

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
DISTRICT COURT**

SIXTH DIVISION

Nicholas Berman :
v. :
Department of Labor and Training, : **A.A. No. 12 - 167**
Board of Review :

ORDER

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 instant complaint is DISMISSED for LATENESS.

Entered as an order of this Court at Providence on this 27th day of September, 2012.

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
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FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Nicholas Berman urges this Court to set aside a decision rendered by the respondent Board of Review of the Department of Labor and Training which was adverse to his efforts to receive employment security benefits. Jurisdiction for appeals from the decisions of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. These matters have been referred to me for the making of findings and recommendations pursuant to

General Laws 1956 § 8-8-8.1. Unfortunately, this Court will not be able to address the merits of this instant appeal: because claimant filed this appeal after the applicable appeal period had expired, I must recommend his appeal be dismissed.

I. FACTS AND TRAVEL OF THE CASE

During 2011 Mr. Berman — a per-diem classroom behavioral specialist — was employed by Lifespan. Most weeks he worked five days but during a number of weeks he worked fewer days. During those weeks he was allowed, pursuant to Gen. Laws 1956 § 28-44-7, to collect partial unemployment benefits. Then, on January 26, 2012, the Director issued a decision indicating that he should repay certain benefits he had previously received.¹ The Director decided that Mr. Berman received an excessive amount of unemployment benefits because he failed to accurately report his earnings during the weeks he worked part-time, breaching a duty imposed upon him by Gen. Laws 1956 § 28-44-7. See Director's Decision, January 26, 2012. The Director found Mr. Berman at fault for this overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered him to make repayment in the amount of \$4,937.00

¹ The Director actually issued two decisions, which were identical except that they considered different weeks in which claimant worked part-time. They were denominated 1158331 and 1162651. Before the Referee (and the Board), they became 20120643 and 20120641, respectively.

plus interest.²

Mr. Berman appealed and a hearing was held on March 7, 2012 before Referee Nancy L. Howarth. On March 30, 2012 Referee Howarth issued a decision in which she affirmed the Director. In doing so she made the following Findings of Fact:

The claimant was employed as a per diem classroom behavioral specialist by the employer. He worked part time during the weeks in question. The claimant failed to report his part-time earnings when he filed his claim for benefits for each of these weeks.

Referee's Decision, March 30, 2012, at 1. As a result of these findings, the Referee concluded — after summarizing section 28-44-7 — that Mr. Berman failed to accurately report his wages:

Based upon the evidence and testimony presented at the hearing, I find that the claimant incorrectly reported his part time earnings in the weeks in question.

Referee's Decision, March 30, 2012, at 2. He also found Claimant to be subject to a repayment order:

When he filed his claim for benefits for each of the weeks in question, the claimant failed to correctly report his part time earnings. As a result of the claimant's misrepresentation, he received benefits to which he was not entitled. The claimant is, therefore, overpaid and at fault for the overpayment. Accordingly, it would not defeat the purpose of the above Section of the Act to require the claimant to make restitution.

² This is a combined figure for both cases enumerated in footnote 1.

Referee's Decision, March 30, 2012, at 2. From this decision the Claimant appealed to the Board of Review on April 3, 2012.

On July 12, 2012 the Board of Review unanimously — utilizing its authority to decide cases on the basis of the record of the proceedings before the Referee — affirmed the Referee's decision. It stated its findings and conclusions as follows:

The Board finds:

- (1) The claimant was employed as a classroom behavioral specialist;
- (2) The claimant had a set schedule Monday through Friday;
- (3) The claimant worked part-time during weeks ending February 5; March 26 through April 16th, April 30th through May 28th, June 8, and June 18, 2011, the claimant did not report his earnings for the periods;³ and
- (4) The employer reported earnings for the aforementioned dates.

The Board concludes that the claimant failed to correctly report his wages as required under Section 28-44-7 of the Act. As a result, the claimant was overpaid Employment Security benefits. The claimant is required to repay the overpayment under Section 28-42-68 of the Act.

Board of Review Decision, July 12, 2012, at 1 (Footnote added). Accordingly,

³ These dates concerned appeal number 1158331/20120643. The dates in appeal number 1162651/20120641 were: July 9, 2011 thru July 30, 2011, August 20, 2011, September 3, 2011, September 17, 2011, October 1, 2011 through November 12, 2011 and November 26, 2011. See Board of Review Decision, July 12, 2012, (20120641), at 1.

affirmed the finding of overpayment and the order of repayment.

On August 28, 2012, Claimant filed an appeal in the Sixth Division District Court.

II. STANDARD OF REVIEW

The standard of review by which the court must proceed is established in 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.’”⁴ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.⁵ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁶

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of 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

⁴ 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).

⁵ Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

⁶ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

III. ANALYSIS

As stated above in the travel of the case, the Board of Review rendered its decision on July 12, 2012, but Claimant's appeal was not submitted until August 28, 2012 — 47 days later — after the thirty day appeal period had expired. See Gen. Laws 1956 § 42-35-15(b). While Berman did not explain his tardiness in his complaint, any explanation, however meritorious, would have been of no avail; quite simply, the District Court is not authorized to extend the appeal period, which has been held to be jurisdictional. See Considine v. Rhode Island Department of Transportation, 564 A.2d 1343, 1344 (R.I. 1989)(“... the District Court does not possess any statutory authority to entertain appeals that are filed out of time.” 564 A.2d at 1344.). See also Dub v. Dept. of Employment Security Board of Review, A.A. No. 90-383 (Dist.Ct. 1/23/92) (SaoBento, J.)(“ * * * [complainant's] failure to comply with the procedural requirements of § 42-35-15(b) also *invalidates* his claim for relief.” Slip op. at pp. 7-8. *Emphasis added*). Thus, Mr. Berman's appeal must be dismissed.

