



Nursing Placement, Inc. :  
v. : A.A. No. 14 – 091  
Department of Labor and Training, :  
Board of Review :  
(Peggy S. Long) :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case Nursing Placement, Inc., urges that the Department of Labor and Training Board of Review erred when it found its former employee, Ms. Peggy S. Long, eligible to receive unemployment benefits — despite the objection it lodged that she had been terminated for misconduct.<sup>1</sup>

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<sup>2</sup> and the procedure that we follow in adjudicating these appeals is

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<sup>1</sup> See Gen. Laws 1956 § 28-44-18.

<sup>2</sup> See Gen. Laws 1956 § 28-44-52.

that prescribed in the Rhode Island Administrative Procedures Act.<sup>3</sup> Finally, I note that this matter has been referred to me as District Court magistrate for the making of findings and recommendations.<sup>4</sup>

For the reasons stated below, I conclude that the decision issued by the Board of Review granting benefits to Ms. Peggy Long is not clearly erroneous in light of the evidence of record and the applicable law; I therefore recommend that it be AFFIRMED.

## I

### FACTS AND TRAVEL OF THE CASE

Ms. Peggy Long was employed by Summit Health Service for approximately thirteen years until that firm was purchased by Nursing Placement in October of 2013. Mainly used as a scheduling coordinator, she also provided some care as a certified nursing assistant (CNA) on weekends. And it was this latter aspect of her duties which gave rise to the present case.

In January of 2014 Nursing Placement received confidential allegations that Claimant was submitting false time records regarding her weekend CNA work. After its agents observed two locations where Claimant was scheduled to

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<sup>3</sup> See Chapter 35 of Title 42 generally and Gen. Laws 1956 § 42-35-15(g), in particular.

<sup>4</sup> See Gen. Laws 1956 § 8-8-8.1.

be on three dates, the Claimant was terminated.

Claimant filed for unemployment benefits and on April 1, 2014, a designee of the Director of the Department of Labor and Training ruled that she was ineligible to receive benefits, based on a finding that misconduct had been shown;<sup>5</sup> from this decision the Claimant appealed. As a result, a hearing was scheduled before a referee employed by the Board of Review on April 24, 2014. Claimant Long appeared, as did two employer representatives.

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

I find by preponderance of credible testimony and evidence the following findings of fact:

Claimant was employed by the Summit Health Service until that employer was purchased by Nursing Placement October 2013. Claimant was the scheduling coordinator and provided limited certified nursing assistant care on weekends. Employment was continuous during the changeover.

January 2014 the employer became aware of allegations that the claimant was falsifying her service work on weekends. Saturday, February 1, Sunday, February 2 and Saturday, February 22, 2014 the employer observed two Westerly Rhode Island locations that involve two clients. The claimant or her vehicle was not observed at either location on the identified dates.

Activity record for each client for each of the days was submitted by the claimant. One client endorses the activity record and the second client does not sign. The employer compared the signature of the one client with known signatures and found them to differ.

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<sup>5</sup> See Claimant Decision, April 1, 2014 — Director's Exhibit No. 2.

The employer discharged the claimant for misconduct and reversed billing charges associated with the service dates.

Notarized statement of the one client affirmed service on the one date identified to the claimant by the Department of Labor and Training alleged to be a non-service date accompanied by false documentation.

The claimant has three vehicles. The buildings have multiple entrances.

Decision of Referee, April 25, 2014 at 1-2. 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 of termination, the employer bears the burden to prove by 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 failed to meet their burden.

In an abundance of caution the employer discharged the claimant based on allegations from unidentified sources, an absence of visual evidence to support the claimant or her vehicle was at the two locations and what appeared to be questionable client signatures.

The specifics surrounding the service provided on the identified dates in February 2014 were not clearly established during the hearing.

The claimant provides the only first hand testimony regarding client services provided on the identified days. One client's notarized statement confirms the claimant testimony. There is no credible evidence to refute the claimant. There is no evidence that the clients were not serviced or that the client signature was

forged.

Therefore, I find and determined that the claimant was discharged under non-disqualifying circumstances.

