STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Falvey Linen Supply Co.	**:**	
	:	
v.	**:**	**A.A. No. 14 - 435**
	:	
Department of Labor and Training,	**:**	
Board of Review	**:**	
(Pedrito V. Enriquez)	**:**	

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 REVERSED.

Entered as an Order of this Honorable Court on this 22nd day of October, 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

Falvey Linen Supply Co.	:	
	:	
v.	:	**A.A. No. 14 – 435**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Pedrito V. Enriquez)	:	

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 Falvey Linen Supply Inc. urges that the Department of Labor and Training Board of Review erred when it found its former employee, Mr. Pedrito Enriquez, eligible to receive unemployment benefits — despite its assertion that he had been terminated for misconduct.[1] Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by a provision of the Employment Security Act[2]

[1] See Gen. Laws 1956 § 28-44-18.

[2] See Gen. Laws 1956 § 28-44-52.

and the procedure that we follow in adjudicating these appeals is that prescribed in the Rhode Island Administrative Procedures Act.[3] Finally, I note that this matter has been referred to me as District Court magistrate for the making of findings and recommendations.[4]

For the reasons stated below, I conclude that the decision issued by the Board of Review granting benefits to Mr. Pedrito Enriquez is clearly erroneous in light of the competent evidence of record and the applicable law; I therefore recommend that it be REVERSED.[5]

I
FACTS AND TRAVEL OF THE CASE

Mr. Pedrito Enriquez was employed by Falvey Linen Supply Inc. as a maintenance worker for eight years until July 8, 2014, when he was discharged for sleeping on the job. Claimant applied for unemployment benefits and on

---

[3] See Chapter 35 of Title 42, generally, and Gen. Laws 1956 § 42-35-15(g), in particular.

[4] See Gen. Laws 1956 § 8-8-8.1.

[5] This would seem to be an appropriate juncture to acknowledge that, since Mr. Enriquez received his benefits pursuant to decisions in his favor made by the Director, the Referee and the Board of Review, he cannot be ordered to repay the benefits he received. See Gen. Laws 1956 § 28-44-40. The case is, in all actuality, moot as to him. It is not moot as to the employer, since the outcome here can affect its contribution rate.

September 18, 2014, a designee of the Director of the Department of Labor and Training ruled that he was eligible to receive benefits, because "[the] employer has failed to provide sufficient evidence to support their statement."[6] From this decision the Employer appealed. As a result, a hearing was scheduled before a referee employed by the Board of Review on October 8, 2014. Claimant Enriquez appeared, with counsel — as did three employer representatives, who were also accompanied by counsel.

In his written Decision, the Referee, Mr. William Enos, made Findings of Fact, which are quoted here in their entirety:

> Claimant worked as a maintenance man for Falvey Linen for eight years and one month, last on July 8, 2014. The claimant was discharged for violating the company policy concerning sleeping on the job. The employer submitted evidence that showed that the claimant had two unrelated written warnings during his employment, one in 2006 and the other in 2011. The claimant argued that he went into the bathroom but was not sleeping. The employer introduced evidence, a photo taken over the top of the bathroom stall, showing that the claimant was sitting on the toilet with his pants on. The claimant stated that he has only had two old warnings over his eight years working for this employer. The employer admitted that other than this incident the claimant was a good worker, but they had no choice but to terminate his employment.

[6] See Director's Decision, September 18, 2014 — Director's Exhibit No. 2.

Decision of Referee, October 9, 2014 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) — the Referee pronounced the following conclusions:

> * * *
> In cases such as this, the burden of establishing proof of proven misconduct is on the employer. That burden had not been met.
>
> I find that the testimony presented that the claimant may have had an isolated case of poor judgment. Based on this conclusion, I find the claimant is entitled to Employment Security benefits under the provisions of Section 28-44-18 of the Employment Security Act.

Decision of Referee, October 9, 2014 at 2. The employer appealed and the Board of Review deliberated on the matter.

On November 18, 2014, the Board of Review unanimously affirmed the decision of the Referee and held that it constituted a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, November 18, 2014, at 1. As a result, the Board adopted the decision of the Referee as its own. Id. Finally, Falvey Linen filed a complaint for judicial review in the Sixth Division District Court on December 4, 2014.

II

APPLICABLE LAW

A

Misconduct Generally

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 beginning on or after 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 earnings greater than or equal to eight (8) times 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.

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. Neubeck, 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.[7]

[7] Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

B

The Isolated Instance of Misconduct

We must view the allegation in conjunction with another well-established doctrine of unemployment law — that a Claimant may be allowed benefits notwithstanding the commission of putative misconduct if that bad behavior is found to have been uncharacteristic of the employee's behavior. Its origins may be traced to the following language in the Boynton Cab decision which was embraced by our Supreme Court in Turner —

> … 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.

Turner, ante, 479 A.2d at 741-42 quoting Boynton Cab, ante, 296 N.W. at 640 (emphasis added). As stated above, the Referee found an isolated case of poor judgment. Thus, in the language of the statute, the Referee found that Mr. Enriquez' snooze was an inadvertency in an isolated instance.

