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

Melissa Arcand	**:**	
	:	
v	**:**	**A.A. No. 2011-151**
	:	
Department of Labor and Training,	**:**	
Board of Review and	**:**	
Roger Williams Medical Center	**:**	

JUDGMENT

This cause came before Clifton, J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board is reversed.

Dated at Providence, Rhode Island, this 30th day of April, 2012.

Enter: **By Order:**

/s/ **/s/**

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.		**DISTRICT COURT**
SIXTH DIVISION		
Melissa Arcand,	:	
	:	
v.	:	**A.A. No. 6AA-2011-00151**
	:	
Department of Labor and Training	:	
Board of Review, and Roger Williams	:	
Medical Center	:	

Decision

This matter is before the Court on the complaint of Ms. Melissa Arcand seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor & Training (the Board), which held that Ms. Arcand was not entitled to receive employment security benefits. This Court has jurisdiction over appeals from the Board under Gen. Laws. 1956 § 28-44-52, and the standards of review utilized in administrative appeals apply. After reviewing the record and applying the appropriate standards, this Court holds that the Board's decision is clearly erroneous in light of the reliable, probative, and substantive evidence of the whole record.

I. Facts & Travel of the Case

Ms. Arcand was employed by Roger Williams Medical Center (RWMC) as a certified nursing assistant (CNA) for one and a half years. Decision of Referee, at 1. On April 4, 2011 Ms. Arcand was assigned to a "patient watch," which required her to observe a patient who had been placed in restraints. (Ref. Tr., 4, July 22, 2011). This particular patient had been placed in restraints because she was verbally abusive toward hospital staff and suicidal. Id. at 17-19. The patient appears to have been placed in four

point restraints that restricted movement of all her limbs. The record establishes and Ms. Arcand admitted at the referee hearing that she decided to and did remove one of the patient's restraints, which resulted in the patient removing the three remaining restraints. Id. at 4-5, 8-9.

Ms. Arcand was very busy the night of April 4, 2011 as she had several patients she was responsible for. Id. at 10. She continuously observed this particular patient for nearly five hours. Id. at 18. The patient was emotional and wanted to speak with some of the hospital counselors. Id. The patient was not initially restrained, but Ms. Arcand left for a dinner break and when she returned the patient was restrained. Id. at 18-19. When Ms. Arcand returned she made a statement to an RN within earshot of the patient that the counselors had lied when they told the patient she would be next. Id. at 19. The RN scolded Ms. Arcand for making this statement in the patient's presence. Id.

Ms. Arcand admitted at the referee hearing that she made the decision to remove the patient's restraint without consulting a registered nurse (RN) or doctor. Id. at 8-9. Ms. Arcand removed one of the patient's restraints, and she testified that she did not get to inform the RN about this fact because of her high workload that night. Id. at 10. Ms. Arcand's removal of one of the patient's restraints allowed the patient to release the remaining three restraints. Id. When the RN on duty that evening discovered the patient was unrestrained, she directed Ms. Arcand to put the patient back into the restraints. Id. According to Ms. Arcand, the RN gave her permission to leave one of the patient's limbs free. Id. Ms. Arcand left one limb free and the patient removed all of her restraints a second time. Id. at 10-11.

At the referee hearing, Ms. Arcand maintained that multiple RNs told her that CNAs are permitted to remove one restraint at a time from a patient when the patient "is behaving and compliant." Id. at 8. According to Ms. Arcand's testimony before the referee, several RNs stated that if the patient remains compliant after one restraint is removed, CNAs are then permitted to remove the rest of the restraints. Id. at 9. Ms. Arcand testified that she removed restraints from patients within her own discretion during the entire course of her employment at RWMC because she believed this was the normal operating procedure. Id. at 12- 13.

Clinical Nurse Manager Candace Wray and Manager of Human Resources Kim Whitaker testified on behalf or RWMC at the hearing before the referee. Ms. Wray and Ms. Whitaker both testified that making an independent decision to remove a patient's restraints is outside the scope of practice for a CNA and in violation of the policies of RWMC. Id. at 5, 15. Ms. Wray testified that the only employees authorized to make decisions involving the restraint of a patient are RNs and doctors. Id. at 15. She explained that RNs will generally consult with hospital doctors if they believe restraints are required and the doctor will order them if he or she agrees with the RN's assessment. Id. Ms. Whitaker testified that multiple CNAs and hospital security staff were interviewed and that each employee stated they do not remove restraints from patients. Id. at 20.

