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

Maria I. Rodriguez	:	
	:	
v.	:	**A.A. No. 2010 – 193**
	:	
Department of Labor and Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In the instant complaint Ms. Maria I. Rodriguez urges that the Board of Review of the Department of Labor & Training erred when it held that she was not entitled to receive employment security benefits because she had been discharged for 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 General Laws 1956 § 28-44-52. 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: Ms. Maria Rodriguez worked as

an assistant teacher for the Joslin Community Development Corporation until March 12, 2010. She applied for unemployment benefits but on April 15, 2010 the Director determined her to be disqualified from receiving benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since she was terminated for misconduct – *i.e.,* failure to obtain her GED.

Complainant filed an appeal and a hearing was held before Referee Gunter A. Vukic on July 15, 2010. Claimant appeared and was assisted by her daughter, who interpreted for her; the Joslin Center was representation by Gilamina Sanchez, its Executive Director, and Micayla Cook, a teacher and member of the accreditation committee. On July 21, 2010, the Referee held that Ms. Rodriquez was disqualified from receiving benefits because she was terminated for proved misconduct. In his written Decision, the referee found the following facts:

> The claimant was hired as an assistant teacher by the subject employer prior to employer's accreditation by the National Association for Education of Young Children (NAEYC). The claimant employment application submitted was completed by her daughter and indicated claimant was a high school graduate when that was not the case. Approximately five years before the discharge, the employer sought accreditation by the NAEYC. The accreditation was in jeopardy based on the claimant's lack of high school diploma as discovered during the certification process. The NAEYC pending decision was appealed by the employer who indicated that the claimant would obtain her GED and Certification of Developmental Association on the job certification.
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> The claimant, agreed to pursue her GED and take the additional training provided by the employer. The claimant did take employer paid annual training and was paid for her training time.
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> Upon application for recertification, it was discovered that the claimant had not obtained her GED nor had she started class. The claimant was discharged for her failure to obtain her GED, a lack that again jeopardized the employer accreditation. The employer was unable to appeal using the same basis the original accreditation was appealed under that the

claimant was in the process of obtaining her GED.

Decision of Referee, July 21, 2010 at 1. Based on these facts, the referee came to the following conclusion:

> * * *
> In the instant case, no credible testimony has been provided to support why the claimant, aware of the employment requirement, failed to take any credible action to obtain her GED during the five years. The original false information provided by the claimant at time of hire indicated she had a high school diploma when in fact she did not. The claimant action was against the best interest of her employer since it jeopardized the employer ability to conduct business under the appropriate accreditation.

Decision of Referee, July 21, 2010 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On August 30, 2010, the members of the Board of Review unanimously held that 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, August 30, 2010, at 1.

Finally, Ms. Rodriguez filed a complaint for judicial review in the Sixth Division District Court.

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.**
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> * * *
>
> (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

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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).

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:

> * * * 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.

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[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).

ANALYSIS

The Board adopted the referee's factual conclusion that claimant had been fired for failing to obtain her GED diploma.

Before discussing the legal principles applicable to the instant case, I shall review the record to determine whether the referee's findings of fact are supported by the evidence of record.

The story which led to claimant's firing began about five years prior to her termination — apparently circa 2005. At that time, the school was engaged in an effort to become accredited by the National Association for the Education of Young Children (NAEYC). Referee Hearing Transcript, at 13-14. Among the requirements for accreditation is that assistant teachers — like Ms. Rodriquez — hold a Certificate of Developmental Associates (CDA) (or at least be actively pursuing it). Referee Hearing Transcript, at 13. In ordered to hold a CDA credential, an assistant teacher must hold a high school diploma of an equivalency certificate (GED).

While assembling its employees' credentials during the accreditation process five years before, the school learned claimant did not have a GED, even though she had indicated she did on her original employment application. Referee Hearing Transcript, at 12-13. As a result, the school had to request a waiver for claimant from the NAEYC, which it received — based on its promise that claimant would obtain her GED and CDA. Referee Hearing Transcript, at 13.

The problem was explained to Ms. Rodriguez and she was told she needed to obtain her GED. Referee Hearing Transcript, at 15-16. The school was willing to

pay for her training, as it had done on prior occasions. Referee Hearing Transcript, at 16. The issue resurfaced at the five-year re-accreditation process mark — which came in 2010. Referee Hearing Transcript, at 18. At that time it was determined claimant never obtained her GED. Claimant was fired.

