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

Lindsay Conn	:	
	:	
v.	:	**A.A. No. 13 - 166**
	:	
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 and the matter is REMANDED for further investigation by the Department of Labor and Training.

Entered as an Order of this Court at Providence on this 27th day of December, 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 Ms. Lindsay E. Conn urges that the Board of Review of the Department of Labor and Training erred when it held that she was not entitled to receive employment security benefits because she quit her 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 not supported by the reliable, probative, and substantial evidence of record; I therefore recommend that the Decision of the Board of Review be REVERSED. And, for the reasons explained below, I shall further recommend that the matter be REMANDED for additional fact-finding.

I

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Lindsay E. Conn worked for Bayada Nurses Inc. for six years; her last day of work was March 10, 2012. She filed a claim for unemployment benefits but on May 6, 2013 a designee of the Director issued a decision finding that she had left Bayada's employ without good cause, within the meaning of Gen. Laws 1956 § 28-44-17.

Claimant appealed from this decision and on June 21, 2013 Referee Carol A. Gibson conducted a hearing on the matter. The Claimant was present and gave testimony, as did Bayada's Recruiting Manager, Mr. Dean Ventre. In her June 21, 2013 decision, Referee Gibson pronounced the following findings of fact:

The claimant had worked for the employer, a home health care

> agency, for six years as a certified nursing assistant through March 10, 2012. The claimant was removed from her assignments as of that date as she was not in compliance with the health screening requirements for the position. The claimant had missed appointments with the employer to update her health screenings due to personal reasons. The claimant testified that her children were experiencing issues during this period. The claimant states her Director told her she was not allowed to work until she resolved her personal problems. The claimant indicates there had been issues in the workplace since the Director began her employment and she felt she was not treated fairly by this individual. On March 21, 2012, the claimant submitted a letter to the employer indicating that she was going to take time to address the needs of her children and to "get herself together." The claimant testified that she did need time during this period to address her personal issues. The claimant indicates she did not return to the job due to problems she had with the Director. The claimant did not address these issues with the corporate office.

Referee's Decision, June 21, 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 she had good cause for leaving her job, the claimant must show that the work had become unsuitable or that she was faced with a situation which left her with no reasonable alternative but to terminate her employment. The burden of proof in establishing good cause rests solely with the claimant. In this case the claimant has not sustained this burden.
>
> The record is void of sufficient evidence to indicate the work itself had become unsuitable. The evidence and testimony

> presented at the hearing establishes that the claimant left the job, following a leave of absence, due to issues she was having with her Director. The claimant did not address these issues with the corporate office prior to making the decision to leave her job. Since the claimant had a reasonable alternative available to her, which she chose not pursue, I find that her leaving is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, June 21, 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 August 28, 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 30, 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

[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).

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, 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.

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[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, 246 A.2d 213 (1968). Also D'Ambra v. Board 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 or made upon unlawful procedure.

V

ANALYSIS

The Board of Review, relying on the Referee's decision, found Claimant quit her position at Bayada Nursing 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 was made upon unlawful procedure. To put this issue in context, we shall begin our review by synopsizing the relevant testimony.

A

The Facts of Record

Ms. Conn began her testimony by denying she voluntarily quit her job with Bayada Nursing. Referee Hearing Transcript, at 15-16. She indicated that in the period just before her separation she was required to take a tuberculosis test. Referee Hearing Transcript, at 16-17. She had received the injection for

the PPD tuberculosis test but had been unable to have it read — due to her need to bring her children to counseling sessions. Referee Hearing Transcript, at 16. As a result, she had to have it done again. Id. When they injected her again (at the Bayada office) her Director, Telisha Wendling,[4] called her in and said that she needed to "fix" her life. Referee Hearing Transcript, at 16-18. At this point her clients were taken away. Referee Hearing Transcript, at 18. And when the Referee inquired about a letter she had written on March 21, 2012,[5] in which she said that she needed to get her life together, she indicated the wording was suggested by her Director, Ms. Wendling. Referee Hearing Transcript, at 20. Since she had no income, she filed for unemployment. Id.

When the Referee asked if there was someone above her in authority that she could have spoken to, she said no. Referee Hearing Transcript, at 19. Finally, she stated she had not presented herself for work because, in fact, she was having difficulty in coping with her life issues. Referee Hearing Transcript, at 22-23. She also felt that if Bayada had hours for her they would

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[4] Throughout the transcript, Ms. Conn's Director, her supervisor, is referred to as "Telisha." In a letter she wrote which was located in the record — addressed "To whom it may concern" — she signed her name "Telisha Wendling." In order to avoid the appearance of undue familiarity, I shall employ her surname.

