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

Jeanine Vigeant	:	
	:	
v.	:	**A.A. No. 11 - 084**
	:	
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, 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 13th day of October, 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

Jeanine Vigeant	:	
	:	
v.	:	**A.A. No. 11 - 085**
	:	
Department of Labor and Training,	:	
Board of Review	:	

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STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
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Jeanine Vigeant	:	
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	:	
Department of Labor & Training,	:	
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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 Jeanine Vigeant urges that the Department of Labor and Training Board of Review erred when — in two decisions —it (1) found her ineligible to receive employment security benefits because she quit a position without good cause and (2) found she failed to report wages she had earned while collecting 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 finding that the claimant voluntarily left her employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 is supported by substantial evidence of record and was not affected by error of law; I find the second decision — that she failed to properly report wages — was also supported by the evidence of record. I therefore recommend that both decisions of the Board of Review be affirmed.

FACTS & TRAVEL OF THE CASE

Claimant Vigeant was self-employed as a pedorthist for approximately eight years. On December 2, 2008, she sold her business to Independence, LLC. She started a new business and operated it for about one year, when the business closed. Then, in July of 2009, she accepted a position with Independence, LLC, which lasted until February of 2010, when she was laid off.

Thereafter, claimant began a commission-only relationship with Regal Medical Supply. But after claimant had been working for about six weeks, Independence LLC discovered her activities with Regal. Claimant then ended her relationship with Regal.

Administrative Action By the Director

She applied for benefits but on December 16, 2010 the Director of the Department of Labor and Training issued two decisions: (1) in the first, the Director found that the claimant had voluntarily left her employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 and denied her claim for benefits;

(2) in the second, the Director found that the claimant had failed to report wages as required by Gen. Laws 1956 § 28-44-13. The claimant filed timely appeals in both cases and on April 27, 2010 hearings were held, seriatim, before Referee Gunter A. Vukic.

Adjudications By the Referee

At the hearing the claimant alone appeared and testified. Referee Hearing Transcript, April 27, 2010 at 1. The Referee issued separate decisions on each issue.

Unemployment Appeal No. 20106538
(Leaving Without Good Cause)

In his May 26, 2011 decision the referee made the following findings of fact on the issue of whether claimant left her employment without good cause:

> I find by a preponderance of credible testimony and evidence the following findings of fact: The claimant is an experienced Pedorthist who operated her own business for approximately eight years. December 2, 2008, the claimant sold her business to Independence LLC. The business was largely comprised of a client list. Claimant opened a new business and operated it for approximately one year. The business closed and she filed bankruptcy. July 2009, claimant accepted salaried employment with Independence LLC. She was laid off February 2010.
> The claimant contacted Regal Medical Supply and entered into an arrangement for commission paid work. The claimant no longer had the ability to bill Medicare or third parties for foot care services. The claimant contacted her previous clients, in violated of the non-compete clause, from the list she sold to Independence LLC. Regal Medical was to do the billing and pay her a commission. The claimant worked approximately six weeks until Independence LLC discovered the claimant activity. The claimant ended her relationship with the subject employer. The claimant did not notify the Department of Labor & Training regarding her commissioned employment nor did she provide the commission earnings.

* * *

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

> * * * In order to show good cause for leaving her job, the claimant must show that the work had become unsuitable or that she was faced with such a situation that left her no reasonable alternative but to resign. The burden of proof rests solely on the claimant.
>
> In the instant case, the claimant entered into a questionable employment relationship after she contacted the subject employer and offered to provide a client list that she sold to Independence LLC. Despite of the fact that the claimant could no longer use her former client list, there is no clear evidence of job unsuitability. Claimant had the reasonable alternative of continuing with her commission relationship and developing a new client base, investigate other opportunities with the subject employer, and/or find new employment before she quit.
>
> Therefore, I find and determine that the claimant left her job for personal reasons and benefits are denied.

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, he affirmed the decision of Director. Id.

