STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Maureen A. Mangione	:	
	:	
v.	:	**A.A. No. 12 - 188**
	:	
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 10th day of May, 2013.

By Order:

/s/
Stephen C. Waluk
Acting 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. Ms. Maureen A. Mangione 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 unemployment benefits because she had been discharged for proved misconduct. Jurisdiction for appeals from decisions of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Applying the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by reliable, probative, and substantial evidence of record and was not affected by error of law; accordingly, I recommend that it be affirmed.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: For ten years Maureen A. Mangione was employed as a teacher's assistant by the Valley Community School, which served a clientele of students with behavioral problems. She was discharged on April 5, 2012. The next day she applied for employment security benefits but, on April 30, 2012, a designee of the Director of the Department of Labor and Training decided that Ms. Mangione was ineligible to receive benefits because she was terminated for proved misconduct within the meaning of Gen. Laws 1956 § 28-44-18. See Director's Exhibit No. 2.

Claimant filed an appeal and a hearing was scheduled before Referee Nancy L. Howarth on June 14, 2012 at which the Claimant and three employer representatives appeared and testified. In her July 6, 2012 Decision, Referee Howarth found the following facts on the question whether Ms. Mangione was fired for proved misconduct:

> **2. Findings Of Fact:**
> The claimant was employed as a teacher assistant in the employer's school for at risk students with behavioral problems. On March 30, 2012, she and two other staff members accompanied twelve students on a field trip to see a movie at the Lincoln Mall. The claimant and her supervisor had discussed which movie the students would see. The movie was rated PG 13. The employer's procedure provided that students were not allowed to view R rated movies. When they arrived at the theater, some of the students wanted to see a movie other than the one which had been chosen, and which had an R rating. The claimant purchased seven tickets for that movie and five for the original movie. The employer had provided money to the claimant to purchase concessions for the students. However, they were to be given to the

students. On this occasion, the claimant gave the money to the students and waited while they purchased concessions.

The claimant overheard three of the students saying that they were going to McDonald's, which was in a separate building, across the mall parking lot. In a situation where the students left a staff member's supervision, the employer's procedure provided that the staff member was to notify their supervisor and the police. The two other staff members brought seven of the students to the R rated movie. The claimant took the remaining two students to the PG 13 movie and left them, while she went to McDonald's in search of the remaining three students. The students were in the restaurant. They followed the claimant back to the theater. On the following Monday, May 2, 2012, the claimant's supervisor was reviewing the receipts from the trip. He found the McDonald's receipts. Since the visit to McDonald's was not part of the assigned activity, the supervisor questioned the staff members who had participated in the trip, as well as some of the students. The claimant admitted that she had not followed the employer's procedures, as required. The claimant was terminated as of April 5, 2012 for failure to comply with the employer's procedures.

Decision of Referee, July 6, 2012 at 1. Based on these findings, the Referee pronounced the following conclusions:

3. Conclusion:

* * *

The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant failed to follow several of the employer's procedures when supervising students on a field trip. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, July 6, 2012 at 2. Accordingly, the Referee found Claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by Ms. Mangione and the matter was considered by the Board of Review. In a decision dated August 30, 2012, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Ms. Mangione filed an appeal within the Sixth Division District Court on September 24, 2012.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; 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. (Emphasis added).

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 through a preponderance of evidence that the claimant's action, in connection with his work activities, constitutes misconduct as defined by law.

III. STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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)

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1 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).

2 Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

3 Id.

that a liberal interpretation shall be utilized in construing and applying 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.

IV. 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 Claimant properly disqualified from receiving unemployment benefits due to misconduct as provided by section 28-44-18?

V. ANALYSIS

A. Overview.

A reading of section 28-44-18 reveals that an employer may prove a former employee committed misconduct sufficient to deny benefits under one of two theories — (1) the employee engaged in deliberate conduct in willful disregard of the

employer's interest, or (2) the employee committed a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. See Gen. Laws 1956 § 28-44-18, quoted in full supra at 4-5. The former encompasses conduct which, in a criminal context, might be described as malum in se; the latter would also include conduct which would not be inherently evil. But in order to proceed under this second theory, the employer must demonstrate that the rule in question was reasonable and uniformly enforced.

With these distinctions in mind, I wish to state at the outset of my analysis, even before reviewing the circumstances of her termination, that Ms. Mangione was not fired for any conduct which could fairly be described as malevolent or even wrong-headed. Instead, she was terminated for failing to adhere to the employer's various and sundry rules of the school while supervising students participating in a recreational outing.

Of course, at the hearing conducted by Referee Howarth Claimant Mangione vigorously disputed that she violated these rules. The Board of Review (relying on the Referee's decision) resolved factual disputes in favor of the employer. Because doing so was within the province of the Board, I must recommend its decision be affirmed.

B. Summary of Testimony.

At the hearing before Referee Howarth, the employer proceeded first. It began its presentation by calling as its first and only witness Mr. William Geribo, its Program Manager, who testified that theirs was a school for a clientele with behavioral issues.

Referee Hearing Transcript, at 8. He explained that, as part of its program, they have "Friday activities" — which are made available to students based on their behavior during the week. Referee Hearing Transcript, at 8-9. On the Friday in question, Ms. Mangione, a teacher's assistant, had been selected to lead a movie outing to the Lincoln Mall for twelve students. Referee Hearing Transcript, at 9, 21.

Mr. Geribo met with Ms. Mangione privately and reviewed the particulars of the outing — the movie they were going to see, the roster of students who were going, the funding, and the time frame involved. Referee Hearing Transcript, at 9. Then, they, the two other staff members who were going (a teacher and a teacher's assistant), and the twelve students met in the cafeteria and went over the plan. Referee Hearing Transcript, at 9, 21. Next, although he did not go on the trip, Mr. Geribo told the Referee what happened at the theater. Referee Hearing Transcript, at 11 et seq.

Mr. Geribo informed the Referee that tickets were purchased for an R-rated movie, not the PG-13 movie that had been discussed. Referee Hearing Transcript, at 11. He then told the Referee that Valley's students, when on field trips, are never given cash for concessions, because, based on their histories, they tend to make poor choices — such as buying drugs or drug paraphernalia. Referee Hearing Transcript, at 11-12. But Mr. Geribo testified that the students on this field trip were given cash. Referee Hearing Transcript, at 14. While some made concession purchases, three

students stated they were going to the McDonald's located across the mall parking lot. Referee Hearing Transcript, at 15.

At this point, seven students went into the R-rated movie with the other two staff members; of the remaining five students, two then went into the PG-13 movie with Ms. Mangione, and three went missing. Referee Hearing Transcript, at 16, 24. She then left the two students alone in the theater and went to retrieve the other three students. Id. She got them and took them into the R-rated film. Id.

When they got back to the school Mr. Geribo asked Ms. Mangione and the other staff how things had gone; he was told there were no problems. Referee Hearing Transcript, at 18.

Then, on Monday morning he added up the receipts from the field trip and noticed there were McDonald's receipts. Referee Hearing Transcript, at 18. He then interviewed the staff. Referee Hearing Transcript, at 19. Mr. Geribo concluded that when the students had gone missing the proper procedures — regarding notification of the project manager (i.e., Mr. Geribo), the local police, and the student's guardians — had not been implemented. Id.[4]

On cross-examination, Mr. Geribo maintained that, with regard to field trip duties, a teacher did not out-rank a teacher's assistant. Referee Hearing Transcript, at 22. He said the three staff members in attendance were "equally responsible" for

[4] Mr. Geribo testified that "minimally" they were to notify the program manager, who "makes decisions at that point." Referee Hearing Transcript, at 28.

twelve students on the trip. Referee Hearing Transcript, at 23. He stated that, in his view, the three students (who went to McDonald's) went AWOL. Referee Hearing Transcript, at 25. Mr. Geribo told the Referee that not only Ms. Mangione but the other two staff members (both teachers) also told him the field trip went fine. Referee Hearing Transcript, at 28.

Mr. Geribo conceded that the policy requiring a staffer to notify the program manager if a student is missing is unwritten — as is the policy forbidding the students to be given money directly. Referee Hearing Transcript, at 29, 34. However, he said it was discussed at staff meetings. Referee Hearing Transcript, at 34. He found fault with Ms. Mangione's giving the students cash, even though they were in line at the theater concession stand and she took the change. Referee Hearing Transcript, at 34-37. Mr. Geribo indicated that the other staffers who went on the trip were disciplined, but he could not recall the reason therefore. Referee Hearing Transcript, at 38.

Next, Ms. Mangione testified in support of her claim for benefits. Referee Hearing Transcript, at 39 et seq. After noting she had been working for Valley Community Schools as a teacher's assistant for ten years, she told the Referee that she had been on approximately 10-15 movie field trips. Referee Hearing Transcript, at 44. She then explained what transpired on the March 30, 2012 trip. Referee Hearing Transcript, at 39 et seq.

Ms. Mangione confirmed that she met with Mr. Geribo before the trip and he provided her with money. Referee Hearing Transcript, at 41. She stated she bought

the tickets for the approved movie — "Hunger Games" — from a manager. Referee Hearing Transcript, at 42-43. Apparently, some of the tickets she purchased allowed the guest to see a second movie — "21 Jump Street." Referee Hearing Transcript, at 43. And although she denied requesting passes to this movie, she conceded she did allow a number of students to attend it. Id. She indicated the teachers present did not object to them doing so, though she could not state that they knew it was rated "R." Referee Hearing Transcript, at 44. In fact, she testified she was not aware it was rated "R." Id. She said that on other occasions the students saw a different movie than that which had been designated or had been split into two different movies. Referee Hearing Transcript, at 45.

Regarding the purchase of the items from the concession stand, Ms. Mangione said that each of the students was given $7.00; they purchased their items and she received the change and the receipt. Referee Hearing Transcript, at 45.

Then, as the group was preparing to enter the theater area, she did a headcount and realized three students were missing. Referee Hearing Transcript, at 46-7. She believed she knew were they might be, since she had heard them talking about going to McDonald's, in the context of complaining that they had not gotten lunch. Referee Hearing Transcript, at 46-7. She stated that in no way had she given them permission to go. Referee Hearing Transcript, at 47.

She got the other two students settled, told them where the teachers were, and gave them her cell phone number. Referee Hearing Transcript, at 48. Then she ran to

McDonald's and found the three students, who were getting ready to leave. Referee Hearing Transcript, at 48-9. She brought them back to the movie theater; she checked on the two students she had left, who were fine. Referee Hearing Transcript, at 49-50.

According to Ms. Mangione, she told Ms. Colabella, a teacher, what had happened. Referee Hearing Transcript, at 50. She indicated that — at the time of this field trip — she was not aware of any policy that barred her from handing students cash. Referee Hearing Transcript, at 51.

She said she was aware of a policy that required her to take certain action if the whereabouts of a student became unknown. Referee Hearing Transcript, at 53, 58. But she felt the policy did not apply — because she knew where they were. Id.

Regarding her leaving the two students in the theater, Ms. Mangione said she believed the policy only applied to students under twelve years of age; these students were sixteen. Referee Hearing Transcript, at 54. In closing, she said she was informed she was fired because she did not follow proper policies and procedures. Referee Hearing Transcript, at 55.

C. Explanation.

As I stated at the outset, Ms. Mangione was not accused of what might described as misconduct per se — behavior that is inherently wrong. She was fired, and the Board of Review found, that she failed to adhere to the school's procedures and rules. In her memorandum, Claimant correctly complains that the rules she allegedly transgressed were not in writing; but the employer properly counters that

they need not be. Claimant's Memorandum at 5-6; Employer's Memorandum at 8 n. 2. Nevertheless, it is an element of proof that the employer show that the rules which form the basis of the alleged misconduct existed and were communicated in some manner to the employees — otherwise, they cannot prove a "knowing" violation.

I find that most of the "rules" Claimant was alleged to have violated were not proven with sufficient clarity to undergird a finding of proved misconduct. Ms. Mangione gave her understanding of the rules and — to a great extent — she was not contradicted in rebuttal by Mr. Geribo. For instance, she urges that her understanding of the rule that students were never to be left alone applied to only to those 12 or younger. And, she denied there was a rule (or, at least, that she had been made was aware of) concerning handing students cash. As a result, I do not believe these allegations can form a basis for a finding of proved misconduct.

However, I believe Valley did prove that Ms. Mangione violated one of its policies — the one commanding notification of the administration if the wehereabouts of a student are unknown. Let us summarize the evidence on this point: Mr. Geribo testified that when a student goes missing a school policy, albeit an unwritten one, requires the police and other parties to be notified. Referee Hearing Transcript, at 19, 34. And Ms. Mangione acknowledged there was a rule that required the program manager to be notified if a student left the school. Referee Hearing Transcript, at 53.

Ms. Mangione's defense on this issue was that, in her estimation, the rule did not apply because she knew where the students were — McDonald's. Id. I cannot agree. Indeed, in my view, Ms. Mangione is proffering a defense which, if believed, makes her more culpable, not less.

Firstly, Ms. Mangione testified that she heard the three students indicate they wanted to go to McDonald's for lunch. Referee Hearing Transcript, at 15. But if their statements were stronger than that — for instance, if they said they were *definitely* going to McDonald's, then she was neglectful in not preventing their departure from the theater — either solely or with the assistance of her colleagues. And this would be an allegation of per se misconduct.

Conversely, if she merely had suspicions as to where they might have gone, she had a duty to inform Mr. Geribo that they had left the theater, before she ran across the parking lot to retrieve them. And Mr. Geribo's insistence on staff adhering to this rule does not seem petty or small-minded to me, but completely reasonable. Mr. Geribo implied he was very much concerned about the problems these students might cause for others in the community, and the responsibility the school would bear for any actions they took; but I believe we must also acknowledge the school's potential liability to the students, since it stands in loco parentis, for any misfortune that might have befallen one, two, or all of these students — at the hands of each other or persons unknown. Referee Hearing Transcript, at 56.

I also feel that on this allegation the defense of lack of uniform enforcement provides no safe harbor for Claimant. It was Ms. Mangione who did the headcount and realized three students were missing; it does not appear she relayed this to the two teachers who were with her until after she had returned from McDonald's. By not advising her professional colleagues of the emergency, she took sole responsibility for the outcome upon herself.

Considering the foregoing factors, I must conclude that her failure to notify Mr. Geribo that three students had left the theater without permission constituted a knowing violation of a reasonable rule and, as such, constituted proved misconduct within the meaning of section 28-44-18.

D. Conclusion.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws 1956 § 42-35-15(g), supra at 6-7 and Guarino, supra at 7, n. 1. In other words, the role of this Court is not to choose which set of testimony – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board of Review's decision, in light of the evidence of record, is clearly erroneous. Based on my review of the record, including the testimony given at the hearing before the Referee — which I have summarized above — I believe it is not.

VI. CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was 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 or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

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

/s/
Joseph P. Ippolito
MAGISTRATE

MAY 10, 2013