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

Christopher M. Cleverly	:	
	:	
v.	:	**A.A. No. 11 - 009**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. This matter is before the Court on the complaint of Christopher M. Cleverly seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor & Training, which held that Mr. Cleverly was not entitled to receive employment security benefits. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. Unfortunately, this Court will not be able to address the merits of this instant appeal: because claimant perfected his appeal after the applicable appeal period had expired, I must recommend his appeal be dismissed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case may be briefly stated: Christopher Cleverly was employed by Whole Foods until May 2, 2010. He filed a claim for unemployment benefits but on June 3, 2010 the Director determined he had been terminated for misconduct within the meaning of Gen. Laws 1956 § 28-44-18 and was disqualified

from receiving benefits. The claimant filed an appeal. Referee Carl Capozza held a hearing on the matter on September 7, 2010 at which time claimant appeared and testified, as did two employer representatives. On September 9, 2010 Referee Capozza issued a decision finding claimant disqualified from the receipt of benefits because of misconduct – to wit, failure to attend a mandatory meeting after a warning that a recurrence would result in termination. Decision of Referee, September 9, 2010, at 2. The Director's decision was thereby affirmed.

From this decision claimant filed an appeal and on October 18, 2010, the Board of Review unanimously issued a decision in which it held that the decision of the referee was a proper adjudication of the facts and the law applicable thereto. Thereafter, on or about January 31, 2010, the claimant transmitted a statement of appeal to the District Court, together with the appropriate filing fee.

STANDARD OF REVIEW

The standard of review by which this court must consider appeals from the Board 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]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

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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, 246 A.2d 213 (1968).

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

> * * * 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

As stated above in the travel of the case, the Board of Review rendered its decision on October 18, 2010; but claimant's appeal was not perfected (by submitting the complaint for judicial review along with the appeal fee) for over 100 days — on January 31, 2011 — long after the thirty day appeal period had expired. See Gen. Laws 1956 § 42-35-15(b). While Mr. Cleverly attributes the tardiness of his complaint as an omission on the part of his attorney, his explanations can be to no avail; quite simply, the District Court is not authorized to extend the appeal period, which has been held to be jurisdictional. See Considine v. Rhode Island Department of Transportation, 564 A.2d 1343, 1344 (R.I. 1989)("... the District Court does not possess any statutory authority to entertain appeals that are filed out of time." 564 A.2d at 1344.). See also Dub v. Dept. of Employment Security Board of Review, A.A.

No. 90-383 (Dist.Ct. 1/23/92) (SaoBento, J.)(" * * * [complainant's] failure to comply with the procedural require-ments of § 42-35-15(b) also *invalidates* his claim for relief." Slip op. at pp. 7-8. *Emphasis added*). Thus, Mr. Cleverly's appeal must be dismissed.[4]

CONCLUSION

Upon careful review of the record in this matter, I recommend that the instant complaint for judicial review be DISMISSED because it was filed beyond the prescribed appeal period.

Joseph P. Ippolito
MAGISTRATE

FEBRUARY 11, 2011

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4 Mr. Cleverley, according to the representatives of Whole Foods, was fired not simply for missing the meeting, but for also not calling — being, in the common parlance, a "No call, no show." Referee Hearing Transcript, at 10-11, 17. This he adamantly denied, and testified he texted his superior, a Mr. DeStefano, who was not present at the hearing. Referee Hearing Transcript, at 27. The employer representatives who were present questioned this testimony, indicated Mr. DeStefano had related otherwise — i.e., that claimant did not text him until after the meeting. Referee Hearing Transcript, at 19-20.

In his complaint, Mr. Cleverly asserts that he has proof — in the form of phone records — that he texted Mr. DeStefano before the meeting, not after. In light of the lateness of his appeal claimant's further opportunities for redress would seem to be few: He might proffer this material to the Director, who may reopen any matter within one year if she believes an error has been made. Gen. Laws 1956 § 28-44-39(b). Or, he can ask the Board of Review to reopen his case pursuant to Gen. Laws 1956 § 28-44-49 if he believes the Board has been misled.

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Christopher M. Cleverly	:	
	:	
v.	:	**A.A. No. 11 - 009**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

ORDER

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 instant complaint is DISMISSED for lateness.

Entered as an Order of this Court at Providence on this 11th day of February, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge