STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Donna Sears	:	
	:	
v.	:	**A.A. No. 15 - 024**
	:	
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 and the memoranda of counsel, 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 8th day of September, 2015.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
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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. After Ms. Donna M. Sears was discharged from the employ of Memorial Hospital of Pawtucket, she applied for unemployment benefits, but her claim was denied by the Department of Labor and Training. However, her appeal from this was dismissed by a hearing officer (a "Referee") because it was filed after the statutory appeal period expired. The Board of Review affirmed this dismissal.

In the present action, Ms. Sears (whom we shall refer to as the "Claimant" or the "Appellant") asks this Court to reinstate her appeal.

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 Board of Review's affirmance of the Referee's decision dismissing Claimant Sear's appeal for lateness should be affirmed; I so recommend.

I
FACTS AND TRAVEL

In light of our focus on the late-appeal issue, the facts and travel of the case may be briefly stated: Ms. Donna M. Sears was employed by Memorial Hospital of Pawtucket for eighteen years — until September 20, 2014, when she was discharged. She filed online for unemployment benefits but on November 25, 2014, her claim was disallowed by a designee of the Director of the Department of Labor and Training, based upon a finding that Claimant had been terminated for disqualifying misconduct, pursuant to Gen. Laws 1956 § 28-44-18.

Ms. Sears maintains that after receiving the Director's decision she filed a timely appeal on-line. But, the Board of Review had no record of

such an appeal having been filed by Claimant Sears during the 15-day statutory appeal period. However, it is agreed by both parties that she did file an appeal on January 8, 2015.[1]

The Board of Review assigned her January 8 appeal to one of its hearing officers, Referee Gunter A. Vukic, who conducted a hearing on both the misconduct and lateness issues. Ms. Sears was the sole witness on the issue of the late appeal. In a decision dated January 29, 2015, the Referee dismissed the Claimant's appeal for lateness. The Referee found —

> The November 25, 2014 Department of Labor and Training decision was received Thanksgiving Day weekend. Claimant read the decision denying benefits and the right to appeal. January 7, 2015 Department of Labor and Training notation indicated that the claimant had not established an account with EmployRI nor had she posted a resume. January 8, 2015 the claimant filed a late appeal.

Decision of Referee, January 29, 2015, at 1. Referee Vukic then concluded —

> Claimant failed to provide any evidence of credible testimony to support an earlier and timely appeal. Testimony was contradictory regarding filing and the appeal confirmation number. Testimony was inconsistent with information given to the Department of Labor and Training.

Decision of Referee, January 29, 2015, at 2.

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[1] From Claimant's perspective, this was her second appeal.

Believing herself aggrieved by this decision, Claimant Sears filed an appeal to the Board of Review. But, on February 26, 2015, the Board of Review affirmed the Referee's decision, finding it to be a proper adjudication of the facts and the law applicable thereto. Accordingly, it was adopted as the decision of the Board. Ms. Sears filed the instant complaint for judicial review of the decision of the Board of Review in the Sixth Division District Court on March 18, 2015.

II

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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200

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[2] 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).

[3] Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[4] 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).

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.

III

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.

IV

ANALYSIS

In the instant case, the Board of Review declined to exercise its authority to extend the appeal period, finding only that the Claimant had "failed to justify" her late appeal. And so, this Court must determine whether that conclusion was sufficient to support the dismissal of Ms. Sears' appeal. But before we do we shall review the facts of record and the positions of the parties on this question.

A

The Facts of Record

In her testimony, Claimant conceded that she had been advised by

the Department's adjudicator (by telephone) that she should expect to receive a decision and that, if it went against her, she had a limited period of time to appeal. Referee Hearing Transcript, at 31. She also acknowledged receiving the Decision of the Director the weekend after Thanksgiving. Referee Hearing Transcript, at 32. She said she read the decision and went to the website and registered her appeal. Id.

Alternatively, she told the Referee that, when she originally filed for benefits, she did not note the confirmation number or print it out. Referee Hearing Transcript, at 33, 36. Conversely, she said she did have it, but lost it. Referee Hearing Transcript, at 35.

B

Position of the Parties

1

Appellant's Position

In her Memorandum, Claimant Sears makes several arguments.

First, she urges that Memorial Hospital has no standing to oppose her claim for benefits because it failed to respond to the Department's initial request for information within seven days, as required by Gen. Laws 1956 § 28-44-38(c). Appellant's Memorandum, at 2.

Second, Claimant argues that she did demonstrate good cause for her late appeal in the sense that she did file her appeal timely — on or about December 1, 2014. Appellant's Memorandum, at 3.

Third, Ms. Sears argues that she must have appealed on or about December 1, 2014 because the Department called to remind her of her duty to post a resume on January 7, 2015. Appellant's Memorandum, at 4.

