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

Kate Bowen	:	
	:	
v.	:	**A.A. No. 13 - 044**
	:	
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 AFFIRMED.

Entered as an Order of this Court at Providence on this 27th day of January, 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 administrative appeal Ms. Kate Bowen urges that the Board of Review of the Department of Labor and Training erred when it held that she was not entitled to receive employment security benefits. Jurisdiction for appeals from decisions of the Department of Employment and Training 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 in this opinion, I recommend that the decision rendered by the Board in

this case be AFFIRMED.

I

FACTS & TRAVEL OF THE CASE

The facts and travel of the case may be briefly stated: For a three-year period (ending in January of 2012) Claimant was employed by East Bay Center — most recently as an Intake Clinician. She applied for and was granted Family Medical Leave; however, she did not return to work when it expired. In August of 2012 she filed a claim for unemployment benefits and — in a decision dated October 16, 2012 — a designee of the Director of the Department of Labor and Training decided she was eligible to receive them.

The employer appealed and a hearing was conducted by Referee John R. Palangio on December 18, 2012. Ms. Bowen appeared as did two representatives of East Bay. Referee Hearing Transcript, at 1. Then, on December 19, 2012, Referee Palangio issued a decision in which he made the following findings of fact:

> The claimant was employed by East Bay Center for three years last on January 12, 2012. The claimant was approved for Family Medical Leave (FMLA) in January 2012. When the FMLA expired, the claimant was not able to return to work in [sic] was separated from her employer. The claimant filed for benefits effective August 5, 2012. Upon being informed of the claimants filing for benefits, the employer offered the claimant a position. The claimant declined the job offer after a cursory e-mail

exchange with the employer.

Referee's Decision, December 19, 2012, at 1. Based on these findings, Referee Palangio made the following conclusions:

> * * *
> The credible testimony of the employer was that they offered the claimant a full-time position when they learned she was able and available for full-time work as a result of filing for unemployment benefits. The employer offered the claimant a first shift position. The claimant rejected that job offer based upon her belief that the job would include significant overtime. The claimant had a medical condition which precluded her from working significant amount of overtime.
>
> The employer testifying at this hearing stated that this position would not require overtime. In addition, the employer stated that they could assure the claimant just first shift hours. The claimant testified that she believed that this position included a significant amount of overtime hours per week. However, the e-mail exchange between the claimant and the employer (employer exhibit number one) does not establish that the claimant had performed due diligence in investigating this new position. Specifically, she did not inquire specifically how many hours were to be worked per week, what caseload requirement would be if the claimant did not meet the client quota, and if the offer of first shift was guaranteed. As a result, it cannot be ascertained that this position was unsuitable for the claimant based on the information from the e-mail exchange. As a result, the claimant made a decision not to accept this job based upon prior experience with her employer rather than the facts and evidence presented to her on this new position. Therefore, Unemployment benefits are denied under Section 28-44-20 of the Rhode Island Employment Security Act.

Referee's Decision, December 19, 2012, at 2-3. For these reasons the Referee

reversed the decision of the Director and found Ms. Bowen disqualified from receiving further unemployment benefits because she refused a suitable position, as defined in Gen. Laws 1956 § 28-44-20.

At this juncture Ms. Bowen appealed and the matter was considered by the Board of Review. Although it did not conduct a new hearing — as it need not do — the Board found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto; accordingly, it adopted the decision of the Referee as its own. See Board of Review Decision, February 12, 2013, at 1.

Thereafter, on March 13, 2013, Claimant Bowen filed a complaint for judicial review in the Sixth Division District Court.

II

STANDARD OF REVIEW

The 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]

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

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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, 246 A.2d 213 (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).

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 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

ISSUE

The issue before the Court is whether the decision of the Board of Review which found Claimant should be disqualified from receiving unemployment benefits pursuant to § 28-44-20 was clearly erroneous in light of the probative, reliable and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law?

IV

ANALYSIS

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.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

A

Standard of "Suitability" In Refusal Cases (Section 20)

The standard for suitability in Rhode Island is that stated in section 28-44-20 of the Employment Security Act:

> (b) "Suitable work" means any work for which the individual in question is reasonably fitted, which is located within a reasonable distance of his or her residence or last place of work and which is not detrimental to his or her health, safety, or morals. No work shall be deemed suitable, and benefits shall not be denied under chapters 42 -- 44 of this title to any otherwise eligible

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

[5] Cahoone, supra n. 4. See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

> individual for refusing to accept new work, under any of the following conditions:
> (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
> (2) If the wages, hours, or other conditions of the work are substantially less favorable to the employee than those prevailing for similar work in the locality;
> (3) If, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Gen. Laws 1956 § 28-44-20(b)(Emphasis added). Now, before attempting to answer this question, we must determine whether the Referee's findings are supported by the facts of record.

B

Facts of Record — The Hearing

The employer presented two witnesses at the hearing before the Referee — Karin Donovan, its Vice President of Human Resources and Nancy Guertin, Director of Family Outpatient Services. Ms. Donovan began by indicating that Claimant Bowen was employed until January 12, 2012, most recently as an Intake Clinician. Referee Hearing Transcript, at 17. After January she was out-of-work, first because of an illness her daughter had, and then her own. She was granted a three-month leave under the Family Medical Leave Act (FMLA). Referee Hearing Transcript, at 18. When the leave ended, on

April 13, 2012, Claimant was not ready to come back to work; as a result, she was terminated. Referee Hearing Transcript, at 19.

Then, in August, the management team at East Bay was informed that Ms. Bowen had applied for unemployment benefits. Referee Hearing Transcript, at 20. So, on August 8, 2012 Ms. Donovan sent Claimant a letter asking her to contact East Bay, saying that they had several open positions and would love to have her back. Referee Hearing Transcript, at 20-21. And she followed up by e-mail. Referee Hearing Transcript, at 21-22.

On August 22, 2012 Claimant responded to Ms. Donovan by e-mail, informing her that she had not contacted Nancy Guertin because she did not think she would be able to meet their expectations as to productivity and scheduling. Referee Hearing Transcript, at 24. The same day, Ms. Donovan urged her to speak to Ms. Guertin and get the details of the available positions. Referee Hearing Transcript, at 24.

Then, on August 31, 2012 the Claimant sent an e-mail message to Ms. Guertin inquiring as to the Clinician position — specifically whether evening hours were involved. Referee Hearing Transcript, at 24-25. A few days later Ms. Guertin responded that "there may be some evening hours" but, since there were Clinicians working evening hours, working till five or six p.m. might

be "okay." Referee Hearing Transcript, at 25. At this juncture Claimant responded, thanking Ms. Guertin for her information but expressing her regret that she could not accept any "productivity based positions" and that — when she was ready for work — she would require "consistent day hours." Id. She closed her e-mail by asking Ms. Guertin if she could accommodate day hours and no productivity expectations. Id. Ms. Guertin responded that every position — including her prior position — had productivity expectations attached to it in East Bay's budget process. Referee Hearing Transcript, at 25-26. She added — apparently referring to clinical positions beyond East Bay — that she was unaware of any clinical positions that did not. Referee Hearing Transcript, at 26. But, addressing the issue of night hours, she felt they could work something out. Id.[6]

Then, on September 7th, when East Bay was notified that Ms. Bowen was awarded unemployment benefits, they filed a timely protest, believing that they had offered Ms. Bowen a full-time position. Referee Hearing Transcript, at 27.

[6] This stream of e-mails was read into the record by the Referee and received into evidence as Employer's Exhibit 1. See Referee Hearing Transcript, at 27.

In response to the Referee's inquiry, Ms. Donovan explained that the expectation of 30 hours or 30 clients per week was meant to be achieved in a standard work week of 37.5 hours; further these expectations were prorated for 46 of the 52 weeks in a year — thus, vacation time was built into the formula. Referee Hearing Transcript, at 28. Ultimately, she described the process of evaluating the clinician's fulfillment of East Bay's expectations as "very fluid," taking into consideration cancellations and other circumstances beyond the clinician's control. Referee Hearing Transcript, at 26-31.

