STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, SC **DISTRICT COURT**
SIXTH DIVISION

Maria A. Cintron	:	
	:	
v.	:	**A.A. No. 12 - 195**
	:	
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 deci sion of the Board of Review is AFFIRMED and the matter remanded to the Board of Review for referral to the Director of the Department of Labor and Training so that he may calculate the amount of benefits to be repaid after the application of the benefit offset described in the attached opinion. Finally, Ms. Cintron shall not be required to repay any benefits received on or before July 30, 2011. Entered as an Order of this Court at Providence on this 28th day of February, 2013.

By Order:

/s/
Stephen C. Waluk
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 Ms. Maria Cintron seeking judicial review of two final decisions rendered by the respondent Board of Review of the Department of Labor and Training, each of which held that Ms. Cintron was not entitled to receive employment security benefits. Jurisdiction for appeals from the decision of the Department of Employment and Training 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. Employing the standard of review applicable to administrative appeals, I find that the decisions rendered by the Board of Review on the issue of eligibility are 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 on the fundamental issue of disqualification. I shall, however, recommend that the decisions be modified on two subsidiary issues — as I shall explain at length below.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Maria Cintron worked for Specialty Personnel from October of 2009 until March 22, 2011 — her last day of work. March 22, 2011 was also the last day she worked for Cedar Crest Nursing Home, where she had been employed for just one week (undergoing orientation). On March 23, 2011, she filed a claim for partial unemployment benefits. When, on April 8, 2011, Claimant picked up her pay for her week at Cedar Crest she tendered a medical note keeping her out of work for 10 days. She never returned to

work at Cedar Crest or at Specialty Personnel. She began to receive benefits on April 9, 2011 and continued to receive them for many months.

Then, on July 31, 2012, the Director issued a decision finding that she had left the employ of Cedar Crest without good cause, within the meaning of Gen. Laws 1956 § 28-44-17.[1] A week later, on August 6, 2102, the Director issued a second decision, in which he found that Ms. Cintron had left the employ of Specialty Personnel without good cause, within the meaning of Gen. Laws 1956 § 28-44-17.[2] In the second decision Claimant was ordered to repay $15,124.00.

Claimant appealed from these decisions and on August 30, 2012 Referee Gunter A. Vukic conducted hearings on these matters. A representative of Cedar Crest appeared at its hearing — held first; but Specialty Personnel was not represented at the second hearing. Ms. Cintron appeared at both hearings.

The Referee issued two decisions, finding in each that Ms. Cintron

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[1] See Director's Exhibit D2A. The Cedar Crest Decision was assigned number 1227721 at the Departmental level and enumerated 20124076 by the Board of Review.

[2] See Director's Exhibit D2A. The Specialty Personnel decision was assigned number 1234118 at the Departmental level and enumerated 20124077 by the Board of Review.

had separated from both employers without good cause. Accordingly, Referee Vukic found Claimant to be disqualified from receiving benefits pursuant to section 28-44-17. Claimant filed an appeal and the matter was reviewed by the Board of Review. On September 25, 2012, the Board of Review issued two decisions which found that the decisions of the Referee were a proper adjudication of the facts and the law applicable thereto. Accordingly, the decisions rendered by the Referee were affirmed. Thereafter, on October 9, 2012, the Claimant filed a complaint for judicial review in the Sixth Division District Court.

II. 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.

And in Powell v. Department of Employment Security, Board of Review, 477 A.2d 93, 96-97 (R.I. 1984), the Court clarified that "… the key to this analysis is whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control." See also Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (2000).

III. STANDARD OF REVIEW

The 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.' "[3] The Court will not substitute its judgment for that of the Board as to the weight of the

[3] 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).

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]

The Supreme Court of Rhode Island recognized in Harraka, supra, 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.

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

[5] 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).

IV. 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 she left work without good cause pursuant to section 28-44-17? Additionally, was Claimant properly ordered to repay the benefits she had received?

V. ANALYSIS

The Board of Review, relying on the Referee's decisions, found Claimant quit her positions at Cedar Crest and Specialty Personnel without good cause within the meaning of section 28-44-17. For the reasons I shall now state, I believe his ultimate determination that Claimant was subject to a section 17 disqualification is not clearly erroneous or based on error of law. However, before concluding, I shall discuss one area where I believe the decision must be amended. I must therefore recommend that it be affirmed, with a certain adjustment.

A. The Disqualification Issue.

When first confronted, the Claimant's circumstances appear totally convoluted; but after review and further contemplation, the situation is revealed to be fairly straightforward. Quite simply, the record provides sufficient evidence that Ms. Cintron left her part-time position at Specialty Personnel voluntarily. Likewise, the record support the Referee's finding that she left Cedar Crest voluntarily as well. The only real issue to be considered is whether she did so for good cause. I believe the Board's decision that Claimant failed to prove she quit for good cause is not clearly erroneous. Accordingly, I shall recommend that the Board's decision finding her disqualified pursuant to Gen. Laws 1956 § 28-44-17 be affirmed.

