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

Gladys Portillo	:	
	:	
v.	:	**A.A. No. 2017-062**
	:	
Department of Labor & Training,	:	
Board of Review	:	

JUDGMENT

This cause came on before Caruolo J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board is affirmed.

Dated at Providence, Rhode Island, this 23rd day of January, 2018.

Enter: **By Order:**

____/s/_____ **_____/s/_____**

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DECISION

Caruolo, J. This matter is before the Court on the complaint of Gladys Portillo filed pursuant to Rhode Island General Laws § 42-35-15, seeking judicial review of a final decision rendered by the respondent, Board of Review, Department of Labor and Training, (hereinafter cited as "the Board"). The Board affirmed a Referee's decision that the claimant, Gladys Portillo (hereinafter cited as "Claimant"), was not entitled to receive employment security benefits for the period of February 27, 2017 through March 16, 2017 as a result of her refusal to accept suitable work.

FACTS & TRAVEL OF THE CASE

Claimant worked for Qualified Resources ("Employer") for nine months on assignment as an assembler of Christmas ornaments. She was laid off for lack of work and her last day of work was December 16, 2016. On December 21, 2016, claimant filed for Employment Security benefits. In a decision dated March 20, 2017 the Director denied the claimant benefits for the entire period sought pursuant to § 28-44-17 and ordered repayment of all benefits paid to

Claimant in the amount of $2,190.00 pursuant to § 28-42-68 of the Rhode Island Employment Security Act. Following the issuance of the Director's decision the Claimant filed a timely appeal.

On April 20, 2017 the Referee conducted a hearing on the merits and issued a decision on April 25, 2017. At the conclusion of the hearing the Referee found that the Claimant was involuntarily laid off. As a result of his findings the Referee modified the Director's decision and reinstated the Claimant's benefits through February 27, 2017. Notwithstanding the modification of the Director's decision, the Referee denied the Claimant Employment Security Benefits for the period of February 27, 2017 to March 18, 2017 due to the Claimant's refusal of suitable work pursuant § 28-44-20.

In reaching his conclusion to modify the Director's decision, the Referee identified and analyzed three issues: (1) Whether the claimant left work voluntarily with good cause within the meaning of RIGL § 28-44-17, Voluntary Leaving Without Good Cause; (2) Whether or not the claimant is subject to disqualification under the provisions of RIGL § 28-44-20, Refusal of Suitable Work; and (3) Whether or not the claimant was overpaid Employment Security Benefits and subject to recovery under the provisions of RIGL § 28-42-68, Recovery of Erroneously Paid Benefits, of the Rhode Island Employment Security Act. (Referee's Decision, April 20, 2017 at 2 and 3).

As to the above referenced issues, the Referee concluded that the claimant was involuntarily laid off from work from December 16, 2016 to February 26, 2017. (Referee's Decision, April 20, 2017 at 2). Second, the Referee determined that the claimant refused suitable work after being recalled to her previous position on February 27, 2017, and subsequently failed to appear for work without good cause. (Referee's Decision, April 20, 2017 at 3). Third, the

Referee found claimant at fault for creating an overpayment by failing to provide proper information when she initiated her request for benefits, and ordered repayment of benefits received after February 26, 2017. (Referee's Decision, April 20, 2017 at 3).

On May 9, 2017 the Claimant filed an appeal of the decision of the Appeal Tribunal (Referee). The Board of Review did not hold a new hearing, but conducted a thorough review of the evidence and exhibits submitted on the basis of the certified record before it. RIGL § 28-44-47. On June 19, 2017 the Board affirmed the decision of the Appeal Tribunal (Referee) finding it to be a proper adjudication of the facts and the applicable law, declared it to be the decision of the Board of Review and adopted the Referee's decision as its own. Decision of Board,of Review, June 19, 2017, at 1.

APPLICABLE LAW

On review, case involves the application of RIGL 28-44-17 which addresses the issue of voluntarily leaving without good cause and provides as follows:

> **28-44-17 – Voluntarily 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 purposes of this section, "voluntarily leaving work with good cause" shall include:
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> (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.

