STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Donald J. Pineau	:	
	:	
v.	:	**A.A. No. 13 - 175**
	:	
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 4th 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 Mr. Donald J. Pineau urges that the Board of Review of the Department of Labor and Training erred when it held that Mr. Pineau would be disqualified from receiving unemployment benefits because he was not fully available for work within the meaning of Gen. Laws 1956 § 28-44-12. 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 but reversed on the issue of repayment; I so recommend.

I
FACTS & TRAVEL OF THE CASE

Mr. Pineau re-filed his claim for benefits on July 5, 2013, but on July 25, 2013 the Director determined he failed to meet the Availability requirements of Gen. Laws 1956 § 28-44-12 during the period from the week ending April 13, 2013 through the week ending June 29, 2013 and was thereby disqualified from receiving unemployment benefits. The Director stated —

> To be eligible for benefits, an individual must be able and available for work and that such availability is established by contacting the local job service office in the area in which you live and registering for work.
>
> As you did not register in Massachusetts as required, you do not meet the availability requirements of the law. You are denied benefits as indicated below.

Decision of Director, July 25, 2013, at 1. (Exhibit D-2). Claimant appealed and a hearing was held before Referee Nancy L. Howarth on August 20, 2013, at which time Mr. Pineau was the sole witness.

On August 27, 2013, the Referee issued a decision in which she found the following facts:

> The claimant re-filed his claim for benefits on July 5, 2013. The Rhode Island Department of Labor and Training had advised the claimant that, since he was living in Massachusetts, he was

> required to register with his local unemployment office within 10 days of April 1, 2013. He failed to do so. Although the claimant contends that he did register with his local office, he failed to provide evidence to substantiate his statement.

Referee's Decision, August 27, 2013, at 1. And after quoting extensively from section 28-44-12, the Referee — based on the findings recited above — pronounced the following conclusions:

> In order to be eligible for Employment Security benefits the claimant must be able and available for full-time work and must conduct an active and independent search for such employment. He must also register with his local unemployment office. The claimant was advised by the Department of Labor and Training that he must register with his local office in the Commonwealth of Massachusetts by April 11, 2013. He failed to meet the availability requirements of the above Section of the Act.

Referee's Decision, August 27, 2013, at 2. Accordingly, the Referee found the claimant ineligible to receive benefits.[1]

Claimant filed an appeal from this decision and the matter was heard by the Board of Review. On September 20, 2013, the Board of Review issued a unanimous decision which held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the

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

decision of the Referee was affirmed.

Thereafter, on October 10, 2013, Mr. Pineau filed a complaint for judicial review in the Sixth Division District Court.

II
APPLICABLE LAW

This case centers on the application of the following provision of the Rhode Island Employment Security Act, which enumerates one of the several grounds upon which a claimant may be deemed ineligible to receive unemployment benefits. Gen. Laws 1956 § 28-44-12(a), provides:

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

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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

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

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

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

[4] 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).

> restrictions on eligibility under the guise of construing such provisions of the act.

IV
ISSUE

The first issue before the Court is whether the claimant was properly disqualified from receiving benefits because he failed to show he had registered for work as required by section 28-44-12. The second issue, is whether he should be required to repay benefits received.

V
ANALYSIS

A
The Registration Issue

At the outset we should indicate that 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 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.[5] It is the claimant's burden of proof to meet these conditions. The Referee concluded Mr. Pineau was subject to a section 28-44-12 disqualification in the period from April 13,

[5] 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.

2013 until June 29, 2013 because he failed to register for work at his local unemployment office, part of the third prong of the test.[6]

In denying benefits to claimant, Referee Howarth found that Mr. Pineau did not comply with the requirement that he register for work in the Commonwealth of Massachusetts. In so finding she apparently relied upon a document that was entered into evidence as an exhibit. See Department's Exhibit 4. This document, dated April 16, 2013, appears to be a list of Rhode Island claimants who live in Massachusetts that someone in Rhode Island's Department of Labor and Training sent by facsimile to a person named "Debbie" at the Massachusetts agency (whose full name and title is not listed). Now, it appears that someone, perhaps Debbie, faxed the list back to Rhode Island with notations inscribed before each name — "yes" if the person was registered, "no" if they had not. And the receipt of this document apparently caused an entry to be made in the DLT database indicating Mr. Pineau had not registered in Masaachusetts. See Department's Exhibit 5.

