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

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| **Michael P. Choma** | : | |
| | : | |
| **v.** | : | **A.A. No. 13 - 089** |
| | : | |
| **Dept. 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 and the matter remanded to the Board of Review for referral to the Director of the Department of Labor and Training so that he may calculate the amount of benefits to be repaid after the application of the benefit offset described in the attached opinion.

Entered as an Order of this Court at Providence on this 27th day of June, 2013.

By Order:

____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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| **Department of Labor and Training,** | : | |
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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. Michael Choma 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 a part-time position without good cause. Jurisdiction for appeals from decisions 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 was 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 fundamental issue of disqualification. I shall, however, recommend that the decision be modified due to subsidiary issues that arise in this case.

## I

## Facts and Travel of the Case

The facts and travel of the case are these: Mr. Michael Choma worked for Blue Cross as its chief security officer until 2010. He applied for and received unemployment benefits. Then, he acquired a part-time position with the Rhode Island Bureau of Investigation (RIBI); as a result, his benefits were reduced by his earnings. In this fashion, he both collected benefits and worked part-time until July of 2011, when he quit to accept a new full time position. His last day of work for the RIBI was July 22, 2011.

Unfortunately, Mr. Choma's new position failed to materialize. He then accepted a new part-time job, with C.C. Business Corp, after a brief hiatus. He then continued to collect benefits until November 2, 2012, when a designee of the Director issued a decision finding him both disqualified from

the receipt of benefits and overpaid during the time-period of July 23, 2011 through February 25, 2012.[1] The Claimant was disqualified by the Director because he had left the employ of RIBI without good cause, within the meaning of Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and on January 3, 2013 Referee Nancy L. Howarth conducted a hearing on the matter. Claimant appeared with counsel; two representatives of RIBI also appeared.

The Referee issued a decision on January 15, 2013, in which she made the following findings of fact:

> **2. Findings of Fact:**
>
> The claimant was employed part time as a security officer by the employer. He expected to be offered a position from another employer. He submitted a resignation indicating that his last day of work for this employer would be July 22, 2012. The position with the new employer did not materialize. The claimant obtained a part-time position with a different employer and began working for them on August 3, 2011.

Decision of Referee, January 15, 2013, at 1. Based on these findings, the Referee 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

[1] The decision issued on November 2, 2012 was actually a "Corrected Decision," superseding one issued on October 18, 2012.
Mr. Choma was ordered to repay $11,362.00.

> that he was faced with a situation that left him no reasonable alternative other than to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant. In the instant case the claimant has not sustained this burden. The record is void of any evidence to indicate that the work itself had become unsuitable. The evidence and testimony presented at the hearing establish that the claimant did have a reasonable alternative, which he chose not to pursue. He could have continued to work for the employer until he could obtain another position. He could have continued working for the employer until he was able to obtain another job with a definite start date. Since the claimant had a reasonable alternative available to him, which he chose not to pursue, 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, January 15, 2013, at 2. Accordingly, Referee Howarth affirmed the Director's decision denying benefits to Mr. Choma.[2]

Claimant filed an appeal on March 12, 2013, after the expiration of the 15-day appeal period. The Board of Review issued two decisions. In the first, issued on April 5, 2013, a majority of the Board's members allowed his late appeal. Decision of Board of Review, April 5, 2013, at 1. Then, on April 25, 2013, the Board of Review issued a unanimous decision finding the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, April 25, 2013, at 1. Accordingly, the

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[2] We should note that a separate issue was also before the Referee — whether Mr. Choma had incorrectly reported his part-time earnings at C.C. Business Corporation, the firm for whom he worked part-time after RIBI. The Claimant stipulated to an adjustment. See Referee Hearing

decision rendered by the Referee was affirmed.

Thereafter, on May 20, 2013, the Claimant filed a complaint for judicial review in the Sixth Division District Court.

## II

## Applicable Law

The fundamental issue in 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

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Transcript, at 13.

> 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.' "[3] 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]

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,

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[3] 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).

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

[5] 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).

> 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? Additionally, was Claimant properly ordered to repay the benefits he had received?

## V

## Analysis

In order to determine whether the decision of the Referee was clearly erroneous in light of the reliable, probative, and substantial evidence of record, we must review the facts of record, which emanate primarily from the transcript of the hearing conducted by Referee Howarth. When first confronted, the Claimant's employment history seems convoluted; but, after a brief review, the situation is revealed to be fairly straightforward.