This court has reviewed § 28-44-17 on numerous occasions and determined that eligibility for unemployment benefits under § 17 has three prerequisites – (1) that the claimant *left* his or her prior employment; (2) that the resignation was *voluntary*; and (3) that the claimant left the position *for good cause*, as defined in § 17. Kevin Moore v. Department of Labor and Training, Board of Review, A.A. No. 2016-065. (Emphasis included).

VOLUNTARILY LEAVING

Our Supreme Court previously held, for an individual to recover under RIGL § 28-44-17, an employee must leave both for good cause ***and*** voluntarily. Kane v. Women & Infants Hospital of RI, 592. A.2d137, 139 (RI 1991) (Emphasis included). In Kane, the Court examined the condition of voluntariness set forth in the statute as it applied to situations where an employee resigned because of a reasonable belief that he or she was about to be discharged due to job performance. Kane, at 139. Our Supreme Court also examined holdings from various jurisdictions on the issue of whether employee resignations were voluntary. After considering a variety of factual scenarios, the Court ultimately found that the determination of voluntariness was based on "whether the employee acted of his or her own free volition." Kane at 139, *citing* Green v. Board of Review of Industrial Commission, 728 P.2d 996, 998 (Utah 1986). In illustrating this point further, our Court noted that if the employee's choice to leave his or her

employment is not made freely, but rather is compelled by the employer, that is not an exercise of volition. Kane at 139, *citing* Green at 998.

GOOD CAUSE TO LEAVE

Our Supreme Court has analyzed and clarified the meaning of "good cause" in numerous cases over the past several decades. The overriding theme in each analysis is the legislative mandate set forth in RIGL § 28-42-73 which expressly states that "Chapters 42-44 of this title shall be construed liberally in aid of their declared purpose, which declared purpose is to lighten the burden that now falls on the unemployed worker and his or her family." Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200 A.2d 595, 597 (1964). In Harraka the Court stated, for an individual to have left work voluntarily for good cause, requiring that the termination be of a compelling nature "does violence to the legislative direction that it be liberally construed." Harraka, at 597. Additionally, the Court opined that to view the statutory language of "good cause" as requiring an employee to establish that he terminated his employment under compulsion amounts to reading into the statute a provision which legislature did not intend. Id. In rejecting a petitioner's claim that her marriage and subsequent move to another state constituted good cause, the Court in Murphy v. Fascio, 115 R.I. 33, 36, 340 A.2d 137, 139 (1975) *citing* Gen. Laws 1956 § 28-42-2, held that "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." (Emphasis added). Subsequently, in Powell v. Department of Employment Security, Board of Review, 477 A.2d 93 at 96-97 (1984) *citing* Murphy at 36, our Court held that "… the key to this analysis is whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control."

STANDARD OF REVIEW

The Administrative procedures Act sets forth the standard of review in Rhode Island General Laws § 42-35-15(g), 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]

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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 Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[3] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 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.

ANALYSIS

The first issue before this court is whether the Board's determination that the Referee's decision finding the Claimant entitled to unemployment benefits as a result of being involuntarily laid off, was a proper adjudication of the reliable, probative, and substantial evidence in the record. In this court's view the Board's decision was not "[m]ade upon unlawful procedure" or "affected by other error of law", Rhode Island General Laws § 42-35-15(g)(3) and (4). University of Rhode Island v. Department of Employment and Training, Board of Review, 691 A.2d 552, 554 (1997).

In the instant matter, the Referee engaged in an evidentiary hearing to determine whether the claimant left work voluntarily with good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act. During the evidentiary hearing the Referee heard testimony from both the Claimant and an employer representative. The Claimant testified that on December 16, 2016 the employer laid her off. (Referee Hearing Transcript, p. 6). The

Employer did not dispute Claimant's contention and confirmed that the Employer laid off the Claimant for lack of work. (Exhibit – Director's 1 – Employer Statement). In reaching a conclusion, the Referee focused on whether the Claimant left work "voluntarily" within the meaning of section 17. (Referee's Decision, at p. 2). Based upon the testimony of the Claimant, and the statement of the Employer entered as a full exhibit, the Referee found that the Claimant did not leave work "voluntarily," but rather was laid off for lack of work from December 16, 2016 to February 26, 2017. (Referee's Decision at p. 2, Emphasis added). In this case the Employer exercised its prerogative to unilaterally discontinue the Claimant's employment. Thus, the Claimant's "choice to leave her employment was not made freely, but rather was compelled by the employer." Kane, at 139, *citing* Green at 998. Accordingly, the Board was not clearly erroneous in awarding the Claimant unemployment benefits for the period of December 16, 2016 to February 26, 2017, since an essential element of § 28-44-17, namely, leaving work voluntarily could not be established.

