**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**
**DISTRICT COURT** **SIXTH DIVISION**

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| **Martin Hughes** | : | |
| | : | |
| **v.** | : | **A.A. No. 11 - 0029** |
| | : | |
| **Department of Labor and Training,** | : | |
| **Board of Review** | : | |

## O R D E R

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 in PART and REVERSED in PART.

Entered as an order of this Court at Providence on this 15th day of February, 2012.

By Order:

__/s/_____
Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**
**PROVIDENCE, Sc. DISTRICT COURT**
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## F I N D I N G S & R E C O M M E N D A T I O N S

**Ippolito, M.** In this case Mr. Martin Hughes urges this Court to overturn four decisions rendered by the respondent Board of Review of the Department of Labor & Training, all of which were 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 General Laws 1956 § 8-8-8.1.

## I. FACTS AND TRAVEL OF THE CASES

During 2009 and 2010 Mr. Hughes was receiving unemployment benefits (subject to offsets for wages earned at a part-time position he held at Rhode Island Fast Ferry) when — in August of 2010 — the Director issued four decisions curtailing his unemployment benefits and ordering that he repay certain benefits

previously received. These decisions were affirmed by a Board of Review Referee and, ultimately, by the Board of Review itself. Mr. Hughes then filed a consolidated appeal from all four decisions with this Court.[1] I shall, of course, disclose the facts and travel of each decision seriatim presently.

But before doing so, I should explain — in the interests of clarity — that these four decisions may fairly be grouped, by legal issue, into two pairs. In the first pair of cases (Appeal Nos. 20104231 and 20104233) the Director decided that in 2009 and 2010 Mr. Hughes received an excessive amount of unemployment benefits because he failed to accurately report his earnings from his part-time job with Rhode Island Fast Ferry; in each decision, the Director ordered Mr. Hughes to repay the excess benefits he had received. In the second pair of cases (Appeal Nos. 20104232 and 20104234), the Director decided that Mr. Hughes had been wrongfully deemed eligible for benefits in 2009 and 2010 because he was not truly available for work but was in fact, engaged in other full-time employment (with firms other than Rhode Island Fast Ferry). With this overview in mind, I shall now review the facts and travel of each of the Board's decisions.

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[1] To avoid confusion, I shall refer to each in the manner utilized by the Referee at the consolidated hearing held in this case — i.e., by their Board of Review appeal numbers.

## A. Appeal Number 20104231 — Failure to Report Part-Time Wages Accurately During 2009

This appeal considered a Decision of the Director issued on August 10, 2010 in which the Director determined Mr. Hughes was overpaid for fourteen weeks between May and October, 2009.[2] The Director found that Mr. Hughes failed to accurately report wages he had earned at Rhode Island Fast Ferry during this period into the Department's electronic data systems as required by Gen. Laws 1956 §§ 28-44-7 and 28-42-3(25). Director's Decision, August 10, 2010. The Director found Mr. Hughes at fault for this overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered Mr. Hughes to make repayment in the amount of $1,044.00 plus interest.

Mr. Hughes appealed and a hearing was held on November 30, 2010 before Referee Raymond Maccarone Jr.[3] On December 15, 2010 Referee Maccarone issued a decision in which he affirmed the Director. He found that while in benefit status:

> The claimant worked for this employer usually on weekends, Saturday and Sunday. The claimant had been earning $11.00 per hour as a deckhand. The claimant stated that at the time he requested his benefits either utilizing the Tele-Serve System or the Internet, he usually did not have a paystub. The claimant would estimate his hours once he did receive a stub on a bi-weekly basis

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[2] Specifically, the weeks in question were — the five weeks ending June 20, 2009, July 4, 2009, July 11, 2009, July 18, 2009, August 8, 2009, August 22, 2009, September 5, 2009, September 12, 2009, September 19, 2009, and October 10, 2009.

[3] The record of the hearing of appeal numbers 20104231 and 20104233 is contained on pages 9-25 of the transcript of the November 30, 2010 proceedings.

and split the gross earning in half.

Referee's Decision, December 15, 2010 (20104231UC), at 1. The Referee noted that the Director had subsequently determined the amounts listed by Mr. Hughes to be inaccurate. Id. Accordingly, Referee Maccarone — on the basis of Gen. Laws 1956 § 28-44-13 as well as §§ 28-44-7 and 28-42-3(25), which had been cited by the Director — found claimant had failed to accurately report his part-time earnings. Referee's Decision, December 15, 2010 (20104231UC), at 2.

