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

Francis R. Horton	:	
	:	
v.	:	**A.A. No. 11 - 0118**
	:	
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 AFFIRMED.

Entered as an Order of this Court at Providence on this 12th day of October, 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. Ms. Francis R. Horton comes before the Court seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor & Training, which dismissed Ms. Horton's appeal due to lateness. As a result of the Board's ruling, a previous decision of a referee denying claimant employment security benefits was allowed to stand. 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 affirmed on the issue of the dismissal for lateness; I so recommend.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case may be briefly stated: Ms. Francis Horton was collecting workers' compensation when, on February 18, 2011, she applied for unemployment benefits. The Director determined Ms. Horton failed to meet the availability requirements of Gen. Laws 1956 § 28-44-12. The claimant filed an appeal and Referee Gunter A. Vukic held a hearing on the matter on June 22, 2011. In his July 1, 2011 decision the Referee found the claimant had not made an active and independent search for work. Referee's Decision, July 1, 2011, at 2. Accordingly, Referee Vukic affirmed the Director's denial of benefits.

Claimant's appeal from the decision of the Referee was not received by the Board of Review until July 20, 2011 — four days after the 15-day appeal period had expired on July 16, 2011. On August 26, 2011 the Board unanimously held that "[t]he claimant has failed to justify the late filing of the appeal in the instant case and the appeal is denied and dismissed." Decision of Board of Review, August 26, 2011, at 1. Claimant filed a pro-se complaint for judicial review in the Sixth Division District Court on September 9, 2011.

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

[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).

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:

> * * * 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.

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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. 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).

APPLICABLE LAW

The time limit for appeals from decisions of the Referee (referred is set by Gen. Laws 1956 § 28-44-46, which provides:

> After a hearing, an appeal tribunal shall promptly make findings and conclusions and on the basis of those findings and conclusions affirm, modify, or reverse the director's determination. Each party shall promptly be furnished a copy of the decision and supporting findings and conclusions. This decision shall be final unless further review is initiated pursuant to § 28-44-47 within fifteen (15) days after the decision has been mailed to each party's last known address or otherwise delivered to him or her; provided, that the period may be extended for good cause.

(Emphasis added). Note that while subsection 46 includes a provision allowing the 15-day period to be extended (presumably by timely request), it does not specifically indicate that late appeals can be accepted, even for good cause. However, in many cases the Board of Review (or, upon review, the District Court) has permitted late appeals if good cause is shown.

ANALYSIS

The issue in the case is whether the decision of the Board of Review that claimant had not shown good cause for her late appeal is supported by substantial evidence of record or whether it was clearly erroneous or affected by other error of law.

The time limit for appeals from decisions of the Referee to the Board

of Review is established in Gen. Laws 1956 § 28-44-46 to be 15 days. The decision of the Referee in this case may be found in the record. On page 2 of that decision is a section headlined "APPEAL RIGHTS" in which the 15-day appeal period is clearly explained. Thus, claimant had notice of the appeal period.

And before the Board issued its decision, the Chairman sent a letter to claimant, inviting her to explain why her appeal was late. See Letter from Thomas J. Daniels to Francis Horton, July 27, 2011. Her response is also contained in the record, date-stamped received on August 3, 2011. See Letter From Francis Horton Dated August 3, 2011. In that letter Ms. Horton explains that she received the decision on July 6, 2011 and filed an appeal on July 20, 2011. Id. Counting from the date she received it, she believed she had one day left — until July 21, 2011. Id. She thought the appeal period ran from receipt, not from mailing.

It should be noted that a subjective misapprehension regarding the manner in which the appeal period is calculated has not been deemed good cause under § 28-44-46. See Butler v. Department of Employment & Training Board of Review, A.A. No. 91-183, (Magistrate's Findings, 12/11/91) Adopted By Order (Dist.Ct. 2/7/92)(DeRobbio, C.J.)(Dismissal of appeal by Board affirmed where claimant's sole justification for lateness

was a misunderstanding that the appeal period was ten business days, not calendar days); accord, Gregoire v. Department of Employment Security Board of Review, A.A. 88-33 (Dist.Ct. 8/25/88)(Moore, J.)(same misunderstanding led to same result under § 28-44-39, governing appeal from Director to referee). As a result, the Board's finding that good cause was not shown for the lateness of claimant's appeal must be deemed supported by the record.

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 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 scope of judicial review by the Court is also limited by Gen. Laws 1956 § 28-44-54 which, in pertinent part, provides:

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

[5] Cahoone, supra n. 4, 104 R.I. at 506, 246 A.2d at 215 (1968). See also Gen. Laws § 42-35-15(g), supra p. 3 and Guarino, supra p. 3, fn. 1.

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, the Board's decision that claimant did not demonstrate good cause for her late appeal from the decision of the Referee was supported by the record and cannot be successfully challenged in this proceeding.[6]

[6] I may also note at this juncture that it is difficult to see how claimant could possibly have prevailed in her efforts to prove that she had made a sufficient search for work as required by section 12. Although the transcript of the substantive hearing before the referee was not forwarded to us, we find in the record a "Claimant Statement" containing the following comments from a telephone interview with a DLT staff member:

> * * * I am able and available for full time work. I have not physically applied for work at this time; I have been looking on the computer and in the paper. I will be looking for janitor work. * * *.

Director's Exhibit D1B. Viewed in isolation, these comments would not support a finding of a work search.

CONCLUSION

Upon careful review of the record, 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 is 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).

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

/s/
Joseph P. Ippolito
MAGISTRATE

OCTOBER 12, 2011