STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Joe D. DeMoura	:	
	:	
v.	:	**A.A. No. 13 - 146**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 25th day of November, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Joe D. DeMoura urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive employment security benefits because he quit his prior position without good cause. 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 rendered by the

Board of Review on the issue of eligibility is supported by the reliable, probative, and 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.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Joe D. DeMoura worked for Exuberant Enterprises for two and one-half years; his last day of work was March 1, 2013. He filed a claim for unemployment benefits but on April 30, 2013 a designee of the Director issued a decision finding that he had left Exuberant's employ without good cause, within the meaning of Gen. Laws 1956 § 28-44-17.

Claimant appealed from this decision and on June 13, 2013 Referee Carol A. Gibson conducted a hearing on the matter. The Claimant was present and gave testimony, as did the co-owner of Exuberant, Mr. Fernando DeMoura, the Claimant's brother. In her June 14, 2013 decision, Referee Gibson pronounced the following findings of fact:

> The claimant worked for this employer, a cleaning company, for approximately two and a half years as a cleaner. The business the claimant worked for is co-owned by the claimant's brother and sister-in-law. The claimant states that he last worked on March 1, 2013 and that he was discharged on March 4, 2013 after he reported to work. The claimant states he went to speak with, the manager, his brother, regarding his wages. The claimant indicates the employer took his keys away and that he considered himself to be discharged as he could not get into the worksite. The employer states the claimant was not discharged and that he voluntarily left the job. The employer indicates that on March 4, 2013, the claimant was yelling at him regarding his wages. The employer testified that the claimant threw his keys at the employer and

> quit the job at that time. The claimant subsequently sent text messages to the employer which are part of the record, regarding his concerns with the pay.

Referee's Decision, June 14, 2013, at 1. Based on these findings, Referee Gibson, after quoting extensively from § 28-44-17 of the Employment Security Act (which defines Leaving-Without-Good-Cause as a basis for disqualification), made the following conclusions:

> * * *
> 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 which left him no reasonable alternative but to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant. In this case the claimant has not sustained this burden.
>
> While there is conflicting testimony, it is determined that the claimant voluntarily left his job when he gave his keys to his employer following a dispute regarding his hours and wages. 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, June 14, 2013, at 2. Accordingly, Referee Gibson found Claimant to be disqualified from receiving benefits pursuant to section 28-44-17. Claimant filed an appeal and the matter was reviewed by the Board of Review. On July 29, 2013, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision rendered by the Referee was affirmed. Thereafter, on September 11, 2013, 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 of fact.[2] Stated differently, the findings

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

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, 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:

> * * * 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 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?

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[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).

V. ANALYSIS

In a nutshell, we may describe this as a tale of two brothers and their two stories. One brother, the Claimant, Joe DeMoura, testified that he was fired; the other brother, the Employer, Fernando, testified that Joe quit. The Referee, Ms. Gibson, who had the opportunity to hear and observe their testimony first-hand, credited the latter version of events. And so, she found Mr. Joe DeMoura disqualified from the receipt of benefits.

The Board of Review, relying on the Referee's decision, found Claimant quit his position at Exuberant without good cause within the meaning of section 28-44-17. For the reasons I shall now state, I believe its determination that Claimant was subject to a section 17 disqualification is not clearly erroneous in light of the reliable, probative, and substantial evidence of record. We begin our review by synopsizing the relevant testimony.

Mr. Fernando DeMoura began his testimony by stating that he was a co-owner of Exuberant, along with his wife Lynn. Referee Hearing Transcript, at 34. He indicated his brother worked for him for two and a half years, until he quit. Referee Hearing Transcript, at 35. He indicated that in January of 2013, in a cost-cutting move, Joe was changed from a salaried employee ($400.00 per week) to an hourly one (at a rate of $20.00 per hour). Referee Hearing Transcript, at 35-36. The employer noted

that, if he worked four hours per day (times five days per week), that would give him the same $400.00. Referee Hearing Transcript, at 37.

Mr. Fernando DeMoura then described the confrontation of March 4, 2013. Referee Hearing Transcript, at 38. He said Joe was yelling at him, saying that he wanted the full salary, "no matter what." Id. He, Fernando, responded that he could not afford to do that. Id. Joe then threw his keys at him. Referee Hearing Transcript, at 38-40. Fernando then retrieved his vacuum from the back of Joe's truck. Referee Hearing Transcript, at 38.

Later, he then received a test message from Joe regarding another employee, Mario. Referee Hearing Transcript, at 38-39.

Of course, Mr. Joe DeMoura also testified. See Referee Hearing Transcript, at 16 et seq. He stated he was a part-time employee of the cleaning business, Exuberant, owned by his brother and sister-in-law. Referee Hearing Transcript, at 17. He was working four hours per day — mostly 7:30 to 11:30 a.m. or 8:00 a.m. to noon. Id.

Regarding his separation, he flatly denied he left his job voluntarily. Referee Hearing Transcript, at 18. He stated that when he went in on Monday the fourth, he asked to speak to his brother alone. Referee Hearing Transcript, at 20. And, when he raised the issue of his hours, his brother, whom he calls "Freddy," said — "[J]ust give me the keys, just give me the keys." Id. At this point he was about ten feet away from Freddy, so he "underhanded" the keys to him. Id. Mr. Fernando DeMoura then took

the cleaning agents out of Joe's truck and drove away to the client's building that was due for cleaning; he followed but was not allowed access. Referee Hearing Transcript, at 20-21.

Joe then described that he inferred he was fired from Fernando's directive to give him the keys, because, without them he cannot work. Referee Hearing Transcript, at 22. He also related how his hours (for which he was paid) were decreasing — to the extent of a 33% to 50% diminution. Referee Hearing Transcript, at 23, 25. He said his brother explained that it was necessary because the client, R & W Realty, was threatening to discharge Exuberant if they didn't get their costs down. Referee Hearing Transcript, at 23-24.

To recap, faced with the two versions of the events that led to Mr. Joe DeMoura's separation from Exuberant, the Referee — and the Board of Review — chose to believe the employer's. It was supported by Mr. Fernando DeMoura's testimony. Accordingly, while a reasonable fact-finder could have also believed Claimant's story, this Court must uphold a factual determination made by the Board unless it is clearly erroneous. This decision was not.

VI. CONCLUSION

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.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

I therefore recommend that this Court find that the decision of the Board of Review on the issue of Claimant's eligibility 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).

I therefore recommend that the decision made by the Board of Review in this case be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

November 25, 2013

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4 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

5 Cahoone, supra, n. 4, 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 at 6-7 and Guarino, supra at 7, fn. 1.