Next, Referee Maccarone — after noting that a finding of "fault" is a prerequisite to a repayment order — found that Mr. Hughes should make repayment because " * * * claimant's actions contributed directly to the creation of the overpayment." Referee's Decision, December 15, 2010 (20104231UC), at 3. See Gen. Laws 1956 § 28-42-68. Thus, the decision of the Director was affirmed.

Claimant appealed once more and on February 28, 2011 a majority of the Board of Review found the Referee's decision to be a proper adjudication of the facts and the law applicable thereto; the Member Representing Labor dissented only on the ancillary issue of repayment. Claimant filed a timely appeal in the Sixth Division District Court on March 23, 2011.

**B. Appeal Number 20104232 — Availability for Full-Time Work in 2009**

This case considered a decision issued by the Director on August 12, 2010 in which claimant was retroactively disqualified from receiving benefits for the twenty weeks ending October 3, 2009 pursuant to Gen. Laws 1956 § 28-44-12

(Availability) because he informed his employer that he could not work during the week because he was working full-time as a sales person for another firm. See Director's Decision, August 12, 2010, in record as Department's Exhibit 5.

Claimant appealed and the issue of his availability was also considered at the November 30, 2010 hearing before Referee Maccarone. On December 15, 2010, he issued a separate decision — numbered 20104232UC — on this second issue. Referee Maccarone found that — "The claimant stated that he was occupied full time on a daily basis at his new position. The claimant did indicate that sales for his new employer were slow and that he generated very little if any earnings." Referee's Decision, December 15, 2010 (20104232UC), at 1. Nevertheless, the Referee found claimant had been overpaid and was subject to an order of restitution as provided in Gen. Laws 1956 § 28-42-68. Referee's Decision, December 15, 2010 (20104232UC), at 3.

The matter was reviewed by the Board of Review and on February 28, 2010 the Board of Review unanimously found the Referee's decision to be a proper adjudication of the facts and the law applicable thereto.

**C. Appeal Number 20104233UC — Failure to Report Part-Time Wages Accurately During 2010**

Like Appeal Number 20104231, this appeal considers an August, 2010 determination by the Director that claimant Hughes was overpaid during the four weeks in May and June of 2010 because he failed to accurately report wages he had earned into the Department's electronic data systems as required by Gen. Laws

1956 §§ 28-44-7 and 28-42-3(25). Director's Decision, August 2, 2010. Moreover, the Director found Mr. Hughes at fault for this overpayment and, under the authority of Gen. Laws 1956 § 28-42-68, ordered Mr. Hughes to make repayment in the amount of $506 plus interest.

Mr. Hughes appealed and a hearing was held on November 30, 2010 before Referee Raymond Maccarone Jr. On December 15, 2010 Referee Maccarone issued a decision in which he affirmed the Director. He found that while in benefit status:

> The claimant worked for this employer usually on weekends, Saturday and Sunday. The claimant had been earning $11.00 per hour as a deckhand. The claimant stated that at the time he requested his benefits either utilizing the Tele-Serve System or the Internet, he usually did not have a paystub. The claimant would estimate his hours once he did receive a stub on a bi-weekly basis and split the gross earning in half.

Referee's Decision, December 15, 2010 (20104233UC), at 1. The Referee noted that the Director had subsequently determined the amounts listed by Mr. Hughes to be inaccurate. Id. Accordingly, Referee Maccarone — on the basis of Gen. Laws 1956 § 28-44-13 as well as §§ 28-44-7 and 28-42-3(25), which had been cited by the Director — found claimant had failed to accurately report his part-time earnings. Referee's Decision, December 15, 2010 (20104233UC), at 2.

Next, Referee Maccarone — noting that a finding of "fault" is a prerequisite to a repayment order — again found that Mr. Hughes should make repayment because " * * * claimant's actions contributed directly to the creation of the overpayment." Referee's Decision, December 15, 2010 (20104233UC), at 3. See Gen. Laws 1956 § 28-42-68. Thus, the decision of the Director was affirmed.

Claimant appealed once more and on February 28, 2011 the Board of Review unanimously found the Referee's decision to be a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, February 28, 2010, at 1.

**D. Appeal Number 20104234— Availability for Full-Time Work in 2010**

This case considered a decision issued by the Director on August 12, 2010 in which claimant was retroactively disqualified from receiving benefits during five weeks in May and June of 2010[4] pursuant to Gen. Laws 1956 § 28-44-12 (Availability) because he informed his employer that he could not work during the week because he had begun to work full-time as a sales person for another firm. See Director's Decision, August 12, 2010, in record as Department's Exhibit 5.

Claimant appealed and the issue of his availability was also considered at the November 30, 2010 hearing before Referee Maccarone. On December 15, 2010, he issued a separate decision — numbered 20104234UC — on this issue.

Referee Maccarone found that — "The claimant stated that he was occupied full time on a daily basis at his new position. The claimant did indicate that sales for his new employer were slow and that he generated very little if any earnings." Referee's Decision, December 15, 2010 (20104232UC), at 1. Nevertheless, the Referee found claimant had been overpaid and was subject to an order of restitution as provided in Gen. Laws 1956 § 28-42-68. Referee's Decision,

[4] These are the weeks ending May 22, 2010, May 29, 2010, June 5, 2010, June

December 15, 2010 (20104232UC), at 3.

The matter was reviewed by the Board of Review and on February 28, 2010 the Board of Review unanimously found the Referee's decision to be a proper adjudication of the facts and the law applicable thereto.

## II. APPLICABLE LAW

### A. Availability.

Two of the cases — Appeal Nos. 20104231 and 20104233 — center on the application of the following provision of the Rhode Island Employment Security Act, which enumerates one of the several grounds upon which a claimant may be deemed ineligible to receive unemployment benefits. Gen. Laws 1956 § 28-44-12(a), 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:
>
> (1) File a claim for benefits within any time limits, with any frequency, and in any manner, in person or in writing, as the director may prescribe;
>
> (2) Respond whenever duly called for work through the employment office; and
>
> (3) Make an active, independent search for suitable work.
>
> (b) * * *
>
> (Emphasis added).

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12, 2010, and June 26, 2010.

As one may readily observe, section 12 requires claimants to be able and available for full-time work and to actively search for work.

The test for work-availability under section 12 was established in Huntley v. Department of Employment Security, 121 R.I. 284, 397 A.2d 902 (1979):

> * * * The foregoing authorities persuasively suggest a rule of reason for Rhode Island under which a court faced with a question of availability for suitable work would make a two-step inquiry in the event that a claimant places any restrictions upon availability. First: are these restrictions bottomed upon good cause? If the answer is negative, the inquiry ends and the claimant is ineligible for benefits under the Employment Security Act. If the answer is affirmative, the second stage of the inquiry must be made: do the restrictions, albeit with good cause, substantially impair the claimant's attachment to the labor market? If the answer to this inquiry is affirmative, then the claimant is still ineligible for benefits under the Act.
>
> If, on the other hand, the restrictions do not materially impair the claimant's attachment to a field of employment wherein his capabilities are reasonably marketable, in the light of economic realities, then he is still attached to the labor market and is not unavailable for work in terms of our statute. For example, if a claimant, as in several cases cited, is unavailable for work for 2 or 3 hours out of the 24, in a multi-shift industry, it would be harsh, indeed, to declare such an employee unavailable. If a claimant placed such restrictions upon availability that he would only be available 2 or 3 hours out of 24 for work of a nature which he was able to perform, however good the cause or compelling the reason, he would have in effect removed himself from the labor market and could not, therefore, be eligible for employment benefits.
> Huntley, 121 R.I. at 292-93, 397 A.2d at 907.

## 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 clearly indicates that repayment cannot be ordered where (1) the recipient is without fault and where (2) recovery would not 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.' "[5] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[6] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[7]

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,

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[5] 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).

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

[7] 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).

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.

## IV. ANALYSIS

To reiterate, I find that the first and third decisions of the Board of Review enumerated above (Appeal Numbers 20104231UC and 20104233UC) share a common issue, as do the second and fourth (Appeal Numbers 20104232UC and 20104234UC). Accordingly, for purposes of analysis and resolution, I shall address them in these pairings.

### A. Appeal Numbers 20104231UC and 20104233UC — Wage Reporting.

In these case numbers the Board upheld determinations by the Director that claimant had failed to correctly report his earnings in violation of Gen. Laws 1956 § 28-44-13. In this record there is no suggestion that the computation made by the Department on this question regarding claimant's earnings is inaccurate. Accordingly, I accept the veracity of the Department's computation without

reservation. I therefore find — as the Director and the Board of Review did — that claimant was indeed overpaid.

However, I do disagree with the second aspect of these two cases, wherein the Director ordered repayment. As I recounted above, Referee Maccarone sustained the Director's order of repayment because he found that the " * * * claimant's actions contributed directly to the creation of the overpayment." Referee's Decision, December 15, 2010 (20104231UC), at 3. And because he found a causative link between claimant's inaccuracies and the overpayment, the Referee ordered repayment.

But the repayment statute requires more — it requires a finding of 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.[8] 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.

Clearly there is no proof Mr. Hughes acted with wrongful intent. He stated — and the Department has not proven otherwise — that he reported his earnings by dividing his earnings for the week in half — he was paid bi-weekly and the

[8] 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."

Department required him to report his part-time earnings weekly. Referee Hearing Transcript, at 10-12. In his mind he was doing the best he could to answer the Department's questions.[9]

When Mr. Hughes gave this explanation the Referee commented — " * * * A lot of times that works okay. A lot of times it doesn't work. Uh, because there are some differences in the hours, it's not exactly half. * * * ". Referee Hearing Transcript, at 12. I draw from this statement that the Referee viewed the method claimant used as imprecise — although not necessarily completely inaccurate either.

Another complicating factor is the fact that the Department operates on a Sunday through Saturday week, and the ferry company operated on a Monday through Sunday week. Referee Hearing Transcript, at 18, 22. Since Mr. Hughes was working weekends for the employer, this difference would affect the earnings he should have reported.

In light of all these circumstances, I believe the order of repayment made in these two appeals is clearly erroneous and must be set aside. [10]

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[9] It should be noted that Mr. Hughes was self-reporting on the Department's automated telephone system or on its web-based system. He was not being interviewed by a staff member who could explain the questions. When an agency adopts a self-reporting system, it must expect, and allow for confusion. For example, we know that the Department wants claimants to report monies earned during the week (i.e., wages that are due them), but a lay person tends to report wages received during the week (i.e., wages that were actually paid to them).

[10] Regarding the appeal in 20104231, I also believe that the recalculation of wages prior to August 10, 2009 was unauthorized and illegal. See Gen. Laws 1956 § 28-44-39 (establishing one-year recalculation limitation). For application of this

## B. Appeal Numbers 20104232UC and 20104234UC — Availability.

The second pair of cases — Appeal Numbers 20104231UC and 20104233UC — center on the resolution of a very different issue. Facially, each concerns a finding that Mr. Hughes was unavailable for full-time work during extended periods in 2009 and 2010 because he was fully engaged from Monday through Friday in a sales position. However, before addressing the availability issue under § 28-44-12, I do believe that I must first address a threshold issue implicated by the Board's decision in Appeal Number 20104232.

### 1. No. 20104232UC — Authority to Reconsider Issue.

I believe the following threshold question is triggered by the Director's decision of August 12, 2010 — and the Board's decision to sustain it —

> Did the Director have the authority, on August 12, 2010, to reconsider decisions made about Mr. Hughes' availability for work more than one year prior?

I believe it did not.

In my view this question is governed by Gen. Laws 1956 28-44-39(b), which limits the Director's authority to revisit eligibility determinations to one year, even in cases of nondisclosure or misrepresentation. Section 39(b) provides in pertinent part:

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rule as to Appeal No. 20104232, see section IV(b)(1) at 15-16, infra.

> (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). I therefore conclude that the Director had no authority to reconsider eligibility determinations made more than one year prior. Accordingly, I shall recommend that orders of repayment based on earnings recalculations made regarding weeks prior to August 12, 2009[11] be vacated.

**2. The Availability Issue.**

Resolving the issue of claimant's availability under section 28-44-12 is made more difficult than it needed to be because of a definite lack of focus on the issue during the November 30, 2010 hearing before Referee Maccarone. Instead of focusing on the crucial issue (i.e., whether Mr. Hughes was engaged in employment that precluded his engaging in other, more rewarding, full-time work), the hearing focused on a red herring — whether Mr. Hughes had turned down offers of full-time employment with the ferry company each spring. As a result, the record is not as clear as it might have been on the availability issue.

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[11] Although the Referee simply referred to Mr. Hughes' disqualification during the twenty weeks ending October 3, 2009, the Director's decision specified that overpayments were made in the weeks ending May 23, 2009, May 30, 2009, June 6, 2009, June 13, 2009, June 20, 2009, July 4, 2009, July 11, 2009, July 18, 2009, and August 8, 2009 — and four other weeks after August 12, 2009.

I refer to the issue of Mr. Hughes' alleged rejection of full-time work with Rhode Island Fast Ferry as a red herring because it was immaterial to the issue before the Referee and the Board — availability, which is defined in Gen. Laws 1956 § 28-44-12. Mr. Hughes' alleged refusal of suitable work vel non would have to be considered under Gen. Laws 1956 § 28-44-20, which had not been noticed as a basis for disqualification. Therefore, this issue was not properly before the Referee or the Board and was immaterial in both proceedings.[12] Nevertheless, it was a point the employer's representative felt constrained to mention.

**(a) No. 20104232UC — 2009.**

In this heading we shall consider the rectitude of the Director's redetermination that Mr. Hughes was unavailable for work in 2009 after August 12, 2009.[13]

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[12] It may also be noted at this juncture that availability — as a basis for disqualification — differs greatly from the other bases that most frequently arise — such as committing misconduct, leaving without good cause or refusal of suitable work. These latter reasons for disqualification all concern questions about historical events — E.g., Did the claimant steal from the company? Did the claimant leave his job because a coworker was annoying? Did he refuse a good-paying job that was offered? All these questions concern past events but availability is always an issue to be determined presently. Whether, while unemployed, the claimant is looking for work, or is unable to work due to a non-work relate car accident are questions that the Department is required to answer each week of his unemployment. Viewing the matter from this perspective, it is easy to see that Mr. Hughes' availability in July of 2009 (or 2010) is completely unrelated to his alleged refusal of a job in March.

[13] To reiterate, Appeal No. 20104232 originally concerned the entire twenty-week period ending October 3, 2009. See specification of period supra fn. 10 at 16.

However, I shall recommend that the redetermination regarding the portion of the twenty-week period ending October 3, 2009 prior to August 12,

To begin, Mr. Hughes testified that at the beginning of the 2009 season — which starts in May — he told the ferry company he was not available for full-time work because he was working during the work week as a sales representative for the Innovative Textiles Corporation. Referee Hearing Transcript, at 33, 40-1.[14] But, as the spring turned to summer, Mr. Hughes sought other employment.

Mr. Hughes further testified that his employment with Bio Defense Corporation started on July 1, 2009 and that, at least technically, he was still working for them as of the date of the hearing — November 30, 2010. Referee Hearing Transcript, at 35. Claimant testified he made no earnings from this employment. Referee Hearing Transcript, at 33, 45. Mr. Hughes testified that he started corresponding with another company — from Texas — about a job in December of 2009. Referee Hearing Transcript, at 38. Based on his testimony, I believe there was substantial evidence to support the Referee's finding that the claimant was engaged in full-time work and unavailable for work within the meaning of section 28-44-12 during the period beginning on August 12, 2009 and ending on October 3, 2009.

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2009 be vacated and stricken because it was rendered in violation of the one year limitation on redeterminations found in section 28-44-39. See section IV(B)(1) of this decision, supra, at 15-16.

[14] From context, I infer Mr. Hughes is referring to Innovative Textiles in his testimony on page 33 of the transcript; however, the name of the corporation is

**(b) No. 20104234UC — 2010.**

In this, the fourth and final decision issued by Referee Maccarone (and the Board) in this case, the Director found that Mr. Hughes was unavailable for work during five weeks in May and June of 2010. See specification of weeks in this case, supra, fn. 4 at 7.

At the combined hearing held in this case, Mr. Hughes testified that as of June — presumably June of 2010 — his full-time employer had no interest in him. Id. Mr. Hughes testified that at the end of June, beginning of July — presumably in 2010 — he asked Rhode Island Ferry for more hours after the "Texas thing" fell through, but was told nothing was available because "people were already hired." Referee Hearing Transcript, at 39.

Apparently, the Referee found this testimony credible, because he held that Mr. Hughes' disqualification did not extend into July of 2010. After reviewing the record, I find that there was substantial evidence supporting a finding that Mr. Hughes was not available for full-time work prior to July 1, 2010 but was available after that date.

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designated "inaudible" at that point.

## 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.[15] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[16]

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 in Appeal Numbers 20104231 and 20104231 be AFFIRMED regarding the findings that Mr. Hughes failed to accurately report his wages but I recommend that the associated orders of repayment be REVERSED and VACATED, as being contrary to fact and law.

For the reasons stated above, I recommend that the decision of the Board of Review in Appeal Number 20104232 be AFFIRMED IN PART and REVERSED IN PART (with regard to the portion of the Director's redetermination purporting to redetermine Mr. Hughes' eligibility for benefits in weeks prior to August 12,

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[15] Cahoone, supra at 11, fn. 6.

[16] Cahoone, supra at 11, fn. 6. See also D'Ambra v. Bd. of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 11 and Guarino, supra at 11, fn. 5.

2009). Finally, I recommend that the decision of the Board of Review in Appeal Number 20104234 be AFFIRMED.

___/s/_____
Joseph P. Ippolito
MAGISTRATE

FEBRUARY 15, 2012