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

Debra A. Smith	:	
	:	
v.	:	**A.A. No. 13 - 187**
	:	
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 decision of the Board of Review is AFFIMRMED.

Entered as an Order of this Court at Providence on this 25th day of February, 2014.

By Order:

____/s/_____
Stephen C. Waluk
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. In this case Ms. Debra A. Smith, a substitute nurse for the Coventry School Department, urges that the Board of Review of the Department of Labor and Training erred when it held that she was ineligible for between-term benefits during the summer of 2013 recess because she had been given a reasonable assurance of work during the next term as required by Gen. Laws 1956 § 28-44-68. 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 Board's decision in the instant matter should be affirmed.

I

FACTS & TRAVEL OF THE CASE

Ms. Debra A. Smith, who had been employed by the Coventry School Department as a substitute nurse during the 2012/2013 academic year, applied for unemployment benefits during the 2013 summer vacation period. In a decision dated July 24, 2013, a designee of the Director of the Department of Labor and Training decided that the claimant was not eligible for between-term benefits during the week-ending July 06, 2013 and the remainder of the summer vacation period because she had been given a written assurance of being rehired after the vacation ended — pursuant to Gen. Laws 1956 § 28-44-68. See Exhibit A2.

Ms. Smith appealed and a hearing was held before Referee Carl Capozza on August 28, 2013. The Claimant appeared, as did Ms. Kathryn Duncanson, Director of Compliance for the Coventry Public Schools. Referee Hearing Transcript, at 1-2. Referee Capozza issued a decision on August 29, 2013 which included the following findings of fact:

> **2. Findings of Fact:**
> Claimant had been employed in the position as a substitute nurse until her last day of work the end of the school term on June 20, 2013. Prior to that day on May 31, 2013 the claimant was provided written assurance that she would be similarly employed in the same capacity and under the same conditions in the next ensuing academic year 2013-2014 as in the first term.

Referee's Decision, August 29, 2013, at 1. Then, after quoting extensively from Gen. Laws 1956 § 28-44-68, the referee pronounced the following statements of conclusion:

> * * *
> Based on the credible testimony and evidence of record as indicated, the claimant did have reasonable assurance by written agreement from the employer as required in accordance with Section 28-44-68 of the Act.

Referee's Decision, August 29, 2013 at 2. Accordingly, the Decision of the Director denying benefits pursuant to section Gen. Laws 1956 § 28-44-68 was affirmed.

Ms. Smith appealed and the matter was considered by the Board of Review. On October 9, 2013, a majority of the members of 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 and adopted the decision of the Referee as its own. Thereafter, Claimant 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 § 28-44-68, provides:

> **28-44-68. Benefit payments for services with nonprofit organizations and educational institutions and governmental entities. ---** Benefits based on service in employment for nonprofit organizations and educational institutions and governmental entities covered by chapters 42--44 of this title shall be payable in the same amounts on the same terms and subject to the same conditions as benefits payable on the basis of other services subject to chapters 42--44 of this title, except that:
> (1) With respect to services performed after December 31, 1977, in an instructional, research, or principal administrative capacity for an educational institution (including elementary and secondary schools and institutions of higher education) benefits shall not be paid based on those services for any week of unemployment commencing during the period between two (2) successive academic years or during the between two (2) regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if that individual performs those services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of those academic years or terms. Section 28-44-63 shall apply with respect to those services prior to January 1, 1978.
> (2) * * *
> (3) * * *
> (4) * * *

> (a) "Reasonable assurance" means a written agreement by the employer that the employee will perform services in the same or similar capacity during the ensuing academic year, term or remainder of a term. Further, reasonable assurance would not exist if the economic terms and conditions of the position offered in the ensuing academic period are substantially less than the terms and conditions of the position in the first period. (Emphasis added)

As one may readily observe, subsection (a) requires that the "reasonable assurance" described in the statute to be given in writing, regarding an opportunity of a similar economic benefit.

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:

> **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]

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

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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 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).

> 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 eligible to receive between-term benefits because she had not been given "reasonable assurance" of work during the fall term, in writing, as provided in § 28-44-68.

V

ANALYSIS

Pursuant to Gen. Laws 1956 § 28-44-68, public and non-profit educational institutions who wish to prevent employees from receiving between-term benefits, must provide their employees with reasonable assurance of work in the fall. Pursuant to the amendments to section 68 provided by P.L. 1998, ch. 113, § 1, said assurance must be in writing. In this case this provision was satisfied.

A

Facts Adduced at the Hearing

At the hearing conducted by Referee Capozza, the school department's representative, Ms. Duncanson, testified that during the 2012-2013 school-year Ms. Smith was employed as a substitute nurse. Referee Hearing Transcript, at 5. And as to the fall term, Ms. Duncanson testified that Claimant "received a letter and she was asked to return the declaration of intent, which is what you have there." Referee Hearing Transcript, at 6. Ms. Duncanson provided a copy of Claimant's return, but did not present a copy of the letter, which she described as a "form letter." Referee Hearing Transcript, at 7. She described it as stating — "… you were a substitute last year, please return the attached form if you intend to continue that service in the next year and we will include you in our …." Id. Before concluding, Ms. Duncanson stated that the year before (i.e., 2011-2012), Claimant had worked for Coventry and then was called back for 2012-2013 school year. Referee Hearing Transcript, at 8.

Then Ms. Smith testified. Referee Hearing Transcript, at 9 et seq. She said she had been a substitute nurse for the Coventry schools since 2006. Referee Hearing Transcript, at 9. She explained that in August of 2012, in addition to substituting, she began a special assignment caring for a young girl

with a feeding tube two days per week. Referee Hearing Transcript, at 9-10. Then, at the end of the school year, she was told that the assignment would not continue. Referee Hearing Transcript, at 11. Ms. Smith tried to draw a distinction between her normal substituting and this special assignment, but Ms. Duncanson indicated that she was considered a substitute as to both roles. Referee Hearing Transcript, at 12.

B

Rationale

At the hearing before Referee Capozza, Claimant maintained that she was only appealing from the denial of benefits based on the discontinuation of the special assignment, not her regular position as a substitute with Coventry. She did not seem to question that that relationship, which began in 2006, would continue.[4] But I must agree with the Referee, it is all of a piece.

Instead of only substituting — being constantly subject to the vagaries of being summoned to work on short notice — she had picked up a two-day per week assignment filling in for another nurse. It could have been five-days per week for a week, a month, or a full year. Her relationship with Coventry

[4] For this reason, I do not believe the fact that the letter was not introduced at the hearing is not determinative of the result in this case.

never changed — she was a substitute nurse, filling-in when needed and when summoned.

Our Supreme Court has recently reiterated — in Elis-Clavet v. Board of Review, Department of Labor and Training, 15 A.3d 1008, 1014 (R.I. 2011) — that reasonable assurance is not a "guarantee" of future employment, especially regarding those who serve in our schools as substitutes, whether they be teachers or nurses.

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. After reviewing the complete record below, I find that the Board's decision (adopting the finding of the Referee) that Claimant was ineligible to receive unemployment benefits during the 2013 summer recess, pursuant to section 28-44-68, is fully supported by substantial evidence of record, is consistent with applicable law, and should, therefore, be affirmed.

VI

CONCLUSION

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) 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.

/s/
Joseph P. Ippolito
MAGISTRATE

February 25, 2014