STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Frank Venezia	:	
	:	
v.	:	**A.A. No. 12 - 177**
	:	
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 REVERSED.

Entered as an Order of this Court at Providence on this 19th day of December, 2012.

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 his instant complaint Mr. Frank L. Venezia urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive unemployment benefits. Jurisdiction to hear and decide appeals from decisions rendered 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.

As we shall see, this case presents an unusual fact-pattern — Mr. Venezia sought unemployment benefits even though he had formally retired from the employ of the Town of West Warwick, for which he had been a housing inspector for over

thirteen years. Among those familiar with unemployment benefit jurisprudence, his claim must be viewed skeptically, because employees who quit are generally disqualified from receiving benefits. See Gen. Laws 1956 § 28-44-17. Nevertheless, after considering the factual record and the relevant law, and for the reasons I shall explain, I have concluded that he should have been deemed eligible to receive unemployment benefits; I shall therefore recommend that the decision the Board of Review rendered in this matter be reversed.

I. FACTS & TRAVEL OF THE CASE

Mr. Frank Venezia worked as a minimum housing inspector for the Town of West Warwick for thirteen years. His last day of work was June 15, 2011, but he was allowed to discharge sick leave until February 11, 2012, when he was officially separated. He applied for unemployment benefits but on May 24, 2012, a designee of the Director of the Department of Labor and Training determined that he was ineligible for benefits because he left his job voluntarily without good cause within the meaning of Gen. Laws 1956 § 28-44-17. He appealed from this decision and Referee Stanley Tkaczyk conducted a hearing on the matter on June 26, 2012. The Claimant appeared, with counsel; the employer was unrepresented. Referee Hearing Transcript, at 1. The Claimant testified briefly. Referee Hearing Transcript, at 4-7.

In its June 28, 2012 decision, the Referee made the following Findings of Fact:

The claimant worked for this employer a period of over thirteen years

> in a capacity of a minimum housing inspector. In April of 2011 the claimant was informed that due to budgetary reasons the position was to be eliminated as of July 2011. The claimant decided to put in for a retirement in the spring of 2011. He last actually worked on June 15, 2012. Thereafter, he went out on sick leave. He officially separated from his employer on December 11, 2012.

Decision of Referee, June 28, 2012, at 1. Based on these findings, the Referee concluded that Mr. Venezia's acceptance of the separation agreement did constitute a leaving with good cause within the meaning of Gen. Laws 1956 § 28-44-17:

> * * *
> In order to establish that he left the job with good cause there must be evidence presented that the work was not suitable or that he was faced with a situation that left him no reasonable alternative but to terminate his employment. The burden of proof rests solely upon the claimant. The record is void of any evidence to indicate that the work itself was not suitable after performing the duties for over thirteen years.
>
> In addition, the evidence establishes that the claimant did have a reasonable alternative of waiting to have his position actually eliminated and continue to work until that date rather than submitting his resignation by means of his retirement. In the absence of sufficient evidence to establish good cause I must find the claimant's leaving is not with good cause and benefits must be denied on this issue.

Decision of Referee, June 28, 2012, at 1-2. Thus, Referee Tkaczyk found (1) that the Claimant failed to show that the job was unsuitable and (2) that claimant had a reasonable alternative to retiring — viz., waiting until his job was eliminated. Referee's Decision, June 28, 2012, at 1-2. Accordingly, the Referee concluded that his retirement did not constitute a leaving with good cause within the meaning of § 28-44-17. Referee's Decision, June 28, 2012, at 2. Accordingly, the Referee found Mr. Venezia was disqualified from receiving unemployment benefits.

Claimant filed an appeal and the matter was considered by the Board of Review. On August 8, 2012, 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, on September 7, 2012, the Claimant filed a complaint for judicial review in the Sixth Division District Court. A conference was held by the undersigned on November 7, 2012 at which counsel for the Claimant and counsel for the Board waived the filing of memoranda and submitted the matter to the Court for immediate decision on the record below. Although the employer was notified, no counsel or other representative appeared.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on voluntary leaving without good cause; R.I. Gen. Laws § 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.

