

The Town of Jamestown :
v. : A.A. No. 14 – 059
Department of Labor and Training :
Board of Review, :
(Patricia Buckley) :

FINDINGS & RECOMMENDATIONS

Ippolito, M. The Town of Jamestown participates in Rhode Island’s unemployment insurance system as a “reimbursing employer.” Under this program, in which only governmental and charitable employers may join, the town does not make regular contributions into the unemployment fund, as private employers do; instead, it agrees to pay the Department of Labor and Training (DLT) for any benefits that are provided to its employees.

In 2013 an employee of the town, Ms. Patricia Buckley, a part-time librarian, applied for unemployment benefits when her hours were cut. Conceding that the claim was perfectly proper, at least in theory, Jamestown

nonetheless asserts that the DLT Board of Review erred when it held that Ms. Buckley would not be required to repay the excessive amount of benefits she received as a result of her failure to inform the Department of her (remaining) part-time earnings.¹

Jamestown asks this Court to reverse the Board's decision and order Ms. Buckley to repay the excess benefits she received or, in the alternative, to order the DLT to deduct these funds from any future benefits she would otherwise be eligible to receive.² As a further alternative remedy, Jamestown suggests that we remand the case to the Board so that it may decide whether the Referee abused his discretion — which, it argues, was the standard of review it should have applied.³ Finally, Jamestown urges that the Department of Labor and Training should reimburse the town for the excessive benefits it paid to Ms. Buckley.⁴

Jurisdiction for appeals from the decisions of the Board of Review is vested in 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. And, for the reasons stated in this opinion, I find that

¹ Appellant's Memorandum of Law, at 5-7.

² Appellant's Memorandum of Law, at 6-7.

³ Appellant's Memorandum of Law, at 7.

⁴ Appellant's Memorandum of Law, at 7.

the Board's decision in the instant case is not clearly erroneous in light of the reliable, probative, and substantial evidence in the administrative record certified to this Court; I therefore recommend that the Board of Review's decision in this case be AFFIRMED.

I

FACTS AND TRAVEL OF THE CASE

The facts and travel of the instant case are relatively straightforward. Ms. Patricia Buckley was employed as a part-time librarian by the Town of Jamestown when, in February of 2013, her hours were reduced from 17 hours to 12 hours per week.⁵ As a result, Ms. Buckley applied for, and received, partial unemployment benefits, as provided in Gen. Laws 1956 § 28-44-7.⁶

She continued to receive benefits until the week-ending October 19, 2013. Then, on December 18, 2013, a designee of the Director of the Department of Labor and Training found that Ms. Buckley had received excessive benefits — in the amount of \$3,048.00 — because she did not properly report her earnings as required by Gen. Laws 1956 § 28-44-7.⁷

She appealed to the Board of Review, which referred her case to one of its

⁵ See Referee Hearing Transcript, January 21, 2014, at 10.

⁶ See Referee Hearing Transcript, January 21, 2014, at 5.

⁷ See Decision of Director, December 18, 2013, at 1. And see Gen. Laws 1956 § 28-44-7, quoted in pertinent part, post at 8.

hearing officers, known as “Referees.” At that hearing, conducted on January 21, 2014, Referee William Irons was joined by only two persons — Claimant Buckley and the Finance Director for the Town, Ms. Christina Collins.⁸ Ms. Buckley testified briefly; Ms. Collins not at all.⁹

Ms. Buckley’s testimony was taken up with explaining why, when she utilized the Tele-serve system each week, she answered no when she was asked whether she had received any wages during the previous week.¹⁰ She seems to have believed the question (asked by the Tele-serve system) had as its predicate the fact that she was still working part-time for Jamestown, and she was being asked whether she worked additional hours — for the town or any other employer.¹¹ A week later, on January 28, 2014, Referee Enos published his decision in Ms. Buckley’s case.

The first issue addressed by the Referee was whether Claimant properly reported her earnings to the DLT, so that her partial benefits could be properly computed pursuant to § 28-44-7. His findings were as follows —

⁸ See Referee Hearing Transcript, January 21, 2014, at 1-2.

⁹ The transcript of the hearing runs to a mere 19 pages. Referee Hearing Transcript, January 21, 2014, *passim*.

¹⁰ See Referee Hearing Transcript, January 21, 2014, at 6, 8.

¹¹ See Referee Hearing Transcript, January 21, 2014, at 8-9. As she said —“I thought it only had to do with the hours I was missing.” Id., at 9.