And so, to come under this clause of § 18 there must be (1) proof that the conduct in question was isolated and (2) a showing that the behavior was an inadvertency. And because there is no real issue presented that this was an isolated case, the outcome of this case will focus on whether his behavior (his

sleeping) was inadvertent. In other words, the behavior was not willfully done. We can see this principle in the (pertinent) definitions of the adjectival form, "inadvertent," found in the most commonly relied-upon dictionaries —

- from the Webster's Third New International at 1140: **1 :** not turning the mind to a matter : HEEDLESS, NEGLIGENT, INATTENTIVE <an ~ remark> **2 :** unintentional < ~ violations of trade laws. *Current Biog.*>
- from the Random House Webster's Unabridged Dictionary (Second Edition) at 964: **1.** Unintentional : *an inadvertent insult*. **2.** not attentive; heedless. **3.** of, pertaining to, or characterized by lack of attention.
- From the American Heritage Dictionary (5th edition) at 886: **1.** Marked by or resulting from carelessness; negligent: *an inadvertent error; an inadvertent omission.* **2.** Not deliberate or considered; unintentional: *an inadvertent remark; inadvertent humor.* **3.** Not intending to be so; unwitting: "Physicians have already begun to take on the role of gatekeepers, inadvertent agents of selection … deciding on the relative value of different human lives" (Robert Pollack).

These definitions are uniform. Something is inadvertent if it done thoughtlessly, unintentionally, or carelessly.

And, in many prior cases this Court has emphasized, though we have not always focused on that particular term, the need for there to be some showing of a lack of willfulness, that the (bad) behavior was the result of extenuating circumstances (whether or not those circumstances would fully excuse or justify the Claimant's actions). See Salvatore Moreno v. Department of Employment and Training Board of Review, A.A. No. 95-175, slip op. at 5-7 (Dist.Ct. 1/19/96)(Granting of benefits affirmed, where Claimant, terminated for tardiness, was only late once, the day after employer moved start time back, due to child-care issues) and William Myers and Bradford Lindsley v. Department of Employment Security, Board of Review, A. A. Nos. 85-450, 85-451, slip op. at 2-3 (Dist.Ct. 8/10/1988)(Court reverses Board's denial of benefits where failure to use proper exit was deemed "isolated instance of ordinary negligence or good-faith error in judgment or discretion.").

In fact, this doctrine has been invoked in scenarios even more serious than that seen here. E.g. Maria Pawlowski v. Department of Employment and Training Board of Review, A.A. No. 95-161, slip op. at 5-7 (Dist.Ct. 10/18/95) (DeRobbio, C.J.)(Denial of benefits reversed, where actions of claimant nursing assistant — slapping a dementia-patient on the hand after the patient scratched her — were found to be instance of faulty judgment and "inadvertent.");

Eric Sherman v. Department of Employment and Training Board of Review, A.A. No. 93-133, slip op. at 6-8, (Dist.Ct. 03/14/94)(DeRobbio, C.J.)(Board of Review denied benefits to Claimant sandwich-shop employee who had physical confrontation with assistant manager; District Court reverses, finding that assistant manager provoked confrontation); Robert Dugas v. Department of Employment and Training Board of Review, A.A. No. 94-312, slip op. at 7-8, (Dist.Ct. 06/09/95)(Bucci, J.)(Denial of benefits by Board of Review reversed; Court holds, citing Sherman, that Claimant was not the instigator of the confrontation with employee, whom he did not touch).

C

Sleeping on the Job

As stated ante, Falvey Linen urges Claimant committed disqualifying misconduct by sleeping on the job on a single occasion. Appellant cites a decision of this Court for the principle that sleeping on the job can be a basis for disqualifying a claimant from receiving unemployment benefits. See Appellant's Memorandum of Law, at 7 citing Memorial Hospital of Rhode Island v. Department of Labor and Training Board of Review, A.A. No. 10-

155, slip op. at 5 (Dist.Ct. 1/11/2011). This is certainly a valid citation; the principle is undoubtedly sound.

But, it may be noted that, with regard to overnight workers in the healthcare field, this Court has more found misconduct more readily in cases where it has occurred on more than one occasion. See Izzo v. Department of Employment Security, Board of Review, A.A. No. 83-504 (Dist.Ct. 7/31/1984) (Beretta, J.)(Court affirms disqualification of MHRH night attendant who was found sleeping on duty on two occasions) and Hoague v. Department of Employment Security Board of Review, A.A. No. 85-1 (Dist.Ct. 7/30/1986) (Court affirms disqualification of Ladd Center attendant who was twice found sleeping on duty). But see Living in Fulfilling Environments v. Department of Employment and Training Board of Review, A.A. No. 95-148 (Dist.Ct. 3/5/96)(Claimant found entitled to benefits and employer appealed; reversed, where Claimant, an aide at a group home for the disabled, was asleep on the couch with a blanket, even though the residents required 24-hour supervision).

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.' "[8] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

[8] 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).

fact.[9] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[10]

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.

---

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

[10] 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, Department of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

IV
ANALYSIS

In this case Falvey Linen seeks to reverse the Board of Review's decision granting benefits to Claimant Enriquez.

