

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.**

**DISTRICT COURT  
SIXTH DIVISION**

**Denise M. Banville** :  
 :  
**v.** : **A.A. No. 14 - 037**  
 :  
**Department of Labor and Training,** :  
**Board of Review** :

**ORDER**

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 REVERSED.

Entered as an Order of this Court at Providence on this 24<sup>th</sup> day of February, 2015.

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

Denise M. Banville :  
 :  
v. : A.A. No. 2014 – 037  
 :  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** Ms. Denise M. Banville 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 she was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. After comparing the decision rendered by the Board of Review with the record certified to this Court, I have concluded that the decision disqualifying Ms. Banville is legally and factually infirm; I

therefore recommend that the decision of the Board of Review be REVERSED.

**I**  
**FACTS AND TRAVEL OF THE CASE**

The facts and travel of the case are these: Ms. Denise M. Banville worked for Atria Management Company at its assisted living facility for 2½ years as a licensed practical nurse (LPN) until October 2, 2013. She filed a claim for unemployment benefits but on November 18, 2013, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was conducted by Referee Carol A. Gibson on December 16, 2013. On this occasion the Claimant appeared with counsel; three employer representatives also appeared. Two days later, on December 18, 2013, the Referee held that Ms. Banville would be disqualified from receiving unemployment benefits because she had been fired for misconduct. In her written Decision, the Referee made Findings of Fact on the issue of misconduct, which are quoted here in their entirety —

The claimant had worked for the employer, an assisted living facility, two and a half years as a licensed practical wellness nurse through October 2, 2013. The claimant has been actively working as a nurse since 2000. In July 2013, the employer conducted an audit and discovered the claimant had failed to accurately transcribe two medication orders. The claimant's errors resulted in residents getting inaccurate doses of medication. The claimant was counseled and warned on July 19, 2013. The employer conducted another audit in September 2013 and discovered three additional medication transcription errors made by the claimant. This again resulted in residents getting the wrong dosage of medication. The claimant was issued a final warning on September 26, 2013 and informed if the errors continued it could result in termination. The claimant was to have all her transcribed records reviewed by her supervisor. The claimant states she did submit the medication records to the employer after receiving the warning. Subsequent to the final warning, the employer determined the claimant had made another medication transcription error. The error resulted in the resident receiving medication once a day instead of twice a day. The claimant was suspended pending an investigation and subsequently discharged due to the continued medication transcription errors.

Decision of Referee, December 18, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — Referee Gibson pronounced the following conclusions:

...

In cases of termination, the employer bears the burden to prove by a preponderance of credible testimony or evidence that the

claimant committed an act or acts of misconduct as defined by the law in connection with her work. It must be found and determined that the employer has met their burden.

In this case, the claimant was a well experienced licensed practical nurse who made multiple transcription errors that placed the residents and the employer in jeopardy. The claimant has been counseled and warned. The claimant's actions were against the best interests of the employer, jeopardizing the residents and the employer, and, therefore, support a denial of benefits in this matter.

Decision of Referee, December 18, 2013 at 2. The Claimant appealed and the Board of Review deliberated on the matter. On February 12, 2014, the Board of Review unanimously affirmed the decision of the Referee — finding it to be a proper adjudication of the facts and the law applicable thereto; the Board adopted the decision of the Referee as its own.

Finally, Ms. Banville filed a complaint for judicial review in the Sixth Division District Court on March 14, 2014. A conference was conducted and a briefing schedule set. Appellant's Brief was received on June 30, 2014. However, the Board of Review informed this Court on October 22, 2014 that it would not be submitting a brief in this case. No reason was given and the Court has not inquired why the Board of Review would leave its decision in this matter rhetorically undefended.

## 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.** — ... For benefit years on and after July 1, 2012 and prior to July 6, 2014, 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 greater than, or equal to, his or her weekly benefit rate 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.

