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

Elaine Perry	:	
	:	
v.	:	**A.A. No. 12 - 105**
	:	
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 on the issue of complainant's disqualification is AFFIRMED except that:

1. Ms. Perry is determined not to be disqualified from the receipt of benefits during the weeks ending August 20, 2011 and August 27,

2011; and

2. During the remainder of the period in controversy (the weeks ending July 2, 2011 through August 13, 2011), she is not completely barred from receiving benefits; instead, the amount of wages voluntarily forgone she be calculated as an offset to the benefits she received.

Entered as an Order of this Court at Providence on this 25th day of July, 2012.

By Order:

/s/
Melvin Enright
Acting 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. During the summer of 2011, Ms. Elaine Perry, who had been laid off from her position providing occupational therapy to school children, received unemployment benefits. Later, when the Department of Labor and Training learned she had declined to accept part-time work during the summer from her employer, it retroactively disqualified her from receiving benefits. The decision was affirmed — first by a Referee and then by the Board of Review. Ms. Perry comes to the District Court seeking to reverse this latter decision.

Jurisdiction to hear and decide appeals from decisions made by the Board

[1] Throughout the proceedings below the Claimant is denominated "Elaine Thiboutot." However, she filed the instant complaint as "Elaine Perry." To avoid confusion, I shall refer to her as "Elaine Perry" throughout this opinion.

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. After a review of the entire record in this case, I conclude that the decision rendered by the Board of Review should be affirmed on the fundamental issue of claimant's disqualification; however, for the reasons I shall also explain, I will also recommend that her disqualification not be implemented as a complete bar to the receipt of benefits, but that the benefits she received should be offset by the wages she could have earned at the position she declined.

I. FACTS & TRAVEL OF THE CASE

Claimant was employed as a certified occupational therapist by Bristol County Rehabilitation Services, which provides services to certain public school systems. Her last day of work was June 25, 2011; she filed a claim for benefits on July 25, 2011 and was initially permitted benefits. Subsequently, prompted by an employer protest, the Department considered whether she should be disqualified pursuant to Gen. Laws 1956 § 28-44-20, which bars benefits being paid to claimants who have refused offers of suitable work. See Director's Decision, December 22, 2011. However, the Department disallowed the protest

and found the section 20 issue to be without merit.[2]

But, a second employer protest — grounded in Gen. Laws § 28-44-12's availability requirement — proved successful.[3] See Director's Decision, January 17, 2012, in Department's Exhibit 2. Claimant was found ineligible and ordered to repay all the employment security benefits she had received.[4]

Claimant filed a late appeal from this decision and a hearing was held before Referee Nancy Howarth on March 1, 2012, at which time Ms. Perry testified, as did two employer representatives — Ms. Julie Almeida, its President, and Ms. Maggie Martin, its Office Manager. See Referee Hearing Transcript, at

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[2] It appears that the claimant failed to participate in an interview scheduled as part of the review process. See Director's Decision, December 22, 2011, at 1.

[3] I must express my concern regarding the Department's apparent failure to accord claimant an opportunity to be heard as part of this second review. Even though the claimant had been accorded an opportunity to be heard during the Director's first review (See n.2, supra.), since the issue being considered was, legally, entirely different, the opportunity for a second interview should have been accorded to Ms. Perry, pursuant to the due process clause of the fourteenth amendment.

[4] In fact, the Director's representative issued two decisions in this matter; each covers a separate part of the summer of 2011. In all other respects they are identical. The first (No. 1203021) involves the weeks ending July 2, 2011, July 9, 2011, July 16, 2011 and July 23, 2011; the second (No. 1145833) involves the weeks ending August 6, 2011, August 13, 2011, August 20, 2011, and August 27, 2011.

Before the Referee, these cases were assigned appeal numbers 20120743 and 20120742, respectively. The Referee issued two decisions which were identical, as did the Board. I have treated each set as comprising one decision.

1, 3. Referee Howarth's Decision was issued on March 6, 2012. She allowed Ms. Perry's late appeal and made the following findings of fact on the substantive issue of her eligibility for benefits:

> 2. Findings of Fact:
> The claimant was employed as a certified occupational therapist by the employer. The employer provides services to various public schools. The claimant was employed full time during the school year. At a meeting on March 29, 2011, all staff members were advised that the employer would have approximately fifteen to twenty hours of work, four days per week during the period July through August 15, 2011. Employees were requested to advise the employer of their availability during this time. The claimant indicated that she did not intend to work in the summer. The employer subsequently sent an email to all staff therapists on June 15, 2011, again notifying them that additional work would be available during the summer. The claimant did not respond to the email.

Referee's Decision, March 6, 2012 at 1. Then, after quoting extensively from Gen. Laws 1956 § 28-44-12, the Referee pronounced the following statements of conclusion:

> * * * In order to be eligible for Employment Security benefits the claimant must be able and available for full time work and must conduct an active and independent search for such employment. The credible evidence and testimony presented at the hearing establish that the claimant was not available during the weeks in question for work offered to her by the employer. In addition, the claimant has failed to demonstrate that she has conducted a search for employment. Therefore, I find that the claimant fails to meet the availability requirements of the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, March 6, 2012, at 3. Accordingly, the Decision of the

Director denying benefits to Ms. Perry pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained because she was not available for full-time work and had not made an adequate work search.

Claimant appealed and the matter was considered by the Board of Review. On April 20, 2012, the Board of Review issued a unanimous decision which found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto and adopted the decision of the Referee as its own. Thereafter, Ms. Perry filed a timely 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, 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 Huntley v. Department of Employment Security, Board of Review, 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.

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.' "[5] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

[5] 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).

fact.[6] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[7]

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

7 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV. ISSUE

The issue before the Court is whether the claimant was properly disqualified from receiving benefits because she failed to satisfy the availability requirement enumerated in section 28-44-12. If she was properly disqualified, a subsidiary issue is also presented — How should this disqualification be implemented?

V. ANALYSIS

A. 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 satisfy 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 3.[8] It is the claimant's burden of proof to meet these conditions. The Referee concluded that Ms. Perry was subject to a section 28-44-12 disqualification because, by refusing work, she showed herself to be unavailable for work, thus failing the second prong of the test.

[8] 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.

During July and August of 2011, Ms. Perry was receiving benefits because her school-year position at Bristol County Rehabilitation had ended. However, the Referee found that while she was collecting benefits she had declined part-time work. After a review of the entire record certified to this Court by the Board of Review, I conclude the findings and conclusions made in this case are well-supported by the evidence of record.

1. Claimant's Testimony.

Attempting to prove that she satisfied the availability requirement, Claimant testified that she received one e-mail, in June, offering summer work. Referee Hearing Transcript, at 21, 28. She recalled that the email offered 3-4 hours of work per day. Referee Hearing Transcript, at 28. She could not remember if she responded to it or not. Referee Hearing Transcript, at 21. She supposed she should have. Referee Hearing Transcript, at 22. When asked the larger question — i.e., why she did not work for the employer — she stated: "Because I was looking to better myself, and get out of a very stressful situation." Referee Hearing Transcript, at 22.

She acknowledged that on March 9, 2011 she attended a meeting regarding the fall term. Referee Hearing Transcript, at 30. She did not remember getting an offer of summer school hours in Bristol-Warren. Referee Hearing Transcript, at 31.

2. The Employer's Testimony.

In response, Ms. Julie Almeida testified for the employer that work was available for claimant — at least four days a week or 20-25 hours during July and the first two weeks of August. Referee Hearing Transcript, at 32. She said she informed claimant (and all her staff) of this at a March 29, 2011 staff meeting. Id. However, claimant never expressed an interest. Referee Hearing Transcript, at 33. As a result of a lack of interest, the firm had to refuse work at school departments. Referee Hearing Transcript, at 34.

Ms. Maggie Martin corroborated Ms. Almeida's testimony — indicating that the staff was clearly informed that 15-20 hours work was available during the summer at Newport County Regional Special Ed. Referee Hearing Transcript, at 37-39.

Having examined the 47-page transcript of the hearing before the Referee closely, I find — with one significant exception — that Ms. Perry was unable to refute the testimony of the employer's representatives that she refused part-time work during the summer of 2011.

That exception involves the weeks of August 20, 2011 and August 27, 2011 — Ms. Alemida's testimony was clear that no work was available these weeks. Referee Hearing Transcript, at 32. Therefore, Ms. Perry should not have been disqualified under section 12 for those two weeks. To this extent, the

Board's decision in Case Number 20120742 (affirming the Director's decision in No. 1145833) must be amended. In other respects, I must find that the Referee's decision that Claimant declined to be available for work is not clearly erroneous.[9]

B. The Offset Issue.

As stated above, on January 17, 2012, the Director, based on the finding of lack of availability, determined claimant Perry to be disqualified from receiving unemployment benefits; in the ruling she was specifically told — "… This disqualification covers the period indicated below according to Section 28-44-12 28-42-68: You are denied benefits beginning with the week ending 7/02/11 and for an indefinite number of weeks thereafter until you meet the requirements of the law. * * *." Decision of Director, Exhibit Department's 3, at 1. Based on this phraseology being used, it appears that these decisions ruled claimant to be *entirely, not partially,* disqualified from receiving benefits.

And so, we must inquire: Is this total bar to the receipt of benefits

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[9] The Referee also found, virtually in passing, that the Claimant had failed to engage in an adequate work search. In answer to a question from the Referee, Ms. Perry maintained that she looked for work in other places, but she did not have them written down. Referee Hearing Transcript, at 21-22. I do not believe that claimant may fairly be disqualified on this basis.

The Director's decision focused solely on her unavailability. She clearly did not come to the hearing prepared to discuss this issue. As a result, I believe

correct? I believe not.

For the reasons that follow, I conclude that a claimant who loses a full-time job and who then declines part-time work without good cause should not generally be completely disqualified from receiving benefits. Doing so would be contrary to the manner in which part-time earnings are treated in analogous circumstances under the Rhode Island Employment Security Act.

Firstly, the Act provides that a claimant who is laid-off from a full-time position who is working part-time may collect benefits, subject to an offset based on the worker's part-time earnings. See Gen. Laws 1956 § 28-44-7. Secondly, this Court has long held that a worker who is laid-off from a full-time position who then quits a part-time position (without good cause) may nonetheless collect benefits — subject to an offset for that income voluntarily forgone. See Craine v. Department of Employment and Training, Board of Review, A.A. No. 91-25, (Dist.Ct.6/12/91) (DeRobbio, C.J.)(Claimant lost a full-time job, then took leave from a part-time job; *Held,* partial benefits would be awarded pursuant to § 28-44-7). The rule of Craine provides that although the claimant has left his part-time position in circumstances which would have, if viewed in isolation, triggered a disqualification under section 28-44-17 [Leaving

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due process concerns of notice and opportunity to be heard would be violated by her disqualification on this ground.

Without Good Cause], he is not fully disqualified.

And, in Palazzo v. Department of Labor and Training, Board of Review, A.A. No. 10-55 (Dist.Ct. 10/19/2010), this Court extended the holding in Craine to a claimant who, while collecting benefits because of the loss of her job as a medical technician, was then fired from her position at Dunkin Donuts over attendance issues. This Court held in that the wages Ms. Palazzo lost due to her termination for cause would be treated as an offset from her ongoing benefits. From this holding we may infer a broader rule: that one who is eligible for benefits based on the loss of a full-time job will not be totally disqualified if she then separates from a part-time job under disqualifying circumstances. Thus, the Craine rule was extended to include section 18 cases in Palazzo.

After applying the foregoing statutes and precedents, I have concluded Ms. Perry's situation falls within the logic of this Court's holdings in Craine and Palazzo. Claimant was collecting benefits due to the loss of a full-time position. Part-time work was available. If she accepted such a position, she would not have been completely disqualified from receiving benefits, but an offset would have been applied. I believe the same rule should be applied here: Ms. Perry's benefits should continue to be offset by a deduction based on the amount of wages voluntarily forgone. I believe fairness requires that the offset-rule should

be made fully applicable to her — and other section 12 disqualification cases.[10]

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. The Court, when reviewing a Board decision, does not have the authority to expand the record by receiving new evidence or testimony.

Accordingly, I find that the Board's decision (adopting the finding of the Referee) that claimant was unavailable for full-time work within the meaning of section 28-44-12 — in that she refused work on a number of occasions — is supported by substantial evidence of record, is consistent with applicable law,

[10] The Referee found that Ms. Perry was offered 15-20 hours work per week during the period in question, which was conceded by Claimant and confirmed by Ms. Martin. In order to avoid the need for a further hearing, I believe that the Department should base its offset calculation on the firm figure — fifteen hours per week.

and ought to be affirmed, and the benefits recalculated pursuant to the offset described above.[11]

C. Repayment of Benefits Received.

The Director ordered repayment of all benefits received by Ms. Perry during the weeks under examination. In light of my recommendation that an offset be applied, this order must certainly be set aside. But, this leaves open the question whether the excess amounts received, after the offset is applied, must be repaid. I believe there was a lawful basis for the Board to so order.

By reporting herself available for work, the claimant misled the Department. She was at fault. I therefore conclude she must be liable to pay the adjusted amount.

Of course, regarding the weeks of August 20, 2011 and August 27, 2011, during which no part-time work was offered to claimant, I have recommended that the disqualification order be completely vacated. I believe she is entitled to any benefits she received for those weeks. As a result, the order of repayment must be reduced so as to delete any monies received for these weeks.

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[11] I certainly acknowledge that it can happen that the offset can result in no benefits being payable. This becomes more likely as the amount of the hourly pay and the number hours voluntarily foregone increases.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review 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 be AFFIRMED except that:

3. Ms. Perry is determined not to be disqualified from the receipt of benefits for the weeks ending August 20, 2011 and August 27, 2011; and

4. During the remainder of the period in controversy (the weeks ending July 2, 2011 through August 13, 2011), she is not completely barred from receiving benefits; instead, the amount of wages voluntarily forgone should be calculated as an offset to the benefits she received. The instant matter should be referred to the Department of Labor and Training for the calculation of the offset.

/s/
Joseph P. Ippolito
MAGISTRATE

JULY 25, 2012