In her DLT telephone interview, claimant admitted she knew she had to get her GED. See Department's Exhibit D1(a). She understood the importance of obtaining her GED. Id. While her DLT statement includes various reasons for not acquiring her GED, at the Referee hearing claimant indicated she tried to get into a GED class but many were during the day (at the West End Community Center, CCRI, and Childspan). Referee Hearing Transcript, at 26-28. She said she told Ms. Sanchez she was trying to get in night classes but night classes were full – for five years. Referee Hearing Transcript, at 30. Based on this narrative, the referee's finding that claimant did not exercise due diligence in obtaining her GED is not clearly erroneous.

At first blush, this case is reminiscent of those in which a claimant was discharged (and disqualified) because he or she has failed to maintain a license necessary to their employment. The District Court has repeatedly decided that failure to maintain a license necessary to perform one's employment duties constitutes misconduct.[4] This principle has been applied as to a driver's license: See Prochniak v. Department of Employment & Training, Board of Review, A.A.

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[4] In other cases the failure to gain or maintain a necessary certification has been viewed as a form of leaving without good cause. See Mourachian v. Department of Employment Security, A.A. No. 83-159, (Dist.Ct.9/14/84)(Del Nero, J.). Under this theory the employee is also barred from receiving benefits.

No.03-63, (Dist.Ct.7/30/04) (DeRobbio, C.J.)(Claimant was rehired subject to reinstating his operator's license but was unable to do so; disqualification *affirmed*); a nursing license: Dardeen v. Department of Employment & Training, A.A. No. 92-306 (Dist.Ct.11/18/93)(DeRobbio, C.J.), and to a teaching certificate: McClorin v. Department of Employment & Training, A.A. No. 92-12 (Dist.Ct. 2/16/94) (DeRobbio, C.J.). As to driver's licenses suspended for traffic violations, this rule has been generally accepted nationally. See 76 AM. JUR. 2d Unemployment Compensation § 82 (2005) and ANNOT., Unemployment Compensation Claimant's Eligibility as Affected by Loss of, or Failure to Obtain, License, Certificate, or Similar Qualification for Continued Employment, 15 A.L.R.5th 653, §§ 6, 10 (1993). However, while similar, I believe these cases are not precisely on point. Strictly speaking, claimant was not required to hold a GED to hold her position as an assistant teacher. No law required her to possess a GED in order to be an assistant teacher.

Instead, the issue of her educational accomplishment was relevant solely to the school's efforts to gain and maintain NAEYC accreditation. Among the prerequisites to NAEYC accreditation is the requirement that 50% of assistant teachers in a school must have CDA certification. See Employer's Exhibit 1. While it is true, as claimant argues in her memorandum, that her failure to hold a CDA would not have endangered accreditation so long as 50% of her colleagues did, I

believe this is beside the point — when it was discovered her application falsely stated she did not have a high school diploma, she was not fired[5] but was given a chance to remedy the situation. That opportunity was obtained by Joslin by its promise to NAEYC that claimant would obtain her GED.

This she did not do; to the contrary, by failing to keep her promise to obtain her GED she recklessly endangered the Joslin School's accreditation effort and its relationship with the NAEYC.[6] I find this to be conduct demonstrating a great disregard for her employer's best interests — *i.e.,* its standing in the educational community.

At the end of the day, it appears that the employer acted reasonably and with charitable forbearance.

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

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[5] Many cases hold that providing an employer with a materially false application constitutes proved misconduct within the meaning of section 18. See Gartland v. Department of Employment Security, Board of Review, A.A. No. 90-308 (Dist.Ct. 6/18/91)(Moore, J)Application falsely claimed university degree). So, if she had been fired in 2005, she likely would have been denied benefits.

[6] That a one's reputation for integrity is an asset which must be protected is a principle which has been acknowledged by our Supreme Court when construing the Employment Security Act — albeit in a different context. In Powell v. Department of Employment Security Board of Review, 477 A.2d 93, 97 (RI 1984), the Court held that an public relations man had good cause to quit under section 17 when his employer asked him to prepare a misleading press release. Quite simply, I believe that if Mr. Powell had a right to quit in order to keep his good name, Joslin had the right to fire Ms. Rodriguez for the same reason.

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 — her failure to acquire her GED — 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 in this matter is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is 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.

Joseph P. Ippolito
Magistrate

February 7, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Maria I. Rodriguez	:	
	:	
v.	:	**A.A. No. 10 - 0193**
	:	
Department of Labor & Training, Board of Review	:	

ORDER

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 decisions of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 7th day of February, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge