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

Sandra Powell, Director of the Department of Labor and Training	:	
v.	:	**A.A. No. 10 - 212**
Dept. of Labor and Training, Board of Review And Nella Davis	:	

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 Board of Review's decision is REVERSED.

Entered as an Order of this Court at Providence on this 27th day of July, 2011.

By Order:

/s/
Melvin Enright
Acting 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. Sandra M. Powell, in her capacity as Director of the Department of Labor and Training Board of Review, urges that the Board of Review of the Department of Labor and Training erred when it held that Ms. Nella Davis would be deemed eligible to receive unemployment benefits because she was available for work within the meaning of Gen. Laws 1956 § 28-44-12. Jurisdiction to hear and decide appeals from decisions made by the 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. For the reasons stated below, I conclude that the instant matter should be reversed on the issue of claimant's eligibility for benefits; I so recommend.

FACTS & TRAVEL OF THE CASE

For five years Ms. Nella E. Davis worked part-time for Sojourner House as a child advocate. After being laid off, she filed a claim for Employment Security benefits on March 14, 2010; but the Director determined she failed to meet the availability requirements of Gen. Laws 1956 § 28-44-12 — specifically the element that she demonstrated that she was available for work — and was thereby disqualified from receiving unemployment benefits. Claimant appealed and a hearing was held before Referee Stanley Tkaczyk on August 11, 2010, at which time Ms. Davis was the only witness.

Referee Tkaczyk issued a decision on August 12, 2010 in which he found that "claimant limits her availability to approximately three to four hours per day, a maximum of fifteen hours per week, on second shift because of medical reasons." Referee's Decision, August 12, 2010 at 1. Then, after citing Gen. Laws 1956 § 28-44-12, the referee pronounced the following statements of conclusion:

> * * *
> The evidence presented establishes that claimant's limitation of her availability is due to medical reasons. However, the evidence further establishes that the limitation is of such degree as to effectively bar the claimant from being actively engaged in the labor market. Fifteen hours per week is a substantial restriction. The claimant does not meet the availability requirements under the provisions of Section 28-44-12 of the Rhode Island Employment Security Act and benefits must be denied on this issue.

Referee's Decision, August 12, 2010 at 1. Accordingly, the Decision of the Director denying benefits pursuant to section Gen. Laws 1956 § 28-44-12 (Availability) was sustained.

Claimant appealed and the matter was considered by the Board of Review on the basis of the record below. See Gen. Laws 1956 § 28-44-47. The Board adopted the

following Findings of Fact:

> The claimant was employed part-time as a child advocate; working approximately 15 hours a week. The claimant was laid-off from work. The claimant is on SSDI. She is limited in the amount of hours she is able to work because of medical reasons.

Decision of Board of Review, September 29, 2010 at 1. Based on these facts a majority of the Board adopted the following Conclusions:

> As the Referee noted, the issue, under Section 28-44-12(a) of the Act, is whether the claimant made herself available for work.
>
> It is not contested that the claimant is available to work 15 hours a week. She is unable to work more than 15 hours a week because of medical reasons. The claimant is on Social Security disability. Because of medical reasons, the claimant is able to work 15 hours. 15 hours for this particular claimant amounted to full-time work. She is able to work 75 per cent of the hours allowed under Social Security. The claimant has satisfied the availability requirements set forth in Section 28-44-12 of the Act.

Decision of Board of Review, September 29, 2010 at 2. Accordingly, the Referee's decision was reversed. The Member Representing Industry dissented. Decision of Board of Review, September 29, 2010 at 3. Thereafter, the Department filed a timely complaint for judicial review in the Sixth Division District Court.

APPLICABLE LAW

This case centers on the application of the following provision of the Rhode Island Employment Security Act, which enumerates one of the several grounds upon which a claimant may be deemed ineligible to receive unemployment benefits. Gen. Laws 1956 § 28-44-12(a), provides:

> **28-44-12. Availability and registration for work. --** (a) An individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work

> and available for work. To prove availability for work, every individual partially or totally unemployed shall register for work and shall:
>
> (1) File a claim for benefits within any time limits, with any frequency, and in any manner, in person or in writing, as the director may prescribe;
>
> (2) Respond whenever duly called for work through the employment office; and
>
> (3) Make an active, independent search for suitable work.
>
> (b) * * *

As one may readily observe, section 12 requires claimants to be able and available for full-time work and to actively search for work.

The test for work-availability under section 12 was established in Huntley v. Department of Employment Security, 121 R.I. 284, 397 A.2d 902 (1979):

> * * * The foregoing authorities persuasively suggest a rule of reason for Rhode Island under which a court faced with a question of availability for suitable work would make a two-step inquiry in the event that a claimant places any restrictions upon availability. First: are these restrictions bottomed upon good cause? If the answer is negative, the inquiry ends and the claimant is ineligible for benefits under the Employment Security Act. If the answer is affirmative, the second stage of the inquiry must be made: do the restrictions, albeit with good cause, substantially impair the claimant's attachment to the labor market? If the answer to this inquiry is affirmative, then the claimant is still ineligible for benefits under the Act.
>
> If, on the other hand, the restrictions do not materially impair the claimant's attachment to a field of employment wherein his capabilities are reasonably marketable, in the light of economic realities, then he is still attached to the labor market and is not unavailable for work in terms of our statute. For example, if a claimant, as in several cases cited, is unavailable for work for 2 or 3 hours out of the 24, in a multi-shift industry, it would be harsh, indeed, to declare such an employee unavailable. If a claimant placed such restrictions upon availability that he would only be available 2 or 3 hours out of 24 for work of a nature which he was able to perform, however good the cause or compelling the reason, he would have in effect removed himself from the labor market and could not, therefore, be eligible for employment benefits. (Emphasis added).