Let us review the record — beginning with her separation from Cedar Crest.

Claimant testified that she worked at Cedar Crest for one week as a per diem CNA. Referee Hearing Transcript, (No. 20124077) at 7. During that week, she went through a five-day orientation. Id., at 13. She indicated that "[T]hey stated that I could be working so many hours one

week and I could be working none the following week." Referee Hearing Transcript, (No. 20124077) at 8.

When asked to explain the reasons why she failed to continue at Cedar Crest, she explained that her hours weren't guaranteed, she "had to look for work elsewhere." Id., at 9. She said Cedar Crest called her once for a third shift position, but she could not accept it, due to child care responsibilities. Id., at 11, 13. She denied she ever quit Cedar Crest. Id., at 11. And after two months, she found full-time work at a firm known as "First Student." Id., at 9-10.

Finally, she indicated she did not recall how she responded to the telephone inquiry (known as Teleserve) when she filed for benefits. Referee Hearing Transcript, (No. 20124077) at 13-15.

Mr. Richard Catallozzi, Jr., Cedar Crest's Assistant Administrator, indicated that Claimant had submitted a doctor's note saying she was unable to work and that Cedar Crest never heard back from her. Referee Hearing Transcript, (No. 20124077) at 16. He confirmed that Ms. Cintron was listed as a per diem employee by Cedar Crest. Id., at 17.

Let us now review the record of the hearing regarding Specialty Personnel —

Claimant explained that she started at Specialty on a part-time basis, then increased to full-time, and then lowered back to part-time — as she put it, less than 10 hours (inaudible) between 2 and 4." Referee Hearing Transcript, (No. 20124076) at 7. She said she called everyday for one week and got no hours. Id., at 9. Thereafter, she filed for benefits, because what they offered her on the schedule was limited. Id, at 10.

From this record the Referee (and, secondarily, the Board of Review) could properly find that Claimant abandoned her positions at Cedar Crest and Specialty Personnel. And, although the Referee did not attribute a motive to her actions, the record is clear that she did so because, in her view, these relationships were not lucrative enough to justify her commitment to them. But certainly, Ms. Cintron had a duty to maintain these relationships and garner what salary she could, prior to moving to a more favorable position. Accordingly, I must agree with Referee Vukic that Claimant did not demonstrate good cause for quitting her part-time positions.

But I believe this conclusion gives rise to a further question which the Referee and the Board did not address: What is the effect of this finding? Does it trigger a full or partial disqualification? Applying

longstanding precedents of this Court, I believe the answer to this question must be the latter.

B. The Offset Issue.

As stated above, on July 31, 2012 and August 6, 2012, the Director, based on the finding of leaving without good cause, determined Claimant Cintron to be disqualified from receiving unemployment benefits; in the ruling she was specifically told — "… This disqualification will end when you have at least (8) weeks of covered employment after week ending 03/26/11 and in each of those eight weeks, you have earnings equal to or greater than $148.00." Decisions of Director, Exhibit D2, at 1. This language is repeated, almost verbatim, in the decision of Referee Vukic — "Benefits are denied for the week ending March 26, 2011, and until she has had at least (8) weeks of work and in each of said weeks has earned an amount equal to or in excess of $148.00." See Decisions of Referee, August 30, 2012, at 3. Based on this phraseology being used, it appears that these decisions ruled claimant to be *entirely, not partially,* disqualified from receiving benefits.

And so, we must inquire: Is this total bar to the receipt of benefits correct? I believe not. For the reasons that follow, I conclude that a

claimant who loses a full-time job, who then works part-time for a period, and who then quit the part-time position without good cause should not generally be completely disqualified from receiving benefits. Doing so would be contrary to the manner in which part-time earnings are treated in analogous circumstances.

First, the Rhode Island Employment Security Act provides that a claimant who is laid-off from a full-time position who is working part-time may collect benefits, subject to an offset based on the worker's part-time earnings. See Gen. Laws 1956 § 28-44-7. Secondly, this Court has long held that a worker who is laid-off from a full-time position who then quits a part-time position (without good cause) may nonetheless collect benefits — subject to an offset for that income voluntarily forgone. See Craine v. Department of Employment and Training, Board of Review, A.A. No. 91-25, (Dist.Ct.6/12/91) (DeRobbio, C.J.)(Claimant lost a full-time job, then took leave from a part-time job; *Held,* partial benefits would be awarded pursuant to § 28-44-7). The rule of Craine provides that although the claimant has left his part-time position in circumstances which would have, if viewed in isolation, triggered a disqualification under section 28-44-17 [Leaving Without Good Cause], he is not fully disqualified.

After applying the foregoing statutes and precedents, I have concluded Ms. Cintron's situation falls within the ambit of this Court's holding in Craine. I therefore believe fairness requires that the offset-rule should be made fully applicable to her. Therefore, she must be allowed benefits offset by the amount of weekly wages she gave up by leaving Cedar Crest and Specialty Personnel. These amounts shall be calculated by the Director based on the record of this case and such further investigation as he may deem appropriate.