Decision of Referee, April 25, 2014 at 2-3. The employer appealed and the Board of Review deliberated on the matter.

On June 6, 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, June 6, 2014 at 1. As a result, the Board adopted the decision of the Referee as its own. Id. Finally, Nursing Placement filed a complaint for judicial review in the Sixth Division District Court on June 24, 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.** — ... 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.

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.<sup>6</sup>

### 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.**

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(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

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<sup>6</sup> Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

(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>7</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>8</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>9</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

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<sup>7</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).

<sup>8</sup> Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>9</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, Department of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

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.

#### **IV ISSUE**

Is the decision of the Board of Review — that Claimant Long would be deemed eligible to receive unemployment benefits because she was discharged from her position in the absence of proved misconduct — clearly erroneous in light of the reliable, probative, and substantial evidence in the record?

#### **V ANALYSIS**

Whenever a former employer alleges that an unemployment-benefit claimant was discharged for misconduct and, for that reason, objects to benefits being provided, two questions arise. The first is whether the allegation of misbehavior, if true, is sufficient to constitute misconduct within the meaning of § 28-44-18. If, and only if, the answer to this first question is yes, we may proceed to determine whether the allegation was indeed proven.

In this case Nursing Placement alleged that Ms. Long submitted false work slips — causing Nursing Placement to pay her for time periods during which she had not provided services to its clients. The Board of Review and the Referee assumed that this type of fraud did constitute a sufficient allegation to trigger a section 18 disqualification. And I certainly believe their logic was unassailable, for not only was financial fraud alleged, but a jeopardizing of the employer’s relationship with its clientele, and an endangering of its clients.

And so, in this case the parties join issue only on the second question — whether the allegation was proven. The Referee and the Board of Review found it was not. Nursing Placement urges that this finding constituted reversible error. For the reasons that follow, I find no basis to overturn the Board’s decision in this case. But before we can set forth our rationale for this decision, we must review the evidence of record.

## **A**

### **The Factual Record**

In this case a long term employee of a business (and its predecessor) was terminated based on a very troubling allegation — that, by failing to be present at her CNA assignments she caused Nursing Placement’s clients to go unserved and committed a fraud on the employer.

Nursing Placement was represented at the hearing conducted by Referee Vukic by two of its senior managers — Ms. Lynn DeGuilio, its Human Resources Director, and Ms. Stephanie Ryan, its Director of Operations. Referee Hearing Transcript, at 1, 5. Ms. Ryan testified, under questioning by Ms. DeGuilio. Referee Hearing Transcript, at 7 *et seq.*

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**Testimony of Ms. Ryan**

As background,<sup>10</sup> Ms. Ryan explained to Referee Vukic that Ms. Long was a carryover employee from Summit Health Services, which Nursing Placement purchased in October of 2013. Referee Hearing Transcript, at 15. Nursing Placement retained Ms. Long in the duties she was then performing — mainly she was a scheduling coordinator, but also provided “some” CNA services on weekends. Id. She testified that, in January of 2014, two former Summit employees told her that Ms. Long was fraudulently documenting that she was seeing patients when she was not. Referee Hearing Transcript, at 15-16, 22. As a result, starting on February 1 and February 2, they began visiting clients’ homes. Referee Hearing Transcript, at 16.

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<sup>10</sup> This background information was not given by Ms. Ryan at the beginning of her testimony, but is presented at this juncture to facilitate understanding.

On Saturday, February 1, 2014, and Sunday, February 2, 2014, Mr. Craig Dubrow (Nursing Placement's Associate Director for Operations) went to the morning client's address and Ms. Ryan went to the afternoon client's address. Referee Hearing Transcript, at 7-10. On both occasions Ms. Long was not seen and her car was not there. Referee Hearing Transcript, at 10. Ms. Long did not notify the firm that she would not be able to service her clients. Id.

On cross-examination Ms. Ryan confirmed for Ms. Long that the residence of the morning client is in an apartment building with three entrances and a rather large parking lot. Referee Hearing Transcript, at 11-12. She told Referee Vukic that she looked at the front of the house. Referee Hearing Transcript, at 11. However, she did drive around the perimeter of the parking lot. Referee Hearing Transcript, at 13-14.

