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

Charles J. Fogarty, in his capacity as Director of the Department of Labor and Training	:	
v.	:	**A.A. No. 12 - 244**
Department of Labor & Training,Board of Review (Gabriel Wiggins)	:	

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 29th day of August, 2013.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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Director of the Rhode Island	:	
Department of Labor and Training	:	
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Department of Labor and Training	:	
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(Gabriel Wiggins)	:	

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. Earlier this year, in Fogarty, Director v. Department of Labor and Training Board of Review (Richard Faucher), A.A. No. 12-136 (Dist.Ct. 2/11/2013), this Court rejected a challenge brought by the Department of Labor and Training to a decision of the Board of Review which granted unemployment benefits to a claimant who had been an employee of a limited liability company (LLC) in which he held an ownership interest.[1] In permitting Mr. Faucher to receive benefits, this Court found

[1] Black's Law Dictionary defines a limited liability company to be "A company — statutorily authorized in certain states — which is characterized by limited liability, management by members or managers, and limitations on ownership transfer." Black's Law Dictionary, Ninth Edition (Garner ed. 1990) at 319.

inapplicable the accepted rule[2] that a worker who is also a company's owner — whether a sole proprietor or a partner — cannot participate in the unemployment system; noting that the rule does not apply if the business is a corporation,[3] the Court held it should also not apply if the business is an LLC. Faucher, supra, slip op. at 13-19.

But the Director, believing that an owner of an LLC should be treated like a partner under the Employment Security Act (ESA) — particularly when the LLC has chosen to be treated as a partnership for income tax purposes — has initiated review of the Faucher decision in the Supreme Court by filing a petition for writ of certiorari on February 28, 2013. See Gen. Laws 1956 § 42-35-16. As of this writing, the Supreme Court has not yet decided whether to issue its writ. At the same time, undaunted, the Director presses his appeal of the Board's decision in the instant case, which was filed prior to the issuance of this Court's decision in Faucher and which, he concedes, presents the same legal issue — May an owner of an LLC who is employed by that same LLC participate in the unemployment benefit system?

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[2] Although *well-accepted*, this ostensible rule — i.e., that owners of unincorporated businesses cannot collect unemployment benefits — is not expressly stated in the Employment Security Act (ESA). See discussion, infra at 12-17.

[3] Rector v. Director of Department of Employment Security, 120 R.I. 802, 808, 390 A.2d 370, 374 (1978); see quotation from Rector, infra at 10-11.

It is a question that will be faced by the Department with increasing frequency as the LLC business form becomes entrenched in our economy. And it is a question of importance, one that runs to the essence of Rhode Island's (and, as we shall see, this nation's) unemployment program.

I have concluded — as I did in Faucher — that the Decision of the Board of Review granting benefits to Mr. Wiggins was correct; but since I have given the question much additional consideration, I shall present an expanded exposition of my thoughts on this issue in the opinion which follows.

I

Facts and Travel of the Case

The facts and travel of the case are these: Mr. Gabriel M. Wiggins worked for Accu-Tran Medical Transportation Services, LLC — a limited liability company in which he was a member — for four and one-half years, until May 7, 2012. Referee Hearing Transcript, at 5. He filed a claim for employment security benefits but a designee of the Director, in a decision dated July 26, 2012, determined that Mr. Wiggins was ineligible for benefits pursuant to Gen. Laws 1956 § 28-44-11 because he was a managing partner in Accu-Tran. See Director's Decision, July 26, 2012, at 1.[4]

[4] In its Memorandum of Law, the Department stated that the Director had found Mr. Wiggins ineligible to receive benefits because he had been employed by an LLC in which he was a member and which had elected partnership tax treatment. Department's Memorandum of Law, at 1. This is not precisely correct: It found he was a partner in the company which employed him. Director's Decision, at 1.

Claimant appealed and a hearing was set before Referee Gunter Vukic on August 20, 2012. Mr. Wiggins appeared without counsel and testified that, although he was a "part-owner" in Accu-Tran, his "time in the office was very limited;" to the contrary, he was a worker, "an operator on the truck day and night." See Referee Hearing Transcript, at 7. He described how the business dried up, due to "cutbacks we had with the state and local governments" forcing "tons of layoffs." Id. With these few comments, his testimony was complete.

In his written decision, issued the same day, Referee Vukic made concise findings of fact. He determined that Accu-Tran was not a partnership but an LLC, in which Claimant was a manager and a part-owner. See Referee's Decision, August 20, 2012, at 1. Based on these findings, the Referee found that Claimant was ineligible to receive benefits under § 28-44-11;[5] he therefore affirmed the decision of the Director. See Referee's Decision, August 20, 2012, at 2.

Mr. Wiggins filed a second appeal and the Board of Review considered the matter on the basis of the record developed before the Referee, as is permitted by

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Of course, this misstatement is of no consequence. It does not alter the Department's right to appeal from the decision of the Board of Review. See Renza v. Murray, 525 A.2d 53, 56 (1987).

[5] Section 11 requires unemployment compensation recipients to be monetarily eligible, by showing that they earned a certain amount of wages in his or her "base period." But, by finding Claimant ineligible, Referee Vukic was not finding Mr. Wiggins' wages arithmetically insufficient; rather, that he was ineligible to be credited for participation in the unemployment program.

Gen. Laws 1956 § 28-44-47.

In its October 31, 2012 decision, the Board of Review affirmed the Referee's findings of fact, but supplemented them with three additional facts, each of which is uncontested: (1) Accu-Tran Medical Transportation Services LLC is a limited liability company organized under Rhode Island law; (2) Mr. Wiggins was paid for work he performed for Accu-Tran; and (3) Accu-Tran elected to be treated as a partnership for federal income tax purposes. Decision of Board of Review, at 1.

Based on these findings, the Board concluded:

> This case is analogous to Faucher. Here, as in Faucher, the Claimant was a member of an LLC which elected to be treated as a partnership for federal tax purposes. In Faucher, the Board stated that the purpose of the statute allowing the creation of LLC's was to offer the protections afforded by Corporate status. Consistent with Faucher, the Board concludes that the wages used to establish this claim were earned in the employ of a Limited Liability Company, not a mere partnership.
>
> Accordingly, for purposes of Section 28-44-11(b)(1)(ii), the claimant in this matter is properly considered an Employee of Accu-Tran Medical Transportation Services LLC and the claimant's wages form a proper basis for his claim.

Decision of Board of Review, at 1-2. Thus, the Board of Review rejected the Department's position — i.e., that the LLC's tax election should govern its treatment under the Employment Security Act (ESA). To the contrary, the Board of Review deemed Accu-Tran's tax status to be immaterial. Instead, the Board found that, like a corporation, an LLC has a separate identity from its owners. And so, the Board decided an LLC should be treated in a like manner; it therefore reversed the decision

of the Referee and granted benefits to Mr. Wiggins. Decision of Board of Review, at 2.

Thereafter, on November 28, 2012, the Department filed the instant complaint for judicial review in the Sixth Division District Court. A conference was conducted by the undersigned and a briefing schedule set. Learned (and helpful) memoranda have been received from counsel for the Department and counsel for Mr. Wiggins. The Board of Review has rested on the memoranda it submitted in Faucher, supra, and a case decided the same day — Fogarty, Director v. Department of Labor and Training Board of Review (Roland Martin), A.A. No. 12-159 (Dist.Ct. 2/11/2013) — which concerned a related question: Does the ESA's ban on participation for those who are working for employers to whom they are related apply if the business is set up as an LLC?

