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

Antonio Vieira	:	
	:	
v.	:	**A.A. No. 11 - 139**
	:	
Dept. of Labor & 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 hereby AFFIRMED.

Entered as an Order of this Court at Providence on this 23rd day of November, 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 Mr. Antonio Vieira urges that the Board of Review of the Department of Labor and Training erred when it affirmed a referee's decision dismissing Mr. Vieira's appeal from the Department's decision denying him unemployment benefits because it was filed late. 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. Because I conclude that the Board's decision is supported by substantial evidence of record and is not otherwise affected by error of law, I must recommend that the decision of the Board of Review affirming the dismissal of his appeal be affirmed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case may be briefly stated: Mr. Vieira, who last worked in November of 2009, was receiving benefits when, on September 23, 2010, the Director issued a decision denying further benefits to Mr. Vieira because he did not meet the availability standards established in Gen. Laws 1956 § 28-44-12. Mr. Vieira did not file an appeal from this decision until March 3, 2011. After conducting a hearing on September 7, 2011, Referee Carol A. Gibson issued a decision on September 9, 2011 in which she dismissed claimant's appeal because it had been filed after the expiration of the 15-day appeal period found in Gen. Laws 1956 § 28-44-39(b). On the late-appeal issue Referee Gibson made the following Findings of Fact:

> A notice of Director's decision was mailed to the claimant's address of record on September 23, 2010. The claimant gave conflicting testimony as to whether he received the decision timely. The claimant states that his daughter filed an appeal of the decision within the fifteen day appeal period. The claimant does not know the date or the method in which the appeal was filed. The claimant has no record of this appeal. The Department indicates they received the claimant's appeal by fax on March 3, 2011, five months after the fifteen day period. As stated on the notification the claimant was advised that unless he filed a claim of appeal within fifteen calendar days from the mailing date of the decision it would become final.

Referee's Decision, September 9, 2011, at 1. Based on these findings, the referee made the following conclusions:

> The second issue in this case is whether or not the claimant filed an

> appeal out of time with good cause within the meaning of Section 28-44-39(b) of the Rhode Island Employment Security Act.
>
> The 15-day appeal period provided for under the provisions of Section 28-44-39(b) can be extended if the individual who filed out of time had good cause for being late.
>
> [Quotation of section 28-44-39(b) omitted]
>
> The testimony and facts in this case establish that the Director did mail the notice of decision to the claimant's address of record on September 23, 2010 but there is no evidence that the claimant filed an appeal of that decision within the time limit set forth under the law. There was no evidence provided by the claimant which indicated he was prevented or deterred from filing an appeal in a timely manner. I find that good cause has not been demonstrated and shown by the claimant in this case of his failure to file an appeal within the time limit specified by law. Therefore, the request for a late appeal is denied.

Referee's Decision, September 9, 2011, at 2. Accordingly, the claimant's appeal was dismissed.

Claimant sought review of this decision and on September 30, 2011 the Board of Review unanimously issued a brief decision affirming the referee's dismissal of claimant's appeal and adopting the Decision of the Referee as its own. Thereafter, on October 5, 2011, claimant filed a pro-se complaint for judicial review in the Sixth Division District Court.

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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.

APPLICABLE LAW

The time limit for appeals from decisions of the Director is set by subsection (b) of Gen. Laws 1956 § 28-44-39, which provides

> (b) Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and of any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended. The director, on his or her own motion, may at any time within one year from the date of the determination set forth in subdivision (a)(1) of this section reconsider the determination, if he or she finds that an error has occurred in connection with it, or that the determination was made as a result of a mistake, or the nondisclosure or misrepresentation

of a material fact. (Emphasis added)

Note that while subsection 39(b) 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 was shown.

ANALYSIS

The purpose of all tribunals — whether judicial or administrative — is to adjudicate cases on the merits. However, procedural parameters have to be established to avoid anarchy. The time limit for appeals from decisions of the Director to the Referee level is set in Gen. Laws 1956 § 28-44-39(b) to be 15 days. Accordingly, the issue in the case is whether the decision of the Referee (adopted by the Board of Review) that claimant had not shown good cause for his late appeal is supported by substantial evidence of record or whether it was clearly erroneous or affected by other error of law.

At the hearing held by Referee Gibson, Mr. Veira, denied receiving the Director's September, 2010 decision. Referee Hearing Transcript, at 16. Then he said he appealed from the decision in a timely manner — within fifteen days. Referee Hearing Transcript, at 17. But, he acknowledged he had no documentation of any filing earlier than March of 2011. Referee Hearing

Transcript, at 19. Clearly, Referee Gibson had a basis in the record to reject these contradictory statements.

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, including the question of which witnesses to believe. Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result. The Court, when reviewing a Board decision, does not have the authority to expand the record by receiving new evidence or testimony.

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

> **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, I must conclude that the Referee's decision (accepted and adopted by the Board) that claimant did not demonstrate good cause for his late appeal from the Decision of the Director is supported by substantial evidence of record and is not clearly erroneous.

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. General Laws 1956 § 42-35-15(g)(5),(6).

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

/s/
Joseph P. Ippolito
MAGISTRATE

NOVEMBER 23, 2011