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

Sandra Alves	:	
	:	
v.	:	**A.A. No. 6AA - 2012 - 00017**
	:	
Department of Labor & Training,	:	
Board of Review	:	

ORDER

This matter is before the Court pursuant to § 8-8-16.2 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 claimant's motion to remand for purposes of presenting additional evidence is denied, and 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 14th day of August, 2012.

By order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Montalbano, M. In this administrative appeal Ms. Sandra Alves urges that the Department of Labor and Training, Board of Review erred when it denied her request to receive employment security benefits because she quit a position without good cause. 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 § 8-8-16.2. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review 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 therefore recommend that the decision of the Board of Review be affirmed. For reasons

explained herein, I am also recommending that the claimant's motion to remand for purposes of presenting additional evidence be denied.

FACTS & TRAVEL OF THE CASE

Sandra Alves (hereinafter referred to as "the claimant") was employed by The Miriam Hospital (hereinafter referred to as "employer") from May 03, 2010 until April 27, 2011 as a Clinical Research Assistant. On April 27, 2011, the claimant met with her supervisor, who informed the claimant that due to her erratic behavior on the job she was not to return to work until the employer's in-house health services department cleared her return. Referee Hearing Transcript, at 36-37. Employer's in-house health services department then referred the claimant to another agency, RIEAS, which is an independent agency that evaluates and monitors employees' health issues. Referee Hearing Transcript, at 38-39. RIEAS informed the employer that the claimant would be out for two weeks. Referee Hearing Transcript, at 65. A representative of RIEAS advised the employee to apply for Family Medical Leave ("FML"); however, the claimant was ineligible for FML due to the short length of her employment. Referee Hearing Transcript, at 67. The claimant was not in communication with her employer during this two-week period.

Following the two-week period, the claimant failed to appear for work, and the employer tried to contact the claimant to no avail. Referee Hearing Transcript, at 60-61. The claimant's supervisor and a human resources specialist called the claimant, left her multiple voicemails, and sent her a letter. Referee Hearing

Transcript, at 60-61; Employee's Exhibit A. The letter stated that the claimant needed to contact the employer by May 20, 2011 otherwise she would be terminated. Employee's Exhibit A. On May 19, 2011, the employer finally reached the claimant and explained the situation to her. The claimant stated that she needed more time off without elaborating. Referee Hearing Transcript, at 70. On May 23, 2011 the employer sent the claimant a letter stating that the claimant was considered to have voluntarily left her job as of that date because she had remained out of work on an unauthorized leave and had not contacted the employer. Employee's Exhibit B.

On June 24, 2011 the claimant filed a claim for unemployment benefits, but the Director determined that the claimant had voluntarily left her job without good cause under the provisions of § 28-44-17 of the Rhode Island Employment Security Act. The claimant filed an appeal of the Director's decision and on October 03, 2011 Referee Nancy L. Howarth held a hearing on the claimant's appeal. The claimant, her counsel, and a representative for The Miriam Hospital were present at the hearing. On October 27, 2011 Referee Howarth determined that the claimant had voluntarily left her job without good cause and thus was ineligible for unemployment benefits. Decision of Referee, October 27, 2011 at 2.

On November 08, 2011, the claimant filed a timely appeal with the Board of Review (hereinafter the "Board"). The Board issued a decision on December 15, 2011 affirming Referee Howarth's decision and adopting it as their own. In adopting Referee Howarth's decision, the Board determined that the claimant was

disqualified from receiving unemployment benefits because the claimant had voluntarily left her employment without good cause. Decision of Board Review, at 1.

Thereafter, on January 13, 2012, the claimant filed a timely statement of appeal to the District Court. Subsequently, on June 13, 2012, the claimant also submitted a motion pursuant to R.I. Gen. Laws § 42-35-15(e) for leave to present additional evidence (her cell phone records), which she had failed to present in the previous hearings due to monetary issues. This matter has been referred to me for the making of findings and recommendations pursuant to R.I. Gen. Laws § 8-8-16.2.

APPLICABLE LAW

A. The Additional Evidence Issue

The claimant has filed a motion to remand under § 42-35-15(e), which provides as follows:

42-35-15(e)

> If, before the date set for the hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

B. The Voluntary Quit Issue

This case also 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.**
>
> (a) For benefit years beginning prior to July 1, 2012, an individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week in which the voluntary quit occurred and 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. * * *
> (b) 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; provided, 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, 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 R.I. Gen. Laws § 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:

> * * *
> (g) 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 Empoyment 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.

ISSUE

A. The Additional Evidence Issue

The first issue before the Court is whether the claimant's additional evidence is of such importance that the case should be remanded to the Board of Review for a rehearing.

