

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

**DISTRICT COURT
SIXTH DIVISION**

Nicole Bernard :
 :
v. : **A.A. No. 13 - 116**
 :
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.

Entered as an Order of this Court at Providence on this 29th day of August, 2013.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Ms. Nicole Bernard urges that the Board of Review of the Department of Labor and Training erred when it affirmed a referee's decision dismissing her appeal because it was filed after the expiration of the statutorily established appeal period. 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 that follow, I recommend that the decision issued by the Board of Review in this case be affirmed.

I. FACTS AND TRAVEL OF THE CASE

The travel of the instant case may be briefly stated: Ms. Bernard was employed by Seven Hills RI, Inc. After her separation, she applied for and received unemployment benefits benefits. On March 28, 2012, a designee of the Director of the Department of Labor and Training found her to be disqualified from receiving benefits during the period from October 14, 2011 through November 14, 2011 because she was — for medical reasons — unable to work pursuant to Gen. Laws 1956 § 28-44-12. See Decision of Director, March 28, 2012 (No. 1202621), at 1 (Director's Exhibit No. 2). The Department also found Claimant liable to repay \$ 1056 for funds improperly received. Id.

Ms. Bernard appealed from this decision on April 9, 2013 and a hearing was conducted by Referee Stan Tkaczyk on April 24, 2013. However, at the hearing the Referee not only addressed the disqualification and repayment issues, but also considered why the Claimant's appeal had been filed so tardily, long after the expiration of the statutorily set appeal period.

Indeed, in the decision he issued the next day, Referee Tkaczyk directed his attention exclusively to the late-appeal issue. He dismissed Ms. Bernard's appeal for lateness. Ms. Bernard filed a further appeal to the Board of Review — in a timely manner. As it has the authority to do under Gen. Laws 1956 § 28-44-47, the Board

considered the case on the basis of the record before the Referee. Then, on June 5, 2013, the Board of Review affirmed the decision of Referee Tkaczyk, finding it to be a proper adjudication of the facts and the applicable law. Decisions of Board of Review, June 5, 2013, at 1.

Ms. Bernard filed a timely appeal from this decision in the Sixth Division District Court on July 5, 2013.

II. STANDARD OF REVIEW

The standard of review by which this court must consider appeals from the Board 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 result³

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 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

¹ 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).

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

³ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

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.

III. APPLICABLE LAW

The time limit for appeals from decisions of the Director is set by subsection (b) of Gen. Laws 1956 § 28-44-39, which provides

(b) Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and of any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended. The director, on his or her own motion, may at any time within one year from the date of the determination set forth in subdivision (a)(1) of this section reconsider the determination, if he or she finds that an error has occurred in connection with it, or that the determination was made as a result of a mistake, or the nondisclosure or misrepresentation of a material fact.

(Emphasis added)

Note that while subsection 39(b) includes a provision allowing the 15-day period to be extended (presumably by timely request), it does not specifically indicate that late appeals can be accepted, even for good cause. However, in many cases the Board of Review (or, upon review, the District Court) has permitted late appeals if good cause was shown.

IV. ANALYSIS

The purpose of all tribunals — whether judicial or administrative — is to adjudicate cases on the merits. However, procedural parameters have to be established

to avoid anarchy. The time limit for appeals from decisions of the Director to the Referee level is set in Gen. Laws 1956 § 28-44-39(b) to be 15 days. Accordingly, the issue in this case is whether the decision of the Referee (adopted by the Board of Review) that Claimant Bernard had not shown good cause for her late appeal is supported by substantial evidence of record or whether it was clearly erroneous or affected by other error of law.

A. The Testimony Received On the Issue of the Late Appeal.

At the hearing before the Referee, Claimant Bernard testified concerning the reasons why her appeal was late. Referee Hearing Transcript, at 6–17. Ms. Bernard indicated that she received the decision of the Department of Labor and Training when it was issued in March of 2012. Id., at 6-7. She indicated she really did not understand her rights. Id., at 7. To be specific, she did not realize that she could appeal just the repayment order. Id., at 9. Eventually, she went to the Woonsocket DLT office and they explained things to her; thereafter she filed her appeal. Id.

B. Resolution of the Late Appeal Issue.

Ms. Bernard states she received the Director’s decision but failed to understand her options. This explanation (so patently inadequate that it rings of the truth) is a subjective one, reflecting a personal misunderstanding and failure. This type of reason has never been accepted as good cause because doing so would render the time limit

meaningless and unenforceable. E.g. Davis v. Department of Employment and Training Board of Review, A.A. No. 95-40, (Dist.Ct. 4/26/95)(DeRobbio, C.J.)(Dismissal of appeal affirmed where claimant thought appeal could be filed anytime). Therefore, the Referee's decision finding that Claimant did not demonstrate good cause for the filing of a late appeal was entirely reasonable and not clearly erroneous.

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 of Review decision, does not have the authority to expand the record by receiving new evidence.

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, I must conclude that the Referee's decision (accepted and adopted by the Board) that Ms. Bernard did not demonstrate good cause for the lateness of her appeal from the Decision of the Director is supported by the reliable, probative, and substantial evidence of record and is not clearly erroneous.

V. CONCLUSION

Upon careful review of the record, I recommend that this Court find that the decision of the Board of Review was not clearly erroneous and was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

_____/s/_____
Joseph P. Ippolito
MAGISTRATE
AUGUST 29, 2013