STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Janelle C. Clarke	:	
	:	
v.	:	**A.A. No. 14 - 153**
	:	
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 and the memoranda of counsel, 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 hereby REMANDED for further proceedings as directed in the attached opinion.

Entered as an Order of this Court at Providence on this 16th day of July, 2015.

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 Ms. Janelle Clarke urges that the Board of Review of the Department of Labor and Training erred when it held her to be disqualified from receiving unemployment benefits because she left her position at the Providence School Department without good cause, as provided in Gen. Laws 1956 § 28-44-17. Jurisdiction for appeals from decisions of the Department of Labor 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 Board of Review erred in the procedure it utilized in deciding the matter. I therefore recommend that the case be REMANDED to the Board of Review for further proceedings.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Janelle Clarke was employed for roughly eight years as a school principal by the Providence School Department. But Ms. Clarke's role within the School Department was not fixed. First, in February of 2013, she was transferred from a high school to a middle school, as a principal and with no change in grade or diminution in pay. Then, as the 2013-2014 school-year drew near its end, she received notice that her position would also change. It was this latter process, which began rather uneventfully, which led to her ultimate separation from the Department.

Mr. Craig S. Bickley, Senior Executive Director of Human Resources for the School Superintendent sent Ms. Clarke a letter, on April 21, 2014, informing her that the School Department would recommend, at the School Board meeting on April 28, 2014, that her current contract not be renewed.[1] In

[1] See Department's Exhibit No. 1F.

this letter she was told that she had the right to have her performance discussed in open session. However, Mr. Bickley sent Claimant a second letter on April 28, 2014, which informed her that the Department would also recommend that she be offered a new contract reflecting the position in which she was now serving — i.e., that of a middle-school principal.[2] Having received both these letters, Ms. Clarke did not respond; nor did she appear at the School Board meeting on the 28th.

Then, on April 29, 2014, the President of the School Board, Mr. Keith Oliveira, mailed Ms. Clarke (by U.S. Mail and Certified Mail) a notice advising her that the Board had indeed voted not to renew her current contract, which would expire at the end of the school-year; however, in its place they would be offering her a new contract consistent with her then-current role. She was also informed that she had a right to a prompt hearing.[3]

Finally, by letter dated May 9, 2014 — and which was stamped received by the School Department on May 15, 2014 — Ms. Clarke resigned.[4]

Ms. Clarke's last day of work was June 27, 2014. She filed a claim for unemployment benefits on July 1, 2014 and, in a decision dated July 25, 2014, a

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[2] See Department's Exhibit No. 1E.

[3] See Department's Exhibit No. 1P.

designee of the Director of the Department of Labor and Training found her to have been discharged for non-disqualifying reasons; she was thus deemed eligible for unemployment benefits. See Decision of Director, July 25, 2014. The School Department appealed and a hearing was conducted by Referee Gunter A. Vukic on August 28, 2014.

Present at the hearing conducted by Referee Vukic were Ms. Clarke and the employer's representative, Mr. Charles Ruggerio, who appeared with counsel.[5] The next day, Referee Vukic issued a decision reversing the Director's award of benefits to Claimant, based on a finding that she quit without good cause as defined in § 28-44-17.[6] Referee Vukic arrived at this decision by making findings of fact consistent with the foregoing narrative, which led him to make the following conclusions:

> * * *
> In order to show good cause for leaving employment, the claimant must show that the work had become unsuitable or that she was left with no reasonable alternative but to resign. The burden of proof rests solely with the claimant. Insufficient testimony and no evidence have been provided to support either of the above conditions.
>
> Considering the claimant testimony that she never received the

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4 See Department's Exhibit No. 1G.

5 See Referee Hearing Transcript, at 1.

6 See Decision of Referee, August 29, 2014, passim.

> April 29, 2014 notice of a new position to be offered the first determination to be made is whether the claimant was terminated.
>
> Two letters were sent on April 21, 2014 according to normal protocol. The first letter clearly stated the employer's intention to provide a new contract as a principal. Claimant was aware of school district changes taking place for the new school year. The bureaucratic process did not confirm termination it simply indicated steps had been taken to align the provisions of a new contract with the claimant's current position. Claimant had administrative remedies available to her had she chosen to pursue them, including but limited to attending the School Board meeting and making an appeal. Claimant made no effort to retain employment and chose to accept notice of superintendent recommendations, in part, as an intention to discharge. Claimant is a professional with 15 years of employment with the subject employer and could have questioned any conflict found in the two April 21, 2014 letters regarding her status, even in the absence of receiving the April 29, 2014 letter. In advance of the current school year contract expiring and receiving a new contract the claimant resigned.
>
> Therefore, I find and determine that the claimant left her job without good cause.[7]

In sum, Referee Vukic reversed the Director's finding that Claimant was fired in the absence of misconduct and found that Ms. Clarke quit voluntarily without good cause. Accordingly, he reversed the Director's decision granting benefits to Ms. Clarke.[8]

Claimant filed a timely appeal and, on October 6, 2014, the Board

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[7] See Decision of Referee, August 29, 2014, at 2.

[8] See Decision of Referee, August 29, 2014, at 2-3.

conducted a further hearing into the matter. The Board indicated that — since it was in possession of the transcript of the proceedings before the Referee — it would not be necessary for the parties to repeat their earlier testimony.[9] And so, only brief additional, though significant, testimony was taken.

In any event, on October 15, 2014, the matter was decided by the Board of Review on the basis of the administrative record certified to it and the evidence it received.[10] A majority of the members of the Board affirmed the decision of Referee Vukic, finding it to be a proper adjudication of the facts and the law applicable thereto; moreover, the Board adopted the Referee's decision as its own.[11]

On October 30, 2014, Ms. Clarke filed a complaint for judicial review in the Sixth Division District Court. Thereafter, a conference was conducted by the undersigned with counsel for the Claimant, the Employer, and the Board of Review, at the conclusion of which a briefing schedule was set. I should like to acknowledge that learned and helpful memoranda have been received from the Appellant-Claimant and the Appellee-School Department.

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[9] See Board of Review Hearing Transcript, at 3.

[10] This procedure is authorized by Gen. Laws 1956 § 28-44-47.

[11] See Decision of Board of Review, August 15, 2014, at 1.

II

APPLICABLE LAW

A

Leaving For Good Cause — The Statute

The issue in this case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on those claimants who have left prior positions voluntarily; Gen. Laws 1956 § 28-44-17, provides:

> **28-44-17. Voluntary leaving without good cause.** – (a) … For benefits years beginning on or after July 1, 2012, and prior to July 6, 2014, 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 greater than, or equal to, his or her benefit rate 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 with good cause' shall include:
>
> (1) Sexual harassment against members of either sex;
>
> (2) Voluntarily leaving work with an employer to accompany, join, or follow his or her spouse to a place, due to a change in location of the spouse's employment, from which it is impractical for such individual to commute; and
>
> (3) The need to take care for a member of the individual's immediate family due to illness or disability ….
>
> (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.

As we can see, eligibility for unemployment benefits under § 17 has three conditions — first, that the claimant left her prior employment; second, that her resignation was voluntary; and third, that the claimant left the position for good cause as defined in § 17 (which is § 17's most frequently litigated element).

B

Leaving Voluntarily For Good Cause — The Element of "Good Cause"

In the case of Harraka v. Board of Review of Department of Employment Security (1964)[12], 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.

[12] 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964).

> 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 (1975),[13] 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.[14]

And the Murphy Court added:

> * * * 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."[15]

And finally, in Powell v. Department of Employment Security, Board of Review (R.I. 1984),[16] the Court clarified that "… the key to this analysis is

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13 115 R.I. 33, 340 A.2d 137 (1975).

