STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Westerly Public Schools	:	
	:	
v.	:	**A.A. No. 13 - 101**
	:	
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 and the memoranda of counsel, 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 instant case is DISMISSED for mootness.

Entered as an Order of this Court on this 17th day of November, 2014.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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v.	:	**A.A. No. 13 – 101**
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Department of Labor and Training	:	
Board of Review,	:	
Department of Labor and Training	:	
Charles J. Fogarty, Director	:	
(Jason M. Piccirilli)	:	

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. The Westerly Public Schools participates in Rhode Island's unemployment insurance system as a "reimbursing employer." Under this program, in which only governmental and charitable employers may participate, Westerly does not make regular contributions into the unemployment fund as private employers do; instead, it agrees to pay the Department of Labor and Training for any benefits that are provided to its former employees.

In the instant complaint for judicial review Westerly asserts that the Board of Review of the Department of Labor and Training erred when it held that its

former employee, Mr. Jason Piccirilli, was entitled to receive employment security benefits. Westerly also urges that the Board committed error by finding that it was required to reimburse the Department of Labor and Training for the benefits it had provided to Mr. Piccirilli. In response, the Department of Labor and Training and the Board of Review cry out with one voice their shared belief that the instant case should be dismissed because it is non-justiciable due to mootness.

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. After reviewing the circumstances surrounding the instant case and the issues presented in it, I find that it is indeed non-justiciable due to mootness; I therefore recommend that it be DISMISSED.

I
FACTS AND TRAVEL OF THE CASE

A
Background, and the Between-Terms Claim

Although the significant facts of the case are relatively few, the travel of the case is extensive:[1] In the fall of 2008, Mr. Jason M. Piccirilli was initially hired as a

[1] In order to fully comprehend and relate the facts and travel of this case, I have consulted, in addition to the record in the instant case, the records in the two prior cases, Piccirilli v. Department of Labor and Training Board of Review,

per-diem substitute teacher by the Westerly Public Schools.[2] But shortly thereafter he was retained as a long-term substitute.[3] Originally engaged until January of 2009, his employment in this capacity was ultimately extended until June of 2009.[4] And although he received a letter dated June 3, 2009 from the school system informing him that he had a "reasonable assurance" of work as a substitute teacher in the next academic year, he filed a claim for between-term unemployment benefits.[5] But, on July 14, 2009, a designee of the Director of the Department of Labor and Training found that Mr. Piccirilli was barred from receiving benefits during the summer vacation period pursuant to Gen. Laws 1956 § 28-44-68.[6]

Mr. Piccirilli appealed, urging that he had received "… no guarantee of

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A.A. No. 09-165 ("Piccirilli"), and Westerly Public Schools v. Board of Review of the Department of Labor and Training, A.A. No. 11-24 ("WPS I").

[2] See Decision of Referee, August 19, 2009, at 1, and Referee Hearing Transcript, August 18, 2009, at 14, both found in Piccirilli. Note — this decision may also be found appended to Westerly's Complaint in the instant case as Exhibit 9.

[3] See Decision of Referee, August 19, 2009, at 1 and Referee Hearing Transcript, August 18, 2009, at 7, found in Piccirilli.

[4] See Decision of Referee, August 19, 2009, at 1 and Referee Hearing Transcript, August 18, 2009, at 7, found in Piccirilli.

[5] See Decision of Referee, August 19, 2009, at 1; Referee Hearing Transcript, August 18, 2009, at 8; and Director's Exhibit No. 5, also found in Piccirilli.

[6] See Decision of Director, July 14, 2009, at 1, found in Piccirilli, as Director's Exhibit No. 2. Note — it may also be found appended to Westerly's complaint in the instant case as Exhibit 7. And see Gen. Laws 1956 § 28-44-68, quoted in pertinent part, post at 30-31.

identical working conditions."[7] A hearing on his claim was held on August 18, 2009 before Referee Stanley Tkacyk who, the following day, issued a decision affirming the Director's disqualification of Mr. Piccirilli.[8] Referee Tkacyk noted that a § 28-44-68 disqualification is triggered if the teacher (or other educational worker) merely has a reasonable assurance of work in a similar capacity — a reasonable assurance of work in an identical capacity is not required.[9]

Mr. Piccirilli appealed again and the matter was considered by the Board of Review. In a decision dated September 21, 2009, the members of the Board of Review unanimously affirmed the decision of the Referee, finding it was a proper adjudication of the facts and the law applicable thereto.[10] Mr. Piccirilli filed an appeal with the Sixth Division District Court but, on December 3, 2009, this Court entered an order in which his appeal was "… denied without prejudice to allow the Claimant an opportunity to file a new claim for benefits as of August 30, 2009."[11]

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7 See Decision of Referee, August 19, 2009, at 1.

8 See Decision of Referee, August 19, 2009, at 1-2.

9 See Decision of Referee, August 19, 2009, at 1.

10 See Decision of Board of Review, September 21, 2009, at 1, appended to Westerly's complaint as Exhibit 10.

11 See Order, Piccirilli v. Department of Labor and Training, Board of Review, A.A. No. 09-165, (Dist.Ct.12/03/09)(Rahill, J.)(Emphasis added), appended to Westerly's complaint as Exhibit 11. A review of that file (A.A. No. 09-165) shows that Westerly was given notice as an interested party.

B

The Fall-Term Claim

The last clause of this Court's 2009 order was undoubtedly inserted because the parties were aware that, when the fall-2009 academic term began, Westerly had not needed a long-term, foreign-language, substitute teacher, as it had the previous year; as a result, Mr. Piccirilli's status with Westerly had reverted to that of a per-diem substitute — as such, he was one among many who was registered to apply for daily assignments.[12]

But even this less lucrative relationship did not endure. On November 3, 2009, the Westerly Public Schools sent Mr. Piccirilli a letter inquiring about the status of his teaching certificate.[13] Westerly then suspended his access to its substitute-teacher assignment system until he presented a new certificate.

Now, having received (from the District Court) leave to file a new claim for the 2009-2010 academic-year, Mr. Piccirilli did so — and began to receive benefits. But when the Westerly Public Schools learned these benefits were being provided, it protested, causing the Department to reexamine Claimant's eligibility.[14] Subsequently, on February 11, 2010, a designee of the Director issued a decision

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12 See Referee Hearing Transcript, August 18, 2009, at 10, 13.

13 See Director's Exhibit No. 1, at 6, for sample of form.

14 See Director's Exhibit No. 1, at 4, found in WPS I. This letter may also be found in Exhibit 15 to Westerly's complaint.

holding that Mr. Piccirilli was disqualified from receiving benefits, pursuant to Gen. Laws 1956 § 28-44-17 because he was found to have left his position — constructively, by failing to maintain his teaching certificate — without good cause; he was also ordered to repay the benefits he had received in that period.[15] Five days later a designee of the Director issued a decision finding Claimant to be disqualified from receiving benefits on a second ground — that he had not shown that he had conducted an adequate job search as required by Gen. Laws 1956 § 28-44-12.[16]

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[15] See Decision of Director, February 11, 2010, at 1, found in WPS I and appended to Westerly's complaint in this case as Exhibit 18. This disqualification applied to the period from the week-ending September 12, 2009 to the week-ending February 6, 2010. Id.

[16] See Decision of Director, February 16, 2010, at 1 found in WPS I and appended to Westerly's complaint in this case as Exhibit 19. This disqualification was effective during the same period stated in the § 17 decision. Id. Repayment was not ordered a second time. Id.

It is distressing to Westerly (though ultimately inconsequential) that, just before these decisions were issued, the DLT sent Mr. Piccirilli (in addition to his weekly benefits) a retroactive payment reflecting benefits for the period back to September of 2009. I brand this payment inconsequential because, as we shall see, the Referee reversed the Director's decisions and allowed benefits — in effect, ratifying the prior payments. A retroactive payment would have issued then, in any event.

Had the Referee not ordered benefits, a more precise question would have been presented — whether a reimbursing employer may be billed for payments the Department made prior to its initial adjudication? This question arises because the Department routinely starts to pay benefits based on information provided by the claimant. But, if the benefits given are later determined, in the Director's initial decision, to be unsupported in law or fact, repayment can be

Mr. Piccirilli appealed both decisions. Consequently, on April 6, 2010 a consolidated hearing was held before Referee William G. Brody. Despite receiving notice, no representatives of the Westerly school system appeared.[17] As such, Mr. Piccirilli was the only witness.[18]

He testified that he assumed his full-time, substitute teaching position teaching Spanish for Westerly in the third week of September, 2008.[19] In February

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ordered — because the § 28-44-40(a) prohibition on recoupment only applies when the claimant has collected benefits pursuant to an administrative decision that has been appealed by the employer. As was discussed at the Board of Review hearing, this would have been the situation had the Referee sustained the Director (the chances for which would presumably have increased if Westerly had presented a case). Board of Review Hearing Transcript, at 88. And in this narrower context, Westerly's complaint that the Department violated Gen. Laws 1956 § 28-44-38(c) by failing to give it proper notice that Mr. Piccirilli had filed a second claim might also have carried greater weight. See discussion of § 38(c) issue, post at 39, n. 131.

I should note that it has been my experience that the Department has never sought repayment for any benefits received when the Board or a Referee has allowed benefits — even for those payments received prior to the first decision. The Department may base its practice on a straightforward reading of the last sentence of § 40(a), wherein it states "any benefits" received shall not be recovered. See § 28-44-40(a), quoted post at 27. To my knowledge, the Supreme Court has not ruled on this issue. Cf. Dr. Lee Arnold v. Department of Labor and Training Board of Review, 822 A.2d 164, 169 (R.I. 2003)(In analysis of unemployment attorney-fee claim, Court finds benefits approved by Director not in issue — but Court does not clarify whether benefits were received before Director's formal decision was issued).

17 See Referee Hearing Transcript, April 6, 2010, at 1, 2.

18 See Referee Hearing Transcript, April 6, 2010, at 1, 2.

19 See Referee Hearing Transcript, April 6, 2010, at 7. Later, he testified he began

of 2009 he was informed that the position would expire at the end of the school year (which came on June 26, 2009).[20] He stated he had not received a formal letter of dismissal, so he called the school department on July 10, 2009.[21]

Mr. Piccirilli asserted that his lack of a teaching certificate in the fall of 2009 was not a problem; indeed, he had assumed his full-time duties in September of 2008 without a certificate — but obtained it quickly after he was hired.[22] Mr. Piccirilli explained that he needed the $50.00 renewal fee — and felt he could renew it forthwith if a position came his way.[23] The Claimant also told Referee Brody how he began to receive benefits in the third week of November, 2008 and later received a retroactive payment encompassing the period back to September.[24] At the close of the evidence, he told the Referee he had a job interview that afternoon.[25]

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the position in the second week of September. Id., at 16.

20 See Referee Hearing Transcript, April 6, 2010, at 8-9. He was told this was in the context of the cancellation of the fourth and fifth-year language programs along with the AP program. Referee Hearing Transcript, April 6, 2010, at 8.

21 See Referee Hearing Transcript, April 6, 2010, at 10-13.

22 See Referee Hearing Transcript, April 6, 2010, at 16-17.

23 See Referee Hearing Transcript, April 6, 2010, at 17-18. Mr. Piccirilli explained that he possesses two masters' degrees in education and that, given his qualifications, renewing his license would not be a problem. Id., at 18.

24 See Referee Hearing Transcript, April 6, 2010, at 11.

25 See Referee Hearing Transcript, April 6, 2010, at 20.

In two decisions issued on April 27, 2010, the Referee set aside both decisions of the Director, finding: first, that Claimant did not quit but was laid-off by Westerly — his job having been abolished due to a lack of funding,[26] and second, that Mr. Piccirilli was available for work, even though he had not renewed his teaching certificate, since he could have done so administratively at any time.[27] Westerly appealed but on May 26, 2010 the Board of Review adopted both Referee decisions as their own.[28]

C

The Motion to Re-Open

Westerly did not appeal within the thirty-day period allotted by law; but instead, filed with the Board of Review, on June 25, 2010, what it styled a "Consolidated Motion to Re-open" encompassing both decisions.[29] In the motion Westerly explained its failure to attend the hearing before Referee Brody thusly — "Because the Department believed that the April 6, 2010 hearing would focus on whether Claimant Piccirilli was legally required to repay the benefits he had

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[26] See Decision of Referee, April 27, 2010, No. 20101208, at 1 (section 17), appended to Westerly's Complaint in this case as Exhibit 2.

[27] See Decision of Referee, April 27, 2010, No. 20101209, at 1 (section 12), appended to Westerly's Complaint in this case as Exhibit 3.

[28] See Board of Review Decisions, May 26, 2010, at 1.

[29] This motion may be found as Exhibit T to Westerly's Complaint for judicial review in Westerly Public Schools v. Board of Review of the Department of Labor and Training, A.A. No. 11-24 (WPS I).

wrongfully received, it did not believe that the Department need appear. As a result, no person from the Department appeared at the April 6th hearing."[30]

This motion was denied.[31] Then, on January 28, 2011, Westerly requested the case be re-opened a second time.[32] And, in a decision dated February 10, 2011, the Board of Review again denied Westerly's request.[33] This time, Westerly appealed to the District Court and, by agreement, Westerly was granted an opportunity to be heard — by order dated May 18, 2011, this case was remanded to the Board for further proceedings on the Consolidated Motion to Reopen.[34]

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30 Id., at 8, ¶ 27. Also Board of Review Hearing Transcript, (3/26/2013), at 59-60.

Westerly's rationale for failing to appear at the hearing betrayed a fundamental misunderstanding of the unemployment-claim appeals process by its staff. A subjective misapprehension of this sort is unlikely to be recognized as excusable neglect or good cause sufficient to justify a new hearing because — if it were — fairness would require the flood-gates to be swung open to accommodate all errors of nescience.

31 This decision may be viewed as Exhibit S to Westerly's Complaint for Judicial Review in WPS I.

32 This motion may be viewed as Exhibit U to Westerly's Complaint for Judicial Review in WPS I.

33 This decision may be viewed as Exhibit A to Westerly's Complaint for Judicial Review in WPS I.

34 See Order, Westerly Public Schools v. Department of Labor and Training Board of Review, A.A. No. 11-024 (Dist.Ct. 05/18/2011), at 1-2.

D

Proceedings on Remand and the Instant Case

Pursuant to our order, a new hearing was held by the Board of Review, at which Mr. Piccirilli[35] and Ms. Deborah Kopech,[36] Human Resources Coordinator for the Westerly Public Schools, testified.[37]

Ms. Kopech testified first. She began by explaining the differences in status among "tenured teachers," "probationary teachers," and "substitute teachers."[38] Specifically, she testified that substitute teachers are not covered by collective bargaining, [39] are not covered by a continuous contract that extends from year to year,[40] and are generally hired through the AESOP system, which is an on-line (or telephone) data system that lists available teaching assignments that substitute

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35 See Board of Review Hearing Transcript, March 26, 2013, at 77 et seq. It should be noted that the Board of Review hearing transcript is incorrectly labeled. The hearing was held on March 26, 2013, not May 11, 2010. Id., at 1-2.

36 See Board of Review Hearing Transcript, March 26, 2013, at 4 et seq. At most times pertinent to this case, she was Assistant to the Director of Finance and Administration. Id., at 5.

37 It is clear from the transcript that the Board of Review gave Westerly a full hearing — not one limited to reconsideration of the Motion to Re-Open. As such, the Board went beyond the mandates of our Order.

38 See Board of Review Hearing Transcript, March 26, 2013, at 6-16.

39 See Board of Review Hearing Transcript, March 26, 2013, at 10.

40 See Board of Review Hearing Transcript, March 26, 2013, at 10. And so, they do not have to be notified by March 1 that their contracts will not be renewed. Id., at 16.

teachers can select.[41] She noted that Westerly issues a letter each June to all the substitute teachers that they wish to retain.[42]

After providing this background, Ms. Kopech began to speak to Mr. Piccirilli's particular circumstances.[43] She explained that in June of 2009 Westerly had received a form from the Department of Labor and Training indicating that Mr. Piccirilli was seeking benefits.[44] She filled out the "employer" parts of the form on Westerly's behalf.[45] She informed the Department that Mr. Piccirilli had been assured that he would be rehired as a substitute teacher in the fall term.[46]

Next, Ms. Kopech explained the travel of the summer-term claim: she identified a document that Westerly received notifying them that Mr. Piccirilli's claim had been denied on the ground that he had reasonable assurance of work in the fall term.[47] She indicated Mr. Piccirilli appealed and a hearing was held before

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41 See Board of Review Hearing Transcript, March 26, 2013, at 13-16.

42 See Board of Review Hearing Transcript, March 26, 2013, at 17.

43 See Board of Review Hearing Transcript, March 26, 2013, at 18 et seq.

44 See Board of Review Hearing Transcript, March 26, 2013, at 18-19. This document was marked as the Employer's Exhibit 1.

45 See Board of Review Hearing Transcript, March 26, 2013, at 19-20.

46 See Board of Review Hearing Transcript, March 26, 2013, at 21. Gen. Laws 1956 § 28-44-38(c) requires this form to be returned by the employer within seven days — otherwise, the employer forfeits all right to oppose the claim.

47 See Board of Review Hearing Transcript, March 26, 2013, at 22-23. The document, a "Director's Decision," was marked Employer's Exhibit 2.

the Referee on August 18, 2009.[48] She indicated she participated by telephone.[49] At this point a member of the Board suggested that the facts (and travel) were not in dispute and that they could move ahead to the point where the District Court upheld the denial of summer-term benefits to Mr. Piccirilli with leave to file a new claim effective August 30, 2009.[50]

Following this suggestion, Ms. Kopech testified that Westerly did not receive notice that Mr. Piccirilli filed a new claim.[51] She testified that they first learned that Mr. Piccirilli had been receiving benefits from the week-ending November 29, 2009 onward from a Division of Taxation notice that they received in January.[52] In response, Westerly sent a protest letter to the Department of Labor which opposed Mr. Piccirilli's new claim on two bases — (1) a reasonable assurance letter had been sent, and (2) Mr. Piccirilli's certification had expired on August 31, 2009.[53]

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48 See Board of Review Hearing Transcript, March 26, 2013, at 23-24.