Unemployment Appeal No. 20106539
(Failure to Report Wages)

In his May 26, 2011 decision the referee made the following findings of fact on the issue of whether claimant failed to report wages:

> I find by a preponderance of credible testimony and evidence the following findings of fact:

> The claimant had been receiving Employment Security benefits since filing in February 2010. The claimant entered into a commission only employment relationship with the subject employer. The claimant failed to report the new employment or the commissions earned during a period of benefit collection. The result was an overpayment of benefits for the four identified weeks. The claimant does not dispute her failure to report the wages and the receipt of full benefits during the period identified.

Referee's Decision, at 1. Based on these findings, and after quoting from section 28-44-13, Referee Vukic made the following conclusions:

> ***
> Section 28-44-13 of the Rhode Island Employment Security Act requires reporting of earnings to the Department of Labor & Training in order to calculate benefits under application.
> The claimant does not dispute her failure to report the commission earnings.

Referee's Decision, at 2.

Board of Review Actions

The claimant filed timely appeals on May 31, 2011 and the matters were 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 decisions, dated July 7, 2011, the Board of Review affirmed the decisions of the referee, finding them to be appropriate adjudications of the facts and law applicable thereto and adopted the referee's decisions as their own. See Decision Board of Review, July 7, 2011, at 1. Claimant then filed two timely appeals to this court for judicial review on July 18, 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 Gen. Laws 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

Unemployment Appeal No. 20106538 — A.A. No. 2011-0085

In this case, the Board adopted as its own the Referee's determination that claimant left her job without good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act. I believe this finding is supported by substantial evidence. It is uncontested that claimant quit her job. The only question is whether she did so with good cause.

According to claimant, she did not "quit" — she was no longer working at Regal because she "… couldn't make any money … ." Referee Hearing Transcript (Unemployment Appeal No. 20106538), at 6. Nevertheless, claimant admitted she "resigned" because she could no longer use the client list because Independence, LLC had found out. Referee Hearing Transcript (Unemployment Appeal No. 20106538), at 9.

She had to quit because her actions had become untenable — she was using a client list she had sold previously and since she perceived her illegal (i.e., contrary to contractual, not criminal, law) activities were being discovered, she had to desist. In sum, the job had not become unsuitable, just the manner in which she operated. In my view, her reasons for quitting did not constitute good cause within the meaning of section 17. These circumstances were not beyond her control; she created them.

In a separate decision, the Board adopted the Referee's finding that claimant failed to report her wages and that she admitted she had done so. This finding is clearly supported by the record. Referee Hearing Transcript (Unemployment Appeal No. 20106539), at 10. Claimant's exact words were — "* * * I didn't realize that commission was wages considered wages; * * *." Id. (sic). It is simply undeniable that claimant misled the Department in this regard.

REPAYMENT

Finally, in each case, the claimant was ordered by the Director to repay certain benefits she received.

In Appeal No. 20106539/A.A. No. 2011-0084, she was ordered to repay $2,284.00 in benefits that would not have been received by her — because her benefits would have been reduced — had she notified DLT of the commissions she had been earning. The referee found claimant at fault for this overpayment because they were caused by her failure to report her earnings accurately. Decision of Referee (App. No. 20106539), at 2.

In Appeal No. 20106538/A.A. No. 2011-0085, she was ordered to repay an additional $11,245 — which constituted all benefits she received after she quit the position at Regal Medical. The Referee found claimant to have been at fault for these

overpayments because she omitted to report her relationship with Regal. Decision of Referee (App. No. 20106538), at 3.

In so finding, the referee correctly 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. Clearly, the case at bar is an instance where recoupment is well-justified in fact and law, based on claimant's admitted omissions.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decisions to deny claimant employment security benefits under § 28-44-17 of the Rhode Island Employment Security Act [Appeal No. 20106538 — A.A. No. 2011-0085] was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" Gen. Laws § 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." Gen. Laws § 42-35-15(g)(5)(6).

I also find the decision of the Board finding Ms. Vigeant failed to notify the Department of her commission earnings as required by § 28-44-13 of the General Laws [Appeal No. 20106539 — A.A. No. 2011-0084] is also not clearly erroneous; and neither is it arbitrary or capricious.

Accordingly, I recommend that the decisions of the Board rendered in these cases be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

October 13, 2011