STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC. **DISTRICT COURT**
SIXTH DIVISION

Cynthia Adoian	:	
	:	
v.	:	**A.A. No. 15 - 028**
	:	
Department of Labor & 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 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 AFFIRMED.

Entered as an Order of this Court on this 25th day of November, 2015.

By Order:

/s/
Stephen Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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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. Ms. Cynthia O. Adoian 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. Jurisdiction for appeals from decisions of the Department of Employment 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 of the Board of Review is supported by the reliable,

probative, and substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Cynthia O. Adoian was employed by Memorial Hospital for two years as a certified nursing assistant (CNA) until she was terminated on December 2, 2014 due to complaints of inappropriate behavior toward patients. She applied for employment security benefits, but on December 22, 2014 a designee of the Director of the Department of Labor and Training decided that she was disqualified from receiving benefits due to misconduct as provided in Gen. Laws 1956 § 28-44-18. See Director's Exhibit No. 2.

Claimant filed an appeal and a hearing was held before Referee Gunter A. Vukic on January 26, 2015, at which time the Claimant and several employer representatives appeared and testified. In his January 29, 2015 Decision, Referee Vukic found the following facts regarding the Claimant's termination:

> **2. Findings of Fact:**
> Claimant is a well experienced certified nursing assistant working the last two years with the subject employer. Claimant was issued counseling/warning reports the last of which addressed three complaints from different patients between November 17 and November 22, 2014. Various staff members supported what was characterized as rough and inappropriate patient treatment by the

> claimant during reviews by hospital management. Claimant was discharged due to continuing patient complaints.

Decision of Referee, January 29, 2015 at 1. Based on these findings, the Referee — after quoting extensively from § 28-44-18 and the leading case construing that statute, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984) — pronounced the following conclusions:

> **3. Conclusion:**
> * * *
> Employer provides five credible written counseling/warning reports signed by a supervisor and department head. Claimant signed the March 19, 2013 report but refused to sign subsequent reports. Credible testimony and November 22, 2014 notation support the claimant requested copies of the counseling/warning reports. Claimant provided contradictory testimony during her denial of the allegations that she ever saw some, at least one, of the warnings. Claimant had the opportunity to add her position on any of the counseling reports she did see. Although employee signature is optional her signature would support acknowledgement of receipt. She doesn't acknowledge the alleged behavior or receipt. Finding the employer documentation and testimony credible and in the absence of credible testimony refuting the documentation I find by a preponderance of testimony and evidence that the claimant was discharged under disqualifying circumstances.

Decision of Referee, January 29, 2015 at 2. Accordingly, the Referee found Claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18. Id.

Thereafter, a timely appeal was filed by Ms. Adoian and the matter was considered by the Board of Review. In a decision dated March 10, 2015, a majority

of the members of the Board of Review held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto.[1] Accordingly, the Board determined that Ms. Adoian was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Claimant filed an appeal with this Court on March 25, 2015.

II
APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; 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

[1] The Member Representing Labor dissented, urging that Claimant's behavior was not intentional. Decision, ante, at 3.

> 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 through a preponderance of evidence that the claimant's action, in connection with his work activities, constitutes misconduct as defined by law. See Foster-Glocester Regional School Committee v.

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

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.' "[2] The Court will not substitute its judgment

[2] 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).

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

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 and applying 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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[3] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

[4] Id.

IV
ANALYSIS

Memorial Hospital terminated Ms. Adoian due to repeated complaints regarding her behavior toward its patients. Of course, the hospital's right to take this action is not an issue in this case. The only question before us is whether she must also be disqualified from receiving unemployment benefits.

For the following reasons I conclude that the Board of Review's decision in this case is not clearly erroneous. I do so because I believe the record supports a finding of "misconduct" as that term is defined in § 28-44-18 and the Turner case. I believe that the record shows that the pattern of her behavior was attributable to her failure to conform her conduct to objective standards. And so, I shall recommend that the Board's decision denying benefits to Ms. Adoian be affirmed.

A
Summary of Testimony
1
The Employer's Witnesses

The employer's first witness was Ms. Michelle Mallon, the Nurse Manager of Memorial's Wood 6 Unit. Referee Hearing Transcript, at 8 et seq. She stated that she had received three complaints from patients about Ms. Adoian's care and demeanor, the final one coming on November 22, 2014. Referee Hearing Transcript, at 8.