While a determination of eligibility for unemployment benefits, as defined in § 17, also requires proof that the claimant left work for good cause, based upon the lack of voluntariness, this court need not address the additional element of whether claimant left her position for good cause. However, had the court been confronted with the issue of determining whether Claimant left work for good cause, it is clear that the employer's decision to lay off Claimant for lack of work is an employment decision beyond an employee's control. Powell, *citing* Murphy, 477 A.2d at 96-97.

REFUSAL OF SUITABLE WORK

The next issue before this court is whether an employee who was recalled to duty and refused to accept suitable work because she was upset about the Department of Labor and

Training's decision to cease her employment benefits and recoup benefits previously paid to her, has done so with good cause pursuant to § 28-44-17. In the case at hand, the Referee determined that the Claimant was recalled to her previously held position on March 13, 2017 and failed to appear after agreeing to do so, because she was upset about her employment decision issued by the Department of Labor and Training. (Referee's Decision, at p. 3).

A review of this issue involves the application of RIGL 28-44-20, refusal of suitable work, which provides as follows:

> **28-44-20 – Refusal of Suitable Work.** – (a) … If an otherwise eligible individual fails, without good cause, either to apply for suitable work when notified by the employment office, or to accept suitable work when offered to him or her, he or she shall become ineligible for waiting period credit or benefits for the week in which that failure occurred ***.
>
> (b) "Suitable Work" means any work for which the individual in question is reasonably fitted, that is located within a reasonable distance of his or her residence or last place of work, and is not detrimental to his or her health, safety, or morals. No work shall be deemed suitable, and benefits shall not be denied under chapters 42 – 44 of this title, to any otherwise eligible individual for refusing to accept new work, under any of the following conditions:
>
> (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (2) If the wages, hours, or other conditions of the work are substantially less favorable to the employee than those prevailing for similar work in the locality;
>
> (3) If, as a condition of being employed, the individual would be required to join a company union or to resign from, or refrain from, joining any bona fide labor organization.

During the course of the evidentiary hearing the Referee heard testimony as to whether the Claimant refused suitable work as of March 13, 2017, thus disqualifying her from receiving Employment Security Benefits. The employer representative, Miss Marisol testified that in February 2017 the same assignment the Claimant previously held had become available again.

(Referee Hearing Transcript, at p. 8). On February 27, 2017, the Employer called the Claimant to return to work and Claimant told her she could not return to work in February because she had to tend to personal appointments, but would return on March 13, 2017. (Referee Hearing Transcript, at p. 8). The employer agreed to the claimant's requested return date and the parties concluded their conversation. On March 13, 2017, however, the claimant failed to appear for work. The Employer called the Claimant and inquired as to her failure to appear. (Referee Hearing Transcript, at p. 8). The employer testified that when she spoke to Claimant regarding her absence, the Claimant informed her that she would not be returning to work because she received a letter denying her unemployment benefits. (Referee Hearing Transcript, at p. 7). The Employer representative explained to Claimant that the decision regarding her employment benefits was made by the Department of Labor and Training and not the employer. (Referee Hearing Transcript, at p. 10). During the hearing and upon questioning from the Referee, the Claimant admitted that the reason she had not returned to work on March 13, 2017, as she had promised was because of the decision from the Department of Labor and Training. (Referee Hearing Transcript, at pp. 9 & 10).

In RI Temps Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1126 (2000) the Court found § 28-44-20 requires that a claimant accept a position unless that position can be shown to be unsuitable pursuant to the exceptions set forth in the act itself. Additionally, the Court further defined "suitable work" as any work which is within the individual's capabilities. Id. *citing* § 28-44-62(a)(8). "A claimant who fails to accept suitable work has not fulfilled the statutory requirements in order to be eligible for unemployment benefits." Id.

