

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

C. Robert Mitchell :
 :
v. : A.A. No. 10 - 0162
 :
Dept. of Labor & Training, :
Board of Review :

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. C. Robert Mitchell urges that the Board of Review of the Department of Labor and Training erred when it held — pursuant to Gen. Laws § 28-44-19.1 — that the unemployment benefits he had received for several years were subject to a reduction because of a union pension he was also receiving. 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 Decision of the Board should be affirmed.

FACTS & TRAVEL OF THE CASE

Mr. Mitchell had been receiving unemployment benefits over the course of several benefit years. However, in eight decisions dated November 30, 2009, a

designee of the Director of the Department of Labor & Training decided that the claimant, although eligible for benefits, was subject to the pension reduction found in Gen. Laws 1956 § 28-44-19.1 because he was collecting a private [union] pension.¹ Mr. Mitchell appealed and a combined hearing was held before Referee Stanley Tkaczyk on February 18, 2010; on that same day Referee Tkaczyk issued eight decisions, all of which included the following findings of fact:

2. Findings of Fact:

The claimant had been in receipt of Employment Security benefits during various periods on multiple benefit years. During the application and certification of eligibility the claimant was asked verbally as well as in written form, whether or not he was receiving a Social Security or private pension. The claimant initially indicated “no” to both. He subsequently amended his certification to indicate he was receiving Social Security benefits. In actuality the claimant is receiving Social Security and a private pension funded through his union based on his employment at various subject employers. The claimant alleges that he

1 Each of the eight cases considered the same legal issue; the cases were differentiated by the periods of alleged overpayment. Referee Hearing Transcript, at 5. The cases are divided roughly as follows:

| <u>Referee/Board BU No.</u> | <u>DLT CAU No.</u> | <u>Dates of Overpayment</u> |
|-----------------------------|--------------------|-----------------------------|
| 20095464 | 945421 | 07/19/09 |
| 20095465 | 947754 | 07/19/08 to 08/23/08 |
| 20095466 | 947730 | 01/20/07 to 09/29/07 |
| 20095467 | 947038 | 12/23/06 to 01/06/07 |
| 20095468 | 947030 | 01/21/06 to 04/08/06 |
| 20095469 | 946976 | 01/07/06 |
| 20095470 | 946661 | 01/15/05 to 03/12/05 |
| | | 4 weeks in December 05 |
| 20095471 | 946604 | 01/01/05 |

Each case is represented in the record by a separate packet of material.

verbally notified the Department of his private pension. That allegation is contrary to the written documents of record.

...

Referee's Decision, February 18, 2010, at 1. Then, after quoting extensively from Gen. Laws 1956 § 28-44-19.1, the referee pronounced the following statements of conclusion:

The issue in this case is whether or not the claimant is subject to pension reduction under the provisions of Section 28-44-19.1 and also whether or not the claimant is overpaid under the provisions of Section 28-42-68 of the Rhode Island Employment Security Act.

The evidence presented establishes that the claimant was in receipt of a private pension which he did not declare to the Department. That private pension is subject to reduction because it was based on the services with various base period employers.

Referee's Decision, February 18, 2010 at 1. Accordingly, the Decision of the Director finding claimant to be subject to the pension reduction provisions of section Gen. Laws 1956 § 28-44-19.1 was sustained.

Claimant appealed and the matter was considered by the Board of Review. On July 20, 2010, the members of the Board of Review unanimously agreed that the decision of the referee — that claimant was subject to a section 19.1 offset — was a proper adjudication of the facts and the law applicable thereto; the Board thereupon adopted the decisions of the Referee as its own. Claimant then filed a timely complaint for judicial review in the Sixth Division District Court.

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 § 28-44-19.1, provides:

An individual shall be disqualified from receiving benefits for any week of his or her unemployment within any period with respect to which that individual is currently receiving or has received retirement income in accordance with the following provisions:

(1) The amount of compensation payable to an individual for any week which begins in a period with respect to which that individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of that individual shall be reduced, but not below zero, by an amount equal to fifty percent (50%) of the amount of that pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to that week, if that deduction is required as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq; provided, that if the individual made no contribution to the retirement plan then the amount of compensation payable to the individual shall be reduced, but not below zero, by the full amount of that pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to that week.

(2) If at any time following May 3, 1979, subdivision (1) of this section or any provision of it is not required by federal law in order for an eligible employer to qualify for full tax credit against the tax imposed by the Federal Unemployment Tax Act 26 U.S.C. § 3301 et seq., then subdivision (1) of this section or the provision of it is no longer required and shall have no force or effect.

(3) Social Security benefits received by an individual shall not be included or considered as disqualifying income under the provisions of this section.

(Emphasis added)

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.’”² The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

² 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).

fact.³ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁴

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.

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

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

ISSUES

The first issue before the Court is whether the claimant's unemployment benefits were appropriately subjected to the pension offset provision found in section 28-44-19.1. If he was, a second issue is presented: whether claimant should repay the benefits he received contrary to law?

ANALYSIS

1. Pension Offset Question

The facts of this case are not in dispute. Instead, a legal question is presented for the court's consideration involving the interpretation of Gen. Laws 1956 § 28-44-19.1.

Claimant questions the applicability of the section 19.1 to his circumstances. Pursuant to subsection 28-44-19.1(1), persons who receive pensions or certain other monies are subject to a 50% offset. Claimant urges that his union pension was not subject to the 50% reduction.

However, by its terms, section 19.1 is invoked by a pension, retirement pay, an annuity, or *any other periodic payment based on previous work*. Certainly, his union pension falls into the final catch-all phrase, if none other. I therefore find that under the plain language of the statute Mr. Mitchell's union pension was indeed subject to a section 19.1 reduction.

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 unanimous decision (adopting the finding of the Referee) that claimant was subject to the section 28-44-19.1's offset provision to be correct; I therefore recommend that the decision of the Board be affirmed.

2. Repayment Issue.

Finally, Mr. Mitchell was ordered to repay employment security benefits 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.

In ruling that Mr. Mitchell should repay a portion of the unemployment benefits he received subject while collecting his union pension, Referee Tkaczyk found:

The claimant alleges that he verbally notified the Department of his private pension. The allegation is contrary to the written documents of record.

Referee's Decision, February 18, 2010, at 1, at 2. Based on these findings, he issued the following conclusions:

In regard to the overpayment I find the claimant is in fact, overpaid and subject to recovery of that overpayment in the various amounts at issue because he did not report the fact that he was receiving a private pension. That finding is supported by the written documentary evidence which the claimant acknowledged. The overpayment is subject to recovery under the provisions of Section 28-42-68. (Emphasis added).

Referee's Decision, February 18, 2010, at 2. With this conclusion I generally agree, and so I shall recommend that the Referee's order of repayment be affirmed subject to a modest modification.

The Department urged that the claimant was at fault for his overpayment because he failed to notify it that he was receiving his union pension. In support of its position, the Department's representative cited the claimant failure to be truthful with its telephone interviewers. It also cited several pension information forms he executed.

Quite frankly, I am not persuaded that Mr. Mitchell may properly be deemed at fault for his overpayment based on the telephone interviews. Several of the interview summaries are in the file; they speak of private pensions, an ambiguous term, not found in the statute, which is not explained on the summary. Indeed, claimant testified that when speaking to the interviewers, they misled him as to the impact of his union pension. Referee Hearing Transcript, at 7. The test for determining whether a pension or annuity falls within the ambit of section 19.1 is a simple — if it is “based on previous work,” it is covered. Unfortunately, the interview does not recite this term. Accordingly, I find the results of the oral interviews to be unpersuasive on the issue of fault.

However, the Department also cited certain written forms submitted by claimant. On this form claimant was also asked whether he was receiving a *private* pension. See Question F on Pension Questionnaire Dated February 13, 2005, Director’s Exhibit 1 at 15, in record of Case Number 20095465 BU. At the hearing before the referee, claimant conceded he checked the “no” box on forms such as this. Referee Hearing Transcript, at 15. This question is certainly subject to an accusation of vagueness and immateriality. But the questionnaire also included a more comprehensive question, which asked the claimant whether he was receiving any other monies. See Question H, Id. This too was answered by claimant in the negative, a patently incorrect answer. To this

incorrect answer, ambiguity is no defense or explanation. A correct answer to this question would certainly have caused an inquiry which would have led to the Department's discovery of the claimant's union pension. As Ms. Howard, the Department's representative testified " ... we did not know the pension existed, which resulted in, uh, decisions going out and overpayment. Referee Hearing Transcript, at 15. In conclusion, to the extent claimant failed to answer the pension questionnaire correctly, I believe he is indeed at fault for his overpayment.

I have examined the record of proceedings that was certified to this Court by the Board of Review. I have found several of the written questionnaires; all were answered similarly; the earliest of these is dated February 13, 2005. I therefore find that claimant is responsible for all overpayments which arose after February 13, 2005, but not those before.

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 be
AFFIRMED.

A handwritten signature in black ink, appearing to read "Joe P. Ippolito". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph P. Ippolito
MAGISTRATE

JANUARY 24, 2011

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

DISTRICT COURT

C. Robert Mitchell

v.

Dept. of Labor & Training,
Board of Review

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A.A. No. 10 - 162

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.

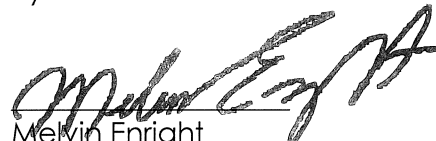
After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

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 24th day of January, 2011.

By Order:


Melvin Enright
Acting Chief Clerk
Melvin J. Enright
Acting Chief Clerk

Enter:


Jeanne E. LaFazia
Chief Judge