 27, 2014.

II
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; 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 by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

III
STANDARD OF REVIEW

The standard 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]

---

[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 Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

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 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.

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

IV
ANALYSIS
A
Evidence of Record

At the January 6, 2014 hearing conducted by Referee Vukic in this matter the first witness was Steven Barboza, Business Manager for the employer. Referee Hearing Transcript, at 5 et seq.

Mr. Barboza began his testimony by indicating that Mr. Ascoli was hired with the understanding that he would be both a bartender and a service bartender at the restaurant the company operates. Referee Hearing Transcript, at 6-8. He said that Mr. Ascoli indicated he preferred just the (regular) bartending. This resulted in him receiving fewer and fewer shifts over time. Referee Hearing Transcript, at 9. Later, he was offered shifts as a greeter (host) which, after trying, he also declined. Referee Hearing Transcript, at 7, 11. When asked on cross-examination to specify when Claimant refused to handle the service bar, he was unable to cite specific dates. Referee Hearing Transcript, at 10.

Mr. Ascoli began his testimony under examination by the Referee. Referee Hearing Transcript, at 12. He explained that at the end of his shift on August 18, 2013, Mr. Barboza told him he had to let him go because "it's not working out." Referee Hearing Transcript, at 13. Claimant stated that he generally worked on

Tuesdays and Wednesdays — and on Tuesdays he did both the service bar and regular bar. Referee Hearing Transcript, at 14. On this basis, he denied he ever told Mr. Barboza that he would not do a service bar shift. Referee Hearing Transcript, at 7. Id.

However, Mr. Ascoli did concede that on two occasions, he went in for his regular Tuesday or Wednesday shift and saw his name on the schedule for Saturday night, and had to tell the manager that he could not do the Saturday due to a prior commitment with his wife. Referee Hearing Transcript, at 15. But he reiterated that he did not decline the shifts because it would have been a service bar shift. Id. Mr. Ascoli maintained he was never given a warning or a remediation period. Referee Hearing Transcript, at 16.

B

Discussion

The employer alleged that Mr. Ascoli refused to perform part of his job — working the service bar — and that this constituted proved misconduct. As we saw in our review of the evidence, the parties joined issue, not on any subtle nicety, but on this very issue — whether or not he refused to work the service bar. In support of this allegation, it presented the testimony of Mr. Barboza. Mr. Ascoli denied the allegation.

Of course it is precisely the Board of Review's role (as finder of fact) to decide which testimony it shall credit and which it shall not. And once the Board accepted this allegation as fact, there is little doubt the Claimant was guilty of misconduct, since the refusal to perform duties within the scope of one's job has long been held to constitute misconduct within the meaning of § 28-44-18.[4]

Of course, another fact-finder might well have found the testimony of Mr. Ascoli to be the more believable — particularly in light of his statement that he handled the service bar on Tuesdays. But so long as the Board's findings are supported by competent evidence of record, they must be affirmed. Mr. Barboza's testimony provided a sufficient support for the Board's decision. It must, therefore, be upheld.

VI
CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the

[4] See Halpin v. Department of Employment Security Board of Review, A.A. 82-90 slip op. at 2, 5 (Dist.Ct. 06/03/1983)(Chaharyn, J.)(Board found claimant fork-lift operator not entitled to benefits; affirmed, where Board's determination that claimant's refusal to perform particular job constituted misconduct was not clearly erroneous) and Mullen v. Department of Employment and Training Board of Review, A.A. 93-142 slip op. at 5-7 (Dist.Ct. 02/21/1994)(Rocha, J.)(Board's disqualification of claimant affirmed

substantial evidence of record, or arbitrary or capricious. The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[5] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[6]

Upon careful review of the evidence, I conclude that the Board's decision disqualifying Mr. Ascoli from receiving unemployment because he was fired for proved misconduct is not clearly erroneous in view of the reliable, probative, and substantial evidence of record — and the applicable law. Gen. Laws 1956 § 42-35-15(g)(3),(4). I therefore recommend that the Decision of the Board of Review rendered in this case be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

DECEMBER 22, 2014

---

where claimant refused to carry out a particular [unspecified] task).

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

[6] Cahoone, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986) and Gen. Laws 1956 § 42-35-15(g), supra at 6 and Guarino, supra at 6, n. 1.