(Emphasis added). 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” previously pronounced in a decision of the Wisconsin Supreme Court — 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.<sup>1</sup>

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<sup>1</sup> Foster-Glocester Regional School Committee v. Board of Review,

### 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.’”<sup>2</sup> The Court will not substitute its

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Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

<sup>2</sup> 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).

judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>3</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>4</sup>

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.

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<sup>3</sup> Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>4</sup> 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

**The Decision of the Board of Review**

It is our customary practice in section 18 (misconduct) cases to begin our analysis of a decision of the Board of Review by recounting the evidence and testimony adduced at the hearing, so that we may determine whether the findings made by the Board are supported by reliable, probative, and substantial evidence. Of course, when we do so, we are implicitly assuming that the Board's findings regarding the claimant's behavior are — if supported by the record — sufficient as a matter of law to constitute misconduct within the meaning of section 18. In most cases this issue is not subject to serious debate.

But it is in the instant case. Indeed, I believe that the findings made by the Board of Review regarding Ms. Banville's behavior are inadequate to satisfy the section 18 definition of misconduct.<sup>5</sup> It ignores as well the very clear statements in the Turner decision (quoted by the Referee) that mere

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<sup>5</sup> The Director's decision also rested its conclusion on the simple finding that the errors Claimant made were not in the employer's best interests.

inefficiency and good faith errors are not enough, per se, to trigger a section 18 disqualification.<sup>6</sup>

The Board's disqualification of Ms. Banville was based on the following syllogism — Claimant, a nurse, made a series of errors in transcribing the medication orders of physicians into the residents' medical records, which caused certain residents to receive an improper dosage of medication, which could certainly endanger their health and the prosperity of the employer's business.<sup>7</sup> She was therefore disqualified from receiving unemployment benefits.

Now, I do not question that the factual elements assumed by this rationale are indeed true. To the contrary, I believe they are completely borne out by the evidence of record. The importance to the employer (and the patients) of maintaining accurate medical records and properly dispensing

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<sup>6</sup> See Decision of Referee, at 2 quoting Turner decision's adoption of the standard for misconduct set forth by the Wisconsin Supreme Court in Newbeck. And see generally, Part II of this decision, "Applicable Law", ante, at 4-6.

<sup>7</sup> Ms. Barbara Stuber, R.N. testified that the individual medicine orders (prescriptions) written by physicians for the residents of Atria are transferred onto the monthly Medication Administration Record (MAR) by the nursing staff. Referee Hearing Transcript, at 13-14, 17. Thereafter, the private pharmacy retained by Atria provides it with a printout of the

medications is patent and undeniable. But I do question, indeed I reject, any suggestion that this syllogism is legally sufficient to undergird a finding of disqualification for misconduct under section 18.

The Board<sup>8</sup> made no finding that Claimant's errors were made deliberately or in willful disregard of the employer's interests. And, in my view, there is nothing in this record to suggest that they were made deliberately or with any such willful disregard of the employer's business interests or the patients' well-being.<sup>9</sup> Therefore, I find that the decision rendered by the Board of Review is inadequate — as viewed on its face and through a reading of the facts of record — to justify the disqualification of Ms. Banville.

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MAR's for the month. Referee Hearing Transcript, at 17.

<sup>8</sup> I refer here (and throughout Part IV of this opinion) to the Board of Review and not the Referee who first published the decision since, as noted above, the Board adopted the Referee's decision as its own.

<sup>9</sup> Although it forms no part of my rationale on this point, I should mention at this juncture that Ms. Banville ascribed her errors to the atmosphere at the facility, which she described as "crazy hectic" and marked by "constant interruption." Referee Hearing Transcript, at 63. Claimant stated she brought this issue up at a staff meeting which was held a couple of days before the last incident. Referee Hearing Transcript, at 65. Also mitigating against any inference of deliberateness or recklessness on her part was Ms. Banville's (presumed) realization that errors of the sort cited here could affect her licensure as an LPN.

