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

Ann Rock	:	
	:	
v.	:	**A.A. No. 12 - 057**
	:	
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 4th day of February, 2013.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

__/s/_____
Jeanne E. LaFazia
Chief Judge

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

Ann Rock	:	
	:	
v.	:	**A.A. No. 12 - 057**
	:	
Department of Labor and Training,	:	
Board of Review	:	

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. Ann Rock urges that the Board of Review of the Department of Labor and Training erred when it held Ms. Rock to be 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 and the associated issue of repayment; I so recommend.

I. FACTS AND TRAVEL OF THE CASE

After being laid-off from her full-time job as a teacher's assistant for the Northern Rhode Island Educational Collaborative (NRIEC) in June of 2010 Ms. Ann Rock collected unemployment benefits throughout the 2010/2011 school year. On September 21, 2011 the Claimant was offered a position on the daily substitute list (who are paid at a rate of $65.00 per day), which she accepted by means of an e-mail message which she sent to NRIEC on September 28, 2012.

Notwithstanding this communication, Claimant Rock never accepted per diem work. And based on information provided by NRIEC, the Department reconsidered her prior eligibility. Specifically, on November 25, 2011, a designee of the Director determined she failed to meet the Availability requirements of Gen. Laws 1956 § 28-44-12 during three particular weeks — the weeks ending October 8, 2011, October 15, 2011, and October 22, 2011 — and was thereby disqualified from receiving unemployment benefits; the Director also determined she was subject to repay the aggregate benefits she collected during these weeks — $987.00. Decision of Director, November 25, 2011, at 1. (Exhibit D-2). Claimant appealed and a hearing was held before Referee Carol Gibson on January 4, 2012, at which time Ms. Rock appeared with counsel and a

witness; two representatives of the Collaborative appeared with counsel. See Referee Hearing Transcript, at 1.

In her January 9, 2012 decision, Referee Gibson summarized the above-recited travel, which is not in controversy. She then made particular findings regarding the circumstances wherein Claimant agreed to substitute but never accepted such employment:

> … On September 21, 2011, the claimant was sent a letter from the employer offering to place her on a daily substitute list for the 2011/2012 school year at the rate of $65.00 a day. The letter also stated that if she refused the offer, it may impact future employment benefits. On September 28, 2011, the claimant emailed the employer and requested to be placed on the substitute list. The claimant states that even though she made this request, she had no intention of accepting work as a substitute as she felt the wages and the temporary nature of the work made it unsuitable. The record indicates the claimant was contacted for work by the employer's automated telephone system during the weeks in question, but her phone number was busy or no one answered. The claimant states that she was online looking for work which made her phone unavailable to accept calls. The claimant was aware that she should be expected potential work from the employer. The employer provided documentation which indicates the claimant logged on to the employer's online system to view jobs. The claimant indicates no work was available during this time. The record provided by this employer is contrary to the claimant's testimony.

Referee's Decision, at 1-2. On the basis of these findings, the Referee arrived at a set of conclusions:

> In order to be eligible for benefits, claimant must be able to establish that she was able and available for full-time employment

> and that she was accepting suitable employment which was offered to her.
>
> The evidence presented establishes that during the three weeks at issue, work was available and being offered to the claimant, but she chose not to accept work offered by the employer. While the claimant had been a full-time teacher's assistant, she had not worked in that capacity since June 2010 and she had been totally unemployed for fourteen months when this offer of substitute work was made and accepted by the claimant. Therefore, it is determined the claimant does not meet the availability requirements under the provision of Section 28-44-12 of the Rhode Island Employment Security Act for the period at issue.

Referee's Decision, at 2-3. Accordingly, the Decision of the Director denying benefits pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained.

Claimant appealed and the matter was considered by the Board of Review. On February 29, 2012, a majority of the Board of Review found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto; the Board therefore adopted the decision of the Referee as its own. Board of Review Decision, at 1. The Member Representing Labor dissented, believing that the work offered was unsuitable. Board of Review Decision, at 1.

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 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

---

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).

> 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.

IV. ISSUE

The issue before the Court is whether the claimant was properly disqualified from receiving benefits because she failed to hold herself available for work as required by section 28-44-12.

V. ANALYSIS

A. The Availability Issue.

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 5.[4] Claimants bear the burden of proving that they have satisfied these conditions. The Referee concluded Ms. Rock was subject to a section 28-44-12 disqualification during certain weeks in

[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.

October of 2011 because she was unable to document that she was truly available for suitable work.

In denying benefits to claimant, Referee Gibson found that Ms. Rock was 'unavailable' within the meaning of section 28-44-12(a) because she had not responded to the Collaborative's offers of per diem work during the weeks in question. See Referee's Decision, at 2-3.

