STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Robert B. Furlan	:	
	:	
v.	:	**A.A. No. 11 - 183**
	:	
Dept. of Labor & 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 on the issue of eligibility but the Order of Repayment is REVERSED and VACATED.

Entered as an Order of this Court at Providence on this 13th day of February, 2012.

By Order:

____/s/_____________
Melvin Enright
Acting Chief Clerk

Enter:

___/s/____________
Jeanne E. LaFazia
Chief Judge

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

Robert B. Furlan	:	
	:	
v.	:	**A.A. No. 11 - 183**
	:	
Dept. of Labor & 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 Mr. Robert B. Furlan urges that the Board of Review of the Department of Labor and Training erred when it held that Mr. Furlan would be disqualified from receiving unemployment benefits because he 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 but reversed on the issue of repayment; I so recommend.

FACTS & TRAVEL OF THE CASE

After being laid-off from his full-time job in June of 2010 Mr. Furlan began to receive unemployment benefits. Later, in July of 2011 he inquired about extended benefits. Based on a statement he made to an interviewer at that time, the Department reconsidered his prior eligibility. Specifically, on August 22, 2011 the Director determined he failed to meet the Availability requirements of Gen. Laws 1956 § 28-44-12 during the period from November 13, 2010 through January 1, 2011 — particularly the element of demonstrating that he was available for work — and was thereby disqualified from receiving unemployment benefits. The Director stated — "Since you are[1] primarily engaged in self-employment, it is determined that you do not meet the requirements of the law." (footnote added) Decision of Director, August 22, 2011, at 1. (Exhibit D-2). Claimant appealed and a hearing was held before Referee Carol Gibson on September 28, 2011, at which time Mr. Furlan was the sole witness.

In her October 5, 2011 decision, Referee Gibson did not find that

---

[1] Obviously, since the decision considered a period eight months earlier, this statement should have written made in the *past* tense.

claimant was engaged in self-employment during late 2010. Instead, she found that Mr. Furlan had not proven that he had engaged in an active search for work during this period. Doing so is a second requirement of § 28-44-12. Referee's Decision, February 1, 2010 at 1. Accordingly, the Decision of the Director denying benefits pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained but on a different ground – not because he was not available for full-time work but because he hadn't made an appropriate work search.

Claimant appealed and the matter was considered by the Board of Review. On November 16, 2011, the Board of Review issued a unanimous decision in which it 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. Thereafter, on December 19, 2011, Mr. Furlan filed a complaint for judicial review in the Sixth Division District Court.

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) <u>Make an active, independent search for suitable work.</u>
>
> (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 <u>Huntley v. Department of Employment Security</u>, 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.

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.' "[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 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

---

[2] 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).

[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. 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).

> 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.

ISSUE

The issue before the Court is whether the claimant was properly disqualified from receiving benefits because he failed to satisfy the job-search requirement enumerated in section 28-44-12.

ANALYSIS

I. 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 page 4.[5] It is the claimant's burden of proof to meet these conditions. The Referee concluded Mr. Furlan was subject to a section 28-44-12 disqualification in the period from November 7, 2010 until December 31, 2010 because he was unable to document that he had made an active search for work, the third prong of the test.

---

[5] It is confusing that section 12 is commonly known as the "Availability"

In denying benefits to claimant, Referee Gibson found that Mr. Furlan was 'unavailable' within the meaning of section 28-44-12(a)(3) because he had not maintained a record of his work search activities during the weeks in question. See Referee's Decision, at page 3. This finding is indeed supported in the record; Mr. Furlan admitted in his testimony before the Referee that he did not keep detailed records of his job search. See Referee Hearing Transcript, at 16-20. Accordingly, given the fact that the claimant bears the burden of proving all elements of the availability test, I cannot find that the Referee's decision on the section 12 issue is clearly erroneous.

II. Repayment of Benefits Received.

Secondly, claimant was ordered to repay $4,368.00 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 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.

---

section and that "availability" in a stricter sense is an element of the test.

> * * *
>
> (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 filed for and received Employment Security benefits indicating he was available for work and looking for full-time work, but he failed to maintain or provide a record of his work search activities or to establish that he was looking for work during this period. Due to the claimant's failure to conduct an active and verifiable search for full-time work, he received Employment Security benefits during a period of disqualification. The claimant is at fault for the overpayment and subject to make restitution.

Referee's Decision, October 5, 2011, at page 3. Accordingly, the Referee upheld the Director's order of repayment. For the reasons that follow, I believe this Order must be set aside.

We must remember that the Director ordered repayment based on a finding that claimant was self-employed during the November—December (2010) period; the Referee did not affirm this finding but found claimant disqualified based on a new finding of an inadequate work search. Accordingly, the Director never exercised his discretion to order repayment based on the job-search issue.

In addition, we must recall that — while the claimant bears the burden of proof on the section 12 issues (ability to work, availability to work, proof of job-

search) — the Department must demonstrate fault in order to sustain a repayment order. See Gen. Laws 1956 § 28-42-68(b). In my estimation, a failure to maintain adequate work search records does not per se equate to the kind of deception necessary to support a finding of fault.[6]

Moreover, the Department presented no evidence concerning the nature of claimant's actions that would constitute fault within the meaning of section 28-42-68. For example, no witnesses testified to explain how the claimant deceived the Department concerning his work search efforts. Having found the claimant's proof of his efforts inadequate, the Referee seems to have assumed he misled the Department.

Accordingly, I recommend that the Order of repayment be set aside.

---

[6] Recall that the Referee did not find Mr. Furlan's testimony regarding his work search incredible, but based her decision on his failure to keep records of his efforts, a sin of omission. The Director's order of repayment had rested on a finding of a sin of commission — i.e., failing to inform the Department that he was self-employed.

I also believe concerns of fundamental fairness require the repayment order to be set aside. This pro-se claimant proceeded to a hearing before the Referee contesting a finding by the Director that he was disqualified under section 12 because he had been self-employed during the period under review. During the hearing, the Referee decided to additionally address the question of his job search efforts — also a section 12 issue. A reading of the transcript reveals that the claimant was not properly prepared to discuss this issue. I would therefore find it troubling to grant this Court's sanction to a repayment order based on such off-the-cuff testimony.

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 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.

However, for the reasons stated above, I recommend that the Order of repayment be REVERSED and VACATED.

/s/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 13, 2012