14 Murphy, 115 R.I. at 37, 340 A.2d at 139.

15 Murphy, 115 R.I. at 35, 340 A.2d at 139.

16 477 A.2d 93 (R.I. 1984).

whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control."[17]

C

Leaving Voluntarily For Good Cause — "Voluntariness"

First off, we must state that this element is not redundant to the element of the leaving (i.e., the resignation). Our Supreme Court has interpreted § 17, in Kane v. Women and Infants Hospital of Rhode Island (1991),[18] in a manner that gives individual effect[19] to the word "voluntarily," declaring that —

> To recover under § 28-44-17, an employee must leave for both good cause and voluntarily."[20]

This means (however anomalous or inconsistent it may seem) that a finding that a worker resigned from a position is not legally incompatible with a finding that the worker did so involuntarily.[21] As it happens, the circumstances in Kane

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17 477 A.2d at 96-97. Also, Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (R.I. 2000).

18 Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991).

19 This result was consistent with the precept of statutory interpretation that "the court will give effect to every word, clause, or sentence, whenever possible." State v. Bryant, 670 A.2d 776, 779 (R.I. 1996).

20 Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991)(Emphasis in original).

21 Kane, 592 A.2d at 139-40.

are highly reminiscent of the scenario presented in the instant case.

In Kane, the Court considered the unemployment-benefit claim of a hospital employee who, when facing discharge for misconduct, took an early retirement.[22] The Court did not have to decide whether Ms. Kane quit for reasons constituting good cause under § 17, often a thorny question, because the statute dictated such a finding — by declaring quitting pursuant to a retirement plan to be good cause per se.[23] And so, with the good cause issue resolved, the Court was free to focus its attention on the element of voluntariness — which it had never grappled with previously.[24]

The Court began by stating the majority rule thusly —

> … Most jurisdictions hold that if an employee resigns because of a reasonable belief that he or she is about to be discharged for job performance, then the resignation is not voluntary. See Matter of Werner, 44 N.C. App. 723, 725-29, 263 S.E.2d 4, 6-7 (1980)(an employee who resigns at his employer's request because the employer is no longer "pleased" with his job performance did not resign voluntarily); Norman Ashton Klinger Associates v. Unemployment Compensation Board of Review, 127 Pa. Commw. 293, 295-98, 561 A.2d 841, 842-43 (1989)(an employee who resigns upon being told he would be discharged, not for willful misconduct, did not resign voluntarily). These cases examine the voluntariness of the resignation according to

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22 Kane, 592 A.2d at 138.

23 For the language of this provision as it then existed, see Kane, 592 A.2d at 138. Section 17 no longer contains this provision.

24 See Kane, 592 A.2d at 139.

> whether the employee acted of his or her own free volition. Green v. Board of Review of Industrial Commission, 728 P.2d 996, 998 (Utah 1986). Even though an employee may be given a choice to resign or be fired, "if that choice is not freely made, but is compelled by the employer, that is not an exercise of volition." Id. An employee who wishes to continue employment, but nonetheless resigns because the employer has clearly indicated that the employment will be terminated, does not leave voluntarily. Perkins v. Equal Opportunity Commission, 234 Neb. 359, 362, 451 N.W.2d 91, 93 (1990).[25]

Thus, the majority rule — which our Court embraced — was that a claimant who quit in the face of a discharge for poor performance was regarded as having quit involuntarily.[26] It is this rule which Ms. Clarke seeks to invoke — i.e., that one who quits in the face of a termination for poor performance does not quit voluntarily.

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

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[25] See Kane, 592 A.2d at 139.

[26] See Kane, 592 A.2d at 139. Indeed, the Court extended this rule, bringing within its orbit those who resign while facing discharge for misconduct. Id.

> 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.' "[27] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[28] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[29]

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[27] 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).

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

[29] 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).

The Supreme Court of Rhode Island recognized in Harraka,[30] that a liberal interpretation shall be utilized in construing the 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.[31]

IV

ANALYSIS

A

Evidence of Record

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Testimony of Charles Ruggerio, Esq.