1. The Factual Record.

This finding is indeed supported in the record; Ms. Paula Andrews indicated Ms. Rock accepted the Collaborative's offer to place her on the substitute list for teacher's assistants. See Referee Hearing Transcript, at 9-10. She also testified that Ms. Rock was sent information on the use of the automated phone and internet systems — known as AESOP — through which job assignments were made. See Referee Hearing Transcript, at 10. Ms. Andrews introduced the AESOP record regarding Ms. Rock. See Referee Hearing Transcript, at 12. Ms. Andrews told Referee Gibson that she called Ms. Rock personally on October 3, 2011, and got a busy signal. See Referee Hearing Transcript, at 14.

Before the Referee, Ms. Rock asserted that she was justified in failing to cooperate with the Collaborative's efforts to place her in substitute assistant-teaching assignments. She testified frankly that she had no intention of

accepting substitute work; agreeing to do so only because she "felt bullied." See Referee Hearing Transcript, at 46. She told Referee Gibson that, in her estimation, substitute assistant-teaching was not "suitable" work. See Referee Hearing Transcript, at 40. She testified at length about the differences in pay and benefits between the substitute position and her former situation. See Referee Hearing Transcript, at 41-42.

2. The Positions of the Parties.

After distilling these circumstances, we may concisely present the positions of the parties — (1) The Collaborative urges that Ms. Rock reneged on her agreement to be available for substitute work; (2) Ms. Rock urges that she was excused from doing so because the position being offered was not financially suitable.

3. Resolution.

After reviewing the rather unusual circumstances of the instant case, I have concluded that Ms. Rock cannot interpose unsuitablility as an excuse for her failure to be available for substitute work. I believe she surrendered that defense when she agreed to be placed on the list, an action which she did not withdraw in a proper or timely manner. She could have rejected substitute work, and adjudicated her right to do so under section 12 (and perhaps section 20). But she did otherwise. In my view, her agreement to substitute changed their

relationship — working a novation of sorts. And so, I must find her unavailability disqualifies her from receiving benefits during the weeks in question.

On the other hand, Ms. Rock's position — that we should ignore her agreement to substitute teach — would be simply unadministrable. Workers are constantly changing their status within the workplace — e.g., moving from one job to another, relocating, going from full-time to part-time or vice versa; being laid off in slack times and then being re-hired; engaging in seasonal work. Adjudication of unemployment claims would become labyrinthine if an employee's last status could be ignored. And we must recognize that employees often make decisions which, viewed solely from the perspective of their status as unemployment claimants, are disadvantageous. That is because they are making life decisions, not just employment decisions.

The Director, as administrator of the Employment Security Act must make eligibility determinations based on the worker's actual status at the operative moment (i.e., the moment of separation or the moment when a job offer is rejected), not a former status in — even one in which the claimant could have remained. The Board of Review's decision is, in principle, entirely correct.[5]

[5] The Claimant argues, convincingly, that the AESOP records show only two job-offer inquiries during each of the weeks of October 15th and October

Accordingly, given the fact that Claimant bears the burden of proving she met all the elements of the availability test, I cannot find that the Referee's decision on the section 12 issue is clearly erroneous in light of the substantial, probative, and reliable evidence of record.

B. Repayment of Benefits Received.

Secondly, claimant was ordered to repay $987.00 by the Director, pursuant to Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with

---

22nd. She joins this fact with the legal principle confirmed by counsel for the Department at the conference held in this matter — i.e., that a claimant collecting benefits (from the loss of a prior full-time position) who is working part-time will only be declared unavailable for work (pursuant to section 28-44-12) for a full calendar week if he or she is unavailable for more than two days in that week. Otherwise, the claimant will be declared unavailable only for the particular days (one or two) that he or she was unavailable.

The theory of this rule of practice is that people collecting benefits get sick, or have doctor's appointments or school appointments for their children just as full-time workers do, and it would be unfair to hold them to a rigid standard of perfect availability. The principle is well known to the Court and has been applied in a good many cases, published and unpublished. The Board of Review has always accepted the application of this rule without objection.

Accordingly, in this case, the Department is directed to recalculate the overpayment made to Ms. Rock making only per diem offsets for the weeks of October 15th and 22nd.

> respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.
> * * *
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

When reviewing the Director's order, the Referee found that:

> The claimant certified that she was able and available and did not refuse work during the three weeks at issue, resulting in the overpayment.

Referee's Decision, January 9, 2012, at 2. Accordingly, the Referee upheld the Director's order of repayment. For the reasons that follow, I believe this Order must be affirmed.[6]

Certainly, we must concede that Claimant, had she openly and honestly declined substitute work, could have raised a substantial legal issue — i.e., suitability — as a justification. But she did not do so. She was, by her own admission, disingenuous with the Collaborative. This action was, in my view,

[6] As explained supra at 11-12 fn. 5 the repayment will be adjusted by the Department.

sufficient to supply the "fault" necessary to sustain the instant repayment order. See Gen. Laws 1956 § 28-42-68(b).

Accordingly, I recommend that the Order of repayment be affirmed.

VI. CONCLUSION

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.

Applying this standard, and 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) on the issues of disqualification and repayment were 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).

I therefore recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 4, 2013