STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Scott Unsworth	:	
	:	
v.	:	**A.A. No. 15 - 023**
	:	
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 8th day of September, 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. Mr. Scott Unsworth 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 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 competent evidence of record; I must therefore recommend

that the decision of the Board of Review be affirmed.

I

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Scott Unsworth worked at the Zamburano Unit of the Eleanor Slater State Hospital[1] for eleven years as a Certified Nursing Assistant (CNA). He was terminated on September 25, 2014 and filed a claim for unemployment benefits on November 6, 2014. A designee of the Director determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

Mr. Unsworth filed an appeal and a hearing was conducted by Referee William Enos on January 15, 2015. The next day, the Referee affirmed the Director's decision and held that Mr. Unsworth was terminated for proved

[1] Despite references in the record to the contrary, the Claimant's employer was, at all times pertinent to this case, the Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals. See Gen. Laws 1956 § 40.1-1-3.1, a division of the Executive Department of Rhode Island's state government.

This seems an appropriate point to indicate that I shall refer to this department and "the Employer" or "the State." To avoid confusion, I shall reserve the terms "the Department" for the Department of Labor and Training (DLT) and "the Director" for the leader of that agency.

misconduct. In his written Decision, the Referee made Findings of Fact, which are presented here in their entirety:

> The claimant worked as a Certified Nursing Assistant for MHRH, Division of Rehabilitation for eleven years last on September 25, 2014. The employer terminated the claimant for violating known hospital policies, concerning patient abuse. The employer introduced evidence, a Rhode Island State Police Report, that showed that two witnesses/co-workers observed the claimant punch a patient three times in the face after the patient spat and called the claimant names. The employer introduced evidence, a prior warning and a five-day suspension, involving patient abuse. The claimant argued that the patient was combative and he was using his hand to block the patient from spitting at him and did not hit him.

Decision of Referee, January 16, 2015 at 1. 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:

> * * *
> The claimant was terminated for violating known hospital policies, concerning patient abuse. Therefore, I find that the claimant was discharged for disqualifying reasons under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, January 16, 2015 at 2. The Claimant appealed and the matter was considered by the Board of Review. On March 12, 2015, the

members of the Board of Review issued a unanimous decision in which they found the decision of the Referee 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.

Finally, Mr. Unsworth filed a timely complaint for judicial review in the Sixth Division District Court on March 17, 2015.

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

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[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).

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

[4] 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).

> 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

I must now determine whether the Board of Review's disqualification of Claimant was clearly erroneous in light of the reliable, probative, and substantial evidence of record. As we shall see, the answer to this question is dependent on whether the hearing was affected by error of law — specifically, whether the Referee erred when he admitted into evidence (and relied upon) the arrest report prepared in conjunction with Claimant's arrest by a member of the Division of State Police. But, before doing so, I shall present the facts of record and the positions of the parties.

A

The Facts of Record

1

Testimony of Ms. Fournier

The first (and only) witness called by the State at the hearing before the Referee in support of its effort to prove Mr. Unsworth was discharged for misconduct was Michelle Fournier, from the Department of Administration's office of Human Resources.

Ms. Fournier began her testimony by stating that, on September 25, 2014, two of Mr. Unsworth's co-workers at Zambarano Hospital (fellow CNA's) reported that he struck an impaired patient three times in his face. Referee Hearing Transcript, at 5. The co-workers, who indicated that they were in the same room with Mr. Unsworth when he did this, reported Claimant's conduct to his supervisor, who then forwarded the accusation up the chain of command — to the Nurse Manager and the Director of the Hospital. Referee Hearing Transcript, at 5-6. Mr. Unsworth was then placed on administrative leave and directed to depart the premises. Referee Hearing Transcript, at 6.

The allegation was then referred to the State Police, members of which

responded to the hospital and interviewed the two percipient witnesses and the doctor who examined the patient and found he bore indicia of an assault. Referee Hearing Transcript, at 6.[5] Mr. Unsworth was charged with a felony. Referee Hearing Transcript, at 7. The State Police investigation was summarized in an Arrest Report which was written by Trooper David M. Trainor; it was admitted as the Employer's Exhibit No. 2 at the hearing conducted by Referee Enos.