At the August 28, 2014 hearing conducted by Referee Vukic the first witness was the employer's representative, Mr. Ruggerio.[32] He began his

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30 Harraka, ante at 7, 98 R.I. at 200, 200 A.2d at 597.

31 Harraka, id.

32 Referee Hearing Transcript, at 8 et seq. It may be noted that the employer

testimony, under questioning by counsel for the City, by stating that he is an Administrator and legal counsel for the Providence School Department.[33] Asked to explain the circumstances of her separation from the School Department, he stated —

> … Miss Clarke received a notification by the office of human resources that it intended to recommend her no-renewal to the Providence School Board but at the same time it would intend to recommend that she be issues (sic) a new administrative contract which left her with the current assignment. Miss Clarke was for the school year of 2012 through 2013 um employed as a Principal at Wanita (sic) Sanchez educational complex and they (sic) are actually employed as a principal at Del Sesto Middle Achool. So the purpose of the correspondence was to notify Miss Clarke that she would be receiving a non-renewal of her contract as a principal of the high school which was the one in the Wanita Sanchez complex and be issued a new contract of Principal of Del Sesto Middle School and I believe that was from Mr. Bickley.[34]

He testified that, as stated in the letter, the matter was brought before the School Board, sitting in executive session.[35] Mr. Ruggerio said both decisions (i.e., not to renew her current contract and offer her a new contract), were

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proceeded first because the case came to the Referee as a discharge.

33 Referee Hearing Transcript, at 8.

34 Referee Hearing Transcript, at 8-9.

35 Referee Hearing Transcript, at 9.

communicated to Ms. Clarke.[36] But, he said, she was never offered the new contract; they had no opportunity to do so because she resigned from the school district about eleven days after the School Board decision.[37]

In answer to a question from Claimant, Mr. Ruggerio conceded he could not produce a certified mail receipt indicating that she received the April 29, 2015 letter from Mr. Oliveira — which indicated the Board voted not to renew her current contract but to offer her a new contract.[38] He said, when asked by the Referee, that her new, middle-school contract would pay about $ 7,000.00 to $ 8,000.00 per year less than her high-school contract.[39] He also could not testify that there were conversations about these changes between School Department representatives and Ms. Clarke, although he had an "expectation" that such discussions occurred.[40]

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36 Referee Hearing Transcript, at 10.

37 Id.

38 Referee Hearing Transcript, at 12.

39 Referee Hearing Transcript, at 13-14.

40 Referee Hearing Transcript, at 15.

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Testimony of Ms. Clarke

Ms. Clarke, who had been a school principal for about eight years, began her testimony by recounting that she had been reassigned to a new location during the 2012-2013 school year.[41] She said that her contract for the 2013-2014 school year was changed to reflect her new assignment in a middle school, though the remuneration remained the same.[42] Ms. Clarke said that she submitted her letter of resignation since she had not heard anything subsequent to receiving the letters of April 21, 2014.[43] She added that the second line in the termination letter (which indicated that the Board would be discussing her job performance) stood out.[44] Because of this reference, Ms. Clarke "accepted that as they were not renewing [her] contract and that they were going to be terminating [her] position."[45]

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41 Referee Hearing Transcript, at 16, 23.

42 Id. Ms. Clarke testified that in the prior year documentation was distributed in June of 2013 explaining the new pay scale for administrators. Id.

43 Referee Hearing Transcript, at 18-19.

44 Referee Hearing Transcript, at 19. See also Department's Exhibit No. 1F.

45 Referee Hearing Transcript, at 19.

Ms. Clarke thought this because the documents she received differed from those she had been given in prior years.[46] But mostly, she came to this conclusion because she had not received an approval letter from the School Board.[47] Of course, she agreed — when asked by the Referee — she had not received a discharge letter from the Board either.[48]

When asked by counsel for the School Department whether she had ever inquired about the outcome of the April 28th meeting, she said no.[49] Her explanation for this omission was straightforward — she was on medical leave.[50] And she insisted she never received unofficial (or informal) knowledge of the Board's decision from anyone.[51] Finally, Ms. Clarke denied she knew — at all — her rights under the school administrator's act.[52] As a result, she denied

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46 Referee Hearing Transcript, at 19.

