STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Cynthia Dube	:	
	:	
v.	:	**A.A. No. 13 - 206**
	:	
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 hereby REMANDED.

Entered as an Order of this Honorable Court on this 17th day of November, 2014.

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. Cynthia Dube 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 left her prior employment without good cause. 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 Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the instant matter should be REMANDED to the Board of Review for further proceedings as outlined in this opinion.

I
FACTS AND TRAVEL OF THE CASE

Ms. Cynthia Dube was employed by the Cintas Corporation as an accounts receivable clerk until June 14, 2013. On that date a confrontation arose regarding the possibility that Ms. Dube was under the influence of alcohol. The parties agree that, as a result of this interchange, Ms. Dube was separated from her employment; however, they disagree on the particulars — Claimant insists she was fired, the employer asserts she quit.

Ms. Dube applied for unemployment benefits but, on September 4, 2013, the Director deemed her ineligible because she resigned without good cause within the meaning of Gen. Laws 1956 § 28-44-17, or as the Director phrased it, there was "no evidence that [her] job was unsuitable." Claimant appealed from this decision and Referee Carol Gibson held a hearing on the matter on September 30, 2013. Ms. Dube appeared, as did two representatives of Cintas — Nina Grayson, its officer manager, and Jill Lambert, its human resources manager. See Referee Hearing Transcript, at 1-2.

In her decision, issued on October 1, 2013, the Referee made the following Findings of Fact regarding claimant's separation:

2. FINDINGS OF FACT:

> The claimant had worked for the employer for close to six years and was last employed as an a/r clerk on June 14, 2013. On that date, several employees reported to the employer concerns regarding the claimant's behavior. Two management individuals assessed the claimant's behavior and that drug/alcohol testing can be requested if there are concerns regarding conduct or behavior in the workplace. The testing is done at the employer's expense and it is conducted offsite. The claimant denies she was intoxicated in the workplace. The employer states the testing could also determine if there was a medical issue for the behavior. The claimant initially indicated she would submit to the testing but then refused to comply with the employer's request. The claimant states that she was discharged. The employer indicates the claimant was informed she was would be suspended and an investigation would follow if she refused the testing but she was not under immediate threat of discharge. The employer states the claimant indicated she was quitting an left the job.

Referee's Decision, October 1, 2013, at 1. Based on these findings — and after quoting extensively from Gen. Laws 1956 § 28-44-17 — the Referee formed the following conclusions on the issue of claimant's separation:

3. CONCLUSION:

> * * *
> Although there was conflicting testimony, it is determined the claimant voluntarily left her job. 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 that either of the above situations existed when the claimant made the decision to leave her job. The evidence and testimony presented at the hearing establishes that the claimant left her job when the employer requested that she submit to drug/alcohol testing. Accordingly, 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, October 1, 2013, at 2. Thus, Referee Gibson found claimant to be disqualified from receiving benefits because she left work without good cause.

Claimant filed an appeal and the matter was reviewed on the merits by the Board of Review. On November 19, 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 of the Referee was affirmed. Finally, on December 13, 2013, the Ms. Dube filed a complaint for judicial review in the Sixth Division District Court.

II
APPLICABLE LAW
A
Leaving For Good Cause

This case centers on the application and interpretation of the following provision of the Rhode Island Employment Security Act, which permits

claimants who have voluntarily quit their positions to receive unemployment benefits — if they do so for 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.

B

The Employer Testing Statute

In 1987, the General Assembly enacted Chapter 6.5 of Title 28 of the General Laws, entitled "Urine and Blood Tests As a Condition of

Employment." It provides that employers can only require drug tests consistent with the provisions of the act. See Gen. Laws 1956 § 28-6.5-1(a). Now, much of the statute is taken up with setting forth the conditions pursuant to which a test will be performed. Only the following portion of the Act defines when (i.e., under what conditions) an employer may request an employee submit to a test.

> … Employers may require that an employee submit to a drug test if:
>
> (1) The employer has reasonable grounds to believe based on specific aspects of the employee's job performance and specific contemporaneous observations, capable of being articulated, concerning the employee's appearance, behavior or speech that the employee's use of controlled substances is impairing his or her ability to perform his or her job; …

Gen. Laws 1956 § 28-6.5-1(a).[1]

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:

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[1] Presented above is the version of the statute in effect on the date of Claimant's separation, June 14, 2013. Subsequently, it was amended by P.L. 2013, ch. 145, § 1 (effective July 6, 2013) and P.L. 2013, ch. 494, § 1 (effective July 17, 2013). Appellant cites the version of the statute now in effect. See Appellant's Brief, at 4-5. Note that the current statute is triggered if the worker is "under the influence." The statute as it existed on June 14,

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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

2013 requires impairment of the worker's ability to perform his or her job.

[2] 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).

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

[4] Cahoone v. Board of Review of Department of Employment Security, 104

The Supreme Court of Rhode Island recognized in Harraka, cited supra page 5, 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
ANALYSIS

When analyzing a claim for unemployment benefits the first question must always be — Was the Claimant fired or did she quit? Depending on how this question is answered, follow up questions arise, such as: (a) Was the Claimant fired for proved misconduct? or (b) Did the claimant quit for good cause? And so, it is convenient for this Court, and the administrative decision-

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R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review,

makers authorized to resolve unemployment claims, that in the great majority of cases the parties agree on this point. However, in this case, the parties do not agree on this fundamental question.

A

The Evidence of Record

1

Claimant's Testimony

At the hearing before Referee Gibson, Ms. Dube testified first. She stated that she worked for the Cintas Corporation, a uniform rental company, for five years and eleven months, most recently as an accounts receivable specialist (handling collections on accounts lettered "a" through "e"). Referee Hearing Transcript, at 10. Ms. Dube professed no knowledge of whether Cintas had a policy which permitted it to request drug tests from its employees. Referee Hearing Transcript, at 16-17. However, Claimant admitted she had been tested before being hired. Referee Hearing Transcript, at 17.

Ms. Dube described the events of June 14, 2013. Referee Hearing Transcript, at 12 et seq. She said that when she entered the workplace she spoke to Nina Grayson and then, in the cafeteria, to a co-worker, Kim Lapore. She went to her desk and then, at 8:45 A.M., all the employees did "stretch and

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Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

flex." Referee Hearing Transcript, at 12. At about nine she went back to her desk. Referee Hearing Transcript, at 13.

Then, at about ten-thirty Nina Grayson came to her desk and called her into the office, where she told Ms. Dube she thought she was impaired. Referee Hearing Transcript, at 13. According to Claimant, Ms. Grayson did not explain her statement. Id. Ms. Dube speculated that she mistook the indicia of diabetes (which runs in her family) for the indicia of alcohol consumption. Id.

Ms. Dube explained that "if there's low sugar" a diabetic can emit "the same smell … as being impaired." Referee Hearing Transcript, at 14. She explained that — as of the date of the hearing — she had not yet been diagnosed as a diabetic but was being tested for it; in fact, the test was scheduled for the day after the hearing, October 1, 2013. Referee Hearing Transcript, at 14, 16. (Her laboratory test order was entered into the record as Claimant's Exhibit No. 1). She testified that the test was delayed because she had been without insurance and her new coverage would become effective the next day. Referee Hearing Transcript, at 15.

But she noted that she had been at work for two hours before she was collected by Ms. Grayson. Referee Hearing Transcript, at 14. She stated Jill Lambert told her they wanted her tested. Referee Hearing Transcript, at 16.

She stated she refused to do so because she was "highly insulted." Referee Hearing Transcript, at 16-17. And Claimant told them that. Referee Hearing Transcript, at 18. She also told them their request was "bullshit." Id. She got up, and was followed to her desk by Nina Grayson, who told her that she could not stay (unless she agreed to take the test). Referee Hearing Transcript, at 11, 18, 22. While at her desk she grabbed her son's pictures. Referee Hearing Transcript, at 11. She was then escorted to her car by Nina Grayson. Referee Hearing Transcript, at 11, 18.

