STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

Providence, Sc. **DISTRICT COURT**
SIXTH DIVISION

Maria E. Iovino	:	
	:	
v.	:	**A.A. No. 13 - 132**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

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

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED except the order of repayment is REVERSED.

Entered as an order of this Court at Providence on this 27th day of September, 2013.

By Order:

____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Ms. Maria E. Iovino urges this Court to set aside a decision rendered by the respondent Board of Review of the Department of Labor and Training which was adverse to her efforts to receive employment security benefits. Jurisdiction for appeals from the decisions of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. These matters have been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

I. FACTS AND TRAVEL OF THE CASE

During 2012 and 2013 Ms. Iovino was receiving unemployment benefits when — on May 6, 2013 — the Director determined that she should repay a portion of the benefits she had received. The Director decided that in 2012 and 2013 Ms. Iovino received an excessive amount of unemployment benefits because she failed to accurately report her earnings from a part-time job with Federal Express, breaching a duty imposed upon her by Gen. Laws 1956 § 28-44-7. See Director's Decision, May 6, 2013. The Director found Ms. Iovino at fault for the resulting overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered her to make restitution in the amount of $1,997.00 plus interest.

Ms. Iovino appealed and a hearing was held on June 13, 2013 before Referee John Palangio. The same day Referee Palangio issued a decision in which he affirmed the Director's decision. In doing so he made the following Findings of Fact:

> The claimant filed for benefits for the weeks ending March 31, 2012 through April 13, 2013 through the use of the teleserve payment system. During that period the claimant was partially unemployed and in partial benefits status. When using the system, the claimant was requested and required to enter and report his gross wages for each and every week in which she claimed benefits. The claimant did not, resulting in an overpayment of benefits for those weeks totaling $2006.85. The reason provided by the claimant for her failure to do so was that she did not remember the amount of hours worked for the previous week and thereby estimated the amount of hours worked from memory.

Referee's Decision, June 13, 2013, at 1. As a result of these findings, the Referee

concluded that Ms. Iovino failed to accurately report her wages:

> …
> Section 28-44-7, states, in part, that an individual partially unemployed and eligible in any week shall be paid benefits for that week, so that his or her week's wages, as defined in 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week. It is noted that 28-42-3(25) states that an employee is deemed partially unemployed if in any week of less than full-time work.
>
> The testimony and evidence presented in this case indicates that the claimant was not in compliance with the reporting requirements of the above Section of the Act with the weeks at issue. Questions on the teleserve were explicit in requesting the entry of the gross wages earned by the claimant for the weeks in which she was claiming benefits. Based on these conclusions it is determined that the claimant was not in compliance with the above section of the Act as previously determined by the Director.

Referee's Decision, June 13, 2012, at 1-2. He also found her to be subject to a repayment order pursuant to section 28-42-68:

> Since the claimant did not properly record her earnings for the weeks in issue as required, a correct calculation of the mount of benefits to which she was entitled could not be determined by the Director with regard to the weeks in issue. I find, under the circumstances, that she was overpaid benefits for those weeks and at fault for her nondisclosure and, therefore, determine that it would not defeat the purposes for which the Employment Security Act was designed to require her to repay those benefits as previously determined by the Director under Section 28-42-68 of the Act.

Referee's Decision, June 13, 2013, at 2. Ms. Iovino appealed once more and on July 15, 2013 the Board of Review unanimously found the Referee's decision to be a proper

adjudication of the facts and the law applicable thereto. Claimant filed a timely appeal in the Sixth Division District Court on August 14, 2013.

II. APPLICABLE LAW

A. Partial Benefits.

Gen. Laws 1956 § 28-44-7 provides:

> **28-44-7. Partial unemployment benefits. –** For weeks beginning on or after July 1, 1983, an individual partially unemployed and eligible in any week shall be paid sufficient benefits with respect to that week, so that his or her week's wages, rounded to the next higher multiple of one dollar ($1.00), as defined in 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week..

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

B. Repayment.

Gen. Laws 1956 § 28-42-68 provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to

> the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15. * * *
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

(Emphasis added). Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid. Subsection (b) of section 28-42-68 specifies that repayment cannot be ordered where (1) the recipient is without fault or where (2) recovery would defeat the purposes of the Act.

III. STANDARD OF REVIEW

The standard of review by which the court must proceed is established in Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
>
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;

> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964), that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which

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1 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).

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

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

> 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.

IV. ANALYSIS

A. Wage Reporting.

In this case the Board of Review affirmed the Director's determination that Claimant Iovino failed to accurately report her part-time earnings as required by Gen. Laws 1956 § 28-44-7. In order to review this determination we must address two questions — (1) did the Department have the authority to reconsider the benefits it had awarded to Ms. Iovino? and, (2) was the Board's redetermination correct?