According to Ms. Whitaker, RWMC's policy that CNAs may not remove patient restraints without first consulting a physician or RN is well known among RWMC's employees. Id. at 5-6. Ms. Wray explained that all CNAs are required to go through orientation when they come to work at RWMC and that one of the "competencies" taught

in this orientation involves the hospital policies governing the use of restraints.[1] Id. at 6. These hospital policies are contained in the RWMC Clinical Operations Manual, a portion of which was admitted into evidence at the referee hearing. Policy # B-38 section VII governs the release and reinstitution of restraints on a patient. This section provides that RNs "may attempt a trial removal of restraints [without consulting a physician] if the patient demonstrates reduction in the behaviors that led to the initiation of the restraints." Management of Patients in Restraints or Seclusion Policy # B-38, at 5.[2]

Ms. Arcand testified that many of the RNs at the RWMC do not adhere to this policy, and that the nurses "make their own rules." (Ref. Tr., 14, July 22, 2011). Ms. Arcand described the department she worked in at RWMC as very disorganized. Id. at 13. Ms. Arcand stated that she understood the hospital policies, but that the rules would change depending on the RN supervising her. Id. at 14. Ms. Arcand claimed that other CNAs and hospital security personnel also removed restraints within their own discretion. Id. at 19. She also testified that there is no supervisor present in her department for the entirety of each shift ensuring the hospital policies are enforced uniformly. Id. at 13. Ms. Arcand stated that she along with several other CNAs had asked Ms. Wray for a meeting

[1] As part of orientation, all RWMC employees are required to fill out and sign an Orientation Checklist that certifies they have familiarized themselves with the medical center's policies including the policies governing the use of restraints. (Ref. Tr., 6, July 22, 2011). This checklist is included in the employee's file and an Orientation Checklist signed by Ms. Arcand was admitted into evidence at the referee hearing.

[2] It should also be noted that the job description for Ms. Arcand's position was admitted into evidence at the referee hearing. This description clearly states that an employee in Ms. Arcand's position "provides care for a defined group of patients . . . as assigned or directed by the RN and Nurse Manager." Job Description/Performance Evaluation, at 1.

to discuss the discrepancies in the enforcement of hospital policy, but this meeting never occurred. Id.

Ms. Whitaker testified that there is a supervisor present for each shift that is responsible for the entire hospital. Id. at 11. This supervisor makes rounds throughout the hospital and would visit Ms. Arcand's department three times per shift. Id. Ms. Wray testified that each of the three shifts in Ms. Arcand's department was overseen by a charge nurse. Id. Ms. Whitaker and Ms. Wray both testified that a policy against allowing CNAs to make decisions regarding patient restraints is the general practice in every hospital. Id. at 15.

Ms. Arcand's actions on the night of April 4, 2011 were reported by the RN on duty that night, and the record shows that she was terminated that evening. Therefore, Ms. Arcand's last full day of work was April 4, 2011 and she has been unemployed since. Id. at 4-5.

On May 19, 2011, the director of the Department of Labor and Training issued a decision finding Ms. Arcand was discharged for disqualifying reasons and that she was therefore not entitled to unemployment benefits. Claimant Decision, May 19, 2011. Ms. Arcand filed a timely appeal of the director's decision on May 26, 2011 and a referee hearing was held on July 22, 2011. The Referee's decision was delivered on August 4, 2011, affirming the Director and denying Ms. Arcand benefits. Decision of Referee, at 3. Ms. Arcand appealed to the Board, which affirmed the Referee in a decision delivered September 26, 2011. Decision of Board of Review, at 1. Ms. Arcand has now appealed the Board's decision to this Court.

