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

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|---|---|---|
| **Raymond Hobin** | : | |
| | : | |
| **v.** | : | **A.A. No. 11 - 0124** |
| | : | |
| **Dept. of Labor & 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, 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 18th day of October, 2011.

By Order:

/s/
Melvin Enright
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.** In this administrative appeal Mr. Raymond Hobin urges that the Department of Labor and Training Board of Review erred when it denied his request to receive employment security benefits. Jurisdiction for appeals from the Department of Labor 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. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review finding that the claimant voluntarily left his employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 is supported by reliable, probative, and 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

Claimant Hobin was employed as a part-time waiter for sixteen years by Twenty Water Street, a restaurant located in East Greenwich. His last day of work was Thanksgiving Day — November 25, 2010. He filed for Employment Security benefits but on January 7, 2011, the Director of the Department of Labor and Training found that the claimant had voluntarily left his employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 and denied the claim. The claimant filed a timely appeal and on May 18, 2011 a hearing was held before Referee Gunter A. Vukic. At the hearing the claimant and two employer representatives appeared and testified. Referee Hearing Transcript, at 1.

In his June 7, 2011 decision the referee made the following findings of fact:

> * * * The claimant was a part-time waiter working at Twenty Water Street for approximately sixteen years. The claimant was given great latitude in establishing his own work schedule. The claimant was working on the Thanksgiving Day holiday when he was approached by the owner and question (sic) regarding the carving of the turkey. The claimant abandoned his job after being approached and questioned.

Referee's Decision, at 1. Based on these findings, the Referee made the following conclusions:

> In order to show good cause for leaving his job, the claimant must show that the work had become unsuitable or that he was left with no

> reasonable alternative but to resign. The burden of proof rests solely on the claimant. Insufficient testimony and no evidence has been provided to support either of the above conditions.
>
> In the instant case, the claimant felt offended based on being approached by the owner in front of customers. More credible testimony supports that the approach was professional and not offensive to either the claimant or to the customers in the restaurant at the time. Claimant abandoned his job and left the restaurant with limited staff to address the holiday business. No good cause has been provided to support the claimant's resignation or that he had no reasonable alternative but to resign. The singular approach during a period of sixteen years of employment did not make the job unsuitable.

Referee's Decision, at 1-2. Thus, the referee determined that the claimant voluntarily left his employment without good cause within the meaning of section 28-44-17 of the Rhode Island Employment Security Act. Referee's Decision at 2. Accordingly, he affirmed the decision of the Director. Id.

The claimant filed an appeal on June 22, 2011 and the matter was reviewed by the Board of Review. The Board did not conduct an additional hearing, but instead chose to consider the evidence submitted to the Referee pursuant to Gen. Laws 1956 § 28-44-47. In its decision, dated August 19, 2011, the Board of Review affirmed the decision of the referee, finding it to be an appropriate adjudication of the facts and law applicable thereto and adopted the referee's decision as their own. See Decision Board of Review, August 19, 2011, at 1. Claimant then filed an appeal to this Court for judicial review on September 19, 2011.

## APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on voluntary leaving without good cause; R.I. Gen. Laws § 28-44-17, provides:

> **28-44-17. Voluntary leaving without good cause.** – An individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week until he or she establishes to the satisfaction of the director that he or she has subsequent to that leaving had at least eight (8) weeks of work, and in each of those 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, 'voluntarily leaving work without good cause' shall include voluntarily leaving work with an employer to accompany, join or follow his or her spouse in a new locality in connection with the retirement of his or her spouse, or failure by a temporary employee to contact the temporary help agency upon completion of the most recent work assignment to seek additional work unless good cause is shown for that failure; however, that the temporary help agency gave written notice to the individual that the individual is required to contact the temporary help agency at the completion of the most recent work assignment to seek additional work.

In the case of Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964), the Rhode Island Supreme Court noted that a liberal reading of good cause would be adopted:

> To view the statutory language as requiring an employee to establish that he terminated his employment under compulsion is to make any voluntary termination thereof work a forfeiture of his eligibility under the act. This, in our opinion, amounts to reading into the statute a provision that the legislature did not contemplate at the time of its enactment.

> In excluding from eligibility for benefit payments those who voluntarily terminate their employment without good cause, the legislature intended in the public interest to secure the fund from which the payments are made against depletion by payment of benefits to the shirker, the indolent, or the malingerer.
> However, the same public interest demands of this court an interpretation sufficiently liberal to permit the benefits of the act to be made available to employees who in good faith voluntarily leave their employment because the conditions thereof are such that continued exposure thereto would cause or aggravate nervous reactions or otherwise produce psychological trauma.

Later, in Murphy v. Fascio, 115 R.I. 33, 340 A.2d 137 (1975), the Supreme Court elaborated that:

> The Employment Security Act was intended to protect individuals from the hardships of unemployment the advent of which involves a substantial degree of compulsion.
> Murphy, 115 R.I. at 37, 340 A.2d at 139.
>
> and
>
> * * * unemployment benefits were intended to alleviate the economic insecurity arising from termination of employment the prevention of which was effectively beyond the employee's control."
> Murphy, 115 R.I. at 35, 340 A.2d at 139.

An individual who voluntarily leaves work without good cause is disqualified from receiving unemployment security benefits under the provisions of § 28-44-17. See Powell v. Department of Employment Security, 477 A.2d 93, 96 (R.I. 1984)(citing Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597 (1964)). In order to establish good cause under § 28-44-17, the claimant must show that his or her work had become unsuitable or that the choice to leave work was due to circumstances beyond his or her control. Powell, 477 A.2d at 96-97; Kane v. Women and

Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991). The question of what circumstances constitute good cause for leaving employment is a mixed question of law and fact, and "when the facts found by the board of review lead only to one reasonable conclusion, the determination of 'good cause' will be made as a matter of law." Rocky Hill School, Inc. v. State of Rhode Island Department of Employment and Training, Board of Review, 668 A.2d 1241, 1243 (R.I. 1995) (citing D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1040 (R.I. 1986)).

## STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under § 28-44-52. The standard of review which the District Court must apply is set forth under G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> The court shall not substitute its judgment for that of the agency as to 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.

The scope of judicial review by this Court is limited by § 28-44-54, which, in pertinent part, provides:

> The jurisdiction of the reviewing court shall be 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. 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. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (citing § 42-35-15(g)(5)).

Stated differently, this Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). "Rather, the court must confine itself to review of the record to determine whether "legally competent evidence" exists to support the agency decision." Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d at 363.

## ANALYSIS

In this case both parties agree that Mr. Hobin's separation from Twenty Water Street occurred after he was rebuked (or at least corrected) concerning the manner in which he had carved a turkey for guests on Thanksgiving Day.

However, the parties do not join issue on the question of whether the claimant's turkey-carving error was so egregious as to justify a termination for misconduct. Neither does the case turn on whether the manner of his correction was so humiliating as to provide claimant with good grounds to quit. No, their versions of the incident diverge at a more fundamental level: The claimant maintained he was fired; the employer's representatives stated he quit.

At the hearing held by Referee Vukic, the owner of the restaurant, Mr. C. Milton Tanner, testified. Referee Hearing Transcript, at 20 et seq. He told the Referee that he had a policy at Twenty Water Street that the turkey should be carved into thin slices. Referee Hearing Transcript, at 20. When, on Thanksgiving, he saw that Mr. Hobin was not following this policy, he spoke to him. He explained what he then did and how Mr. Hobin reacted:

> * * * So I walked over to him. I was not looking over his shoulder. I walked (inaudible) over to him to specifically mention one thing, "Ray, please carve the turkey thin." He had it cut in three slabs, the whole side of an 18-pound turkey. And he was obviously going to serve three pieces to two adults and one child. I didn't raise my voice at all. I didn't get angry at all. I was not angry at him at all. I was just simply quietly telling him how to carve the turkey properly. I was surprised that he didn't know, but he did not know how to carve a turkey, had no knowledge of it, doing what he was doing. He immediately — he didn't put down the knife and fork. He threw them into the turkey, turned around to me, and said, "I quit." I was absolutely spellbound. I couldn't understand why — why, what had caused this. I knew that Ray had a flaring temper at times but there was no reason for it, none. I then followed him into where he kept his coat, which was about 15 feet away, and pleaded with him to stay. I said, "Ray, there is no reason for you to leave here, none whatsoever. I was simply correcting you." But he was so angry, he was talking, and I couldn't understand what he was saying. He simply grabbed his

> coat and walked out. There was no mention of hiring, firing, or anything else. I didn't want him to go home. * * *

Referee Hearing Transcript, at 20-21. Thus, Mr. Tanner testified that, after being corrected regarding the manner in which he was carving a turkey, Mr. Hobin quit — he was not fired. He denied he gave instructions to his daughter that Ray was to be fired. Referee Hearing Transcript, at 26.

During her testimony received earlier in the hearing, Mr. Tanner's daughter, Kristin L. McCabe, the President of the restaurant, indicated that on the day after Thanksgiving Mr. Hobin came in and gave her his keys to the restaurant — unsolicited. Referee Hearing Transcript, at 16-17. She denied firing him. Referee Hearing Transcript, at 19.

To be sure, Mr. Hobin's testimony was completely at odds with the employers' — he stated that he did not quit but was fired.

Mr. Hobin testified that when he was rebuked by Mr. Tanner he put down the knife and fork and said — "Here, you cut it." Referee Hearing Transcript, at 9. He went into the back room and said — "Don't you ever, ever talk to me again, or anybody here, in front of customers like that." Id. Then, as it was 3:30 p.m., he went home. Id. The next day, he went in and Kristin said — "My father doesn't want you here anymore." Id.

It is clear that that the positions of the parties stand in stark opposition to each other. In denying benefits to claimant, the referee (and by inference the Board of Review) clearly credited the employer's version of events.

Having found that Mr. Hobin quit, the Board also found that he did so without good cause. This finding is certainly consistent with prior decisions rendered by this Court. See Ward v. Department of Employment & Training, Board of Review, A.A. No. 96-51 (Dist.Ct. 9/4/96)(DeRobbio, C.J.)(Denial of benefits affirmed where claimant walked off job after work-product was criticized); Spalt v. Department of Employment & Training, Board of Review, A.A. No. 96-30 (Dist.Ct. 8/9/96)(DeRobbio, C.J.)(Denial of benefits affirmed where claimant quit after disparaging remark was received from manager); Brown v. Department of Employment & Training, Board of Review, A.A. No. 94-295 (Dist.Ct. 6/9/95)(DeRobbio, C.J.)(Denial of benefits affirmed where claimant quit when after receiving a reprimand for incomplete work performance). These cases have taken the view that criticism — at least generally, within bounds of decency — is not a circumstance that would justify one to become unemployed forthwith, without a new position in hand.

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, including the question of which witnesses to believe.[1] Stated differently, the findings of the agency will be

[1] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

upheld even though a reasonable mind might have reached a contrary result.[2] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated his employment at Twenty Water Street without good cause within the meaning of section 17 is supported by the evidence of record and must be affirmed.

## CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to deny claimant Employment Security benefits under § 28-44-17 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g)(5)(6). On findings of fact and as to the weight of the evidence, this Court shall not substitute its judgment for that of the administrative agency. Substantial rights of the claimant have not been prejudiced. Accordingly, I recommend that the decision of the Board be affirmed.

/s/
Joseph P. Ippolito
Magistrate

October 18, 2011

[2] Cahoone, supra n. 1, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 6.