II

Standard of Review

The standard of review which is applicable to appeals from the Board of Review is provided by Gen. Laws 1956 § 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.' "[6] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[7] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[8]

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 (ESA):

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[6] 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).

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

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

> * * * 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.

III

Analysis

A

The Posture of the Case, The Position of the Parties

That the instant case comes to us in an unusual posture is evident from its lengthy caption — Fogarty, Director of the Department of Labor and Training v. Department of Labor and Training Board of Review and Gabriel Wiggins. As was noted at the outset of this opinion, the department of state government charged with administering the Rhode Island Employment Security Act, the Department of Labor and Training,[9] is challenging a decision made by the Department of Labor and

[9] See Gen. Laws 1956 § 42-16.1-1 et seq. The Department is vested with "regulatory" powers to administer the Employment Security Act (ESA). Newman-

Training Board of Review,[10] which is an independent body charged with the adjudication of appeals from the Department's decisions granting or denying unemployment benefits.

In this case, the Department seeks to set aside a Board of Review decision which granted benefits to Mr. Wiggins — notwithstanding his ownership interest in his employer, the LLC known as Accu-Tran. As we begin our analysis of this case, we are fortunate (and pleased) to be able to note that the parties agree on all of the operative facts and many of the legal principles necessary to resolve this internecine dispute. Most importantly, the parties agree that the issue before the Court — i.e., whether a part-owner of an LLC who works for that firm may collect benefits if his employment relationship is terminated — is an important question which must be resolved.[11]

Crosby Steel, Inc. v. Fascio, 423 A.2d 1162, 1165 (R.I. 1980).

[10] See Gen. Laws 1956 § 42-16.1-6 — 42-16.1-11. The Board of Review's powers are quasi-judicial. Newman-Crosby Steel, supra n. 9, 423 A.2d at 1166.

[11] Perhaps because of this sense of urgency, the Board and Mr. Wiggins have not raised the question of financial mootness, which arises from the fact that Mr. Wiggins cannot be ordered to repay the benefits he has received pursuant to the Board's decision and the fact that this recipient's benefits would have little, if any, effect on Accu-Tran's contribution rate. In any event, as the agency responsible for the administration of the unemployment system in Rhode Island, the Department has standing to litigate this issue, which is undoubtedly a matter in the public interest. See Newman-Crosby, supra n. 9, 423 A.2d at 1165, 1168 and Renza v.

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The Facts and Law the Parties Agree Upon

(a)

The Undisputed Facts

The facts of this case — which are entirely undisputed — may be summarized thusly: Mr. Gabriel Wiggins worked for Accu-Tran Medical Transportation Services, LLC, a firm in which he was a part-owner and which had elected to be taxed as a partnership for federal income tax purposes. He was laid off and applied for unemployment benefits; his request was denied.

(b)

The Undisputed Law — Status of Corporate Owners Under the Employment Security Act

The Board of Review and the Department (and Claimant Wiggins) agree that an employee of a corporation who is also an owner may be deemed to be employed within the meaning of the Employment Security Act. Undoubtedly, this consensus of opinion arises from their shared knowledge of the Rhode Island Supreme Court's decision in Rector v. Director of Department of Employment Security, 120 R.I. 802, 390 A.2d 370 (1978). Mr. John Rector was laid off from a position at Brown University; however, he was denied unemployment benefits because he was also a 50%

Murray, supra n. 4, 525 A.2d at 55-56.

owner in a corporation which operated an establishment known as "Leo's Tap." Rector, 120 R.I. at 804-05, 390 A.2d at 372. In light of this circumstance, the Department regarded him as being self-employed and denied him unemployment benefits. But the Supreme Court — distinguishing sole proprietorships and partnerships — ultimately reversed this decision, stating:

> The defendant director alternatively argues that because plaintiff owned a 50 percent interest in the corporation he was self-employed and therefore per se ineligible for benefits. Self-employment describes that work situation in which one carries on a trade or business as an individual or as a member of a partnership. A corporation, however, is a legal being separate and apart from its stockholders and officers. Therefore, the concept of self-employment is inappropriately raised in the case at bar. See G.L. 1956 (1969 Reenactment) § 7-1.1-4; Olney v. Conanicut Land Co., 16 R.I. 597, 18 A. 181 (1889). For the foregoing reasons, we conclude that plaintiff was totally unemployed within the meaning of § 28-42-3(15).[12] (Emphasis and footnote added).

Rector, 120 R.I. at 808; 390 A.2d at 374. As we can see, the Court found Mr. Rector had only performed duties in his capacity as a corporate officer (such as signing corporate checks) for which he received no remuneration. Rector, 120 R.I. at 807-08; 390 A.2d at 373-74. Applying the principles quoted above regarding the nature of the corporate business form to the facts of the case, the Court found that the evidence of record failed to support findings that — after his termination from the university — Mr. Rector was "self-employed," or that he was not "totally unemployed." Rector, 120 R.I. at 808; 390 A.2d at 374. And so, the prior decision of the Superior Court (which

[12] The definition of "total unemployment" referenced in Rector as subdivision (15) is

then had jurisdiction over unemployment appeals) permitting benefits to Mr. Rector was allowed to stand. Id.

Thus, we may conclude that a corporation's owner who is employed by the firm is eligible to participate in the unemployment system and collect benefits if he or she is terminated (and is otherwise qualified to receive benefits).

(c)

The Undisputed Law —
Status of the Self-Employed
Under the Employment Security Act

That the self-employed are ineligible for benefits is regarded as a fundamental tenet of unemployment law. Rector, 120 R.I. at 808; 390 A.2d at 374. This principle is relevant to the instant case because not only sole proprietors but partners may be considered self-employed. But curiously, we can point to no provision of the ESA which expressly states such a rule.[13]

Now, even though the parties all profess belief in this principle, they do so without citation. But given the importance of this principle to this case (and especially to the Department's position) I believe it is crucial that we establish both its origins

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now codified as § 28-42-3(27).

[13] Indeed, the term "self-employment" is not even defined in the ESA Gesualdi v. Board of Review of the Department of Employment Security, 118 R.I. 399, 403, 374 A.2d 102, 104 (1977). And so we employ the following definition provided by the Supreme Court in Rector — "Self-employment describes that work situation in which one carries on a trade or business as an individual or as a member of a partnership." Rector, 120 R.I. at 808, 390 A.2d at 374.

and vitality, to insure we are not analyzing this case from a false premise. So, where does this deep-seated notion originate?

It can be said to arise from various provisions of the Act, a few of which shall now be presented. While most of these statutes are immaterial to Mr. Wiggins's particular situation, they shall nonetheless be shared in order to confirm the vitality of the self-employment rule. They may also help us to determine the proper protocol by which we may evaluate the existence vel non of the employment relationship.

(i)

Distinguishing Employees from Independent Contractors

The first provision of the Act which has helped make universal the perception that the self-employed cannot participate in the unemployment program to become axiomatic is Gen. Laws 1956 § 28-42-7 — which provides the standard by which the ESA distinguishes the employees of a firm (who are therefore eligible for benefits) from independent contractors (who are self-employed and therefore ineligible).

