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

Kerri A. Simmons	:	
	:	
v.	:	**A.A. No. 12 - 199**
	:	
Dept. of Labor & 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 and the matter remanded to the Board of Review for referral to the Director for the calculation of the eligibility-offset described in the attached opinion.

Entered as an Order of this Court at Providence on this 16th day of November, 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. This matter is before the Court on the complaint of Ms. Kerri A. Simmons seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor and Training, which held that Ms. Simmons was not entitled to receive employment security benefits. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-

8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; I therefore recommend that the Decision of the Board of Review be affirmed on the issue of disqualification. I shall, however, recommend that the decision be modified on a subsidiary issue — as I shall explain at length below.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: After working for seventeen years as a manager of the jewelry department at a local branch of a national department store, Ms. Simmons secured a part-time position as a sales clerk at a jewelry store in nearby Wrentham, Massachusetts. She worked there for three months and then quit on June 7, 2012. (It was also alleged that that she refused full-time work at the store). She filed for unemployment benefits but on July 16, 2012 a designee of the Director of the Department of Labor and Training determined that Claimant was ineligible to receive unemployment benefits because she quit her employment without good cause.

Claimant appealed from this decision and on August 8, 2012 Referee William Enos held a hearing on the matter. Before the Referee were three issues — (1) whether Claimant left Ultra Diamond without good cause under

§ 28-44-17; (2) whether she refused suitable work under § 28-44-20; and (3) whether she was available for work under § 28-44-12. But Claimant appeals from only one of the Referee's decisions — the one which addressed the question of whether she should be disqualified pursuant to section 17 (Leaving-without-good-cause). The Referee found that Ms. Simmons "… voluntarily left work without good cause when she refused two offers of full-time work with benefits." Referee's Decision, August 15, 2012, at 2. Accordingly, Referee Enos found Claimant to be disqualified from receiving benefits pursuant to section 28-44-17. Id., at 3.

Claimant filed an appeal and the matter was reviewed by the Board of Review. On September 26, 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 October 10, 2012, the Claimant filed a complaint for judicial review in the Sixth Division District Court.

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; 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.

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).

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:
> (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

[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).

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]

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

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

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 or not it was clearly erroneous or affected by error of law. More precisely, was Claimant properly disqualified from receiving unemployment benefits because she left work without good cause pursuant to section 28-44-17?

V. ANALYSIS

The Board of Review, relying on the Referee's decision, found Claimant quit her position at Ultra Diamond without good cause within the meaning of section 28-44-17. For the reasons I shall now state, while I disagree with the Referee's analysis, I believe his ultimate determination that Claimant was subject to a section 17 disqualification is not clearly erroneous or based on error of law. However, before concluding, I shall discuss one area where I believe the decision must be amended. I must therefore recommend that it be affirmed, with a certain proviso.

A. The Disqualification Issue.

I believe the issue of Claimant's disqualification is fairly straightforward. Quite simply, the record is clear that Ms. Simmons left her part-time position voluntarily. The only issue to be considered is whether she did so for good cause. I believe the Board's decision that Claimant failed to prove she quit for good cause is not clearly erroneous. Accordingly, I shall recommend that the Board's decision finding her disqualified pursuant to Gen. Laws 1956 § 28-44-17 be affirmed.

On the issues pertinent to the instant appeal, Claimant testified that after she was laid off from the North Attleborough (Emerald Square) Macy's (where she had been the jewelry department manager) she accepted a part-time position at Ultra Diamonds in Wrentham — where, working 25 hours per week, earning $14.00 per hour. Referee Hearing Transcript, at 7, 26. She indicated she liked working at Ultra Diamonds, but it was expensive to commute there, in terms of gas money; she also felt it was interfering with her job search efforts. Referee Hearing Transcript, at 9.

The employer's representative at the hearing was Victor Castriotta, the store manager. Referee Hearing Transcript, at 18 et seq. Mr. Castriotta testified that while he tried to accommodate Claimant's desire to work no

more than 25 hours per week, he may have gone over on occasion. Referee Hearing Transcript, at 19. But he tried to keep her at the 20-25 hour per week level. Referee Hearing Transcript, at 20, 23. Mr. Castriotta also disagreed with Claimant's testimony that it would cost $100 per week to commute to Wrentham; he put the figure at half that amount. Referee Hearing Transcript, at 25. He also noted that her previous place of employment, the Emerald Square Mall in North Attleborough, was not much closer to her home than Wrentham. Referee Hearing Transcript, at 26.

