STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Melanie Abbruzzese	:	
	:	
v.	:	**A.A. No. 12 - 125**
	:	
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 REVERSED.

Entered as an Order of this Court at Providence on this 10th day of October, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Melanie A. Abbruzzese	:	
	:	
v.	:	**A.A. No. 2012 – 125**
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Department of Labor and Training,	:	
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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. Melanie Abbruzzese 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. 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 clearly erroneous in light of the reliable, probative and substantial evidence of record and was thereby affected by error of law; I therefore recommend that the decision of the Board of Review be

reversed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Melanie A. Abbruzzese worked for the St. Elizabeth Manor as a Certified Nursing Assistant (CNA) for four months until she was terminated on February 23, 2012. She filed an immediate application for unemployment benefits but on March 23, 2012, the Director determined her to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee William Enos on April 26, 2012. On April 27, 2012, the Referee held that Ms. Abbruzzese was disqualified from receiving benefits because she was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in full:

> **2. FINDINGS OF FACT:**
> Claimant worked as a Certified Nursing Assistant for St. Elizabeth Manor for four months last on February 23, 2012. The employer testified and produced evidence that showed that the claimant was terminated for a violation of a known company policy, being rude and unprofessional while providing care to patients. The employer testified and produced evidence that showed that the claimant was a new employee on her probationary period and had been warned on January 16, 2012 for not cleaning a soiled patient before being put to bed for the night. The employer testified and produced evidence that showed that the claimant was warned and terminated for another incident dated February 23, 2012 involving a male patient

> who soiled himself with feces. The employer produced evidence, a witness statement, which said that the claimant turned the patient over roughly and when the patient moaned the claimant told him "stop yelling you have shit everywhere." The witness statement also stated she kept saying "f…" every few minutes while cleaning the patient. The claimant testified that she denied doing all of those things and it was another Certified Nursing Assistant who was trying to get her fired so she could get her hours. The claimant testified that there was a lot of racial discrimination going on and nothing was done about it.

Decision of Referee, April 27, 2012 at 1. Based on these facts, the Referee — after quoting from section 28-44-18 and the leading case interpreting it, Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740 (1984) — announced the following conclusion:

> * * *
> I find from the credible evidence and testimony that the claimant was terminated under disqualifying reasons since the claimant's actions were not in the best interest of the employer. Based on this conclusion, I find the claimant is not entitled to Employment Security benefits under Section 28-44-18 of the above Act.

Decision of Referee, April 27, 2012 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On May 30, 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, May 30, 2012, at 1.

Finally, Ms. Abbruzzese filed a complaint for judicial review in the Sixth Division District Court on June 5, 2012.

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. —** 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.

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 the Employment Security Act:

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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).

> * * * 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.

IV. 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.

V. ANALYSIS

In this case the Court must decide whether Ms. Melanie A. Abbruzzese, a probationary CNA, should be disqualified from receiving unemployment benefits because it was proven that she was terminated from the employ of St. Elizabeth Manor for misconduct — viz., the mistreatment of a patient. There is certainly no question that the allegation made against Ms. Abbruzzese, if proven, would be sufficient to constitute proved misconduct within the meaning of section 18. To be blunt, Ms. Abbruzzese was accused of treating a patient roughly, and speaking

to him in a harsh tone, employing foul language.[4] The issue we must face is — Were these allegations proven?

The Referee found Claimant ineligible and the Board of Review affirmed. But, for the reasons that I shall explain, I believe the decision of the Board was inadequate on its face. I further believe the record was inadequate to support a finding that these heinous charges were proven. I shall therefore recommend reversal.

A. The Decision of the Referee/Board.

We begin with the decision of the Referee, which was adopted by the Board of Review as its own. In his findings of fact, which were presented in full supra at 2-3, the Referee summarized the testimony presented, but never evaluated the credibility of the witnesses and assessed the evidence presented. In short, he never made findings of fact — as required by Gen. Laws 1956 § 28-44-46. Thus, the Referee/Board's decision is inadequate as a matter of law. However, for the reasons I shall now enumerate, I have concluded that remand shall not be necessary.

[4] We may say that Claimant's alleged treatment of a patient fell woefully short of the standard of care and compassion established by the paragons of the nursing profession, such as Florence Nightingale, Clara Barton, and St. Elizabeth of Hungary, to such a degree as to affect not only her ability to collect unemployment benefits but her professional standing.

B. Sufficiency of the Evidence of Record.

1. Review of the Evidence of Record.

The claim of misconduct centers on an allegation made against the Claimant on February 23, 2012. The employer presented no percipient witnesses regarding this incident, but relied upon a written statement that had been submitted by a co-worker of the Claimant, Ms. Cassandra Lovely. Referee Hearing Transcript, at 6-7. After submitting a second report regarding an earlier incident — the employer rested. Id.

After the employer rested on the written reports, the Claimant, through counsel, undertook cross-examination of Ms. Kim Amaral, the Human Resources Manager. Little was elicited regarding the February 23, 2012 incident; instead, there was an extended review of an allegation of racial discrimination (leveled against the employer by Claimant and a colleague). Referee Hearing Transcript, at 10–17.

