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

Corey Brown	:	
	:	
v.	:	**A.A. No. 10 - 0241**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Corey Brown, a bus driver for the Met School, urges that the Board of Review of the Department of Labor and Training erred when it held that he was ineligible for unemployment benefits during the 2010 summer vacation period because he had been given a reasonable assurance of work during the next term as required by Gen. Laws 1956 § 28-44-68. 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.

FACTS & TRAVEL OF THE CASE

Mr. Corey Brown was employed by the Metropolitan Regional School as a bus driver for two academic years. When the 2009-2010 academic year ended on June 4, 2010, his services were no longer required. He applied for unemployment benefits but

on June 24, 2010, a designee of the Director of the Department of Labor & Training decided that the claimant was not eligible for benefits during the summer vacation because he had a reasonable assurance of being rehired after the vacation ended. Gen. Laws 1956 § 28-44-68.

Mr. Brown filed a late appeal and a hearing was held before Referee Stanley Tkaczyk on October 26, 2010. On October 27, 2010, Referee Tkaczyk issued a decision in which he allowed the late appeal and made the following findings of fact on the issue of the section 68 disqualification:

> 2. Findings of Fact:
> * * *
> The claimant had worked for this employer as a school bus driver a period of two academic years. His last day of work was June 4, 2010. At that time school closed for the summer recess. He was recalled in the same capacity on August 25, 2010.

Referee's Decision, October 27, 2010, at 1. Then, the referee pronounced the following statements of conclusion:

> * * *
> In regards to the second issue of whether or not the claimant is subject to disqualification under the provisions of Section 28-44-68, the evidence presented establishes that the claimant performed services for this employer in a prior school year which ended on June 4, 2010 and resumed performing services in the same capacity when the upcoming school year began on August 25, 2010. The claimant is subject to disqualification under the provisions of Section 28-44-68 for the period at issue.

Referee's Decision, October 27, 2010 at 2. Accordingly, the Decision of the Director denying benefits pursuant to section Gen. Laws 1956 § 28-44-68 was sustained.

Mr. Brown appealed and the matter was considered by the Board of Review. On November 24, 2010, the Board of Review issued a decision which found that the

decision of the referee was a proper adjudication of the facts and the law applicable thereto and adopted the decision of the Referee as its own. Thereafter, claimant 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 § 28-44-68, provides:

> **28-44-68. Benefit payments for services with nonprofit organizations and educational institutions and governmental entities. ---** Benefits based on service in employment for nonprofit organizations and educational institutions and governmental entities covered by chapters 42--44 of this title shall be payable in the same amounts on the same terms and subject to the same conditions as benefits payable on the basis of other services subject to chapters 42--44 of this title, except that:
> * * *
> (2) With respect to services in any other capacity for an educational institution, including elementary and secondary schools and institutions of higher education, compensation payable for weeks of unemployment beginning on or after April 1, 1984, on the basis of the services shall be denied to any individual for any week which commences during a period between two (2) successive academic years or terms if that individual performs those services in the first of those academic years or terms and there is a reasonable assurance that the individual will perform those services in the second of those academic years or terms, except that if compensation is denied to any individual for any week under this subdivision and the individual was not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms, the individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of this subdivision.
> * * *
> (a) <u>"Reasonable assurance" means a written agreement by the employer that the employee will perform services in the same or</u>

similar capacity during the ensuing academic year, term or remainder of a term. Further, reasonable assurance would not exist if the economic terms and conditions of the position offered in the ensuing academic period are substantially less than the terms and conditions of the position in the first period.
(Emphasis added)

As one may readily observe, subsection (a) requires that the "reasonable assurance" described in the statute to be given in writing.

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:

> **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

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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).

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]

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.

ISSUE

The issue before the Court is whether the claimant was eligible to receive between-term benefits because he had not been given "reasonable assurance" of work in the fall term in writing as provided in section 28-44-68.

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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).

