



STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

Nathan D. Capalbo :  
 :  
v. : A.A. No. 14 - 006  
 :  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** After leaving his previous employment as a senior residential counselor with Child and Family Services on July 23, 2012, Mr. Nathan D. Capalbo received unemployment benefits from Rhode Island's Department of Labor and Training (DLT) during a fifty-week period beginning in August of 2012 and ending in July of 2013.

However, a month after his benefits ended, a designee of the DLT Director found that the Department had erred when it awarded benefits to Mr.

Capalbo and that, to the contrary, he should have been disqualified from receiving benefits for two reasons — first, regarding the circumstances of his separation, the DLT designee found that he left his prior employment without good cause, and was therefore ineligible for benefits as provided in Gen. Laws 1956 § 28-44-17;<sup>1</sup> and second, the DLT designee found that Mr. Capalbo was not able to work during the period he collected unemployment benefits, and was therefore disqualified under Gen. Laws 1956 § 28-44-12.<sup>2</sup> Worst still for Claimant Capalbo, in each of the DLT decisions, he was declared overpaid,<sup>3</sup> and ordered to repay all the benefits he had previously received — in the amount of \$13,313.<sup>4</sup> In the instant case, he urges that the Department’s Board of Review

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<sup>1</sup> See Director’s Decision, September 5, 2013 (No. 1334114), at 1, citing Gen. Laws 1956 § 28-44-17.

<sup>2</sup> See Director’s Decision, September 5, 2013 (No. 1336466), at 1, citing Gen. Laws 1956 § 28-44-12. As we have seen, the Director’s designee issued two decisions regarding Mr. Capalbo’s eligibility for benefits — one addressed the leaving-without-good-cause allegation (No. 1334114) and a second covered the inability-to-work issue (No. 1336466). On appeal, No. 1334114 became 2013673 before the Referee and the Board of Review; and No. 1336466 became 2013674 before the Referee and the Board.

<sup>3</sup> See Director’s Decision, September 5, 2013 (No. 1334114), at 1-2 and Director’s Decision, September 5, 2013 (No. 1336466), at 1.

<sup>4</sup> See Director’s Decision, September 5, 2013 (No. 1334114), id. While the Director’s decision in the inability-to-work case found he was overpaid, a

erred when it affirmed each of these decisions of the Director.

Jurisdiction for appeals from decisions of the Department of Labor and Training Board of Review is conferred upon the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decisions rendered by the Board of Review were, in the § 17 case, made upon unlawful procedure, and, in the § 12 case, clearly erroneous — for all but a brief period in which Claimant received benefits. I shall therefore recommend that the § 17 decision of the Board of Review be REVERSED and the § 12 decision be REVERSED in part and AFFIRMED in part.

## I

### FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: after leaving the employ of Child and Family Services, Mr. Nathan Capalbo applied for — and received — unemployment benefits from (the week-ending) August 18, 2012 through (the

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repayment order was not issued, since he was already to make restitution in the § 17 case. Director's Decision, September 5, 2013 (No. 1336466), id.

week-ending) July 27, 2013.<sup>5</sup> As stated above, in two cases, a designee of the Director declared Mr. Capalbo had been wrongly awarded unemployment benefits. At this juncture, for clarity's sake, we shall present these decisions (and their administrative travel) separately.

## A

### **The Section 17 (Leaving Without Good Cause) Case (No. 1334114/20133673)**

The Director ruled that Mr. Capalbo should have been disqualified from receiving unemployment benefits because he quit his position without good cause.<sup>6</sup> Claimant appealed from this decision and, on October 16, 2016, Referee Nancy L. Howarth conducted a hearing on the matter. Two weeks later, on October 30, 2013, the Referee issued her decisions. In the § 17 case, she made the following findings of fact:

#### **2. Findings of Fact:**

The claimant was employed as a senior residential counselor by the employer. He was out of work due to an approved medical leave of absence beginning in 2011. In February of 2012 the claimant was

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<sup>5</sup> According to Ms. Liese, the Department's witness at the hearing conducted by Referee Howarth in this case, Mr. Capalbo was determined to be monetarily eligible for benefits on or about August 16, 2012. See Testimony of Helga Liese, Senior Employment Training Manager for the Department of Labor and Training, Referee Hearing Transcript, at 3, 11.