Ms. Mallon explained that Ms. Adoian had been referred to the Employee Assistance Program (EAP) for help in working on her demeanor. Referee Hearing Transcript, at 9. She attended the program for about a year. Id. According to Ms. Mallon, the hospital made "every effort" to address these issues. Id. She indicated that with regard to each complaint they would seek the Claimant's side of the story. Referee Hearing Transcript, at 10.

Ms. Mallon described the incident on November 22, 2014 this way —

> The patient complained that she needed the bed pan, and she was told that she was already placed on it, when indeed she was not on it and when she asked for it, it was told to her that she was on it and the patient ended up soiling herself and she was upset and that was with Cynthia.

Referee Hearing Transcript, at 11. See also Referee Hearing Transcript, at 12.

She then described the November 17th incident –

> … this was an orthopedic patient down in Room 11 she was fresh post-op from elective joint surgery and I think she was just one or two days post-op and she had asked, or needed to be pulled up from, and apparently from the conversation I had with the patient is that Cynthia was trying to pull the patient up and being rough with her, not giving her the time, the patient told me the point where she had to yell at Cynthia to say stop, because you are hurting me. She said, I said it three times and for the third time I had to yell at her.

Referee Hearing Transcript, at 13. Ms. Mallon then related the facts of the November 20th incident —

> … there was a patient in 615 who complained, and it was a young woman and her husband was in the room with her visiting and they asked for a chair. And what the patient told me is that Cynthia just pointed to another chair, you can sit right down …

Referee Hearing Transcript, at 13. At this point the Referee asked, "What's wrong with that?" She explained that the patient did not think it was appropriate because it was a chair for patients. Id. Moreover, the lady in the other bed was incontinent (and a little confused) and would play with the call button. Referee Hearing Transcript, at 13-14. So, the patient went down the hallway to notify the nurse. Referee Hearing Transcript, at 14. But, she saw Ms. Adoian in the hallway, who told her to get back in her room and they would be taking care of it. Id. The patient was upset, for in her mind she was being treated as a little child. Id.

The next witness was Ms. Elaine Joyal, Memorial's Patient Care Director. Referee Hearing Transcript, at 16 et seq. She said that Ms. Adoian was perceived by patients (and their family members) as being uncaring. Referee Hearing Transcript, at 16. Ms. Joyal said that both she and Ms. Mallon tried to work with Ms. Adoian on her interpersonal skills, but she was unable to meet the Hospital's expectations. Referee Hearing Transcript, at 17-18. Finally, Ms. Joyal stated her opinion that someone, like Ms. Adoian, who had been a CNA since 1990, should be able to behave in a fashion consistent with the role of a nursing assistant. Referee Hearing Transcript, at 18-19.

2

Testimony of the Claimant

Ms. Adoian began by addressing the November 20 incident. She said that, when she was pulling up the patient, she was assisting a registered nurse, one Suzanne Gomes Grimes. Referee Hearing Transcript, at 23. She added that Ms. Grimes was on the side that had been operated upon. Referee Hearing Transcript, at 24. She said that the patient did get uncomfortable and so they did stop. Referee Hearing Transcript, at 24. She said that, later on, the patient did apologize, recognizing that she (Ms. Adoian) had not done anything wrong. Id.

When her focus was drawn to the November 17 incident, she said that the patient's husband wanted the recliner, but that it was being used by the other patient in the room. Referee Hearing Transcript, at 25-26. So, Ms. Adoian got him a chair. Referee Hearing Transcript, at 26.

At this juncture, Ms. Adoian turned her attention to the December 1 incident. Referee Hearing Transcript, at 29. She said that, during the evening, she answered many calls for both patients in Room 615 (designated 615A and 615B). Referee Hearing Transcript, at 29-30. During the evening, she had been directed by the nurse in charge of 615B (Debbie) to put a "body alarm" on that patient, since she was confused and had re-entered the elevator several times. Referee Hearing Transcript, at 30. At about 7:00 p.m., 615A put her light on; and when she

went into the room with 615A's nurse (Dawn), they learned she had been incontinent; and so the nurse told Ms. Adoian to clean her up, which she did. Id. And when Ms. Adoian finished cleaning the patient, the nurse helped her reposition the lady. Id.

