STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Jean Kerwin	:	
	:	
v.	:	**A.A. No. 13 - 138**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

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

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

ORDERED, ADJUDGED AND DECREED,

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

Entered as an order of this Court at Providence on this 30th day of October, 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. Jean Kerwin 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. Because I have concluded that the decision

rendered by the Board of Review in this case is not clearly erroneous, I shall recommend it be affirmed.

I. FACTS AND TRAVEL OF THE CASE

Ms. Jean Kerwin had been receiving unemployment benefits (since 2010) when — on May 17, 2013 — the Director determined that she should repay a portion of the benefits she had received. The Director decided that in certain weeks in 2012 and 2013 Ms. Kerwin received an excessive amount of unemployment benefits because she failed to accurately report her earnings from two part-time positions, breaching a duty imposed upon her by Gen. Laws 1956 § 28-44-7. See Director's Decision, May 17, 2013, at 1. The Director found Ms. Kerwin 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 $3,789.60 plus interest. Id., at 2

Ms. Kerwin appealed and a hearing was held on June 19, 2013 before Referee Gunter A. Vukic. The same day Referee Vukic issued a decision in which he affirmed the Director's decision. In doing so he made the following Findings of Fact:

> After separation from her full-time employer, Amica Insurance, in 2010 the claimant filed for Employment Security benefits and was found eligible. She filed online weekly and continued to do so through the emergency extensions. While on the extended benefits the claimant began working part-time for Bouchard

> Broadcasting and part-time for Forecourt in September 2012. Claimant reported $125.00 in wages weekly without any evidence to support the additional Forecourt earnings commencing in September.

Referee's Decision, June 19, 2013, at 1. As a result of these findings, the Referee concluded that Ms. Kerwin failed to accurately report her wages:

> …
> The claimant reported weekly gross earnings that in the instant case reflect only the Bouchard Broadcasting gross wages. Claimant's failure to report earnings from her second part-time employment at Forecourt is without explanation or evidence to refute the employer submission of earnings and the subsequent re-calculation of partial benefits by the Department of Labor and Training. Claimant is at fault for the overpayment and required to make restitution.

Referee's Decision, June 19, 2013, at 2. Ms. Kerwin appealed once more and on July 29, 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 26, 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) <u>There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.</u>

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

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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).

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 Kerwin 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. Kerwin? 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 clearly is yes, the Department did have the authority to reconsider the validity of the benefits it had provided to Ms. Kerwin. 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). Thus, § 39(b) grants the Director authority to revisit eligibility determinations but limits the time for making such a redetermination to one year. But, since all the weeks for which Ms. Kerwin's benefits were redetermined were within the year prior to May 17, 2013, I must conclude that the Department had full authority to reconsider the propriety of the benefits it had given to Ms. Kerwin.

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 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 Vukic sustained the Director's order of repayment because he found that:

> Claimant's failure to report earnings from her second part-time employment at Forecourt is without explanation or evidence to refute the employer submission of earnings and the subsequent re-calculation of partial benefits by the Department of Labor and Training.

Referee's Decision, June 17, 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.[4] To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless. Nevertheless, in this case I believe a neglect of duty has been shown.

While Ms. Kerwin maintained that she acted in good faith, she had no explanation for the differences between her true part-time earnings and the amounts she reported to the Department. Referee Hearing Transcript, at 9-15.

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

In particular, she could not explain why the amount of part-time earnings she reported each week was the same in many instances — $125.00 — when the hours she worked varied. See wage reports contained in the administrative record as Exhibit D1. One would think that — if she was reporting her earnings faithfully, as she urged — the fact that the unemployment benefits she was receiving did not fluctuate, when the hours she worked did, would have raised a flag for her, causing her to make inquiry. And so, in my view of this case I conclude that the Department did meet its burden of proving the degree of fault necessary to justify a repayment order. In light of all these circumstances, I believe the order of repayment made in this appeal is justified and must be upheld.

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 evidence on questions of fact.[5] Stated

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

differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[6]

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

/s/
Joseph P. Ippolito
MAGISTRATE

OCTOBER 30, 2013

[6] Cahoone, supra at 6, n. 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 and Guarino, supra at 6, n. 1.