In its current incarnation — pursuant to a 1998 revision — section 7 provides that the determination whether a worker is an employee will be made pursuant to the factors used by the Internal Revenue Service in its code and regulations. See P.L. 1998, chs. 234 and 334. However, the Supreme Court of Rhode Island has not had occasion to interpret either this or the prior incarnation of section 7, which delineated a three-prong test for differentiating employees from independent contractors.

It is true that cases considering the applicability of § 28-42-7 were brought before the Court, in cases involving the status of cabbies,[14] members of traveling orchestras,[15] and real estate salesmen.[16] But each case was resolved without reference to the tri-partite test; instead, the Court found the workers' relationships with their managers were not "within the scope of the act"[17] because they did not meet the ESA's definitions of "employment," "employers," or "wages," or a combination thereof.[18] This notion — that satisfying the definitions of employment and related concepts is a predicate to participation in the receipt of unemployment benefits — was combined with a brief but elegant exposition of the importance of establishing the relationship

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[14] Mount Pleasant Cab Co. v. Unemployment Compensation Board, 73 R.I. 7, 13-15, 53 A.2d 485, 489-90 (1947)(Cab drivers were not employed by the company from which they leased their cabs, as they performed no services for the company and received no compensation from it).

[15] Trinity Bldg. Corp. of New York v. Rhode Island Unemployment Compensation Board, 76 R.I. 408, 414-16, 71 A.2d 505, 508-09 (1950) (Musicians who played in traveling bands which appeared at Providence's Biltmore Hotel were not employed by the hotel but by the bandleaders who paid them).

[16] See H.J. Bernard Realty Co. v. Director of Employment Security, 104 R.I. 651, 656, 248 A.2d 245, 247-48 (1968) (Real estate salesmen were not in "employment" as they provided no service to the company and received no wages).

[17] Mt. Pleasant Cab, supra n. 14, 73 R.I. at 15, 53 A.2d at 490.

[18] See Mount Pleasant Cab Co., supra n. 14; Trinity Bldg. Corp., supra n. 15; and, H.J. Bernard Realty Co., supra n. 16.

When Mount Pleasant Cab and Trinity Building were decided the three-prong test was located in the definition of employment found in subsections (7)(e)(1)(2) and (3) of section 3 of the Act.

between wages and services by Justice Kelleher in H.J. Bernard Realty Co. v. Director of Employment Security, 104 R.I. 651, 248 A.2d 245, (1968):

> … it is our opinion that the service or services performed by a person for wages as contemplated by the Employment Security Act must be service for an employer with a consequent obligation by the employer to pay the employee for his rendition of the service. If this fundamental relationship is not established by the record the act has no application. (Emphasis added).

H.J. Bernard, 104 R.I. at 656, 248 A.2d at 247.[19] In any event, the lesson to be learned is unmistakable — We must never contemplate whether an unemployment benefit claimant falls within the ambit of an exception to eligibility (such as status as an independent contractor or a partner or its equivalent) unless we first determine that the claimant had indeed been part of an employment relationship.

(ii)

The Requirement That the Claimant be Totally Unemployed

A second provision of the ESA which has nourished belief in the tenet (that the

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[19] The ESA's first and broadest definition of employment is :

> (17)(i) "Employment," subject to §§ 28-42-4 — 28-42-10, means service, including service in interstate commerce, performed for wages or under any contract for hire, written or oral, express or implied;
> … (Emphasis added).

Likewise, the ESA's definition of "wages" is also wide in its scope:

> (28) "Wages" means all remuneration paid for personal services on or after January 1, 1940, including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash, … (Emphasis added).

self-employed are barred from partaking in the unemployment program) is the requirement — found in Gen. Laws 1956 § 28-44-6 — that unemployment benefit claimants be "totally unemployed." This provision must be viewed in conjunction with the definition of "total unemployment," found in subdivision 28-42-3(27), that prevents a claimant from being considered totally unemployed if he or she can "reasonably" return to any kind of self-employment.[20] This section was applied in Berberian v. Department of Employment Security, Board of Review, 414 A.2d 480 (R.I. 1980) to deny benefits to an attorney who, while he was laid off by one employer, nonetheless maintained an active law practice.

(iii)

The Availability Requirement — Section 28-44-12

A final provision of the ESA which fosters the notion that the self-employed are barred from participation in the unemployment system is Gen. Laws 1956 § 28-44-12, which requires that unemployment claimants be — inter alia — available for work. One who is actively engaged in a trade or profession is, by definition, not available for work. See Berberian, supra, 414 A.2d at 483-84.

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[20] Gen. Laws 1956 § 28-42-3(27) defines "total unemployment" as follows: "An individual shall be deemed totally unemployed in any week in which he or she performs no services (as used in subdivision (25) of this section) and for which he or she earns no wages (as used in subdivision (25) of this section), and in which he or she cannot reasonably return to any self-employment in which he or she has customarily been engaged;" (Emphasis added).

(iv)

The Treatment of the Self-employed By the ESA — Summary

In the case at bar there is no hint of a suggestion that Mr. Wiggins was an independent contractor, was not totally unemployed after Accu-Tran expired, or was, after its demise, anything other than fully available for work. We considered these topics for two purposes: (1) to validate the unwritten rule that the self-employed may not participate in the unemployment program, and (2) to ascertain what they might teach us regarding a manner of proceeding when determining if a claimant should be disqualified for being self-employed, in whatever permutation of the question might present itself. And, after this effort we have satisfied ourselves that the rule is in fact valid and that — when considering whether a claimant falls within its ambit — we must begin by determining whether an employment relationship existed. This we shall do at the appropriate juncture, when we come to apply the facts of Mr. Wiggins' circumstances to the applicable law.

But, to prepare ourselves for the resolution of this case, we must acquaint ourselves with the defining characteristics of this relatively new business structure.[21]

[21] Limited liability companies were created as a Rhode Island business form in 1992. See P.L. 1992, ch. 280, § 1.

(d)

Limited Liability Companies

And finally, the parties are generally not at odds regarding the nature of the LLC business form. The Rhode Island Limited Liability Company (LLC) Act — Chapter 16 of Title 7 of the General Laws — does not provide a short definition of an LLC, but, in its many sections, establishes its salient features.[22] To begin with, the LLC Act declares that a limited liability company "… has the purpose of engaging in any lawful business;"[23] it possesses various powers, including the power to sue and be sued, to transact business, to make contracts, to sell and purchase property;[24] it is formed by delivering articles of organization for filing with the secretary of state;[25] its members and managers enjoy limited liability;[26] the company must file an annual return with the tax administrator.[27]

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22 Gen. Laws 1956 § 7-16-2(15), in circular fashion, defines a limited liability company to be "… an entity that is organized and existing under the laws of this state pursuant to this chapter."

23 Gen. Laws 1956 § 7-16-3.

24 Gen. Laws 1956 § 7-16-4.

25 Gen. Laws 1956 § 7-16-5. The necessary particulars of the articles of organization are enumerated in § 7-16-6.

26 Gen. Laws 1956 § 7-16-23.

27 Gen. Laws 1956 § 7-16-67.

The Department does not question that an LLC is a separate institution which has a separate identity. It does not even suggest that all LLC owners should be barred from the unemployment system. The Department would extend this privilege to the owners of LLC's which have chosen corporate tax treatment. It only seeks to bar those owners whose LLC's have elected partnership tax treatment; the rule it recommends is therefore conditional.

