STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Karen Pare	:	
	:	
v.	:	**A.A. No. 13 - 122**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

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

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the Board of Review's decision is AFFIRMED on the issue of eligibility but the Order of Repayment is REVERSED and VACATED.

Entered as an Order of this Court at Providence on this 27th day of June, 2014.

By Order:

____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

____/s/_____
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Ms. Karen A. Pare urges that the Board of Review of the Department of Labor and Training erred when it declared her to be disqualified from receiving unemployment benefits because she was neither totally unemployed nor available for work during two periods when she was laid off by a company of which she was a director and part-owner. Jurisdiction to hear and decide appeals from decisions made by 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. For the reasons stated below, I conclude that the

instant matter should be affirmed on the issue of Claimant's disqualification and reversed on the issue of repayment; I so recommend.

I
FACTS & TRAVEL OF THE CASE

Ms. Pare was a director and five percent owner of a corporation, Rise Above Construction. In 2012, she was then laid-off due to a lack of work, effective January 25, 2012. She filed a claim for unemployment benefits on February 2, 2012, and she collected unemployment benefits from the week-ending February 11, 2012 through the week-ending March 31, 2012.

In January of 2013, Ms. Pare was again laid off by Rise Above and she filed a new claim for benefits. However, on March 15, 2013 a designee of the Director of the Department of Labor and Training determined she was not "totally unemployed" — as that term is defined in Gen. Laws 1956 § 28-42-3(27). Decision of Director, No. 1306164, March 15, 2013, at 1.[1] The Director's decision particularly cited the fact that she was devoting more than forty hours

[1] In truth, the Director's designee rendered two decisions. The first (Department's No. 1311665, Board of Review No. 20131139) in the Department's system, concerned benefits Ms. Pare received during February and March, 2012. The second, (Department's No. 1306164, Board of Review No. 20131140), concerned the claim for benefits Ms. Pare filed on January 27, 2013, which was rejected. Unfortunately, this distinction is not finely drawn in the Referee decisions.

per week to the business. Id. He therefore found her ineligible to receive benefits. Id.

On the same day, the Director decided that she had not been totally unemployed during her 2012 lay-off and should have been disqualified from receiving unemployment benefits. As a result, he found that Ms. Pare had been overpaid in the amount of $4,690, which he ordered her to repay. Decision of Director, No. 1311665, March 15, 2013, at 1.

> The Director's Decision states in pertinent part —
>
> …
>
> Section 28-42-3(27) states that an individual is deemed "totally unemployed" in any week in which there are no services performed, no wages earned, and if self-employed, cannot reasonably return to any self-employment in which that individual has customarily been engaged.
>
> Since you were performing full time services for your employer and working full time hours each week, it is determined you do not meet the definition of an unemployed individual. Benefits are denied. …

Decision of Director, No. 1311665, March 15, 2013, at 1. (Exhibit D-2). Claimant appealed and a hearing was held before Referee Nancy L. Howarth on May 14, 2013, at which time Ms. Pare appeared with counsel and four[2] DLT representatives appeared, also with counsel.

[2] Ultimately, only three actually gave testimony.

On May 28, 2013, the Referee issued a decision in which she found the following facts:

> The claimant is employed as a director and five percent owner of an active corporation. During the weeks in question the claimant worked full-time in the business, without pay. She also worked on a private project to patent and market technology she had developed.
>
> When she filed her claim for benefits for each of the weeks at issue the claimant was required to respond to various questions. She indicated that she had not worked, performed services or earned any wages and had not worked full-time during any of the weeks in question.
>
> The claimant did not search for work outside her own business. She has failed to provide evidence to indicate that she was able and available for full time work in another position.