The Court, as stated above, rejected the notion that the termination must be "under compulsion" or that the reason therefore must be of a "compelling nature." See also Rocky Hill School Inc. v. Department of Employment and Training, Board of Review, 668 A.2d 1241, 1244 (1995). And in Powell v. Department of Employment Security,

Board of Review, 477 A.2d 93, 96-97 (R.I. 1984), the Court clarified that "… the key to this analysis is whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control." See also Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (2000).

Finally, it is well-settled that in order to be eligible for unemployment benefits a worker who leaves his position voluntarily bears the burden of proving that he did so for good cause within the meaning of § 28-44-17.

III. 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]

In evaluating specific circumstances which might constitute "good cause," the Court confronts a mixed question of law and fact. D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1040 (R.I. 1986). Where the record supports only one conclusion, the case must be decided as a matter of law. D'Ambra, 517 A.2d at 1041. On the other hand, if more than one reasonable conclusion could be reached, the agency decision will be affirmed. D'Ambra, 517 A.2d at 1041.

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

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

3 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506-07, 246 A.2d 213, 215 (1968).

> * * * 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. 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 it was clearly erroneous or affected by error of law. More precisely, was Claimant properly deemed ineligible to receive unemployment benefits because he left work voluntarily but without good cause pursuant to section 28-44-17?

V. ANALYSIS

A. DEFINING THE LEGAL TEST.

In this atypical case, centering on a claimant who resigned, it is important to clarify the precise legal question to be answered. The Referee assumed that the legal question before the Court is whether Claimant had good cause to quit. See Referee's

Decision, supra, passim. I believe this assumption must be challenged. Indeed, in the recent case of Verizon v. Department of Labor and Training Board of Review, A.A. No. 2012-86, (Dist.Ct. 11/27/2012), this Court adopted a two-prong test for cases in which benefits have been requested by one who formally resigned. In such cases the Court must evaluate two questions: (1) whether the claimant had good cause to quit, but also (2) whether the claimant quit voluntarily.[4]

The Court in Verizon went on to explain how we should apply the two elements — not as one big jumble but allocating a different function to each. In fact, in Verizon the Court decided that each must be assigned a different role, in the following manner — Insofar as the question before the Court is a determination of the objective likelihood of the Claimant's termination at the moment he or she accepted the separation package, a voluntariness issue is presented; however, if the inquiry focuses on the claimant's subjective understanding of his future employment

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[4] In Verizon, this Court — citing an annotation — noted that many courts employ the good cause test and others, though fewer, focus on voluntariness vel non. This standard was adopted for two reasons. Firstly, regarding section 17 cases, the Rhode Island Supreme Court has specifically stated — "To recover under § 28-44-17, an employee must leave for both good cause *and* voluntarily." Kane, supra, 592 A.2d at 139 (Emphasis in original). That this Court is bound to follow the directives of our Supreme Court is a constitutional principle too fundamental to require citation. Secondly, we must avoid rendering the element meaningless. Our Supreme Court has indicated generally that it is a fundamental precept of statutory interpretation that "… the Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause or sentence, whenever possible." State v. Bryant, 670 A.2d 776, 779 (R.I. 1996). And so, I have concluded that, in adjudicating this case,

prospects (which may differ from objective reality), an issue of good cause is presented. See Verizon, supra, slip op at 16. I shall now offer a few clarifying comments as to each element.

1. The Voluntariness Test.

Obviously, in all cases wherein an employee accepted an incentive package we could say — without any further ado — that he or she quit voluntarily. The worker signed the papers without duress, doing so for a financial benefit. So, in order to make voluntariness vel non a legitimate point of contention (and not just a straw man to be knocked down) we must presuppose the ability of the fact-finder (whether administrative or judicial) to look beneath the surface image of what transpired (a putative resignation) and examine the three-dimensional reality (identifying those factors which truly triggered the claimant's acceptance of the plan). Can we do so? I believe we can.