[5] This holographic document is present in the certified record, but is not denominated as an exhibit.

have called, which they did not do. Referee Hearing Transcript, at 23. Plus, she simply did not feel comfortable working with Ms. Wendling. Referee Hearing Transcript, at 24. She said she e-mailed the people at the corporate personnel office regarding Ms. Wendling but never got a response. Referee Hearing Transcript, at 25.

Ms. Conn said she started her new job on October 9, 2012. Referee Hearing Transcript, at 27. She said that when she told Ms. Wendling she was going to file for unemployment benefits, she responded — "Do what you have to do." Referee Hearing Transcript, at 27-28. And when asked if she advised the Department that she had requested a leave of absence in writing, she said no — because she had lost her clients. Referee Hearing Transcript, at 28.

Next, the employer's representative testified. Referee Hearing Transcript, at 31 et seq. Mr. Ventre said that the issue was one of compliance with the health screening. Referee Hearing Transcript, at 32. He claimed no knowledge of the particulars of Claimant's meeting with Ms. Wendling and no knowledge of why she was never called back. Referee Hearing Transcript, at 34. He had no knowledge of the Claimant's letter or her putative leave of absence. Referee Hearing Transcript, at 35. In fact, he had no contact with the Claimant during March of 2012. Referee Hearing Transcript, at 36.

Mr. Ventre indicated that employees are made aware that they can contact the human resources department in New Jersey. Referee Hearing Transcript, at 37. But, he added "it's very very rare." Referee Hearing Transcript, at 38.

B

Rationale

The facts of the instant case are somewhat convoluted, including a written leave request that was disavowed by its author as being the subject of coercion. And so, I believe it is vital that we begin our discussion by recalling a few fundamental principles —

First, and as the Referee properly noted, it is the claimant's burden to satisfy the Board of Review that she left for good cause. In the instant case, Ms. Conn testified at length that she was forced from her employment by her Director, Ms. Wendling. Of course, we know that a forced resignation must be treated as a termination, a firing. See Kane v. Women & Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991).

Second, even though a claimant's explanation of the reasons why she quit her prior employment is not rebutted by first-hand testimony from the employer, the administrative fact-finder (here the Referee or the Board) need not accept it, if it is found to be incredible. And in this case the Referee did

not credit Ms. Conn's testimony; in fact, the only piece of evidence she cited approvingly was the letter Ms. Conn submitted to her Director, Ms. Wendling, on March 21, 2012. And in her leave letter, the Claimant cited family issues with children as the reason for her leave. The employer accepted it on that basis. Although the Claimant also testified that she had issues with Telisha, there is simply no dispute that her children's problems precipitated her absence from work — whether voluntary or not.

Third, quitting in order to address child-care needs has always been recognized as good cause to quit. Of course, this principle is seldom litigated because a parent who leaves work to care for a child who requires intense care will often be unavailable for work and thereby be subject to a disqualification under Gen. Laws 1956 § 28-44-12.[6]

Nevertheless, applying these three principles to the facts of the instant case, I believe the evidence is overwhelming that Claimant tendered her leave request for the reason that she would tend to the dire problems of her children. I therefore find she left her employment with good cause within the meaning of section 28-44-17.

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[6] This issue will have to be addressed further, as I recommend below.

C

Resolution

First, for the reasons stated above, I find that Ms. Conn left the employ of Bayada Nursing for good cause — to wit, to attend to the care of her children. I therefore recommend that the Board of Review's decision to the contrary be vacated.

Second, if my first recommendation is accepted, I must further recommend that this matter be remanded to the Board of Review so that it may refer the issue of Claimant's availability vel non to the Department for investigation.

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.[7] Stated

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

differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[8]

For the reasons explained above, I recommend that this Court find that the decision of the Board of Review finding Claimant disqualified from receiving unemployment benefits be vacated, as 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 REVERSED and REMANDED for investigation and determination by the Department on the issue of Claimant's Availability pursuant to Gen. Laws 1956 § 28-44-12.

/s/
Joseph P. Ippolito
MAGISTRATE

December 27, 2013

[8] Cahoone, supra, n. 7, 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 7 and Guarino, supra at 7, n. 1.