2. Referee's Findings of Fact & Conclusion:

> "Claimant worked as a Certified Nursing Assistant for this employer for one and a half years. Her last day of work was April 4, 2011. Employer testified that claimant performed outside the scope of her Certified Nursing Assistant's license by removing a patient's restraint without the permission of a Registered Nurse or doctor. Employer testified and provided evidence showing that the claimant knew that the employee handbook clearly outlined that Certified Nursing Assistants are not allowed to remove restraints without permission from a Registered Nurse or doctor. Employer also testified that claimant did have a written warning dated February 11, 2011 [sic][3] for inappropriate behavior/unprofessional conduct. Claimant testified that the patient had four-point restraint and she had removed one and that the patient removed the other three restraints on her own. Claimant testified that removing one restraint is common practice done by other Certified Nursing Assistants as well." Decision of Referee, at 1.

After setting forth these findings of fact, the Referee then came to the following conclusion and denied Ms. Arcand unemployment benefits:

> "The issue involved is whether or not the claimant was discharged from this job under disqualifying circumstances within the provisions of the Section 28-44-18 of the Rhode Island Employment Security Act.
>
> An individual who is discharged for reasons of proven misconduct in connection with his work must be held to have been terminated under disqualifying circumstances under the provisions of Section 28-44-18 which provides, in part, as follows:
>
> > 'For the purposes of this section, misconduct shall be 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

[3] Ms. Arcand was issued a Performance Improvement Notice on February 11, 2010 for "[i]nappropriate behavior/[u]nprofessional conduct." RWMC Performance Improvement Notice, at 1. According to this document and the testimony during the referee hearing, Ms. Arcand was involved in a confrontation with a staff member from the Providence Center that escalated in front of a patient's room. Id. Ms. Arcand testified that she was never found guilty of any misconduct in connection with that incident and that she signed the form because she was not aware of her right to refuse to do so. (Ref. Tr., 9-10, July 22, 2011).

> other provisions of chapters 42-44 of this title, this section shall be construed in a manner which is fair and reasonable to both employer and the employed worker.'

In the case of Turner vs. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a general definition of the term, 'misconduct', as enunciated in Boynton Cab Co. vs. Newbeck, 237 Wis. 249, 296 N.W. 636 (1941):

> '[M]isconduct' . . . 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 employer's interest or 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.' Id. at 259-60, 296 N.W. at 640.

Credible testimony and evidence has been provided to support that the claimant exhibited unprofessional conduct and was working outside the scope of her Certified Nursing Assistant's license. Therefore, I find that claimant was discharged for disqualifying reasons under Section 28-44-18 of the Rhode Island Employment Security Act.

The evidence presented at the administrative hearing before the Referee consisted of testimony from Ms. Whitaker and Ms. Wray as well as Ms. Arcand, various letters and pleadings filed in connection with the administrative process, a RWMC Performance Improvement Notice regarding the February 2010 incident between Ms. Arcand and a Providence Center staff member, an Orientation Checklist signed by Ms. Arcand and her manager, a job description for Ms. Arcand's position, a Problem Identification Sheet

signed by the RN supervising Ms. Arcand on April 4, 2011 describing the events of that night, and portions of the RWMC Clinical Operations Manual.

Ms. Arcand appealed and the Board reviewed this case, issuing a decision on September 26, 2011. The Board found that "the findings of the Appeal Tribunal on the factual issues . . . constitute[ed] a proper adjudication of the facts." Decision of Board, at 1. The Board affirmed the decision of the Referee with one member dissenting. Id. at 2. The dissenter stated,

> "[i]n the case before us, the claimant admits to having removed one restraint from a patient. She testified that this was common practice which was supposedly against policy. Be that as it may, the law speaks to the malicious actions of an employee when denying benefits.
>
> All that was shown in this case was an employee doing her job as best she would [sic] and she was terminated. Under these facts, benefits should be allowed." Id.

II. Applicable Law

This case requires the Court to apply and interpret the following provision of the Rhode Island Employment Security Act, which specifically addresses an employee's dismissal for proven misconduct; Gen. Laws 1956 § 28-44-18, provides:

> "**Discharge for misconduct. –** For benefit years beginning prior to July 1, 2012, 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 . . . 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."

When an employer seeks to establish that a former employee is ineligible for unemployment benefits as a result of misconduct, the employer bears the burden of establishing the employee's misconduct by a preponderance of the evidence. Foster Glocester Regional School Committee v. Board of Review, 854 A.2d 1008, 1017-18 (R.I. 2004). Our Supreme Court has said that,

> "'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 a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." Turner v. Dep't of Employment Security, 479 A.2d 740, 741-42 (R.I. 1984).