Referee's Decision, No. 20131139, May 28, 2013, at 1.[3]

As did the Director, the Referee considered the foregoing facts with regard to the concept of total unemployment, as provided in § 28-42-3(27); she then concluded:

> The evidence and testimony presented at the hearing establish that the claimant was working full (sic) in her business and at home for the business, as well as working to patent and market technology she had developed. Therefore, I find that since the claimant was working full time performing services for the employer she does

[3] These are the Findings of Fact taken the decision regarding the 2012 lay-off. The facts found in the 2013 case are the same, except the second paragraph is omitted. Referee's Decision, No. 20131140, May 28, 2013, at 1.

> not meet the definition of a totally unemployed individual under the above Section of the Act.

Referee's Decision, No. 20131139, May 28, 2013, at 2.[4] However, the Referee went further, and also considered whether Ms. Pare met the Availability requirements set forth in § 28-44-12. Referee Howarth — after quoting extensively from section 12 — pronounced the following conclusions:

> In order to be eligible for Employment Security benefits a claimant must be able and available for full-time work and must conduct an active and independent search for such employment. The evidence and testimony presented at the hearing fail to establish that the claimant searched for work outside her business, or that she was able and available for other full time work. Therefore, I must find that the claimant fails to meet the availability provisions of the above section of the Act.

Referee's Decision, No. 20131139, May 28, 2013, at 2.[5] Accordingly, the Referee found the Claimant ineligible to receive benefits for both reasons.[6]

Claimant filed an appeal from this decision and the matter was considered by the Board of Review on the basis of the record developed by the Referee. On July 15, 2013, the Board of Review issued two unanimous decisions which held

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[4] This paragraph appears identically in both Referee Decisions.

[5] This paragraph appears identically in both Referee Decisions.

[6] Referee Howarth also upheld the Director's order of repayment, which we shall discuss separately, infra.

that the decisions of the Referee were proper adjudications of the facts and the law applicable thereto. Accordingly, the decisions of the Referee were affirmed.

Thereafter, on July 19, 2013, Ms. Pare filed a complaint for judicial review in the Sixth Division District Court. On August 28, 2013 a conference was conducted by the undersigned, at which a briefing schedule was set. Helpful memoranda have been received from Claimant Pare and the Department of Labor and Training.

II
APPLICABLE LAW

A
Total Unemployment

The concept of "total unemployment" (or the state of being "totally unemployed") is defined in § 28-42-3(27) of the Employment Security Act —

> "Total unemployment." An individual shall be deemed totally unemployed in any week in which he or she performs no services (as used in subdivision (25) of this section) and for which he or she earns no wages (as used in subdivision (25) of this section), and in which he or she cannot reasonably return to any self-employment in which he or she has customarily been engaged;

Because the definition is stated in the conjunctive, it seems that all three conditions must be satisfied in order for the definition to be fulfilled. Put simply, a person claiming unemployment benefits must have performed no

services and earned no wages and not been able to return to self-employment. If any one of these hurdles is not cleared, the claimant will not be deemed totally unemployed.

B

Availability

In this case we must also consider the following provision of the Rhode Island Employment Security Act, which enumerates another of the several prerequisites to being deemed eligible to receive unemployment benefits. Gen. Laws 1956 § 28-44-12(a), provides:

> **28-44-12. Availability and registration for work. --** (a) An individual shall not be eligible for benefits for any week of his or her partial or total unemployment unless during that week he or she is physically able to work and available for work. To prove availability for work, every individual partially or totally unemployed shall register for work and shall:
>
> (1) File a claim for benefits within any time limits, with any frequency, and in any manner, in person or in writing, as the director may prescribe;
>
> (2) Respond whenever duly called for work through the employment office; and
>
> (3) Make an active, independent search for suitable work.
>
> (b) * * *
>
> (Emphasis added).

As one may readily observe, section 12 requires claimants to be able and available for full-time work and to actively search for work. It is the burden of the claimant to prove compliance with section 12's requirements.

III
STANDARD OF REVIEW

The pertinent standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[7] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of

[7] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425

fact.[8] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[9]

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

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

(1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

[8] Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[9] Cahoone, 104 R.I. at 506, 246 A.2d at 215. Also D'Ambra v. Bd. of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

IV
ISSUE

The first issue before the Court is whether the claimant was properly disqualified from receiving benefits because she failed to show (1) that she was totally unemployed and (2) that she met the Availability requirements established in section 28-44-12. Thereafter, we shall consider the legality of the order requiring Ms. Pare to repay the benefits she received in 2012.

V
DISCUSSION

At the outset of our analysis we should enumerate the two conditions precedent to the collection of unemployment benefits by Ms. Pare. First, she must show that she was "totally unemployed" as defined in section 28-42-3(27). Second, she must show that she was available for work as that term is defined in section 28-44-12. After conducting a brief review of the facts of this case, I shall now consider these issues in seriatim.

A
Review of the Facts

Since she bore the burden of proving she satisfied both the total-unemployment and work-search requirements, Ms. Pare testified first at the

consolidate hearing conducted by Referee Howarth in these matters.[10] She testified that she was a Director of Rise Above Construction and its Office Manager.[11] At Rise Above, which she described as a "family business,"[12] her duties consisted of soliciting bids, estimating, contracting and proposal writing; she oversaw design, ordered material, and monitored accounts payable.[13] Ms. Pare explained that she and her sister decided that she would be laid-off.[14] Originally, her return-to-work date was set as April 22, 2013 but this was changed later to March 23, 2013.[15]

For the first month of her 2013 lay-off, Ms. Pare believed, as she had previously, that if she had a return-to-work date within twelve weeks, she was exempted from many of the job-search requirements found in § 12 and that, instead of looking for outside work for herself, she could spend her time looking for jobs for Rise Above.[16] And that is mostly what she did, although she

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10 Referee Hearing Transcript, at 10 et seq.

11 Referee Hearing Transcript, at 10-11.

12 Referee Hearing Transcript, at 12.

13 Referee Hearing Transcript, at 23.

14 Referee Hearing Transcript, at 12.

15 Referee Hearing Transcript, at 13-14.

16 Referee Hearing Transcript, at 13-16, 19.

did seek work for herself in the wind industry[17] and with the town of West Warwick.[18] But Ms. Pare's understanding of the DLT's job-search rules changed during a February 14, 2013 telephone conversation with a representative of the Department.[19]

The initial purpose of the call was to discuss the fact that she had stated that she was an officer of Rise Above Construction; she learned that a "Director" was not considered an "Officer" — for DLT purposes.[20] She agreed to resubmit the application with that correction.[21] But during this call she was told the policy had changed — that the exemption now applied only to those who had a return-to-work date within eight weeks of their layoffs.[22]

Ms. Pare testified that during her January 2013 layoff she worked for Rise Above about 20 hours per week, down from the 32 hours per week she worked when being paid.[23] She stated that she dedicated more hours to her wind-energy

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17 Referee Hearing Transcript, at 17. Ms. Pare sought work in conjunction with a patent she owned. Id., at 17-18.

18 Referee Hearing Transcript, at 20.

19 Referee Hearing Transcript, at 14, 19.

20 Referee Hearing Transcript, at 19.

21 Referee Hearing Transcript, at 19.

22 Referee Hearing Transcript, at 19, 22.

23 Referee Hearing Transcript, at 21, 24, 30.

interests, seeking ways in which to exploit a patent she owned.[24] As a result, only about twenty percent of her total weekly work-hours — which she put at about 62 hours per week — were spent on Rise Above matters.[25] In any event, she testified that if she had found another position she would have taken it.[26]

Ms. DiBiasio was the Department's first witness.[27] She stated that her attention was drawn to Ms. Pare's circumstances because, on a "corporate" questionnaire, she stated that she was a corporate officer of Rise Above Construction; ironically, the Department does not consider a director an officer.[28] But, it led Ms. DiBiasio to conduct a telephone interview with Appellant on February 14, 2013. Ms. Pare described to Ms. DiBiasio the duties she performed for Rise Above before the layoff, and then stated that there was no change in her schedule during the layoff.[29] Ms. DiBiasio discussed the Availability and work-search requirements with Ms. Pare and told Appellant she had to look for work outside her company unless she had a return-to-work date

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24 Referee Hearing Transcript, at 25-28.

25 Referee Hearing Transcript, at 29-30. She acknowledged the inconsistency in her testimony on this point. Referee Hearing Transcript, at 30.

26 Referee Hearing Transcript, at 28.

27 Referee Hearing Transcript, at 32 et seq.

28 Referee Hearing Transcript, at 32-33.

29 Referee Hearing Transcript, at 34.

within eight weeks.[30] She remembered that Ms. Pare stated she did not have a definite return date but would return to Rise Above in April or May (2013).[31] She further told Ms. Pare that she had to apply for three positions per week.[32] Ms. DiBiasio testified that Ms. Pare told her that she had not applied for work outside her company.[33]

According to Ms. DiBiasio, Ms. Pare questioned her regarding why she should have to apply for work outside her firm.[34] In fact, Appellant claimed that she had been told by a DLT representative that seeking work for her company counted toward her work search.[35] In any event, Claimant agreed to do so going forward.[36] However, Ms. DiBiasio did not recall discussing the fact that the exemption was formerly effective for those with a recall date within twelve weeks.[37]

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30 Referee Hearing Transcript, at 34, 39, 43-44.

31 Referee Hearing Transcript, at 39-40. However, on cross-examination Ms. DiBiasio conceded that she did not record this statement. Referee Hearing Transcript, at 46.

32 Referee Hearing Transcript, at 40-41.

33 Referee Hearing Transcript, at 43.

34 Referee Hearing Transcript, at 41, 45.

35 Referee Hearing Transcript, at 40-41.

36 Referee Hearing Transcript, at 46.

37 Referee Hearing Transcript, at 39.

As to her procedure in the interview, Ms. DiBiasio stated that she did not record what she (Ms. DiBiasio) told Ms. Pare, only what Ms. Pare said to her.[38]

The next witness for the Department was Mr. David Wright, a Principal Employment and Training Interviewer.[39] On direct-examination, he testified on one point only — he denied he ever told Ms. Pare that searching for work for her company would, per se, satisfy the work-search requirement.[40] Yet, on cross-examination, he admitted that he had no present recollection of a discussion with Ms. Pare.[41]

The third witness for the Department was Ms. Kathy Catanzaro, Chief of the Unemployment Insurance Special Program.[42] Ms. Catanzaro testified she first became familiar with Ms. Pare as a result of an inquiry regarding the status of her claim.[43] She spoke to Ms. Pare and told her it would be issued the next day.[44] At that time Ms. Pare expressed concern about her discussion with Ms. DiBiasio, insisting that she had been told by a NetworkRI counselor that it was

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38 Referee Hearing Transcript, at 44-45.

39 Referee Hearing Transcript, at 48 et seq.

40 Referee Hearing Transcript, at 49.

41 Referee Hearing Transcript, at 50.

42 Referee Hearing Transcript, at 55 et seq.

43 Referee Hearing Transcript, at 56.

permissible to seek work for her company only.[45] She was concerned that a counselor would say such a thing and asked Ms. Pare if she was sure that had been said.[46] But, according to Ms. Catanzaro, Claimant conceded that the counselor had said she had to look for other work as well.[47]

After Ms. Catanzaro concluded her testimony, the parties began to address the issue of the alleged 2012 overpayment.

Ms. Pare gave further testimony.[48] As in 2013, she testified that she was laid off in 2012 due to a lack of work.[49] Once again, the decision was made by her sister and herself.[50] At the outset of the layoff, which began in late January, she expected to be off the payroll for up to twelve weeks, returning some time in April.[51] As it happened, she returned to the payroll in ten weeks.[52] Ms. Pare testified that when she collected benefits in 2012 she had no conversations with

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44 Referee Hearing Transcript, at 57.

45 Referee Hearing Transcript, at 58.

46 Referee Hearing Transcript, at 59.

47 Referee Hearing Transcript, at 59.

48 Referee Hearing Transcript, at 65 et seq.

49 Referee Hearing Transcript, at 65.

50 Referee Hearing Transcript, at 66.

51 Referee Hearing Transcript, at 67.

52 Referee Hearing Transcript, at 68.

DLT personnel.[53] She also stated that during her 2012 layoff she devoted less time to Rise Above (maybe four or five hours per week), because she was busy trying to license her technology.[54] It was her recollection that she never discussed her 2012 layoff (and her receipt of benefits) with Ms. DiBiasio.[55]

Ms. DiBiasio then testified further.[56] She testified that she asked Ms. Pare whether she had been working full-time when she collected benefits in 2012, and she answered in the affirmative.[57] But according to Ms. Pare, Ms. DiBiasio never said that the interview would apply to both her 2012 and 2013 claims.[58]

B

The One-Year Redetermination Limitation

But before addressing the substantive issues that the instant case presents, I feel constrained — by fundamental fairness — to raise a procedural issue. I refer here to a provision of the Employment Security Act — Gen. Laws 1956 § 28-44-39 — which authorizes the Director to reconsider prior decisions he has

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53 Referee Hearing Transcript, at 70.

54 Referee Hearing Transcript, at 70-73.

55 Referee Hearing Transcript, at 74-75.

56 Referee Hearing Transcript, at 75 et seq.

57 Referee Hearing Transcript, at 76-77. However, she had to concede that she did not memorialize this statement in writing. Referee Hearing Transcript, at 79-81.

made regarding a claimant's eligibility for benefits or the amount of benefits to be received. It is pursuant to the authority of section 28-44-39 that the Director was empowered to issue his March 15, 2013 decision revisiting Ms. Pare's receipt of benefits in 2012.

However, section 28-44-39 places a specific time limitation on the Director's authority to reconsider decisions:

> * * * The director may at any time within one year from the date of determination either upon the request of the claimant or on his or her own motion reconsider that determination if he or she finds that an error in computation or in identity has occurred in connection with it, or that additional wages pertinent to the status of the claimant has become available, or if that determination was made as a result of a non-disclosure or misrepresentation of a material fact. * * * (Emphasis added).

Gen. Laws 1956 § 28-44-39(a)(1)(i). Thus, the Director's ability to revise prior decisions is confined to a one-year period.

The application of this statute to the instant case may be simply done. When he rendered his decision on March 15, 2013, the Director could not revise any determination of Ms. Pare's eligibility that had been made prior to March 15, 2012. Therefore, all benefits received prior to the week ending March 17,

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[58] Referee Hearing Transcript, at 82-83.

2012 must be regarded as settled and unaffected by the Director's decisions.[59] Her eligibility for benefits during the period from the weeks-ending February 18, 2012 through March 10, 2012 is, as a matter of law, reinstated. We may not, therefore, consider the substantive issues of "total unemployment" and "Availability" as to this period; neither may we consider whether Ms. Pare ought to be ordered to repay benefits received in this period.[60]

C

Eligibility — The Requirement of "Total Unemployment"

The record is clear that during both her 2012 and 2013 layoffs Ms. Pare continued to perform well more than *de minimis* services to Rise Above Construction. Such a finding is supported by Ms. Pare's own testimony (regarding 2013) and the testimony of Ms. DiBiasio, who testified that Appellant stated she worked full-time during her 2012 layoff. And so, in his Decisions, the Director found Ms. Pare ineligible to receive benefits because she was not

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[59] By setting aside the finding of disqualification for all periods prior to March 15, 2012, the Court is, in effect, treating the receipt of each week's benefits as a separate determination. I believe this practice is equitable to both the Department and its clientele.

[60] And so, we shall consider the legal issues mentioned only as they may apply to the weeks ending March 17, 2012, March 24, 2012 and March 31, 2012.

"totally unemployed." These rulings were upheld, in turn, by Referee Howarth and the Board of Review.

Total unemployment is a concept that is defined in section 28-42-3(27) of the Employment Security Act –

> "Total unemployment." An individual shall be deemed totally unemployed in any week in which he or she performs no services (as used in subdivision (25) of this section) and for which he or she earns no wages (as used in subdivision (25) of this section), and in which he or she cannot reasonably return to any self-employment in which he or she has customarily been engaged;

Now, facially, it would appear that Ms. Pare would run afoul of the first element of this definition, because she concedes that while collecting unemployment benefits she did do work for the company, Rise Above Construction, and such work would seem to constitute "services."

But Claimant cites Dumont v. Hackett, 120 R.I. 818, 390 A.2d 374 (1978) for its holding that a Claimant would be deemed totally unemployed despite the fact that he had worked, without remuneration, for a corporation in which he held an ownership interest.[61] This outcome was based on the Employment Security Act's definition of "services" which, at that time, defined "services" as

[61] Claimant's Memorandum, at 3-4.

work done in return for remuneration (in excess of five dollars per week).[62] Under the Act's current definition of "services" — codified at subdivision 28-42-3(25) — the financial trigger is still present, although it has been raised substantially. See Gen. Laws 1956 § 28-42-3(25)(ii). As a result, Ms. Pare's work for Rise Above Construction, which is undisputed, does not constitute "services" as that term is defined in the Act. Accord, Gesualdi v. Department of Employment Security, 118 R.I. 399, 374 A.2d 102 (1977).

And so, Appellant did carry her burden of showing she was "totally unemployed" and she cannot be deemed disqualified from receiving unemployment benefits pursuant to the definition of "total unemployment" found in Gen. Laws 1956 § 28-42-3(27).[63]

D

Eligibility — The Availability Requirement

Section 28-44-12 requires that — in order to be eligible for benefits – a claimant must pass the following three-prong test: that the claimant is able to

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[62] Dumont, 120 R.I. at 822-23, 390 A.2d at 377 citing the definition of services then codified at subdivision 28-42-3(13). The definition of "total unemployment" was then codified at subdivision 28-42-3(15).

[63] For the reasons stated in Part V-B of this opinion, this finding only applies to her 2013 layoff and the weeks ending March 17, 2012, March 24, 2012, and March 31, 2012.

work, that the claimant be available for work, and the claimant must be actively searching for work. See Gen. Laws 1956 § 28-44-12(a) and § 28-44-12(a)(3), excerpted supra at page 4.[64] It is the claimant's burden of proof to show he or she has satisfied these conditions.

In this case the Referee concluded Ms. Pare was subject to a section 28-44-12 disqualification during the periods she was laid-off by Rise Above in 2012 and 2013 because she failed to make a sufficient search for work, as required in the third prong of the § 12 test.

Now, Ms. Pare endeavored to prove she had no § 12 duty to search for work because she had a return-to-work date within twelve weeks; and this fact, she believed, exempted her from § 12's work-search requirements.[65] In this regard she relied on a document called a "Work Search Policy."[66]

Now, the Department's response throughout the hearing was that, although the exemption rule was still in effect, it had been modified, changing the return-to-work window from twelve weeks to eight. Indeed, Ms. Catanzaro

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[64] It is confusing that section 12 is commonly known as the "Availability" section and that "availability" in a stricter sense is an element of the test.

[65] See Claimant's Exhibit No. 1, entitled "Work Search Policy" which cites a twelve-week return-to-work date for exemption from the DLT's work search rules.

[66] See Claimant's Exhibit No. 1.

stated, on two occasions at the hearing, that the rule had been changed in late 2012.[67] Unfortunately, neither party entered a copy of the rule into the administrative record or presented a copy in connection with their memoranda.

And so, this Court searched for the rule and found it at Rule 35 of the Unemployment Insurance and Temporary Disability Insurance Program Rules, codified as R.I. Admin. Code 42-2-2:35. And, according to the reporter's note, it was adopted on September 19, 2012, proving Ms. Catanzaro's memory to be perfectly correct.

It therefore appears that twelve-week rule was still in effect in early 2012 and therefore — exempting her from the demands of a § 12 job search in March of 2012. Therefore, as to her 2012 leave, Ms. Pare should not be disqualified under § 12.

But, as to her 2013 layoff, Ms. Pare's misunderstanding of the regulation's contents (however induced) cannot provide her with a safe harbor from the job-search mandates of § 12. The regulation, duly promulgated under the Rhode Island Administrative Procedures Act, Gen. Laws 1956 § 42-35-1 et seq., has the

[67] Referee Hearing Transcript, at 6, 69. Counsel for the Department appeared to confirm her recollection. Referee Hearing Transcript, at 7.

force of law, unless inconsistent with higher Rhode Island law or federal law. I find no such impediment here.

Quite simply, Ms. Pare placed upon the record insufficient evidence of an independent job search (both before and after her telephone interview with Ms. DiBiasio) to satisfy her burden of proof on the issue. As a result, the Board of Review's decision disqualifying her from receiving benefits during her 2013 layoff must be upheld.

E

Repayment of Benefits Received

In the 2012 case (No. 20131139), Referee Horwath also upheld that provision of the Director's Decision which ordered Ms. Pare to repay the $4,690.00 she had received. As we have seen supra, in Part V-B of this opinion, the first five weeks cannot be altered. But, as I am recommending that Ms. Pare be declared not disqualified for her remaining three weeks of benefits, the issue of repayment is moot. Nevertheless, in the interests of providing this Court with the most comprehensive findings and recommendations possible, I shall offer a few comments on the repayment issue.

The Director had acted pursuant to Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.
> * * *
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

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

> When she filed for her claim for benefits for each of the weeks in question the claimant indicated that she was able and available for full-time work and that she had not worked during that week, although this was not the case. As a result of the claimant's misrepresentation she received benefits to which she was not entitled. The claimant is, therefore, overpaid and at fault for the overpayment. Accordingly, it would not defeat the purpose of the above section of the Act to require that the claimant make restitution.

Referee's Decision, No. 20131139, May 28, 2013, at 3. Accordingly, the Referee upheld the Director's order of repayment. But for the reasons that follow, I believe this Order — upheld by the Board of Review — must be set aside.

First of all, the Referee's finding of fault keys on two non-issues in the case — (1) her ability to work and her (2) availability for work. But the section 12 disqualification had been based on the lack of an adequate work-search, not on her availability or ability to work.[68] Moreover, as to 2012, it would have been difficult to show "fault" — as required by § 28-42-68(b) — for the overpayment when it appears she acted in good faith in reliance on the earlier version of the job-search exemption policy.[69] For these reasons the order of repayment was of doubtful merit.

VI
CONCLUSION

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, *inter alia*, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of

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[68] And rightly so, as there was no proof of her inability to work and she stated she would have accepted work elsewhere had it become available.

[69] This might well have been true even if the eight-week rule had gone into effect before Ms. Pare's 2012 layoff.

which witnesses to believe. Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.

Applying this standard, and upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review (affirming the decision of the Referee) on the issue of disqualification was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(G)(5),(6). I therefore recommend that the decision of the Board be AFFIRMED as to the 2013 case (Board of Review No. 20131140, Department's No. 1306164) but REVERSED as to 2012 case (Board of Review No. 20131139, Department's No. 1311665).

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 27, 2014