C. Repayment of Benefits Received.

1. Repayment Pursuant to Gen. Laws 1956 § 28-42-68.

Finally, Claimant was ordered to repay many thousands of dollars by the Director,[6] pursuant to 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

[6] In Department's No. 1234118 the Director ordered repayment of $15,124.00..

> 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. In my view "fault" implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one's duty to do what is right.[7] To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless. With this in mind, let us focus on the facts and

[7] In the Webster's Third New International Dictionary (2002) at 839 the first definition of fault applicable to human conduct defines "fault" as "3: A failure to do what is right. a: a moral transgression." This view is longstanding. As Noah Webster stated in the first edition of his American Dictionary of the English Language (1828), "Fault implies wrong, and often some degree of criminality."

circumstances of the overpayment in the instant case. When reviewing the Director's order, the Referee found that:

> * * *
> The fault for the overpayment lies with the claimant who failed to report the Cedar Crest employment and earnings as well as her job abandonment from to (sic) employers. It is further noted that the medical note provided by the claimant shows her to be medically disabled during the weeks ending April 9 and 16, 2012, weeks during which she responded she was able and available, fully seeking full-time employment. The claimant is subject to make restitution in the instant case.

Referee's Decision (No. 1234118/No. 20124076), August 30, 2012, at 3. So, the Referee found fault based on Claimant's inability to prove an active search for work.

The facts found by the Referee support a conclusion that Claimant did not reveal she had she had separated from her employers. In my opinion the Claimant's failure to be frank with the Department of Labor and Training does indeed support a finding of fault. Ms. Cintron did not deny that she told the Department she was able to work during the weeks of April 9th and April 16th when, at the very same time she submitted a doctor's note to Cedar Crest indicating she was unable to work. I therefore recommend that the Decisions of the Board of Review requiring repayment of funds she received be set aside.

2. Adjustment Pursuant to Gen. Laws 1956 § 28-44-39.

Before concluding, I must consider the effect of one more section of the Employment Security Act — Gen. Laws 1956 § 28-44-39. It is this section which authorizes the Director to reconsider prior decisions he has made regarding a claimant's eligibility for benefits or the amount of benefits to be received. It is pursuant to the authority of section 28-44-39 that the Director issued his July 31, 2012 and August 6, 2012 decisions, which were the first step in the current controversy. However, section 28-44-39 places a specific time limitation on the Director's authority to reconsider decisions:

> * * * The director may at any time within one year from the date of determination either upon the request of the claimant or on his or her own motion reconsider that determination if he or she finds that an error in computation or in identity has occurred in connection with it, or that additional wages pertinent to the status of the claimant has become available, or if that determination was made as a result of a non-disclosure or misrepresentation of a material fact. * * * (Emphasis added).

Gen. Laws 1956 § 28-44-39(a)(1)(i). Thus, the Director's ability to revise prior decisions is confined to a one year period.

The application of this statute to the instant case may be simply done. When he rendered his first decision, on July 31, 2012, the Director

could not revise any determination of Ms. Cintron's eligibility that had been made prior to July 31, 2011. Therefore, all benefits received prior to the week ending July 30, 2011 must be regarded as settled and unaffected by the Director's decisions.[8] Her eligibility for benefits during the period from April through July 2011 is, as a matter of law, reinstated. She may not, therefore, be ordered to repay unemployment benefits received during this period.

VI. CONCLUSION

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.[9] Stated differently, the findings of the agency will be

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[8] By setting aside the finding of disqualification for all periods prior to July 30, 2011 the Court is, in effect, treating the receipt of each week's benefits as a separate determination. I believe this practice is equitable to both the Department and its clientele.

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

upheld even though a reasonable mind might have reached a contrary result.[10]

Applying this standard, I recommend that this Court find that the decisions of the Board of Review were not affected by error of law. Gen. Laws 1956 § 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. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Specifically, the Board of Review's decision (adopting the findings and conclusions of the Referee) that claimant voluntarily terminated her employment at Cedar Crest and Specialty Personnel without good cause within the meaning of section 17 are well-supported by the evidence of record. However, applying the tenets of section 28-44-7 and the applicable District Court precedents, I find that Claimant is disqualified only to the extent of the wages voluntarily forgone by her when she abandoned her part-time positions at Specialty Personnel and the Cedar Crest Nursing Home — which shall be treated as an offset to benefits received by her. Finally, the Claimant shall not be ordered to repay any benefits received

[10] Cahoone, supra at 7, n. 5, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), supra at 6-7 and Guarino, supra at 7, fn.4.

on or before the week ending July 30, 2011 since the Director was without authority to revise his eligibility determinations for those weeks.

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review on the issue of Claimant's eligibility was not affected by error of law. Gen. Laws 1956 § 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. Gen. Laws 1956 § 42-35-15(g)(5),(6).

/S/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 28, 2013