On cross-examination, Ms. Fournier verified that she was not present during the incident with the patient. Referee Hearing Transcript, at 8-9. She also conceded that the two CNA's who observed the incident were not present to testify. Referee Hearing Transcript, at 10. And neither was Ms. Nancy Houle, the executive nurse at the hospital. Id. Finally, Ms. Fournier confirmed that her knowledge of the incident came from discussions with Ms. Houle, the doctor, the nurse manager on the floor, and the two CNA's, and from reviewing the police report. Referee Hearing Transcript, at 10-11.

[5] At this point an objection to the admission of this hearsay evidence was implicitly overruled by the Referee. Referee Hearing Transcript, at 6-7.

2

Testimony of Mr. Unsworth

At the outset of his testimony Claimant Unsworth indicated he had been employed for eleven years as a Certified Nursing Assistant (CNA). Referee Hearing Transcript, at 15. Claimant indicated that, as a CNA, he would, on a daily basis: "change a patient, wash him up, feed him, do a range of motion, get him out of bed" and related matters. Referee Hearing Transcript, at 15-16.

With regard to the patient in question, Mr. Unsworth said he had attended to him on previous occasions. Referee Hearing Transcript, at 16. In fact, he testified that the patient had been verbally and physically abusive, including biting him. Id.

Turning to the incident on September 24, 2014, Mr. Unsworth said that he was trying to change the patient when he became combative, and was spitting on him. Referee Hearing Transcript, at 17. He told the patient to please stop spitting and used his left hand to block the spit. Id. He said that previously he had to undergo a year's worth of blood tests because he had been spat on by a different patient. Id.

He then added that the patient was calling him names, specifically — "black n****r" and "white n****r." Referee Hearing Transcript, at 18. He indicated that the patient had put other CNA's out of work. Id.

Mr. Unsworth then disputed the report from the two other CNA's. Referee Hearing Transcript, at 18-19. He expressly denied he intentionally struck the patient. Referee Hearing Transcript, at 20. He did concede that, due to a vision problem he had (retina amitosis), his left hand, which he was using to block the spit, might have come in contact with the patient's mouth, but not with great force. Referee Hearing Transcript, at 19. And he said he did not remember telling the patient he would "knock out" his "f***ing teeth." Referee Hearing Transcript, at 20-21.

B

Position of the Parties

1

Appellant's Position

In his Memorandum, Claimant Unsworth makes several arguments.

First, Mr. Unsworth urges that the documents introduced by the employer should not have been considered. See Appellant's Memorandum, at 3. In particular, he urges that the Arrest Report was not reliable. Id.

Secondly, Claimant also asserted that the Referee misconceived the contents of the Report, because he found that two CNA's claimed to have observed the punch, when only one did. See Appellant's Memorandum, at 4 citing the Referee's Decision, at 1.

Thirdly, Mr. Unsworth argues that the Referee erred by considering past instances of misconduct. See Appellant's Memorandum, at 5-6.

2

The Employer's Position

In its Memorandum, the Employer urges that the Referee's decision was supported by sufficient evidence.

In particular, the State asserts that the Arrest Report (and the accusations contained therein that had been made by the two CNA's), were reliable. Employer's Memorandum, at 5. In this regard the employer noted that criminal sanctions may attach to those who mislead officers performing their duties. Id. The employer also noted that the statements in the report were made contemporaneously. Id.

The employer also commented that Mr. Unsworth said — both on the day of the incident and at the hearing — that he could not recall whether he

told the patient he would knock his teeth out. Employer's Memorandum, at 5.

Finally, the hospital cites DePasquale v. Harrington, 599 A.2d 314 (R.I. 1991) and Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training, 854 A.2d 1008 (R.I. 2004) as, taken together, justifying the Referee's reliance on the Arrest Report in making his decision. Employer's Memorandum, at 6.

C

Resolution

1

Mr. Unsworth's main point on appeal is a legal one — the Referee (and the Board of Review on appeal) should not have disqualified him based on the contents of the Arrest Report created by a member of the Division of State Police.[6] He argues that the admission of the report into evidence means that his disqualification was based only on unreliable hearsay.

[6] As I read Claimant's arguments it seems he is implicitly conceding that, had the persons quoted therein appeared at the hearing and repeated their testimony in person, he could not plausibly contest the sufficiency of the evidence against him — given our limited standard of review on all matters factual.