47 Referee Hearing Transcript, at 19-20.

48 Referee Hearing Transcript, at 20.

49 Referee Hearing Transcript, at 20-21. Neither had she attended the meeting. Referee Hearing Transcript, at 22.

50 Referee Hearing Transcript, at 21.

51 Referee Hearing Transcript, at 21.

52 Referee Hearing Transcript, at 22.

knowing that prior to being terminated an administrator must receive a formal communication.[53]

3

Testimony before the Board of Review

At the hearing before the Board of Review Ms. Clarke was represented by counsel, who questioned her concerning the nature of the medical leave she was on when the personnel reshuffling was taking place.[54] She discussed the medications she was on and the limitations they created.[55] Claimant Clarke also restated her motive in tendering her resignation, which was to avoid the appearance that she was being discharged.[56] On cross-examination by the employer's representative, she conceded that she did not reference her condition in the May 9th letter.[57]

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53 Referee Hearing Transcript, at 22.

54 Board of Review Hearing Transcript, at 4 et seq.

55 Board of Review Hearing Transcript, at 4-5.

56 Board of Review Hearing Transcript, at 5.

57 Board of Review Hearing Transcript, at 6.

B

Discussion

— "What we've got here is failure to communicate." [58]

While these eight words, uttered in a film almost a half-century ago, are reflected, to varying degrees, in many cases that come before this Court, they capture the *essence* of the instant matter to the *nth* degree. They constitute the entire sum and substance of this dispute — the School Department anticipated moving Claimant into a slightly lower position and Ms. Clarke believed she was being fired. And so, the question the Board of Review had to answer was simply this — Who should bear the greater responsibility for this misunderstanding?

Should it be the school department, which failed to provide definitive proof that it communicated its decision to employ Claimant in another (only slightly less lucrative) position by any of means — such as a face-to-face conference, a telephone call, a letter, an e-mail, or lastly, a text message? Or should it be the Claimant, who, by her own admission, failed to inquire through any source, official or unofficial — formal or informal, whether she held or had

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[58] Uttered by the actor, Strother Martin, in the part of "Captain," in the film Cool Hand Luke, (Warner Bros.-Seven Arts, 1967), screenplay by Donn Pearce and Frank R. Pierson.

lost a position paying more than $100,000.00 per year?

In her Memorandum, Claimant Clarke argues that — "This confusion was caused by the employer and the employer should be responsible for it, rather than trying to blame the Claimant for not investigating or challenging it."[59] In support of this argument, she argues that the medications she was then taking affected her judgment.[60] And the School Department, in its brief, joins issue on the manner in which this Court should treat the medication issue. Employer's Memorandum of Law, at 6-7. Unfortunately, the Board did not address this issue. It made no findings as to the relevance or credibility of her testimony regarding her state of mind. It merely adopted the decision of the Referee as its own. In doing so, I believe the Board violated a fundamental procedural requirement that is mandated by statute and which has been recognized by this Court for many years.

In Achorn v. Department of Employment Security, Board of Review,[61] Chief Judge Laliberte considered a case with a similar procedural posture. After conducting a full hearing on Ms. Achorn's appeal from a referee decision finding her disqualified from receiving benefits, the Board of Review issued a decision in

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[59] Appellant's Memorandum of Law, at 4.

[60] Appellant's Memorandum of Law, at 4.

which it summarily affirmed the decision of the referee, adopting the decision as its own.[62] Reading two procedural provisions of the Employment Security Act together, the Chief Judge concluded that the Board's decision did not pass muster.

