STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Mark D. Semenuk	:	
	:	
v.	:	**A.A. No. 13 - 056**
	:	
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 21ST day of May, 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. In this case Mr. Mark D. Semenuk urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive employment security benefits because he quit his prior position without good cause. 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 decision rendered by the Board of Review on the issue of eligibility is supported by the reliable, probative, and 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.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Mark D. Semenuk worked for United Water Environmental for thirty months; his last day of work was June 15, 2012. He filed for unemployment benefits on October 31, 2012 but on November 29, 2012 a designee of the Director issued a decision finding that he had left United Water's employ without good cause within the meaning of Gen. Laws 1956 § 28-44-17.

Claimant appealed from this decision and on January 14, 2013 Referee Gunter A. Vukic conducted a hearing on the matter. Mr. Semenuk, who appeared telephonically, was the only witness. In his decision issued the same date, Referee Vukic made the following findings of fact:

> Claimant was on an approved vacation/leave following his last day of work and through July 18, 2012. Saturday, June 16, the claimant flew to Arizona and returned by air Monday, June 18. While out of state he was told by his attorney that he had a court appearance Tuesday, June 19. Claimant was sentence by Massachusetts judge to serve six months. In lieu of jail the claimant entered a six-month rehabilitation

program.

During his unapproved absence he was separated for job abandonment.

Referee's Decision, January 14, 2013, at 1. Based on these findings, Referee Vukic made the following conclusions:

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.

In order to show good cause for leaving employment, the claimant must show that the work had become suitable or that the claimant was left with no reasonable alternative but to resign. The burden of proof rests solely upon the claimant. Insufficient testimony and no evidence has been provided to support either of the above conclusions.

Claimant had reasonable alternatives available to him rather than allow his approved vacation/leave to expire without notification to his employer. Only after being notified that a letter of separation was mailed to his home did the claimant contact the employer through a third-party. Claimant's separation had occurred and no credible information was given to the employer at the time of contact. Mid-August, the claimant mailed the employer a letter indicating the reason for his abandonment. The claimant's unapproved absence was due to activities under his control.

Therefore, I find and determined that the claimant left his job without good cause and benefits are denied.

Referee's Decision, January 14, 2013, at 1-2. 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

February 28, 2013, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision rendered by the Referee was affirmed. Thereafter, on March 28, 2013, 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 (R.I. 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.' "[1] The Court will not substitute its judgment for that of the 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, 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

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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

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

> 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.

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 he left work without good cause pursuant to section 28-44-17?

V. ANALYSIS

The Board of Review, relying on the Referee's decision, found Claimant quit his position at United Water Environmental without good cause within the meaning of section 28-44-17. For the reasons I shall now state, I believe its determination that Claimant was subject to a section 17 disqualification is not clearly erroneous in light of the reliable, probative, and substantial evidence of record.

A.

Let us review the facts of record. After his last day of work — on June 15, 2013 — Mr. Semenuk was scheduled to begin approved leave through July 18,

2012. Referee Hearing Transcript, at 6. On Saturday, June 16, 2012, he flew out to Arizona to visit with his sister, who was ill. Referee Hearing Transcript, at 7. However, he had to cut short his visit because he was notified to be in Court in Massachusetts on Tuesday, on a charge of driving on a suspended license. Id. In lieu of a six-month prison sentence, he was ordered to attend an alcohol rehabilitation program in Springfield, to which he was transported directly from the courthouse. Referee Hearing Transcript, at 8-9. He was released on October 30th. Referee Hearing Transcript, at 8.

Mr. Semenuk testified that his girlfriend notified his employer of his whereabouts in the second or third week of July. Referee Hearing Transcript, at 10.

B.

Of course, there is no allegation that Mr. Semenuk formally quit his position at United Water Environmental. To the contrary, he was disqualified under what has been alternatively termed a constructive quit or a de facto quit or job abandonment. And this theory does not hinge on Mr. Semenuk's failure to notify his employer that he could not be at work for the next few months, but on the fact

that he had — because of his own actions — made himself unavailable to work due to his court-ordered residence at an alcohol treatment facility.

Indeed, this Court has recognized that incarceration will give rise to a section 17 disqualification on several occasions. See O'Grady v. Department of Employment and Training, Board of Review, A.A. No. 93-177 (Dist. Ct. 2/16/1994)(DeRobbio, C.J.)(Inability to work due to incarceration for B & E held not termination for good cause); Calise & Sons Bakery, Inc. v. Department of Employment and Training, Board of Review, A.A. No. 89-51 (Dist.Ct. 10/2/1989).

Accordingly, the Referee's finding (adopted by the Board of Review) that Mr. Semenuk constructively quit his position by conduct that caused him to be ordered to attend an alcohol rehabilitation program is in harmony with the applicable law. As such, he was not left unemployed due to "circumstances effectively beyond his control." Powell, supra. To the contrary, he became unemployed completely because of his own actions. Thus, the Board's finding that he left United Water Environmental without good cause within the meaning of section 28-44-17 is not clearly erroneous in view of the reliable, probative, and substantial facts of record.

VI. CONCLUSION

I therefore 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
MAY 21, 2013