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

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| **Dave Hanscom** | : | |
| | : | |
| **v.** | : | **A.A. No. 11 - 187** |
| | : | |
| **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 on the issues of disqualification and repayment.

Entered as an Order of this Honorable Court at Providence on this 28th day of February,2012.

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 case Mr. Dave Hanscom urges that the Board of Review of the Department of Labor & Training erred when it held that Mr. Hanscom was not entitled to receive employment security benefits. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the decision issued by the Board of Review denying benefits to Mr. Hanscom is supported by the facts of the case and the applicable law and should be affirmed; accordingly, I so recommend.

## FACTS & TRAVEL OF THE CASE

Mr. Dave Hanscom worked for Stack Design as a carpenter until January 26, 2011. He applied for unemployment benefits but the Director deemed him ineligible because he resigned without good cause within the meaning of Gen. Laws 1956 § 28-

44-17. Claimant appealed from this decision and Referee Carol Gibson held a hearing on the matter. Mr. Hanscom appeared telephonically; the employer's representative, Mr. Andrew Keating, appeared in person. In her decision, issued on September 14, 2011, the Referee made the following Findings of Fact regarding claimant's termination:

> **2. FINDINGS OF FACT:**
> The claimant had worked for the employer for six months as a carpenter through January 26, 2011. On January 27, 2011 the claimant was informed that he was temporarily laid off for a few days due to inclement weather. The employer states that after a few days they attempted to contact the claimant by phone and e-mail for continued employment. The claimant did not initially respond to the employer. On February 3, 2011 the claimant sent the employer an e-mail outlining concerns he had with his employment. The claimant was requesting that the employer guarantee him forty hours of work per week and he also mentioned issues with his supervisor. In the e-mail, the claimant states that he was being forced to go home to Ohio. The employer had no further contact from the claimant beyond this e-mail. The employer states that they were not able to address the issues or concerns that were raised as the claimant did not contact them for work. The employer considers the claimant to have voluntarily left the job when he failed to respond to their contacts for continued employment.

Referee's Decision, September 14, 2011, at page 1. Based on these findings the Referee formed the following conclusion on the issue of claimant's separation:

> **3. CONCLUSION:**
> * * *
> In order to establish that he had good cause for leaving his job the claimant must show the work had become unsuitable or that he was faced with a situation which left him with no reasonable alternative but to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant. In this case the claimant has not sustained this burden. The record is void of sufficient evidence to indicate that either of these situations existed. The claimant left his

> job when he failed to contact the employer for continued employment. It is determined that the claimant's leaving under these circumstances is without good cause under the above Section of the act. Accordingly, benefits must be denied on this issue.

Referee's Decision, September 14, 2011, at page 2. Thus, Referee Gibson found claimant to be disqualified from receiving benefits because he failed to contact his employer to receive instructions as to further employment.

Claimant filed an appeal and the matter was reviewed on its merits by the Board of Review. On November 23, 2011, the Board of Review unanimously issued a decision which found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision of the Referee was affirmed. Finally, on December 23, 2011, the claimant filed a complaint for judicial review in the Sixth Division District Court.

## APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on voluntary leaving without good cause; Gen. Laws 1956 § 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.

## 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

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

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, supra page 3, 98 R.I. at 200, 200 A.2d at 597 (1964) 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.

## 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

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

[3] Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Bd. of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

whether or not it was clearly erroneous or affected by error of law. More precisely, was claimant properly disqualified from receiving unemployment benefits because he abandoned his position without good cause pursuant to section 28-44-17?

**ANALYSIS**

As stated above, the Board found that claimant failed to appear for work and that by doing so he quit his position as a matter of law. The legal principle which implicitly supports this finding, *i.e.,* that not appearing for work constitutes a quitting, has been previously invoked by the Board and recognized by this Court. See Jencks v. Department of Employment & Training Board of Review, A.A. 90-342, (Dist.Ct. 6/17/91)(DeRobbio, C.J.). With this principle in mind, we shall now contrast the two positions presented to the Referee.

Briefly, claimant denied he quit and denied he failed to appear for work. In his testimony he explained that on the morning of January 27, 2011 he received a call from "Saul Estrada"[4] indicating that the project he was then working on — i.e., framing an exterior addition in Westford, Massachusetts — was closed because of a snow storm. Referee Hearing Transcript, at 8-9. He said he was told he would be contacted by e-mail when the job reopened. Referee Hearing Transcript, at 9. However, he claimed he never heard from Mr. Estrada again. Id. Mr. Hanscom

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[4] Claimant identified Mr. Estrada as the "Project Superintendent." Referee Hearing Transcript, at 9. I have spelled the gentleman's name "Estrada" because that how it was spelled in a company e-mail. In the transcript his name is spelled "Astrada."

related that when the job was previously closed due to weather conditions, he had received an e-mail when the job reopened. Referee Hearing Transcript, at 10.

It is at this point his testimony became, from the written record, disjointed and confusing.

He testified that on Thursday, January 27, 2011 he was told by Saul to leave the work site immediately. Referee Hearing Transcript, at 12. When the Referee demurred that this statement would appear to conflict with his prior testimony that work had been cancelled, Mr. Hanscom explained that he had slept in his trailer at the work site. Referee Hearing Transcript, at 13.

Mr. Hanscom acknowledged he received an e-mail on February 3, 2011, but not a prior e-mail. Referee Hearing Transcript, at 15. Later in his testimony, he acknowledged he received a February 1, 2011 e-mail from Saul, asking him to call, and believes he sent an e-mail in response. Referee Hearing Transcript, at 21.

Mr. Hanscom freely conceded that he responded to Stack that he would not come to Rhode Island unless he was guaranteed 40 hours of work per week. Referee Hearing Transcript, at 17. He also conditioned his return on the amelioration of a "hostile work environment" created by Saul. Id. Otherwise, he would return to Ohio. Referee Hearing Transcript, at 19.[5]

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[5] Claimant testified he did in fact return to Ohio, his place of residence, during the first week of February, after which he returned to New Hampshire. Referee Hearing Transcript, at 20.

Mr. Hanscom testified that "a couple of weeks after" the 27th he received a termination e-mail from Andrew Keating, which indicated he was being fired because the employer was unable to reach him on the Stack phone and another phone number. Referee Hearing Transcript, at 11.[6]

In response, the employer's representative, Mr.Keating indicated that Mr. Hanscom was a full-time employee subject to weather conditions. Referee Hearing Transcript, at 26. In this regard, he testified that the job was never closed for more than a few days. Referee Hearing Transcript, at 27. Mr. Keating testified that after Mr. Hanscom's last day of work, he was contacted for further work on numerous occasions by both his direct managers and by Mr. Keating himself. Referee Hearing Transcript, at 28. He explained that these efforts to contact claimant were the basis of Mr. Estrada's e-mail, in which he asked Mr. Hanscom — "Do you ever plan on calling me?" Referee Hearing Transcript, at 28. Mr. Keating testified that Mr. Hanscom never called him looking for work. Referee Hearing Transcript, at 31.

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[6] In the record is an exhibit marked Director's # 1 which is a forwarded copy of Mr. Keating's e-mail to Mr. Hanscom. It reads in its entirety:

> "I have just tried to reach you on both your Stack phone and the other phone number we have for you. Saul has attempted to contact you numerous times and has requested via email that you contact him. While we would prefer to have a verbal communication regarding this, this electronic communication is your formal notification of termination from your employment at Stack Design Build.
>
> Your phone can be left at the front desk at the Stack office, and your check picked up any time between 9am and 5pm tomorrow."

Mr. Keating acknowledged that Mr. Hanscom had made him aware of his issues with Mr. Estrada. Referee Hearing Transcript, at 29-30.

In sum, Mr. Keating testified that the only reason Mr. Hanscom was no longer working at Stack Design was "because he refused to contact us to discuss these issues." Referee Hearing Transcript, at 31. He testified that work was available to him. Referee Hearing Transcript, at 30-31.

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.

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.[7] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[8] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily

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

8 Cahoone, supra n. 4, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra p. 5 and Guarino, supra p. 5, fn.1.

terminated his employment at Stack Design without good cause within the meaning of section 17 is supported by the evidence of record and must be affirmed.

## REPAYMENT

Finally, claimant was ordered to repay over $8,858.00 by the Director. In affirming this order, the Referee found claimant to have been at fault for this overpayment because he misreported the circumstances of his departure from Stack Design. In her decision, issued on September 14, 2011, the Referee made the following Findings of Fact regarding claimant's overpayment:

> **2. FINDINGS OF FACT:**
>
> The claim for benefits was filed indicating the claimant was laid off due to lack of work. As a result of that representation, the claimant received the benefits totaling $8,858.00.

Referee's Decision, September 14, 2011, at 1. Based on these findings the Referee arrived at the following conclusion on the issue of claimant repayment:

> **3. CONCLUSION:**
>
> * * *
> The claimant filed his claim for Employment Security Benefits without disclosing he had voluntarily left his job. Based on the claimant's failure to disclose information regarding his separation from employment he received Employment Security Benefits during a period of disqualification. The claimant is at fault for the overpayment and subject to make restitution.

Referee's Decision, September 14, 2011, at 3. Accordingly, the Referee found claimant both overpaid and at fault for the overpayment.

In so finding, the Referee applied Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.
> * * *
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery would not defeat the purposes of the Act.

However, in this case the nature of the misrepresentation is evident on the record. Claimant admitted he told the Department he was laid off for lack of work. Referee Hearing Transcript, at 24. He also admitted he did not inform the Department of the contents of the communication from Mr. Keating. Referee Hearing Transcript, at 25. Clearly, whether he agreed with Mr. Keating's statement — i.e., that he was considered to have abandoned his position — or not, he had a duty to convey the employer's position to the Department.

Accordingly, I believe the order of repayment is not clearly erroneous.

## 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, the instant decision was 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 be AFFIRMED on the issue of claimant's disqualification and AFFIRMED on the issue of repayment.

/s/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 28, 2012