Fourth, Appellant commends a prior decision of this Court — Nathan Rene v. Department of Labor and Training Board of Review, A.A. No. 14-56 (Dist.Ct. 03/11/2015) to our attention. Appellant's Memorandum, at 4-5. Ms. Sears cites the Rene case for the proposition that the Court should remand the case to the Board for findings to be made on the § 38(c) issue, the good cause for a late-appeal issue, and the merits of the separation issue.

2

The Employer's Position

In its Memorandum, Memorial Hospital reminds us that, while Claimant suggested that she had filed an appeal "sometime between 11/29–12/1" she did not have a confirmation number from that transaction. Employer's Memorandum, at 3 citing Department's Exhibits,

Nos. 1-N and 1-O. Memorial Hospital also notes that Referee Vukic found Ms. Sears' testimony on this issue to be contradictory and inconsistent.

The employer also responds to Claimant's legal arguments on the issue of late appeals in several ways —

First, it cites DePetrillo v. Department of Employment Security, 623 A.2d 31, 33-35 (R.I. 1993), for the principle that Claimant's subjective understanding of his eligibility (or lack thereof) did not justify his failure to file a timely claim. Employer's Memorandum, at 5.

Secondly, it disputes the applicability of the Rene case, urging that the remand order issued therein was based on a lack of specificity in the administrative decision, a circumstance not present in the instant case. Employer's Memorandum, at 7-8. Instead, Memorial quoted a prior decision of this Court for the proposition that a " 'subjective failure to comply with the statutorily established time frames' 'has never been deemed good cause for lateness.' " Employer's Memorandum, at 8 quoting Marleine Andre v. Department of Labor and Training, Board of Review, A.A. No. 2012-171 (Dist.Ct. 09/27/2012). Memorial also cited John D. Luongo v. Department of Labor and Labor and Training, Board of

Review, A.A. No. 2013-051 (Dist.Ct. 05/13/2013) in support of this principle. Employer's Memorandum, at 8.

Thirdly and finally, Memorial Hospital urges that Claimant has no right to challenge its standing to oppose her claim for benefits since she did not raise it below. Employer's Memorandum, at 9-10.

C

Resolution

1

In addressing the issue before the Court, we must start with a few fundamental points: First, there is no question that the appeal the Department received on or about January 8, 2015 was late. The decision was published on November 25, 2014; the appeal was filed on January 8, 2015 — well after the fifteen-day appeal period had expired. Secondly, Claimant was given notice of the appeal time-period; on page 1 of the Referee's November 25, 2014 decision is a section headlined "RIGHT TO APPEAL" in which the 15-day appeal period is clearly delineated. The "Right to Appeal" section also informs the parties that an appeal may be effectuated by mail, by facsimile, or by internet. Id. And thirdly, we come to the only issue requiring any substantial comment — whether the Board

of Review's decision (that Appellant failed to demonstrate that her appeal was tardy for reasons constituting good cause), was supported by competent evidence of record. For the reasons I shall now set forth, I believe it was.

2

To be precise, Ms. Sears did not try to justify the late filing of her appeal. Instead, she insisted that she did file a timely appeal (or at least tried to do so). Unfortunately, she had no proof of that effort. No print-out was presented; no confirmation number was given; and the Department's records were devoid of any such filing during the appeal period.

The members of the Board of Review unanimously affirmed the Referee's decision, which found that Ms. Sears "failed to provide any evidence of credible testimony to support an earlier and timely appeal." Decision of Referee, at 2.

On this record, it cannot be said that the Referee was required to accept Claimant's uncorroborated self-serving statements that she attempted to file a timely appeal. The cases cited by Memorial are apt and fairly state this Court's longstanding policy that subjective reasons for

missing an appeal period are examined critically.[5] See Luongo, ante, slip op. at 8-9 and Marleine, ante, slip op. at 7.

3

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.[6] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[7] Applying this standard of review and the definition of misconduct enumerated in Turner, ante, I must recommend that this Court hold that the Board of Review's finding — that claimant did not show good cause for filing a late appeal — is well-supported by the competent record and

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[5] The rectitude of our position was undoubtedly underscored by our Supreme Court's decision in DePetrillo, ante — though that case concerned the filing of a claim, not an appeal.

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

[7] Cahoone, ante n. 6, 104 R.I. at 506, 246 A.2d at 215 (1968). See also Gen. Laws § 42-35-15(g), ante at 4-5 and Guarino, ante at 5, n. 2.

should not be overturned by this Court.

V

CONCLUSION

Upon careful review of the evidence in the record below, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

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

/s/
Joseph P. Ippolito
Magistrate

September 8, 2015