Chief Judge Laliberte began his analysis by noting a procedural requirement for board decisions; in plain language section 28-44-52 mandates that:

> "Each party shall be promptly furnished a copy of the decision and the supporting findings and conclusions of the board of review. * * * " (Emphasis added) [63]

Next, he cited a section that gives the Board great flexibility in conducting its proceedings:

> This Court is aware that under G.L. 1956 (Reenactment of 1979) § 28-44-47 the Board of Review may decide a case 'solely on the basis of evidence previously submitted.'[64]

He then read the two together:

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61 A.A. No. 81-368, (Dist.Ct. 12/6/86).

62 Achorn, slip op at 4.

63 Achorn, slip op at 4, n. 3.

64 Achorn, slip op at 4. The last sentence of § 28-44-47 states – "The board of review may affirm, modify, or reverse the findings or conclusions of the appeal tribunal solely on the basis of evidence previously submitted or upon the basis of any additional evidence that it may direct to be taken."

> However, § 28-44-47 does not relieve the Board of its duty to supply findings of fact, as set forth in § 28-44-52, in order that this Court may be able to determine whether the agency decision violates any of the criteria of § 42-35-15. A Board of Review decision "solely on the basis of evidence previously submitted" would be appropriate where a full hearing is held by the Board. In the case at hand, the Board held such a hearing, and it should complete the review process by supplying findings based on the evidence adduced at that hearing.[65]

Thus, Chief Judge Laliberte drew a bright-line distinction between cases wherein the Board relies on the record of the referee hearing and cases wherein it takes in new evidence; in the former it is permissible for the Board to issue a summary decision of affirmance, in the latter it must make findings regarding the impact of that evidence. Accordingly, Chief Judge Laliberte ordered Ms. Achorn's case remanded to the Board so that it could issue an appropriate decision.

Chief Judge Laliberte's analysis has generally governed Board practice since 1986. However, from time to time, this Court has needed to reaffirm the vitality of these principles,[66] perhaps most recently in 2010.[67] In the instant case I believe this Court should reiterate its adherence to the holding in Achorn.

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[65] Achorn, slip op at 5.

[66] E.g. Benevides v. Department of Employment & Training Board of Review, A.A. No. 91-240, slip op. at 3-4 (Dist. Ct. 2/12/92)(DeRobbio, C.J.) and Fryer v. Department of Employment & Training Board of Review, A.A.

And this case clearly falls under the holding in Achorn. The Board heard from a witness, Ms. Clarke, in an area that she had not spoken to before the Referee, except in passing. Her counsel has briefed the issue; and counsel for the School Department has responded. Thus, her testimony is certainly material.

As stated above, to resolve the instant case the Board was required to determine which of the parties bore the greater responsibility for the shocking lack of communication exhibited in this case. Clearly, both parties are at fault. As a result, the state of mind (or the condition of mind) of the Claimant is an issue that should not have been ignored.

And so, because it took testimony, I conclude the Board should have made findings on this issue.[68] Consequently, I must recommend that this matter be remanded to the Board of Review for the issuance of a new decision.

No. 94-265, slip op. at 8-9 (Magistrate's Findings, Ippolito, M.) Adopted by Order (Dist.Ct. 7/21/95) (DeRobbio, C.J.).

[67] See Accu-Tran v. Department of Employment & Training Board of Review, A.A. No. 10-049, slip op. at 5-8 (Dist.Ct. 05/20/2010).

[68] Or, at a minimum, it could have made *supplemental* findings on the issue, as it occasionally does.

V
CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), and upon careful review of the record, I conclude that the Board's decision disqualifying Ms. Clarke from receiving unemployment because she quit without good cause was made through erroneous and unlawful procedure.[69] I therefore recommend that the Decision of the Board of Review rendered in this case be REVERSED and REMANDED for the making of a new decision.

/s/
Joseph P. Ippolito
Magistrate

JULY 16, 2015

[69] Gen. Laws 1956 § 42-35-15(g)(3).