On the other hand, the Board of Review advocates the adoption of a rule that is categorical — viz., that all LLC's, whatever their tax treatment, are separate legal entities whose owners, like owners of corporations, cannot be viewed as being self-employed. Therefore, the Board rationalizes that the employee/owners of all LLC's should not be disqualified from receiving unemployment benefits. We shall now examine each position in greater depth.

2

The Position of the Board of Review

The decision rendered by the Board of Review in this case rests on the following legal assumptions: (1) a corporation has a separate legal identity from its owners; (2) as a result, one who works for a corporation in which he or she has an ownership interest cannot be deemed to be self-employed; (3) and so, he or she is eligible to participate in the employment security system; and (4) since an LLC also has

a separate identity from its owners it should be treated in a like manner. In my view, there is support for each of these predicate assumptions.

In its decision, the Board of Review's analysis of the LLC Act was slight — and conclusory. Citing its recent decision in the matter of Richard Faucher, 20111430 BU (June 8, 2012), the Board stated its belief that "the purpose of the statute allowing the creation of LLC's was to offer the protections afforded by corporate status" to the owners of LLC's. Decision of Board of Review, at 1. As a result, it concluded that LLC's should be treated under the ESA as corporations are. Decision of Board of Review, at 2. And finally, the Board held that the partnership exclusion did not apply to Mr. Wiggins. Decision of Board of Review, at 2. This is an example of reasoning by analogy, a basic tool used everyday by members of bench and bar. It is undoubtedly a valid procedure. But this result seems superficial and unsatisfying — we would prefer an outcome which rests on a firmer foundation — more firmly rooted in pertinent statutes or precedent.

3

The Position of the Department

On the other hand, the Department does not advocate a bright-line, categorical rule. Instead, the Department urges that an LLC's treatment under the ESA must vary according to its tax election. The Department notes that an LLC may elect to be treated as a corporation or as a partnership for federal income tax purposes.

Department's Memorandum of Law, at 3.[28] It notes that the salaries of partners do not constitute wages under the ESA. Department's Memorandum of Law, at 3, 5. And so it urges that an LLC's federal income tax election should govern its treatment under the ESA.

Indeed, the Department treats this position — i.e., that an LLC's status under the Employment Security Act must follow its federal income tax status — as being self-evident. For instance, its analysis begins by stating that "LLC's are taxed for this state's unemployment compensation tax purposes according to their filing status with the IRS." Department's Memorandum of Law, at 3. This is apparently a statement of the Department's administrative practice (and not legal analysis) and is therefore not susceptible to dispute — but neither is it a persuasive argument that the Department's practice is correct.[29]

The Department further reports that Accu-Tran never filed the necessary form to be taxed as a corporation.[30] Director's Memorandum of Law, at 3. The existence vel non of such a document is another matter entirely within the Department's

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[28] If it is treated as a partnership, the LLC is not taxed on its profits; the profits are designated to the partners, who become responsible for reporting them on their individual income tax returns.

[29] It is appropriate at this juncture that the Department concedes that it collected unemployment contribution from Accu-Tran for Mr. Wiggins. See Department's Memorandum of Law, at 5.

[30] It identifies this document as a "Form 8832." See Department's Memorandum of

administrative ken. And, in any event, this statement is not challenged by the Board of Review or Claimant Wiggins.

The Department urges that a contrary rule would lead to egregious results. Director's Memorandum of Law, at 3-4. And, the Department urges that since Accu-Tran opted to be treated as a partnership for tax purposes, it must be regarded similarly under the ESA. See Department's Memorandum of Law, at 5. The result of this determination is that Mr. Wiggins should be deemed subject to the self-employment exclusion.

The Department then presents what it urges is the statutory anchor for the premise that is the heart of its position — i.e., that partners who also provide services to their firm cannot participate in the unemployment system. In support of this statement, the Department cites § 28-42-8(7), which provides:

> "Employment" does not include:
>
> > (7) Services performed by an individual in any calendar quarter on and after January 1, 1972 in the employ of any organization exempt from income tax under 26 U.S.C. § 501(a)(other than services performed for an organization defined in 28-42-3(24)[31] or for any organization described in 26 U.S.C. § 401(a) or under 26 U.S.C. § 521) if the remuneration for that service is less than fifty dollars ($50.00)."

(Footnote added). The Department advises us that the provision of federal law cited (26 U.S.C. § 501) exempts partnerships from federal taxation. Director's Memo-

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Law, at 3.

[31] Subdivision 28-42-3(24) defined the term "non-profit organization."

randum of Law, at 4. And so, it asserts that pursuant to federal law, as referenced in subdivision 28-42-8(7), services provided to a partnership of which one is a member may not be considered "employment" under the ESA. Director's Memorandum of Law, at 1-2.

However, as we shall see in the next section of this opinion, I cannot confirm the validity of the underpinnings of this argument.

B

Evaluating the Arguments and Exposition of Analysis

1

The Department's Position

Firstly, the Department's reliance on § 28-42-8(7), quoted supra at 22-23, is misplaced because, to my reading, 26 U.S.C. § 501 relates to not-for-profit organizations, not partnerships.[32] As a result, the Department's assertion that § 28-42-

[32] I am at a loss to explain this misapprehension on the Department's part. One might assume that it was caused by a vestigial cross-reference. However, a review of 26 U.S.C. § 501's history shows that it has always related to not-for-profit organizations.

Moreover, it becomes clear that the General Assembly intended a reference to non-profits in § 28-42-8(7) when one examines the second clause of subdivision 28-42-3(17)(i), which states — "provided, that service performed shall also be deemed to constitute employment for all purposes of Chapters 42 – 44 of this title, if performed by an individual in the employ of a nonprofit organization described in subdivision (24) of this section except as provided in § 28-42-8(7)."

Finally, in its Memorandum the Department has not responded to my comment in Faucher that its reliance on § 28-42-8(7) was "infelicitous." See Faucher, supra, slip op. at 20. Its silence in the face of such a comment must be taken as

8(7) of the Employment Security Act bars owners from participation in the unemployment system is without statutory support.

But, as grievous as this error may be, I believe it falls to naught when compared to the Department's second, more fundamental misapprehension — i.e., its assumption that the issue of whether an LLC owner's employment by the firm he owns (or partially owns) is "covered employment" is, at the end of the day, governed by federal law. See Department's Memorandum of Law, at 3. As we shall see below, issues of unemployment eligibility coverage, with few exceptions, are generally left to the states to decide. Does the issue fall within one of those exceptions? To answer this question, I believe we would profit from an overview of America's unemployment insurance system, which we shall undertake presently.

2

The Unemployment System

America's unemployment insurance system has been described as a "cooperative endeavor"[33] entered into jointly by the federal government and the several state governments during the Great Depression.[34] Our own Supreme Court, in

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acquiescence.

[33] Buckstaff Bath House v. McKinley, 308 U.S. 358, 363-64, 60 S.Ct. 279, 281-82, 84 L.Ed. 322 (1939).