As we shall see, the record provides definitive evidence that Mr. Choma left his part-time position at RIBI voluntarily. He conceded that he did. The only real issue (and this is rather ephemeral) to be considered is whether he did so for good cause. I believe the Board of Review's decision that Claimant failed to prove he quit for good cause is not clearly erroneous. Accordingly, I shall recommend that the Board's decision finding him disqualified pursuant to Gen. Laws 1956 § 28-44-17 be affirmed.

But the resolution of this question will not end our labors. To the contrary, I believe we must evaluate whether the Referee erred in two subsidiary matters — (1) the question of whether this finding should effect a full or partial disqualification and (2) statutory limitations on the ability of the

Department to revise its decisions. In order to analyze these questions properly, we shall begin with a review of the factual record.

**A**

**Review of the Factual Record**

It is conceded by all parties in interest that Mr. Choma was employed as the chief security officer of the Blue Cross organization until 2010, when he was discharged, apparently for non-disqualifying reasons. He applied for and received unemployment benefits. He began to work for the Rhode Island Bureau of Investigations (RIBI), a private-sector security firm, on June 8, 2011. Referee Hearing Transcript, at 8. He worked for RIBI as a security officer on foot patrol, about 16-21 hours per week, earning $10.50 per hour. Referee Hearing Transcript, 17-18. But, approximately six weeks later, on July 15, 2011, he submitted a letter of resignation to RIBI, indicating that his last day of work would be July 22, 2011. Referee Hearing Transcript, at 27. The representatives of RIBI told Referee Howarth that there were no issues with Mr. Choma's performance, and he could have stayed with the firm. Referee Hearing Transcript, at 30.

In his letter of resignation, Mr. Choma indicated that he had been offered a position at the U.S. Army Test Center. Referee Hearing Transcript,

at 27. But at the hearing, Mr. Choma testified that the Army offer was merely tentative. Referee Hearing Transcript, at 31. And so, when he was offered a part-time position by C.C. Business Corporation, he accepted it. Referee Hearing Transcript, at 31. He began to work for C.C. Business during the week ending July 30, 2011. Referee Hearing Transcript, at 32.

The Hearing also considered the issue of the overpayment. Specifically, the Department alleged that the Claimant was overpaid for each week from July 23, 2011 to February 25, 2012. Referee Hearing Transcript, at 33. When the Referee asked Mr. Choma to explain how he could have told the Department that he left RIBI due to lack of work, he claimed no specific recollection, but speculated that he might have been referring to his separation from Blue Cross. Referee Hearing Transcript, at 33-34. He stated he reported his CC Business Corporation earnings to the Department. Referee Hearing Transcript, at 36. We may now turn to the main issue in this case, whether Claimant quit his part-time position at RIBI for reasons that constitute good cause.

**B**

**The Issue of Disqualification**

In my estimation, the Referee's conclusion (adopted by the Board of Review as its own) — i.e., that Claimant quit his position at RIBI without good cause within the meaning of section 28-44-17 — is fully supported by the record in this case. He departed from RIBI before securing a new position. Both the Board of Review and this Court have held on innumerable occasions held that leaving one's job to pursue a new position but without a firm offer in hand constitutes a leaving without good cause.

We now turn to the subsidiary questions which arise from the resolution of the disqualification issue.

**C**

**Full or Partial Disqualification (The Offset Issue)**

The Board of Review's fundamental conclusion — that Claimant quit his position at RIBI for reasons that did not constitute good cause — gives rise to a further question which the Referee and the Board did not address but which, in the interests of fairness, I shall consider sua sponte: What is the effect of this finding? Does it trigger a full or partial disqualification? Certainly, if Mr. Choma had quit a full-time position without good cause, he

would be fully disqualified from the receipt of benefits. But Claimant only worked part-time hours at RIBI. Should he also be fully disqualified? In light of both statutory law and certain longstanding precedents of this Court, I believe the answer to this question must be no.

To begin with, it is clear from the record that the Director held Claimant Choma was fully disqualified from receiving benefits. In his November 2, 2013 decision, the Director, based on his finding that Mr. Choma left without good cause, determined Claimant Choma to be disqualified from receiving unemployment benefits; in the ruling he was specifically told — "… This disqualification will end when you have at least (8) weeks of covered employment after week ending 07/23/11 and in each of those eight weeks, you have earnings equal to or greater than $148.00." Decision of Director, Exhibit Dept. 2, at 1. Based on this phraseology being used, it appears that these decisions ruled claimant to be *entirely, not partially,* disqualified from receiving benefits.[6]

But, should Mr. Choma be disqualified from the receipt of all benefits? I believe not. Doing so would be contrary to the manner in which quitting a

[6] This language was not repeated in the decision of Referee Howarth — apparently the Referee was convinced that in the intervening period he had satisfied the employment requirement. See Decision of Referee, January 15, 2013.

part-time position is 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 or she is not fully disqualified, only partially.

After applying the foregoing statutes and precedents, I have concluded Mr. Choma's 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 him — after all, he should not be penalized for obtaining a

replacement part-time position, even though this fact will necessitate adding an additional step to the calculation of the offset.[7] And so, Mr. Choma must be allowed benefits offset by the amount of weekly wages he gave up by leaving RIBI; however, the amount of this offset shall be diminished by the wages he earned at C.C. Business. These amounts shall be calculated by the Director based on the record of this case and such further investigation as he may deem appropriate.

**D**

**Repayment of Benefits Received Pursuant to § 28-42-68.**

Finally, Claimant was ordered to repay thousands of dollars by the Director pursuant to Gen. Laws 1956 § 28-42-68. In light of my recommendation in Subsection C that Claimant should not be fully disqualified from the receipt of unemployment benefits but only partially so,

[7] Assuming that he earned more at RIBI than he did at C.C. Business, the formula is this: Y=B–(C–D), where Y is the amount of weekly benefits Claimant should receive after the offset, where B is the amount he would receive on his claim for unemployment based on his discharge from Blue Cross, where C is the figure for the weekly earnings he gave up by quitting his position at RIBI, and where D is his weekly earnings at C.C. Business. Of course, if his average earnings at C.C. Business were greater, the formula is simply Y=B–D.

further discussion is unnecessary as the issue is moot. The order of repayment must be set aside in favor of the offset calculation described above.

**E**

**Adjustment of the Repayment Order Per Gen. Laws 1956 § 28-44-39**

Before concluding, I must consider the effect of one more section of the Employment Security Act — Gen. Laws 1956 § 28-44-39. It is this section which authorizes the Director to reconsider prior decisions he has made regarding a claimant's eligibility for benefits or the amount of benefits to be received. It is pursuant to the authority of section 28-44-39 that the Director was empowered to issue his November 2, 2012 decision, which was the first step in the travel of the current controversy. However, section 28-44-39 places a specific time limitation on the Director's authority to reconsider decisions:

> * * * The director may at any time within one year from the date of determination either upon the request of the claimant or on his or her own motion reconsider that determination if he or she finds that an error in computation or in identity has occurred in connection with it, or that additional wages pertinent to the status of the claimant has become available, or if that determination was made as a result of a non-disclosure or misrepresentation of a material fact. * * * (Emphasis added).

Gen. Laws 1956 § 28-44-39(a)(1)(i). Thus, the Director's ability to revise prior decisions is confined to a one year period.

The application of this statute to the instant case may be simply done. When he rendered his first decision, on November 2, 2012, the Director could not revise any determination of Mr. Choma's eligibility that had been made prior to November 2, 2011. Therefore, all benefits received prior to the week ending November 5, 2011 must be regarded as settled and unaffected by the Director's decisions.[8] His eligibility for benefits during the period from July through November, 2011 is, as a matter of law, reinstated. He may not, therefore, be ordered to repay unemployment benefits received during this period. A fortiori, the offset calculation described in Section V-C, supra, shall be undertaken only for the period commencing with the week ending November 5, 2011.

## 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

[8] By setting aside the finding of disqualification for all periods prior to November 2, 2011 the Court is, in effect, treating the receipt of each week's benefits as a separate determination. I believe this practice is equitable to both the Department and its clientele.

the Board as to the weight of the evidence on questions of fact.[9] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[10]

Applying this standard, 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).

Specifically, the Board of Review's decision (adopting the findings and conclusions of the Referee) that Claimant voluntarily terminated his employment at RIBI without good cause within the meaning of section 17 is well-supported by the evidence of record. However, applying the provisions of section 28-44-7 and the applicable District Court precedent, I find that Claimant is disqualified only to the extent of the wages voluntarily forgone by him when he abandoned his part-time positions at RIBI — which shall be treated as an offset to benefits received by him. Finally, the Claimant shall not

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

[10] Cahoone, supra at 8, 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

be ordered to repay any benefits received on or before the week ending November 2, 2011 since the Director was without authority to revise his eligibility determinations for those weeks.

Upon careful review of the evidence, I 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).

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 27, 2013

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at 7-8 and Guarino, supra at 8, n. 3.