STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Michael J. Sepe	:	
	:	
v.	:	**A.A. No. 12 - 108**
	:	
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 at Providence on this 13th day of July, 2012.

By Order:

___/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
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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. Mr. Michael J. Sepe 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 he was not entitled to receive employment security benefits based upon proved misconduct. This matter has been referred to me for the making for 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; I therefore recommend that the Decision of the Board of Review be affirmed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Michael J. Sepe worked for the City of Providence as a Call Center Operator for about five years until he was terminated on September 27, 2011. He filed an application for unemployment a few weeks later. But, on November 22, 2011, the Director of the Department of Labor and Training determined him to be eligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was not terminated for proved misconduct.

The employer filed an appeal and a hearing was held before Referee William Enos on February 22, 2012. On February 29, 2012, the Referee held that Mr. Sepe was disqualified from receiving benefits because he was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in pertinent part:

> Claimant worked as a Call Center Operator for the City of Providence for five years last on September 27, 2011. The employer testified that on the early morning of September 27, 2011 the claimant was seen by the Director sleeping on duty. The employer testified that the claimant was a five-year employee that knew the Department's Policies. The employer testified that this position is a public safety position and sleeping on the job is a very serious offense. The employer testified and presented evidence that showed that the claimant was on a Last Chance Agreement. * * *

Decision of Referee, February 29, 2012 at 1. Based on these facts, the Referee came to the following conclusion:

> * * *
> In cases such as this, the burden of establishing proof of misconduct is on the employer. That burden has been met.

> I find that the credible testimony and evidence submitted at this hearing showed that the claimant clearly violated known Department policy. Therefore, I find that sufficient credible testimony has been provided to support the employer's position that claimant was discharged for proven misconduct

Decision of Referee, February 29, 2012 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On April 9, 2012, the Board of Review issued a decision in which the decision of the Referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, April 9, 2012, at 1.

Finally, Mr. Sepe filed a complaint for judicial review in the Sixth Division District Court on May 9, 2012.

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. —** 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 of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title 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.

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,

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

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

3 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

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.

ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

ANALYSIS

The Board adopted the Referee's factual conclusion that claimant was found to be sleeping during working hours in violation of the Department's promulgated policies and that this action constituted proved misconduct. See Gen. Laws 1956 § 28-44-18. Accordingly, our first duty must be to examine the record to determine whether these allegations are supported in the record.

The Referee's factual conclusions are abundantly supported by the testimony and evidence elicited at the hearing before the Referee. William Trinque,

the Director of Communications, testified that when he entered the Call Center premises on September 27, 2011 at about 6:00 A.M. he found Mr. Sepe alone in the Channel Four room, with the lights out, laying on the desk with his eyes closed, his shirt off and his shoes off. Referee Hearing Transcript, at 13, 35, 37. Director Trinque observed him for about 20 to 30 seconds and concluded he was asleep.[4] Referee Hearing Transcript, at 38. He said — "Wake up and get dressed." Id. At his point claimant did startle and move. Id. Mr. Trinque told the supervisor, who told him claimant was sleeping "all the time." Referee Hearing Transcript, at 13. At that time Mr. Sepe was working an overtime shift of 11:00 P.M. to 7:00 A.M. Referee Hearing Transcript, at 33.

As background to the issue, Director Trinque presented Section 211 of the Communications Department Rules and Regulations — "Resting or sleeping while on duty, regardless of the shift, is strictly prohibited. Referee Hearing Transcript, at 16. Mr. Trinque also explained how Mr. Sepe had been previously placed on a Last Chance Agreement. Referee Hearing Transcript, at 19 et seq. He did, however, concede that, to his knowledge, it was never signed. Referee Hearing Transcript, at 32. Regarding the incident in question, Director Trinque testified that he was not aware of Mr. Sepe missing any calls. Referee Hearing Transcript, at 38.

Thereafter, Mr. Sepe was suspended pending a hearing. Referee Hearing Transcript, at 45. At the hearing Mr. Sepe denied he was sleeping when found but

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[4] On cross-examination, Director Trinque refused to admit that it was possible that Mr. Sepe was resting, not sleeping. Referee Hearing Transcript, at 41.

only resting. Referee Hearing Transcript, at 50. Subsequent to that hearing, he was terminated. Referee Hearing Transcript, at 46.

Claimant testified that when Director Trinque came in he (i.e., Mr. Sepe) asked him "How are ya doin', Director – – –." Referee Hearing Transcript, at 56. The Director asked claimant if he was comfortable, but claimant did not answer. Id. He told claimant to put his shoes on. Id. He denied all the lights were off. Referee Hearing Transcript, at 56-57. He said he went home at the conclusion of his shift. Referee Hearing Transcript, at 57. Claimant acknowledged that sleeping on duty in a public safety position would be unacceptable. Referee Hearing Transcript, at 59.

Legally, this Court has long held that sleeping on duty may constitute misconduct within the meaning of § 28-44-18 and the Supreme Court's holding in Turner, supra. And, in the setting of a health care facility (a residential group home), this Court has specifically held that falling asleep on duty only once may satisfy the Turner standard. See Living in Fulfilling Environments v. Department of Employment and Training Board of Review, A.A. No. 95-148, Slip op. at 7, (Dist.Ct. 3/5/1996) (DeRobbio, C.J.). As Mr. Sepe conceded, he was working in a public safety position. Accordingly, I feel the same rule must apply in the instant case — one proven instance of falling asleep on duty is sufficient to meet the section 18/Turner standard of misconduct.

Pursuant to the applicable standard of review described supra at 4-5, 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. This Court is not permitted to substitute its judgment for that of the

Board as to the weight of the evidence; finally, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result.

In this case, the testimonies of Director Trinque and Claimant Sepe completely contradicted each other. But, the Referee and the Board found the Director Trinque's version of events to be the more credible. Read in its entirety, the testimony presented at the hearing provides substantial evidence of the circumstances which led to Claimant's termination.

Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection with his work — by sleeping during working hours — is well-supported by the record and should not be overturned by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

July 13, 2012