1. The Department's Authority to Reconsider Eligibility Determinations.

I believe the answer to the threshold question is — yes, for the most part, the Department did have the authority to reconsider the validity of the benefits it had provided to Ms. Iovino.

This question is governed by Gen. Laws 1956 28-44-39(b), which provides in pertinent part:

> (b) * * * The director, on his or her own motion, may at any time within one year from the date of the determination set forth in subdivision (a)(1) of this section reconsider the determination, if he or she finds that an error has occurred in connection with it, or that the determination was made as a result of a mistake, or the nondisclosure or misrepresentation of a material fact.
> (c) * * *

Gen. Laws 1956 28-44-39(b)(Emphasis added). Thus, § 39(b) grants the Director authority to revisit eligibility determinations but limits the time for making such a redetermination to one year — even in cases of nondisclosure or misrepresentation. I must therefore conclude that the Department had no authority to reconsider the propriety of the benefits it had given to Ms. Iovino more than one year prior to May 6, 2013. Accordingly, I shall recommend that orders of repayment based on earnings recalculations made regarding weeks prior to May 6, 2012[4] be vacated.

2. The Accuracy of the Department's Redeterminations.

In this record there is no suggestion that the computation made by the Department on the question of claimant's part-time earnings is inaccurate. It was made on the basis of wage reports that are contained within the record forwarded to this Court by the Chairman of the Board of Review. Accordingly, I accept the veracity of

[4] Specifically, these would be the weeks of 3/31/12, 4/21/12, and 5/05/12. See Director's Decision, May 6, 2013, at 1.

the Department's findings without reservation. I must therefore conclude — as did the Director and the Board of Review — that Claimant was indeed overpaid.

B. Repayment

In this case the Board of Review made a second decision — affirming the Director's order of repayment.

As I recounted above, Referee Palangio sustained the Director's order of repayment because he found that the " * * * claimant did not properly report her earnings for the weeks in issue as required." Referee's Decision, June 13, 2013, at 2. And because he found a causative link between claimant's inaccuracies and the overpayment, the Referee determined her, ipso facto, to be "at fault" for the overpayment. Id.

But the repayment statute requires more than a mere invocation of the term "fault." In my view "fault" implies more than a mere causative relationship, 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.[5] To find the legislature employed the

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

term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless.

In my view of the record, no proof was presented tending to show that the Claimant acted with wrongful intent. Ms. Iovino testified that she generally wrote down the hours she worked at Fedex but admitted that "sometimes" she would "forget." Referee Hearing Transcript, at 9. She also conceded that she "messed up" on some occasions. Referee Hearing Transcript, at 13. Even the Referee, who upheld the order of repayment, told Ms. Iovino that, on many weeks, "you weren't off by a lot." Referee Hearing Transcript, at 12. He postulated that it seemed that she reported her net earnings, not her gross earnings, as required by the Employment Security Act. Referee Hearing Transcript, at 18. Although wrong, to me this does not seem patently deceitful.

But Ms. Iovino maintained that she acted in good faith. When the Referee asked about a certain week for which she reported that she had earned only $4.00 at Fedex, she replied that the entry was inadvertent, and that she later telephoned the Department to inform the staff that she had been overpaid. Referee Hearing Transcript, at 11.

In my view it is the Department's burden to establish the degree of fault necessary to justify a repayment order. In this case the Department completely failed

to meet this burden of proof. In fact, it sent no witnesses to the hearing before Referee Palangio.

Accordingly, there is nothing in the record to show how the Department instructs claimants on the proper way to answer the questions put forward by the teleserve system.[6] And speaking of the Department, it sent no witnesses to the hearing before Referee Palangio in attempt to satisfy its burden of showing "fault." In light of all these circumstances, I believe the order of repayment made in this appeal is clearly erroneous and must be set aside.[7]

V. CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the

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[6] It should be noted that Ms. Iovino was self-reporting on the Department's automated telephone system or on its web-based system. She was not being interviewed by a staff member who could explain the questions. When an agency adopts a self-reporting system, it must expect, and allow for, some measure of confusion.

[7] If my recommendation that the entire repayment order be reversed is accepted, it will not be necessary to make a specific order as to the amounts received by Ms. Iovino before May 6, 2012, as explained in Part IV-A-1 of this opinion.

evidence on questions of fact.[8] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[9]

Upon careful review of the evidence, and applying the standard of review and the principles of law outlined above, I recommend that this Court find that the decision of the Board of Review be AFFIRMED regarding its finding that Ms. Iovino failed to accurately report her wages but I recommend that the associated order of repayment be REVERSED, as being contrary to fact and law.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 27, 2013

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

[9] Cahoone, supra at 6, fn. 2. See also D'Ambra v. Bd. of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), supra at 5-6 and Guarino, supra at 6, fn. 1.