STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Blanca Mineros	:	
	:	
v.	:	**A.A. No. 15 - 004**
	:	
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 31st day of July, 2015.

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. Blanca Mineros urges that the Board of Review of the Department of Labor and Training erred when it held that she would 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; I so recommend.

I
FACTS AND TRAVEL OF THE CASE

Ms. Mineros was receiving unemployment benefits when, on September 17, 2014, a designee of the Director determined that she failed to meet the Availability requirements of Gen. Laws 1956 § 28-44-12 during the period from the week-ending January 25, 2014 through the week-ending July 19, 2014 due to her child care responsibilities — and was thereby disqualified from receiving unemployment benefits. Decision of Director, September 17, 2014, at 1. Claimant appealed and a hearing was held before Referee Carol Gibson on November 10, 2014, at which time Ms. Mineros was the sole witness.

On November 13, 2014, the Referee issued a decision in which she found the following facts:

> The claimant re-opened her claim for Employment Security benefits effective January 12, 2014. The claimant was in benefit status at the time this issue arose. The claimant requested and received benefits on her claim from the week ending January 25, 2014 through the week ending July 19, 2014. The record indicates the claimant left a message for the Department, on a record line,

> on July 28, 2014 indicating she has not been available for full-time work since January 2014 because of issues with her children. The claimant also gave a telephone statement to the Department indicating she was not available for full-time work. The claimant states she is a single parent of three children ages ten, fourteen and seventeen. At the hearing, the claimant presented documentation indicating that her three children have chronic medical problems and she has been looking for work between appointments for her children. The claimant states she has been looking for full-time work but she has not maintained a record of her work search since filing for benefits. The claimant testified that she has appointments each week and that she would need to take time out of work for these weekly appointments. The claimant did secure work with a temporary agency, COWORX on August 6, 2014. The claimant presented paystubs which indicate that she has worked over thirty-five hours in only one of the six weeks for which she presented paystubs.
>
> The record indicates the claimant filed for and received benefits indicating she was available for full-time work and looking for work. As a result of that representation, the claimant received benefits in the amount of $8,420.

Referee's Decision, November 13, 2014, at 1-2. Based on the findings recited above — and after quoting extensively from Gen. Laws 1956 § 28-44-12 — Referee Gibson pronounced the following conclusions:

> In order to be eligible for Employment Security benefits, an individual must be able to establish that she was able and available for full-time employment and provide evidence of a verifiable work search for each week she claims benefits. The testimony and evidence has established the claimant was not available for full-time work during the weeks at issue due to her children's chronic medical problems and the appointments required for those issues.

> Since the claimant has not established that she was available for full-time work or conducting an active work search, it is determined she does not meet the requirements of the law. Therefore, benefits must be denied on this issue as previously determined by the Director.

Referee's Decision, November 13, 2014, at 2. It is notable that Referee Capozza not only found Ms. Mineros unavailable for work (as the Director had), but also found she had not engaged in an active search for work. Accordingly, on both of these bases, Referee Gibson found the Claimant ineligible to receive benefits.

Ms. Mineros filed an appeal from this decision and the matter was considered by the Board of Review. On December 26, 2014, the Board of Review issued a unanimous decision which held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision of the Referee was affirmed. Thereafter, on January 14, 2015, Ms. Mineros 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) * * *.

As one may readily observe, § 12(a) requires claimants to be able and available for full-time work and to actively search for work.

The test for work-availability under § 12 was set forth by our Supreme Court 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. It is the burden of the claimant to prove compliance with these requirements.

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

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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, 104 R.I. at 506, 246 A.2d at 215. Also, D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV
ANALYSIS

A
Evidence of Record — The Testimony of Ms. Mineros

At the outset we should indicate that § 28-44-12 requires that a claimant — in order to be eligible for benefits — must satisfy the following three-prong test: that the claimant is able to work, that the claimant be available for work, and the claimant has been actively searching for work. See Gen. Laws 1956 § 28-44-12(a) and § 28-44-12(a)(3), excerpted ante at 5.[4] At this juncture we shall summarize the testimony and evidence received at the hearing conducted by Referee Capozza.

The sole witness at that hearing was Ms. Mineros. Referee Hearing Transcript, at 7 et seq. She explained that she had three children, ages 17, 14, and 10. Each has serious medical issues.[5]

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[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.