B. The Voluntary Quit Issue

The second 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 the claimant disqualified from receiving unemployment benefits because she left work without good cause pursuant to section 28-44-17?

ANALYSIS

A. The Additional Evidence Issue

In order for the motion for leave to present new evidence to be granted, the claimant would have to show that (1) the new evidence is material; and (2) there was a good reason for why the evidence was not presented at the previous hearings. This Court is of the opinion that the additional evidence is not material, and therefore, the motion must be denied.

In order for the additional evidence to be material, it would have to be of such magnitude that it likely would have impacted the outcome of the case had the evidence been available to the Referee or the Board. The additional evidence is not material because it merely strengthens a set of facts that the Referee and the Board had already determined; namely, that the employer had talked to the claimant just before May 20, 2011. Employee's Exhibit A. The outcome would have still likely been the same even if the new evidence had been available to the Referee and the Board; therefore, the new evidence is not material.

Because the new evidence was not material, there is no need to go into an analysis of whether or not the claimant showed a good reason for why she did not present the evidence at the hearing. Both elements are necessary in order for a remand to be granted, so if just one element is missing—as is the case here—then the motion for leave to present additional evidence must be denied.

B. The Voluntary Quit Issue

In this case, the Board determined that the claimant voluntarily left her job without good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act. I believe the evidence supports this finding.

The Board found that the claimant voluntarily quit her job rather than being terminated, and this Court is inclined to agree. This Court has recognized on numerous occasions that an employer has a right to expect that its employees will maintain communication when on leave or on Temporary Disability Insurance ("TDI"). See Sanchez v. Department of Labor and training, Board of Review, A.A. No. 05-80, (Dist. Ct. 1/24/06) (finding that an employee on medical leave had voluntarily quit following her failure to submit leave requests and failure to respond to the employer's inquiries); Fierlit v. Department of Employment and Training Board of Review, A.A. No. 93-162, (Dist. Ct. 2/3/94) (finding that employee on TDI voluntarily quit following her failure to comply with company policy to check in with employer every two weeks).

On April 27, 2011, the employer explained to the claimant that a physician's note was needed for the claimant to go on an extended medical leave.

Referee Hearing Transcript, at 57-59. The claimant produced a physician's note for a two-week medical leave on or about May 03, 2011, meaning that the claimant was aware of her employer's policy regarding medical leave. Referee Hearing Transcript, at 65. Subsequent to those two weeks, however, the claimant failed to present any new documents to the employer or to respond to the employer's inquiries regarding her return. Referee Hearing Transcript, at 60-61, 69. The employer was left with no choice but to mail a letter to the claimant stating that if the claimant did not update the employer with her status by May 20, 2011 that she would be considered to have abandoned her employment. Employee's Exhibit A. On May 19, 2011, the employer finally reached the claimant and expressly informed the claimant of her situation, to which the claimant replied that she was not ready to return to work without further explanation. Referee Hearing Transcript, at 70. The employer made its policy clear to the claimant, and the claimant was cognizant of that policy; therefore, the claimant's failure to comply with the policy should be considered a voluntary quit rather than a termination.

The claimant has failed to show good cause for why she voluntarily quit because she has failed to show that her job had become unsuitable or that she had no reasonable alternative but to terminate her employment. The claimant does not claim that she was under any form of duress at her job, nor does she claim that her ADHD made performing her employment duties unbearably difficult or impossible. See Referee Hearing Transcript, at 38-89, 55-56. Furthermore, the

claimant had a reasonable alternative available to her other than terminating her employment: She could have remained in contact with her employer to extend her medical leave. The claimant has presented evidence (Exhibit C) in support of her argument that her employer knew that her leave was to be extended beyond two weeks. Employee's Exhibit C. However, the evidence is not clear that (1) it complied with the employer's policy regarding extended medical leave; (2) that the employer ever saw the note; and (3) that the claimant ever made the effort to confirm that the employer signed off on the note.

Unemployment benefits were designed for those out of work due to circumstances beyond their control. The simple truth is that the claimant had full control over her situation from beginning to end yet failed to comply with her employer's policy. In addition, the claimant, as the moving party, bears the burden of proof in this scenario and has failed to present evidence demonstrating that she terminated her employment with good cause or that she had no reasonable alternative but to terminate her employment.

CONCLUSION

Upon careful review of the evidence, this Court finds that the Board's decision to deny the claimant unemployment 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" Gen. Laws § 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion." Gen. Laws

§ 42-35-15(g)(5)(6). The Court further finds that the additional evidence cited in the motion to remand is not material.

Accordingly, I recommend that the motion to remand be denied and the decision of the Board be AFFIRMED.

___/s/_____
Joseph A. Montalbano
Magistrate

August 14, 2012