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

Susan L. Randall	:	
	:	
v.	:	**A.A. No. 12 - 186**
	:	**A.A. No. 12 - 187**
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 vacated.

Entered as an Order of this Court at Providence on this 28th day of February, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Susan L. Randall	:	
	:	
v.	:	**A.A. No. 12 - 186**
	:	**A.A. No. 12 - 187**
Department of Labor and Training,	:	
Board of Review	:	

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 the instant cases Ms. Susan L. Randall urges that the Board of Review of the Department of Labor and Training erred when it held her to be disqualified from receiving unemployment benefits because she was unavailable for work within the meaning of Gen. Laws 1956 § 28-44-12. Jurisdiction to hear and decide appeals from decisions rendered by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. These matters have 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 decisions issued by the Board of Review regarding Ms. Randall's eligibility for benefits should be affirmed; however, I also recommend that the orders of repayment issued in this case be set aside.

I. FACTS & TRAVEL OF THE CASE

Ms. Susan Randall was employed by Newport Hospital for many years until November 16, 2010. She filed for benefits the next day and began to receive them. Fifteen months later, on February 17, 2012, the Director of the Department of Labor and Training decided that Ms. Randall was disqualified from receiving benefits pursuant to section 28-44-12, because, throughout the period she had collected benefits, she had not been making an adequate search for work.[1] The Director ordered Ms. Randall to repay the benefits she had

[1] In point of fact, the Director issued two decisions on February 17, 2012. In the first — numbered 1203815 — the Director held that she was disqualified pursuant to section 28-44-12 from the week ending November 27, 2010 through the week ending June 18, 2011; in the second — numbered 1208845 — the Director held Ms. Randall disqualified under section from the week ending June 25, 2011 through the week ending February 11, 2012. On appeal to the Referee and Board of Review, No. 12038815 was renumbered 20121139; before this Court it is enumerated A.A. No. 2012-187. Likewise, No. 1208845 became No. 20121140 at the Board level and A.A. No. 2012-188 before this Court.

In fact, not only have two decisions been issued at each level of adjudication, the decisions issued have generally been identical twins. And so, for simplicity's sake, I shall describe these decisions in the singular —

received pursuant to 28-42-68.

Ms. Randall appealed and a hearing was scheduled before Referee Gunter Vukic on March 26, 2012. On April 6, 2012, the Referee issued a decision in which he found the following facts:

> During the claimant's employment she worked the last 11 years with a doctor she considered a personal friend who was separated from the employer in September 2010. The claimant was separated in November 2010.
>
> The doctor opened a practice in January 2011. The claimant's daughter works at the practice. The claimant began volunteering approximately 24 hours a week at the doctor's office and is receiving training to become a medical assistant. The practice does not allow for hiring additional staff. While still employed claimant volunteered at the Middletown senior center and continued to do so.
>
> The claimant received Department of Labor and Training documentation on how to make weekly benefit applications. Claimant provided her weekly certification in writing, through tele-serve and on the web beginning with her initial application and through the F2 extended benefit program.
>
> Following an anonymous notification that the claimant was working and collecting, the Department of Labor and Training initiated an investigation that confirmed the claimant's presence at Doctor Green's office and that there was no evidence contained in the doctor's records to support payment to the claimant. There was no evidence of credible weekly job search.
>
> The claimant initiated a modest job search. Claimant did not

---

except in the one instance where the decisions varied slightly, at the Board of Review level. See fn. 2, infra at 5.

register with netWORKri.

Referee's Decision, April 9, 2012, at 1-2. Based on these findings, the Referee pronounced the following conclusions:

> Although the record remained open for submission of credible search records for each identified week, limited documentation was provided to support an active and independent job search beyond the substantial documentation submitted at the hearing that largely included computer downloads of newspaper want ad pages. While there is no prohibition that would deny the claimant the right to provide volunteer services while searching for full-time employment and applying for Employment Security benefits, the claimant must still adhere to the Department of Labor and Training provisions to support eligibility for each of the weeks in which she applied for benefits. Claimant has failed to register with netWORKri as required. Not only is the netWORKri registration required, the services provided would have clearly assisted the claimant in identifying new full-time employment, particularly since she points to the difficulties that accompany living on the island, and provided a record of credible job search applications.
>
> Therefore, I find and determined that the claimant has failed to meet the availability requirements that would support eligibility for benefits.

Referee's Decision, April 9, 2012, at 2-3. Accordingly, the Referee found the claimant ineligible to receive benefits.

Claimant filed an appeal from this decision and the matter was heard by the Board of Review. On August 23, 2012, 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.[2] Accordingly, the decision of the Referee was affirmed.

Thereafter, the claimant timely filed complaints for judicial review in the Sixth Division District Court.

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 disqualifying circumstances; R.I. Gen. Laws § 28-44-12(a), provides:

> **28-44-12. Availability and registration for work. --** (a) An individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work and available for work. To prove availability for work, every individual partially or totally unemployed shall register for work and shall:
>
> (1) File a claim for benefits within any time limits, with any frequency, and in any manner, in person or in writing, as the director may prescribe;
>
> (2) Respond whenever duly called for work through the employment office; and
>
> (3) Make an active, independent search for suitable work.
>
> (b) * * *
>
> (Emphasis added)

[2] In No. 20121139 (Department's 1203815/A.A. 2012-187), the Board of Review vacated the finding of overpayment regarding monies received by Claimant prior to February 19, 2011, applying (properly, in my view) section 28-44-39(a)'s limitation on the Department's ability to revise benefit awards to a one year period.

