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

Robert Michaud	:	
	:	
v.	:	**A.A. No. 11 - 096**
	:	
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 26th day of September, 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. This matter is before the Court on the complaint of Mr. Robert Michaud seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor & Training, which held that Mr. Michaud 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 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. For the reasons stated below, I conclude that the instant matter should be affirmed; I so recommend.

FACTS & TRAVEL OF THE CASE

The facts and travel of this case are not in dispute and may be stated briefly: Mr. Robert Michaud was employed as a painter by Electric Boat for three years until August 21, 2010. He filed a claim for unemployment benefits but on January 4, 2011 the Director of the Department of Labor & Training, through a designee, decided claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-17 (Leaving Without Good Cause). Claimant filed a timely appeal and on April 27, 2011 Referee Carl Capozza held a hearing regarding Mr. Michaud's claim. At this hearing Mr. Michaud appeared and testified. On May 12, 2011 the referee issued a decision in which he made the following findings of fact:

> 2. FINDINGS OF FACT
>
> Claimant had been employed as a painter for approximately three years until his last day of work August 21, 2010. Prior to his shift on that date claimant was arrested by the North Kingstown Police Department concerning an existing bench warrant and a domestic incident. He was then presented in District Court at which time he was held and confined until December 1, 2010, when he was released. He then contacted his employer and was advised that since he had been absent for more than five consecutive days it was determined that he had abandoned his position and further advised that he could re-apply for employment following one year from his separation.

Referee's Decision, May 12, 2011, at 1. Based on these brief findings the referee made the following conclusions on the issue of the claimant's eligibility:

> The issue in this case is whether or not the claimant left work voluntarily with good cause within the meaning of Section 28-44-17 of

the Rhode Island Employment Security Act.

> The credible testimony and evidence indicates that the claimant was incarcerated as a result of an existing bench warrant on charges concerning a domestic dispute. Because of his incarceration claimant was unavailable for work for several months until December 1, 2010 when he was released. In the meantime the employer without contact from the claimant determined that he had abandoned his position when he failed to report for work for more than five days following his last day of work. It has long been established that individuals who cannot report to their shifts due to incarceration are determined to have voluntarily left their job without good cause. Based on these conclusions it is determined that claimant voluntarily left her (sic) job without good cause within the meaning of the above Section of the Act and not entitled to benefits.

Referee's Decision, May 12, 2011, at 1. Accordingly, Referee Capozza found claimant disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-17.

Claimant filed an appeal and the matter was considered by the Board of Review. On July 1, 2011, the Board of Review 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.

Thereafter, the claimant filed a complaint for judicial review in the Sixth Division District Court. This matter has been referred to me for the making of Findings and Recommendations pursuant to section 8-8-8.1 of the General Laws.

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 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 pertinent standard of review is provided by Gen. Laws 1956 § 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]

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.

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

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Bd. of Review, Dept of Emp. Security, 517 A.2d 1039, 1041 (R.I. 1986).

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 because he was absent from work without good cause pursuant to section 28-44-17?

ANALYSIS

At the hearing before the Referee, claimant Michaud testified as to the circumstances of his incarceration. Referee Hearing Transcript, at 4-12, passim. He also explained that after he was released he went to Electric Boat and was told he was terminated. Referee Hearing Transcript, at 12.

Based on these facts, the Board of Review (by adopting the decision of the Referee as its own) found claimant quit his position without good cause within the meaning of section 28-44-17. Of course, he didn't quit in the common meaning of the term; he was absent not because he wanted to be, but because he was incarcerated. And since there is no factual dispute in this case the question which must be addressed in this case is a simple legal one — Is an extended absence due to incarceration a constructive job abandonment? For the reasons that follow I believe the answer is yes.

The District Court has long held that an employee who is discharged because he is unable to report to work due to incarceration is said to have left without good cause. See e.g. Calise & Sons Bakery v. Department of Employment Security, Board of Review, A.A. No. 89-51, (Dist.Ct. 10/2/1989)(Pirraglia, J.) and Joseph O'Grady v. Department of Employment & Training, Board of Review, A.A. No. 93-177 (Dist.Ct. 2/16/1994) (DeRobbio, C.J.). In O'Grady Chief Judge DeRobbio addressed the question of whether one who is incarcerated may be deemed to have quit his position without good cause within the meaning of section 17:

> On the issue of voluntary leaving without good cause, the record is clear that the claimant voluntarily quit his job when he was unable to report to work for the period of his incarceration. Not only did his own conduct cause him to leave his job, he also removed himself from the labor market by being incarcerated. An individual who, by his own actions, causes himself to be incarcerated cannot be considered [to have quit for] good cause.
> O'Grady, supra, slip op. at pages 7-8.

In considering this question it is appropriate to invoke the standard for good cause to quit established in Murphy v. Fascio — that unemployment benefits were designed for those out of work due to circumstances beyond the worker's control. Murphy, supra, at page 4. Mr. Michaud was out of work because he was charged with a violation of a court order and was incarcerated for almost three months. This cannot be said to be 'good cause' within the meaning of section 17.

Moreover, it certainly cannot be expected that the employer should hold a job open for that period under these circumstances. Thus, applying these principles and precedents, I conclude, consistent with District Court precedent, that Mr. Michaud must be viewed as having abandoned his job; he is thus disqualified from receiving benefits by section 28-44-17.

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.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated his employment without good cause within the meaning of section 17 is supported by the evidence of record and must be affirmed.

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

[5] Cahoone, supra n. 4, 246 A.2d at p. 215 (1968). See also D'Ambra v. Bd. 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.

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. *R.I. General Laws § 42-35-15(g)(3),(4).* Further, it was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. *R.I. General Laws § 42-35-15(g)(5),(6).*

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

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 26, 2011