In fact, doing so would not be unprecedented in Rhode Island law. In an analogous setting, the Rhode Island Supreme Court authorized the Board of Review (and this Court) to look beyond appearances to the reality of the termination and to determine for itself, whether the claimant terminated voluntarily or involuntarily. The case to which I refer is Kane v. Women and Infants Hospital, supra. In Kane the Rhode Island Supreme Court held that a worker who retired in the face of

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we must to give appropriate attention to both elements.

termination for misconduct did not truly quit, but was terminated. The Court, in an opinion authored by Justice Murray, commented thusly:

> Most jurisdictions hold that if an employee resigns because of a reasonable belief that if he or she is about to be discharged for job performance, then the resignation is not voluntary. [citations omitted]. 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 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).

Kane, 592 A.2d at 139. Accordingly, because she did not terminate voluntarily, the Court found Ms. Kane ineligible to receive benefits under section 17[5] and the claimant disqualified for misconduct under section 28-44-18. In doing so the Court unequivocally stated its preference for substance over form on the subject of the voluntariness of the claimant's separation.[6] Thus, I believe the Supreme Court would once again find that the Board of Review does have the authority to determine whether a resignation was involuntary in the face of an express resignation.

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[5] At the time, section 17 provided that quitting pursuant to a retirement plan cannot be determined to have quit without good cause. See Section 17 as quoted in Kane, supra, 592 A.2d at 138.

[6] In finding that the claimant did not quit voluntarily (in the face of an express resignation), we are finding a constructive termination. This is analogous to this Court's recognition — in innumerable cases — of the concept of the constructive quit. This concept is often invoked in situations wherein the claimant has walked

To recap, the first prong of the test is whether the claimant was, objectively, likely to be laid off. If the answer is yes, we must find that section 17 does not disqualify the claimant from receiving benefits. If the answer is no, we must ask the second question — whether the claimant had good cause to quit.

2. The Good Cause Test.

In the retirement context, I believe the "good cause" test should be reserved for issues emanating from the claimant's subjective knowledge. Such beliefs, to be actionable, although subjective, must nevertheless be reasonable. These beliefs may be based on the statements of others (usually representatives of the employer) or other articulable facts obtained by the claimant independently. But, to reiterate, neither the Board nor this Court can grant benefits based on fantasy or delusion.

Of course, in the retirement context, a finding of good cause will usually be based on factors other than the inherent unsuitability of the job — i.e., issues such as mistreatment by a superior, dangerous working conditions, being asked to perform illegal duties; instead, it will be based on issues in the broader employment relationship. But, this is not unprecedented. Our Supreme Court has found that extraneous reasons may make the employment relationship untenable, as has the District Court. See Rocky Hill School, supra, (leaving to join spouse at new job in Colorado found to be good cause); see also J. Arthur Trudeau Memorial Center v. Department of Employment and Training, Board of Review, A.A. No. 94-190

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off the job or failed to report for work.

(Dist.Ct.10/18/94) (DeRobbio, C.J.) (Award of benefits affirmed to claimant who quit after maternity to care for twins and who had explored alternative child care possibilities). Again, the hallmark of the Rhode Island good cause standard is that the reason for leaving must be beyond the employee's control.

B. EVALUATING THE FACTUAL RECORD.

With this two-prong framework in mind, we may now review the facts of record, disregarding those that are not pertinent to the question we have identified. The record is brief, occupying only to eight pages of typed transcript; Mr. Venezia's testimony took only three. This brevity is undoubtedly attributable to the fact that the Town did not participate.

Claimant Venezia testified that in April of 2011 he was working for the Town of West Warwick, which he wanted to continue to do, when the head of his department, the building inspector, told him his "… job was going to be eliminated due to, ah, budget cuts." Referee Hearing Transcript, at 4-5. He saw the proposed budget for fiscal year 2012 — which began on July 1, 2011 — and his job was, in fact, eliminated. Referee Hearing Transcript, at 7.