ANALYSIS

Pursuant to Gen. Laws 1956 § 28-44-68, public and non-profit educational institutions who wish to prevent employees from receiving between-term benefits, must provide their employees with reasonable assurance of work in the fall. Pursuant to the amendments to section 68 provided by. P.L. 1998, ch. 113, § 1, said assurance must be in writing. See Gail Frederick v. Department of Labor and Training, Board of Review, A.A. No. 10-140 (Dist.Ct. 10/19/10) and New England Torah School, Inc. v. Department of Labor and Training, Board of Review, A.A. No. 10-37 (Dist.Ct. 8/26/10). For the reasons that reasons that will be explained below, I believe that claimant was not given such a written assurance of work in the fall term when he was laid off in June. Accordingly, I believe the Decision of the Board denying between-term benefits to Mr. Brown must be reversed.[4]

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4 In referring to his call back, Mr. Brown said he was "rehired," which is not typical nomenclature employed by educational employees for their end of their annual summer layoffs. My curiosity was piqued. This anomaly was explained when I reviewed the entire file and found a letter sent to the Board of Review by Danielle Maddox, the representative of the Met School who appeared on its behalf at the referee's hearing. The letter, which was received by the Board after the Referee had ruled but before it issued its own decision, states in its entirety as follows:

> This letter is in reference to Corey Brown's second appeal attempt for unemployment benefits. Corey is currently employed at the Metropolitan Regional Career & Health Center as a part-time bus driver.
> As a bus driver, he is employed for the academic school year, and when school is out of session, there is no work available. More importantly to this case, when our school is in between academic terms, our bus drivers are completely unemployed by the MET. Each, driver participates in our re-hire process, if they so choose. Our process for re-hiring bus driver is as follows. For every driver, we obtain a copy of their BCI, Motor Vehicle Record, verify license arid personal auto insurance. We also, look at previous year's performance and if that driver is going to be called back to work for the next academic year, they are called in late August and notified of their return date.

The hearing held by the referee in this case was brief: the transcript runs only to 14 pages and all but six relate to the late appeal issue. See Referee Hearing Transcript, at 9-14. In his inquiry of Mr. Brown at the October 26, 2010 hearing, the referee centered on the outcome of the claimant's summer lay-off, and took note that Mr. Brown had been laid off on June 4, 2010 and brought back on August 25, 2010. See Referee Hearing Transcript, at 10. He also established, through questions to the employer's representative, that Mr. Brown was rehired in the same capacity. See Referee Hearing Transcript, at 12. Thus, contrary to the clear mandates of § 28-44-68, the referee viewed the matter *retrospectively*, and made no inquiry regarding what claimant had been told about his prospects for fall-term employment as of June 4, 2010.

In any event, the record is devoid of any evidence that Mr. Brown had been given a reasonable assurance of fall-term employment, in writing — as required by

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> When they return, they also receive given an employment contract which solidifies employment. In short, our bus drivers are not given a contract/written assurance until late August, when they are called back to work, as each year they have to be re-hired.
>
> If there are any questions, please feel free to contact me. (Emphasis added).

This statement would seem to entirely contradict and disprove the referee's finding that Mr. Brown had a reasonable assurance of fall-term employment. From this letter a reasonable mind can draw but one inference: that the bus drivers at the Met School work on a year-by-year basis with no expectation of future employment.

But, because this evidence is without the record of the hearing held by the referee, it cannot provide a basis for a reversal. On the other hand, this letter is sufficient *per se* to require a remand in the interests of justice. However, given my recommendation that the decision of the Board should be reversed on other grounds (*i.e.*, the lack of a written reasonable assurance), a remand for further consideration is unnecessary. Nevertheless, it appears the lack of reasonable assurance in this case is substantive and not merely a matter of form.

statute — or orally, for that matter. Accordingly, pursuant to the plain language of § 28-44-68(a), he may not be deemed disqualified from the receipt of between term benefits. The Board's decision to the contrary is clearly erroneous and contrary to law.

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. After reviewing the complete record below, I find that the Board's decision (adopting the finding of the Referee) that claimant was ineligible to receive unemployment benefits during the summer 2010 recess pursuant to section 28-44-68 is not supported by substantial evidence of record, is not consistent with applicable law, and must 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.

Joseph P. Ippolito
MAGISTRATE

JANUARY 19, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Corey Brown	:	
	:	
v.	:	**A.A. No. 10 - 241**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

ORDER

This matter is before the Court pursuant to § 88-8.1 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.

Entered as an Order of this Court at Providence on this 19th day of January, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge