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

Christine A. Lank	:	
	:	
v.	:	**A.A. No. 15 - 036**
	:	
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 Honorable Court at Providence on this 28th day of December, 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. Christine Lank urges that the Board of Review of the Department of Labor and Training erred when it held that she was not entitled to receive employment security benefits because she left her prior employment without good cause. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that

the decision issued by the Board of Review in this matter is supported by the facts of record and the applicable law. I shall therefore recommend that it be affirmed.

I
FACTS & TRAVEL OF THE CASE

Ms. Christine Lank was employed by Institute for Environmental Health (IEH) for three weeks as a microbiologist, until October 31, 2014. She filed for unemployment benefits but, on December 22, 2014, a designee of the Director deemed her ineligible because she resigned without good cause within the meaning of Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and, as a result, Referee John Costigan held a hearing on February 6, 2015, at which Ms. Lank appeared; a representative of the employer, Ms. Martha O'Brien, appeared telephonically.

In his decision, issued on February 11, 2015, the Referee made the following Findings of Fact regarding Claimant's separation:

> **2. <u>FINDINGS OF FACT</u>:**
> The claimant last worked as a microbiologist for the employer for 3 weeks. Her last day of employment was October 31, 2014. She indicated she was hired and was under a 3 week probationary period. On her last day of employment her supervisor indicated to her that she was not a strong candidate in the position. Prior to the end of her

> shift she asked the supervisor what shift she would be working the following week. She indicated the supervisor told her she did not know. No further discussion took place and the claimant completed her shift and went home. On November 3, 2014 the claimant sent the employer an email indicating that she would not be returning to the lab. She stated that she had not been told what her shift was to be and the supervisor indicating she was not a strong candidate meant that her job was not going to continue. She did not ask the employer to confirm this nor did she follow up again to determine her return to the job.

Referee's Decision, February 11, 2015, at 1. Based on these findings — and after quoting from section 28-44-17 — the Referee formed the following conclusions on the issue of claimant's separation:

> **3. CONCLUSION:**
> * * *
> In order to show good cause for leaving her job, the claimant must establish that the job was unsuitable or that she had no reasonable alternative. Based on the testimony and evidence presented, I find the claimant has failed to meet that burden of proof. The claimant said she was hired under a 3 week trial period, however, no documentation confirming her employment agreement was presented. Correspondence presented by the claimant of the job offer defines a 3 week training program and then identifies the ongoing work schedule following the training weeks. The employer policy presented at the hearing identifies that new employees are considered probationary for the first 90 days of employment, not 3 weeks. The claimant indicated she was not comfortable in the situation but she did not take any steps to define her issues or concerns with the employer and to confirm specifically her employment status. She was not told by the employer that she was no longer employed by them. In the absence of sufficient evidence to establish good cause I find

> the claimant leaving is without good cause and, as such, benefits must be denied in this matter.

Referee's Decision, February 11, 2015, at 2. Thus, Referee Costigan found claimant to be disqualified from receiving benefits because she left work without good cause. Id.

Claimant filed an appeal and the matter was reviewed on its merits by the Board of Review. On March 24, 2015, the members of the Board of Review issued a unanimous decision holding that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision of the Referee was affirmed. Finally, on April 13, 2015, the Claimant filed a complaint for judicial review in the Sixth Division District Court.

II
APPLICABLE LAW
A
LEAVING FOR GOOD CAUSE — THE STATUTE

The resolution of this case involves the application of the following provision of the Rhode Island Employment Security Act, which specifically touches on the issue of voluntary leaving without good cause; Gen. Laws 1956 § 28-44-17, provides:

28-44-17. Voluntary leaving without good cause. – (a)

> For benefit years beginning on or after 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 earnings greater than, or equal to, eight (8) times his or her weekly 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.

Based on the language of the above statute, eligibility for unemployment benefits under § 17 has three conditions — first, that the claimant left his or her prior employment; second, that the resignation was voluntary; and

third, that the claimant left the position for good cause as defined in § 17 (this last condition is the most frequently litigated element of § 17).

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, 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.[1]

[1] Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964).

Later, in Murphy v. Fascio (1975),[2] our 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.[3]

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."[4]

And finally, in Powell v. Department of Employment Security, Board of Review (R.I. 1984),[5] 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."[6]

C

LEAVING VOLUNTARILY FOR GOOD CAUSE — "VOLUNTARINESS"

In Kane v. Women and Infants Hospital of Rhode Island (1991),[7]

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

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

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

5 477 A.2d 93 (R.I. 1984).

6 477 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).

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

our Supreme Court has interpreted § 17 in a manner that gives effect[8] to the term "voluntarily," declaring that —

> To recover under § 28-44-17, an employee must leave for both good cause and voluntarily.[9]

Therefore, a finding that a worker resigned from a position does not imply that the worker did so voluntarily.[10] One can resign involuntarily. And so, to understand this seeming paradox, we will now review the Kane case in a bit more depth.

The Kane case is a cornerstone of our understanding of "voluntariness" as that term is used in § 17. In Kane, the Court considered the unemployment-benefit claim of a hospital employee who — when facing discharge for misconduct — took an early retirement.[11] 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 (then in effect) dictated such a finding; by declaring quitting pursuant to a

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[8] 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).

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

[10] Kane, 592 A.2d at 139-40.

[11] Kane, 592 A.2d at 138.

retirement plan to be good cause per se.[12] And so, with the good-cause issue resolved, the Court was free to focus its attention on the element of voluntariness — an issue of first impression.[13]

The Court began by stating the majority rule as follows —

> … 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 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,

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

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

234 Neb. 359, 362, 451 N.W.2d 91, 93 (1990).[14]

Thus, the majority rule is that claimants who quit in the face of a discharge for poor performance are regarded as having quit involuntarily; the Kane Court embraced and extended this rule, bringing within its orbit those who resign while facing discharge for misconduct.[15] Having decided that Ms. Kane did not quit voluntarily, but was terminated, the Court then reviewed the record to determine whether she was terminated for misconduct.

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:

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14 See Kane, id.

15 See Kane, id.

> (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.'"[16] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[17] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[18]

The Supreme Court of Rhode Island stated in Harraka, cited ante at 6, that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

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[16] 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)).

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

[18] Cahoone, ante n.17, 104 R.I. at 506-07, 246 A.2d at 215. Also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

> * * * 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.

IV
ANALYSIS

When an appeal from a Board of Review decision denying unemployment benefits under § 28-44-17 comes to us, we must decide whether the Board's decision is clearly erroneous by resolving the following questions.

1. Was the Claimant fired or did she quit voluntarily? This must be the first question because the answer determines which section of the Employment Security Act governs the case. If she was fired, § 28-44-18 must be applied and the Claimant will be deemed eligible unless she was

terminated for proved misconduct. If she resigned involuntarily, in the face of an immediate termination, we also apply a § 28-44-18 analysis.

2. If the Claimant quit voluntarily, did she do so for good cause, as that term is defined in § 28-44-17 and the case law construing that provision?

In the instant case, the Board (adopting the decision of the Referee as its own) determined that Ms. Lank quit voluntarily but without good cause. She was therefore denied unemployment benefits. For the reasons I shall explain (after a brief review of the testimony and evidence taken at the hearing conducted by the Referee), I have concluded that neither of these determinations is clearly erroneous. I must therefore recommend that the decision rendered by the Board of Review in this case be affirmed.

A

The Evidence — Ms. Lank's Testimony

Ms. Lank said that she was hired by e-mail, by Ms. Crystal Ernest, the firm's Director. Referee Hearing Transcript, at 20-21.[19] Claimant stated that, during her entire tenure with the employer, she was in a training period — a trial period — at the conclusion of which, she hoped to be

[19] Later in her testimony, Ms. Lank located a copy of the email; and read it into the record. Referee Hearing Transcript, at 48.

offered a permanent position. Referee Hearing Transcript, at 15-16.[20] The training period ended on her last day of work, October 31, 2014. Id.

Ms. Lank testified at length about conversations she had with Ms. Ernest on her last day of work. That morning, at the beginning of her shift, Ms. Ernest told her that she "wasn't a strong candidate for the position." Referee Hearing Transcript, at 16, 26. Ms. Lank construed this to mean that Crystal was leaving it up to her whether she wanted to stay or not. Referee Hearing Transcript, at 17, 26. And as Ms. Ernest was leaving, Claimant asked her — Where do we go from here? Referee Hearing Transcript, at 27. To which she responded that she did not know. Finally, she asked Ms. Ernest, and her assistant, to answer a more concrete question — What shift she would be working on Monday? Each said they did not know. Referee Hearing Transcript, at 17-20, 26.

Because she did not know when she should report on Monday, she did not report at all. Referee Hearing Transcript, at 29. Instead, she sent an email stating she would not be returning. Referee Hearing Transcript,

[20] Ms. Lank said she was informed of her status "verbally." Referee Hearing Transcript, at 16, 21. Since she added that she received no written documentation, I must infer she meant "orally." Id.

at 27.[21] When prodded by the Referee, Ms. Lank said that she did not call on Monday because she did not feel comfortable doing so. Referee Hearing Transcript, at 30-31.[22] Nevertheless, she conceded that Ms. Ernest never told her not to report to work again, nor did she tell her she no longer had a job with IEH. Referee Hearing Transcript, at 40, 51.

