STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Raymond A. LaPerche	:	
	:	
v.	:	A.A. No. 13 - 048
	:	
Department of Labor & 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 and the memoranda of counsel, 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 reversed.

Entered as an Order of this Court at Providence on this 19th 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. Mr. Raymond E. LaPerche filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits based upon proved misconduct. Jurisdiction for appeals from the decision 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. However, I will not be able to address the merits of the misconduct issue, since I find

that the Board erred by allowing the employer to appeal from the Department's initial decision allowing benefits, notwithstanding its failure to respond to the Department's request for information within the time period allotted by statute. Accordingly, I find that the Board should have dismissed the employer's appeal, thereby reinstating the Director's decision. Therefore, I recommend that the Board of Review's decision finding Claimant to be disqualified from the receipt of employment security benefits must be REVERSED.

I

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Raymond E. LaPerche was employed by Douglas Construction as a machine operator for 2½ months until he was terminated on October 4, 2012. He applied for employment security benefits immediately and on November 8, 2012 the Director issued a decision holding that (1) the employer was disqualified from opposing Mr. LaPerche's claim for benefits because it failed to respond to the Department's request for information within seven (7) days as required by Gen. Laws 1956 § 28-44-38(c); furthermore, Mr. LaPerche was eligible to receive benefits because he was not shown to have engaged in proved misconduct within the meaning of Gen. Laws 1956 § 28-44-18. Therefore, he was granted benefits.

Complainant filed an appeal, and a hearing was held before Referee Carl Capozza on December 12, 2012 at which the Claimant, the owner of Douglas Construction, and a supervisor appeared and testified. See Referee Hearing Transcript, at 1. In his December 14, 2011 Decision, the Referee made the following findings of fact on the issue of the employer's procedural non-compliance:

> A notice of claim form was mailed to the employer's address of record on October 14, 2012. For reasons unknown the employer was not in receipt of the document and, therefore, did not complete the same as required.

Decision of Referee, December 14, 2012 at 1. (N.B. — the Referee also found that Claimant LaPerche was fired for making insubordinate statements. Id.). Based on these findings, the Referee — after quoting from section 28-44-38(c) — made the following conclusions:

> Based on the credible testimony presented in this case, I find that the employer was not in receipt of the notice of separation form and, therefore, was not subject to the disqualification provision of the above Section of the Act.

Decision of Referee, December 14, 2012 at 2. (N.B. — the Referee also found that the statements made by Claimant LaPerche constituted proved misconduct and Mr. LaPerche was disqualified from receiving unemployment benefits pursuant to section 28-44-18. Id., at 2-3).

Thereafter, a timely appeal was filed by Claimant and the matter was reviewed

by the Board of Review. In a decision dated February 14, 2013, a majority of the members of the Board of Review held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. The Member Representing Labor dissented, opining that (1) the employer should have been barred from opposing benefits under section 28-44-38(c) and (2) insufficient evidence of misconduct had been presented. Nevertheless, the Decision of the Referee was affirmed.

Mr. LaPerche filed a Complaint for Judicial Review in the Sixth Division District Court on or about March 15, 2013. A conference with counsel for the Claimant, the Employer, and the Board of Review was conducted on June 12, 2013, at the conclusion of which a briefing schedule was set.

Sometime after the Claimant's brief was filed, counsel for the employer filed a motion to withdraw (citing an irretrievable breakdown in the attorney-client relationship) and notified the Court that the employer no longer wished to actively contest Mr. LaPerche's claim for benefits. The Board of Review has informed the Court that it did not object to the Motion to Withdraw; however, it also informed the Court that it, too, would not be filing a brief in opposition to Mr. LaPerche's claim for benefits.

And so, I have proceeded to submit these findings and recommendations to the Court without further delay.

II

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on the employer's duty to respond with information after a claim has been filed by a former employee. Gen. Laws 1956 § 28-44-38(c), provides:

> **28-44-38. Filing of claims — Printed copies — Notices. —**
> * * *
> (c) The employers shall promptly furnish the information required to determine the claimant's benefits. If the claimant's employer or employers have any information which might affect either the validity of the claim or the right of the claimant to waiting period credit or benefits, he or she shall return the notice with that information. <u>If an employer fails without good cause as established to the satisfaction of the director to return this notice within seven (7) working days of the mailing thereof, the employer shall have no standing to contest any determination to be made by the director with respect to the claim and any benefit charges pursuant thereto, and the employer shall be barred from being a party to any further proceedings relating to the claim</u> * * *. (Emphasis added)

In my view it is axiomatic that the employer bears the burden of proving good cause for an untimely response — just as a party attempting to justify a late appeal bears the burden of showing good cause.

III

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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

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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 Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

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 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

ANALYSIS

While two issues have been raised by Claimant on appeal, I shall not address the misconduct issue, because I have concluded that the instant case should be reversed on the issue of noncompliance with subsection 38(c) for, in my view, the employer's

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[3] Id.

testimony on this issue was wholly inadequate to satisfy the "good cause" standard.

There are certainly several ways in which to demonstrate good cause for failing to return the form to the DLT— illness or absence of key office personnel, a fire or flood that prevents access to the office, a snowstorm or other weather-related cause, to name but a few examples. The possibilities are endless.

But Douglas Construction's explanation for its non-compliance defense was simple — they could not return the document because they had never received it. This put Douglas in the unenviable position of having to prove a negative. In order to make a prima facie case on this point — all the personnel who were likely to have received it must be heard from. In the light most favorable to the employer, the testimony and evidence must be sufficient to exclude the possibility that the notice was, for instance, received and forgotten, or received and lost. In my opinion, the evidence presented by Douglas Construction did not meet this standard; and so, its proof on this point was deficient, and fails as a matter of law.

When asked if he had received a document relating to Mr. LaPerche from the Department of Labor and Training, the owner of Douglas Construction, Mr. Paul Surabian, said — "I did not." Referee Hearing Transcript, at 8. That's all he said regarding the form. And it appears from the context of his testimony that the employer was using the first person singular form (i.e., "I") intentionally and advisedly.

Mr. Surabian stated later in his testimony that such documents are handled by either the officer manager or himself. Referee Hearing Transcript, at 10. He described the office manager as a 15-year employee who would answer such inquiries in a timely fashion. Id. But he did not present an affidavit, or a written statement, or even quote an oral statement from the office manager indicating that she never received such a document from the Department.[4] And her absence from the hearing was unexplained. And so, even if we fully credit the testimony of Mr. Surabian, there remains a missing link in the chain of fact and logic presented by Douglas Construction on the subsection 38(c) default issue.

Pursuant to the applicable standard of review described supra at 6-7, 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 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.

In sum, because I have concluded that the Board of Review's (implicit) finding that the employer satisfied subsection 28-44-38(c)'s requirement that "good cause" be shown for non-compliance with the response requirement is clearly erroneous and

[4] One regrets having to refer to the officer manager as "she," but Mr. Surabian does not name her.

contrary to law, I must recommend that the decision of the Board in Mr. LaPerche's case be set aside by the Court.

V

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review is affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board be REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 19, 2014