About five minutes later, 615A pushed the call button again, and she went into the room with Alicia, another nurse. Referee Hearing Transcript, at 30-31. At this point the patient said she had been denied the bed-pan. Referee Hearing Transcript, at 31. So, Alicia the nurse gave her the bed-pan. Referee Hearing Transcript, at 31. After another five minutes, the nurse in charge, named "Youngster," asked Ms. Adoian whether she had denied 615A the bed-pan. Id. She rebutted it. Id. Ms. Youngster then told the Claimant to stay out of that room. Id. Ms. Youngster explained that the patient's daughter had called, complaining that her mother had been denied the bed-pan. Id. But then, about twenty minutes later, Nurse Youngster instructed Ms. Adoian to assist her in putting 615A on the commode. Id. Later, the nurse checked on the patient, who was not finished. Id. When she came back to the desk, Nurse Youngster reported that the patient had claimed she was denied the bed-pan as well as the commode. Id.

Answering a question from Ms. Mallon, Ms. Adoian stated that she was a competent CNA. Referee Hearing Transcript, at 37. She agreed that she had gone

to the EAP for about a year, to work on issues of teamwork with other employees. Referee Hearing Transcript, at 37-38. She also acknowledged that Ms. Joyal and Ms. Mallon came in on a Saturday to speak with her regarding the importance of the manner in which she acted with patients. Referee Hearing Transcript, at 40.

B

Position of the Parties

1

Appellant's Position

In her Memorandum, Claimant Adoian makes several arguments.

First, Ms. Adoian urges that the Referee found disqualifying misconduct — not in her treatment of patients, but in her failure to acknowledge (by her signature) warnings she had received. See Appellant's Memorandum, at 2-3 (citing the Referee's Decision, at 2).

Secondly, Claimant asserted that only the incidents from November and December of 2014 were at all relevant to the allegation of misconduct. See Appellant's Memorandum, at 3. And, she noted, all the employer's evidence on those points came through hearsay. Id.

Thirdly, Ms. Adoian argues that the allegations lodged against her — which she describes as "[p]ersonality conflicts or tone of voice" — do not rise to the level of disqualifying misconduct, particularly in light of her willingness to attend

the Employee Assistance Program. See Appellant's Memorandum, at 3.

2

The Employer's Position

In its Memorandum, the Employer urges that the Referee's decision was supported by sufficient evidence. In particular, the Hospital asserts that her actions should be deemed misconduct for the following reasons — "(1) the Hospital's interest in providing a comfortable environment for its patients and visitors; (2) Ms. Adoian's level of experience; (3) the repeated nature of Ms. Adoian's inappropriate behavior; (4) its frequency; and the fact that Ms. Adoian had received five prior warnings about it … ." Employer's Memorandum, at 5. In support of its allegations, it cites the various reports entered into evidence.[5]

C

Rationale

Ms. Adoian presents two fundamental arguments in support of her appeal. The first is legal — that the allegations of rude behavior, even if proven, are not sufficient to cause her disqualification since there was no allegation of intentional conduct.[6] The second is factual — that the Hospital failed to prove the

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[5] See Employer's Memorandum, at 6 (citing Department's Exhibits Nos. 1-E, 1-F, 1-G, 1-H, 1-I, and 1-J).

[6] I do not subscribe to the Claimant's theory that Referee Vukic disqualified her based on her failure to sign warnings. As I read it, the Referee was simply

allegations. Let us tackle the legal question first.

1

The Sufficiency of the Allegation

To begin, I believe there can be no question that the allegations against Ms. Adoian were, if true, sufficient to constitute proved misconduct. Quite simply, the allegations of neglect made herein would constitute misconduct per se, given the deleterious results described. Ms. Adoian does not question this rule conceptually, but proceeds on the hypothesis that this standard cannot be applied to her because her actions were not willful — they were instead, the unintended results of her personality. However, notwithstanding her assumption, the question of her willfulness vel non remained at all times a factual question that the Board was duty-bound to decide.

And, in the absence of any evidence that Claimant has been diagnosed (by a competent medical professional) to suffer from a disorder that rendered her unable to conform her behavior to the Employer's standards, the Board was perfectly justified in finding that her actions — if proven — violated objective standards of behavior that should be expected of a licensed nursing assistant in a hospital setting. But Claimant does not concede that the actions described in the

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pointing out that there would have been proof that she was aware of each allegation if she had signed each incident reports. And so, I will not address this argument further.

complaints against her are true. To the contrary, she has repeatedly denied them as this case has progressed through the administrative and judicial process. This gives rise to her second, factual, argument.