Huntley, 121 R.I. at 292-93, 397 A.2d at 907.

STANDARD OF REVIEW

The pertinent 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 of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Bd. of Review, Dept of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of the Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 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.

ANALYSIS

At the outset we should indicate that section 28-44-12 requires that – in order to be eligible for benefits – a claimant must pass the following three-prong test: that the claimant is able to work, that the claimant be available for work, and the claimant must be actively searching for work. See Gen. Laws 1956 § 28-44-12(a) and § 28-44-12(a)(3), excerpted supra at page 4.[4] It is the claimant's burden of proof to meet these conditions. The referee concluded that Ms. Davis became subject to disqualification — pursuant to section 28-44-12 — when she was laid off because she was not fully available for work, the second prong of the test.

[4] It is confusing that section 12 is commonly known as the "Availability" section and that "availability" in a stricter sense is an element of the test.

In making his findings and conclusions in this case, the Referee relied entirely upon claimant's testimony. As to her availability, claimant testified that she could only work part-time (i.e., fifteen hours per week) due to her medical condition. Referee Hearing Transcript, at 5. To reiterate, the referee fully accepted her testimony on this point. But, he found claimant ineligible because her limitations impaired her attachment to the labor market. In so ruling the Referee followed the teaching of the Rhode Island Supreme Court in Huntley v. Department of Employment Security, Board of Review, 121 R.I. 284, 397 A.2d 902 (1979). In Huntley the Court said:

> If a claimant placed such restrictions upon availability that he would only be available 2 or 3 hours out of 24 for work of a nature which he was able to perform, however good the cause or compelling the reason, he would have in effect removed himself from the labor market and could not, therefore, be eligible for employment benefits.

Huntley, 121 R.I. at 293, 397 A.2d at 907. It seems claimant falls precisely within the holding of Huntley, since she could only work fifteen hours per week, which is three hours times five days. According to the Supreme Court, a person who can only work fifteen hours per week has a substantially impaired attachment to the labor market; as a result, that person is ineligible under section 12, even if the reason for the limitation is beyond reproach. See Huntley, 121 R.I. at 292-93, 397 A.2d at 907, discussed supra at page 4.

However, on appeal, the Board of Review took an entirely different approach. It viewed the question of claimant's attachment to the labor market in the context of her position as a Social Security recipient — not the labor market generally. This approach is certainly not illogical, but it is not authorized in law. It can certainly be argued that it is unfair that claimant, who has been working steadily for four years [and the employer has

presumably been paying into the system on her wages], cannot even collect partial benefits when she was laid off. Her desire to work is indisputably admirable. However, this Court must enforce the provisions of the Employment Security Act as enacted, not as we might prefer it. Accordingly, I believe that Ms. Davis is disqualified from receiving benefits by section 12.

This decision — finding Ms. Davis disqualified — is consistent with the majority of District Court precedents. In the following cases a claimant who could only work part-time was deemed disqualified by this Court. See Lannigan v. Department of Labor and Training, Board of Review, A.A. 03-050, (Dist.Ct. 10/14/03)(DeRobbio, C.J.) (Restriction of 20 hours per week so as to avoid sanction under Social security benefits; denial of benefits affirmed) and Powell, Director of the Department of Labor and Training v. Board of Review of the Department of Labor and Training and Corsi, A.A. 08-61, (Dist.Ct. 7/11/08)(DeRobbio, C.J.)(Restriction of 15 hours per week so as to avoid sanction under Social security benefits; granting of benefits reversed). Ayanyan v. Department of Labor and Training, Board of Review, A.A. 05-099, (Dist.Ct. 6/15/06)(Gorman, J.)(Claimant limited her work availability to 4:30 to 9:00 p.m. each day — due to child care duties — denial of benefits affirmed). To the contrary is Morris v. Department of Labor and Training Board of Review, A.A. No. 00-58 (Dist.Ct. 5/18/01)(Cappelli, J.)(Claimant was limited to part-time work by an illness; denial of benefits reversed). Guided by the weight of authority, I must find that the Board's decision granting claimant benefits was contrary to law and clearly erroneous.

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. For the reasons stated above, I find that the Board's decision granting Ms. Davis benefits is contrary to the prior decisions issued by the Court. Accordingly, I find that the Board's decision (reversing the finding of the Referee) that claimant was available for full-time work within the meaning of section 28-44-12 is clearly erroneous and contrary to law and ought to be reversed.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review (affirming the decision of the Referee) was affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board be REVERSED.

___/s/_____
Joseph P. Ippolito
MAGISTRATE

JULY 27, 2011