## B

### Was Claimant Insubordinate?

A second instance of potential misconduct may also be gleaned from the record before us — which is whether she violated a direct order of her supervising nurse by failing to submit the prescription she transcribed (onto an MAR form) to Ms. Stuber for her review. According to Nurse Stuber, included within Claimant’s September warning was a command that she present every order she transcribed to Nurse Stuber for her review; she was also told to bring any prescriptions she could not decipher to Nurse Stuber for her assistance. Referee Hearing Transcript, at 22.<sup>10</sup> According to Nurse Stuber, these materials had to be brought to her and only her. Referee Hearing Transcript, at 31. The fact that this directive was issued in light of Ms. Banville’s history of transcription errors gives it a certain gravity. And so, I have no doubt that a finding that Claimant intentionally violated this order would constitute misconduct with the meaning of section 18, resulting in Claimant’s disqualification from the receipt of employment security benefits.

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<sup>10</sup> See also Employer’s Exhibit, titled “Employee Corrective Action Form,” dated 9/26/13, Section 3 (Supervisor’s support).

Insubordination has long been held to be behavior that falls within the ambit of disqualifying misconduct.<sup>11</sup>

And although insubordination was not cited by Atria's representatives as a ground for her termination,<sup>12</sup> a disqualification may still be based upon it.<sup>13</sup> Now, because the Board made no findings on this issue, the normal

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<sup>11</sup> E.g. Borges v. Department of Labor and Training Board of Review, A.A. No. 92-295 (Dist.Ct. 1/31/1994)(Cappelli, J.)(Board found claimant not entitled to benefits; affirmed, where Claimant exhibited poor attitude, poor workplace attire, and refused to perform assigned work); Mullen v. Department of Labor and Training Board of Review, A.A. No. 93-142 (Dist.Ct. 2/21/1994)(Rocha, J.)(Board found claimant not entitled to benefits; affirmed, where Claimant refused to carry out particular task).

<sup>12</sup> Ms. Margaret Minichini, Atria's Executive Director, testified in clearest possible terms that Ms. Banville was terminated based solely on her transcription errors —

... I mean, Denise does admit that she (inaudible) the error. I think that the, the issue that seems to come up is that whether it was reviewed or not, the error was still made. Um, she was still continuing to make errors. The second check is there to catch and, ah, and some, everyone will make a mistake in their careers. It's there to catch those mistakes. It's not there to correct ongoing errors. And what we have is a situation of ongoing errors.

Referee Hearing Transcript, at 47-48. When Referee Gibson pressed the issue of whether Ms. Banville was terminated because she failed to bring the document for review to her supervising nurse, Ms. Minichini went on to explain Claimant was terminated due to the "history" of "ongoing incidents." Referee Hearing Transcript, at 48.

<sup>13</sup> See Technic, Inc. v. Rhode Island Department of Employment and Training, 669 A.2d 1156, 1159-60 (R.I. 1996).

procedure would be to remand the case for it to make further findings.<sup>14</sup> However, in this case I believe such action would be unnecessarily wasteful of the Board's valuable time, for I believe the evidence on this point is decidedly insufficient.<sup>15</sup>

As stated above, Nurse Stuber testified that Claimant was instructed to bring all MARs she created to her.<sup>16</sup> And so, after Claimant's final transcription error was discovered in late September, she asked Ms. Banville why she did not bring the order to her, for her review. Referee Hearing

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<sup>14</sup> See Gen. Laws 1956 § 42-35-15(g).

<sup>15</sup> We could also view the instruction as a work rule, and evaluate whether Claimant violated it and, if she did, whether that violation should disqualify her from receiving benefits under the 1998 amendment to section 28-44-18, which permits disqualification if an employee has committed "... a knowing violation of a reasonable and uniformly enforced rule or policy of the employer." See citation of the 1998 amendment in Appellant's Legal Brief, at 5; and see the provision, as incorporated into § 28-44-18, ante at 5 (within highlighted portion of text). But I do not believe this view is apt, since the instruction that Ms. Banville present her transcriptions to Ms. Stuber (and only Ms. Stuber) seems to have been solely directed to Claimant, and not a standing order or a general order. Nurse Stuber testified that it is a general policy of Atria that the accuracy of the transcription must be checked by the resident service director or another qualified member of the staff. Referee Hearing Transcript, at 20, 31.