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[6] The duty to register is implied by paragraph (a)(2) of section 28-44-12 and expressly mandated by Rule 17(A)(3) of the Rules of the RI Department of Labor And Training for the Unemployment Insurance and Temporary Disability Insurance Programs, (November 2013), available at http://www.dlt.ri.gov/pdf/UITDIRules1113.pdf.

I find the Department's (and the Referee's) reliance on this document to be more than questionable — I find it troubling. In my view this is no way to decide if unemployed persons are to be disqualified from receiving benefits. Now, it is true that Board of Review hearings are not subject to the Rules of Evidence and the general bar to hearsay contained therein. See Gen. Laws 1956 § 42-35-10(a) and Gen. Laws 1956 § 42-35-18(c)(1). Nevertheless, our Supreme Court has indicated that the admission of hearsay at Board hearings should be guided by section 10's instruction that "[i]rrelevant, immaterial, and unduly repetitious evidence be excluded." Foster-Glocester School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018-19 (R.I. 2004) citing § 42-35-10(a). Similarly, the Court in Foster-Glocester invoked DePasquale v. Harrington, 599 A.2d 314, 316 (R.I. 1991) for the principle that, prior to hearsay evidence being admitted in administrative hearings, it must be viewed as reliable.

I do not view Department's Exhibit No. 5 as being reliable or trustworthy in the least. It does not indicate within its four corners the name of the person (or persons) who performed the checking in Massachusetts, who made the yes-or-no notations on the document, or what database was checked. As such, the

document contains rank hearsay. Accordingly, I do not believe the Department proved Mr. Pineau failed to register for work in Massachusetts.

Of course, it was not the Department's duty to do so. It is the Claimant's duty to prove he registered; and this, he certainly did not do. His own protestations that he did so were not supported by any credible evidence. So, the Referee's finding that Claimant did not prove compliance with the mandates of section 28-44-12 is certainly supported by the evidence of record — or, specifically, the absence of such evidence. Accordingly, given the fact that the claimant bears the burden of proving all elements of the availability test, I cannot find that the Referee's decision on the section 12 issue is clearly erroneous.

B

Repayment of Benefits Received

Secondly, claimant was ordered to repay $ 6,276.00 by the Director, 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:

> The claimant received Employment Security benefits for the weeks ending April 13, 2013 through June 29, 2013. He was aware that he was required to register with his local unemployment office, but failed to do so. Therefore, I find that the claimant is overpaid and at fault for the overpayment under the above Section of the Act. Accordingly, it would not defeat the purpose of the above section of the Act to require that the claimant make restitution. (Emphasis added).

Referee's Decision, August 27, 2013, at 3. Accordingly, the Referee upheld the Director's order of repayment. For the reasons that follow, I believe this Order must be set aside.

The Director ordered repayment based on a finding that Claimant failed to register for work in the Commonwealth. Having found that finding was not supported by reliable evidence of record, I have disregarded that finding — and found instead that Mr. Pineau failed to prove he registered, which is not at all the same thing. And while the claimant bears the burden of proof on the section 12 issues (ability to work, availability to work, proof of job-search) — the

Department must demonstrate fault in order to sustain a repayment order. See Gen. Laws 1956 § 28-42-68(b). In my estimation, a failure to prove registration does not per se equate to the kind of deception necessary to support a finding of fault.

Accordingly, I recommend that the Order of repayment be set aside.

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 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.

However, for the reasons stated above, I recommend that the Order of repayment be REVERSED and VACATED.

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 4, 2014