I should also note that much of the hearing and the Referee's decision were taken up with an analysis of Claimant's rejection of full-time work at Ultra Diamonds. I find that those parts of the decision which discuss her refusal of a full-time position to be entirely immaterial to the decision regarding the section 17 disqualification. Of course, they may be perfectly germane to the Referee's decisions regarding section 12 and section 20, but they are not before me. (What is more, they have not been transmitted to this Court, as they were not appealed.)

From this record the Board could properly find that Claimant did not demonstrate good cause for quitting her part-time position. The Board was entitled to rely on Mr. Castriotta's testimony regarding the expense of travel

from North Providence to Wrentham. Accordingly, I cannot state that the Board's decision was clearly erroneous in light of the reliable, probative and substantial evidence of record.

But I believe this conclusion gives rise to a further question which the Referee and the Board did not address: What is the effect of this finding? Does it trigger a full or partial disqualification? Applying longstanding precedents of this Court, I believe the answer to this question must be the latter.[4]

B. The Offset Issue.

As stated above, on July 16, 2012, the Director, based on the finding of leaving without good cause, determined Claimant Simmons to be disqualified from receiving unemployment benefits; in the ruling she was specifically told — "… This disqualification will end when you have at least (8) weeks of covered employment after week ending 06/09/12 and in each of those eight

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[4] Claimant also asserted in her testimony that she quit her part-time position with the blessing of two DLT employees. While the Board (and this Court) has allowed late appeals when it has found a DLT employee misled a claimant, such extensions are discretionary. No DLT employee can change the legal standard for the receipt of benefits.

Moreover, I must also note that it seems that she primarily sought advice regarding whether she would be justified in rejecting Ultra Diamond's offer of full-time work, which is an entirely different question from that which is properly before the Court. Referee Hearing Transcript, at 10-11, 29-31.

weeks, you have earnings equal to or greater than $148.00." Decision of Director, Exhibit D2, at 1. This language is repeated, almost verbatim, in the decision of Referee Enos — "Benefits are denied for the week ending June 7, 2012, and until she has had at least (8) weeks of work and in each of said weeks has earned an amount equal to or in excess of $148.00." See Decision of Referee, August 15, 2012, at 3. Based on this phraseology being used, it appears that these decisions ruled claimant to be *entirely, not partially,* disqualified from receiving benefits.

And so, we must inquire: Is this total bar to the receipt of benefits correct? I believe not. For the reasons that follow, I conclude that a claimant who loses a full-time job, who then works part-time for a period, and who then quit the part-time position without good cause should not generally be completely disqualified from receiving benefits. Doing so would be contrary to the manner in which part-time earnings are treated in analogous circumstances.

First, the Rhode Island Employment Security Act provides that a claimant who is laid-off from a full-time position who is working part-time may collect benefits, subject to an offset based on the worker's part-time earnings. See Gen. Laws 1956 § 28-44-7. Secondly, this Court has long held

that a worker who is laid-off from a full-time position who then quits a part-time position (without good cause) may nonetheless collect benefits — subject to an offset for that income voluntarily forgone. See Craine v. Department of Employment and Training, Board of Review, A.A. No. 91-25, (Dist.Ct.6/12/91) (DeRobbio, C.J.)(Claimant lost a full-time job, then took leave from a part-time job; *Held,* partial benefits would be awarded pursuant to § 28-44-7). The rule of Craine provides that although the claimant has left his part-time position in circumstances which would have, if viewed in isolation, triggered a disqualification under section 28-44-17 [Leaving Without Good Cause], he is not fully disqualified.

After applying the foregoing statutes and precedents, I have concluded Ms. Simmons' situation falls within the ambit of this Court's holding in Craine. I therefore believe fairness requires that the offset-rule should be made fully applicable to her

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.[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 her employment at Ultra Diamond without good cause within the meaning of section 17 is well-supported by the evidence of record.

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 of Review be AFFIRMED on the issue of disqualification. As explained in this opinion, I further recommend that the matter be referred by the Board to the Director for a determination of Claimant's part-time earnings at the Ultra Diamond.

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[5] Cahoone v. Bd. of Review of the Dept.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, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), supra

Once this is done, the Department will be able to compute the benefits to which Ms. Simmons is entitled — which shall be determined by calculating the benefits to which she would have been entitled based on her loss of her full-time position, subject to an offset for the wages she voluntarily gave up by quitting her subsequent part-time position.

___/s/_____
Joseph P. Ippolito
MAGISTRATE

NOVEMBER 16, 2012

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p. 6 and Guarino, supra p. 6, fn.1.