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

Kristine Kelly	:	
	:	
v.	:	**A.A. No. 12 - 013**
	:	
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 is AFFIRMED except the Order of Repayment is VACATED.

Entered as an Order of this Court at Providence on this 19th day of June, 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

Kristine Kelly	:	
	:	
v.	:	**A.A. No. 12 - 013**
	:	
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 Ms. Kristine Kelly urges that the Board of Review of the Department of Labor and Training erred when it held that Ms. Kelly was disqualified from receiving unemployment benefits because she 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; I so recommend.

I. FACTS & TRAVEL OF THE CASE

Claimant was receiving unemployment benefits when, on September 17, 2010, the Director determined she failed to meet the availability requirements of Gen. Laws 1956 § 28-44-12 — specifically the element that she demonstrate that she was available for work and searching for work — and was thereby disqualified from receiving unemployment benefits. See Exhibit D2. Claimant appealed and a hearing was held before Referee William Enos on November 1, 2011, at which time Ms. Kelly testified, as did an employer representative. See Referee Hearing Transcript, at 1.

Referee Enos issued a Decision on November 3, 2011 in which he made the following findings of fact:

> 2. Findings of Fact:
> Claimant testified that the employer offered her assignments in area (sic) she did not know and they never paid mileage as promised. The employer testified and submitted evidence that showed that the claimant refused many shifts during the weeks in question. The claimant testified that the call logs were wrong but produced no evidence or credible testimony to show that the logs were inaccurate.

Referee's Decision, September 3, 2011 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 benefits claimant must be able to establish that she was able and available for full-time employment and that she has an unrestricted attachment to the local labor market. By refusing work the claimant has taken herself out of the job market. Therefore, she was not able and available.

Referee's Decision, September 3, 2011, at 2. Accordingly, the Decision of the Director denying benefits to Ms. Kelly pursuant to Gen. Laws 1956 § 28-44-12 (Availability) was sustained because she was not able and available for full-time work — as the Director had found.

Claimant appealed and the matter was considered by the Board of Review. On December 13, 2011, 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. Kelly 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) * * *. (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 Huntley v. Department of Employment Security, 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.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

---

1 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).

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

3 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).

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 claimant was properly disqualified from receiving benefits because she failed to satisfy the availability requirement enumerated in section 28-44-12.

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 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 3.[4] It is the claimant's burden of proof to meet these conditions. The Referee concluded that Ms. Kelly was subject to a section 28-44-12 disqualification because, by refusing work, she was unavailable for work, the second prong of the test.

During the time-period in question, Kristine Kelly was working for Arbor Associates, a temporary placement employment firm, on an as-needed basis. She accepted many days' work. She collected partial unemployment benefits when she was out of work. The instant controversy arose because Arbor alleged that on a number of occasions Ms. Kelly refused work.

Having examined the 23-page transcript of the hearing before the Referee closely, I find that Ms. Kelly was unable to refute the testimony of the employer's representative that she refused work on a number of occasions. Part of her difficulty was that the employer's records regarding her refusals were grouped by week. E.g. Referee Hearing Transcript, at 7-9. Based on the record before him, I must find that the Referee's decision that Claimant refused work is not clearly erroneous.[5]

---

[4] 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.

[5] In her Memorandum presented to this Court, Ms. Kelly presents additional reasons why she refused work — which she implies constitute good cause. Of course, the Court may not consider these arguments, as we are bound by the record certified to us by the Board of Review.

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[6] — is supported by substantial evidence of record, is consistent with applicable law, and ought to be affirmed.

---

[6] Ms. Kelly was working for Arbor Associates on an ongoing basis. It is uncontested that she accepted some jobs they offered and refused others. Of course, it is vital to remember that she was disqualified by the Director under Gen. Laws 1956 § 28-44-12 (Availability), not under Gen. Laws 1956 § 28-44-20 (Refusal of Suitable Work). The difference in practice is this — one who is found to have refused a position under section 20 is barred from receiving benefits until he or she reestablished eligibility, one who declines a position under section 12 is merely found unavailable that day. Thus, the remedy for her section 12 violations is to be deemed ineligible for any day she refused work, which results in an offset being deducted from her benefits for the amount of wages voluntarily forgone.

B. Repayment of Benefits Received.

Secondly, claimant was ordered to repay $3,016.00 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.
> * * *
> (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:

> Finding of fault must be made. Fault is established that the claimant contributed to the overpayment. Since the claimant did not provide the proper information at the time of filing she is at fault in creating the overpayment. She is subject to the recovery provisions of 28-42-68 of the Rhode Island Employment Security Act and must make restitution in the amount of $3,016.00 * * *.

Referee's Decision, November 3, 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 refused work on a number of occasions. We must further 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). However, the Department presented no evidence at the hearing — in particular, there was no testimony regarding what claimant represented to the Department when she filed for benefits and how it deceived the Department. This Court will not infer the nature of those representations. In the absence of such proof the repayment order must be set aside; I so recommend.

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 the order of repayment should be VACATED.

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 19, 2012