STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Michael S. Petteruto	:	
	:	
v.	:	**A.A. No. 12 - 012**
	:	
Dept. 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, 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 except that the order of repayment is REVERSED.

Entered as an Order of this Court at Providence on this 28th day of February, 2012.

By Order:

____/s/______________
Melvin Enright
Acting 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 Mr. Michael S. Petteruto, a school teacher for the the City of Providence, urges that the Board of Review of the Department of Labor and Training erred when it held that he was ineligible for unemployment benefits during the 2011 summer vacation period because he 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 instant matter should be affirmed on the issue of claimant's eligibility.

FACTS & TRAVEL OF THE CASE

Mr. Michael S. Petteruto was employed by Providence as a school teacher when he applied for between-term unemployment benefits during the 2011 summer vacation period. In a decision dated August 22, 2011, a designee of the Director of the Department of Labor & Training decided that the claimant was not eligible for between-term benefits as of the week-ending August 13, 2011 and for the remainder of the vacation period because — as of that date — he had a reasonable assurance of being rehired after the vacation ended. Gen. Laws 1956 § 28-44-68. Mr. Petteruto appealed and a hearing was held before Referee William Enos on October 11, 2011. Referee Enos issued a decision on October 13, 2011 which included the following findings of fact:

> 2. Findings of Fact:
> The claimant had been employed in the position of a teacher with the Providence School Department. On August 10, 2011 the claimant was provided with a written agreement by the employer that the claimant would perform services in the same or similar capacity during the ensuing academic year, term or remainder of term.

Referee's Decision, October 13, 2011, at 1. Then, after quoting extensively from Gen. Laws 1956 § 28-44-68, the referee pronounced the following statements of conclusion:

> * * *
> It must be found and determined that the claimant had reasonable assurance by written agreement from the employer to perform services in the same or similar capacity during the ensuing

> academic year, term or a remainder of a term and that the economic terms and conditions of the position offered were not substantially less than the terms and conditions of the position in the first period.

Referee's Decision, October 13, 2011 at 2. Accordingly, the Decision of the Director denying benefits pursuant to section Gen. Laws 1956 § 28-44-68 was sustained.

Mr. Petteruto appealed and the matter was considered by the Board of Review. On December 7, 2011, 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.

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:
> * * *
> (2) With respect to services in any other capacity for an educational institution, including elementary and secondary schools and institutions of higher education, compensation payable for weeks of unemployment beginning on or after April 1, 1984, on the basis of the services shall be denied to any individual for any week which commences during a period between two (2) successive academic years or terms if that individual performs those services in the first of those academic years or terms and there is a reasonable assurance that the individual will perform those services in the second of those academic years or terms, except that if compensation is denied to any individual for any week under this subdivision and the individual was not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms, the individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of this subdivision.
> * * *
> (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.

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]

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[1] 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).

[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).

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.

ISSUE

The issue before the Court is whether the claimant was eligible to receive between-term benefits because he had not been given "reasonable assurance" of work in the fall term in writing as provided in section 28-44-68.

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.

Mr. Petteruto was employed by the Providence School Department as a teacher[4] at Central High School during 2010-2011 academic year. On February 19, 2011, he was notified that the School Board would consider his dismissal — effective the last day of the school year — at its February 24, 2011 meeting. On May 17, 2011 he was notified by certified mail and at his school e-mail address that his dismissal was affirmed at the May 2, 2011 School Board meeting. On June 22, 2011, his dismissal was confirmed by e-mail. By letter dated July 27, 2011, his dismissal was confirmed and he was provided with a letter addressed "To Whom It May Concern" that his termination was without cause and the result of final exigencies. On Saturday August 7, 2011, an e-mail was sent by the School Department to claimant informing him that his termination would be considered for rescission by the Board on August 9, 2011. On August 13, 2011, an e-mail was sent confirming the rescission of his termination.

Mr. Petteruto denied receiving the August 7, 2011 and August 13, 2011 e-mails. He denied checking the e-mails during the summer, explaining that he

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[4] Note – when the employer's representative called him a "regular" teacher at the hearing Mr. Petteruto interjected that he was a "long-term substitute in the pool." Referee Hearing Transcript, at 4.

thought — since he was dismissed — that his school department e-mail had been turned off. Referee Hearing Transcript, at 6. He added that on prior occasions he had been notified of reinstatement by letter. Id. Mr. Petteruto maintained he first found out he might have been rehired in a letter from the Department of Labor and Training. Id. He then did check his e-mail and found out it was true. Referee Hearing Transcript, at 9.