Next, Ms. Anne Marie Tebano, the Unit Manager, testified. Referee Hearing Transcript, at 20 et seq. She first addressed the January incident. She indicated that when she questioned Ms. Abbuzzese about neglecting to perform care on one of the residents, Claimant said she didn't have time. Referee Hearing Transcript, at 20. She was instructed that, in the future, she should inform the nurse so that assistance can be obtained. Id.

Regarding the final (February) allegation, she indicated it was reported to her by the Charge Nurse. Referee Hearing Transcript, at 21. She testified that Claimant denied any wrongdoing. Referee Hearing Transcript, at 22-23.

Claimant also testified under questioning by the employer. Regarding the January incident, Claimant explained that she failed to wash the patient because she was already in a new johnny, and the protocol is for the patients to be washed before they are put in a new johnny. Referee Hearing Transcript, at 25. And, as to the final incident, she explained that she had asked her co-worker Cassandra to help her with the Hoyer lift of the patient and then Cassandra left. She insisted that she was at all times professional to the patient. Referee Hearing Transcript, at 27-28. She said the nurse on duty that evening spoke to her at 10:30 p.m. and told her she was being accused of swearing at a patient, which Claimant denied. Referee Hearing Transcript, at 28-29. The next day, she was fired. Referee Hearing Transcript, at 29-30.

Issues of uniform enforcement of discipline at the facility were also discussed. Referee Hearing Transcript, at 30-32. There was also a discussion of allegations of racial animus at the facility, which — in Claimant's view — were never acted upon. Referee Hearing Transcript, at 33-35, 37-38.

When asked what reason Cassandra might have for making a false accusation against her, she indicated that Miss Lovely, a part-time worker, had said she needed forty hours. Referee Hearing Transcript, at 36, 38-40.

The last witness, Samantha Mailles, a former co-worker of Claimant, also testified regarding issues of racial discrimination. Referee Hearing Transcript, at 52-53. She also spoke of the January incident. Referee Hearing Transcript, at 54.

2. Evaluation of the Evidence of Record.

Reviewing this record, and while fully acknowledging that the Board has discretion to admit hearsay, I believe the Referee's complete reliance on hearsay in this case constituted error. These charges — of patient mistreatment — were uncorroborated by testimony or by physical or documentary evidence. And by permitting his finding to rest entirely on the statement, the Referee denied Ms. Abbruzzese the opportunity to cross-examine her accuser.[5]

Allegations such as these are easily made but difficult to disprove. In my view, resting a decision entirely on such a statement, denying the Claimant the opportunity to cross-examine the accuser, provides a great opening for mischief

[5] This situation calls to mind the Supreme Court's decisions defining the minimum due process safeguards that apply at probation violation hearings. In that context, unquestionably different from the proceeding below, the Court has repeatedly held that a finding of violation should not be based primarily on a hearsay statement unless the trial judge finds good cause for the nonproduction of a living witness. See State v. Tatro, 659 A.2d 106, 110-14 (R.I. 1995). No such finding was made in the instant case.

— especially between co-workers — and undercuts the notion of fundamental due process, which Board hearings must certainly provide.

The absence of Ms. Lovely from the hearing is particularly troubling because no explanation was offered for her failure to testify. Apparently she was still on staff and fully available to be called by the employer. While this Court has sanctioned the absence of first-hand testimony when the accuser was a client of the employer, Ms. Lovely's absence is, in my view, inexplicable and unfair.[6]

It also must be noted that the Referee/Board's ruling was issued despite the Claimant's testimony, given under oath to the Referee, denying entirely the substance of the allegation against her. Cf. Technic, Inc.v. Department of Employment and Training, Board of Review, 669 A.2d 1156, 1160 (R.I. 1996)(uncontradicted statement may form basis of proved misconduct). The employer simply failed to prove its case to the standard of reliable, probative and

[6] At the conference held in this case before the undersigned on August 22, 2012, Claimant's counsel presented to the Court a decision of a referee in the case of In re Samantha Mailles, No. 20121512UC (April 26, 2012), in which Ms. Mailles, a former colleague of Ms. Abbruzzese at St. Elizabeth Manor (and a witness in the instant case), was permitted benefits. Ms. Mailles had also been accused in writing by Ms. Loveley of profanity (toward a co-worker). She was permitted benefits when Ms. Lovely failed to appear at the scheduled hearing and the alleged target of the tirade testified that it did not occur. Counsel for Ms. Abbruzzese tendered the Mailles decision in support of a request for reversal or remand. In light of my recommendation, it shall not be necessary to address this request. It should be noted that this circumstance was not known to Referee Enos when he decided the instant case, as the Mailles decision was mailed on the very date of Ms. Abbruzzese's hearing.

substantial evidence.

I therefore find that the Board's finding that claimant was discharged for proved misconduct in connection with her work is insufficiently supported by the evidence of record and must be overturned.

3. Resolution.

Pursuant to the applicable standard of review described supra at 5-7, 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; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. 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 her work — by mistreating a patient — is clearly erroneous in light of the reliable, probative, and substantial evidence of record and should be set aside by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. GEN. LAWS 1956 § 42-35-15(G)(5).

Accordingly, I recommend that the decision of the Board of Review be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

October _____, 2012