At this juncture the Referee endeavored to obtain the Claimant's perspective on these events and circumstances. Referee Hearing Transcript, at 35 et seq. He began by asking her the key (but simple) question — Why did Ms. Bowen decline to accept the position as a clinician at East Bay? Referee Hearing Transcript, at 35. She answered that she did not believe she could fulfill the 30-hour productivity expectation. Id. Now, the Referee seemed to view this statement as controverting the fact that, by applying for benefits, Claimant was assuring prospective employers (and the Department) that she was both able to work and available for work. Id.

So, the Referee pressed on, and asked her why she thought she could not perform this first-shift position. Id. She responded by stating her belief

that East Bay was not in fact flexible (or "fluid") in the manner it administered its 30-hour productivity expectation. Referee Hearing Transcript, at 36. She feared that, if she fell below the expected performance, she would be required to "make up" the appointments. Referee Hearing Transcript, at 38.

At this point, the Referee inquired about her medical documentation. Referee Hearing Transcript, at 38. He examined an April 9th note, indicating she was cleared to return to work without restrictions. Referee Hearing Transcript, at 39. Claimant then provided him with a note from December of 2012, in which the doctor indicated she could return to work full-time with restrictions regarding productivity or management. Referee Hearing Transcript, at 39-40, 48.[7]

Claimant testified she had been in the Clinician's position for about a year before she left East Bay, working overtime almost every day, for a total of about 50 hours per week. Referee Hearing Transcript, at 41. She added that, at the time, she was in a supervisory role. Referee Hearing Transcript, at 42. The Referee then asked Claimant why she did not ask East Bay directly whether she could accept this position and not work overtime. Referee Hearing

[7] This document, dated December 12, 2012, was read into the record by the Referee and received into evidence as Claimant's Exhibit 1. See Referee Hearing Transcript, at 48-49.

Transcript, at 43. She answered that, at East Bay, there was always overtime to make up missed appointments. Referee Hearing Transcript, at 44-46.

On cross-examination, Ms. Bowen indicated that she had been taking private clients referred by Blue Cross. Referee Hearing Transcript, at 47.

Ms. Nancy Guertin then testified. Referee Hearing Transcript, at 49 et seq. She told Referee Palangio that the situation was not as "cut and dry" as the Claimant had stated. Referee Hearing Transcript, at 50-52. It was not really like a bank where you had to make up missed appointments and the like. Id. She denied clinicians were working 50 hours per week. Referee Hearing Transcript, at 53.

Ms. Donovan added that "things have changed" since Ms. Bowen left and she regretted that she never had the chance to sit down with her. Id. She and Ms. Guertin told Referee Palangio that 10-15 hours of overtime per week for a clinician was now "out of the ordinary." Referee Hearing Transcript, at 54. Finally, when asked directly by the Referee what would happen to a clinician who did not achieve the 30-hour productivity rate over the course of a year, Ms. Guertin responded that the employee would not be terminated. Referee Hearing Transcript, at 56.

C

The Findings of the Referee

In my view, the findings and conclusions made by Referee Palangio, quoted supra at 2-3, are fully supported by the testimony and evidence elicited at the hearing. The testimony summarized in Subpart B, supra, is fully consistent with the Referee's conclusion — viz., that Claimant precipitously declined the position based on her preconceived notions of what the job would have required, without ever giving East Bay's managers a chance to clarify the requirements of the position they were tendering.[8] And so, I must conclude that the Board of Review's ruling (adopting the Referee's decision as its own) that Claimant refused a suitable position with East Bay, her former employer, was not clearly erroneous.

Pursuant to the applicable standard of review described supra in Part II, at 4-6, 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. This Court is not permitted to substitute its

[8] On the other hand, to the extent that Claimant asserted that she could not work any overtime whatsoever, she put into question her ability to hold any salaried professional position, giving rise to a potential disqualification pursuant to Gen. Laws 1956 § 28-44-12 (Availability).

judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result.

And so, in light of the evidence of record and the limitations on the scope of our review described above, I recommend that the Board of Review's decision that Ms. Bowen be disqualified from the receipt of benefits pursuant to Gen. Laws 1956 § 28-44-20 be affirmed.

V

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 § 42-35-15(g)(3),(4). Further, it is 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.

/s/
Joseph P. Ippolito
MAGISTRATE

JANUARY 27, 2014