When Referee Vukic asked for the position of the clients in these matters, Ms. DeGuilio explained that Nursing Placement does not call the clients, not wishing to put the clients "in the middle" of an employer-employee controversy. Referee Hearing Transcript, at 14.

Ms. Ryan told Referee Vukic that on the morning of February 22, 2014 she arrived at the residence of a client to whom Ms. Long was assigned at 8:45 a.m. Referee Hearing Transcript, at 8. She remained there until 9:45 a.m. Id. She

did not see Ms. Long arrive to service the client. Id. Later, a Mr. Dubrow arrived at the home of Claimant's afternoon client at about 12:45 p.m. and stayed till about 1:15 p.m. Referee Hearing Transcript, at 8-9. He did not see Ms. Long, even though she was scheduled to be there from 1:15 to 3:15. Id., at 8-9.

Ms. Ryan also urged that the signature on a document submitted by Ms. Long was "clearly different" from that submitted by the client on other occasions. Referee Hearing Transcript, at 17. She described the clients whom Ms. Long was serving on the occasions at issue herein as being elderly but not have any special mental impairment or disability. Referee Hearing Transcript, at 19. On February 25, 2014, — a day Ms. Long had called in sick — Ms. Ryan called her to discuss the matter and to inform her that she was being terminated. Referee Hearing Transcript, at 20. Ms. Long disagreed with her accusations but Ms. Ryan told her it was a very serious matter. Id. Ms. Ryan informed Referee Vukic that the employer did not bill the State Medicaid program for the services they could not prove were provided. Referee Hearing Transcript, at 21.

Finally, Ms. Ryan testified that, while working for Summit, Ms. Long had received a warning for similar conduct; however, she did not provide evidence of the warning to the Referee. Referee Hearing Transcript, at 22-23. Moreover, she could not remember whether that warning involved the same clients.

Referee Hearing Transcript, at 23. She did recall that Claimant denied the allegation. Id. At the conclusion of Ms. Ryan’s testimony the employer rested. Id.

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### **Testimony of Ms. Long**

Ms. Long responded to the employer’s allegations by stating she obtained a notarized note from the client stating she was there on March 23, 2014. See Referee Hearing Transcript, at 25-28 and Claimant’s Exhibit No. 1.

She said she owned three vehicles: a Jeep Commander, a Chevy, and a Nissan. Referee Hearing Transcript, at 26. She said she never entered through the front door of the afternoon client’s home. Id. She said she received an excellent review from the nurse who did a spot check in January. Referee Hearing Transcript, at 27.

Ms. Long denied she forged anyone’s signature. Referee Hearing Transcript, at 30. She says she always took the morning client out, “because she never got out.” Id. They would go out for breakfast or lunch. Id. She testified the morning client was not elderly, but had psychological issues. Id. Ms. Long said her timesheets were always signed by the morning client in her car, just before the client stepped out, so they might be a little “off.” Referee Hearing

Transcript, at 30-31. Specifically, Claimant confirmed that she went out with the morning client on both February 22 and February 23. Referee Hearing Transcript, at 32. She said the morning client took a shower while she was there before they went out (on both these days). Referee Hearing Transcript, at 33-34. It takes that client about ten minutes to shower. Referee Hearing Transcript, at 34. She said, since she takes her out to eat, she puts down “meal prep” on her report, called a “flow sheet.” Id.

Claimant said the afternoon client, whose residence is about five minutes away from that of the morning client, was an elderly Italian woman, who speaks “very little English.” Referee Hearing Transcript, at 30.

## **B**

### **Position of the Parties**

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### **Position of the Appellant-Employer**

On October 20, 2014 Appellant Nursing Placement submitted a Memorandum in Support of its Appeal.