In the instant case, the Claimant was offered the same assignment, duties and location

which she previously held when she was laid off. There was no evidence submitted that the position offered reduced wages, unreasonable hours or less favorable conditions than that which she held three months earlier. At the hearing before the Referee, Claimant admitted that she did not return to work because she was upset about an unfavorable decision from the Department of Labor and Training. (Referee Hearing Transcript, at p. 9 & 10). Additionally, as part of her appeal of the Board's Decision, Claimant conceded in her "Appeal Reason" that she should "have to pay back money given to me when I denied to go back to work on March 13, 2017." (Appeal Information E-Mail,dated May 9, 2017).

The Claimant's voluntary decision to intentionally absent herself from suitable employment due to a disagreement over a decision made, not by the Employer, but rather by a third party agency is not supported by the exceptions enumerated in § 28-44-20(b)(1)(2) or (3). Accordingly, this court finds the Referee properly concluded that the claimant refused suitable work pursuant to RIGL § 28-44-20, when she was recalled to her previously held position and failed to appear for work because she was upset about her unemployment decision. (Referee Decision, at p. 3).

REPAYMENT

The final issue addressed by the Referee was whether the claimant was overpaid Employment Security Benefits and subject to recovery of erroneously paid benefits under the Rhode Island Employment Security Act. (Referee's Decision, p 3). The Referee affirmed the Director's decision that the claimant was at fault for not providing proper information at the time she requested her benefits, namely, that the Claimant had quit her job and this omission contributed to the overpayments. (Referee's Decision, p. 3). However, the Referee modified the Director's determination that Claimant should repay *all employment security benefits received*, and

instead limited the recovery to those benefits received after the Claimant was offered suitable work. (Referee's Decision, p. 3)(Emphasis added). Consequently, the Referee determined that the Claimant was subject to the recovery provisions of § 28-42-68 and ordered restitution for any payments made to her as of the date she refused suitable work and beyond, specifically February 27, 2017. (Referee's Decision, p. 3).

The authority to order repayment is delineated in RIGL § 28-42-68 of the Employment Security Act, which provides as follows:

> **28-42-68 – Recovery of Erroneously Paid Benefits.** – (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sums 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 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) …
> (c) …
> (d) <u>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.</u>

(Emphasis added). Thus, as this court previously opined, § 28-42-68(d) specifies that repayment cannot be ordered where (1) the recipient of benefits is without fault or where (2) recovery would defeat the purpose of the Act. <u>Cheryl Boyd v. Department of Labor and Training, Board of Review</u>, A.A. NO. 16-0004, at 5 (Dist.Ct. Oct. 2016). In <u>Boyd</u> this court discussed the legislative intent of the term "fault" and stated that it implies the indifference or

neglect of one's duty to do what is right. Id., at 10. In the confines of the case at bar, one could interpret this description of the term "fault" to be a knowing and intentional omission of material facts having an foreseeable impact on the outcome of the case.

In the instant case I believe the Referee and Board of Review were not clearly wrong in concluding that the Claimant should be required to repay the employment security benefits paid to her as of February 27, 2017 and thereafter. Accordingly, I find that the Referee correctly determined that the Claimant should not be mandated to repay benefits for a period of time for which she was clearly "laid off" by her Employer, specifically, December 13, 2016 to February 26, 2017 as recovery for this period of time would defeat the purpose of chapters 42 – 44 of this title as proscribed by Subsection (d) of § 28-42-68. (Emphasis added). Moreover, it is worth noting the Claimant concedes that some form of repayment should be required. In her appeal, under the section entitled "Appeal Reason " claimant stated "I agree that I should have to pay back money given to me when I denied to go back to work on March 13, 2017." (Appeal Information E-Mail, dated May 9, 2017).

A review of the entire record demonstrates that there is substantial, probative and reliable evidence to support the findings of fact, conclusions and decision of the Board of Review. The Board's decision must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the evidence of record or arbitrary or capricious. This Court cannot substitute its judgment for that of the Board as to the weight of the evidence. Accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result.

CONCLUSION

Upon careful review of the evidence, this Court finds that the decision of the Board of Review was not made upon unlawful procedure, affected by other error of law or "clearly erroneous in view of the reliable, probative and substantial evidence of the entire record" and that said decision was not "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Rhode Island General Laws § 42-35-15(g)(3),(4),(5).

Accordingly, the decision of the Board of Review is AFFIRMED.