<sup>16</sup> See Referee Hearing Transcript, at 22, 31.

Transcript, at 31. Claimant, admitting her (transcription) error, responded that she brought it to the other wellness nurse. Id.<sup>17</sup>

Nurse Stuber further testified that the other LPN stated, in writing, that he had no recollection of Claimant giving her the medicine orders. Referee Hearing Transcript, at 34. Nurse Stuber spoke with that nurse personally, and he repeated this to her. Referee Hearing Transcript, at 35. Margaret Minichini, Atria’s Executive Director, also stated that she spoke to the (other) LPN, quoting him as saying that — “He said he did not recall having, um, seeing the paperwork.” Referee Hearing Transcript, at 49.

Next, Ms. Banville gave her testimony. Referee Hearing Transcript, at 51 et seq. During her testimony, she stated that she had been an LPN since 1970, though she had been inactive for some years. Referee Hearing Transcript, at 62, 67. Ms. Banville said that after she transcribed the patient’s medical orders, she offered the material to Ms. Stuber. Referee Hearing Transcript, at 52, 59. But Ms. Stuber said no, so she put it in the pile on the RN’s desk, so that she and Charlie, the other nurse, could check (as they referred to the process) and “double-check” it. Referee Hearing Transcript, at

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<sup>17</sup> Nurse Stuber described this as Ms. Banville’s “defense.” Referee Hearing Transcript, at 32.

53, 54.<sup>18</sup> Ms. Banville denied she gave it to the other nurse. Referee Hearing Transcript, at 53, 61-62.

On rebuttal, Ms. Stuber could not say if Ms. Banville's final, erroneous, MAR was added to the pile on her desk. She said —

... Um, whether or not that particular MAR was in there, I don't know. I don't recall. I would have, if I had seen it and reviewed it, I would have initialed it. Um, and um, I do not recall Denise specifically giving it to me or bring it in my office.

Referee Hearing Transcript, at 70.<sup>19</sup> But, she believed the MAR's on her desk had been reviewed by the other LPN. Referee Hearing Transcript, at 69-70. And, Nurse Stuber confirmed that when Ms. Banville was confronted with the final issue, she did assert that she had given it to her. Referee Hearing Transcript, at 71. Ms. Stuber then checked her desk, and the MAR was not there. Id.

And so, the state of the evidence is this — Ms. Banville stated she gave the MAR to Nurse Stuber; Nurse Stuber was not sure it had not been given to

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<sup>18</sup> According to Claimant, this occurred in Nurse Stuber's office. Referee Hearing Transcript, at 55. She put the document in the "pile" of MARs waiting to be reviewed. Id.

<sup>19</sup> In light of Nurse Stuber's statement, it was unfortunate that Atria did not put the faulty MAR into evidence. A quick check (for her initials) would have shown whether or not Nurse Stuber had in fact reviewed it.

her; the other LPN could not recall whether he had seen it. In my view, Atria did not prove, by a preponderance of the relevant evidence, that Claimant failed to submit the MAR to Nurse Stuber. As a result, she could not be found to have been insubordinate to her superior.

Pursuant to the applicable standard of review described supra at 6-7, the decision of the Board of Review 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. Applying this standard of review, I must recommend that this Court hold that the Board's decision was legally flawed. I therefore recommend it be REVERSED.

**V**  
**CONCLUSION**

For the reasons stated above, I hereby recommend that the decision of the Board of Review be REVERSED.

\_\_\_\_\_/s/  
Joseph P. Ippolito  
Magistrate  
February 24, 2015

