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

James Branca	:	
	:	
v.	:	**A.A. No. 12 - 185**
	:	
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 25th day of October, 2012.

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 Mr. James Branca urges this Court to set aside a decision rendered by the respondent Board of Review of the Department of Labor and Training which was adverse to his efforts to receive employment security benefits. Jurisdiction for appeals from the 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.

I. FACTS AND TRAVEL OF THE CASE

During early 2012 Mr. James Branca was receiving unemployment benefits

offset by wages he was earning from week to week. After an audit of his wages was conducted by the Department of Labor and Training the Director issued a decision indicating that Mr. Branca had been overpaid because he failed to accurately report his earnings from a part-time job with at the Alpine Country Club to the Department, breaching a duty imposed upon him by Gen. Laws 1956 § 28-44-7. See Director's Decision, May 18, 2012 — contained in the administrative record as Director's Exhibit No. 2. The Director found Mr. Branca at fault for this overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered him to make repayment in the amount of $ 739.00 plus interest.

Mr. Branca appealed and a hearing was held on July 9, 2012 before Referee Stanley Tkaczyk. On July 13, 2012 Referee Tkaczyk issued a decision in which he affirmed the Director's ruling. In doing so he made the following Findings of Fact:

> The claimant had been in receipt of partial benefits. Subsequently, a wage audit was conducted and it was discovered that the claimant did not report his true gross earnings for the week ending February 11, March 3, March 10, March 31 and April 14, 2012. On February 11, 2012 the claimant earned $331 and reported zero earnings, March 3, 2012 he earned $241.00, reported zero earnings, March 10, 2012 earned $218.00 reported $140.00 earnings, March 31, 2012 he earned $449.00 reported $142.00 earnings, April 15, 2012 claimant earned $555.00 reported $217.00 in earnings. As a result the claimant was declared overpaid. Claimant did not report his true gross earnings because the employer paid on a different pay period.

Referee's Decision, July 13, 2012, at 1. As a result of these findings, the Referee

concluded that Mr. Branca failed to accurately report his wages:

> The evidence presented establishes that the claimant was required to report his true gross earnings during each calendar week in which benefits are claimed. It further establishes that the true gross earnings were not reported during the periods at issue. Therefore, the claimant is not in compliance with the provisions of Section 28-44-7.

Referee's Decision, July 13, 2012, at 1. He also found Claimant to be subject to a repayment order:

> In addition, with regard to the overpayment I find the claimant is, in fact, overpaid and subject to the recovery of that overpayment because he did not notify the Department of the error and remained silent on the matter of the overpayment.

Referee's Decision, July 13, 2012, at 2. He therefore found the Claimant to be at fault for the overpayment and affirmed the Director's order of repayment. Referee's Decision, July 13, 2012, at 3. Mr. Branca appealed once more and on August 23, 2012 the Board of Review unanimously found the Referee's decision to be a proper adjudication of the facts and the law applicable thereto. Claimant filed a timely appeal in the Sixth Division District Court on September 21, 2012.

II. APPLICABLE LAW

A. Partial Benefits.

Gen. Laws 1956 § 28-44-7 provides:

> **28-44-7. Partial unemployment benefits. –** For weeks beginning on or after July 1, 1983, an individual partially unemployed and eligible in any week shall be paid sufficient benefits with respect to

> that week, so that his or her week's wages, rounded to the next higher multiple of one dollar ($1.00), as defined in 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week..

As one may readily observe, section 7 provides that a person who would be otherwise eligible for benefits may work without being disqualified from receiving benefits; instead, the wages they earn will be offset against the benefits to which they would be otherwise entitled to receive.

B. Repayment.

Gen. Laws 1956 § 28-42-68 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) <u>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.</u>

(Emphasis added). Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid. Subsection (b) of section 28-42-68 clearly

indicates that repayment cannot be ordered where (1) the recipient is without fault and where (2) recovery would not defeat the purposes of the Act.

III. STANDARD OF REVIEW

The standard of review by which the court must proceed is established in 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

[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).

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 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.

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

[3] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

IV. ANALYSIS

A. Wage Reporting.

In this case the Board upheld the determination of the Director that claimant had failed to correctly report his earnings in violation of Gen. Laws 1956 § 28-44-7. In this record there is no suggestion that the computation made by the Department on this question regarding Claimant's earnings is inaccurate. Accordingly, I accept the veracity of the Department's computation without reservation. I therefore find — as the Director and the Board of Review did — that Claimant Branca was indeed overpaid.

B. Repayment.

We may now turn to the Board's adjudication of the second question presented in this case, wherein the Director ordered repayment. As I recounted above, Referee Tkaczyk sustained the Director's order of repayment. Referee's Decision, June 22, 2012, at 3. And, as Referee Tkaczyk referenced, the repayment statute requires more than simple but–for causation — it requires a finding of fault.

So let us begin by reviewing the concept of fault in this context. In my view "fault" — as the term is used in section 68 — implies a moral responsibility for the erroneous payments 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 is implicated.[4] 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.

And when determining whether a claimant was "at fault" for an overpayment, we must keep in mind that earnings figures are generally reported through "Teleserve" — the Department's automated telephone system or on its web-based system. They are not interviewed by a staff member who could explain the questions. I believe that when an agency adopts a self-reporting system, it must expect some degree of confusion and be understanding toward the making of honest mistakes.

Referee Tkaczyk found Claimant to be at fault for his overpayment, not merely because he may have reported his wages incorrectly, but because he failed to correct the information given to the Department — which he could and should have done when he received his unemployment checks and saw the offsetting wages listed on the attached statements. Referee Hearing Transcript, at 7.

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[4] 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."

Mr. Branca testified he faithfully reported his total earnings — including tips — at the end of each week. Referee Hearing Transcript, at 4-5. He conceded, however, that his reports to the Teleserve system may have been incorrect — because the Alpine pay week was Monday through Sunday and the Department's reporting week is Sunday through Saturday. Referee Hearing Transcript, at 4.

So, let us apply simple logic to see if his explanation — that the error was caused by the difference in pay weeks — bears scrutiny. To do so let us examine the week ending March 10th. He earned $218.00 but only reported $148.00, a difference of $70.00. This could be explicable if that $70.00 was earned on Sunday March 4th. DLT would have counted his March 4th pay in the week ending March 10th but the Alpine would have counted it in the prior week. But his explanation evaporates at this point because Claimant reported no earnings in the prior week — i.e., the week ending March 3rd. Moreover, when the Alpine — pursuant to a DLT request — submitted Claimant's precise earnings, it reported that he did not work on that day. See Director's Exhibit No. 1, at 4 (Employer's Certification of Earnings dated May 1, 2012).

At the end of the day, the Director, the Referee, and the Board of Review cannot read minds. I must concede, therefore, that there may have been an innocent (alternative) explanation for Mr. Branca's misreporting; however, if one exists, it has

not been revealed on this record.[5] Accordingly, I am left with the inescapable conclusion that the Board was therefore well-justified in finding Claimant was at fault for the overpayment.

CONCLUSION

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.[6] Stated differently, the findings of the

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[5] Claimant's alternative explanation for his errors was that his earnings reporting lagged a week behind. Referee Hearing Transcript, at 5. I must concede that this explanation does indeed fit two weeks wherein the Department found discrepancies: February 11 and April 15. For the week of February 11th the Claimant reported zero earnings, which were his true earnings for the following week; for the week of April 15th Claimant reported $217.00, his true earnings for the following week, not including tips. Because he did not include tips, Claimant would be deemed at fault for the inaccuracy. After all, he testified he had included tips when he reported his income. Referee Hearing Transcript, at 5.

Paradoxically, with regard to the week of March 10th, Claimant also erred — but inconsistently. He reported $140.00, which were his earnings (minus tips) for the prior week, March 3rd. Again, because he did not include all his earnings, this cannot be deemed an innocent mistake. Moreover, this error demonstrates that there was no rhyme or reason to the Claimant's inaccuracies, no innocent explanation for them all.

[6] Cahoone, supra at 6, fn. 2.

agency will be upheld even though a reasonable mind might have reached a contrary result.[7]

Upon careful review of the evidence, and applying the standard of review and the principles of law outlined above, I recommend that this Court find that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE
OCTOBER 25, 2012

[7] Cahoone, supra at 6, fn. 2. See also D'Ambra v. Board of Review, Department of Employment Security, Board of Review, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 5 and Guarino, supra at 5, fn. 1.