[34] See C.C. Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), Buckstaff Bath House, supra n. 25, 308 U.S. at 363-64, 60 S.Ct. at 281-82, and Wimberley v. Labor and Industrial Relations Commission of Missouri, 479

Rivard v. Bijou Furniture Co., (1941), commented that the federal and state statutes "interlock in a number of material respects."[35]

The Federal Unemployment Tax Act, universally known by the acronym "FUTA," was originally enacted as Title IX of the Social Security Act of 1935[36] and became effective on August 14, 1935.[37] The state laws were passed promptly thereafter.[38]

U.S. 511, 514, 107 S.Ct. 821, 823, 93 L.Ed 2d 909 (1987).

As Justice Cardozo explained in Steward Machine, a national scheme was necessary because individual states were reluctant to enact such a system — fearing that the new taxes that would be imposed to fund the program would place the state's employers at a competitive disadvantage. 301 U.S. at 588, 57 S.Ct. at 891.

[35] 67 R.I. 251, 256, 21 A.2d 563, 566 (hereinafter Rivard I). In this case and its successor, Rivard v. Bijou Furniture Co., 68 R.I. 358, 27 A.2d 853 (1942)(hereinafter Rivard II), the Supreme Court determined how the remaining assets of a business in receivership should be distributed to its creditors — of which, the most prominent were (1) the United States, regarding federal unemployment taxes owed and (2) the State of Rhode Island, regarding delinquent unemployment contributions. These cases are, to my knowledge, the earliest in which our Court considered the nature of the new unemployment system.

[36] See United States v. Silk, 331 U.S. 704, 710-11, 67 S.Ct. 1463, 1466-67, 91 L.Ed. 1757 (1947) and Wimberly v. Labor and Industrial Relations Commission of Missouri, 479 U.S. 511, 514-15, 107 S.Ct. 821, 823-24, 93 L.Ed 2d 909 (1987). FUTA is now codified as 26 U.S.C. § 3301 et seq.

[37] Howes Brothers Company v. Massachusetts Unemployment Compen-sation Commission, 296 Mass. 275, 277, 5 N.E. 2d 720, 722 (1936).

[38] Rhode Island's "Unemployment Compensation Act," as it was first titled, was enacted on May 5, 1936. See P.L. 1936, ch. 2333. If this seems a prompt legislative response we must consider the fact that the Massachusetts law was passed on August 12, 1935 — two days before the federal act became law. Howes Brothers

The state and federal laws work together in this way: The administration of the unemployment system — including the distribution of benefits to the unemployed — is assigned to the state governments. But FUTA funds these benefits by taxing employers on the wages they have paid out.[39] However, the full impact of the FUTA taxes is softened by a credit which is given for payments the employers must also make into their state's unemployment fund.[40] These state payments are called *contributions*, but are *taxes* in all but name.[41] Although a few categories of employment are exempted from participation,[42] by far the largest percentage of employers and workers are subject to the federal tax.

Company, supra n. 29, 296 Mass. at 277, 5 N.E. 2d 722.

39 See United States v. Silk, 331 U.S. 704, 710-11, 67 S.Ct. 1463, 1466-67, (1947).

40 See Standard Dredging v. Murphy, 319 U.S. 306, 310, 63 S.Ct. 1067, 1069, 87 L.Ed. 1416 (1943) and Rivard v. Bijou Furniture Co., 68 R.I. 358, 361, 27 A.2d 853, 854 (1942)(hereinafter Rivard II). See also Buckstaff, supra, 308 U.S. at 363, 60 S.Ct at 281. Indeed, a 90% credit against the federal tax is given for the "contributions" employers remit to their state's unemployment fund. Standard Dredging, id; Rivard II, id.

41 These payments are required by Chapter 43 of Title 28, entitled — "Employment Security – Contributions." And see Rivard I, 67 R.I. at 257-58, 21 A.2d at 567.

42 Id. As one would assume, the employers of exempt workers are not liable for FUTA taxes based on their earnings. Id.

It is often said that the federal government induced the states to participate.[43] That the states benefit financially from their involvement in the unemployment system cannot be doubted. But these benefits do not come without strings. In order for a state to participate, its unemployment program must meet certain federal requirements.[44] But, in truth, this cession of authority is limited.

As Justice Sandra Day O'Connor explained in Wimberly v. Labor and Industrial Relations Commission of Missouri (1987)[45] — a case which considered whether Missouri's unemployment act met the minimum federal standards regarding its treatment of pregnant claimants — the states retain a great measure of discretion in establishing the parameters of their particular unemployment systems:

> The Federal Unemployment Tax Act (Act), 26 U.S.C. § 3301 et seq., enacted originally as Title IX of the Social Security Act in 1935, 49 Stat. 639, envisions a cooperative federal-state program of benefits to unemployed workers. See St. Martin Evangelical Church v. South Dakota, 451 U.S. 772, 775, 101 S.Ct. 2142, 2144, 68 L.Ed. 2d 612 (1981).

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[43] Standard Dredging v. Murphy, 319 U.S. 306, 310, 63 S.Ct. 1067, 1069, 87 L.Ed. 1416 (1943), Buckstaff, supra, 308 U.S. at 363, 60 S.Ct at 281, and Macias v. New Mexico Department of Labor, 21 F.3d 366 (10th Cir. 1994). In reality the Congress used a carrot-and-stick approach. First, the stick: all U.S. employers are subject to the FUTA tax, whether their state participates or not. Next, two carrots: the 90% credit is available only in participating states; and, the benefits paid in participating states work a salutary effect on the economies of the participating states. Rivard II, 68 R.I. at 361, 27 A.2d at 854-55.

[44] See 26 U.S.C. § 3304(a), cited in Wimberly v. Labor and Industrial Relations Commission of Missouri, 479 U.S. 511, 514-15, 107 S.Ct. 821, 823-24, 93 L.Ed 2d 909 (1987).

[45] 479 U.S. 511, 107 S.Ct. 821, 93 L.Ed 2d 909 (1987).

> The Act establishes certain minimum federal standards that a state must satisfy in order to participate in the program. See 26 U.S.C. § 3304(a). The standard at issue in this case, § 3304(a)(12), mandates that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."
>
> Apart from the minimum standards reflected in § 3304(a), the Act leaves to state discretion the rules governing the administration of unemployment compensation programs. See Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). State programs, therefore, vary in their treatment of the distribution of unemployment benefits, although all require a claimant to satisfy some version of a three-part test. First, all states require claimants to earn a specified amount of wages or to work a specified number of weeks in covered employment during a 1-year base period in order to be entitled to receive benefits. Second, all States require claimants to be "eligible" for benefits, that is, they must be able to work and available for work. Third, claimants who satisfy these requirements may be "disqualified" for reasons set forth in state law. The most common reasons for disqualification under state employment compensation laws are voluntarily leaving the job without good cause, being discharged for misconduct and refusing suitable work. See Brief of United States as Amicus Curiae 2-3; Note, Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act, 82 Mich. L. Rev. 1925, 1928-29 (1984). (Emphasis added).

Wimberly, 479 U.S. 511, 514-15, 107 S.Ct. 821, 823-24, 93 L.Ed 2d 909 (1987).[46] Although in the case sub judice the particular issue of unemployment benefits for pregnant claimants is not before us, the Wimberly case is nonetheless edifying — for it confirms the principle that the states are free to establish criteria by which claimants must prove their eligibility for unemployment benefits, limited only by certain

[46] With this background in hand, the Court found that Missouri's unemployment pregnancy provision did not violate § 3304(a)(12). Wimberly, 479 U.S. at 517-22, 107 S.Ct. at 825-28.

minimum standards enumerated in FUTA.[47] And, the discretion the states enjoy in setting eligibility standards for unemployment compensation has been repeatedly noted by the Rhode Island Supreme Court, which has, in its unemployment jurisprudence, consistently declined to defer to any federal provision or rule other than an express FUTA mandate.[48]

Of course, the issue before the Court is of the first type identified by Justice O'Connor — that is, we must determine whether the claimant satisfied the wage requirement by working in a position "covered" under the Employment Security Act.[49] I have found no provisions in FUTA which restrict the discretion of the states on this issue (i.e., permitting benefits to claimants who are owners of partnerships, LLC's, or

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47 See Wimberly, 479 U.S. at 514-15, 107 S.Ct. at 823-24.

48 See, where the FUTA provision was merely permissive: Imperial Products Co. v. Employment Security Board of Review, 576 A.2d 1210 (1990)(Two employers would be denied use of "common paymaster" payroll system where (1) it was not authorized by the Employment Security Act — in § 28-42-3(17), (2) even though it was permitted under federal law — in 26 U.S.C. § 3306(p) — since (3) consent to its use was not required of the states by FUTA).

A fortiori, the Court has declined to defer to federal administrative rulings: University of Rhode Island v. Department of Employment and Training Board of Review, 691 A.2d 552, 555 (R.I. 1997)(Court declares Rhode Island is not bound by administrative interpretation of FUTA issued by federal agency). Accord, Harvey v. Department of Employment Security Board of Review, 120 R.I. 159, 163, 385 A.2d 1057, 1060 (1978).

49 See highlighted portion of quotation from Wimberly, supra at 27.

corporations) — not in § 3304(a),[50] nor in the definition of "employment" found in § 3306(c).[51] Quite simply, no statute (state or federal) cited by the Department (or found by our own research) requires us to treat the owner of an LLC as a partner. It is therefore abundantly clear that the eligibility vel non of an owner/employee of an LLC under the ESA is a state law issue.[52]

In light of the foregoing, I conclude that Rhode Island, like our sister states, has unfettered discretion to allow (or disallow) benefits to LLC owners like Mr. Wiggins as it sees fit. Of course, this is not a decision that the judiciary must make, but one within the province of the legislature. And so, the question is — What rule has the General Assembly established?

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[50] Cf. Macias v. New Mexico Department of Labor, 21 F.3d 366, 368 (10th Cir. 1994)(decision in agricultural workers not violative of FUTA).

[51] Many of the provisions of § 28-42-8 defining employment have correlatives in 26 U.S.C. § 3306(c). In particular, subdivision 26 U.S.C. § 3306(c)(10)(A) seem to be the analog of 28-42-8(7). Examining the statute and its cross references, I see nothing relating to partnerships.

[52] See Singer Sewing Machine Co. v. State Unemployment Commission, 167 Or. 142, 175-76, 116 P.2d 744, 751 (1941)(deciding that "employment" under the unemployment act may encompass more than the types of relationships which were viewed as employment at common law). See also United States v. Silk, 331 U.S. 704, 713-14, 67 S.Ct. 1463, 1468, 91 L.Ed. 1757 (1947).

Faucher: Reliance on the Limited Liability Company Act

We have seen that the provisions of the Employment Security Act offer no convincing guidance to us on the question before us. The position of the Board of Review (simply analogizing an LLC to a corporation) is unsatisfying and the position of the Director (relying on sections of the Employment Security Act) is unfounded in law. Thus, if the ESA were our only source of illumination, we would be lost.

Luckily, in Faucher we discovered a guidepost to lean upon in the guise of a section of the Rhode Island Limited Liability Company Act, Gen. Laws 1956 § 7-16-73 — entitled "Construction With Other Laws." Section 73 provides:

> (a) Unless the provisions of this chapter or the context indicates otherwise, each reference in the general laws to a "person" is deemed to include a limited liability company, and each reference to a "corporation," except for references in the Rhode Island Business and Nonprofit Corporation Acts, and except with regard to taxation, is deemed to include a limited liability company. (Emphasis added).

We noted in Faucher that subsection (a) directs us to regard LLC's as corporations, unless the context indicates otherwise, "and except with regard to taxation." See Faucher, slip op. at 16-19. And subsection (b) explains how LLC's will be treated vis à vis issues of taxation:

> (b) As to taxation, a domestic or foreign limited liability company shall be treated in the same manner as it is treated under federal income tax law. (Emphasis added).

As can be clearly seen, subsection (b) mandates that, as to "taxation," LLC's will be treated in the same manner they are treated for federal income tax purposes.[53]

In Faucher, after reviewing this section in its entirety, we held that the tax clause was inapplicable to the issue of unemployment coverage before the Court; and so, we found that Lincoln Liquors LLC, Mr. Faucher's employer, should be treated as a corporation and that, under the rule pronounced in Rector, Mr. Faucher should not be disqualified under the self-employment rule. See Faucher, slip op. at 19-22.

Now, since § 73 of the LLC Act was the basis of our decision in Faucher, each party in the instant case has discussed it in the memoranda they have submitted. As one might expect, the Claimant (and by implicit if not express incorporation, the Board of Review) endorses the Court's application of § 73 in Faucher and requests that we do so once more. See Gabriel Wiggins' Memorandum of Law, at 1-2. Conversely, the Department urges that this Court misapplied § 73 in Faucher.[54] It asks us to reconsider our ruling in Mr. Wiggins' case.

And so, at this juncture, we may finally leave behind discussions of our previous ruling and the positions of the parties and commence our renewed analysis of the legal

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[53] As we shall address in part III-B-5 of this opinion, infra at 34-42, interpretation of this section requires us to determine whether all or just some taxes are referenced by the term "taxation" in § 73(b).

[54] Of course, this is the same election that the Department has asserted to be determinative since the outset of this controversy — though without citation to this provision.

issue presented in earnest. Taking to heart the Supreme Court's guidance in Mt. Pleasant Cab, Trinity Building, and H.J. Bernard, we begin by looking to core principles of the ESA to determine if Mr. Wiggins meets the preliminary tests of eligibility.

4

Employment For Wages: The First Hurdle of Eligibility

As the Supreme Court stated repeatedly in the cases which were supposed to address the distinction between independent contractors and employees, the Court must not consider exceptions to eligibility until it first determines whether the Claimant has cleared the first hurdle to eligibility — a finding that he was "employed" within the meaning of the ESA.

Employment is defined in very broad terms in subdivision 28-42-3(17)(i) as follows, in pertinent part:

> (17)(i) "Employment," subject to §§ 28-42-4 — 28-42-10, means service, including service in interstate commerce, performed for wages or under any contract for hire, written or oral, express or implied; …

This definition must be read in conjunction with the equally broad definition of "wages" in subsection 28-42-3(28):

> (28) "Wages" means all remuneration paid for personal services on or after January 1, 1940, including commissions and bonuses and the cash value of all remuneration paid in any medium other than cash …

Do the circumstances of Mr. Wiggins and Accu-Tran meet these standards? I believe they do.

