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

Yomaira Marte	:	
	:	
v.	:	**A.A. No. 12 - 143**
	:	
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 Board of Review's decision is AFFIRMED.

Entered as an Order of this Court at Providence on this 20th day of September, 2012.

By Order:

/s/
Stephen C. Waluk
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. Yomaira Marte urges that the Board of Review of the Department of Labor and Training erred when it held that Ms. Marte was disqualified from receiving unemployment benefits because she was not fully 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 affirmed on the issue of

claimant's disqualification; I so recommend.

I. FACTS & TRAVEL OF THE CASE

Claimant, an employee of Kenney Manufacturing, last worked on May 25, 2011. Then, as a result of surgery she received in the Dominican Republic, she was placed on medical leave. On January 14, 2012, having returned to Rhode Island, she filed a claim for unemployment benefits, which was denied by the Director on February 21, 2012 on the ground that that she had not provided proof that she had been medically cleared to return to work, thereby failing to satisfy the Availability requirement enumerated in Gen. Laws 1956 § 28-44-12. See Department's Exhibit No. 3, at 4. Claimant appealed and a hearing was held before Referee Nancy Howarth on March 28, 2012, at which time Ms. Marte appeared and testified. See Referee Hearing Transcript, at 1.

Referee Howarth issued a Decision on May 17, 2012 in which she made the following findings of fact:

> 2. Findings of Fact:
> The claimant was employed as an assembly line worker by the employer. She was absent from work, beginning May 28, 2011, due to a medical leave of absence. She was out of the country beginning May 30, 2011 and had surgery in the Domenic of Republic (sic). The claimant subsequently returned to Rhode Island and was released to work on January 4, 2012. The employer was unable to hold the claimant's position. Since her release to return to work, the claimant's search for employment has consisted of contacting two temporary agencies.

Referee's Decision, May 17, 2012 at 1. Then, after quoting extensively from Gen.

Laws 1956 § 28-44-12, the Referee pronounced the following statements of conclusion:

> * * * In order to be eligible for Employment Security benefits, the claimant must be able and available for full time work and must conduct an active and sustained search for such employment. Based upon the evidence and testimony presented at the hearing, I find that the claimant has failed to demonstrate that she has conducted an adequate search for employment. Therefore, the claimant fails to meet the availability requirements of the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, May 17, 2012, at 2. Accordingly, the Decision of the Director denying benefits to Ms. Marte pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained because she had not conducted an adequate search for work and not — as the Director had found — because she was not medically cleared for work.

Claimant appealed and the matter was considered by the Board of Review. On June 22, 2012, the Board of Review issued a unanimous 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, Ms. Marte filed a complaint for judicial review in the Sixth Division District Court.

II. 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) * * *. (Emphasis added).

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

III. 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

[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.

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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). Also D'Ambra v. Bd. of Review, Dept of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV. ISSUE

The issue before the Court is whether the claimant was properly disqualified from receiving benefits because she failed to satisfy the availability requirement enumerated in section 28-44-12.

V. 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 3.[4] It is the claimant's burden of proof to meet these conditions. The Referee concluded that Ms. Marte was subject to a section 28-44-12 disqualification because she had failed to conduct an adequate search for work, the third prong of the test.

Having examined the 16-page transcript of the hearing before the Referee closely, I find that the Referee's findings were a fair reflection of the Claimant's testimony. To my reading of the transcript Ms. Marte only described one employer — "Monroe's" — where she had looked for work, albeit at two locations, Providence and Worcester. Referee Hearing Transcript, at 14. The Referee treated this as two separate employers. Claimant specifically stated she had not called any other

[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.

employers besides these two in the 75-day period from January 9 to the date of the hearing, March 28, 2012. Referee Hearing Transcript, at 13-14. Based on the record before her, I must find that the Referee's decision (adopted by the Board) that Claimant failed to conduct an adequate search for work is not clearly erroneous. Indeed, finding that contacting one potential employer per month is sufficient to satisfy the statute would render the job-search requirement meaningless. See Iadevaia v. Department of Employment Security Board of Review, A.A. No. 83-47 at 5, (Dist.Ct. 7/12/83)(Pederzani, J.)(Board found claimant not entitled to benefits; Affirmed, where Board's finding that applying for three teaching positions did not constitute active search for work was not 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. 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.

Accordingly, I find that the Board's decision (adopting the finding of the Referee) that claimant was unavailable for full-time work within the meaning of

section 28-44-12 — in that she had not conducted an adequate search for work — is supported by substantial evidence of record, is consistent with applicable law, and ought to be affirmed.

CONCLUSION

Upon careful review of the evidence, 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 was 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

SEPTEMBER 20, 2012