STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

David A. Shikiar	:	
	:	
v.	:	**A.A. No. 13 - 196**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

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

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

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIMRMED except for the order of repayment, which is REVERSED.

Entered as an Order of this Court at Providence on this 26th day of February, 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. David A. Shikiar, an adjunct professor at Rhode Island College, urges that the Board of Review of the Department of Labor and Training erred when it held that he was ineligible for between-term benefits during the summer of 2013 recess because he had been given a reasonable assurance of work during the next term as required by Gen. Laws 1956 § 28-44-68. 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 Board's decision in the instant matter should be affirmed.

I

FACTS & TRAVEL OF THE CASE

Mr. David A. Shikiar was employed by Rhode Island College as an adjunct professor when he applied for between-term unemployment benefits during the 2013 summer vacation period. In a decision dated August 2, 2013, a designee of the Director of the Department of Labor and Training decided that the claimant was not eligible for between-term benefits during the weeks-ending July 13, 2013, July 20, 2013, and July 27, 2013 and for the remainder of the vacation period because he had been given a reasonable assurance of being rehired after the vacation ended — as provided in Gen. Laws 1956 § 28-44-68. See Exhibit A2.

Mr. Shikiar appealed and a hearing was held before Referee Carl Capozza on September 9, 2013. The Claimant appeared, as did Ms. Janine Tegu, from the Human Resources office of Rhode Island College. Referee Hearing Trnascript, at 1-2. Referee Capozza issued a decision on September 10, 2013 which included the following findings of fact:

> **2. Findings of Fact:**
> Claimant had been employed in the position as an adjunct instructor with Rhode Island College for the spring term ending May 15, 2013. Prior to the date on March 29, 2013 the claimant

> received written assurance that he would perform services in the same or similar capacity during the next ensuing academic year 2013/2014. The economic terms offered were not substantially less than the terms and conditions of the position in the first period.

Referee's Decision, September 10, 2013, at 1. Then, after quoting extensively from Gen. Laws 1956 § 28-44-68, the referee pronounced the following statements of conclusion:

> * * *
> Based on the credible testimony and evidence of record it must be determined that the claimant did have reasonable assurance by written agreement from the employer to perform services in the same or similar capacity during the ensuing academic year 2013/2014 and that the economic terms and conditions of the position offered were not substantially less than the terms and conditions of the position in the first period.

Referee's Decision, September 10, 2013 at 2. Accordingly, the Decision of the Director denying benefits pursuant to section Gen. Laws 1956 § 28-44-68 was sustained.

Mr. Shikiar appealed and the matter was considered by the Board of Review. On October 22, 2013, a majority of the members of the Board of Review issued a decision which found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto and adopted the decision of the Referee as its own. Thereafter, claimant 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 § 28-44-68, provides:

> **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) <u>"Reasonable assurance" means a written agreement by the employer that the employee will perform services in the same or</u>

> similar capacity during the ensuing academic year, term or remainder of a term. Further, reasonable assurance would not exist if the 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" described in the statute to be given in writing, regarding an opportunity of a similar economic benefit.

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:

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

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

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of 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

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

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

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

> legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV

ISSUE

The issue before the Court is whether the claimant was eligible to receive between-term benefits because he had not been given "reasonable assurance" of work in the fall term, in writing, as provided in section 28-44-68.

V

ANALYSIS

Pursuant to Gen. Laws 1956 § 28-44-68, public and non-profit educational institutions who wish to prevent employees from receiving between-term benefits, must provide their employees with reasonable assurance of work in the fall. Pursuant to the amendments to section 68 provided by. P.L. 1998, ch. 113, § 1, said assurance must be in writing. In this case this provision was satisfied.

A

Facts Adduced at the Hearing

At the hearing conducted by Referee Capozza, the college's representative, Ms. Tegue, testified that Mr. Shikiar was employed by the college as an adjunct instructor teaching two courses during the spring term of 2013.

Referee Hearing Transcript, at 4-5. And as to the fall term, Claimant received notices (by e-mail) regarding two courses he was expected to teach. Referee Hearing Transcript, at 5. She further testified that the terms and conditions were essentially the same as the prior term. Referee Hearing Transcript, at 6.

Then Mr. Shikiar testified. He agreed that he taught two courses during the spring 2013 term. He also conceded that he received an e-mail from the department chair but stated that in his opinion it did not constitute a guarantee or reasonable assurance of future employment. Referee Hearing Transcript, at 8. He grounded this conclusion on the fact that courses can be taken away from adjunct professors. Referee Hearing Transcript, at 10-11.

For this reason, he did not inform the Department that he had a reasonable assurance of fall employment. Referee Hearing Transcript, at 14.

He cited a recent experience of an adjunct having a course taken away, which he alleged meant that there was a 5.5% chance that the college would renege on such an assurance of future work. Referee Hearing Transcript, at 12, 16. He also commented that courses may be dropped due to lack of enrollment. Referee Hearing Transcript, at 22.