Although the Rhode Island Administrative Procedures Act (APA) generally requires administrative agencies to follow the rules of evidence as applied in civil cases, the Board is expressly excluded from this requirement. R.I. Gen. Laws §§ 42-35-18(c)(1), 42-35-10; Turner, 479 A.2d at 742. The legislative intent behind excluding the Board from the constraints of civil and APA evidentiary rules is to ensure the Board receives the broadest range of evidence possible before making a decision to grant or deny benefits. Turner, 479 A.2d at 743. The Supreme Court of Rhode Island has noted that the lack of evidentiary constraints is consistent with the legislative purpose of the Employment Security Act, which is to "protect against the ill effects of unemployment that occu[r] in depressed economic times." Id.

When a claimant appeals a decision of the Board to this Court, our jurisdiction is "confined to questions of law, and, in the absence of fraud, the findings of fact by the

Board of Review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive." Gen. Laws 1956 § 28-44-54 (emphasis added). This Court's review of questions of fact in an appeal from the Board is governed by the provisions of § 42-35-15(g), which provides:

> "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 or 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."

This Court cannot weigh the evidence, and may only review the record in order to determine whether legally competent evidence supports the administrative decision. Bunch v. Board of Review, 690 A.2d 335, 337 (R.I. 1997). The factual findings of the Board may only be reversed if this Court finds that they are devoid of competent evidentiary support in the record, "or from the reasonable inferences that might be drawn from such evidence." Id. (citing Guarino v. Department of Social Welfare, 410 A.2d 425, 428 R.I. 1980). The factual findings of the Board will be upheld even though a reasonable mind may have reached a contrary result. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

The Employment Security Act is remedial legislation that requires this court to liberally construe its provisions in favor of the act's purpose, which "is to lighten the burden that now falls on the unemployed worker and his or her family." Gen. Laws 1956

§ 28-42-73; Charlonne v. Cote, 96 R.I. 318, 319, 191 A.2d 276, 277 (1963). This liberal construction does not, however, allow the Court to "enlarge the exclusionary effect of expressed restrictions on eligibility under the act. . . ." Harraka v. Board of Review, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964).

III. Issue

The issue before the Court is whether the decision of the Board of Review 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. More precisely, was Ms. Arcand properly disqualified from receiving unemployment benefits because she was discharged for "a knowing violation of a reasonable and uniformly enforced rule or policy" of RWMC?

IV. Analysis

Ms. Arcand argues that RWMC failed to establish before the Board that she knowingly violated a uniformly enforced rule or policy of the employer. Pl.'s Brief, at 3. She contends that the rule or policy was never entered into evidence before the Referee or the Board, and that RWMC failed to produce written documentation showing Ms. Arcand was aware of the relevant policy. Id. Ms. Arcand further contends that her actions in this case fall short of the definition of misconduct set forth in § 28-44-18 and Turner. Id. at 4. In support of her arguments, Ms. Arcand points to her testimony that there was no uniformly enforced policy at RWMC about CNAs removing restraints and that she was never disciplined for doing it in the past. Id. Ms. Arcand's position is that she is not guilty of misconduct under the Rhode Island Employment Security Act and that the Board's decision is clearly erroneous. Id.

A. Does the Evidence Produced Establish Ms. Arcand Knowingly Violated a Uniformly Enforced RWMC Policy or that she Acted in Willful Disregard of the Employer's Interest?

It is an established principle that employers may establish performance standards and rules of conduct governing their employees and violation of these regulations may serve as grounds for dismissal. St. X Parish Corp. v. Murray, 557 A.2d 1214, 1717-18 (R.I. 1989). However, violating an employer's performance standard or rule of conduct does not automatically disqualify an employee from receiving unemployment benefits. Id. at 1218. In situations like the one presented here, employers are required to establish by a preponderance of the evidence that the employee engaged in misconduct as defined in section 28-44-18. Foster Glocester Regional School Committee v. Board of Review, 854 A.2d 1008, 1017-18 (R.I. 2004). This burden requires the production of evidence that although "not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY 1220 (8th Ed. 2004).

