STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Phillip C. Keefe	:	
	:	
v.	:	**A.A. No. 2011 - 0010**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

ORDER

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 11th day of March, 2010.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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

Phillip C. Keefe	:	
	:	
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	:	
Department of Labor & Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. This matter is before the Court on the complaint of Mr. Philip C. Keefe seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor & Training which was adverse to Mr. Keefe's efforts to receive employment security benefits. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the decision issued by the Board of Review denying benefits to Mr. Keefe was supported by the facts of the case and the applicable law and should be affirmed; accordingly, I so recommend.

FACTS & TRAVEL OF THE CASE

Mr. Keefe worked for Town Taxi for two years and ten months until May 2, 2010. He applied for unemployment benefits on May 21, 2010 but — in a decision

dated July 13, 2010 — the Director deemed him ineligible because he resigned without good cause within the meaning of Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and Referee Nancy Howarth held a hearing on the matter on November 15, 2010. In her decision, issued on December 2, 2010, the referee made the following Findings of Fact regarding claimant's termination:

> 2. **FINDINGS OF FACT:**
> The claimant was employed as a taxi driver by the employer. On May 21, 2010, at the start of the claimant's shift, the employer indicated that the claimant had not cleaned out the vehicle on the previous night. The employer was upset since the vehicle was scheduled for a P.U.C. inspection that day and the employer had paid outside vendors to clean it. The claimant insisted that he had cleaned it. They began arguing. The claimant gave his keys to the dispatcher and left. He did not report to work again. Two weeks subsequent to the claimant's last day of work the office manager left a message informing him that he had not been discharged. The claimant did not contact the employer.

Referee's Decision, December 2, 2010, at 1. Based on these findings the referee formed the following Conclusion:

> 3. **CONCLUSION:**
> * * *
> In order to establish that he had good cause for leaving his job the claimant must show that the work had become unsuitable or that he was faced with a situation that left him no reasonable alternative but to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant. In the instant case the claimant has not sustained this burden. The record is void of any evidence to indicate that the work itself had become unsuitable. The evidence and testimony presented at the hearing that the claimant did have a reasonable alternative available to him, other than to terminate his employment. He could have discussed his job status with his employer rather than assume that he had been discharged. Since the claimant had a reasonable alternative available to him, which he chose not to pursue, I find that his leaving is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, December 2, 2010, at 1- 2. Accordingly, Referee Howarth found claimant to be disqualified from receiving benefits.

Claimant filed an appeal and the matter was reviewed by the Board of Review. On January 10, 2011, a majority of the members of the Board of Review issued a decision which found 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. Thereafter, the claimant filed a complaint for judicial review in the Sixth Division District Court.

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.

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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]

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

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

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I.

The Supreme Court of Rhode Island recognized in Harraka, supra page 4, 98 R.I. at 200, 200 A.2d at 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

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?

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

ANALYSIS

This case is of a type reviewed by this Court more frequently than might be assumed. Stated simply, the key factual issue in this case is whether the claimant quit or was fired; he says he was fired, the employer indicates he quit. In this group of cases the facts are always muddy and particularly difficult to sort out. The outcome of these cases is usually determined by their particular facts and not upon legal principles; as a result, some are resolved for claimants — some for employers. Cf. Erica Lanigan v. Department of Labor & Training Board of Review, A.A. No. 2010 – 0202, (Dist.Ct. 1/13/11)(Board's finding of misconduct based on claimant's alleged failure to appear for work reversed; Court finds absence of misconduct where her queries about job status were left unanswered) with Pink Pineapple LLC v. Department of Labor & Training Board of Review, A.A. No. 2010 – 0025, (Dist.Ct. 2/1/11)(Board's finding claimant — who had been sent home by her employer — quit by her failure to work on her next scheduled day affirmed by the District Court despite testimony to contrary). For the reasons stated below, I have concluded that the decision of the Board of Review — affirming and adopting the decision of the referee — is supported by substantial evidence of record and is not clearly erroneous.

Claimant asserts that he was fired and testified accordingly. See Referee Hearing Transcript, at 7-9. Specifically, he testified that at the end of the argument he was told to go home. Referee Hearing Transcript, at 36. In his dissent the Member Representing Labor expressed the opinion that the employer's conduct — i.e., his

failure to call the claimant back when was walking off the job — buttressed the view that he had indeed been fired. This is certainly a valid inference.

On the other hand, the Referee was certainly entitled to credit the employer's story. Mr. Peter Miller, Vice-President of Town Taxi, testified that he never fired Mr. Keefe. Referee Hearing Transcript, at 15, 20. He conceded that there was an argument about the cleanliness of the car. Referee Hearing Transcript, at 15-18. Mr. Miller denied he had been yelling and screaming, or called Mr. Keefe a liar. Referee Hearing Transcript, at 19-20. He did admit seeing Mr. Keefe get out of his vehicle, but denied seeing him go in the office; and when he came out, the car Mr. Keefe had been sitting in was still there. Referee Hearing Transcript, at 20. Another employee then said Mr. Keefe was gone. Referee Hearing Transcript, at 22. Mr. Miller testified he did not want to fire Mr. Keefe. Referee Hearing Transcript, at 20. On cross-examination Mr. Miller indicated in his business sometimes people walk away and come back, but Mr. Keefe never did. Referee Hearing Transcript, at 24. According to Mr. Miller, claimant never said he quit to anyone in the company. Id.

Of course, after comparing the testimony of the claimant and his employer, many reasonable persons might well have viewed the evidence in this matter as being a case of "He said — He said" and viewed the evidence as being in a state of equipoise. What then — in the eyes of the referee — tipped the scales in favor of the employer's position?

Ultimately, Referee Howarth placed great reliance on the fact that approximately two weeks later, the office manager called Mr. Keefe to tell him he

was not fired. See Referee Hearing Transcript, at 13-14. Mr. Keefe never followed up on this call, explaining that "... he had enough." See Referee Hearing Transcript, at 14. In his testimony, Mr. Miller confirmed that he would have hired claimant back. Referee Hearing Transcript, at 22.[4] Thus, on the basis of this evidence the referee was well-justified in finding claimant had truly abandoned his position.

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.[5] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[6] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated his employment at Town Taxi without good cause within the meaning of section 17 is supported by the evidence of record and must be affirmed.

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[4] The Referee viewed the claimant's failure to reclaim his position as being the final step in his separation from Town Taxi. Clearly, it could also have been viewed as an instance of refusal of suitable work, a disqualifying circumstance pursuant to Gen. Laws 1956 § 28-44-20.

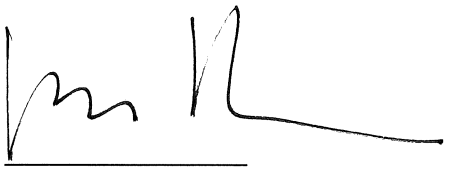
[5] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

[6] Cahoone, supra n. 5, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), supra p. 5 and Guarino, supra p. 5, fn.1.

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, 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).

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



Joseph P. Ippolito
MAGISTRATE

MARCH 11, 2010