He explained that his last day of work was June 15, 2011, after which he began collecting his sick time, which he did until February 11, 2012, when he turned sixty years old. Referee Hearing Transcript, at 6. At that time he became eligible to retire, which he did. Referee Hearing Transcript, at 6. There was some discussion of a part-time job, but it never materialized. Referee Hearing Transcript, at 5. He said that, as

of the date of the hearing, he was looking for full time work. Referee Hearing Transcript, at 5.

C. APPLICATION OF THE LAW TO THE FACTS.

The Board of Review (affirming the Referee) found Claimant did not have good cause to quit. And, as discussed previously, the Board's findings are erroneous as a matter of law. See discussion, supra, section V-B of this opinion.

1. The Voluntariness Test.

Because the Board did not make a finding on the issue of voluntariness, our review of the first prong of the test must be limited. If we can find the facts only support one conclusion, we may decide the case as a matter of law. But if the evidence is amenable to more than one reasonable conclusion, we would be required to remand the case to the Board of Review for findings to be made.

Since Mr. Venezia's testimony was the sole evidence of record before the Referee. He indicated — without contradiction — that his job was eliminated. He then explained that he did not leave immediately.

Of course, he could have left immediately but the Town allowed him to discharge his sick time. I believe the Town's patience and forbearance does not change the nature of his separation, which was involuntary — there being an indication in this record that the elimination of his position was never rescinded. The Referee's comment that Mr. Venezia could have delayed his departure — beyond February — is, from my reading of the record, unsupported speculation. I therefore

find, as a matter of law, his separation was involuntary. On the basis of the forgoing, I conclude that the evidence was definitive, and subject to only one reasonable conclusion, and this outcome is required as a matter of law. Now, in these circumstances, we need not reach the second prong of our test and evaluate good cause.

2. The Good Cause Test.

At this point we could reverse the case forthwith — since the claimant must prevail if either test is satisfied; nevertheless, I shall address the good cause issue as well, in an effort to provide this Court with the fullest report of this case.

As we explained above, the good cause test is broader, allowing us to consider the reasonableness of the claimant's subjective perceptions of his situation. Having found that Claimant Venezia was subject to lay-off as a matter of law, we must find that he reasonably believed that he was subject to lay-off, based on the statements of his supervisor. In sum, based on the evidence of record, I believe the Board's finding that Claimant left under circumstances that were effectively beyond his control is supported by the reliable, probative, and substantial evidence of record.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra at 6 and Guarino, supra at 7, fn.1. The scope of judicial review by the District Court is also limited by General Laws' section 28-44-54 which, in pertinent part, provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated without good cause by accepting West Warwick's retirement plan is clearly erroneous in light of the reliable, probative and substantial evidence of record and must be reversed.

3. The Policy Question.

At this juncture, I should make a few points on the policy implications of the instant decision.[7] There are those who would object to Mr. Venezia's collection of unemployment benefits while he is collecting his pension a kind of double payment. Of course, this is not a comment on the legality of the circumstance, but on the policy thereof. Happily, we note that our legislature (the body established to resolve policy questions) has acted in this area. Its resolution involves a compromise — establishing that unemployment benefits are subject to a 50% percent reduction based on pension benefits being received.[8]

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[7] This is putting aside the obvious point: which is that the instant case has an unusually one-sided factual record — undoubtedly resulting from the fact that the employer did not participate.

[8] Those who think this protocol is still unduly generous should be advised that prior to 1993, when Gen. Laws 1956 § 28-44-19.1 was enacted, section17 specified statutorily that leaving to accept a retirement plan constituted good

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(5),(6).

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

__/s/_____
Joseph P. Ippolito
MAGISTRATE

DECEMBER 19, 2012

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cause as a matter of law. See P.L. 1993, ch. 298. So, in those days double collection was typical.