STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Natee Rezendes	:	
	:	
v.	:	**A.A. No. 15 - 037**
	:	
Department of Labor and 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 16th day of July, 2015.

By Order:

/s/
Stephen C. 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. Natee Rezendes 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 the decision 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 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. Natee Rezendes — a licensed practical nurse (LPN) — was employed by the Mount St. Rita Health Center for seven months, until December 6, 2014. Because of an incident that occurred on her last day, she was discharged by the employer.

She filed a claim for unemployment benefits but on January 21, 2015, 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. Ms. Rezendes appealed and a hearing was held before Referee Nancy L. Howarth on February 24, 2015, at which the Claimant and an employer representative appeared and testified. In her February 27, 2015 decision, Referee Howarth found the following facts regarding the Claimant's termination:

> **2. <u>Findings Of Fact:</u>**
>
> The claimant was employed as an LPN by the employer. On December 6, 2014 the claimant was scheduled to work from 7:00 a.m. to 11:00 p.m. At approximately 2:00 p.m. the charge

> nurse was informed that there was a new admission on another unit. Since there were eight patients and two nurses on the claimant's unit and twenty-two patients with only one nurse on the unit expecting the admission the charge nurse requested that the claimant assist with the admission. The claimant replied that she was mentally and physically exhausted, and did not report to the other unit. The claimant subsequently went to that unit one hour after she was directed to do so. She was discharged on December 6, 2014 for insubordination.

Decision of Referee, February 27, 2015 at 1. Based on these findings, the Referee (after quoting from the statute, Gen. Laws 1956 § 28-44-18, which bars those who commit misconduct from receiving unemployment benefits), pronounced the following conclusions:

> **3. Conclusion:**
> * * *
> The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant fail (sic) to comply with a direct order of her supervisor. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, February 27, 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. Rezendes and the matter was considered by the Board of Review. In a decision dated April 9, 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. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Ms. Rezendes filed an appeal within the Sixth Division District Court on April 13, 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 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.

The particular ground of misconduct alleged in the instant matter — insubordination — has been held to constitute misconduct justifying disqualification from the receipt of benefits in many District Court cases. This has also been the predominant view nationally. ANNOT., Employee's insubordination as barring unemployment compensation, 26 A.L.R.3d 1333 (1969) and 76 Am. Jur. 2d Unemployment Compensation § 75.

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.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

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

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1 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).

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

3 Id.

> 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.

IV

ANALYSIS

A

Review of the Testimony

1

Testimony of Ms. Laverty

The employer endeavored to satisfy its burden of proving Ms. Rezendes committed misconduct by presenting the testimony of Ms. Lynn Laverty, its Director of Nursing. Referee Hearing Transcript, at 3, 9.

When asked by the Referee to describe the incident that led to the Claimant's discharge, she began stating that on Friday, December 5, 2014, they were "looking" for Natee, but she was "nowhere to be found on the floor." Referee Hearing Transcript, at 9.[4] She was found in the chapel, where

[4] According to Ms. Laverty, Claimant was being sought because she was the charge nurse that day and had the keys to the medication room, which a

a funeral mass was being conducted for a deceased resident. Referee Hearing Transcript, at 10. Ms. Laverty told Ms. Rezendes to report to the Administrator. Id.

Later that same day, while she was in her vehicle returning to St. Rita's from an appointment, she was called by Joann Kelly, another LPN, who was, at that moment, "in charge of the building." Referee Hearing Transcript, at 11. The situation she described was this — they were getting an admission on the third floor and there was a "relatively new" nurse up there, alone, with twenty-two patients plus the admission coming in. Referee Hearing Transcript, at 11-12. And so, Ms. Kelly asked Ms. Rezendes to go up and help with the admission. Referee Hearing Transcript, at 12. And then, as it was phrased by Ms. Laverty, "… I guess the response was that Natee said that she was physically and mentally exhausted and she wasn't going to go." Id.[5] According to Ms. Laverty, Ms. Rezendes was on an overtime shift. Id.

In Ms. Laverty's view, Claimant refused the order of a nurse, which, "you just don't do." Referee Hearing Transcript, at 12. She added that Ms. Kelly's request was "appropriate." Id. In any event, by the time Ms. Laverty

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patient's family needed to enter to retrieve something. Referee Hearing Transcript, at 9-10.

