THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2010-0530, Appeal of Stephen P. Lucier, the court on October 12, 2011, issued the following order:

The claimant, Stephen P. Lucier, appeals an order of the New Hampshire Department of Employment Security Appeal Tribunal finding that he engaged in misconduct that disqualified him from receiving unemployment compensation. He argues that: (1) the appeal tribunal illegally inquired into areas of conduct that were not the stated reason for termination; (2) the appeal tribunal erred in finding him disqualified because there was no evidence of a pattern of insubordination; (3) there was insufficient evidence of misconduct; and (4) the board of selectmen (board) violated his rights to due process. We affirm.

Our review of the tribunal's decision is confined to the record. RSA 282-A:67, IV (2010). We will not substitute our judgment for that of the tribunal as to the weight of the evidence on questions of fact. RSA 282-A:67, V. We will, however, reverse, modify or remand the decision for further proceedings if the substantial rights of the petitioner were prejudiced because the administrative findings, inferences or conclusions were unauthorized, affected by error of law or clearly erroneous in view of all the evidence presented. Appeal of Motuzas, 158 N.H. 655, 658-59 (2009); RSA 282-A:67, V.

New Hampshire's unemployment compensation system is predicated upon benefits being paid to those who become unemployed through no fault of their own. Motuzas, 158 N.H. at 659. No benefits are to be paid, however, to an employee who is terminated as a result of "misconduct connected with his work." RSA 282-A:32, I (b); Appeal of Brooks, 161 N.H. 457, 460 (2011). We have previously rejected a definition of misconduct that requires proof of willful and wanton disregard of an employer's interest; instead, we have adopted a less stringent two-pronged definition of misconduct. Appeal of Brooks, 161 N.H. at 460. Under the first prong, recurring careless or negligent acts constitute misconduct; the negligence need not be of such a degree or recurrence as to manifest wrongful intent or evil design or to show intentional or substantial disregard. Id. at 460-61. Alternatively, under the second prong, a single act may be sufficient to support a finding of misconduct if it is a deliberate violation of a company rule that is reasonably designed to protect the legitimate business interests of the employer. Id. at 461.

The claimant first argues that the appeal tribunal erred in allowing the town to present evidence of a verbal altercation that he had with his supervising selectman on the day before he was terminated because the stated reason for his

termination was a lack of improvement after he received a previous letter warning of his deficient performance. The town argues that the claimant has failed to preserve this issue for our review. We will assume without deciding that the claimant preserved this issue. But see In the Matter of Birmingham & Birmingham, 154 N.H. 51, 56 (2006) (pro se litigants bound by same procedural rules that govern parties represented by counsel).

We note that the board's letter of September 22, 2009, cited the claimant's performance and his September 21, 2009 "outburst" in support of its conclusion that the claimant's performance had not improved since the board's earlier letter. We are not persuaded by the claimant's argument that the altercation and the deficiencies in his job performance were two separate grounds for his termination, though we note that, taken separately, they may well have met both prongs of the misconduct test. Despite his attempts to selectively parse the testimony of the supervising selectman, the record indicates that the claimant continued to exhibit deficiencies in performance up to and including the day of the altercation. Indeed, the altercation, which the appeal tribunal found included the claimant "using loud, abusive and profane language directed at his [supervising selectman] in the presence of town employees and in a public place," occurred after he failed to obtain approval for a purchase and was reminded that this was against policy.

Nor are we persuaded by his argument that there was no evidence of a pattern of insubordination. As early as January 2009, the board detailed concerns about the claimant's failure to follow policies and indicated that it had previously alerted him to at least some of those concerns.

The claimant also argues that there was insufficient evidence of misconduct. We disagree. The claimant did not object to the admission of the earlier letters from the board documenting the deficiencies in his performance. These letters, combined with his supervising selectmen's testimony provided evidence of his misconduct. See RSA 282-A:67, V (supreme court will not substitute its judgment for that of tribunal as to weight of evidence on questions of fact); Appeal of Brooks, 161 N.H. at 460-61 (setting forth misconduct analysis).

The claimant's final argument is that his termination violated his right to due process because the selectmen terminated his employment without a hearing and failed to "justify their decision under RSA 231:65." Even if we assume that this issue is within the scope provided by statute for the tribunal's inquiry, we decline to review it. We find no evidence that he raised this constitutional issue during the hearing before the appeal tribunal. Accordingly, it has not been preserved for our review. See, e.g., Appeal of Bosselait, 130 N.H. 604, 607 (1988) (issues must be raised at earliest possible time because trial

forums should have full opportunity to come to sound conclusions and to correct alleged errors in first instance).

Affirmed.

DUGGAN, CONBOY and LYNN, JJ., concurred.

Eileen Fox,
Clerk

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