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

Cheryl Baker	:	
	:	
v.	:	**A.A. No. 11 - 0142**
	:	
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 REVERSED and REMANDED for further proceedings as described in the attached opinion.

Entered as an Order of this Court at Providence on this 23rd day of December, 2011.

By Order:

____/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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

Cheryl Baker	:	
	:	
v.	:	**A.A. No. 11-0142**
	:	
Department of Labor & Training,	:	
Board of Review	:	

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 Ms. Cheryl Baker urges that the Department of Labor and Training Board of Review erred when it denied her 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 pursuant to 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 — which held that the claimant voluntarily left her employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 — is not supported by substantial evidence of record and was

affected by error of law; I therefore recommend that the decision of the Board of Review be reversed.

FACTS & TRAVEL OF THE CASE

Claimant Baker was employed for about one year by a dental practice as an office worker. Her last day of work was April 5, 2011. She filed for Employment Security benefits but on April 26, 2011, the Director of the Department of Labor and Training found that the claimant had voluntarily left her 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 June 13, 2011 a hearing was held before Referee Carol Gibson. At the hearing the claimant and two employer representatives appeared and testified. Referee Hearing Transcript, June 13, 2011, at 1.

In her June 28, 2011 decision the referee made the following findings of fact:

> 2. FINDINGS OF FACT
>
> The claimant had worked for the employer for a year as an office worker through April 5, 2011. The claimant was a full-time employee working from 8:00 a.m. to 5:00 p.m. The claimant has two children ages twelve and sixteen. On February 16, 2011, the claimant's children were both arrested. At the time, the claimant also determined there were issues occurring in school and after school hours. The claimant requested time off from the employer and subsequently returned to work on February 28, 2011. When the claimant returned to work, the employer temporarily allowed her to work from 8:00 a.m. to 2:00 p.m. so she could leave to supervise her children after school. The employer informed the claimant that he could not permanently accommodate the part-time hours unless he could find another employee to work on a part-time basis for the afternoon hours. If the employer could not find an employee to work those hours, he would need to hire a full-time employee to replace the claimant. The claimant worked part-time from February 28, 2011 through March 21, 2011 and she was not able to make other arrangements for her children after school hours. The employer was

> not able to hire an employee to work part-time in the afternoon hours and he hired an employee to work full-time to replace the claimant. The claimant trained the new employee and worked until April 5, 2011. The employer states the claimant is considered to have voluntarily left her job when she was no longer able to work full-time hours required of the position.

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

> ***
> In order to show good cause for leaving a job, the claimant must show that the work had become unsuitable or that she was faced with no reasonable alternative but to resign. The burden of proof rests solely with the claimant. In this case, the claimant has not sustained this burden. Based on the credible testimony presented in the case, the claimant left her job because she was no longer able to work full-time hours due to issues with her children. The claimant's testimony has not established that she took all steps necessary to secure other arrangements for her children for her afternoon work hours. Her leaving under those circumstances is considered to be without good cause as she did not take all steps necessary in order to protect her employment. Based on these conclusions, it is determined the claimant left her job without good cause within the meaning of the above Section of the Act and is not entitled to benefits.

Referee's Decision, at 2. Thus, the referee determined that the Claimant voluntarily left her 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, she affirmed the decision of Director. Id.

The claimant filed a timely appeal on June 30, 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 September 16, 2011, a majority of 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, September 16, 2011, at 1. The Member Representing Labor dissented. Id., at 2. Claimant then filed a timely appeal to this Court for judicial review.

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:
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> (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 a majority of the members of the Board decided that claimant had left her job without good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act. This finding implies two subordinate determinations: (1) that the claimant quit, and (2) that she did so without good cause. After a thorough review of the record, I conclude neither determination is supported by the record; instead, I believe the record is

clear that Ms. Baker was fired because she could only work part-time due to child-care responsibilities. Referee Hearing Transcript, at 11.[1]

In concluding that Ms. Baker quit her position, the Referee certainly could rely on a certain statement her employer, Dr. Harnick, made at the hearing before the Referee —

> … On April 5th, she said to me, um, she's all set, and I'm leaving. So that was inaccurate. I did not tell her to leave on April 5th. She left on her own accord.[2]