The record of the hearing held in this case is modest, involving a mere 10-page transcript. The testimony of Mr. Wiggins, who was the only witness, took up only a few pages. See Referee Hearing Transcript, at 5-7. The Department of Labor and Training, which now seeks judicial review by this Court, did not send a representative to the hearing conducted by Referee Vukic. According to Mr. Wiggins he spent his time not as a manager but as a worker on the company's medical transport trucks. See Referee Hearing Transcript, at 7. He was paid "wages" by means of a "paycheck" in compensation for his work. Id.[55]

And so, I believe it is indisputable that Mr. Wiggins' uncontradicted testimony was sufficient to satisfy his burden of showing that he was paid wages for the services he rendered to Accu-Tran as a medical transport worker. Our review of the LLC Act demonstrates irrefutably that Accu-Tran had the authority to agree to such an employment contract in its own name. See discussion of powers of an LLC, supra at 18-20 and Gen. Laws 1956 § 7-16-4.

[55] Mr. Wiggins conceded he had not taken a paycheck at the end approached because of the company's condition. Referee Hearing Transcript, at 7. In my view, this should not be deemed a factor against his status as a worker.

And so, with this hurdle cleared successfully, we may now provide our rationale for determining that Mr. Wiggins should not be disqualified from participation in the unemployment system on some other ground.

5

Revisiting Subsection 73(b) of the Limited Liability Company Act

We commence this portion of our analysis by restating, as precisely as we can, the nub of the issue before the Court — Does the phrase "As to taxation …" at the beginning of subsection 73(b) include within its meaning the unemployment contributions (or taxes) required to be paid by employers pursuant to the Rhode Island Employment Security Act? If it does, Accu-Tran must be treated as a partnership and Mr. Wiggins will be disqualified. If not, it shall be treated as a corporation, and Mr. Wiggins shall be declared eligible, under § 73(a). For several reasons, I believe not.

First. Stepping back, looking at the issue from a broad view, I do not believe that subsection 73(b) applies to the instant case because the Employment Security Act is not a tax act.[56] In Rivard I, supra, the Supreme Court called Rhode Island's

[56] I recognize that the federal unemployment act (FUTA) was deemed constitutional as an exercise of the Congress's Article I, section 8 authority to levy excise taxes or imposts. See Charles C. Steward Machine Company v. Davis, 301 U.S. 548, 578-583, 57 S.Ct. 883, 887-889 (1937).

On the other hand, the state unemployment acts are generally viewed as being enacted as an exercise of the police power. Howes Brothers Company v. Massachusetts Unemployment Compensation Commission, 296 Mass. 275, 283, 5

unemployment law "progressive social legislation to alleviate the principal causes of insecurity in the economic life of this country."[57] Later, in Harraka, supra, the Court — citing Gen. Laws 1956 § 28-44-73 — described the unemployment system as a social welfare program whose purpose is "to lighten the burden which now falls upon the unemployed worker and his family."[58] And the view that our Supreme Court expressed in Rivard I and Harraka is typical of statements found in many other cases from throughout the nation.

Regarding the source of the states' authority to enact this type of legislation, we could do no better than to quote the comments of Chief Justice Rugg of the Massachusetts Supreme Judicial Court in Howes Brothers Company v. Massachusetts Unemployment Compensation Commission (1936) when that Court considered the

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N.E. 2d 720, 725 (1936).

[57] 67 R.I. at 251, 256, 21 A.2d at 566.

[58] Harraka, supra, 98 R.I. at 197, 200 A.2d at 595, quoted supra at 9. See also Gen. Laws 1956 § 28-42-2, the second section of the Employment Security Act, entitled "Declaration of Policy," which pronounces "Economic insecurity, due to unemployment, being a serious menace to the health, morale, and general welfare of the people of this state, is, therefore, a subject of interest and concern to the community as a whole, warranting appropriate action by the general assembly to prevent its spread and to lighten the burden which now falls on the unemployed worker and his or her family …. Chapters 42 — 44 of this title are designed to meet in some measure this situation by providing for the accumulation of a fund to assist in protecting the public against the ill effects of unemployment which may arise in future years."

constitutionality of its new unemployment insurance program[59] — "This law was enacted in the exercise of the police power. The nature of that legislative prerogative cannot easily be stated with exactness. This Court has never undertaken to define its limitations. It includes that right to enact laws in the interests of the public health, the public safety, the public morals and the general welfare." (Citations omitted).[60] In harmony with this comment is another, pronounced fifty-five years later by the Supreme Court of Illinois:

> "The Unemployment Compensation Act is not a taxing act, but is one passed to alleviate the perils of unemployment under the police powers of the State, and should receive a liberal construction." Eutetic Welding Alloys Corp. v. Rauch, (1953) 1 Ill.2d 328, 332, 115 N.E.2d 898. [Other Citations omitted].

Jack Bradley, Inc. v. Department of Employment Security, 146 Ill. 2d 61, 74, 585 N.E.2d 123, 129 (1991)(Court affirmed Department's finding that food demonstrators were employees and not independent contractors). See also Sutherland, Statutory Construction, § 74:7.

And while we know that the Employment Security Act requires employers to make "contributions" — which they may fairly view to be taxes — it has been said that "the taxing feature of the unemployment compensation legislation is incidental rather than controlling; that the paramount purpose is one of relief under the police

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[59] See Howes Brothers Company v. Massachusetts Unemployment Compensation Commission, 296 Mass. 275, 5 N.E. 2d 720 (1936).

power." Singer Sewing Machine Company v. State Unemployment Compensation Commission, 167 Or. 142, 162, 116 P. 744, 746 (1941). The Supreme Court of Vermont has stated this sentiment in another way — opining that its unemployment act and its tax acts are not in pari materia.[61] And so, I find § 73(b) is inapplicable to the case sub judice because the ESA is an example of social legislation enacted under the police power of the state and not a tax act.

Second. But if we assume, arguendo, that the Employment Security Act — which requires employers to remit unemployment contributions — is, at least in part, a tax law, must we then regard it as being referenced in § 73?

Inarguably, the Rhode Island income tax is included in the reference; this follows ineluctably from the section's reference to federal income taxes. Of course, one could argue that the reference — "[a]s to taxation" — should be deemed to apply only to the state income tax. But admittedly this is an extreme construction, one whose probity we need not decide at this time.

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[60] Howes Brothers Co., supra n. 59, 296 Mass. at 283, 5 N.E. 2d at 726.

[61] See Vermont Camping Ass'n v. Department of Employment and Training, 145 Vt. 630, 633, 497 A.2d 353, 355 (1985)(Court rejected employers' assertion that "wages" should carry definition found in FUTA's § 3306(b). Instead, it broadened the definition, stating that tax law and unemployment not in pari materia).

See also Littlefield v. Department of Employment and Training, 143 Vt. 495, 497, 468 A.2d 566, 567 (1983)("not in pari materia but parts of entirely different statutory systems."

At the other end of the interpretive spectrum one can find an equally extreme interpretation — that § 73(b)'s reference to taxes encompasses all state taxes of every type. I believe this construction cannot be seriously posited; not only would it destroy the LLC's character as a business with a separate identity from its owners, it would lead to absurd results.

Let us recall that when an LLC is treated as a partnership for tax purposes, the business does not pay income taxes; instead, the members report their shares of the business's profits on their personal returns, avoiding what is often described as double taxation. This procedure just would not work in the case of taxes that aren't based on profits and losses that can be tallied on a periodic basis.