B

Rationale

Claimant asserted in his complaint, and the Member Representing Labor commented in his dissent, that there must be an "agreement" to provide future services. Our Supreme Court has recently reiterated — in Elis-Clavet v. Board of Review, Department of Labor and Training, 15 A.3d 1008, 1014 (R.I. 2011) — that reasonable assurance is not a "guarantee" of future employment. And, while subdivision 28-44-68(4)(a) does employ the phrase "written agreement,"[4] it does so in an effort to define the term "reasonable assurance" — which is the phrase employed in the operative sections of the statute.

And, according to Mr. Shikiar's argument, he had roughly a 5.5% chance of losing a course to a lack of enrollment. In my view, such a relatively small likelihood of a course being withdrawn is not sufficient to vitiate the overwhelming odds that an instructor offered a course will be teaching it; therefore, I believe that Rhode Island College fulfilled its duty to provide Mr. Shikiar with a "reasonable assurance" of future employment in writing.

[4] In my opinion it is noteworthy that the phrase "written agreement" is used in the context of "written agreement by the employer." Section 68 does not require a written agreement by the employer and the teacher, which would signify a contract, an offer and an acceptance, a meeting of the minds. Instead, it requires an intention phrased as a solicitation to provide services.

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. After reviewing the complete record below, I find that the Board's decision (adopting the finding of the Referee) that Claimant was ineligible to receive unemployment benefits during the 2013 summer recess, pursuant to section 28-44-68, is fully supported by substantial evidence of record, is consistent with applicable law, and ought, therefore, be affirmed.

VI

REPAYMENT

Finally, Mr. Shikiar was ordered to repay the unemployment benefits he received in July, 2013. The authority of the Director — and the Board of Review on appeal — to order repayment is delineated in § 28-42-68 of the Employment Security Act, 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.
> (Emphasis added).

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery would not defeat the purposes of the Act. In my view "fault" implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one's duty to do what is right.[5] To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless.

With this in mind, let us focus on the facts and circumstances of the overpayment in the instant case. Referee Capozza found:

> When filing his claim for benefits on July 7, 2013 the claimant failed to notify the Department of Labor and Training that he had received reasonable assurance and as a result received benefits for the weeks ending July 13, 2013 through July 27, 2013, totaling $750.00.

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

Referee's Decision, September 10, 2013, at 1. Based on these findings, he issued the following conclusions:

> Based on the credible testimony and evidence of record it is indicated that the claimant, because of his failure to disclose to the Department of Labor and Training that he had received a letter of reasonable assurance, was in receipt of benefits for the weeks in issue totaling $750.00. Because of his non-disclosure I find that he is overpaid those benefits and is at fault for the overpayment and, therefore, it would not defeat the purposes for which the Employment Security Act was designed to require repayment of those benefits to the Department of Labor and Training as previously determined by the Director.

Referee's Decision, September 10, 2013, at 3. Specifically, Referee Capozza found that the claimant was at fault for his overpayment because of "his failure to disclose to the Department of Labor and Training that he had received a letter of reasonable assurance … ." And so, to resolve this repayment issue we must evaluate the propriety and effect of this finding.

At the outset of my comments on this question, I must state my firm belief that the Department, when it seeks repayment, bears the burden of showing that the recipient of unemployment benefits was "at fault." But while the Department was unrepresented at the hearing before Referee Capozza, I believe the record is sufficient for this Court to rule on this issue; accordingly, I shall now present my findings and recommendation on this issue.

In his testimony, Mr. Shikiar freely acknowledged that he had received the email designating him for two courses in the fall semester. Referee Hearing

Transcript, at 8, 12. But he stated he did not consider it to have constituted a reasonable assurance of work in the fall due to the vagaries of factors such as course enrollment and the like. Referee Hearing Transcript, at 12-18.

We also find in the record — as page 2 of Exhibit A1 — a print-out of a computer questionnaire completed by the Claimant. To the question —

"Are you returning to the same position in the next academic term?"

The Claimant apparently answered "Y" for yes.[6] He answered truthfully. Why the Department paid him benefits in spite of this answer one cannot say. But I can find no fault, no deception.

Accordingly, I find no evidence that Mr. Shikiar was at fault for any overpayment and I recommend the order of repayment be vacated.

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[6] To the next question — "If yes, were you notified of this in writing?" — Mr. Shikiar answered no. I do not consider this answer problematic. Mr. Shikiar received his notification by email. While I consider that an email can satisfy the requirement that an assurance be made "in writing" (for purposes of section 28-44-68), this issue is by no means settled. Therefore, I must concede that this answer could well have been made in good faith — and not from pedantry or sophistry.

In any event, I do not believe the issue was raised in this case, in which Mr. Shikiar concentrated his fire on the issue of an adjunct professor's likelihood of employment — notwithstanding an offer of a course (or courses) in the next term.

Finally, if this issue had been raised, the email might well have been considered "in writing" because there was an attachment to it that had to be printed out by the adjunct professor, signed, and returned to the office of the departmental chair. See Employer's Exhibit No. 1, at 4.

VI

CONCLUSION

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) was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it 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).

Accordingly, I recommend that the decision of the Board of Review be AFFIRMED on the issue of eligibility but REVERSED as to the order of repayment.

/s/
Joseph P. Ippolito
MAGISTRATE

February 26, 2014