At the hearing, Ms. Lank was also questioned by the company's representative, Ms. Martha O'Brien. Referee Hearing Transcript, at 34. Ms. Lank agreed that all new employees are on probationary status for 90 days. Referee Hearing Transcript, at 35. Yet, Ms. Lank also stated that Ms. Ernest, in the email offering her the position, referred to a three-week probationary period. Referee Hearing Transcript, at 39. She also acknowledged that her schedule (while in training) was Tuesday through Friday. Referee Hearing Transcript, at 38.

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[21] Ms. Lank said she sent the message to Ms. Ernest through a Craigslist email address. Referee Hearing Transcript, at 32-33. And according to the employer's representative at the hearing, Ms. Ernest received the message on her company-email. Referee Hearing Transcript, at 33.

[22] In fact, Ms. Lank told Referee Costigan that her whole time at the company was uncomfortable. Referee Hearing Transcript, at 23. She explained that she was doing testing; and she was concerned that she was not receiving any feedback regarding how she was performing. Referee Hearing Transcript, at 23-24.

B

Rationale

Ms. Lank's claim for unemployment benefits was opposed by her former employer. But, her testimony was not contradicted by the employer's testimony. Nevertheless, the Board has the authority to reject a claim brought under § 17 if it finds that the Claimant has not met her burden of proving that she voluntarily left her position at IEH for good cause.

1

Voluntariness

Ms. Lank's departure from IEH was not an involuntary leaving as that principle is defined in Kane, ante at 7-10. By her own testimony, she had not been discharged. And there is no evidence in the record which even suggests that she was about to be terminated.[23] Therefore, the Board's conclusion that Ms. Lank voluntarily separated from IEH is

[23] Even if we stipulate to the sincerity (which I do) of Ms. Lank's concerns that she would ultimately have been terminated, our analysis does not change. It is my view that the Employment Security Act anticipates that a person in Ms. Lank's predicament would stay with the job at IEH while they sought a new position — limiting, if not preventing, an unnecessary period of unemployment and a needless pay-out from the unemployment fund.

unquestionably supported by the evidence of record and is not clearly erroneous.

2

Good Cause

The second issue to be resolved is the meaning of the statement that Ms. Ernest made to Ms. Lank — i.e., that she was not a "strong candidate" for the position. Now, even if this statement is construed — as Ms. Lank did construe it — as an indication of Ms. Ernest's disesteem for her work and a warning that she was not likely to be retained beyond the expiration of her probationary period, the Board acted within its authority[24] when it declined to view these inferences as providing Ms. Lank with good cause to separate forthwith.[25] The Board could reasonably

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[24] That question of what circumstances may constitute good cause for leaving employment is a mixed question of law and fact. D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1040-41 (R.I. 1986).

[25] See White v. Department of Employment and Training Board of Review, A.A. 91-174, at 8-9 (Dist.Ct. 03/16/92)(Court, adopting Master's findings, affirms Board's denial of benefits where management's perceived lack of confidence in Claimant did not reach degree of compulsion necessary to justify resignation) and Tanzi v. Department of Employment and Training Board of Review, A.A. 93-172, at 5-6 (Dist.Ct. 05/03/94)(DeRobbio, C.J.)(Board found Claimant not entitled to benefits; affirmed where allegedly unfair criticism did not require Claimant to quit prior to seeking new employment). And

find that, although distressing to Ms. Lank, the conditions at IEH were not such as would require an immediate separation, whatever the future might hold.

C

Resolution

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, including the question of which witnesses to believe.[26] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[27] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated her employment without good cause is supported

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conversely, see Furmanick v. Department of Employment Security Board of Review, A.A. No. 86-068, at 3-4 (Dist.Ct. 02/04/87) (SãoBento, J.)(Board's denial of benefits affirmed where Claimant resigned because she lacked confidence in new nursing supervisor.)

[26] Cahoone, ante at 11, n.17, 104 R.I. at 506, 246 A.2d at 215.

[27] Cahoone, id and D'Ambra, ante at 11, n.18. See also Gen. Laws § 42-35-15(g), ante at 10-11 and Guarino, ante at 11, n.16.

by reliable, probative and substantial evidence of record. I must therefore recommend that her disqualification under § 28-44-17 (Leaving without good cause) be affirmed.

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, the instant decision 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).

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

/s/
Joseph P. Ippolito
MAGISTRATE

DECEMBER 28, 2015