2

Now, regarding the question of the admissibility of hearsay evidence at unemployment hearings, let as start from first principles. We may begin by noting that Board 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 Gen. Laws 1956 § 42-35-18(c)(1). Nevertheless, our Supreme Court has indicated that the admission of hearsay at Board hearings should be guided by § 42-35-10's instruction that "[i]rrelevant, immaterial, and unduly repetitious evidence be excluded." Foster-Glocester School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018-19 (R.I. 2004) citing § 42-35-10(a). Similarly, the Court in Foster-Glocester 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 viewed as reliable.

I do believe the contents of the Arrest Report were relevant and material (patently) and not repetitious (since it was essentially the only evidence presented). And, for the reasons I shall now enumerate, I also conclude the report satisfies the test of reliability.

The report cited, by name, the witnesses who provided the information contained therein; they were persons known to Mr. Unsworth; they made their statements just after the incident. And, generally speaking, Mr. Unsworth confirmed that an incident had in fact occurred, though he denied punching the patient. Reliability also attaches to the Report because the troopers were able to observe the patient, and observe "minor abrasions." The report is also made reliable by the fact that the witness, Ms. Fournier, spoke to many of the same persons whom the State police interviewed, and received consistent statements.

In considering Claimant's legal argument, I have reviewed the cases he cites. The two Rhode Island Supreme Court cases he cites, Cahill v. Gagnon, 794 A.2d 451 (R.I. 2002) and Mercurio v. Fascitelli, 116 R.I. 237, 354 A.2d 236 (1976) both involve the admissibility of evidence at a civil trial (considering the application of the doctrine of past recollection recorded), not an administrative proceeding; they are therefore inapposite.[7]

[7] And I am also not persuaded by the District Court unemployment-appeal opinions Claimant cites. In the 1993 decision — Slater Health Center v. Department of Employment and Training, Board of Review, A.A. No. 92-70 (Dist.Ct. 02/02/1993) — Chief Judge DeRobbio's ruling, while conceding that hearsay was admissible at Board of Review hearings,

Mr. Unsworth also makes a factual criticism of the Referee's decision. He urges that the Referee conflated the statements of the two percipient witnesses. He argues that only one of the two CNA's present reported seeing him throw punches, not both. But, while we may concede the truth of the statement, this argument does not avail Mr. Unsworth. For even though the second CNA did not see the punches thrown, she reported she heard them; so, her statement corroborates her colleague's accusation.[8]

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focused on the fact that the person making the accusation of misconduct (in the hearsay statement) was unidentified; the Chief Judge found that the Claimant "could not respond to any specific charge … ." Slater Health Center, slip op. at 7. The allegation here, and the persons making it, are perfectly clear to Mr. Unsworth.

The other two cases cited are similarly distinguishable. In Helia Collins v. Department of Labor and Training, Board of Review, A.A. No. 11-137, slip op. 13-15 (Dist.Ct. 06/22/2012), this Court declined to affirm a finding of misconduct which to be found insufficiently grounded in the evidence of record and proper inferences therefrom. And, in Donald Pineau v. Department of Labor and Training, Board of Review, A.A. No. 13-175 (Dist.Ct. 06/04/2014), this Court held that a finding (that the Claimant did not register for work in another state where he was residing) which was based on rank (unidentified) hearsay to be insufficient. The hearsay here contained no such infirmities.

[8] And both of the percipient witnesses said they heard him threaten to knock the patient's teeth out. In my view, proof of this allegation would have been sufficient, per se, to prove misconduct.

And so, at the end of the day, while the employer's case may have been made even stronger if the State had presented the accusers in person, the Board of Review's decision to find proved misconduct based on the record before it was clearly supported by lawful and competent evidence.

3

Pursuant to Gen. Laws 1956 § 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.[9] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[10] Applying this standard of review and the definition of misconduct enumerated in Turner, ante, I must recommend that this Court hold that the Board of Review's finding — that Claimant did assault and threaten a patient he was attending to at the state

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

[10] Cahoone, ante n. 9, 104 R.I. at 506, 246 A.2d at 215 (1968). See also Gen. Laws § 42-35-15(g), ante at 6 and Guarino, ante at 6, n. 2.

hospital where he was employed, was not clearly erroneous in light of the reliable, probative, and substantial evidence of record. I find that this conduct constituted disqualifying misconduct under § 28-44-18, as a matter of law.

V
CONCLUSION

Applying the foregoing standard, and upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review (affirming the decision of the Referee) on the issue of disqualification was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(G)(5),(6).

I therefore recommend that the decision rendered by the Board of Review in this case be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

September 8, 2015