In the “Discussion” portion of its Memorandum, the employer makes, inter alia, the following points: first, the evidence demonstrates that Ms. Long failed to appear at the homes of clients as scheduled on six occasions; Appellant’s Memorandum of Law, at 4; secondly, the statement of the client

was, according to the employer, irrelevant, because it related to a day regarding which it has made no allegation against Ms. Long. Appellant's Memorandum of Law, at 4-5. As a result, Nursing Placement argues that the testimony of its agent, Ms. Ryan, was the only direct evidence on the record. Appellant's Memorandum of Law, at 5. thirdly, Appellant asserts (correctly) that mere lateness has been determined to be misconduct sufficient to trigger a § 28-44-18 disqualification. Appellant's Memorandum of Law, at 5-6.

In conclusion, the Appellant urged that its evidence was not contradicted.

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### **Position of the Claimant-Appellee Peggy Long**

On November 14, 2014, Appellee Long filed her Brief in Opposition to the employer's appeal, in which she argues that the employer did not meet its burden of proving misconduct. Claimant's Memorandum of Law, at 6. She notes that much of the evidence was hearsay, which was regarded as having little credibility. Claimant's Memorandum of Law, at 7-8. And Claimant asserts that Ms. Ryan's testimony was unnecessarily uncorroborated.<sup>11</sup> Claimant's Memorandum of Law, at 8.

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<sup>11</sup> Claimant points out that the employer could have obtained statements from the clients; alternatively, its investigatory personnel could have called the clients while outside and asked Claimant to come to the door. Claimant's

## C

### Resolution of the Misconduct Issue

The employer's theory of the case was a simple syllogism: (1) On specified dates and times our agents viewed (briefly) the exterior of a residence where Claimant Long was scheduled to be working; (2) Our agents saw neither Claimant nor her vehicle; (3) Therefore, Claimant Long was not present on these occasions and she committed fraud by submitting time slips stating otherwise.

As I interpret the decision below, the Board found this theory lacking both logically and factually. Logically, the employer's case was questioned because the employer's evidence, even if believed, could not foreclose the possibility that she was indeed in attendance at her assigned work station on the dates in question. First, the residences under observation have multiple entrances. Secondly, the Claimant has the use of multiple vehicles. Thirdly, the agents did not enter the premises (or even knock on the door) in order to determine whether, in fact, Ms. Long was present.

Factually, the Board was entitled to weigh whether the employer's evidence — essentially the testimony of Ms. Ryan — proved its case to the standard of a fair preponderance. In making this determination, the Board was

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Memorandum of Law, at 8.

certainly entitled to consider the fact that the employer did not choose to present Mr. Dubrow as a witness.<sup>12</sup> Conversely, the Board had every right to find Ms. Long's denials of wrongdoing to be credible, particularly her testimony that she customarily took the morning client out to eat. Additionally, the Board was entitled to give the client's sworn statement such weight as the members believed it deserved.<sup>13</sup>

Of course, the Board of Review could well have found against Ms. Long — if it had drawn all possible inferences in the employer's favor and disregarded the Claimant's testimony entirely. But such a finding was certainly not required on this record. At the end of the day, the Board simply found that the employer's evidence was insufficient to prove misconduct as defined in § 18.

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<sup>12</sup> Neither did the employer present the testimony of the employees who made the original allegations in January.

<sup>13</sup> The employer urges that the letter had no probative value because it related to February 23, 2014, not a date about which it presented testimony, which is certainly true. Of course, we are left to speculate where Claimant could have gotten the notion it was in issue if not from her conversation with Ms. Ryan on February 25, 2014. One questions whether she could have received that idea from the DLT's telephone adjudicator in light of the fact that in the employer's first communication with the Department — a letter dated March 11, 2014 from Ms. DeGuilio — she only mentioned one date (February 22, 2014) and not the other two also discussed at the hearing (February 1, 2014 and February 2, 2014). So, one must have some sympathy for Ms. Long if she appeared confused.

## Summary

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.<sup>14</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>15</sup> Accordingly, I must conclude that the Board of Review's finding — that misconduct on Claimant's part had not been proven — is not clearly 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 affirmed.

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<sup>14</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

<sup>15</sup> Cahoone, supra n. 12, 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 7-8 and Guarino, supra at 8, n. 7.