[5] According to Ms. Laverty, Ms. Rezendes was on an overtime shift at that point in time. Referee Hearing Transcript, at 12.

got back to St. Rita's Ms. Rezendes had gone up to the third floor and was assisting. Id.[6] And as far as Ms. Laverty knew, no one ordered her to do it a second time; as the witness put it, "She must have thought about it and had gone up." Referee Hearing Transcript, at 13.

But notwithstanding her change of heart, Ms. Rezendes was terminated by the Director when she came back to work. Referee Hearing Transcript, at 14. This occurred on December 10, 2014. Id.

2

Testimony of Claimant Rezendes

Ms. Rezendes began her testimony by stating that she began work for this employer on April 19, 2014 and was terminated on December 10, 2014. Referee Hearing Transcript, at 15. She said that on Friday, December 5, 2015 she was scheduled to work a double shift; she was not, as Ms. Laverty had suggested, on overtime. Referee Hearing Transcript, at 16.

She said on Friday, the fifth, she had begun her shift on 2 North by looking for a patient's cell phone, which was missing; she had continued to do so as she attended to her nursing duties. Referee Hearing Transcript, at

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[6] Ms. Laverty indicated that when she spoke to Ms. Rezendes she told her that — if she was really tired — she was much better off doing the admission on the computer in a quiet place. Referee Hearing Transcript, at 12-13.

17. Then, at 11:00 a.m., she went to the chapel for the funeral mass for one of the patients who had passed away, and with whom she had been close. Id. She acknowledged she was on the clock. But she insisted that she told the staff where she would be. Id. She said Lynn came to mass and got her. Id. And she denied that they came to get her about a room key — instead, the administrator wanted to speak to her about her search for the cell phone. Referee Hearing Transcript, at 18.

Next, the Referee straightforwardly asked Claimant whether she had refused to go to the second floor. Referee Hearing Transcript, at 18. She denied it. Referee Hearing Transcript, at 19.

Ms. Rezendes denied she refused to do the admission. Referee Hearing Transcript, at 19. According to Claimant, when she got the call at about 2:00 p.m., she did tell Ms. Kelly that she was exhausted, and had come in for her shift even though her mom was in the hospital; and she suggested it might not be best for her to show the nurse on the third floor the new admission procedure; but, according to Ms. Rezendes, Ms. Kelly said — "Just help." Referee Hearing Transcript, at 19-20. In response, she again asked for guidance, regarding what specifically she should do. Referee Hearing Transcript, at 19. At this point Ms. Kelly got mad, and accused her of saying

no. Id. Claimant then told her that she was not saying no, she was just suggesting that it would be better if she did the admission by herself. Referee Hearing Transcript, at 20. According to Ms. Rezendes, Ms. Kelly "got mad and hung up the phone." Id.

Claimant testified at 3:00 p.m., she gave her report to the oncoming nurse, and called Becky, the nurse on the first floor. Id. On the stairwell, she encountered the 3-to-11 supervisor, who directed her to go right upstairs right now and do the admission. Id. When she said she never refused to do the admission, the supervisor responded — "Don't give me that crap, go upstairs right now." Id. She went upstairs and handled a number of tasks. Referee Hearing Transcript, at 21.

She then concluded her testimony by stating that at the end of her shift, Ms. Laverty asked to speak with her. Referee Hearing Transcript, at 21. Claimant again denied refusing to do the admission. Id.

B

Discussion

The Mt. St. Rita Health Center terminated Ms. Rezendes due to conduct it deemed to constitute insubordination — refusing to assist in another unit of the facility. Of course, the Center's right to take this action is

not at issue in this case. The only question is whether Ms. Rezendes must be disqualified from receiving unemployment benefits.

At the hearing, Ms. Rezendes' defense to this allegation was simple — she never refused to go upstairs. She merely made as a suggestion as to how she could best assist when she got there. As we saw, the employer's case depended on a hearsay report which, even if faithfully repeated, was somewhat ambiguous.

Our approach to this appeal is simple — we must first determine whether the allegation, if true, is sufficient to constitute misconduct; and if it is, we must decide whether the allegation was proven.

1

The Allegation of Insubordination

Before we can decide if Claimant was accused of insubordination, we must establish the meaning of that term. To do so, let us review a few respected authorities.