49 See Board of Review Hearing Transcript, March 26, 2013, at 24.

50 See Board of Review Hearing Transcript, March 26, 2013, at 25. This order was entered on December 3, 2009. Id., at 26.

51 See Board of Review Hearing Transcript, March 26, 2013, at 26.

52 See Board of Review Hearing Transcript, March 26, 2013, at 27.

53 See Board of Review Hearing Transcript, March 26, 2013, at 28-29. Ms. Kopech testified that this information was sent to "Ellen" at the Department of Labor and Training on January 22, 2010. Id., at 30. The document was Marked Employer's Exhibit 3 for purposes of the hearing. Id.

Ms. Kopech was asked to identify a document she recognized as a letter that is sent out through the AESOP system to substitute teachers whose certification has expired.[54] She testified Mr. Piccirilli received such a letter.[55] Because they did not receive his recertification, Mr. Piccirilli was dropped from Westerly's AESOP system on December 18, 2009.[56] She testified that, if the Claimant had submitted a renewed certificate, he could have stayed in Westerly's AESOP system and obtained jobs as they became available.[57]

Subsequently, on February 10, 2010, she had a telephone conversation with a person named Bob Morrow at the Department of Labor and Training, whom she quoted as describing the receipt of benefits ($528.00 per week) by Mr. Piccirilli as being "totally inappropriate."[58]

Ms. Kopech did acknowledge receiving an employer copy of a decision by

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54 See Board of Review Hearing Transcript, March 26, 2013, at 30-32. The form letter advises each teacher that if they send in a completed renewal form they can be extended for two months. Id., at 31. It was marked as Employer's Exhibit 4. Id., at 30.

55 See Board of Review Hearing Transcript, March 26, 2013, at 32.

56 See Board of Review Hearing Transcript, March 26, 2013, at 32-33.

57 See Board of Review Hearing Transcript, March 26, 2013, at 50-51. Ms. Kopech testified that it cost $50.00 to renew a substitute teacher's certification. Id., at 33.

58 See Board of Review Hearing Transcript, March 26, 2013, at 35-36.

the Department denying benefits to Mr. Piccirilli.[59] This notice informed Westerly that — as a reimbursing employer — it was responsible to repay the Department for benefits it had provided to the Claimant.[60] Ms. Kopech further testified that the Westerly Public Schools had not received notice of the hearing that had led to the Department's decision.[61] And she stated that Westerly received additional bills from the Department of Labor in February and March of 2010.[62]

Ms. Kopech testified that Westerly submitted its motion to re-open after the school system received notice of the decisions made in April by Referee Brody that granted benefits to Mr. Piccirilli.[63] Ms. Kopech also described a letter which Westerly found in the Department's file from Board of Review Chairman Thomas Daniels to an employee of the Board named Carol Gibson.[64]

And then, answering a question posed by counsel for the Department, Ms.

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59 See Board of Review Hearing Transcript, March 26, 2013, at 39-41. This document was dated February 11, 2010. Id., at 39.

60 See Board of Review Hearing Transcript, March 26, 2013, at 40.

61 See Board of Review Hearing Transcript, March 26, 2013, at 42. This was curious phraseology, because the designees of the Director do not conduct hearings. They make adjudications solely on the basis of the documents they have received and telephone inquiries they make.

62 See Board of Review Hearing Transcript, March 26, 2013, at 43-44. The March invoice included retroactive payments back to September of 2009. Id., at 44.

63 See Board of Review Hearing Transcript, March 26, 2013, at 45.

64 See Board of Review Hearing Transcript, March 26, 2013, at 46-48.

Kopech indicated that Westerly became aware that Mr. Piccirilli had filed a second claim for benefits, for the fall term, when it received invoices from the Department of Labor and Training.[65] They protested, and then received decisions from the Director denying Claimant fall-term benefits.[66] Ms. Kopech then conceded that Westerly had received two notices, in March, of the hearing conducted by Referee Brody — one concerned "Voluntary Quit Without Good Cause, Overpayment; Available Requirements, Overpayment" and the other "Availability Requirements; Overpayment."[67] She stated she did not attend because she was "baffled" as to what was happening and did not understand the purpose of the hearing.[68]

At roughly this point Ms. Kopech's testimony ended — the remainder of the hearing was mostly taken up with what could be generously described as advocacy and discourse.[69]

However, before the hearing closed, Mr. Piccirilli testified briefly. He said that he had been hired for one academic year, earning $200.00 per day as a full-

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65 See Board of Review Hearing Transcript, March 26, 2013, at 54.

66 See Board of Review Hearing Transcript, March 26, 2013, at 54-56.

67 See Board of Review Hearing Transcript, March 26, 2013, at 56-58.

68 See Board of Review Hearing Transcript, March 26, 2013, at 59-60. Counsel for Westerly stipulated for the record that notice of the hearing was received by the school system. Id., at 60.

69 See Board of Review Hearing Transcript, March 26, 2013, at 66 et seq.

time, long-term substitute;[70] he learned, by asking, that no similar position would be available in September.[71] He also stated that, in the prior year, he had worked one to two weeks before he obtained his certificate[72] and he had never participated in the AESOP system.[73] After more discourse, the hearing concluded.

On May 16, 2013, the Board issued an eight-page decision which unfolded in a cogent manner the extended travel of the case[74] through the administrative (and judicial) process to that point.[75] Substantively, the Board of Review affirmed

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70 See Board of Review Hearing Transcript, March 26, 2013, at 77. Ms. Kopech agreed with this statement. Id., at 78.

71 See Board of Review Hearing Transcript, March 26, 2013, at 78. He described how he was informed by his Department Chair and his Principal, that there would be no need for his services in the fall, since the school department was cancelling the fourth-year AP program. Id., at 81. Ms. Kopech, however, made the point that there were "plenty" of substitute positions available. Id., at 79.

72 See Board of Review Hearing Transcript, March 26, 2013, at 82.

73 See Board of Review Hearing Transcript, March 26, 2013, at 87.

74 Westerly opens its brief with a cutting reference to Jarndyce v. Jarndyce, the interminable fictional case in equity at the heart of Mr. Dickens' Bleak House, tendered in apparent criticism of the duration of the pendency of the instant case (and its two predecessors). Appellant's Memorandum of Law, at 1. But this blade would have cut far deeper if a substantial portion of this period had not been taken up with litigating Westerly's Motion to Re-open, which was made necessary by Westerly's failure to present witnesses at the hearing before Referee Brody.

75 See Decision of Board of Review, May 16, 2013, at 1-4. As noted above with regard to the hearing, the Board's decision went beyond the charge we placed in our remand order — i.e., that the Board reconsider its denial of the Consolidated Motion to Re-open — and considered the appeal on the merits. See Part V of this opinion, post.

both the section 17 and section 12 decisions rendered by Referee Brody back on April 27, 2010. Regarding Mr. Piccirilli's separation from the Westerly Public Schools, the Board found Westerly had no position available for him in the fall-2009 term that was equivalent to the full-time substituting position he had held in the spring term.[76] And, on the issue of availability, the Board concluded that Claimant's lack of a teaching certificate did not make him unavailable, within the meaning of § 28-44-12, since it was a matter that could be cured administratively at any time.[77] The Board also found he was not required to accept a per-diem teaching position.[78] It found that his efforts to seek "… positions in the educational sector which would utilize his professional expertise in the realm of foreign language education …" satisfied the job search requirement.[79]

Disappointed by this outcome, the Westerly Public Schools filed its second appeal to the District Court on June 17, 2013.[80] On November 13, 2013, the undersigned conducted a conference with counsel at which a briefing schedule was set. Helpful memoranda have been received from the Employer, the Board of Review, and the Department of Labor and Training.

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76 See Decision of Board of Review, May 16, 2013, at 4-6.

77 See Decision of Board of Review, May 16, 2013, at 6-7.

78 See Decision of Board of Review, May 16, 2013, at 6.

79 See Decision of Board of Review, May 16, 2013, at 7.

80 See Complaint of Westerly Public Schools, passim.

II
ISSUES PRESENTED — APPLICABLE LAW

Introduction

In order to resolve the Appellees' argument that the instant case is not justiciable, we will need to possess at least a modest understanding of four areas of law — first, the doctrine of mootness itself; second, the law establishing within the unemployment system a separate program for reimbursing employers — so we can decide if the instant case will have a financial effect on the Appellant; third and fourth, so we can decide if the instant case presents an issue requiring adjudication despite its mootness — we will review the doctrine of collateral estoppel and the statute that disqualifies the great majority of educators from receiving benefits during the periods in-between school-terms, § 28-44-68.

A
Mootness

Both the Board of Review and the Director urge that Westerly's appeal is moot; they believe the Westerly school system, as a reimbursing employer, must repay the Department for the benefits it has provided to Mr. Piccirilli pursuant to the decisions of the Referee and the Board of Review — whatever this Court's ruling in this case may be. In order to begin our evaluation of their position, we must now enumerate the fundamental canons which, taken together, comprise the

doctrine of mootness as it exists in Rhode Island's jurisprudence.

We begin from first principles. Our Supreme Court has held that the first requirement for the exercise of jurisdiction is an "actual, justiciable controversy"[81] as the Court (and, by extension, the inferior courts) will not take on "an abstract question or render an advisory opinion."[82] Justiciability requires a plaintiff with standing and a "legal hypothesis which will entitle the plaintiff to real and articulable relief."[83] Or, as the Supreme Court has stated on several occasions — "As a general rule, we only consider cases involving issues in dispute; we shall not address moot, abstract, academic, or hypothetical questions."[84] Furthermore, a case which is justiciable when filed will be deemed moot if "… events occurring after

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81 H.V. Collins Company v. Williams, 990 A.2d 845, 847 (R.I. 2010) citing Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997). This principle has been applied to employers in an unemployment case, though not under a justiciability theory. In Newman-Crosby Steel, Inc. v. Fascio, 423 A.2d 1162, 1167 (R.I. 1980), the Court held that the employer had not shown it was an "aggrieved party" under the Rhode Island Administrative Procedures Act, Gen. Laws 1956 § 42-35-15(a), since it had not shown that its contributions to the balancing account (then known as the "insolvency" account) would rise if the Claimants were granted benefits.

82 H.V. Collins Company, 990 A.2d at 847 citing Sullivan v. Chafee, id. Of course, the Supreme Court does render advisory opinions on constitutional questions pursuant to Article 10, section 3.

83 H.V. Collins Company, 990 A.2d at 847 citing N & M Properties, LLC v. Town of West Warwick, 964 A.2d 1141, 1145 (R.I. 2009)(quoting Bowen v. Mollis, 945 A.2d 314, 317 (R.I. 2008)).

84 H.V. Collins Company, 990 A.2d at 847 citing Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980).

the filing have deprived the litigant of a continuing stake in the controversy."[85]

Now, the Supreme Court has identified an exception to the mootness rule — to be invoked only "when the issues raised are of extreme public importance and likely to recur in such a way as to evade judicial review."[86] Generally, a matter of "great public importance" is one which "will usually implicate important constitutional rights, matters concerning a person's livelihood, or matters concerning voting rights."[87] In Foster-Glocester Regional School Committee v. Board of Review (R.I. 2004)[88] the Court found that the issue presented — the evidentiary value to be given to prior recorded testimony in unemployment hearings — met this standard.[89]

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85 Foster-Glocester Regional School Committee v. Board of Review, 854 A.2d 1008, 1013 (R.I. 2004) citing In re New England Gas Co., 842 A.2d 545, 553 (R.I. 2004)(quoting Cicilline v. Almond, 809 A.2d 1101, 1105 (R.I. 2002) (per curiam). See also Associated Builders and Contractors of Rhode Island v. City of Providence, 754 A.2d 89, 90 (R.I. 2000).

86 Foster-Glocester, 854 A.2d at 1013 citing New England Gas Co., 842 A.2d at 554 citing Cicilline, 809 A.2d at 1105-06. Also, H.V. Collins, 990 A.2d at 847 citing In re Stephanie B., 826 A.2d 985, 989 (R.I. 2003) quoting Morris, 416 A.2d at 139.

87 Foster-Glocester, 854 A.2d at 1013 citing New England Gas, 842 A.2d at 554 citing Cicilline, 809 A.2d at 1106.

88 854 A.2d 1008 (R.I. 2004). Our Supreme Court's ruling in Foster-Glocester is pertinent to the instant case in two areas of law — mootness and collateral estoppel. As a result, it will be cited frequently in this opinion.

89 Foster-Glocester, 854 A.2d at 1013-14, 1017-21. The Court also considered the estoppel effect to be given to a decision rendered in the related arbitration case

B

Government Agency Participants in the Unemployment System: Reimbursing Employers

Having set forth the principles of justiciability and mootness generally, we must now determine whether the Appellees' assumption — that Westerly must reimburse the Department whatever the outcome here — is valid. And we can only resolve that issue by achieving 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 payroll[90] and its "experience rate"[91] — 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 known as the "balancing account."[92] And within the balancing account, each employer has

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regarding the Claimant's termination. Id., at 1014-17.

[90] 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).

[91] Gen. Laws 1956 §§ 28-43-1(5) and 28-43-8.

[92] Gen. Laws 1956 §§ 28-43-1(1) and 28-43-2.

its own "employer's account."[93] 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.[94] Participation in the program — which is required by the Federal Unemployment Tax Act (FUTA)[95] — is not mandatory; but if a governmental employer opts out of the program, it must enter the contribution system.[96] Each month, the Department bills each governmental

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

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

95 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).

96 Gen. Laws 1956 § 28-43-24(c).

employer for benefits paid to their former employees.[97]

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.[98]

It appears from my research that the parameters of this condition (i.e., that the benefits be attributable to the government work) have been litigated only at the margins, in two contexts, neither of which applies here — (1) where the Claimant

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[97] 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). Thus, a state government employer could not withhold payment to the Department as Westerly has done.

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).

[98] 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 progeny 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>."

was given benefits "without authority,"[99] and (2) where the defendant is given

[99] In Jewish Home for the Aged v. Department of Labor and Training, A.A. No. 91-255 (Dist.Ct. 03/06/1992), this Court refused to order a charitable institution to reimburse the Department of Labor and Training for payments made illegally. What happened was this — the claimant was permitted benefits by the Director but when the Referee reversed, curtailing benefits, the DLT continued to pay the Claimant. We found that the payments made illegally were, per se, not attributable to the claimant's service with the charitable institution.

Our opinion in Jewish Home cited an earlier sister state decision — Holy Cross Hospital of Silver Spring, Inc. v. Maryland Employment Security Administration, 288 Md. 685, 421 A.2d 944 (1980). In Holy Cross Hospital the Maryland Employment Security Administration (ESA) initially found the Claimant eligible to receive benefits. Holy Cross Hospital, 421 A.2d at 945. The hospital took an appeal and a Referee found the Claimant disqualified for gross misconduct. Id. However, the Employment Security Administration did not terminate the Claimant's receipt of benefits. Id. The employer, which had no objection to reimbursing the ESA for the benefits received before the Referee's decision issued, opposed reimbursing the ESA for the much larger amount of benefits received after the Referee ruled. Id., at n. 2. Ultimately, the Maryland Court of Appeals held that monies paid were not attributable to service at the Hospital and were not chargeable for the monies paid by the ESA in error. Holy Cross Hospital, 421 A.2d at 950-51.

But while we embraced the holding in Holy Cross Hospital we eschewed the Maryland Court's terminology — ascribing the payments to "agency error." Holy Cross Hospital, 421 A.2d at 950. The Maryland Court's use of the term "error" to describe a turn of events is unfortunate, because it conflates a clerical error with an adjudicatory error, which was clearly not at issue in Holy Cross Hospital (since the hospital had no objection to reimbursing the ESA for the benefits received pursuant to the ESA's initial determination of eligibility, before the Referee's decision was rendered). See discussion of this issue, ante at 6-7, n. 16. Instead, we denominated these benefit-payments as being made "illegally." Jewish Home, slip op. at 7. Upon reflection, I believe the use of the term "illegally" in this context is also ill-fitting; I now believe we should use the less-inflammatory phrase, "without authority," to describe such situations. In any event, such payments are not "attributable" to a Claimant's employment by

benefits that are charged to the accounts of several employers, on a pro-rata basis.[100]

Finally, although, strictly speaking, it is not a part of the reimbursing

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a governmental or charitable institution.

[100] In the past, if a worker separated from his employer under circumstances precluding the receipt of unemployment benefits and then joined the service of a second employer and was terminated in circumstances permitting the worker to receive benefits, charges were made to both employers' rates, pro rata, based on wages earned from each within what is known as the "base year" — generally, the twelve months prior to the claimant's termination.

But what is to be done if the first employer was a reimbursing employer, which, by definition has not made contributions to the fund? Shall the first employer be charged directly for a pro rata share of the benefits paid? Rhode Island courts have not, to my knowledge, addressed this issue. But the Courts of sister states have, with mixed results. See Wilmington Medical Center v. Unemployment Insurance Appeal Board, 346 A.2d 181, 183 (Del.Super. 1975) affirmed Unemployment Insurance Appeal Board v. Wilmington Medical Center, 373 A.2d 204 (Del. 1977)(Delaware Court declined to hold charitable reimbursing employer partially chargeable for unemployment benefits given to former employee, who left its employ under circumstances not giving rise to eligibility for benefits and who was thereafter separated from private employer in circumstances causing eligibility, finding such benefits not "attributable" to his/her governmental service). But see Lester E. Cox Medical Center v. Labor and Industrial Relations Commission, 608 S.W.2d 442, 445 (Mo. App. 1980)(Missouri Court of Appeals declined to adopt what it called Wilmington Medical's "narrow interpretation" of what benefits are "attributable" to the Claimant's prior government service) and Mississippi Employment Security Commission v. City of Columbus Light & Water Department, 424 So. 2d 553, 557 (Miss. 1982)(the Mississippi Supreme Court held that reimbursing employers would be charged for their pro rata share of the benefits given, indicating the Mississippi statutes were more comprehensive than the pertinent Delaware statutes considered in Wilmington Medical).

As we can see, the cases cited on this point are rather dated; accordingly, I express no opinion regarding whether this (pro-rata charge) system is still in effect.

employer system, it is appropriate to note the presence of the following provision of the Employment Security Act:

> **28-44-40. Payment of benefits pending appeal —** (a) If an appeal is filed by an employer, benefits shall be paid to an eligible claimant until that employer's appeal is finally determined. If the employer's appeal is finally sustained, no further benefits shall be paid to the claimant during any remaining portion of the disqualification period. Any benefits paid or payable to that claimant shall not be recoverable in any manner. …

As can be readily seen, § 28-44-40(a) requires benefits paid to Claimants during the pendency of an employer's appeal. It is this provision that makes the instant case financially moot as to Mr. Piccirilli.

C

Collateral Estoppel

As indicated above, Westerly urges that the decision denying summer benefits to Mr. Piccirilli should have been recognized as precluding benefits to him in the fall-term and thereafter. For this reason, we must review the basic elements of the doctrine of collateral estoppel.

A part of the broader doctrine of res judicata, collateral estoppel — also known as issue preclusion — "makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action …."[101]

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[101] Foster-Glocester Regional School Committee, 854 A.2d 1008, 1014 n. 2 (R.I. 2004), citing E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Co. of

The elements of collateral estoppel (or issue preclusion) have been recently (and concisely) reiterated by our Supreme Court in Foster-Glocester Regional School Committee v. Board of Review of the Department of Labor and Training (2004):

> … "Under the doctrine of collateral estoppel, 'an issue of ultimate fact that has been actually litigated and determined cannot be re-litigated between the same parties or their privies in future proceedings.' " George v. Fadiani, 772 A.2d 1065, 1067 (R.I. 2001) (per curiam)(quoting Casco Indemnity Co. v. O'Connor, 755 A.2d 779, 782 (R.I. 2000)). Subject to situations in which application of the doctrine would lead to inequitable results, we have held that courts should apply collateral estoppel [ ] when the case before them meets three requirements: (1) the parties are the same or in privity with the parties of the previous proceeding; (2) a final judgment on the merits has been entered in the previous proceeding; (3) the issue or issues in question are identical in both proceedings. Lee v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO, Local 186, 796 A.2d 1080, 1084 (R.I. 2002)(per curiam)(citing Wilkinson v. State Crime Laboratory Commission, 788 A.2d 1129, 1141 (R.I. 2002)).[102]

The Court noted that issue preclusion "may apply even if the claims asserted in the two proceedings are not identical."[103] Procedurally, the burden of proving the merit of an application for collateral estoppel is on the party seeking its invocation.[104]

Newark, New Jersey, 635 A.2d 1181, 1186 (R.I. 1994).

[102] Foster-Glocester Regional School Committee, 854 A.2d at 1014 (footnote omitted).

[103] Foster-Glocester Regional School Committee, 854 A.2d at 1014 n. 2.

[104] See State v. Pineda, 712 A.2d 858, 861-62 (R.I. 1998) and 47 Am. Jur. 2d Judgments, § 640.

D

School Employees — Between-Term Benefits

The Board of Review's initial decision in this matter focused on Mr. Piccirilli's right — if any — to receive unemployment benefits during the summer of 2009. Applying § 28-44-68 of the Employment Security Act, which governs between-terms claims by educational employees, the Board found no such entitlement. Westerly has urged that the Board should have given their initial decision estoppel effect and found that the between-terms decision precluded, as a matter of law, his subsequent, fall-term 2009 claim. To evaluate this argument, we must understand the origins and workings of § 68.

Generally, workers in all fields of endeavor are treated alike under the Rhode Island Employment Security Act. There is one notable exception — educational employees. A specific provision of the Federal Unemployment Tax Act (FUTA) requires each state's employment security act to include a provision barring educational employees from receiving unemployment benefits during the scheduled breaks in their work schedules — such as summer vacations, holiday-period vacations, and the like — so long as the teacher has a "reasonable assurance" of work "in a similar capacity" at the end of the vacation period.[105] In our Employment Security Act this provision is Gen. Laws 1956 § 28-44-68, which

[105] See FUTA, 26 U.S.C. § 3304(a)(6)(A).

provides, in pertinent part:[106]

> **28-44-68. Benefit payments for services with nonprofit organizations and educational institutions and governmental entities. —** Benefits based on service in employment for nonprofit organizations and educational institutions and governmental entities covered by chapters 42--44 of this title shall be payable in the same amounts on the same terms and subject to the same conditions as benefits payable on the basis of other services subject to chapters 42--44 of this title, except that:
> (1) With respect to services performed after December 31, 1977, in an instructional, research, or principal administrative capacity for an educational institution (including elementary and secondary schools and institutions of higher education) benefits shall not be paid based on those services for any week of unemployment commencing during the period between two (2) successive academic years or during the between two (2) regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if that individual performs those services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of those academic years or terms. Section 28-44-63 shall apply with respect to those services prior to January 1, 1978.
> (2) * * *
> (3) * * *
> (4) * * *
> (a) "Reasonable assurance" means a written agreement by the employer that the employee will perform services in the same or similar capacity during the ensuing academic year, term or remainder of a term. Further, reasonable assurance would not exist if the

[106] Note that "reasonable assurance" is tested through a forward-looking analysis. For instance, with regard to the summer vacation period, a teacher is either barred from receiving unemployment benefits in June, July, and August or not, depending on the teacher's understanding of his or her status at that time. Section 68 is not evaluated by waiting until September, seeing whether the teacher was rehired and, if not, granting her or him benefits retroactively.

> economic terms and conditions of the position offered in the ensuing academic period are substantially less than the terms and conditions of the position in the first period. (Emphasis added)

As one may readily observe, subsection (a) requires that the "reasonable assurance" be given in writing, and pertain to a position carrying a similar economic benefit.

It is fair to say that, when applying § 28-44-68, our Supreme Court has given the statute an expansive reading — i.e., one that tends to make it applicable to a larger number of educators. Recently, it reiterated that reasonable assurance does not connote a guarantee of work in the next term.[107] Additionally, the Court has repeatedly declined to distinguish between the various categories of substitute teachers, even after the 1998 amendment to § 68 which declared that reasonable assurance cannot be found if "economic terms and conditions of the position offered in the ensuing academic period are substantially less than the terms and conditions of the position in the first period."[108]

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[107] See Elias-Clavet v. Board of Review of Department of Employment and Training, 15 A.3d 1008, 1014 (R.I. 2011)(Court comments that reasonable assurance of work in fall-term is not a "guarantee" of future employment. And, while subdivision 28-44-68(4)(a) does employ the phrase "written agreement," it does so in an effort to define the term "reasonable assurance."

[108] Elias-Clavet v. Board of Review of Department of Employment and Training, 15 A.3d 1008, 1013-15 (R.I. 2011). Among prior cases, see Preziosi v. Department of Employment Security, Board of Review, 529 A.2d 133, 135-37 (R.I. 1987)(In Preziosi, the Supreme Court decided that Providence long-term

III
POSITIONS OF THE PARTIES

Introduction

In its memoranda, the Westerly Public Schools has presented various assignments of error regarding the Board of Review's decision in this case. However, we will not be able to address these issues directly unless we can clear a hurdle placed before us by the Board of Review and the Department of Labor and Training — the preliminary question of whether Westerly's appeal is non-justiciable under the mootness doctrine.[109] They urge that the instant case is moot because they believe the outcome of this case cannot alter the financial positions of the parties. In addition, the Board argues that the circumstances of this case do not fall within the ambit of the one exception to the mootness rule that our Supreme Court has enunciated. At this juncture, we shall present the position of the Board of Review on this question more fully, after which, we shall relate, in

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substitutes and long-term substitutes "in pool" had reasonable assurance of work in fall-term in "any such capacity" if they had reasonable assurance of work as "per diem substitutes," notwithstanding diminished pay and benefits received by substitute teachers in that category) and Baker v. Department of Employment and Training Board of Review, 637 A.2d 360, 363-65 (R.I. 1994)(In Baker, the Court upheld the Board's finding that the Pawtucket school department gave most of claimant substitute teachers reasonable assurance — despite earlier letter of termination).

[109] Board of Review's Memorandum of Law, at 8-10 citing In re Briggs, 62 A.3d 1090, 1097 (R.I. 2013) and City of Cranston v. Rhode Island Laborers' District Council, Local 1033, 960 A.2d 529, 533 (R.I. 2008).

turn, the positions of the Department of Labor and Training and the Westerly School Department.

A

The Position of the Board of Review

The Board of Review urges that the instant case is moot because Mr. Piccirilli has been paid all possible benefits under the claim arising out of his employment by the Westerly School Department and the employment security benefits paid to Mr. Piccirilli cannot be recouped from him because he collected them pursuant to decisions made by the Referee and the Board of Review;[110] and, as a reimbursing employer, Westerly must repay the Department of Labor and Training for the actual benefits it paid to him,[111] even if this Court were to find that the decisions of the Referee and the Board of Review approving the payment of benefits were unsound. And so, the Board argues, since the Westerly Public

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[110] Board of Review's Memorandum of Law, at 8-9 quoting Gen. Laws 1956 § 28-44-40. The exact date Claimant's benefits ran out is nowhere stated in the decision below. Nevertheless, it is common knowledge that in recent times 99 weeks has been the maximum period for the collection of unemployment benefits. If Mr. Piccirilli received benefits for that full period, his benefits would have been exhausted in the summer of 2011, just after we remanded this case in WPS I.

[111] Board of Review's Memorandum of Law, at 8-9.

Schools must reimburse the DLT whatever the outcome, any ruling made in this case can have no financial effect on Appellant; the instant case is therefore moot.[112]

Now, the Board of Review concedes that — even if we find financial mootness — we must consider whether the instant case falls within the exception to the rule which allows moot cases to be decided "when the issue before [the] court is one of great public importance that, although technically moot, is capable of repetition yet evading [judicial] review."[113] A matter of "great public importance" is one that "will usually implicate important constitutional rights, matters concerning a person's livelihood, or matters concerning voting rights."[114]

According to the Board, this case does not fall within the exception for three reasons[115] —

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112 Board of Review's Memorandum of Law, at 8 citing City of Cranston v. Rhode Island Laborers' District Council, Local 1033, 960 A.2d 529, 533 (R.I. 2008). The Board further cites a recent District Court unemployment decision applying this principle to an appeal by a self-insured employer. See Kent County Water Authority v. Department of Labor and Training, Board of Review, A.A. No. 2014-71, at 7-9 (Dist. Ct. 2013)(Montalbano, M.).

113 Board of Review's Memorandum of Law, at 8 citing (indirectly) In re Tavares, 885 A.2d 139, 147 (R.I. 2005). See also In re Briggs, 62 A.3d 1090, 1097 (R.I. 2013) and City of Cranston v. Rhode Island Laborers' District Council, Local 1033, 960 A.2d 529, 533 (R.I. 2008).

114 Board of Review's Memorandum of Law, at 9 quoting Briggs, supra, 62 A.3d at 1097 and Rhode Island Laborers' District Council, supra, 960 A.2d at 533-34.

115 Board of Review's Memorandum of Law, at 9 quoting Briggs, supra, 62 A.3d at 1097 and Rhode Island Laborers' District Council, 960 A.2d at 533-34.

(1) The issue before the Court is one which could affect only "… a highly speculative class of applicants' eligibility …" for benefits.[116] Although the Board does not explain this statement, I believe we can discern their meaning. This ruling would only affect teachers who are full-time in year one and then part-time (or "per diem" in the parlance of educators) in year two. Unlike the issues surrounding between-term benefits — which have been the subject of many decisions by this Court, several by our Supreme Court[117] and a recent revision by the legislature — it appears that this issue had never been considered by our highest court.

(2) Secondly, the Board of Review asserts that Westerly's predicament cannot present an issue of "great public importance" because it results from the school department's decision to participate in the unemployment system as a reimbursing employer.[118] The Board argues that it is the plain statutory law that such an entity agrees to reimburse the Department of Labor and Training for monies paid to its former employees, on a dollar-for-dollar basis, even if the benefits were awarded erroneously;[119] and, the governmental unit assumes the risk of such an error of adjudication on the part of Department of Labor and Training or the Board of

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116 Board of Review's Memorandum of Law, at 9.

117 See sampling of cases decided under § 28-44-68, ante at 31-32, n. 108.

118 Board of Review's Memorandum of Law, at 9.

119 Board of Review's Memorandum of Law, at 9.

Review.[120] Alternatively, the Westerly Public Schools could become a contributing (i.e., taxpaying) participant in the unemployment system, and be protected from the effects of (what it believes to be) erroneous awards of benefits.

(3) Finally, the Board argues that the issue does not meet the requirement that the question is "capable of repetition yet evading review" because further occurrences can be avoided if the school department alters its personnel practices with regard to full-time (but temporary) substitute teachers.[121]

B

The Position of the Director of the Department of Labor and Training

In his Memorandum of Law, the Director also argues that the instant case is not justiciable.[122] He echoes the Board of Review's argument in large part, adding specific references to the statutory provisions that permit governmental entities to be reimbursing employers under the Employment Security Act.[123]

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120 Board of Review's Memorandum of Law, at 9. Of course, the referees act as designees of the Board of Review.

121 Board of Review's Memorandum of Law, at 10 citing Rhode Island Laborers' District Council, Local 1033, supra, 960 A.2d at 536 and Sullivan v. Chafee, 703 A.2d 748 (R.I. 1997).

122 It may be noted that the Director's memorandum was filed on June 4, 2014, before the Board of Review's memorandum was filed — on June 30, 2014.

123 Director's Memorandum of Law, at 4-5.

The Director also cites, and attaches to its memorandum, as Exhibit A, orders entered by this Court dismissing appeals by reimbursing employers for mootness.[124]

C

The Position of the Westerly School Department

The Westerly School Department has responded to the mootness arguments presented by the Director and the Board of Review in a reply memorandum received by this Court on July 11, 2014.[125] Westerly opposes dismissal for mootness on two grounds — (1) that the instant appeal is not financially moot;[126] and, (2) the Board committed error in failing to apply the doctrine of res judicata in this case.[127]

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[124] Director's Memorandum of Law, at Exhibit A — St. Benedict's Church v. Board of Review of the Department of Labor and Training (Timothy Morgan), A.A. 11-103 (Dist.Ct. 11/15/11); Department of Children, Youth, and Families v. Board of Review of the Department of Labor and Training (William Barnette), A.A. 12-155 (Dist.Ct. 10/23/12); The Town of Lincoln v. Board of Review of the Department of Labor and Training (Gwendolyn Thompson), A.A. 12-126 (Dist.Ct. 11/30/12).

[125] In its initial memorandum, Westerly argues extensively that it did not lay-off Mr. Piccirilli, even the Board of Review conceded this point in its post-remand decision. Cf. Westerly's Memorandum of Law, at 9-14 and Decision of Board of Review, at 5.

[126] See Westerly's Reply Memorandum, at 1-2.

[127] See Westerly's Reply Memorandum, at 2.

To begin with, Westerly argues the instant case is not financially moot. Noting that it has withheld payment from the Department of Labor and Training for the benefits it gave Mr. Piccirilli, it argues that Gen. Laws 1956 § 28-44-40(a) will bar the DLT from recovering these monies from Westerly, since it bars recovery of benefits paid during the pendency of an employer's appeal "in any manner" and, by inference, from any entity, not just the Claimant who received them.[128] It also argues that, if it prevails, the Department will not be barred from recouping the monies paid to Mr. Piccirilli from him, since, in that eventuality, he will have been found not to have been an "eligible claimant," and thus, outside the protections of § 40(a).[129]

Secondly, Westerly submits that the Board was required to find Claimant ineligible to receive benefits during the period commencing in the fall of 2009 because of its prior ruling denying him benefits in the summer of 2009 — the "between-terms" claim — by invocation of the doctrine of res judicata.[130]

Within this argument, Westerly renews its assertion that the Department failed to provide it with timely notice that Mr. Piccirilli had filed a new claim for

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128 See Westerly's Reply Memorandum, at 1-2. And see Gen. Laws 1956 § 28-44-40(a), quoted ante at 27.

129 Westerly's Reply Memorandum, at 2. These arguments are inconsistent: the first assumes that § 40(a) is applicable to this case; the second assumes it is not.

130 Westerly's Reply Memorandum, at 2-4. Also Westerly's Memorandum, at 7-9.

benefits with an effective date of September, 2009 — which it urges was a violation of Gen. Laws 1956 § 28-44-38(c).[131]

Next, without discussing the established criteria for invocation of the exception to the mootness doctrine, Westerly argues that the importance of the issues at bar merit consideration. It again urges that the between-terms decision, in which the Board found "reasonable assurance" under § 28-44-68, should have carried forth into the claim for benefits in the fall-term.[132] Westerly has repeatedly argued that the finding of reasonable assurance was determinative of the outcome in the second claim.[133] In particular, Westerly argues that the Board's decision

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131 Westerly's Reply Memorandum, at 2-3. Westerly urges this omission relieves it of its duty to reimburse the Department. Westerly's Reply Memorandum, at 3-4. But it is hard to see how this error justifies the relief Westerly seeks. While § 38(c) provides that an employer which fails to return a notice of claim form (with its response) to the Department within seven days of its mailing is barred from contesting the claim at any level, there is no analogous provision holding a reimbursing employer harmless if it is not given such notice in a timely manner. Gen. Laws 1956 § 28-44-38(c).

The DLT's attempts to justify this failure are feeble, at best. Its position, that it was not a new claim, was patently wrong. The claim covered a different period and was controlled by different laws. Of course, had Westerly appeared at the referee hearing and prevailed it could have shown prejudice. But it did not. At the point when the referee ruled, notice issues became immaterial.

In any event, the depth of Westerly's outrage is hard to fathom, given that it was on notice (from this Court's 2009 order) that a new complaint would be forthcoming.

132 See Westerly's Reply Memorandum, at 4-7.

133 See Westerly's Reply Memorandum, at 3, 7.

failed to apply our Supreme Court's most recent § 68 decision — Elias-Clavet v. Board of Review, 15 A.3d 1008 (R.I. 2011).[134]

IV
ANALYSIS – THE JUSTICIABILITY (MOOTNESS) QUESTION

A
The Appeal Is Moot

After considering the merits of both positions, I have concluded that the instant case is indeed moot, because — as the Director and the Board urge — whatever our decision, the Westerly Public Schools must reimburse the Department of Labor and Training for benefits it paid to Mr. Piccirilli. Why must it do so? Because it promised to. As a reimbursing employer, Westerly 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.[135]

A reading of the extensive record in the instant case (and the two prior cases), shows not a hint that Mr. Piccirilli was employed in any position other than his position in Westerly during his base period. So, as a matter of simple logic, his claim must be attributable to that position — there is no other position to which

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[134] See Westerly's Reply Memorandum, at 7-10.

[135] Gen. Laws 1956 §§ 28-43-29(a) and 28-43-24(a).

his claim could be linked. Furthermore, Mr. Piccirilli was awarded benefits by Referee Brody and the full Board of Review based on his work with Westerly. In my view, unemployment benefits received pursuant to an administrative or judicial decision are, logically, "attributable" to the Claimant's service with that employer. After all, administrative decisions granting unemployment benefits include implicit findings that the Claimant is monetarily eligible to receive benefits based on wages earned or weeks worked during a one-year base period, that the Claimant is able to work and available for work, as well as a (usually) explicit finding that the Claimant was terminated from his or her prior employment under circumstances which do not give rise to disqualification.[136]

Westerly's arguments to the contrary are ephemeral. The lynchpin of Westerly's argument is that it should not be responsible for the benefits awarded by the Board of Review to Mr. Piccirilli because the decision in which that award was made was unsound and erroneous. Thus, Westerly 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 Mr. Piccirilli's claim and his work for Westerly is patently obvious. Nothing more need be shown.

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[136] See Wimberly v. Labor and Industrial Relations Board of Missouri, 479 U.S. 511, 515, 107 S.Ct. 821, 824 (1987).

Secondly, in urging that it will not have to reimburse the Department of Labor and Training for the benefits paid to Mr. Piccirilli if it prevails, Westerly fails to discuss (or even cite) the statutes that establish the reimbursing employer system.[137] And its reliance on § 28-44-40 is completely misguided, ignoring the plain language of the statute and failing to read it in context. Quite simply, it is clear, when one reads § 28-44-40 in context, that it is directed toward the rights and privileges of the claimant/recipient, not the responsibilities of employers. And the statute speaks of the recovery of "benefits." Reimbursing employers do not pay benefits — they make "contributions" or "reimbursing payments."[138] Thus, it cannot "recoup" benefits it did not pay out.[139]

Westerly argues that the legislature intended to establish a system in which the "reimbursing" governmental employer is not responsible to make the

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

138 Gen. Laws 1956 § 28-43-24(a),(b). See Dr. Lee Arnold v. Department of Labor and Training Board of Review, 822 A.2d 164, 170 (R.I. 2003)(In analysis of unemployment attorney-fee claim, the Court finds employer-hospital cannot have "benefits" at issue before the Board).

139 And even if the Department of Labor and Training could legally pursue Mr. Piccirilli for benefits it paid before the Director's decision was issued, a notion concerning which I have great doubts, Westerly must fulfill its promise to pay the Department. Whether it later can be reimbursed if and when Mr. Piccirilli reimburses the Department, is a hypothetical not before the Court.

Department whole if the award is reversed on appeal.[140] But if this was the General Assembly's desire, it did not act upon it directly or clearly — failing even to specify from whence the money would come to replenish the Department's coffers.

Since Westerly 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 Westerly 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 Westerly'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

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[140] Recall that the DLT did not grant Mr. Piccirilli benefits. The first to rule in the Claimant's favor was the Referee, who is employed by the Board of Review, not the Department. Where is the equity in holding the Department liable for an award it did not make — where, as here, benefits were granted by a Referee after a hearing at which the employer did not appear? Shall the Department be charged in such a situation? In my view, Westerly (which failed to appear at the Referee hearing) is particularly ill-suited for the mantle of victim-hood.

But, let's extend the hypothetical — What if the Department, the Referee, and the Board of Review all deny a claim, but benefits are granted by the District Court, and the Supreme Court reverses? Will the Department be required to reimburse DLT? Will the judiciary? The ramifications of Westerly's position are potentially far-reaching.

charitable organizations that have elected to be reimbursing employers.[141] 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 rejected. 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 the Westerly Public Schools must reimburse the Department of Labor and

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[141] In my view, the adoption of Westerly'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. Indeed, it is not uncommon for the issue regarding eligibility to change. For example, a case which appeared to the DLT adjudicator to hinge on whether the Claimant left his position for good cause under § 28-44-17 may ultimately be decided — after the employer presents its position more fully — on the basis of an allegation of misconduct pursuant to § 28-44-18, or vice versa. And so, given the fluidity of these situations, if the DLT adjudicators knew their Department would be responsible for any awards that were reversed, their impartiality would be suspect. Such a pecuniary interest would certainly not stand scrutiny in a criminal setting. See Connally v. Georgia, 429 U.S. 245, 248-51, 97 S.Ct. 546, 548-49 (1977)(holding fourth amendment violation where the issuance of a search warrant generated a fee for justice of the peace, but rejection did not). And the pecuniary interest need not be personal. See Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 59-61 (1972)(finding due process violation where fines assessed by mayor-judge were deposited into municipal fund controlled by the same mayor-judge).

Training for the monies it paid to Mr. Piccirilli in the form of unemployment benefits. I must therefore recommend that this Court find that Westerly's appeal is financially moot.

This recommendation is consistent with a recent District Court ruling, which held that the appeal of a reimbursing government employer was financially moot.[142] And while our Supreme Court has not confronted the issue directly, it nearly did so in Foster-Glocester Regional School Committee v. Board of Review, (R.I. 2004),[143] where the Court assumed arguendo that the case before it was financially moot — as it proceeded to find the case fell within the exception to the mootness rule.[144]

B

The Mootness Exception Is Inapplicable

But — does this case fall within the exception to the rule against deciding moot cases? Are there issues present in the instant case that are so portentous as to require adjudication in the absence of a justiciable controversy? Are such issues likely to recur, but in such a manner as to avoid review? For the reasons I shall now set forth, I believe not.

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142 See Kent County Water Authority v. Department of Labor and Training, Board of Review, A.A. No. 2014-71, at 7-9 (Dist.Ct. 2013)(Montalbano, M.).

143 854 A.2d 1008, 1013-14 (R.I. 2004).

144 Id.

1

Possible Issue — the Reimbursement System

The Court could certainly choose to review the fundamental precepts of the reimbursing system and specifically answer the question — does the reimbursing employer have to pay the Department if an award of benefits is reversed on appeal? That is undoubtedly an important matter. But, I simply do not believe that Appellant's position is sufficiently plausible to merit Supreme Court review.

The Westerly Public Schools were not able to cite a single case in which a state court, at any level, has ruled that an award of benefits (made at any administrative level) that was reversed on appeal (by any higher tribunal, administrative or judicial) need not be reimbursed by a governmental or charitable reimbursing employer.[145] My own research efforts have revealed no such case. This is especially notable because FUTA requires that an analogous provision to § 68 must be included in every state's employment security act. And yet, we find no case supporting the school department's position.

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[145] To be clear, I make this statement in reference to the broad issue of whether the employer must reimburse the Department if an award is reversed on appeal, acknowledging cases may be found on the marginal (and inapposite) questions described above, ante at 25-26, nn. 99-100.

And the statutes that establish the reimbursing system in our Employment Security Act are clear.[146] Giving these sections their plain and ordinary meaning requires us to conclude that a reimbursing employer must make the Department of Labor and Training whole for benefits it provided to a former employee of that employer pursuant to an administrative or judicial decision. At the end of the day, I believe we must conclude that suffering the full effects of an "unsound" decision is simply a risk inherent to an employer's participation in the reimbursing system.

2

Possible Issue — Application of Collateral Estoppel

The Court might also wish to consider another issue raised by Westerly — whether the Board erred by failing to give estoppel effect to its initial 2009 ruling, that Mr. Piccirilli was ineligible for between-term benefits. The failure of a Court (or an agency) to apply principles of collateral estoppel or — as it is also known — issue preclusion,[147] can certainly merit review. After all, the Supreme Court reviewed a case it assumed was moot in Foster-Glocester Regional School Committee v. Board of Review (R.I. 2004) because it perceived a need to deal with an issue of estoppel regarding an arbitration award.[148]

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146 Gen. Laws 1956 §§ 28-43-24 — 28-43-31.

147 Foster-Glocester Regional School Committee, 854 A.2d at 1014 n.2.

148 Foster-Glocester Regional School Committee, 854 A.2d at 1014-17.

Nevertheless, I do not believe collateral estoppel (or issue preclusion) can be successfully invoked by Westerly in the instant case because the issue decided in the first case is not identical to the issue presented herein. In the between-terms case Mr. Piccirilli was denied benefits because he had a reasonable assurance of work in the fall term; he was granted benefits in the instant case because, when the fall term arrived, he had lost his full-time job.

We must keep in mind that § 68's broad disqualification of substitute teachers who are assured of work (in any category of substitute teaching) in the next term applies only between terms, not within terms. Indeed, § 68 begins by declaring that, except for the between-terms disqualifications described above —

> Benefits based on service in employment for nonprofit organizations and educational institutions and governmental entities covered by chapters 42–44 of this title shall be payable in the same amounts on the same terms and subject to the same conditions as benefits payable on the basis of other services subject to chapters 42–44 of this title … ."[149]

As we can see, § 68 expressly states that — except in a between-terms scenario — the unemployment claims of educators are governed by the same principles of law as the claims of all other workers. Therefore, the issue of reasonable assurance under § 68 is, as a matter of law, irrelevant to an appraisal of Mr. Piccirilli's

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[149] Gen. Laws 1956 § 28-44-68. For a more complete quotation of the beginning of § 68, see ante, at 30-31.

eligibility for benefits beginning in the fall-term of 2009.[150] And so, Westerly's arguments to the contrary — though zealously presented — are fundamentally misguided. And it follows from this conclusion that the third element of the three-part test for the invocation of collateral estoppel — the identity of issues — is not satisfied. Therefore, the Town's assignment of error to the Board of Review for declining to apply principles of collateral estoppel in this case must thereby fail.

And while the foregoing may be dispositive of Westerly's assignment of error regarding the Board's failure to invoke issue preclusion in this case, it begs the question — if we were to evaluate Mr. Piccirilli's claim by general (i.e., non-§ 68) principles, how should we proceed? Based on the circumstances presented in this case, I believe that we may best begin by asking the following question regarding Claimant's fall-term unemployment eligibility — Was Mr. Piccirilli reduced from full-time to part-time status? Clearly he was.[151] This answer is significant because it is well-settled that a worker who is reduced from a full-time position to a part-time position is allowed to collect unemployment benefits.[152] Of

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150 Also irrelevant are the cases and statutes cited by Westerly in its (initial) memorandum regarding the legal status of substitute teachers. Westerly's Memorandum of Law, at 10-11.

151 But, Claimant was not laid-off, as the Board of Review conceded in its post-remand decision. See Decision of Board of Review, May 16, 2013, at 5.

152 See Gen. Laws 1956 § 28-44-7. The Supreme Court seemed to endorse this basic approach in an educational (during a term) setting in Brouillette v.

course, their benefits are reduced by the wages they earn.[153]

Let us reflect on this point, as I believe it to be the crux of this matter. It is the fact that Mr. Piccirilli was reduced from full-time work to part-time work that is the key here, not his profession.[154] Section 68 commands us to treat all

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Department of Employment and Training Board of Review, 677 A.2d 1344, 1346-47 (R.I.1996).

[153] For more than twenty years this Court has extended the fundamental principle of § 28-44-7 (that the partially unemployed may collect partial benefits) to those workers who, having been laid-off from a full-time position, then quit a part-time position; this Court has ruled that such a worker may also receive benefits, subject to an offset for that income which was voluntarily forgone. See Craine v. Department of Employment and Training, Board of Review, A.A. No. 91-25, (Dist.Ct.6/12/91) (DeRobbio, C.J.)(Claimant lost a full-time job, then took leave from part-time job; Held, partial benefits would be awarded pursuant to § 28-44-7). The rule of Craine provides that although the claimant has left his part-time position in circumstances which would have, if viewed in isolation, triggered a disqualification under section 28-44-17 [Leaving Without Good Cause], he is not fully disqualified. For recent cases applying this rule, see: Deletetsky v. Department of Labor and Training Board of Review, A.A. No. 13-153 (Dist.Ct. 2014), at 21-24; Aponte v. Department of Labor and Training Board of Review, A.A. No. 13-205 (Dist.Ct. 2014, at 10-13); McCormick v. Dept. of Labor and Training Board of Review, A.A. No. 13-159 (Dist.Ct. 2014), at 13-16. This rule can certainly be applied to educators during terms.

And so we are led ineluctably to the one issue that I believe the Board of Review might well have addressed in this case, but did not — whether Claimant's benefits should have been reduced by the amount of wages he could have earned from being a part-time per-diem teacher but did not pursue. Of course, Westerly did not raise this specific issue, though it referred to the issue of Claimant's availability generally. Westerly's Memorandum of Law, at 10-11.

[154] This is, in my view, Westerly's fundamental misapprehension. The school department's arguments all have their origins in Mr. Piccirilli's profession, not his circumstances.

professions equally, with the exception of educators — but only during vacations or other periods between terms. If Mr. Piccirilli was a sales clerk in a department store who was upgraded to full-time status and then, nine months later, lowered back to part-time status, he would be allowed to collect benefits. And since, in the instant claim, Mr. Piccirilli was a full-time worker in the 2008-2009 school-year who was then reduced to part-time status in the 2009-2010 school-year, there is, as I see it, no reason why he should not be deemed eligible for benefits, as would any other worker in any other field.

3

Likely Recurrence in a Manner Avoiding Review

Although I do not find the presence of an issue of sufficient magnitude to justify review notwithstanding mootness, I shall now offer a few comments regarding whether the issue is likely to recur in a manner evading review. In sum, I do not believe these issues meet this standard.

The first point to be made is the one proffered by the Board of Review — the Westerly Public Schools does not have to be a reimbursing employer. It can shift into the contributing system at its pleasure.[155] So, it can avoid the recurrence

[155] The fact that the employer had such an option was regarded as a factor which undercut a religious reimbursing-employer's claim that an order of reimbursement constituted an interference with its first amendment rights in St. Pius X Parish Corporation v. Murray, 557 A.2d 1214, 1218 (R.I. 1989).

of these circumstances absolutely.

Second, with regard to any argument that Westerly might make regarding the liability vel non of a reimbursing employer for unsound decisions awarding benefits that are later reversed, we now know they will absolutely not recur. After the receipt of all memoranda, it came to our attention that the General Assembly has answered the question at the center of this case — whether a reimbursing employer is responsible to reimburse the Department for benefits it paid, either through error or as a result of a decision that was later reversed. See P.L. 2014, ch. 203, § 2 amending Gen. Laws 1956 § 28-43-31. Of course, this amendment, which became effective on June 30, 2014, does not govern the substantive issue in the present case. But it does insure, definitively, that in the future, reimbursing employers will be required to make payments for benefits paid pursuant to clerical error or paid pursuant to a decision reversed on appeal. While, in some future case, we may be called upon to apply § 28-43-31 as amended, we are not likely to be required to revisit the law that governs the instant case.

4

Summary

Given the number of subsidiary questions we have addressed in this case, it seems a summary of my findings and conclusions is appropriate.

I find the instant case is moot, because I conclude that Westerly must repay

the Department of Labor and Training for benefits it gave to Mr. Piccirilli. Next, I find the case does not fall within the ambit of the exception to the mootness rule: first, because of the recent amendment to § 28-43-31, the issues presented are not likely to recur; second, I believe neither of the two issues presented merit special consideration — (a) Appellant's argument that a reimbursing employer need not pay the Department for an unsound award of benefits is belied by the plain meaning of the Employment Security Act, and (b) Appellant's argument that the Board of Review was bound by estoppel to deny Mr. Piccirilli benefits in the fall of 2009 because it denied him benefits in the summer of 2009 is fundamentally misguided because § 28-44-68 disqualifications apply only between terms, not during terms; as a result, there was no identity of issues, as required to invoke collateral estoppel.

V
THE MOTION TO RECONSIDER

As we noted in passing when outlining the facts and travel of the case, although this Court remanded the instant case for further consideration of the Motion to Reopen, the Board of Review went further, and considered the matter de novo. As a result, I have addressed the matter on the merits, to the extent relevant to my resolution of the defense of mootness.

Nevertheless, I do feel constrained to indicate that, if I had been required to rule on this issue, I would have found that Westerly did not show sufficient justification for the granting of that motion since I believe, as stated above, that the case is moot. And I can see no circumstances in which the opportunity to litigate a moot case could be deemed good cause to reopen a case that was decided further down the administrative ladder and not appealed.

VI
THE WAIVER OF INTEREST AND PENALTIES

In its decision the Board of Review included a waiver of all interest and fees, which it entered — in a sense of fairness — for various reasons.[156] This Court, following the Board's lead, included in its May 18, 2011 Order a provision staying the accumulation of interest and penalties pending the Board's further action in the case.[157]

In his memorandum, the Director has argued that the Board of Review exceeded its authority in waiving interest and fees in this matter. As I have

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[156] See Decision of Board of Review, May 16, 2013, at 7 and Decision of Board of Review, May 16, 2013, at 8 (Concurring opinion of Member Representing Industry).

[157] See Order, Westerly Public Schools v. Department of Labor and Training Board of Review, A.A. No. 11-024 (Dist.Ct. 05/18/2011), at 2.

reviewed this matter I have begun to believe that the Director may well be right.[158] Nevertheless, I do not believe this issue is properly before us — the Director did not appeal the Board's order and the issue has not been fully briefed. And, in any event, it would be illogical for this Court to grant dismissal for mootness, as the Department urges, and also address this substantive issue. Such a dismissal divests this Court of any authority to emend the Board's decision in any of its particulars. Therefore, I shall not address this matter despite the Director's stated concerns.

VII
CONCLUSION

For the reasons stated above, I recommend that the instant appeal be DISMISSED for mootness.

/s/
Joseph P. Ippolito
MAGISTRATE

November 17, 2014

[158] Although the Department does not argue the point, I have also come to believe that this Court's stay of the accrual interest may well have been granted improvidently. See Gen. Laws 1956 § 28-43-30(f).