<sup>6</sup> Decision of Director, September 5, 2013 (No. 1334114), at 1.

released to return to work part-time. The employer allowed the claimant to work twenty-four hours per week, beginning February 13, 2013. On June 14, 2012 the employer sent a letter to the claimant informing him that his part-time schedule would continue until July 26, 2012, when the claimant had a follow-up appointment with his doctor. The letter advised the claimant that he must then either return to full-time work or accept a per diem, on call position. If the claimant accepted the on call position he would be required to work at least one shift every forty five days and could refuse any other hours offered. In addition, his full-time position would be held until he was medically able to return to work. The claimant did not return to full-time work nor accept an on call position. The claimant provided medical documentation at the hearing, dated September 26, 2013, which indicates that he was able to return to work without restrictions on August 1, 2012. However, medical documentation dated July 26, 2012 and presented to the employer by the claimant at that time states that he was advised to work on a part-time basis until a reevaluation by his doctor on September 24, 2012. The claimant was considered to have voluntarily quit his job as of July 23, 2012 since he was not released to return to work and he failed to accept an on call position.<sup>7</sup>

Based on these findings, and after referencing § 28-44-17, the Referee announced the following Conclusions:

\* \* \*

In order to establish that he had good cause for leaving his job, the claimant must show that the work had become unsuitable or that he was faced with a situation that left him no reasonable alternative other than to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant. In the instant case, the claimant has not sustained this burden. The evidence and

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<sup>7</sup> Decision of Referee, October 30, 2013 (No. 20133673), at 1.

testimony presented at the hearing establish that the claimant's full-time work had become unsuitable. However, the claimant did have a reasonable alternative, other than to place himself in a position of total unemployment. He could have accepted an on call position and continued to work part-time until he was able to return to his full-time job. Since the claimant had a reasonable alternative available, which he chose not to pursue, he voluntarily left his job without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.<sup>8</sup>

And so, Referee Howarth affirmed the Director's decision denying benefits to Mr. Capalbo.<sup>9</sup>

On November 13, 2013, Claimant filed an appeal to the Board of Review; but, on December 20, 2013, a majority of the members of the Board of Review issued a decision finding the decision of the Referee was a proper adjudication of the facts and the applicable law.<sup>10</sup> The decision rendered by the Referee was thereby affirmed.<sup>11</sup> Finally, on January 17, 2014, Claimant Capalbo filed a complaint for judicial review of the Board of Review's § 17 decision in the Sixth Division District Court.

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<sup>8</sup> Decision of Referee, October 30, 2013 (No. 20133673), at 2.

<sup>9</sup> Decision of Referee, October 30, 2013 (No. 20133673), at 3.

<sup>10</sup> Decision of Board of Review, December 20, 2013 (No. 20133673), at 1.

<sup>11</sup> Decision of Board of Review, December 20, 2013 (No. 20133673), at 1.

## **B**

### **The Section 12 (Availability) Case (No. 1336466/2013674)**

The Director also ruled that Mr. Capalbo should have been disqualified from receiving unemployment benefits because — during the time he was receiving benefits — he was physically unable to work full-time.<sup>12</sup> Claimant's appeal from this decision was also reviewed by Referee Howarth at the hearing she conducted on the matter; in her § 12 decision, released on October 30, 2013, she made the following findings of fact:

#### **2. Findings of Fact:**

The claimant was employed as a senior residential counselor by the employer. He was out of work due to an approved medical leave of absence through February 13, 2012. At that time he provided medical documentation which indicated that he was restricted to work on a part-time basis. The claimant provided additional medical documentation to the employer on June 7, 2012 which provided that he was medically advised to continue working only part-time.

On June 14, 2012 the employer sent a letter to the claimant informing him that the employer could no longer accommodate him with a part-time schedule. They stated that as of July 26, 2012, the employer would require that the claimant either return to his full-time position, change to an on call, per diem position or terminate his employment. The claimant chose to terminate his employment. Although he was still medically restricted from returning to full-time work at that time he refused the offer of an

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<sup>12</sup> Decision of Director, September 5, 2013 (No. 1336466), at 1.

on call position, which would have required that he work at least one day every forty-five days and would have preserved his job when he was able to resume his full-time schedule.