Section 28-44-18 defines misconduct 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." RWMC has specifically alleged that Ms. Arcand committed a violation of its policies concerning the removal of patient restraints. Therefore, this Court must determine whether Ms. Arcand committed a knowing violation of this policy. The Supreme Court of Rhode Island has not specifically defined what constitutes a knowing violation of a rule or policy of an employer. Therefore, this Court will look to cases from the Commonwealth of Massachusetts for guidance.

In the Commonwealth, courts are required to consider the employee's state of mind when she allegedly violated a work rule. Still v. Com'r of Department of Employment & Training, 657 N.E.2d 1288, 1292 (Mass. App. Ct. 1995). When a knowing violation of an employer's rule or policy is alleged, the employer must prove at a minimum that the employee was conscious of what she was doing and "[aware] that she [was] in the process of violating a rule or policy of the employer." Id. When confronted with such a case, courts are required to consider mitigating factors. Id. One of the mitigating factors a court may consider is an employee's belief that violations of a particular rule or code of conduct were habitually ignored or considered unimportant by her employer. Smith v. Director of Division of Employment Security, 382 N.E.2d 199, 202 (Mass. 1978).

In Smith, a warehouse worker at Sears, Roebuck and Co. was discharged because he was found drinking on the job in violation of company policy. Id. at 201. The record established that the worker was aware of this company policy, but evidence was introduced that this rule was not enforced in a uniform manner and that the worker in Smith was the only employee terminated for violating it. Id. The Supreme Judicial Court scolded the administrative hearing officer for not considering this evidence and making findings of fact on it, and ultimately remanded the case for further proceedings. Id. at 203. However, the court noted that the arbitrary and capricious enforcement of a work rule could prevent a finding that an employee was discharged for misconduct even if he committed a knowing violation of a work rule. Id. at 202.

In Still, a nurse's aide was discharged from her position at a nursing home for cursing at a patient in violation of the home's policies. 657 N.E.2d at 1290. The policy at

issue in that case was set forth in the nursing home's employee handbook, which was given to the aide at her initial orientation before starting work. Id. at 1291. The aide was aware of this policy and that other employees had been terminated for violating it. Id. However, the aide was consistently harassed by a particular patient at the home, and one day she was pushed to an emotional outburst against the patient. Id. at 1292. She was terminated as a result of her actions. Id. However, the Appeals Court of Massachusetts found the aide had not knowingly violated the home's policy because she had been on duty for nearly 10 hours and the patient made particularly offensive remarks to her. Id. at 1294. The court reasoned that her outburst was made without sufficient deliberation or forethought to establish a knowing violation of her employer's policies. Id.

In Chartier v. Department of Employment & Training, 673 A.2d 1078 (R.I. 1996), which is cited by RWMC in their brief, the Supreme Court of Rhode Island considered whether an employee's dismissal for deliberately ignoring the instructions of his supervisor was misconduct under section 28-44-18. 673 A.2d at 1079. The employee was a psychotherapist who initiated a personal relationship with a patient despite specific instructions from his supervisor not to do so and that he would be fired if he did. Id. at 1079-80. The employer's policy and procedure manual clearly stated that a refusal to comply with a supervisor's instructions was an offense justifying immediate suspension or termination. Id. at 1080. The court found that the employee's clear violation of this rule by willfully ignoring his supervisor's instructions was misconduct as defined in the Rhode Island Employment Security Act. Id. at 1081.

After reviewing the record in this case, this Court cannot conclude that Ms. Arcand's actions constituted a knowing violation of the RWMC policies governing the

restraint of patients. Ms. Wray and Ms. Whitaker both testified before the Referee that making an independent decision to remove a patient's restraints falls outside the scope of practice for CNAs and violates specific RWMC policy. (Ref. Tr., 5, 15, July 22, 2011). According to their testimony, only an RN or a physician may make decisions regarding the restraint of a patient, and CNAs must get permission to remove restraints. Id. at 5-6, 15. They testified that this policy is well known and that it is discussed at orientation and contained in the RWMC Clinical Operations Manual. Id. at 6. After reviewing the evidence provided to support this contention, the Court holds that the RWMC has not produced sufficient evidence to prove this policy even exists or that it is uniformly enforced.