For instance, is it to be seriously suggested that an LLC — which is authorized by statute to acquire real and personal property and to hold it in its own name[62] — is immune from the Sales and Use Tax[63], or immune from the Motor Vehicle Excise Tax regarding vehicles it owns,[64] or immune from the municipal real estate taxes? Are all these taxes going to be passed through to the members of the firm? Such a procedure would not only be an administrative nightmare for the businesses, but also for the

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[62] See Gen. Laws 1956 §§ 7-16-4(5) and 7-16-68.

[63] See generally, Chapter 44-18 of the General Laws. And see § 44-18-6, defining a "person" to include a limited liability company, for purposes of the sales tax.

[64] See Chapter 44-34 of the General Laws regarding the Motor Vehicle Excise Tax which, despite its name, is really a property tax. See Cohen v. Harrington, 772 A.2d

state and its municipalities — which would have to issue individual tax bills to the members of the LLC and then reconcile payments of the firm members to insure the entire tax was paid.

We can also look to the one tax which the Limited Liability Company Act specifically directs be paid by LLC's which have chosen federal income tax treatment as a partnership. Gen. Laws 1956 § 7-16-67 directs that an LLC that has elected partnership tax treatment is nonetheless required to pay an amount equal to the minimum corporate tax established in Gen. Laws 1956 § 44-11-2(e).

In addition, although the Department has argued that an LLC that has elected partnership income tax treatment should not remit unemployment contributions for owner-employees (like Mr. Wiggins), it has not argued that these LLC's should not remit unemployment contributions for all their other workers. In other words, using the instant case as an example, the Department has not suggested that the unemployment contributions for Accu-Tran's non-owner employees should have come from the members of the firm and not from Accu-Tran itself. To the contrary, the Department demonstrates an acquiescence to the practice that all LLC's (whatever their tax status) should forward unemployment contributions directly, when it suggests that Accu-Tran should seek a refund of the unemployment contributions it

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1191, 1194 (R.I. 1999).

(erroneously) made on Mr. Wiggins's behalf. See Department's Memorandum of Law, at 5.

And so, I conclude that the reference to taxation in § 73(b) should not be interpreted to include unemployment contributions.

Third. Even if the Employment Security Act is considered to be a tax act (in some sense or to some extent), the issue before the Court is not one of taxation in any true sense. The issues before the Court do not concern the computation of a tax, assessment procedures, or collection procedures. The issue before the Court, viewed narrowly, is whether Mr. Wiggins' work for Accu-Tran was "covered employment"; viewed more broadly, is whether Mr. Wiggins was eligible to participate in the unemployment system. It is an issue of coverage, not taxation.[65]

I therefore find the exception found in subsection 7-16-73(b) to be immaterial to the issue at bar.

And it has often been said that on issues of coverage the courts have taken an inclusive view. For example, our Supreme Court has indicated that our courts "must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the

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[65] Conversely, it is instructive to recall that when the Rhode Island Supreme Court faced a pure tax issue in Imperial Products Co. v. Employment Security Board of Review, 576 A.2d 1210 (1990), where it considered whether two employers would be denied use of the "common paymaster" payroll system it relied upon state law and not federal law, where the federal law permitted the procedure but did not require its availability for use.

circumstances." Harraka, 98 R.I. at 197, 200 A.2d at 595.[66] It has been almost universally agreed that unemployment compensation laws should be given a liberal interpretation.[67] And, at the end of the day, enlarging the pool of covered employees will have the consequential effect of making the pool of contributions larger, aiding the vitality of the unemployment system overall.

And so, applying § 73(a) directly, the LLC known as Accu-Tran Medical Transportation should be regarded as would a corporation, with a separate identity. I believe the categorical approach is consistent with our Rhode Island Supreme Court precedent. The Court's decision in Rector was fully categorical, applying equally to all corporations.[68] It was not limited to any particular size of corporation, or the size of

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66 This sentiment was again given voice by the Supreme Court of Illinois in 1991:

> . . . because the Act was enacted with the public welfare in mind, construction of its provisions should favor inclusion, and there is a strict burden of proof placed upon one claiming an exemption. [Citations omitted].

Jack Bradley Inc. v. Department of Employment Security, 146 Ill. 2d 61, 75, 585 N.E.2d 123, 129 (1991).

67 See Sutherland, Statutory Construction § 74:7, at 1072-74 n. 3 (Citing cases from 35 states in support of this statement).

68 There is no indication in the record, in the cases and statutes cited to me, or in the submissions of counsel that the Department does not apply the Court's teachings in Rector to Subchapter S corporations, which are not subject to the Rhode Island Business Corporation Tax (Chapter 11 of Title 44) but are taxed (for income tax purposes) as partnerships or sole proprietorships. See Gen. Laws 1956 § 44-11-2(d). So, it appears that there is a lack of consistency in the way Subchapter S owners are treated — as partners for income tax purposes but as corporate owners for unemployment tax purposes.

the claimant's ownership interest; neither did it focus on the extent of the claimant's managerial duties.[69] The holding was triggered by one fact — the business Mr. Rector worked for was a corporation.

And so, I infer that the Supreme Court would once again adopt a categorical rule — one that would be easy for the Department to administer and for the Board of Review and this Court to apply.

C

Summary

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.[70] Stated differently, the findings of the agency will be

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[69] In this regard Rector appears to be an outlier from the unemployment jurisprudence of our sister states, which generally focus on the degree of control the employee/owner exercised regarding the corporation in question. — To a great extent, the greater the control or ownership interest, the greater the likelihood of disqualification. See 76 AM. JUR.2d Unemployment Compensation § 56 and Annot., Employee's Control or Ownership of Corporation As Precluding Receipt of Benefits Under State Unemployment Compensation Provisions, 23 A.L.R. 5th 176 (1994). Thus, it seems in this matter Rhode Island has forged its own path in this field of the law.

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

upheld even though a reasonable mind might have reached a contrary result.[71] Accordingly, the Board of Review's decision that claimant was eligible for benefits even though he held an ownership interest in Accu-Tran is well-supported by the applicable law and the evidence of record.[72]

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[71] Cahoone, supra n. 70, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), supra at 6-7 and Guarino, supra at 7, n. 6.

[72] My recommendation in this case should not be construed as a complete rejection of the Director's fundamental argument — that it is simply unfair for an LLC to file income taxes as an individual but participate as a corporation in the unemployment system. As the Department has noted, the LLC is therefore allowed to "have it both ways." But I have concluded that this equitable argument cannot supersede the statutory analysis undertaken herein. The Director's equitable argument is one which should properly be directed to the policy-making body of our state government, the General Assembly.

It is also fair to point out that the owners of Subchapter S corporations apparently enjoy such an inconsistency — being taxed as partnerships but still being able to participate in the unemployment benefit program. This fact would seem to militate against the Department's argument that an inconsistency of this type is a taboo which must be assiduously shunned.

In addition, it may also be noted that the LLC forwarded contributions into the unemployment fund on behalf of Mr. Wiggins. We infer this from the fact that the Director suggests the LLC should bring an action to recover its contributions. Department's Memorandum, at 5. While estoppel against the State is disfavored (See O'Reilly v. Glocester, 621 A.2d 697 [R.I. 1993]), this fact does vitiate the strength of the Department's appeal to fairness.

IV

Conclusion

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review 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).

I therefore recommend that the decision of the Board of Review in this case be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

AUGUST 29, 2013