[5] Because the extent of their medical problems is apparently unquestioned by the Department and the Board of Review, I believe there is no need to set forth the problems these children have in this opinion. It may suffice to say that their medical issues were extensively revealed at the hearing in Ms. Mineros' testimony and in various exhibits that were entered into evidence.

Claimant said she did apply for work at various businesses. Referee Hearing Transcript, at 10, 13. But, when the Referee asked her if she had any proof of her job search efforts from January through July, she said no — because businesses would not give her applications. Referee Hearing Transcript, at 15, 18. Ms. Mineros denied she was ever told that she had to keep a record of her attempts to find work. Referee Hearing Transcript, at 16. She said that she would only make one or two applications per week. Referee Hearing Transcript, at 16-17.

Ms. Mineros said that when she applied for jobs she would not mention her need to take time off for medical appointments, because she knew that, if she did, "… they would never give me any jobs anywhere." Referee Hearing Transcript, at 17. And so, she would apply for full-time jobs (eight hours per day). Referee Hearing Transcript, at 18.[6]

[6] The extent of her commitments was shown by the paystubs she had from CoWorks, her employer at the time of the hearing, which showed she had not been working full weeks — which she attributed to attending medical appointments with her children. Referee Hearing Transcript, at 19.

B

Rationale

When pressed, Claimant conceded that she had no evidence of a proper work search during the weeks in question. And the evidence that she was unavailable for full-time work during the same period is incontrovertible. As a result, we must face the ineluctable conclusion that Ms. Mineros failed to satisfy her burden of proving compliance with § 12's availability and job-search mandates. *A fortiori*, I cannot find that the Board's decision on the § 12 issue is clearly erroneous.

V

RECOUPMENT

Finally, Claimant was ordered to repay $8,420.00 by the Director,[7] 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 respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be

[7] See Director's Decision, September 17, 2014, contained in the administrative record as Department's Exhibit No. 2.

> 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.

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery would not defeat the purposes of the Act. In my view "fault" implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one's duty to do what is right.[8] To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to

[8] In the Webster's Third New International Dictionary (2002) at 839 the first definition of fault applicable to human conduct defines "fault" as "3: A failure to do what is right. a: a moral transgression." This view is longstanding. As Noah Webster stated in the first edition of his American Dictionary of the English Language (1828), "Fault implies wrong, and often some degree of criminality."

render its usage meaningless. With this in mind, we may now turn to the circumstances of the overpayment in the instant case.

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

> * * * When the claimant filed her claim for Employment Security benefits for the weeks in question, she inaccurately indicated she was available for full-time work, when she had restrictions on her availability for work. As a result, the claimant received benefits to which she was not entitled. The claimant is, therefore, overpaid and at fault for the overpayment. Accordingly, it would not defeat the purpose of the act to require that the claimant make restitution.

Referee's Decision, November 13, 2014, at 3. So, the Referee found fault based on Claimant's inability to prove availability for full-time work.[9]

Now, at the hearing before Referee Gibson, Claimant did not dispute that when she applied for benefits each week she said was available for (and looking for) full-time work. Referee Hearing Transcript, at 20-21. These representations were, as we have seen, false. As a result, I cannot say that the Referee's finding of fault was clearly erroneous.

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[9] Of course, as stated ante in Part IV of this opinion, Claimant also failed to engage in an adequate search for work.

Nevertheless, I am concerned that the Referee gave short shrift to the second and final issue in § 68 adjudications — i.e., whether recovery "would defeat the purposes" of the Employment Security Act. It seems that the Referee concluded that a finding of fault satisfied, per se, this element. I do not agree. I believe the Director must evaluate the entire circumstances of the situation, including the Claimant's financial condition (which, in Ms. Mineros's case, seems nothing less than dire) when determining whether recoupment "would defeat the purposes" of the Act."

However, since there is no assertion in this record that the Director has employed any draconian methods of recoupment, there is no justiciable issue before us at this time. Nevertheless, I believe Ms. Mineros may, if any such efforts should later be undertaken, return to this Court for relief.

VI
CONCLUSION

Applying the applicable standard of review, 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 issue of disqualification 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). I therefore recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

JULY 31, 2015