STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

The Preservation Society of Newport County	**:**	
	:	
v.	**:**	**A.A. No. 13 – 198**
	:	
Department of Labor and Training,	**:**	
Board of Review	**:**	
(Claire J. Sylvia-Pianin)	**:**	

O R D E R

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

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

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 22nd day of December, 2014.

By Order:

___/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

____/s/_____
Jeanne E. LaFazia
Chief Judge

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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 REVERSED.

Entered as an Order of this Court at Providence on this 22nd day of December, 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 the Preservation Society of Newport County urges that the Board of Review of the Department of Labor and Training erred when it held that its former employee, Claire J. Sylvia-Pianin, was — first, not required to repay the excess partial benefits she received when reduced to part-time status (in January and February of 2013); and second, entitled to receive employment security benefits because she quit her position (in June of 2013) with good cause. Jurisdiction for appeals from decisions of the Department of Employment and

Training 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. Employing the standard of review applicable to administrative appeals, I find that the decision rendered by the Board of Review on the issue of eligibility was clearly erroneous; I therefore recommend that the Decision of the Board of Review regarding the partial benefits claim (in A.A. No. 2013-198) be AFFIRMED and its decision regarding her voluntary termination (in A.A. No. 2013-199) be REVERSED.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Claire J. Sylvia-Pianin was employed by the Preservation Society for nine years as a manager of one of its retail locations. In January of 2013 she filed for — and received — partial unemployment benefits. As a recipient of partial benefits she was required to report her earnings each week, so that the Department could properly offset them against the benefits she would otherwise have received. She did so, but incorrectly — she reported net earnings instead of gross earnings, which had the effect of diminishing the offset and increasing the benefits she received (during the period from the week-ending January 19, 2013 to the week-ending February 23, 2013).

At this point, we can move ahead to the month of May of 2013, by which time Ms. Sylvia-Pianin had returned to full-time status.

On May 20, 2013, it came to the employer's attention that Claimant's store had certain signs displayed in violation of the Society's policy. A meeting was held in which the signage issue and other issues were discussed. A summary of the meeting was presented to Claimant, which she signed. Thereafter, she revised the summary and submitted it to the Society. She revised it again on June 12, 2013. While working at her shop she was summoned to the office but did not report; instead, she went home early and resigned her position. Ms. Sylvia-Pianin filed for unemployment benefits on-line.

A

Decisions of the Director

On August 8, 2013, a designee of the Director issued two decisions regarding Ms. Sylvia-Pianin. In the first, No. 1331153, a designee of the Director found that Claimant failed to comply with the requirement of Gen. Laws 1956 § 28-44-7 that she accurately report her wages earned during the specified weeks in January and February of 2013; she was also ordered to make restitution to the Department for the overpayment of $617.00 plus interest.[1] In the second, No.

[1] The partial-benefits case was numbered 1331153 at the Department, 20133379OP before the Referee and the Board of Review, and is styled A.A.

1329268, the Director ruled that Claimant left her position with the Society without good cause, within the meaning of Gen. Laws 1956 § 28-44-17.[2] She was also ordered to make restitution — for the five weeks of benefits she received — in the amount of $1,840.00.

B

Decisions of the Referee

Claimant appealed from these decisions and on September 11, 2013 Referee Gunter Vukic conducted two hearings on these matters. Claimant appeared without counsel, as did a representative of the Society. Two days later, the Referee issued two decisions, both of which affirmed the Director's previous rulings.

1

The Referee's Partial-Benefits Decision

In the partial-benefits case Referee Vukic made the following findings of fact:

> Claimant filed online for partial Employment Security benefits. Claimant read the instructions and established a personal confidential pin number. Claimant used the online weekly application system to report net wages rather than gross wages and request partial unemployment benefits.

No. 2013-198 before this Court.

[2] The leaving-for-good-cause case was numbered 1329268 at the Department, 20133380OP before the Referee and the Board of Review, and is designated A.A. No. 2013-199 before this Court.

> Claimant acknowledged the week for which she was applying for partial benefits, affirmed that she worked part time and erroneously provided the Department of Labor and Training with net earnings. The erroneous claimant reporting resulted in an overpayment identified in the subject weeks.

Decision of Referee, September 13, 2013, No. 20133379OP, at 1. Then, after quoting from Gen. Laws 1956 § 28-44-7 (regarding eligibility for partial benefits), Gen. Laws 1956 § 28-42-3(25)(defining partial benefits), and Gen. Laws 1956 § 28-42-68 (regarding restitution for erroneously-paid benefits), the Referee made the following conclusions regarding Ms. Syliva-Pianin's receipt of partial unemployment benefits:

> * * *
> The claimant was a store manager who made application for partial benefits when hours were reduced by the employer. Claimant was made aware gross earnings were to be reported. Claimant reported net earnings that resulted in an overpayment of partial payments. The claimant provided check and receipt copies for three of the four identified weeks that support the net reporting, although the claimant reported her six weeks of earnings in the week after the identified claim week. Absent from her submission of check copies was a copy for the week ending February 23, 2013 in which she was paid gross receipts of $573.04. There is no record that the claimant reported any correction on the erroneous net amounts reported by her in subsequent filings. Claimant is at fault for the overpayment of benefits and subject to make restitution.

Referee's Decision, September 13, 2013, No. 20133379OP, at 2. Accordingly, Referee Vukic affirmed the Director's decision requiring Claimant to repay the excessive partial-benefits she received.

2

The Referee's Leaving-For-Good-Cause Decision

And in the leaving-without-good-cause case Referee Vukic made the following findings of fact:

> Claimant filed online for partial Employment Security benefits. Claimant read the instructions and established a personal confidential pin number. Claimant used the online weekly application system to request partial unemployment benefits during January and February.
>
> The claimant managed one of the mansion retail locations. The employer received a May 20, 2013 e-mail identifying that the claimant's location had unauthorized signs posted in violation of known employer policy. All signage was under the control of the sales department. Claimant was contacted and a meeting was scheduled for May 22, 2013.
>
> During the meeting several other policy violations were identified including but not limited to the claimant's unauthorized work schedule adjustments. May 24, 2013 a meeting summary was given the claimant notifying her that failure to follow department procedures would result in disciplinary action. Claimant signed the notice. Claimant subsequently revised the notice and submitted the disciplinary notice to the employer May 25, 2013 declaring that the employer notice was null and void. The claimant submitted a revision on her revision June 12, 2013 canceling her prior submission.
>
> June 12, 2013, claimant was called to report to the employer office for a meeting. An office worker was sent to her location to cover the store during the claimant's absence during the meeting. The claimant left work early without reporting for the meeting and resigned. June 12, 2013 written resignation was mailed to the CEO in which she states that she was forced to resign and additionally brought attention to her excellent performance evaluation and bonus the preceding month.
>
> Five days later the claimant went online to reopen her claim. She filed that she was laid off for lack of work.

Decision of Referee, September 13, 2013, No. 20133380OP, at 1-2. Based on these findings, the Referee pronounced the following conclusions:

> * * *
>
> In order to show good cause for leaving employment, the claimant must show that the work had become unsuitable or that the claimant was left with no reasonable alternative but to resign. The burden of proof rests solely on the claimant. Insufficient testimony and no evidence has been provided to support either of the above conditions.
>
> All indications point to the fact that the claimant was considered a good employee and was compensated accordingly as evidenced by bonus payments.
>
> The claimant chose to take action outside the employer policy regarding signage. Management was made aware of the claimant action and brought that misstep to the claimant's attention while at the same time pointing out concerns regarding scheduling. Prior to this meeting there is no credible testimony and no evidence that there was animosity or hostility toward the claimant or from the claimant to the employer.
>
> It is at this time that the claimant chose to take control of her employment and minimize her employer responsibility to operate the business. Claimant read the employer concerns and was asked to sign the document in order to memorialize that these concerns were brought to her attention. Claimant did so. In short order the claimant produced two revisions of the employer notice in what appears to be her effort to rationalize her actions and reversed her acknowledgment that the employer made her aware of certain violations. Claimant introduced that her supervisor, and only her supervisor, was responsible for her.
>
> The employer continued to work with the claimant as the claimant began to become combative and refute the employer responsibility to make known employer policies and procedures. As communication continued the claimant abandoned her job leaving her store in a position that required the store to be closed early because of a lack of

> continued coverage following her departure. Claimant clearly acknowledges her resignation yet five days later she went online and selected lay off for lack of work from the Department of Labor and Training drop-down menu and ignored the resignation/quit selection.
>
> Claimant allegations, including but not limited to her allegation that the employer was hiring Russians at a lower pay rate and moving to get rid of the higher paid long-term employees, are without support and without merit. Allegations of harassment are unsupported and appear only to have been provided her letter of resignation and to the Department of Labor and Training during adjudication. Contrary to the claimant's testimony, evidence and testimony from both parties support an amicable relationship prior to May 2013 meeting.

Decision of Referee, September 13, 2013, No. 20133380OP, at 2-3. Accordingly, Referee Vukic affirmed the Director's decision denying benefits to Ms. Sylvia-Pianin.

C

Decisions of the Board of Review

The Board of Review did not hold new hearings but considered Claimant's appeals on the basis of the record certified to it.[3] In two opinions issued on November 7, 2013, it reversed both decisions of Referee Vukic thereby granting benefits to Ms. Sylvia-Pianin.

[3] This procedure is authorized by Gen. Laws 1956 § 28-44-47.

1

The Board of Review's Partial-Benefits Decision

With regard to Ms. Sylvia-Pianin's partial-benefits claim, the Board affirmed the Referee's findings of fact, but rejected his conclusion. The Board held that the Department, which was not represented at the hearing before Referee Vukic, had not shown Claimant was at fault; merely that she had made a mistake (in reporting her net earnings instead of her gross). Decision of Board of Review, November 7, 2013, No. 20133379OP, at 1-2. In doing so the Board cited a then-recent decision of this Court for the principle that the term "fault," as used in the repayment statute, connotes more than mere causation, but some degree of moral responsibility, if not an actual intent to deceive, "at least indifference or neglect of one's duty to do what is right." Decision of Board of Review, November 7, 2013, No. 20133379OP, at 1, citing Kerwin v. Department of Labor and Training Board of Review, A.A. No. 13-138.

2

The Board of Review's Leaving-For-Good-Cause Decision

Regarding her leaving-for-good-cause claim, the Board affirmed the Referee's findings of fact, but made the following additional findings —

> [A]lthough the employer had initially intended to address the signage issue only with the claimant, other issues came up that the employer believed necessary to address; a meeting took place on May 20, 2013;

> after the meeting, the claimant was unable to come to an agreement with the employer regarding one or more of the issues; the claimant had been employed for nine years; and her work performance was considered to be satisfactory by the employer.

Decision of Board of Review, November 7, 2013, No. 20133380OP, at 1. With these findings made, the Board came at the following conclusions —

> … The record of proceedings showed that the claimant had been employed for nine years. During this time, she performed her job satisfactorily; and was promoted to the position as store manager. An issue regarding signage at the claimant's store came about. The issue caused other issues to be raised. A meeting was arranged to address the issues. After the meeting the claimant, who was otherwise a satisfactory employee, was presented with a written warning regarding several issues including an admonition that further violations could or would be grounds for termination. The claimant, who had performed satisfactorily, viewed, rightfully or wrongfully, the written warning as a rejection of her work. The trust and confidence, so necessary in an employment relationship had irretrievably become fractured, through no fault of the parties, despite their original intent to resolve certain issues.
>
> The claimant, believing she did not have the confidence and trust of the employer, quit. We conclude that the claimant's leaving was with good cause; she reasonably believed that she no longer had the trust and confidence of the employer. The otherwise good employment relationship for over nine years had changed into a relationship of distrust and antagonism. The Board concludes that the claimant left her job with good cause.

Decision of Board of Review, November 7, 2013, No. 20133380OP, at 1-2.

Thereafter, on November 27, 2013, the Preservation Society filed two complaints for judicial review in the Sixth Division District Court, one for each

Board decision.

II

APPLICABLE LAW

A

Quitting For Good Cause

The fundamental issue in this case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on voluntary leaving without good cause; Gen. Laws 1956 § 28-44-17, provides:

> **28-44-17. Voluntary leaving without good cause.** – An individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week until he or she establishes to the satisfaction of the director that he or she has subsequent to that leaving had at least eight (8) weeks of work, and in each of those eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. * * * For the purposes of this section, 'voluntarily leaving work without good cause' shall include voluntarily leaving work with an employer to accompany, join or follow his or her spouse in a new locality in connection with the retirement of his or her spouse, or failure by a temporary employee to contact the temporary help agency upon completion of the most recent work assignment to seek additional work unless good cause is shown for that failure; however, that the temporary help agency gave written notice to the individual that the individual is required to contact the temporary help agency at the completion of the most recent work assignment to seek additional work.

In the case of Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964), the Rhode Island Supreme Court noted that a liberal reading of good cause would be adopted:

> To view the statutory language as requiring an employee to establish that he terminated his employment under compulsion is to make any voluntary termination thereof work a forfeiture of his eligibility under the act. This, in our opinion, amounts to reading into the statute a provision that the legislature did not contemplate at the time of its enactment.
>
> In excluding from eligibility for benefit payments those who voluntarily terminate their employment without good cause, the legislature intended in the public interest to secure the fund from which the payments are made against depletion by payment of benefits to the shirker, the indolent, or the malingerer. However, the same public interest demands of this court an interpretation sufficiently liberal to permit the benefits of the act to be made available to employees who in good faith voluntarily leave their employment because the conditions thereof are such that continued exposure thereto would cause or aggravate nervous reactions or otherwise produce psychological trauma.

Later, in Murphy v. Fascio, 115 R.I. 33, 340 A.2d 137 (1975), the Supreme Court elaborated that:

> The Employment Security Act was intended to protect individuals from the hardships of unemployment the advent of which involves a substantial degree of compulsion.

Murphy, 115 R.I. at 37, 340 A.2d at 139. And it added:

> * * * unemployment benefits were intended to alleviate the economic insecurity arising from termination of employment the prevention of which was effectively beyond the employee's control."

Murphy, 115 R.I. at 35, 340 A.2d at 139. And in Powell v. Department of Employment Security, Board of Review, 477 A.2d 93, 96-97 (R.I. 1984), the Court clarified that "… the key to this analysis is whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control." See also Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (2000).

B

Partial Unemployment Benefits

Gen. Laws 1956 § 28-44-7, provides:

> For weeks beginning on or after July 1, 1983, an individual partially unemployed and eligible in any week shall be paid sufficient benefits with respect to that week, so that his or her week's wages, rounded to the next higher multiple of one dollar ($1.00), as defined in § 28-42-3(25), and his or her benefits combined will equal in amount the weekly benefit rate to which he or she would be entitled if totally unemployed in that week.

III
STANDARD OF REVIEW

The 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.' "[4] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact[5] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[6]

The Supreme Court of Rhode Island recognized in Harraka, supra at 12, 98 R.I. at 200, 200 A.2d at 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

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4 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).

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

6 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review, Department of

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

IV

ANALYSIS

A

Evidence of Record

On September 11, 2013, Referee Vukic conducted a separate hearing regarding each of Ms. Sylvia-Pianin's two unemployment claims on September 11, 2013 — the first regarding her partial-benefit claims; the second addressing her claim that she left the Preservation Society's employ for good cause.

1

Testimony Elicited at the Partial-Benefits Claim Hearing

Claimant appeared and testified at the hearing held regarding her claim for partial-benefits in January and February of 2013. Referee Hearing Transcript I, at 9.

Employment Security, 517 A.2d 1039 (R.I. 1986).

The Preservation Society was represented by Janet F. Doda, its Human Resources Manager. Id.

Claimant began by presenting four pay-stubs, which she believed were for the weeks in question — but it turned out one was not. Referee Hearing Transcript I, at 13. This mistake was attributable to the fact that Claimant reported her income in (and for) the week she received her pay, not the week she earned her wages, as is proper. Referee Hearing Transcript I, at 19. Claimant also admitted she reported her net income, not her gross income — a second error. Referee Hearing Transcript I, at 17-18.

2

Testimony Elicited at the Leaving For Good Cause Claim Hearing

When testifying with regard to her leaving-for-good-cause claim, Ms. Sylvia-Pianin began by indicating she had worked for the Preservation Society for nine years. Referee Hearing Transcript II, at 8.

She said that her working conditions had become "deplorable" and her working environment "toxic." Referee Hearing Transcript II, at 9, 10. She alleged that she was "badgered, yelled at, humiliated, harassed, insulted in front of my peers and under constant fear." Referee Hearing Transcript II, at 10.[7] She testified

[7] She clarified that she was under constant fear of termination. Referee Hearing Transcript II, at 11.

that Mrs. Cynthia O'Malley, Director of Retail Sales, called her names, such as "wild child"; and if she questioned something, Mrs. O'Malley would call her insubordinate." Referee Hearing Transcript II, at 6, 11. She said she was denigrated in front of new employees. Id.

