

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.  
SIXTH DIVISION**

**DISTRICT COURT**

**John Reis** :  
 :  
v. : **A.A. No. 11-58**  
 :  
 :  
**Department of Labor & Training,** :  
**Board of Review** :

**ORDER**

This matter is before the Court pursuant to § 8-8-16.2 of the General Laws for review of the Findings & Recommendations of the Magistrate.

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

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 18<sup>th</sup> day of August, 2011.

By Order:

\_\_\_\_\_/s/\_\_\_\_\_  
Melvin Enright  
Acting Chief Clerk

Enter:

\_\_\_\_\_/s/\_\_\_\_\_  
Jeanne E. LaFazia  
Chief Judge

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**FINDINGS & RECOMMENDATIONS**

**Montalbano, M.** This matter is before the Court on the complaint of Mr. John J. Reis seeking judicial review of a final decision rendered by the respondent Board of Review of the Department of Labor and Training, which held that Mr. Reis was subject to the charges imposed upon him as provided under section 28-43-3(2) of the Rhode Island Employment Security Act. This matter was referred to me on July 19, 2011 for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-16.2. After review of the entire record, I find that the decision of the panel should be affirmed and I so recommend.

**FACTS & TRAVEL OF THE CASE**

A statement of charges was mailed to the claimant owner of the partnership known as Partnership to Address Violence through EDUC, Inc. (hereinafter “PAVE”) for benefits paid to him in April 2009 and charged to his account. The

notice of charges was mailed to the claimant on May 15, 2009 in accordance with section 28-43-3(2) of the Rhode Island Employment Security Act. The claimant was denied on a late appeal of that determination by Referee's decision dated June 24, 2010. That decision was thereafter affirmed by the Board of Review and upon appeal to the District Court, A.A. No.: 6AA-2010-00165, his late appeal was allowed and the matter was remanded to the Referee for a decision on the substantive issues under section 28-43-3(2) raised during a previous hearing before Referee Carl Capozza on June 22, 2010, at which time the claimant had appeared and testified. A Department of Labor and Training representative had also participated in the hearing before the Referee.

In his March 1, 2011 decision, the Referee made the following findings of fact:

2. FINDINGS OF FACT:

A notice of charges for the month ending April 30, 2009 was mailed to the claimant/employer on May 15, 2009. The notice requested that the claimant/employer pay the total amount as stated \$3,016.00 in accordance with that notice. The Department had determined that since claimant/employer was the most recent base period employer, he was subject to the payment of those charges.

Referee's Decision, at 1. The Referee affirmed the decision of the Director with regard to the statement of charges in accordance with § 28-43-3(2) of the Rhode Island Employment Security Act, concluding that the claimant/employer was the most recent base period employer for the period at issue, and that charges were properly imposed on the claimant/employer under the law.

The employee filed a timely appeal of the Referee's March 1, 2011 decision and the matter was reviewed by the Board of Review. On May 6, 2011 the Board of

Review issued its decision adopting and incorporating by reference the factual findings of the appeal tribunal (Referee), and affirmed the conclusions of the Referee as to the applicable law. Decision of Board of Review, at 1.

### **APPLICABLE LAW**

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses circumstances for crediting and charging of employer's accounts because of employee's receiving unemployment benefits; Gen. Laws 1956 § 28-43-3, provides:

#### **28-43-3. Employer's Accounts – Credits and Charges.**

Subsequent to the establishment of a separate employer's account for each employer subject to chapters 42--44 of this title as set forth in § 28-43-1(4), the credits and charges to each employer's account, exclusive of the state of Rhode Island, its political subdivisions, and their instrumentalities, shall be determined as follows:

(1) Credits to each employer's account: (i) After the September 30, 1958 computation date all contributions required under § 28-43-8 and paid by each employer; (ii) All surcharges required and paid under § 28-43-4. (2) Charges to each employer's account: (i) Refunds of overpayments under § 28-43-13, as of the date refunded; (ii) For benefit years beginning subsequent to September 30, 1993, an amount equal to the benefits provided in §§ 28-44-6(a) and (b), 28-44-7, and 28-44-8, and paid to each individual with respect to a benefit year, as of the date paid. Those benefits shall be charged to the account of the most recent base period employer, as defined in § 28-43-1(7). \* \* \*

Determinations that an employer should be appropriately billed for unemployment benefits are questions of fact. Rosbo Plastic Corp. v. LaMantia, 254 A.2d 734 (R.I. 1969). In Rosbo Plastic the Supreme Court held that a previous base period employer will not be held liable for billed compensation benefits paid to a laid off employee when the employee subsequently worked for a secondary employer, and was discharged from that employer also. Id.

## 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>1</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>2</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>3</sup>

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<sup>1</sup> Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN LAWS 42-35-15(g)(5).

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

<sup>3</sup> Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). See also D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

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 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 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.

### **ISSUE**

The issue before the court is whether the decision of the Referee, adopted by the Board of Review, that the claimant/employer in this matter was subject to the charges imposed upon him as provided under section 28-43-3(2) of the Rhode Island Employment Security Act was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

### **ANALYSIS**

Claimant, John Reis, received unemployment benefits subsequent to his discharge from the YWCA of Greater Rhode Island, when subsequently the Department of Labor and Training (hereinafter “DLT”) discovered that he was also

claiming income under his own corporation, PAVE. The DLT issued a bill on May 15, 2009 to PAVE, claimant's corporation, for \$3,016 for unemployment benefits received while he was an acting corporate officer and receiving compensation from PAVE, which the Referee found to be at least \$1,000. Transcript, at 24-25.

Merely owning a business or acting as a corporate officer does not disqualify a person from receiving unemployment benefits if they do not receive any compensation, but if profits or compensation are given, that owner/employee is not totally unemployed and therefore ineligible to receive benefits. See Gesualdi v. Board of Review of Dept. of Empl'y't Security, 374 A.2d 102 (R.I. 1997). Claimant is a corporate officer and owner of PAVE and received compensation while collecting unemployment (in at least the amount of \$1,000), therefore Mr. Reis is disqualified from receiving unemployment benefits from the YWCA. Transcript, at 24-25; Decision of Referee, at 1; see also Rosbo Plastic Corp. v. LaMantia, 254 A.2d 734 (R.I. 1969). The benefits Mr. Reis received (\$3,016) while claiming unemployment from the YWCA must be paid by his actual base employer at the time, PAVE. Since PAVE does not contribute quarterly to the unemployment contribution fund, but has elected to pay unemployment individually when someone receives benefits under their company name, PAVE must pay DLT's bill dated May 15, 2009 in the amount of \$3,016 which was previously collected by Mr. Reis. Transcript, at 17; Gen. Laws 1956 § 28-43-29.

This Court will not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Thus, the findings of the agency must be upheld, even though a reasonable fact-finder might have reached a contrary result.

## CONCLUSION

Upon thorough review of the entire record, this Court finds that the Board's decision to affirm the charges imposed on the claimant/employer under section 28-43-3(2) were not "clearly erroneous in view of the reliable, probative and substantial evidence of the whole record." § 42-35-15(g)(5). Neither was said decision "arbitrary capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion." § 42-35-15(g)(6).

Accordingly, I recommend that the decision rendered by the Board of Review in this case be AFFIRMED.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph A. Montalbano  
MAGISTRATE

August 18, 2011