

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

James Oliver :  
v. : A.A. No. 15 - 085  
Dept. of Labor and Training, :  
Board of Review :

**ORDER**

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 REVERSED.

Entered as an Order of this Honorable Court on this 29<sup>th</sup> day of February, 2016.

By Order:

/s/  
Stephen C. Waluk  
Chief Clerk

Enter:

/s/  
Jeanne E. LaFazia  
Chief Judge

James Oliver :  
 :  
v. : A.A. No. 15 - 085  
 :  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case, Mr. James Oliver urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive employment security benefits because he received severance pay. 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 decision rendered by the Board of Review was affected by error of law; I therefore recommend that the Decision of the Board of Review be REVERSED.

## I

### Facts and Travel of the Case

The facts and travel of the case are these: after separating from his employment with Supermedia Sales West, Inc. on March 7, 2014, Mr. James Oliver applied for unemployment benefits — and received them for the twenty-week period from (the week-ending) March 22, 2014 through (the week-ending) August 2, 2014. However, roughly nine months after he stopped receiving unemployment benefits, on May 13, 2015, a designee of the Director of the Department of Labor and Training (DLT) decided — following the provisions of Gen. Laws 1956 § 28-44-59 — that Mr. Oliver should have been disqualified from receiving unemployment benefits because he was in receipt of a severance package equal to twenty-two weeks of benefits.<sup>1</sup> The Director also ordered Mr. Oliver to reimburse the Department for the benefits that it had given to him — in the amount of \$ 11,880.<sup>2</sup>

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<sup>1</sup> Decision of Director, May 13, 2015, at 1.

<sup>2</sup> Decision of Director, May 13, 2015, at 2.

Claimant appealed from this decision and, on June 15, 2015, Referee Carl Capozza conducted a hearing on the matter, at which Claimant Oliver was the sole witness. The Referee issued his decision a week later, on June 22, 2015, in which he made the following findings of fact:

**2. Findings of Fact:**

The claimant last worked on March 7, 2014 following which he was in receipt of his severance/dismissal pay in the amount of \$12,212.00. Information provided by the employer does not specify a set number of weeks that the severance pay represents. Accordingly, in the absence of that information the Department in accordance with the statute used his weekly benefits rate of \$566.00 in determining the number of weeks of disqualification. It determined the claimant's disqualification to be twenty-two weeks starting from his last day of work, further determining that he would not be eligible to receive Employment Security benefits through the week ending August 2, 2014.<sup>3</sup>

Based on these findings, the Referee, after quoting from § 28-44-59, issued the following Conclusions:

\* \* \*

Based on the credible testimony and documents presented in this case, I find that the claimant is subject to a disqualification period of twenty-two weeks based on his benefit rate as previously determined by the Director under the above Section of the Act.<sup>4</sup>

And so, Referee Capozza affirmed the Director's decision denying benefits to

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<sup>3</sup> Decision of Referee, June 22, 2015, at 1.

<sup>4</sup> Decision of Referee, June 22, 2015, at 2.

Mr. Oliver.<sup>5</sup>

Claimant filed an appeal on July 6, 2015. On August 20, 2015, a majority of the members of the Board of Review issued a decision finding that the decision of the Referee was a proper adjudication of the facts and the applicable law.<sup>6</sup> The decision rendered by the Referee was thereby affirmed.<sup>7</sup> Finally, on September 18, 2015, the Claimant filed a complaint for judicial review of the Board of Review's decision in the Sixth Division District Court.

## II APPLICABLE LAW

### A Severance Pay

The fundamental issue in this case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which addresses the issue of whether a claimant who received severance pay may nonetheless receive unemployment benefits; Gen. Laws 1956 § 28-44-59, provides:

**28-44-59. Severance or dismissal pay allocation.** — ... For benefit years beginning on or after July 1, 2012, for the purpose of

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<sup>5</sup> Decision of Referee, June 22, 2015, at 3.

<sup>6</sup> Decision of Board of Review, August 20, 2015, at 1.

<sup>7</sup> Decision of Board of Review, August 20, 2015, at 1.

determining an individual's benefit eligibility for any week of unemployment, any remuneration received by an employee from his or her employer in the nature of severance or dismissal pay, whether or not the employer is legally required to pay that remuneration, shall be allocated on a weekly basis from the individual's last day of work for a period not to exceed twenty- six (26) weeks, and the individual will not be entitled to receive benefits for any such week for which it has been determined that the individual received severance or dismissal pay. Such severance or dismissal pay, if the employer does not specify a set number of weeks, shall be allocated using the individual's weekly benefit rate.

## **B**

### **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 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 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>8</sup>

## C Orders of Repayment

As I mentioned ante, the Director — after finding that the severance payment Mr. Oliver received disqualified him from receiving benefits for 22 weeks — ordered Mr. Oliver to repay the 20 weeks of benefits (\$11,880) that he received.<sup>9</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 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

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<sup>8</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 May 13, 2015 — the date of the Director’s decision.

<sup>9</sup> Decision of Director, May 13, 2015, at 2.

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.

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery 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 an evil intent per se, at least indifference or a neglect of one’s duty to do what is right.<sup>10</sup> As I see the question, to find the legislature employed the term fault in a broader sense of a simple error would be to render its usage meaningless.

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<sup>10</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.”

### 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.’”<sup>11</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

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<sup>11</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).

fact.<sup>12</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>13</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:

\* \* \* 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.

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<sup>12</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

<sup>13</sup> Cahoone, ante, 104 R.I. at 506-07, 246 A.2d at 215. Also, D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1040-41 (R.I.1986).

## IV ANALYSIS

The sole issue which the Director, the Referee, and the majority of the Board of Review wrestled with in this case is straightforward: should Claimant have been disqualified from receiving unemployment benefits because he had received a substantial payment from his prior employer as part of his separation package? And so, we too could assume this is the only question before the Court. But, following the lead of the Board of Review's Member Representing Labor, as declared in his dissent, I believe that another, preliminary question must also be asked: did the Department have the authority to reevaluate Mr. Oliver's eligibility on May 13, 2015?<sup>14</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. But, before I explain the reasons for this conclusion, I shall present a short summary of the proceedings below, as they are reflected in the record certified to this Court by the Board of Review.

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<sup>14</sup> The date of the Director's decision was roughly 14 months after he began to receive benefits and 11 months after his benefits ended.

## A

### The Hearing Below

Within the certified record is the transcript of the hearing conducted by Referee Capozza on June 15, 2016. It may be summarized as follows —

After Mr. Oliver, the sole witness, was sworn,<sup>15</sup> Referee Capozza enumerated the various exhibits which had been submitted —

- The Agency’s Exhibit No. 1 was the DLT 480 form, which is summary of the data and synopses of the department’s telephone interviews with the Claimant and others;<sup>16</sup>
- the Agency’s No. 2 was the Decision of the Director;<sup>17</sup>
- the Agency’s No. 3 was the Claimant’s timely appeal from that decision;<sup>18</sup>
- the Agency’s No. 4 was made up of documents presented by the employer;<sup>19</sup> and,

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<sup>15</sup> Referee Hearing Transcript, at 2.

<sup>16</sup> Referee Hearing Transcript, at 3. This document may be found in the electronic record attached to this case, at page 38. Hereafter, citations to the electronic record shall be styled as “ER [page number].”

<sup>17</sup> Referee Hearing Transcript, at 3-4. This document may be found at ER 35.

<sup>18</sup> Referee Hearing Transcript, at 4. This document may be found at ER 32.

- the Agency's No. 5 consisted of the AS400 form and other documents.<sup>20</sup>

And then, without objection, Referee Capozza admitted these documents as full exhibits.<sup>21</sup>

At that juncture, the Referee began to question Claimant. In doing so, he established that Mr. Oliver had been employed by SuperMedia Sales for just over two years as a media consultant, until he was laid-off on March 7, 2014.<sup>22</sup> In that position, Claimant was a member of the Communication Workers of America (CWA); and, according to Claimant's testimony, officials of the union advised him (and his colleagues) that they were being laid off.<sup>23</sup> The workers were also told by the union officers that they were going to receive additional pay that was definitely not severance pay which would not affect their eligibility for unemployment benefits.<sup>24</sup>

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<sup>19</sup> Referee Hearing Transcript, at 4-5. This document may be found at ER 49.

<sup>20</sup> Referee Hearing Transcript, at 5. This document may be found at ER 42.

<sup>21</sup> Referee Hearing Transcript, at 5. The Referee also marked the notice of the hearing as Referee's Exhibit No. 1. Id., at 4.

<sup>22</sup> Referee Hearing Transcript, at 5-6. Mr. Oliver was only one among many who were laid off – indeed, his whole department was let go as part of a restructuring. Id., at 7. And, to be precise, they were actually released in early February and kept “on the books” until March 7th. Id., at 7-8.

<sup>23</sup> Referee Hearing Transcript, at 5.

<sup>24</sup> Referee Hearing Transcript, at 8-10, 16-17.

After Claimant testified to the foregoing, Referee Capozza confirmed with Mr. Oliver that he filed his claim by the internet on March 9, 2014.<sup>25</sup> Claimant agreed with Referee Capozza that the internet questionnaire did ask whether he had received severance pay.<sup>26</sup> And he conceded that he had answered in the negative.<sup>27</sup>

But, Claimant could not confirm that he was the party who had informed the Department that he had, in fact, received a payment (however denominated) of \$12,212.<sup>28</sup> And so, the Referee asked whether he had a written agreement as to the lump-sum payment he had received.<sup>29</sup> Claimant answered that he had received some paperwork, but he could not find it.<sup>30</sup> He indicated that these documents addressed issues of insurance as well as the manner in which calculations would be made for the payment of funds to those who were being terminated.<sup>31</sup> Moreover, Mr. Oliver could not remember when he had

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<sup>25</sup> Referee Hearing Transcript, at 10, 17.

<sup>26</sup> Referee Hearing Transcript, at 17.

<sup>27</sup> Referee Hearing Transcript, at 17-18.

<sup>28</sup> Referee Hearing Transcript, at 10-11.

<sup>29</sup> Referee Hearing Transcript, at 11.

<sup>30</sup> Referee Hearing Transcript, at 11-12.

<sup>31</sup> Referee Hearing Transcript, at 12.

been given the agreement; neither could he recall when he had received the lump-sum payment.<sup>32</sup>

## **B**

### **Discussion — The Legality of the Director’s Reconsideration of His Prior Determination of Claimant’s Eligibility For Benefits**

Subsection 28-44-39(b), quoted ante at 5, places a one-year limit upon the period in which the Department may, sua sponte, reconsider a previously issued determination of eligibility. Now, since the Department was not represented at the hearing before Referee Capozza, there is no testimony in the record to lead us through the Department’s handling of this case. Instead, we must examine the record ourselves, and glean therefrom what we may as to the actions of the Department regarding Mr. Oliver’s claim.

Having done so, it appears to me that the Department made its initial determination of Claimant’s eligibility on March 10, 2014.<sup>33</sup> Indisputably, the Department’s redetermination was issued on May 13, 2015, fourteen months later.<sup>34</sup> Thus, it is clear that the Decision which the Director issued in this case

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<sup>32</sup> Referee Hearing Transcript, at 13-14, 16.

<sup>33</sup> See Agency’s Exhibit No. 5, at 4; found at ER 45.

<sup>34</sup> See Agency’s Exhibit No. 2; found at ER 35.

was rendered after the one-year limit had expired. It was therefore made in a manner contrary to law.<sup>35</sup>

## C

### Repayment of Benefits Received Pursuant to § 28-42-68

#### 1

#### The Order of Recoupment Must Be Set Aside

Finally, the Director ordered Mr. Oliver to repay the benefits he received (totaling \$11,880) during the period from (the week ending) March 22, 2014 through (the week ending) August 2, 2014 pursuant to Gen. Laws 1956 § 28-42-68.<sup>36</sup> This order was fully ratified in turn by Referee Capozza<sup>37</sup> and the

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<sup>35</sup> As we noted ante at 6, n. 8, § 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 — for two reasons. *First*, a disqualification under § 28-44-59 is not one of the issues to which the longer (six-year) redetermination window applies. See § 28-44-39(a)(ii). *Second*, even where the six-year window applies, there is a secondary limit which comes into play — 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 March of 2014. See Exhibit 4, at ER 49 et seq.

<sup>36</sup> Decision of Director, May 13, 2015, at 1, contained in the record as Agency’s Exhibit No. 2.

Board of Review.<sup>38</sup> However, in light of my finding that the Director's May 13, 2015 decision was invalid, it is axiomatic that the order of repayment included therein must also be set aside.

## 2

### **The Legitimacy of the Order of Recoupment If Viewed Independently**

While I have concluded that the recoupment order must be set aside because its vitality depends upon the redetermination order — which I believe must be vacated — I should like to make a few comments regarding the propriety of the recoupment order, if viewed independently.

When reviewing the Director's order, the Referee found that:

\* \* \* The claimant filed his claim for benefits on March 9, 2014 receiving a waiting period credit for the week ending March 15, 2014 and benefits for the weeks ending March 22, 2014 through August 2, 2014 totaling \$11,880.00. When filing his claim for benefits the claimant indicated he was not in receipt of severance pay, at which time the Department determined him eligible. Prior to his last day of work, the claimant was given thirty day notice of the severance which he signed on March 28, 2014.<sup>39</sup>

Referee's Decision, June 22, 2014, at 1. Based on this finding, the Referee arrived at the following conclusions on the issue of recoupment:

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<sup>37</sup> Decision of Referee, June 22, 2015, at 2-3.

<sup>38</sup> Decision of Board of Review, August 20, 2015, at 1.

<sup>39</sup> Decision of Referee, June 22, 2015, at 1.

The credible testimony and evidence in this case indicates that the claimant did not provide full disclosure to the Department of Labor and Training with regard to the information it requested concerning severance pay. As a result, I find that the claimant is overpaid benefits for the weeks in issue March 22, 2014 through August 2, 2014 totaling \$11,880. It is further determined since the claimant did not provide full disclosure regarding severance that he is at fault for the overpayment of benefits received by him for the weeks ending March 22, 2014 through August 2, 2014 totaling \$11,880. Therefore, it would not defeat the purposes for which the Employment Security Act was designed to require repayment of that amount to the Department of Labor and Training as previously determined by the Director under the above Section of the Act.<sup>40</sup>

Thus, the Referee found fault based on Claimant's failure to inform the Department that he had received severance pay. For two reasons, I would suggest that the finding of fault is, at best, questionable.

First, the evidence of the payment, though competent, was sparse. While Claimant Oliver conceded that he had received a significant cash payment when he was terminated, he consistently maintained that he was told that it was not a "severance" payment.<sup>41</sup> The employer, in the document marked Agency's Exhibit No. 4, reported that he would be paid severance of \$12,212 on March

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<sup>40</sup> Decision of Referee, June 22, 2015, at 2-3.

<sup>41</sup> Ironically, we know that the dispute about nomenclature was immaterial. The statute, § 28-44-59, provides that disqualification may be triggered by "any remuneration received by an employee from his or her employer in the nature of severance or dismissal pay." Therefore, the designation is not dispositive. But that was the focus of the hearing.

28, 2014.<sup>42</sup> But, Mr. Oliver’s testimony regarding what he was told is uncontradicted in the certified record.<sup>43</sup>

Second, the Department seems to have been put on notice as to the “severance” payment. The report of the employer, received into the record as Agency’s Exhibit No. 4, was, on its face, submitted on March 19, 2014 at 4:49 p.m.<sup>44</sup> Thus, it seems that the Department was fully put on notice of the payment that Mr. Oliver had received.<sup>45</sup> In my opinion, this circumstance could have been found to have totally vitiated any finding of fault on the part of Claimant Oliver.

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<sup>42</sup> This exhibit may be located in the electronic record at ER 49 et seq. I say “would be” because the report was submitted on March 19, 2014, before the payment was made. See ER 51.

<sup>43</sup> While there seems to have been a written agreement that Mr. Oliver signed before receiving his pay-out — which may have provided definitive proof of Mr. Oliver’s understanding of the nature of the payment — it was not entered into evidence.

<sup>44</sup> See ER 49 to ER 52. Each page of the report is marked (in a heading) “Date Submitted: 03/19/2014 04:49:22 PM EDT.”

<sup>45</sup> It is because the Department received this notice that the new version of § 59 would not have validated the Director’s reconsideration in this case, since March 19, 2014 is obviously more than a year prior to the date of the Director decision — May 13, 2015. See discussions of revised statute, ante at 6, n. 8 and at 15, n. 35.

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>46</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>47</sup>

After a thorough review of the entire record, I find that the Board of Review's decision affirming the Director's reconsideration of Mr. Oliver's eligibility for unemployment benefits pursuant to § 28-44-59 of the Rhode Island Employment Security Act was contrary to law in that it failed to recognize that the Director's order was made without authority — since it was

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<sup>46</sup> Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

<sup>47</sup> Cahoone, ante n. 46, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), ante at 8 and Guarino, ante at 8, n. 11.