When he filed his claim for benefits for each of the weeks in question the claimant represented to the Department that he was able and available for full-time work, although he has presented insufficient evidence to indicate that he had been medically released to return to full-time work.<sup>13</sup>

Based on these findings, and after quoting extensively from referencing § 28-44-12, the Referee pronounced the following Conclusions:

\* \* \*

In order to be eligible for Employment Security benefits, the claimant must be able and available for full-time work and must conduct an active and independent search for such employment. Although the claimant has presented conflicting evidence, I find that he has not established that he was able and available for full-time work when he filed his claim for benefits. Therefore, the claimant fails to meet the availability requirements of the above Section of the Act. Accordingly, benefits must be denied on this issue.<sup>14</sup>

And so, Referee Howarth affirmed the Director's decision disqualifying Mr. Capalbo because he was not able to work while he was receiving benefits.<sup>15</sup>

Claimant filed an appeal on November 13, 2013. On December 20, 2013,

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<sup>13</sup> Decision of Referee, October 30, 2013 (No. 20133674), at 1.

<sup>14</sup> Decision of Referee, October 30, 2013 (No. 20133674), at 2.

<sup>15</sup> Decision of Referee, October 30, 2013 (No. 20133674), at 3.

a majority of the members of the Board of Review issued a decision finding the decision of the Referee was a proper adjudication of the facts and the applicable law.<sup>16</sup> The decision rendered by the Referee was thereby affirmed.<sup>17</sup> Finally, on January 17, 2014, Claimant Capalbo filed a complaint for judicial review of the Board of Review's § 12 decision in the Sixth Division District Court. Obviously, we are consolidating our review of both issues into this single opinion.

## II APPLICABLE LAW

We shall now present the four main provisions of law which I believe to be pertinent to the proper resolution of this case. The first three were cited and relied upon by the Director, the Referee and the Board of Review. The fourth is one which, in my estimation, is also pertinent to this case.

### A Leaving Without Good Cause — The Section 17 Issue

Gen. Laws 1956 § 28-44-17, which specifically addresses the issue of voluntary leaving without good cause, states, in pertinent part:

**28-44-17. Voluntary leaving without good cause.** – (a) ... For

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<sup>16</sup> Decision of Board of Review, December 20, 2013 (No. 20133674), at 1.

<sup>17</sup> Decision of Board of Review, December 20, 2013 (No. 20133674), at 1.

benefits years beginning on or after July 1, 2012, and prior to July 6, 2014, an individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week in which the voluntary quit occurred and until he or she establishes to the satisfaction of the director that he or she has subsequent to that leaving had at least eight (8) weeks of work, and in each of those eight (8) weeks has had earnings greater than, or equal to, his or her benefit rate for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. ...

Based on the language of the above statute, eligibility for unemployment benefits under § 17 has three conditions — first, that the claimant left his or her prior employment; second, that the resignation was voluntary; and third, that the claimant left the position for good cause.

## **B**

### **Availability For Work — The Section 12 Issue**

This case also centers on the application of Gen. Laws 1956 § 28-44-12(a), which provides:

**28-44-12. Availability and registration for work.** -- (a) An individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work and available for work. To prove availability for work, every individual partially or totally unemployed shall register for work and shall:

...

(3) Make an active, independent search for suitable work. (Emphasis added).

As one may readily observe, subsection 12(a) requires claimants to be able and available for work and to actively search for work. It is the burden of the claimant to prove compliance with these requirements.

## C Orders of Repayment

As mentioned ante, the Director — after finding that Claimant had quit without good cause — ordered him to repay the benefits that he had received.<sup>18</sup>

Repayment orders are authorized by Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

(a) Any individual who, by reason of a mistake or misrepresentation ... 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 be liable to repay to the director for the employment security fund a sum equal to the amount so received ....

(b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 – 44 of this title.

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was at fault and where recovery

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<sup>18</sup> Decision of Director, September 5, 2013, (No. 1334114), at 2-3.

would not defeat the purposes of the Act. In my view, “fault” implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not a fraudulent intent, at least an indifference or a neglect of one’s duty to do what is right.<sup>19</sup> 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.

## **D**

### **Reconsideration**

In subsection (b) of Gen. Laws 1956 § 28-44-39, the Director of the Department of Labor and Training is granted the authority to reconsider eligibility determinations which he or she has made. It provides:

(b) Unless the claimant or any other interested party who is entitled to notice requests a hearing within fifteen (15) days after the notice of determination has been mailed by the director to the last known address of the claimant and of any other interested party, the determination shall be final. For good cause shown the fifteen (15) day period may be extended. The director, on his or her own motion, may at any time within one year from the date of the

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<sup>19</sup> 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.”

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. (Emphasis added)

As may be seen in the quotation, the Director's authority to reconsider may be exercised sua sponte, but in all cases within one year.<sup>20</sup>

### III STANDARD OF REVIEW

The standard 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;

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<sup>20</sup> This section was amended during the 2015 session of the General Assembly. Chapters 102 and 112 of the Public Laws broadened (depending on the basis of disqualification) the time period in which the Department may reconsider findings of eligibility. Each of these statutes became effective on June 19, 2015; and so, the provision quoted above was still in full force and effect on September 5, 2014 — the date of the Director's decisions.

- (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.’ ”<sup>21</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>22</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>23</sup>

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:

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<sup>21</sup> 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)).

<sup>22</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>23</sup> Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also, D’Ambra v. Board of Review, Department 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.

#### **IV**

#### **ANALYSIS**

#### **A**

#### **The Section 17 (Quitting Without Good Cause) Case (No. 1334114/20133673)**

As stated above, the Director, the Referee, and the Board of Review found that Claimant Capalbo had voluntarily separated from Child and Family Services without good cause; accordingly, each of these decision-makers ruled that he should have been disqualified from receiving unemployment benefits pursuant to Gen. Laws 1956 § 28-44-17. Normally, it would be our immediate task to evaluate the legal propriety of the last of these decisions. But, I believe that another, preliminary question must also be asked: did the Department have

the authority to reevaluate Mr. Capalbo's eligibility on September 5, 2013?<sup>24</sup> For the reasons that follow, I believe it did not — that the period of time during which the Director could exercise his authority to revisit prior eligibility determinations had expired before that date.<sup>25</sup>

## 1

### **The Impact of Section 28-44-39(b) on the Section 17 Redetermination**

Subsection 28-44-39(b), quoted ante at 12-13, places a one-year limit upon the period in which the Department may, sua sponte, reconsider a previously issued determination of eligibility. It appears that the Department made its initial determination of Claimant's eligibility in August of 2012. Indisputably, the Department's redetermination was issued on September 5, 2013.<sup>26</sup> Thus, it is clear that the Decision which the Director issued in this case was rendered after the one-year limit had expired; it was therefore made upon an unlawful procedure and in a manner contrary to law.<sup>27</sup> I must therefore recommend that

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<sup>24</sup> The date of the Director's decision was roughly thirteen months after he began to receive benefits and just over one month after his benefits ended.

<sup>25</sup> The date of the Director's decision was roughly thirteen months after he began to receive benefits and just over one month after his benefits ended.

<sup>26</sup> Decision of Director, September 5, 2013 (No. 1334114).

<sup>27</sup> See Gen. Laws 1956 § 42-35-15(g)(3) and (4). And, as we noted ante at 11, n.

the decision which the Board of Review issued in this case (holding that Claimant quit his position without good cause as provided in § 17) be set aside.

And so, we will not be able to address the § 28-44-17 argument proffered by Claimant Capalbo — i.e., that the reduction in hours and pay that were entailed in the employer’s offer gave him good cause to quit. Though I am constrained from suggesting how this issue might have been resolved, I believe I can state that, in my view, this is a substantial issue.<sup>28</sup>

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17, § 28-44-39 was amended during the 2015 session of the General Assembly in a manner designed to provide the Department with a much longer window of time in which to make a reconsideration — up to six years in cases of fraud or non-disclosure of a material fact regarding certain enumerated issues. And while I need not decide whether the Department’s redetermination would have been legal had the new provision governed this case, it is not at all clear that, had this case been decided under the new version of § 28-44-39, that a different result would have been foreordained. Under the new law, while there is a six-year window applies, there is a secondary limit which comes into play — i.e., redeterminations are limited to one-year from the date of discovery of the issue. See § 28-44-39(a)(ii) and § 28-44-39(d). It appears that the employer notified the Department of the severance pay issue in late August of 2012. See Exhibit No. D-1, at 5-6 (Document titled “Employer Separation Report and Notice of Claim Filed and attached letter from President of employer to Claimant Capalbo informing him of separation).

<sup>28</sup> See Appellant’s Memorandum of Law, at 3, citing ANNOT., Unemployment Compensation: Eligibility as Affected by Claimant’s Refusal to Work at Reduced Compensation, 95 A.L.R.3d 449 (1979). See also 76 AM. JUR. 2D Unemployment Compensation § 126

Neither will we be able to explore an even more fundamental question —

### **The Section 17 Recoupment Order**

Of course, the Director's decision finding Mr. Capalbo ineligible for benefits under § 17 also contained an order that Mr. Capalbo repay the benefits he had received over the course of 50 weeks (totaling \$13,313) pursuant to Gen. Laws 1956 § 28-42-68.<sup>29</sup> This order was fully ratified by Referee Capozza and, in turn, by the Board of Review. However, in light of my finding that the Director's September 5, 2013 decision was invalid, it is axiomatic that the order of repayment included therein must also be set aside.

### **B**

#### **The Section 12 (Availability) Case (No. 1336466/2013674)**

We now turn to a second question — one in which we once again consider Mr. Capalbo's eligibility for benefits. However, this issue does not

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whether the Claimant did, in fact, quit voluntarily; or, did he resign in the face of an imminent termination? If he did, the case would have to be analyzed under Gen. Laws 1956 § 28-44-18 (misconduct). See Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139-40 (R.I. 1991). This issue was also raised in Appellant's Memorandum of Law, at 2-3.

<sup>29</sup> Decision of Director, September 5, 2013 (No. 1334114), at 1-2.

concern the circumstances of Mr. Capalbo's separation from Child and Family Services — but, his situation while he was out of work and collecting benefits. We consider here whether Claimant satisfied the § 12 mandate that he show that while receiving unemployment benefits he was physically able to work.

## 1

### **The Disqualification For Inability to Work**

Although a substantial portion of the Referee's hearing into this matter was taken up with testimony and banter about his job-search efforts, neither the Director nor the Referee (nor the Board of Review) made any findings on this issue. Instead, they focused solely on the requirement that Claimant show that he was physically able to work — and each found he was not able to do so.

The evidence on this medical issue was sparse — two notes from Mr. Capalbo's physician, Dr. A.H. Parmenter — (1) a note dated July 26, 2012 in which the doctor requested that Mr. Capalbo be allowed to work part-time until he was re-evaluated on September 26, 2012;<sup>30</sup> and (2) a note dated September 26, 2013, indicating that the patient was able to return to work without restrictions

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<sup>30</sup> See Employer's Exhibit No.1.

on August 1, 2012.<sup>31</sup> The second note, on its face, would seem to be a medical opinion as to Claimant's condition at a certain point in time; while the first would seem to be a mere request for consideration on the patient's behalf. Logically, the second would seem to be the more intrinsically persuasive.

However, when performing an administrative review under § 42-35-15(g) we are not tasked with reevaluating the persuasiveness of the testimony and evidence received by the Board of Review; instead, we are bound to give deference to any competent evidence we find in the record; doing so, I must concede that a reasonable factfinder could view the July 26, 2012 note as indicating (if only impliedly) that Mr. Capalbo could not return to full-time work until (at least) September 26, 2012.<sup>32</sup> And so, with regard to the period from August 1, 2012 to September 26, 2012, one could find that the doctor had

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<sup>31</sup> See Claimant's Exhibit No.1. See discussion of this document at Referee Hearing Transcript, at 13-14, 19-20. At the hearing conducted by Referee Howarth, Mr. Capalbo testified that he believed himself able to work full-time as of August 1, 2012. Referee Hearing Transcript, at 19-20, 31-33. It is indeed unfortunate that the second note was dated September 26, 2013, given that September 26, 2012 was mentioned in the other note. Confusion is simply unavoidable.

<sup>32</sup> The Department seems to have viewed it in this way. See Testimony of H. Liese, Referee Hearing Transcript, at 17-19.

presented conflicting opinions. And of course, it is the job of the Board to resolve such conflicts.

But after the latter date (September 26, 2012) the conflict ends, because the July 26, 2012 note only speaks to the period until that date (i.e., September 26, 2012). From September 26, 2012 onward, the September 26, 2013 note (in which the doctor declared Mr. Capalbo fully capable of working on and after August 1, 2012) stands uncontradicted. And so, the evidence of record not only permits but requires a finding that as of September 26, 2012 Mr. Capalbo was able to work; consequently, he cannot be deemed ineligible under § 12 after that date. Conversely, the same conclusion would seem to necessitate a finding that he was unable to work (and thus ineligible for benefits) during the previous six-week period (ending with the week-ending September 22, 2012) in which he received benefits.<sup>33</sup>

However, before our work is done (on the § 12 disqualification) we must consider one other principle of law — the restraints put upon the Director (and the Board and this Court) by § 28-44-39(b).

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<sup>33</sup> These weeks are: the weeks ending August 18, 2012, August 25, 2012, September 1, 2012, September 8, 2012, September 15, 2012, and September 22, 2012.

## The Impact of Section 28-44-39(b) on the Section 12 Redetermination

We shall now discuss the impact of § 39's one-year limitation on the Director's § 12 decision. But, before we do, we must explain why § 39 is applied differently regarding § 12 issues.

We begin from a fundamental principle — a claimant's compliance, vel non, with the three § 12 prerequisites to eligibility (ability to work, availability for work, and making a proper search for work) must be evaluated for every week in which the claimant receives benefits.<sup>34</sup> This must be contrasted with separation issues, wherein we consider whether a claimant left his prior employment for good cause, or was fired for misconduct. In such cases we are analyzing one-time historical events, which cannot change.<sup>35</sup> However, a claimant who performs an insufficient job search one week can bring himself into compliance the next; a

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<sup>34</sup> Note the language of § 12(a), quoted ante at 10-11: — “[a]n individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work ....” (Emphasis added).

<sup>35</sup> Of course, our analysis of such matters may change, based on new evidence, but not the metaphysical truth of what did or did not happen.

claimant who makes himself unavailable because he takes a vacation is disqualified for that week only; a claimant who is laid-up with an illness of short duration can reestablish eligibility upon his recovery.

And so, in cases involving a § 12 disqualification, § 39's one-year limitation on redeterminations has been applied in this same manner — *i.e.*, week by week.<sup>36</sup> Applying this rule to the instant case, we must conclude that, on September 5, 2013, when the Director issued his redetermination, he had no authority to make any ruling with respect to Mr. Capalbo's eligibility (under § 12) regarding any weeks-ending before September 5, 2012 — specifically, the weeks-ending August 18, 2012, August 25, 2012, and September 1, 2012.

Since, at this point, we are pretty deep into the weeds, let us recap where we stand. The disqualification of Mr. Capalbo for weeks after September 26, 2012 because he was physically unable to work has been found clearly erroneous in light of the doctor's submissions. And the redeterminations for the three weeks Claimant collected benefits before September 5, 2012 have been found to violate the one-year redetermination provision of § 28-44-39(b). And so, as we

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<sup>36</sup> This is apparently the principle which the Department applies in such cases. See Testimony of H. Liese, Referee Hearing Transcript, at 15.

come to the last issue we must address — the Director’s recoupment order — we must understand we have arrived at a place where only three weeks of Claimant’s benefits are still in issue; they are — the weeks ending September 8, 2012, September 15, 2012, and September 22, 2012. In each of these weeks, Claimant collected \$291, for a total of \$873. But notwithstanding the substantial pruning we have done to the amount in controversy, we must perform a full analysis of the question.

### 3

#### **The Section 12 Recoupment Order**

On the issue of repayment, the Referee — after quoting extensively from Gen. Laws § 28-42-68 — found that:

\* \* \* When the claimant filed his claim for Employment Security benefits, the claimant indicated he was able and available for full-time work, although this was not the case. As a result of the claimant’s misrepresentation he received benefits to which he was not entitled. The claimant is, therefore, overpaid and at fault for the overpayment. Accordingly, it would not defeat the purpose of the act to require that the claimant make restitution.<sup>37</sup>

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<sup>37</sup> Decision of Referee, October 30, 2013 (No. 20133674), at 3. Referee Howarth made the exact same finding on the issue of recoupment in her other (leaving-for-good-cause) decision. Decision of Referee, October 30, 2013 (No. 20133673), at 2-3.

So, the Referee found fault based on Claimant's inability to prove he was able to work full-time.

Now, since we have reduced the benefits in question to the three weeks enumerated above (September 8, September 15, and September 22, 2012), we must focus on Claimant's representations as to his ability to work during these weeks, and only these weeks. In order to uphold the order of repayment we must be able to point to competent evidence that Claimant misrepresented his ability during those weeks.

As we approach this task, we can see that this might be a hard standard for the Department to meet — because so much of the inquiry can be asked (and answered) subjectively. How do I feel? Can I move? Does it hurt when I lift things? However, it seems to me that the Referee took a more objective, evidence-based approach.

As we have noted, the issue of Claimant's ability to work resolved by evaluating two conflicting reports from Mr. Capalbo's doctor. And certainly, where there is ambiguity it would be hard to find fault on the Claimant's part if he chose to proffer one opinion or the other. But we have to remember, the second note — which speaks to his ability to work as of August 1, 2012, was not

written until September 26, 2013. And while it is entirely plausible that Claimant might have had a private communication with his physician (oral or written), he did not testify to any. As a result, since he was apparently without a physician's opinion that he was ready to work full-time, I cannot state that the Director's order of repayment, as affirmed by the Board of Review, was clearly erroneous — as least as to the weeks-ending September 8, September 15, and September 22, 2012.

## V CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), a decision of the Board of Review 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.<sup>38</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>39</sup>

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<sup>38</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

<sup>39</sup> Cahoone, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board

After a thorough review of the entire record, I find that the Board of Review's decision affirming the Director's disqualification of Mr. Capalbo on the ground that he left his employment without good cause pursuant to § 28-44-17 was made upon an unlawful procedure and was otherwise contrary to law because it was made after the one-year time-limit for reconsideration of a Referee's award had expired.<sup>40</sup> With regard to the of decision finding the Claimant was unable to work while he was collecting benefits, I find that this decision is clearly erroneous with regard to all weeks of benefits occurring after the week-ending September 22, 2012;<sup>41</sup> I also find the redetermination on § 28-44-12 issue was made pursuant to an unlawful procedure with regard to all weeks of benefits occurring before the week-ending September 8, 2012.<sup>42</sup> Nevertheless, I must recommend that the finding that Mr. Capalbo was ineligible for benefits

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of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), ante at 13-14 and Guarino, ante at 14, n. 21.

<sup>40</sup> Gen. Laws 1956 42-35-15(g)(3)(4). This finding is based on an application of Gen. Laws 1956 § 28-44-39(b).

<sup>41</sup> Gen. Laws 1956 42-35-15(g)(5).

<sup>42</sup> Gen. Laws 1956 42-35-15(g)(3)(4). This finding is based on an application of Gen. Laws 1956 § 28-44-39(b).

be affirmed, but only as to the weeks-ending September 8, September 15, and September 22, 2012; and, as to only those same weeks, I recommend that the associated order of repayment be upheld.<sup>43</sup>

Accordingly, I recommend that the decisions which the Board of Review rendered in this case be REVERSED as to the § 28-44-17 (Leaving Without Good Cause) case (No. 1334114/20133673) and AFFIRMED IN PART and REVERSED IN PART as to the § 28-44-12 (Inability-to work) case (No. 1336466/2013674).

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
MAGISTRATE  
March 4, 2016

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<sup>43</sup> And so, based on my findings and conclusions, I recommend that the amount of benefits ordered repaid be reduced from \$13,313 to \$873.