Spencer Dickinson, its Human Resources Administrator, represented the Department at the hearing. Referee Hearing Transcript, at 2. He verified that 2011 was the first year in which teachers were notified of reinstatement by e-mail, explaining that this change was made on account of the "sheer volume" of the notices. Referee Hearing Transcript, at 6-7. Mr. Dickinson confirmed that in past years the Department had indeed shut down the e-mail accounts of terminated teachers. Referee Hearing Transcript, at 7. He indicated that the union was notified of the change, but apparently no e-mail went out to all teachers directing them to monitor their school accounts. Id.

In view of the foregoing, it is clear that the city fulfilled its duty to provide Mr. Petteruto with a "reasonable assurance" of future employment in writing.[5] Accordingly, claimant must be deemed ineligible for vacation-period

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[5] Note – claimant does not contest — and I shall not raise the issue sua sponte — that an e-mail satisfies the mandate that the notice be "in writing." Given the explosion of new technology into the practice of law, one

benefits pursuant to section 68 after August 7, 2011. The Board's decision denying benefits to claimant is therefore fully supported in fact and law.

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 2011 summer school recess after August 7, 2011 pursuant to section 28-44-68 is fully supported by substantial evidence of record, is consistent with applicable law, and ought therefore to be affirmed.

REPAYMENT

Finally, Mr. Petteruto was ordered to repay the unemployment benefits he received after August 7, 2011. The authority of the Director — and the Board on appeal — to order repayment is delineated in § 28-42-68 of the Rhode Island Employment Security Act, 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

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presumes that if an e-mail is not considered by legal authorities to constitute "a writing" today, it will be soon.

> 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.
> (Emphasis added).

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery would not defeat the purposes of the Act. In my view "fault" implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one's duty to do what is right.[6] To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless.

With this in mind, let us focus on the facts and circumstances of the overpayment in the instant case. Referee Enos found:

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6 In the Webster's Third New International Dictionary (2002) at 839 the first definition of fault applicable to human conduct defines "fault" as "3: A failure to do what is right. a: a moral transgression." This view is longstanding. As Noah Webster stated in the first edition of his American Dictionary of the English Language (1828), "Fault implies wrong, and often some degree of criminality."

> The Director determined that the claimant did not provide the correct information at the time of filing. As a result, the Director is seeking restitution in the amount of $661.00 as provided for under Section 28-42-68 of the Rhode Island Employment Security Act.

Referee's Decision, October 13, 2011, at 1. Based on these findings, he issued the following conclusions:

> Since the claimant did not provide the proper information at the time of filing, he is at fault in creating the overpayment. He is subject to the recovery provisions of Section 28-42-68 of the Rhode Island Employment Security Act and must make restitution in the amount of $661.00.

Referee's Decision, October 13, 2011, at 3. With this conclusion I must both specifically and generally disagree.

Specifically, Referee Enos found that the claimant was at fault for his overpayment because he "did not provide the correct information at the time of filing." This is clearly incorrect. It appears the claim date was June 24, 2011. See Exhibit D1, at 1. Even the School Department does not suggest that claimant possessed a reasonable assurance of work at that time; they urge that it came into being in early August. Accordingly, claimant could not possibly have misrepresented his status when he filed his claim.

More generally, Mr. Petteruto has urged that he did not become aware of the e-mail that was sent to him until late August. He states he did no know his termination has been rescinded because he had not checked his school

department e-mail. Accordingly, he (impliedly) asserts that he did not intentionally deceive the Department of Labor and Training about his job status in the period after August 7th. If so, there would be no basis for a finding of fault and an order of repayment.

Quite frankly, claimant's position is supported by the record. The Providence School Department had, in previous years, closed down the e-mail accounts of terminated teachers. And, in 2011, they had not sent out an e-mail to all teachers informing them to monitor their school e-mail accounts for news regarding their employment status.

Accordingly, I find no evidence that Mr. Petteruto was at fault for any overpayment and I recommend the order of repayment be vacated.

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 on the issue of Mr. Petteruto's eligibility for benefits be AFFIRMED; I also recommend that the order of repayment be REVERSED.

/s/

Joseph P. Ippolito
MAGISTRATE

FEBRUARY 28, 2012