As one may readily observe, section 12 requires claimants to be available for full-time work and to actively search for work.

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.' "[3] The Court will not substitute its

[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d

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]

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

---

425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

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

5 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Bd. of Review, Dept of Emp. Security, 517 A.2d 1039 (R.I. 1986).

> restrictions on eligibility under the guise of construing such provisions of the act.

IV. ISSUE

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was claimant properly disqualified from receiving benefits because she did not make an active, independent search for work? Secondly, if she was properly disqualified, is she subject to an order of repayment?

V. ANALYSIS

A. The Availability Issue

Ms. Randall was disqualified by the Director under section 28-44-12, which is commonly known as the Availability section; the Referee referred to the provision in this way in his decision. See Referee's Decision, quoted supra at pp. 3-4. However, it is important to keep in mind that the Referee denied benefits to Ms. Randall because he found Claimant had not fulfilled a separate, independent requirement found in section 12 — that every claimant must make an active search for work.

At the hearing before Referee Vukic, Ms. Randall described her work-search effort. See Referee Hearing Transcript, at 8 et seq. In addition to

applying for particular positions, she registered with employment web-sites such as monster.com, snagajob.com and Employ Rhode Island. Referee Hearing Transcript, at 10, 17. On the other hand, she conceded that she never registered with netWORKri, the Department of Labor and Training's employment site, as all unemployment recipients are instructed to do. Referee Hearing Transcript, at 21.

Ms. Randall also described how she volunteered on a regular basis at the medical office of a physician with whom she was friendly. Referee Hearing Transcript, at 65 et seq.

These are the fundamental facts of record. I shall now evaluate this evidence to determine if it is sufficient to support the Referee's finding that Claimant was not "Available" within the meaning of section 12, specifically, that she failed to make a sufficient work search during her period of unemployment.

In my view, all mention of Claimant's time spent volunteering at the office of a physician/friend is immaterial — a mere red herring. There has never been a prohibition on volunteering while receiving unemployment benefits. Indeed, it should be encouraged. It has the benefit of keeping social skills honed and keeping the recipient's spirits inflated. It may also provide an

opportunity to learn new job skills. Quite simply, there was no evidence presented that Claimant's efforts at the physician's office constituted an attachment that would prevent her accepting a position at any time.

The real issue to be resolved is whether Claimant had made an "active" search for work while unemployed — one commensurate with the length of her unemployment. On the basis of the evidence of record, there is no doubt Ms. Randall did make efforts to search for work. However, the Referee described her efforts as "modest." And even if one does not agree with that description, one can still concede that the job-search efforts Ms. Randall described — although not insignificant — when spread out over a 16-month period, do not appear energetic or "active." Accordingly, I find that Referee Vukic and the Board of Review were justified in finding that Ms. Randall had not satisfied her burden of proving that she made an active search for work during her period of unemployment. Her disqualification pursuant to section 12 must therefore be regarded as supported by the evidence of record and not clearly erroneous.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra at 7 and Guarino, supra at 6, fn. 3.

The scope of judicial review by the District Court is also limited by Gen. Laws section 28-44-54 which, in pertinent part, provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** The jurisdiction of the reviewing court shall be confined to questions of law, and in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive.

Accordingly, the Board's decision (adopting the finding of the Referee) that claimant should be disqualified under section 28-44-12 of the Act is supported by the evidence of record and must be affirmed.

B. Repayment of Benefits Received.

Finally, Claimant was ordered to repay many thousands of dollars by the Director,[6] 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

---

[6] In Department's No. 1203815 the Director ordered repayment of $13,858, although this is subject to a revision downward. See supra at 5, fn. 2. In Department's No. 1208845 the Director ordered repayment of $17,589.00.

> 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.

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.[7] 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. When reviewing the Director's order, the Referee found that:

---

[7] 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

> * * * While it is now apparent that the claimant was volunteering, volunteer work consumed a substantial amount of the work day each week. The Department of Labor and Training must rely on each claimant fulfilling the eligibility requirements and be in a position to prove that when asked. The absence of credible testimony and evidence to support the weekly certifications made by the claimant support fault on the part of the claimant for benefits paid now identified as the overpayment.

Referee's Decision, April 9, 2012, at 3. So, the Referee found fault based on Claimant's inability to prove an active search for work.

In my opinion the Claimant's failure to prove an active search for work does not, ipso facto, prove fault. This Claimant was called to a hearing sixteen months after she began collecting unemployment. At that point she did not have the records in her possession to satisfy her burden of proof. But neither the Referee, nor the Board of Review, nor this Court is in a position to find, as a matter of fact, that she did not actively search for work. It could well be that she did satisfy the work-search requirement. The Referee found only that she had not proven it. That does not equate to "fault." I therefore recommend that the Decisions of the Board of Review requiring repayment of funds she received be set aside.

---

some degree of criminality."

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decisions of the Board of Review in this case were not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, they were 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 decisions of the Board be AFFIRMED except that the orders of repayment are vacated.

/s/
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 28, 2013