Ms. Dube conceded that Ms. Grayson never said that she was fired or had to leave "permanently." Referee Hearing Transcript, at 19. On the other hand, Ms. Dube denied she quit. Referee Hearing Transcript, at 18, 21. According to Claimant she never punched out. Referee Hearing Transcript, at 11, 18.

2

Testimony of Ms. Grayson

The first witness for the employer was Ms. Nina Grayson. Referee Hearing Transcript, at 23 et seq. She said Cintas does have a policy regarding drug testing, for safety reasons, because part of the premises is a warehouse with forklifts and trucks moving about. Referee Hearing Transcript, at 24. Ms.

Dube, she said, has access to those parts of the building. Id. As a result, employees can be requested to submit to a drug testing, which costs the employee nothing, at any time. Referee Hearing Transcript, at 24-25.

Regarding the events of June 14, 2013, Ms. Grayson testified that, after another employee reported that Ms. Dube seemed intoxicated, she had some uncharacteristically strange conversations with Claimant. Referee Hearing Transcript, at 23. Later, she got close enough to detect the smell of alcohol on her breath. Id. So, she was called into the office, to meet with Andrew Heroux, the General Manager, Jill Lambert, and herself. Referee Hearing Transcript, at 23-24.

Ms. Grayson testified that, at first, Ms. Dube agreed to be tested — but then, she alleged that she was being persecuted because she was thinking of leaving. Referee Hearing Transcript, at 25. But Ms. Grayson denied any knowledge that Claimant possessed any such intentions. Referee Hearing Transcript, at 25-26. Then, Ms. Grayson said Ms. Dube said she quit. Referee Hearing Transcript, at 27. Mr. Heroux wanted to call a cab for her, and warned that if she would not use it, he would have to notify the police. Referee Hearing Transcript, at 27. Claimant responded — "Go ahead. Call the police, it

will only help my case when I see you." Id. In fact, they did call the police. Referee Hearing Transcript, at 28. And they did not hear from Ms. Dube. Id.

She also denied that Ms. Dube was facing termination. Referee Hearing Transcript, at 26. She also denied she ever told Ms. Dube she had to leave. Referee Hearing Transcript, at 27, 29. Ms. Grayson quoted Ms. Dube as telling a co-worker (on her way out) that she was quitting. Referee Hearing Transcript, at 28. Finally, she confirmed that she followed Claimant out to get her license plate. Referee Hearing Transcript, at 28. She did so out of fear of what could have transpired on the highway. Referee Hearing Transcript, at 30.

3

Testimony of Ms. Lambert

Next, Ms. Lambert testified. Referee Hearing Transcript, at 31 et seq. She explained that she had been put on notice regarding Ms. Dube's condition by Ms. Grayson. Referee Hearing Transcript, at 31. So, she made it a point to observe Ms. Dube. Referee Hearing Transcript, at 31-32. She described Claimant as being more outgoing than usual — dancing, joking, slurring her words, and emitting the smell. Referee Hearing Transcript, at 32.

Ms. Lambert explained that members of the management team met to discuss Ms. Dube's condition. Referee Hearing Transcript, at 32-33. They also

reviewed Cintas's testing policy, which Claimant signed-off on in 2007. Referee Hearing Transcript, at 33-34. (The copy of the policy that Ms. Dube had signed when hired was received into evidence as Employer's Exhibit No. 1). Then, they brought Ms. Dube into the meeting. Referee Hearing Transcript, at 34.

When they explained their concerns to Ms. Dube and requested she submit to a drug test she agreed — at first. Referee Hearing Transcript, at 34. And so they explained how it would work: (1) that Ms. Grayson would take her to the facility and stay with her, and (2) that she could not return to work until the results were in. Referee Hearing Transcript, at 34-35. At this point Ms. Dube responded — saying that the accusation was "bullshit" and ascribing management's action to her conversation in the cafeteria about giving two weeks' notice. Referee Hearing Transcript, at 35. Ms. Lambert described her as being "irate." Id. Mr. Heroux explained that if she refused the testing — which she had a right to do — she would be suspended pending an investigation. Id. But termination was never discussed. Id. At that point she quit. Referee Hearing Transcript, at 35-36.

Ms. Lambert echoed Ms. Grayson's testimony about the offer of a cab ride, and that, if she declined, the police would be notified. Referee Hearing Transcript, at 36.

B

Claimant's Position

At this juncture, I shall recount the arguments made by Ms. Dube in her Legal Brief, which was received by this Court on June 4, 2014.

Her main argument, as she describes it, is that the substance test she was being asked to take was not legal under Gen. Laws 1956 § 28-6.5-1. She asserts that the statute requires, as a precondition to a request for a drug test, specific observations as to both (1) the worker's condition and (2) his or her job performance. Claimant's Brief, at 4-7. She argues that the statute must be read in the conjunctive, and the employer must show both elements are fulfilled. Claimant's Brief, at 6. Conceding that the testimony of Ms. Grayson and Ms. Lambert may well have satisfied the element of observation of her condition, she asserts that there was no evidence that her condition, whatever its origin, affected her job performance in any way. Claimant's Brief, at 7.

So, how does she use this argument? She does not aver that she quit because she was being asked to submit to an illegal drug test (and that constituted a good reason to quit); instead, she maintains that it gave her a valid reason to believe she was being fired. Claimant's Brief, at 8.

C
Discussion

In my view, the Claimant's argument that Cintas's violations of the drug-test law tends to show that Claimant did not quit (but was fired) is utterly unconvincing. I simply do not believe that this one fact (even if true), can sustain that inference. And so, given our standard of review, and in light of the unqualified testimony of Ms. Grayson and Ms. Lambert that Ms. Dube quit, I conclude that there is no basis to find otherwise. In my opinion, the only issue that could merit any serious consideration is whether it was reasonable for her to quit on the theory that Cintas's request that she undergo drug and alcohol testing was not unauthorized under the drug-test statute.

Unfortunately, this issue cannot be given the consideration which (at least in theory) I believe it deserves — at least at this time. This issue was not raised below. As a result, no findings were made as to the legality, vel non, of Cintas's request that Ms. Dube submit to a drug test. And so, quite simply, we cannot find the Board of Review erred on the drug-test issue since it did not address the legality of Cintas's request. And it would be improper for this Court to address the issue ab initio, since our role is simply to determine whether the Board's findings are clearly erroneous.

However, Gen. Laws 1956 § 28-44-44 does impose upon the Referee hearing an appeal to "inquire into and develop all facts bearing on the issues." This duty is significant, particularly because many Claimants and employers appear at the referee-level hearings without legal representation. While I do not believe we can expect a referee to raise sua sponte all potential issues, in the case at bar the drug test issue was manifestly central to Ms. Dube's separation.[5] And so, I have no reluctance in concluding that the Referee in this case (and, by extension, the Board of Review) made her decision through an improper procedure in that she failed to address the drug-test issue, in violation of Gen. Laws 1956 § 42-35-15(g)(3). Accordingly, I recommend that the instant case be REMANDED to the Board of Review for further proceedings and the making of findings on the drug-test issue. The Board may make findings on the record before it or it may conduct a further hearing, as it deems best. The Board is respectfully reminded that it should apply the drug-test law in effect on the day of Claimant's separation.

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[5] I also find it significant that the employee drug-test law is found in Title 28, relating to Labor and Labor Relations, as is the Employment Security Act. One of the oft-cited benefits of an administrative hearing system is that the hearing officers develop an expertise in the factual and legal issues that arise within their jurisdiction.

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was made upon unlawful procedure. Gen. Laws 1956 § 42-35-15(g)(3).

Accordingly, I recommend that the instant matter be REMANDED to the Board of Review for further proceedings consistent with this opinion.

/s/
Joseph P. Ippolito
Magistrate

November 17, 2014