

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
Providence, Sc.

DISTRICT COURT
SIXTH DIVISION

Antonio B. Tudino :
v. : A.A. No. 13 - 131
Department 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 AFFIRMED.

Entered as an order of this Court at Providence on this 8th day of October, 2013.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. Antonio B. Tudino urges this Court to set aside a decision rendered by the respondent Board of Review of the Department of Labor and Training which was adverse to his efforts to receive employment security benefits. Jurisdiction for appeals from the decisions of the Department of Employment and Training Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. These matters have been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

I. FACTS AND TRAVEL OF THE CASE

During 2012 and 2013 Mr. Tudino was receiving unemployment benefits when — on May 30, 2013 — the Director determined that he should repay a portion of the benefits he had received. The Director decided that in 2012 and 2013 Mr. Tudino received an excessive amount of unemployment benefits because he failed to accurately report his earnings from a part-time job with ADP/Mastec Services, breaching a duty imposed upon him by Gen. Laws 1956 § 28-44-7. See Director's Decision, May 30, 2013. The Director found Mr. Tudino at fault for the resulting overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered him to make restitution in the amount of \$11,305.48 plus interest.

Mr. Tudino appealed and a hearing was held on June 27, 2013 before Referee John Palangio. The same day Referee Palangio issued a decision in which he affirmed the Director's decision. In doing so he made the following Findings of Fact:

The claimant filed for benefits for the weeks ending August 19, 2012 through February 2, 2013 through the use of the teleserve payment system. During that period the claimant was partially employed and in partial benefits status. When using the system, the claimant was requested and required to enter and report his gross wages for each and every week in which he claimed benefits. The claimant did not, resulting in an overpayment of benefits for those weeks totaling \$11,305.48. The claimant could not provide a plausible reason for his failure to report his wages accurately.

Referee's Decision, June 27, 2013, at 1. As a result of these findings, the Referee

concluded that Mr. Tudino failed to accurately report his wages:

...

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

The testimony and evidence presented in this case indicates that the claimant was not in compliance with the reporting requirements of the above Section of the Act with the weeks at issue and presented no valid reasons for his not doing so. Questions on the teleserve were explicit in requesting the entry of the gross wages earned by the claimant for the weeks in which he was claiming benefits. Based on these conclusions it is determined that the claimant was not in compliance with the above section of the Act as previously determined by the Director.

Referee's Decision, June 27, 2012, at 1-2. He also found him to be subject to a repayment order pursuant to section 28-42-68:

Since the claimant did not properly record his earnings for the weeks in issue as required, a correct calculation of the amount of benefits to which he was entitled could not be determined by the Director with regard to the weeks in issue. I find, under the circumstances, that he was overpaid benefits for those weeks and at fault for his nondisclosure and, therefore, determine that it would not defeat the purposes for which the Employment Security Act was designed to require him to repay those benefits as previously determined by the Director under Section 28-42-68 of the Act.

Referee's Decision, June 27, 2013, at 2. Mr. Tudino appealed once more and on July 29, 2013 the Board of Review unanimously found the Referee's decision to be a

proper adjudication of the facts and the law applicable thereto. Claimant filed a timely appeal in the Sixth Division District Court on August 13, 2013.

II. APPLICABLE LAW

A. Partial Benefits.

Gen. Laws 1956 § 28-44-7 provides:

28-44-7. Partial unemployment benefits. – For weeks beginning on or after July 1, 1983, an individual partially unemployed and eligible in any week shall be paid sufficient benefits with respect to that week, so that his or her week’s wages, rounded to the next higher multiple of one dollar (\$1.00), as defined in 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week..

As one may readily observe, section 7 provides that a person who would be otherwise eligible for benefits may work without being disqualified from receiving benefits; instead, the wages they earn will be offset against the benefits to which they would be otherwise entitled to receive.

B. Repayment.

Gen. Laws 1956 § 28-42-68 provides in pertinent part:

(a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to

the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15. * * *

(b) 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 section 28-42-68 specifies that repayment cannot be ordered where (1) the recipient is without fault or where (2) recovery would defeat the purposes of the Act.

III. STANDARD OF REVIEW

The standard of review by which the court must proceed is established in Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

42-35-15. Judicial review of contested cases.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”¹ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.² Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.³

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964), that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

* * * eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which

¹ Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

² Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

³ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968). Also D’Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

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. Wage Reporting.

In this case the Board of Review affirmed the Director’s determination that Claimant Tudino failed to accurately report his part-time earnings as required by Gen. Laws 1956 § 28-44-7. In order to review this determination we must address two questions — (1) did the Department have the authority to reconsider the benefits it had awarded to Mr. Tudino? and, (2) was the Board’s redetermination correct?

1. The Department’s Authority to Reconsider Eligibility Determinations.

I believe the answer to the threshold question is — yes, the Department did have the authority to reconsider the validity of the benefits it had provided to Mr. Tudino.

This question is governed by Gen. Laws 1956 28-44-39(b), which provides in pertinent part:

(b) * * * The director, on his or her own motion, may at any time within one year from the date of the determination set forth in subdivision (a)(1) of this section reconsider the determination, if he or she finds that an error has occurred in connection with it, or that the determination was made as a result of a mistake, or the nondisclosure or misrepresentation of a material fact.

(c) * * *

Gen. Laws 1956 28-44-39(b)(Emphasis added). Thus, § 39(b) grants the Director authority to revisit eligibility determinations any time within one year. I must therefore conclude that on May 30, 2013 the Department had authority to reconsider the propriety of the benefits it had given to Mr. Tudino since August of 2012.

2. The Accuracy of the Department's Redeterminations.

In this record there is no suggestion that the computation made by the Department on the question of claimant's part-time earnings is inaccurate. It was made on the basis of wage reports that are contained within the record forwarded to this Court by the Chairman of the Board of Review. Accordingly, I accept the veracity of the Department's findings without reservation. I must therefore conclude — as did the Director and the Board of Review — that Claimant was indeed overpaid.

B. Repayment

In this case the Board of Review made a second decision — affirming the Director's order of repayment.

As I recounted above, Referee Palangio sustained the Director’s order of repayment because he found that the “... claimant did not properly report his earnings for the weeks in issue as required...” Referee’s Decision, June 13, 2013, at 2. And because he found a causative link between Claimant’s inaccuracies and the overpayment, the Referee determined him, ipso facto, to be “at fault” for the overpayment. Id.

But the repayment statute requires more than a mere invocation of the term “fault.” In my view “fault” implies more than a mere causative relationship, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one’s duty to do what is right.⁴ To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless.

But in my view, the circumstances of this case lead one to the ineluctable conclusion that Mr. Tudino was at least neglectful of his duty to report his earnings accurately. The amounts of the underreported earnings are — taken week by week — very large indeed. At the hearing before Referee Palangio, Mr. Tudino was unable to

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

offer a rational explanation for the size of the discrepancy between his reported and actual earnings.

I would also note that the Referee went through the teleserve questionnaire with Claimant, explaining how it takes an applicant through the process of reporting his or her earnings, and he took no exception to the Referee's version. Referee Hearing Transcript, at 10-11.

On the basis of the foregoing, I believe the Board of Review's decision to sustain the Department's order of repayment is not clearly erroneous or contrary to law.

V. CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.⁵ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁶

⁵ Cahoone, supra at 6, n. 2.

⁶ Cahoone, supra at 6, n. 2. See also D'Ambra v. Bd. of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws 1956 § 42-35-15(g), supra at 5-6 and Guarino, supra at 6, n. 1.

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

_____/s/_____
Joseph P. Ippolito
MAGISTRATE

OCTOBER 8, 2013