The Ninth Edition of Black's Law Dictionary defines insubordination as either "a willful disregard of an employer's instructions" or "an act of disobedience to proper authority." Black's Law Dictionary 870 (9th ed. 2009). General dictionaries follow suit: the Webster's Third defines "insubordinate" as "unwilling to submit to authority." Webster's Third New

International Dictionary 1172 (3rd ed. 2002); likewise, the American Heritage defines "insubordinate" as "not submissive to authority." American Heritage Dictionary 910 (5th ed. 2011).

Now, according to Ms. Laverty's informant — Ms. Kelly — Claimant refused to go up to the third floor to help out. And nowhere in the record is there any doubt raised that she was Claimant's superior and entitled to instruct her on her duties. And so, in my view there is no question that the allegation against Ms. Rezendes is, if believed, sufficient to constitute insubordination and misconduct.

The fact that, by all counts, Ms. Rezendes did proceed to the third floor some time later does not vitiate the insubordination in her initial refusal.

2

The Proof of Insubordination

As recounted above, Ms. Laverty was not a percipient witness to the communication between Claimant and Ms. Kelly. And so, the testimony she provided on this point quoting Ms. Kelly must be regarded as hearsay.[7] However, hearsay is admissible at hearings conducted by the Board of

[7] Hearsay is defined as "[a] statement, other than made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." RI Rules of Evidence 801(c).

Review. See Foster-Glocester Regional School Committee v. Board of Review, 854 A.2d 1008, 1018-20 (R.I. 2004) citing Gen. Laws 1956 §§ 42-35-18(c)(1) and 42-35-10(a).

Now, two members of the Board were satisfied by this evidence; but the third, the Member Representing Labor, was not. Nevertheless, in my view, the testimony of Ms. Laverty was competent which the members of the Board were entitled to rely upon — if they chose.

While I believe the Center's better course would have been to call Ms. Kelly as a witness, this does not mean that the employer failed to sustain its burden of proof. The telephone report Ms. Laverty relied upon was apparently made within a few moments after Ms. Kelly's conversation with Ms. Rezendes had occurred. The report came from a licensed professional nurse. As hearsay statements may be graded, her testimony must be viewed as being of the reliable sort. Accordingly, the majority of the members of the Board committed no error in finding Ms. Laverty's hearsay testimony sufficient to meet the employer's burden of proving misconduct.

V
THE AVAILABILITY ISSUE

The entirety of the foregoing relates to decisions made by the Department, the Referee, and the Board of Review regarding Ms. Rezendes' claim on the issue of misconduct.[8] But, while doing so, we have assiduously not revealed that these same decision-makers made additional decisions on the separate issue of availability under Gen. Laws 1956 § 28-44-12.[9] Obviously, if my recommendation on the issue of misconduct is adopted (affirming the decision rendered by the Board of Review on the issue of misconduct), this second issue will be rendered moot. Nevertheless, I shall tender a few comments on this issue.

The Department found Ms. Rezendes to be unavailable for work during the four-day period from December 7, 2014 through and including December 10, 2014.[10] Clearly, this finding was triggered by a statement Ms.

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[8] For clarity, we may note that the misconduct decisions were assigned numbers 1442631 by the Department and 20150343 by the Board of Review. Note – as the Referees are designees of the Board they naturally share the same numbering system.

[9] These decisions were assigned numbers 1502173 by the Department and 20150342 by the Board of Review.

[10] Why the Department should find it necessary to treat such a short period as being worthy of separate treatment is a question for which I cannot even hazard a guess.

Rezendes made to the Department's adjudicator on December 29, 2014 — "I am requesting benefits effective 12/7/14. My last date of physical work was 12/6/14. I was taken out of work due to a foot infection and, therefore, not able and available for work through 12/10/14." See Form DLT 480 contained in record as Department's Exhibit No. 1.[11] Claimant confirmed these facts at the hearing before Referee Howarth. See Referee Hearing Transcript, at 23-25. Therefore, the unanimous decision of the Board on this issue must be affirmed.

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 6-7 and Guarino, ante at 7, n. 1. 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, I believe

[11] It is perhaps appropriate to note that Ms. Rezendes apparently worked a double shift in the advent of this malady, which is admirable. Moreover, she did not interpose this issue as an excuse for her (admitted) failure to respond immediately to the directive that she proceed to the third floor.

the Board of Review'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 of Review be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE
July 16, 2015