The claimant testified that she was confused when she reported her wages and simply made a mistake.¹²

Based on these findings, the Referee arrived at the following conclusions —

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 employed in that week. It is noted that 28-42-3(25) states that an employee is deemed partially unemployed in any week of less than full-time work.¹³

As a result, Ms. Buckley was found to have received excessive benefits from the week-ending April 20, 2013 to the week-ending October 19, 2013.¹⁴

The second issue the Referee confronted was whether the Claimant was subject to the recovery provisions of § 28-42-68. On this issue Referee Enos made the following findings of fact —

The Director determined that she did not note the proper information covering her earnings. As a result, she was considered at fault in this overpayment and declared overpaid in the amount of \$3,048 plus \$15.03 interest under Section 28-42-68 of the Rhode Island Employment Security Act.¹⁵

From these findings, and after setting forth § 28-42-68 in full, the Referee arrived

¹² See Decision of Referee, January 28, 2014, at 1.

¹³ See Decision of Referee, January 28, 2014, at 1-2.

¹⁴ See Decision of Referee, January 28, 2014, at 2.

¹⁵ See Decision of Referee, January 28, 2014, at 1.

at the following conclusions —

Findings of fault must be made. Fault is established that the claimant contributed to the overpayment. Since the claimant did not provide the proper information at the time of the filing, she is at fault in creating the overpayment. She is subject to the recovery provisions of Section 28-42-68 of the Rhode Island Employment Security Act.¹⁶

Accordingly, Ms. Buckley was ordered to repay \$3,048.00 plus interest.¹⁷

Thus, the Referee upheld both aspects of the Director's decision. Believing herself aggrieved by this decision, Ms. Buckley sought further review by the Board of Review. The Board chose not to conduct a new hearing, but, as authorized by Gen. Laws 1956 § 28-44-47, to decide the case based on the record developed by the Referee.

In its March 21, 2014 decision, a majority of the members of the Board pronounced the following findings of fact, stressing information pertinent to the issue of repayment —

The claimant worked part-time as a librarian. The claimant's hours were reduced from 17 hours a week to 12 hours a week. The claimant filed for partial Employment Security benefits on April 25, 2013, effective April 14, 2013. The claimant would call teleserve, but did not report her wages. When the claimant received her benefits, she believed the amount was not correct. She wrote a letter to the Director in April. The Director answered the letter by

¹⁶ See Decision of Referee, January 28, 2014, at 2.

¹⁷ See Decision of Referee, January 28, 2014, at 2.

telephone. The claimant was confused by the information she received over the telephone. She tried to call the Director, but could not get through. The claimant continued to receive benefits without a reduction for her earnings. On October 10, 2013, the Director requested wage information from the employer.¹⁸

With these facts in hand, the Board's majority found,¹⁹ in the "Conclusion" section of its opinion, that repayment would defeat the purposes of the Act —

As the Referee noted, under Section 28-42-68 of the Act, in order to require restitution, it must be established that the claimant was at fault in the payment of Employment Security benefits. The record established that the claimant did not report her wages, as required under Section 28-44-7 of the Rhode Island Employment Security Act. However, the claimant did observe that she was getting benefits in what she believed was the wrong amount. She wrote a letter to the Director. The Director received the letter and responded with a telephone call. The telephone call did not end the claimant's confusion. The letter and resulting phone call occurred in April. Notwithstanding the claimant's confusion, and the Director's knowledge of the situation, payments continued through October. There is no explanation (Director was not present before the Referee) as to the reason for payments being made to claimant despite the claimant's letter and the Director's telephone call to the claimant. The Director had the authority to take action to suspend payments; instead payments continued to be made with knowledge that the claimant was confused over the payment of partial benefits. It would defeat the purpose of the Act to determine, in these circumstances, that the claimant should be required to make restitution. *See* Section 28-42-68 (b) of the Act.²⁰

¹⁸ See Decision of Board of Review, March 21, 2014, at 1.

¹⁹ The Member Representing Industry dissented, stating that — "Although there was confusion on the Claimant's part, she was unjustly enriched and should pay back some of the benefits." Decision of Board of Review, at 2.

²⁰ See Decision of Board of Review, March 21, 2014, at 2.

And so, the Board of Review found that although Ms. Buckley failed to properly report her weekly earnings, her efforts to notify the Department that something seemed amiss insulated her from the duty to make repayment; in sum, the Board unanimously affirmed the Referee on the question of Claimant's non-compliance with § 28-44-7 but reversed his decision on the issue of Claimant's duty to make repayment as provided in § 28-42-68.²¹

The Town filed its complaint for judicial review with this Court on April 23, 2014. On July 8, 2014, a conference with counsel was conducted by the undersigned at which a briefing schedule was set. A helpful memorandum has been received from the Town; the Board of Review has indicated it shall not submit a memorandum.

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

²¹ See Decision of Board of Review, March 21, 2014, at 2.

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, § 28-44-7 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 § 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.

C

Government Agency Participants in the Unemployment System: Reimbursing Employers

Jamestown has asked for various remedies (in the alternative), some of which arise from its status as a reimbursing employer. To address these requests, we shall need to possess an understanding of the unemployment system as it applies to reimbursing employers.

For the most part, the unemployment benefit program operates like an insurance system — employers pay contributions (which are certainly not voluntary and which are properly considered to be taxes) to the Department of Labor and Training. The amount of these contributions is based on the size of the employer’s payroll²² and its “experience rate”²³ — which is determined by the employer’s unemployment experience (i.e., the number of its former workers who have collected benefits). These contributions become the corpus of what is

²² The size of the employer’s payroll — for purposes of the Employment Security Act — is designated its “taxable wage base.” Gen. Laws 1956 § 28-43-7(b).

²³ Gen. Laws 1956 §§ 28-43-1(5) and 28-43-8.

known as the “balancing account.”²⁴ And within the balancing account, each employer has its own “employer’s account.”²⁵ The bottom line is that if a firm’s former employee is awarded benefits, the employer’s contribution rate may increase, but benefits will come from the account.

However, within the Employment Security Act are a series of provisions which, taken together, permit governmental employers (and nonprofit employers) to avoid this system — by agreeing “to pay to the director for the employment security fund the full amount of regular benefits ... that are attributable to service in the employ ...” of the governmental employer.²⁶ Participation in the program — which is required to be established by the Federal Unemployment Tax Act (FUTA)²⁷ — is not mandatory; but if a governmental employer opts out of the program, it must join the contribution

²⁴ Gen. Laws 1956 §§ 28-43-1(1) and 28-43-2.

²⁵ Gen. Laws 1956 §§ 28-43-1(4) and 28-43-3, 28-43-4, and 28-43-5.

²⁶ Gen. Laws 1956 §§ 28-43-29(a) and 28-43-24(a). See also Gen. Laws 1956 § 28-43-31 (Emphasis added).

²⁷ See 26 U.S.C. § 3304(a)(6)(B) and 26 U.S.C. § 3309(a)(2). It has been said that Congress’s purpose in permitting governmental and non-profit employers to be “reimbursers” is to permit these employers to avoid paying more into the unemployment fund than the actual costs incurred by the unemployment program. See 76 AM. JUR. 2d Unemployment Compensation § 37 citing Wilmington Medical Center v. Unemployment Insurance Appeal Board, 346 A.2d 181, 183 (Del.Super. 1975) aff’d Unemployment Insurance Appeal Board v. Wilmington Medical Center, 373 A.2d 204 (Del. 1977).

system.²⁸ Each month, the Department bills each governmental employer for benefits paid to their former employees.²⁹

Note that the duty to repay the Department is absolute, so long as the benefits that were paid were “attributable” to work for the reimbursing employer. While the term “attributable” is not defined in the statute, we can nonetheless note that — according to lexicographers past and present — the word connotes only a causative relationship.³⁰

²⁸ Gen. Laws 1956 § 28-43-24(c).

²⁹ Gen. Laws 1956 § 28-43-30(a). Indeed, payment by state agencies is virtually automatic; invoices for state agencies are sent directly to the General Treasurer for payment. Gen. Laws 1956 § 28-43-30(b).

On the other hand, the invoices for municipalities are sent to their financial authorities. Gen. Laws 1956 § 28-43-30(c). Payment must be made within thirty days. Gen. Laws 1956 § 28-43-30(d). In the instant case, Jamestown has honored the DLT’s invoices and is seeking reimbursement.

³⁰ Mr. Webster defined the term as being an adjective meaning “That may be ascribed, imputed or attributed; ascribable; imputable; as, the fault is not *attributable* to the author.” Noah Webster, American Dictionary of the English Language (1828). But his successors do not define the adjective in a meaningful way; so, we must turn to the definition of the verb form. See Webster’s Third New International Dictionary of the English Language, (2002) at 142, wherein the second definition of the verb “attribute” is given as — “: to explain as caused or brought about by : regard as occurring in consequence of or on account of < the collapse of the movement can be *attributed* to lack of morale>.”

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;
- (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.’”³¹ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

³¹ 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).

fact.³² Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.³³

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security (1964)³⁴ that a liberal interpretation shall be utilized in construing the Employment Security Act:

* * * eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

³² Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

³³ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D’Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

³⁴ 98 R.I. 197, 200, 200 A.2d 595, 597 (1964).

IV
ANALYSIS

A

**The Board Decided That Claimant Failed to Report Her
Part-time Wages Accurately**

In this case the Board of Review affirmed the Referee's (and the Director's) determination that Claimant Buckley failed to accurately report her part-time earnings as required by Gen. Laws 1956 § 28-44-7. 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, the Referee, and the Board of Review — that Claimant was indeed overpaid.

B

**The Board Decided That Claimant Could Not Be Ordered
to Repay the Excess Benefits She Received**

In this case the Board of Review made a second decision — reversing the Director's (and the Referee's) order of repayment.

As recounted above, Referee Enos sustained the Director’s order of repayment because he found that “* * * since the claimant did not provide the proper information at the time of the filing, she is at fault in creating the overpayment.”³⁵ And so, because Referee Enos found a causative link between claimant’s inaccuracies and the overpayment, he determined her, ipso facto, to be “at fault” for the overpayment.³⁶

But, § 68 requires more than a mere invocation of the term “fault,” it requires proof of it. And what is “fault,” as that term is used in § 68? 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.³⁷ 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.

³⁵ See Referee’s Decision, January 28, 2014, at 2.

³⁶ See Referee’s Decision, January 28, 2014, at 2.

³⁷ 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.”

As I read the record, no proof was presented tending to show that the Claimant acted with wrongful intent. Ms. Buckley testified that when she was responding to the DLT's automated system (Tele-serve) each week, she believed she was being asked if she had worked anywhere else — i.e., in addition to the 12 hours she was working for Jamestown.³⁸ Although incorrect, her declaration of this belief does not seem patently implausible or deceitful per se.

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 Enos.

However, the Board did not rest its decision on a finding that the Department did not prove fault (as required by § 68); to the contrary, it found (in effect) that Ms. Buckley affirmatively proved a lack of fault.

As quoted ante, at 6-7, much of the Board's decision was dedicated to a recounting of the fact that — when her benefits began — Ms. Buckley wrote to the Director questioning the amount of benefits she was receiving; in addition she spoke to a staff member who called her.³⁹ And subsequently, and finally, she

³⁸ See Referee Hearing Transcript, January 21, 2014, at 9-10, 13.

³⁹ See Referee Hearing Transcript, January 21, 2014, at 10-13.

called the Director's office again. Based on her efforts to notify the Department of a potential discrepancy, the Board found that requiring her to make restitution of the excessive benefits she received would defeat the purposes of the Act.⁴⁰ It therefore set aside the Director's order of repayment.

I think the record in this case clearly supports both the Board's findings of fact and decision on the issue of repayment. Although she could not present a copy of the letter she sent to the Department, the Board had every right to rely on Claimant's testimony — evidence which was competent and uncontradicted. I therefore must recommend that the Board of Review's decision on the issue of recoupment be affirmed.⁴¹

⁴⁰ While I have no qualms about the propriety of the Board's decision to deny recoupment, I do have one about its analysis. I believe it is clear that the facts the Board found regarding Claimant's efforts to notify the Department of a potential error should more logically be viewed as vitiating the narrower standard element of fault, not as undercutting the much broader (and amorphous) second element, i.e., consistency with the purposes of the Act. But, viewed either way, the Board's decision that restitution could not be ordered under section 68 must be upheld.

⁴¹ It goes without saying that, if affirmed by this Court, the Board's decision setting aside the Director's recoupment order will preclude Ms. Buckley from (1) having to repay the excess benefits she received or (2) from having that amount deducted from any future benefits she might otherwise be entitled to, as urged in the Town's alternate requested remedy.

C

Assertion of Error — The Board Failed to Apply the Proper “Abuse of Discretion” Standard

The Town suggests that the instant case should be remanded for a determination of whether the Referee abused his discretion.⁴² The Town proposes that the Board’s decision should have been limited to deciding whether the Referee’s ruling violated this standard. Quite simply, this argument arises from a false premise; the Board’s authority is not so limited.

The Board of Review may decide cases on the basis of the record developed by the Referee; it may adopt the decision of the Referee as its own.⁴³ But the Board decides the cases that come before it de novo. Its discretion is in no way constrained by the prior rulings of the Referee.

D

Assertion of Error — The Board Failed to Order The Department to Reimburse the Town

The Town has reimbursed the Department of Labor and Training for all unemployment benefits it has paid to Ms. Buckley, including the amounts that the Director, the Referee, and the Board have unanimously determined to be excessive. In its Memorandum, Jamestown argues that it should not be made to

⁴² Appellant’s Memorandum of Law, at 6-7.

⁴³ See Gen. Laws 1956 § 28-44-47.

financially suffer for the Department's error, notwithstanding any determination that Mrs. Buckley was not at fault.⁴⁴

Certainly, there is a certain justice in the town's request — the Claimant is being allowed to keep monies she should not have received because the Board credited Claimant's testimony that she put the Department on notice that she was still working for Jamestown, albeit for fewer hours per week. But, after considering the merits of its position, I have concluded that Jamestown's request is without a foundation in law. In sum, as a reimbursing employer, Jamestown voluntarily assumed the duty to repay the Department of Labor and Training, without reservation, for any benefits it paid that were "attributable" to employment in its service.⁴⁵

In the time-frame pertinent to this case (her base-period), Ms. Buckley was employed solely by Jamestown. So, as a matter of simple logic, her claim must be

⁴⁴ This is perhaps an appropriate juncture to mention an intriguing issue that would have been presented had we not recommended affirmance of the Board's refusal to order restitution by Ms. Buckley — would she be held harmless by § 28-44-40(a), which precludes Claimants from having to repay benefits they received pursuant to an administrative decision later reversed? Or is that statute inapposite because the Board never ruled that she was entitled to the excess benefits, just that it would be unjust for her to be required to repay them? But, given my recommendation, I need not reach this issue.

⁴⁵ Gen. Laws 1956 §§ 28-43-29(a) and 28-43-24(a).

attributable to that position — there is no other position to which his claim could be linked. In my view, the excess unemployment benefits paid by the Department prior to the issuance of the Director’s decision are, logically, “attributable” to the Claimant’s service with that employer.

Thus, Jamestown is asking this Court to interpolate an element of correctness into the term “attributable,” where it has no right to be. As we saw in part II–C of this opinion, the term “attributable” merely connotes a causative relationship; such a connection between Ms. Buckley’s claim and her work for Jamestown is patently obvious. Nothing more need be shown.

Since Jamestown does not pay contributions into the so-called “balancing account,” as private employers do, the Department of Labor and Training cannot rightly draw these monies from that source. Nor has the legislature established a separate fund for the DLT from which to finance awards that are later reversed. And so, I do not agree with Jamestown that the legislature intended to hold reimbursing employers harmless for reversed awards.

And, viewing the issue from a broader, policy perspective, I believe the adoption of Jamestown’s position as law in Rhode Island would be disastrous — for the State of Rhode Island and its agencies, our 39 cities and towns, and the

many charitable organizations that have elected to be reimbursing employers.⁴⁶ Quite simply, such a decision would cause the end of the reimbursing system in Rhode Island. It would change the Department of Labor and Training from being the agent of the reimbursing employers to being their guarantor — holding all government employers harmless for all claims that are ultimately ruled improper. I do not believe our legislature would place the unemployment system in such an untenable (and financially unsustainable) position by mere inference. And so, I conclude that this Court cannot order the DLT to reimburse Jamestown for the monies it paid to Ms. Buckley as excessive unemployment benefits.

At the end of the day, I believe we must conclude that suffering the full effects of an overpayment by the Department is simply a risk inherent to an employer's participation in the reimbursing system.

⁴⁶ In my view, the adoption of Jamestown's position would also be disastrous for Claimants who were previously employed by governments and charities, because it would create a conflict of interest in the Department's adjudicators, who make initial eligibility determinations on the basis of telephone interviews, not formal (or informal) adversarial hearings. Quite frequently, initial eligibility determinations are often revised on appeal because additional facts (unknown to the DLT adjudicator) are revealed.

E
Summary

Pursuant to the applicable standard of review described ante at 13-14, the 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. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that Claimant should not be ordered to repay the benefits she received — because she had put the DLT on notice when she began to receive benefits that the amount did not seem correct — is well-supported by the record and should not be overturned by this Court.

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is also not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious. Gen.

Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board of Review be
AFFIRMED.

_____/s/_____
Joseph P. Ippolito
MAGISTRATE

March 25, 2015