Referee Hearing Transcript, at 20. (Footnote added). Read out of context, this statement would seem to indicate that Ms. Baker was not fired. However, other portions of the employer's testimony gainsay such a conclusion. Earlier in the doctor's testimony, he indicated that on the day he learned of Ms. Baker's family troubles, he told her she could work part-time for a while, but he would advertise for full or part-time help. Referee Hearing Transcript, at 18-19. And if he could get part-time help to pick up her hours, she could stay; but, if he could only get full-time help, he wouldn't be able to keep her. Referee Hearing Transcript, at 19. Unfortunately, the qualified person he found only wanted full-time work. Id.

The doctor then explained that Ms. Baker agreed to train her replacement. Id. During the week of March 28, 2011, the doctor agreed to one more week. Referee Hearing Transcript, at 19-20. On Tuesday of that next week, the doctor testified — as quoted above

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[1] Ms. Baker's issues with her sons' behavior were described in the record; they may fairly be described as grave. However, in the interests of her children's privacy they shall not be described here.

[2] The comment "she's all set" clearly referred to the fact that her replacement had been sufficiently trained.

— that claimant told him the new person was ready. Referee Hearing Transcript, at 20. So, placed in context, it appears that claimant left early, by three days. But, in all of the doctor's testimony, there was no suggestion Ms. Baker was not being replaced. [3] Indeed, he concluded on this issue by stating — "If she told me she could continue full-time, I would have kept her on." Referee Hearing Transcript, at 20. This final statement clearly shows that it was the doctor and not Ms. Baker who decided their employment relationship would end. Of course, this makes common sense — Ms. Baker was not all dissatisfied with the part-time role she was then serving — the employer was.

We note that there is no indication of any misconduct on Ms. Baker's part that would disqualify her under § 28-44-18. She was unable to work full-time due to child-care responsibilities, which is not misconduct.

Assuming arguendo that Ms. Baker did quit, we shall now briefly consider whether she did so with good cause. Child-care responsibilities have long been held to generally constitute good cause to quit. E.g. Flowers v. Department of Employment Security Board of Review, A.A. No. 83-292 (Dist.Ct. 4/29/88) (Wiley, J.). I believe there are no special circumstances here which would take this case out of the general rule.[4] I therefore conclude that — if claimant quit — she did so for good cause within the meaning of section 17.

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[3] Of course, if the claimant had resigned in the face of an imminent termination she would not be considered a voluntary quit and a § 28-44-18 (Misconduct) analysis would still need to be undertaken. Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991).

[4] For instance, the Referee suggests that claimant's failure to exhaust alternatives to termination undercut her assertion that she left with good cause. That is indeed a principle

For these reasons I believe the referee's decision must be set aside. She is not disqualified under section 17 (Leaving Without Good Cause) or section 18 (Misconduct). She should receive benefits if otherwise eligible.[5] Accordingly, I shall recommend that Ms. Baker's case be remanded to the Board so that her eligibility may be further considered.

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that has been invoked when the worker quits — on the theory that the claimant acted precipitously and unnecessarily severed ties of employment. See Costa v. Department of Employment and Training Board of Review, A.A. No. 94-249 (Dist.Ct. 8/23/95)(Higgins, J.). However, this rule has much less applicability when the employer initiates the separation. In any event, it appears the employer would not have accommodated such a request. Referee Hearing Transcript, at 21. Moreover, claimant's testimony that she tried to obtain after-school supervision for her sons is unchallenged and uncontradicted on this record. See Referee Hearing Transcript, at 13-15.

[5] I agree with the Member Representing Labor that the underlying issue in this case is her Availability For Work under Gen. Laws 1956 § 28-44-12. I further commend to the Board's further consideration his thoughtful suggestion that the matter may be expeditiously and fairly resolved by a Board finding that the employer's account should not be charged in this matter.

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 "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" 42-35-15(g)(3)(4).

Accordingly, I recommend that the decision of the Board be REVERSED and REMANDED for further proceedings consistent with this opinion.

/s/
Joseph P. Ippolito
Magistrate

December 23, 2011