The relevant portions of the RWMC Clinical Operations Manual were admitted into evidence and considered by the Referee and the Board. The provisions relevant to this case are found in Policy # B-38 section VII. 1., which provides "[t]he registered nurse may attempt a trial removal of restraints if the patient demonstrates reduction in the behaviors that led to the initiation of the restraints. This may be done without a physician order or before the expiration of the restraint order." Management of Patients in Restraints or Seclusion Policy #B-38, at 5. The remaining provisions of this section discuss the requisite orders that must be prepared and a requirement that the patient's limbs be released one at a time at set intervals to check for circulation problems or other health issues. Id.

The language of the RWMC Clinical Operations Manual says nothing about the role of CNAs in caring for patients who are restrained. At best, the relevant language leaves a significant gray area regarding the role of a CNA and her ability to remove

patient restraints within her own discretion. The additional documents submitted by RWMC to support its position, namely Ms. Arcand's orientation checklist and her job description provide no guidance as to the ability of CNAs to exercise their own discretion regarding patient restraints. Ms. Arcand's job description does state that she takes direction from a nurse or nurse manager, but it does little to resolve the ambiguity. Job Description/Performance Evaluation, at 1.

Ms. Arcand testified that many of the RNs at RWMC "make their own rules" and that they consistently fail to adhere to the policy Ms. Wray and Ms. Whitaker allege is in place. (Ref. Tr., 14, July 22, 2011). According to Ms. Arcand's testimony, multiple RNs informed her that CNAs are permitted to remove one restraint at a time when patients are "behaving and compliant." Id. at 8. Ms. Arcand testified that she removed restraints from patients within her own discretion during the entire course of her employment at RWMC and that she believed this was the normal operating procedure because she was never disciplined for doing so. Id. at 12-13. Furthermore, Ms. Arcand testified that she along with other CNAs had requested a meeting with Ms. Wray to resolve the discrepancies in hospital policy, but that this meeting never occurred. Id. at 13.

The evidence produced by RWMC falls short of establishing by a preponderance of the evidence that Ms. Arcand knowingly violated an existing and uniformly enforced hospital policy. See Foster Glocester, 854 A.2d at 1017-18 (discussing the burden of proof in unemployment benefit cases). Rather, it establishes the existence of multiple gray areas and a hospital policy that is arbitrarily and capriciously followed, which should not serve as a basis for denying unemployment benefits. See Smith, 382 N.E.2d at 202 (noting that arbitrary enforcement of employee rules may prevent a finding that an

employee was discharged for misconduct). The record does show Ms. Arcand was conscious of what she was doing, but it does not prove that she knew she was in the process of violating RWMC policy. See Still, 657 N.E.2d at 1292 (discussing the requisite proof for a knowing violation). It is clear from the evidence presented that Ms. Arcand worked in a disorganized environment that lacked clear guidelines for employees in her position and that she attempted to fulfill her duties in good faith.

Furthermore, the evidence presented by RWMC fails to establish Ms. Arcand acted in willful disregard of the hospital's interest in removing the patient's restraints by a preponderance of the evidence. The Supreme Court of Rhode Island has defined misconduct as,

> "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 a degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer." Turner, 479 A.2d at 741-42 (emphasis added).

The reliable and probative evidence of the whole record establishes that RWMC did not have a clear standard of behavior in place regarding the authority of CNAs over patient restraints. Ms. Arcand followed what she believed was the proper protocol in these situations and went so far as to request a meeting to clarify the policy discrepancies. These facts distinguish Ms. Arcand's case from the situation in Chartier, where an employee blatantly refused a direct order from his supervisor in violation of the employer's code of conduct. 673 A.2d at 1081. In this case, the evidence fails to show a deliberate violation on Ms. Arcand's part or negligence that rises to the same level of culpability.

This Court holds that the decision of the Board affirming the Referee is clearly erroneous in light or the reliable, probative, and substantial evidence, on the whole record. The employer has not met its burden of establishing employee misconduct by a preponderance of the evidence in this case. Therefore, the decision of the Board is reversed and Ms. Arcand's unemployment benefits must be reinstated.