

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.**

**DISTRICT COURT  
SIXTH DIVISION**

**Tanya A. Mayumbo** :  
 :  
**v.** : **A.A. No. 13 - 181**  
 :  
**Department of Labor and Training,** :  
**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 decision of the Board of Review is AFFIRMED, except that Appellant shall not be deemed disqualified from receiving benefits during the weeks of December 15, 2012, December 22, 2012, and January 5, 2013.

Entered as an Order of this Court at Providence on this 19<sup>th</sup> day of February, 2014.

By Order:

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen C. Waluk  
Chief Clerk

Enter:

\_\_\_\_\_/s/\_\_\_\_\_  
Jeanne E. LaFazia  
Chief Judge

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Department of Labor and Training, :  
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**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In the instant case Ms. Tanya A. Mayumbo urges that the Board of Review of the Department of Labor and Training erred when it held her to be disqualified from receiving unemployment benefits because she was unavailable for work within the meaning of Gen. Laws 1956 § 28-44-12. Jurisdiction to hear and decide appeals from decisions rendered by the 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 Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the decisions issued by the Board of Review regarding Ms. Mayumbo's eligibility for benefits should be affirmed; however, I also recommend that the orders of repayment issued in this case be set aside.

## I

### FACTS & TRAVEL OF THE CASE

While the full travel of Ms. Mayumbo's efforts to receive unemployment benefits is not completely stated in the decision of Referee Howarth, I believe I have been able to discern the outline of what transpired from references in the certified record.

Ms. Tanya A. Mayumbo was employed until November 28, 2012 in the cleaning/maintenance unit of Hedco Limited in Central Falls.<sup>1</sup> She filed for benefits shortly thereafter. Her initial eligibility was apparently the subject of an earlier decision by Referee Palangio.<sup>2</sup> Eventually, she learned she had to refile her claim.<sup>3</sup> Apparently, she did so.

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<sup>1</sup> Referee Hearing Transcript, at 7. She stated she obtained this position in August of 2012. Referee Hearing Transcript, at 19. It seems she had other claims pending based on employment at previous employers. Referee Hearing Transcript, at 19-20.

<sup>2</sup> Referee Hearing Transcript, at 10-11 and Exhibit D-3 at 2.

<sup>3</sup> See Referee Hearing Transcript, at 16 and Exhibit D-1 at 2.

Then, on July 10, 2013, a designee of the Director of the Department of Labor and Training decided that Ms. Mayumbo was disqualified from receiving benefits pursuant to section 28-44-12 because (in the period from the week-ending December 8, 2012 to the week-ending June 15, 2013) she had failed to register for work through the Tele-Serve payment system.<sup>4</sup>

Ms. Mayumbo appealed and a hearing was scheduled before Referee Nancy Howarth on August 6, 2013. On August 9, 2013, the Referee issued a decision in which she found the following facts:

The claimant last worked on November 28, 2012. The Director determined that the claimant failed to contact the Tele-Serve system as required during the weeks ending December 8, 2012 through June 15, 2013, without good cause, and denied her benefits during this period. Based on the evidence presented at the hearing the Department representative agreed that the claimant had contacted the Department since she was experiencing difficulty contacting the Tele-Serve system during the weeks ending December 8, 2012, December 29, 2012, January 12, 2013, May 11, 2013 and May 18, 2013. The representative indicated that the claimant is entitled to backdating of her claim for these weeks. However, the claimant has failed to provide evidence to establish that she contacted the Department during any of the remaining weeks at issue. The claimant is requesting that her claim be backdated for the weeks ending December 8, 2012 through June 15, 2013.

Referee's Decision, August 9, 2013, at 1. Based on these findings, the Referee pronounced the following conclusions:

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<sup>4</sup> See Director's Decision, July 10, 2013, at 1, contained in record as

The evidence and testimony presented at the hearing establish that the claimant did contact the Department regarding her claim for the weeks December 8, 2012, December 29, 2012, January 12, 2013, May 11, 2013 and May 18, 2013. Therefore, she is entitled to backdating of her claim for these weeks. The claimant has failed to establish that she contacted the Department during the remaining weeks at issue. Therefore, I find that the Claimant is not entitled to have her claim backdated for these weeks under the provisions of the above Section of the Act.

Referee's Decision, August 9, 2013, at 2. Thus, the Referee found Claimant Mayumbo was generally ineligible to receive benefits but she eliminated five weeks<sup>5</sup> from the period of disqualification.

Claimant filed an appeal from this decision and the matter was considered by the Board of Review. On September 20, 2013, the Board of Review issued a decision which found 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, the Claimant timely filed a complaint for judicial review in the Sixth Division District Court.

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Exhibit D2.

<sup>5</sup> The Referee did so at the request of the Department's representative, Helga Liese, who appeared at the hearing by telephone, and who conceded that Claimant had communicated with the Department during the five weeks she enumerated. Referee Hearing Transcript, at 8.

## II APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; R.I. Gen. Laws § 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 prove that they were able to work, were available for full-time work, were actively searching for work, and that they registered for work.

## III STANDARD OF REVIEW

The standard of review is provided by R.I. 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.’”<sup>6</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>7</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>8</sup>

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<sup>6</sup> 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).

<sup>7</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>8</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

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.

#### **IV ISSUE**

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was claimant properly disqualified from receiving benefits because she failed to register for work through the Tele-Serve system?

## V

### ANALYSIS — REGISTRATION THROUGH TELE-SERVE

Ms. Mayumbo was disqualified by the Director under § 28-44-12, which is commonly known as the Availability section, which places various duties upon those who would receive unemployment benefits; among these is the obligation to register for work. By Rule 17F of the Department's Rules and Regulations the Department requires recipients to fulfill this obligation by contacting the Tele-Serve automatic payment system each week. This, the Department alleged, she did not do.<sup>9</sup>

Ms. Mayumbo testified that she tried to call Tele-Serve every week — indeed, every day and multiple times per day, but the line was always busy.<sup>10</sup> However, she had no telephone records to show this. And so, before the close of the hearing the Referee provided Ms. Mayumbo with her facsimile telephone number, so that she could fax phone records showing the frequency of her

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<sup>9</sup> Referee Hearing Transcript, at 8-9. Before relating the individual bits of testimony that I found significant, I feel obliged to report that the transcript is, in spots, difficult to fathom. For instance, many times when the DLT representative is discussing the Tele-Serve system we see “inaudibles” and the word “health,” which seems a complete non-sequitur. See Referee Hearing Transcript, at 9, 19, 22, 26, 27 and 31. Nevertheless, I believe have been able to discern the main points of the testimony that was given.

<sup>10</sup> Referee Hearing Transcript, at 21-22.

calls.<sup>11</sup> It appears that no such records were forthcoming. As a result of her frustration with the Tele-Serve system, Ms. Mayumbo e-mailed the Department on a number of occasions.

The representative of the Department explained that Claimant could have made use of the local network offices and a kiosk at the main office.<sup>12</sup> Nevertheless, in the interest of fairness, Ms. Liese informed the Referee that the Department did not oppose granting Ms. Mayumbo benefits during the five weeks in which she e-mailed the Department.<sup>13</sup>

I commend the Department for taking this stance but I think they did not carry the principle far enough. Three of the e-mails came at the beginning of this process — during the weeks ending December 8, 2012, December 29, 2012, and January 12, 2013. While it may fairly be said that later in this process she should have been more wary, and more insistent, I believe during this early time period a person like Ms. Mayumbo could have been reasonably hopeful that sending three e-mails was being insistent and would have gotten some

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<sup>11</sup> See Referee Hearing Transcript, at 23.

<sup>12</sup> See Referee Hearing Transcript, at 22.

<sup>13</sup> See Referee Hearing Transcript, at 8.

response. I therefore recommend that she be deemed to have satisfied her Rule 17F obligation throughout this period.<sup>14</sup>

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review.<sup>15</sup> The scope of judicial review by the District Court is also limited by Gen. Laws section 28-44-54 which, in pertinent part, provides:

**28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings.** – The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, in light of the testimony presented by the Department's representative regarding Ms. Mayumbo's failure to report weekly through Tele-Serve, the Board of Review's decision (adopting the finding of the Referee) that Claimant should be disqualified under § 28-44-12 of the Act is supported by reliable, probative and substantial evidence of record and must be affirmed.

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<sup>14</sup> Specifically, the weeks ending 12/08/12, 12/15/12, 12/22/12, 12/29/12, 01/5/13, and 01/12/13 (the weeks being added are underlined).

<sup>15</sup> See Gen. Laws § 42-35-15(g), supra at 5-6 and Guarino, supra at 6, n. 6.

## VI

### CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review in this case 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 of Review be AFFIRMED except that Ms. Mayumbo shall not be deemed disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-12 and Rule 17F during the weeks ending December 15, 2012, December 22, 2012 and January 5, 2013.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
MAGISTRATE

February , 2013