2

The Sufficiency of the Proof

The employer's representatives at the hearing conducted by Referee Vukic attempted to satisfy the Hospital's burden of proving misconduct by entering into evidence the various complaints regarding Ms. Adoian that they had received from patients and their family members. These exhibits constituted hearsay, as did the testimony given by Ms. Mallon, Ms. Pratt, and Ms. Joyal, describing how they received and recorded those complaints. And so, Claimant argues the evidence presented was insufficient to show constitute proof of misconduct.

We begin our analysis of this point by noting that there is no question of the admissibility of this hearsay evidence. Boards of Review hearings are not subject to the Rules of Evidence and the general bar to hearsay contained therein. See Gen. Laws 1956 §§ 42-35-10(a) and 42-35-18(c)(1). However, our Supreme Court, in an unemployment appeal, Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004), invoked DePasquale v. Harrington, 599 A.2d 314, 316 (R.I. 1991) for the principle that, prior to hearsay evidence being admitted in administrative

hearings, it must be deemed reliable. And with regard to the hearsay statements admitted here, there is no question of reliability — after all, they were presented by managers at a valued institution in the community, Memorial Hospital of Pawtucket. It is also significant that these documents were made contemporaneously with the receipt of the various complaints.

But while reliability may not have been at issue, their persuasiveness undoubtedly was, for, in her testimony, Ms. Adoian refuted each allegation against her.[7] And so, in finding misconduct had been proven, the Board clearly credited the employer's (hearsay) evidence and discredited the Claimant's (first-hand) testimony regarding each incident. But should the Board have favored the Employer's hearsay evidence over the Claimant's first-person account?

From a lay perspective, it is easy to take the position that first-hand testimony is always to be preferred. But sometimes it is not available. And so,

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[7] The Claimant's testimony raised a further issue of proof, which I shall comment upon briefly. Ms. Adoian's testimony regarding each of these confrontations included references to other employees who were present at these confrontations — mostly her nursing superiors. That the management team did not call these nurses as witnesses (drawing them away from the Hospital where they were surely needed), is perhaps understandable. What is not apparent is management's failure to obtain statements from these medical professionals. It is regrettable that the Hospital failed to conduct a more extensive investigation. But, our Supreme Court held, in Foster-Glocester, that an employer's failure to present the best-available evidence of misconduct is not a reason, per se, to set aside a finding of misconduct. Foster-Glocester, ante, 854 A.2d at 1020.

judges of the Anglo-American tradition have found ways to admit it in the interests of more complete fact-finding. These rulings have now been collected and codified in our Rules of Evidence. Therefore, today, hearsay of various sorts is admissible in both civil and criminal cases tried in our Courts — though the rules vary for its admission in each category of cases. See Rhode Island Rules of Evidence 801 et seq. And, once admitted, fact-finders, whether jurymen or judges, are free to give it the weight they believe it deserves.

And in administrative settings, the law has recognized that it may not be realistic to insist upon first-hand evidence. To take the example of hearings conducted by the Board of Review and its Referees, we can see that some hearings where misconduct is alleged involve the Claimant's interaction with the employer's customers (or the employees of a corporate customer). Such is the case here. Calling such persons as witnesses might well sour (or rend) the firm's relationship with that customer — whether the employer is selling a product or providing services, commercial or professional. Employers are not likely to imperil such relationships. It is not reasonable to insist that they do.

Our task is simply to decide if the Board's factual determinations are supported by competent evidence. If they are, we must affirm. In my estimation, the documents presented by the Hospital meet this standard. Whether I, or any

member of this Court, might well have found otherwise, is not before us.

VI
CONCLUSION

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws 1956 § 42-35-15(g), ante at 6 and Guarino, ante at 6, n.2. In other words, the role of this Court is not to choose which version of events – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision, in light of the evidence of record, is clearly erroneous. And so, for the reasons stated above, especially my personal review of the record, particularly the testimony given at the hearing before the Referee, I believe the Board's decision is not clearly erroneous in view of the reliable, probative and substantial evidence of record. Gen. Laws 1956 § 42-35-15(g)(5).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

November 25, 2015