From the start, the employer opposed Mr. Enriquez's claim for unemployment benefits by accusing him of sleeping while on duty on its premises (in a men's room), which it asserted constituted disqualifying misconduct within the meaning of Gen. Laws 1956 § 28-44-18. As we have seen, ante, in Part II-C of this opinion, sleeping on the job can indeed constitute disqualifying misconduct.

For his part, Claimant flatly denied the allegation. Referee Enos found that the Claimant was indeed caught sleeping, but allowed benefits nonetheless, calling the incident "an isolated case of poor judgment." The members of the Board of Review, unanimously, adopted this ruling as its own. Believing itself aggrieved by the Board's decision, Falvey Linen filed a complaint for judicial review in this Court, again asserting that sleeping on the job can constitute misconduct, even if it is only alleged to have occurred on one occasion. Mr. Enriquez responds by presenting three arguments, each a separate defense to this allegation of misconduct. We shall now address these arguments seriatim.

A
The Isolated-Instance Defense

Without doubt, a single instance of sleeping on the job is behavior which can constitute disqualifying misconduct. See Living in Fulfilling Environments, ante at 11. However, the Referee found Mr. Enriquez to be eligible for benefits (and not disqualified under § 18) on the theory that — even if the allegation was true — his conduct constituted an isolated instance of poor judgment. See Decision of Referee, at 2. In its memorandum, Falvey Linen argues that the fact that Mr. Enriquez had no other blemishes on his record is no defense to a finding of misconduct. Appellant's Memorandum of Law, at 8.

Claimant Enriquez counters by quoting a portion of our Supreme Court's opinion in Turner for the proposition that rare instances of poor behavior need not be deemed to constitute disqualifying misconduct. See Claimant's Memorandum of Law, at 3, 8 quoting Turner, ante, 479 A.2d at 741-42 quoting Boynton Cab, ante, 296 N.W. at 640. Accordingly, Claimant urges that the Board was within its authority to award benefits to him. Id.

Now, after reviewing the entire record, I must concede that there are factors militating against disqualification — such as the fact that Claimant was a mechanic in a commercial laundry, not a worker in a medical field whose

alertness could mean the difference between life and death for a patient; conversely, they are factor favoring disqualification — such as the fact that Mr. Enriquez fell asleep during the day, not in the middle of the night, when a person's sleep rhythms can exert overwhelming pressure to sleep. And if our task here were merely factual — a process of evaluating the indicia pro and con disqualification — then we should be required to defer to the decision of the Board on this matter.

However, I believe a legal impediment exists to the application of the doctrine in the instant case. Claimant Enriquez failed to provide any explanation whatsoever for his workplace snooze; to the contrary, he simply denied it.[11] So, there is no way he can claim it was inadvertent. Nor is there other evidence or testimony on the record from which the fact-finder could infer inadvertence.[12]

---

[11] The list of potential explanations with which the average person could attempt to explain why he unintentionally fell asleep is endless: a mere few — I was tired due to illness, or I got no sleep due to illness, or my child's illness; or, there was a disturbance in my neighborhood that prevented me from sleeping; or, I got home late due to a flat tire.

[12] Though the Referee did not find inadvertence, he did find "poor judgment." For purposes of this opinion, let us assume the finding is sufficient to trigger the statute. To be clear, I recommend reversal of the Board's decision not because of insufficient findings, but insufficient evidence.

And this element is crucial to the application of the doctrine. For, if we strike it, then every claimant who is discharged for one act of misconduct must be deemed eligible for benefits. And such a result is certainly not intended by the statute or our case law.

B

Sleeping on the Job — The De Minimis Misconduct Defense

Much space in Mr. Enriquez' memorandum is taken up with argument that even if he was sleeping, it was a de minimis violation which should not disqualify him. I do not agree. If he was truly sleeping on the job, he would have little control of how long he slept. Since he denied sleeping, we must assume he did not intend to nap; as a result, he could not have asked a friendly co-worker to wake him in a few minutes. It was only fortuitous for the employer that he was found without much delay. In sum, sleeping is a serious transgression, not amenable to a finding of a de minimis violation.

C

Sleeping on the Job — The Denial Defense

As we mentioned above, Claimant denied he was caught sleeping. The employer's witnesses said he was indeed sleeping; which was competent evidence upon which the Claimant had every right to rely. See Michael Sepe v.

Department of Employment and Training Board of Review, A.A. No. 2012-108, slip op. at 6-9 (Dist.Ct. 07/13/2012). This is a factual matter in which our freedom of action is very much constrained by the standard of review enumerated ante, at 6-7.

D

Pursuant to § 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 substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe.[13] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[14] Nevertheless, I must conclude that the Board of Review's finding — that disqualifying misconduct on Claimant's part was not proven — is clearly

[13] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[14] Cahoone, supra n. 13, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 12 and Guarino, supra at 12, n. 8.

erroneous in light of the reliable, probative, and substantial evidence of record. As a result, I must recommend that the decision of the Board be reversed.

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3), (4). Further, the instant decision was 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 the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

October 22, 2015