Ms. Sylvia-Pianin stated that on one day she received twelve e-mails from Cynthia O'Malley, and that she was concerned she might suffer a nervous breakdown. Referee Hearing Transcript II, at 9. She specifically alleged that on June 12, 2013, she received — in rapid succession — four or five calls, telling her to come down to the main office. Referee Hearing Transcript II, at 11-12.

Claimant said she called human resources in early May and asked Ms. Doda why she was being harassed. Referee Hearing Transcript II, at 18. Ms. Sylvia-Pianin stated that Ms. Doda responded that she would look into it, but never called back. Referee Hearing Transcript II, at 19-20. She described a meeting on May 22, 2013. Referee Hearing Transcript II, at 17, 20. While Claimant agreed they discussed signage at the meeting, she denied they discussed other issues.

Ms. Sylvia-Pianin indicated an employee named Laura Murphy brought her minutes of the meeting to sign; at first she refused, but later signed under duress. Referee Hearing Transcript II, at 20-21. In fact, she and management disputed the wording of the minutes, and exchanged drafts back and forth. Referee Hearing

Transcript II, at 22. She denied it was a "warning." Referee Hearing Transcript II, at 27.

In response to the Referee's inquiries, Ms. Sylvia-Pianin said that when she applied for benefits the second time she selected, as the reason for her termination, "layoff for lack of work," because she was "still reeling" from the "terrible situation" she had just exited. Referee Hearing Transcript II, at 25. She conceded that she had resigned. Referee Hearing Transcript II, at 25-26. She also conceded she never sought the care of a physician for her alleged work-related stress. Referee Hearing Transcript II, at 27.

Ms. Cynthia O'Malley described the events of June 12, 2013. Referee Hearing Transcript II, at 28. At about noon, she was told by Ms. Doda that she had received something from Claire Sylvia-Pianin — as a result, Ms. O'Malley should call her and have her come to a meeting at headquarters. Referee Hearing Transcript II, at 28-29. She sent another employee down to the Rosecliff mansion and called Ms. Sylvia-Pianin to inform her to come up for a meeting with Jan Doda; she responded that she had a bus and hung up on her. Referee Hearing Transcript II, at 29. According to Ms. O'Malley, she never called back, she never came up, and they never heard from her again. Referee Hearing Transcript II, at 29. The relief person said Ms. Sylvia-Pianin had told her she had to go upstairs

about something. Referee Hearing Transcript II, at 30. At about 2:00 p.m. they had to send someone else to relieve the first "relief" person. Id. Ms. O'Malley had to go and physically close the store at 3:30 p.m. Id.

Ms. O'Malley testified she was unaware that Ms. Sylvia-Pianin felt she was harassing her. Referee Hearing Transcript II, at 30. She also was — "not aware that [she] ever humiliated her in front of other people." Referee Hearing Transcript II, at 33. She indicated that she was not Claimant's supervisor; Ms. Murphy was. Referee Hearing Transcript II, at 30.

Finally, Ms. Doda testified regarding the circumstances of Claimant's separation from the Preservation Society. Referee Hearing Transcript II, at 36 et seq. She described the meeting held about the signage and the subsequent wrangling with regard to the wording of what she termed the "warning" letter. Referee Hearing Transcript II, at 37-38.

B

Discussion

1

The Partial-Benefits Case

First, the Employment Security Act provides that a claimant who is laid-off from a full-time position who is also working part-time may collect benefits, subject to an offset based on the worker's part-time earnings. See Gen. Laws 1956

§ 28-44-7. This provision also applies to full-time workers who are not terminated but reduced to part-time hours. In the instant case, all parties-in-interest accept that Ms. Sylvia-Pianin was entitled to receive partial benefits in January and February of 2013. The Preservation Society disputes only the amount of benefits she received.

The Society states, quite correctly, that recipients of partial benefits must report their gross earnings to the Department — so that the offset may be properly calculated. It urges that Ms. Sylvia-Pianin did not comply with this mandate. Instead, she reported net earnings, which had the effect of lowering her offset and increasing her benefits. Appellant's Memorandum of Law, at 12-13

In her testimony, Claimant did not dispute that she gave her earnings incorrectly or that she received excessive benefits.[8] But a finding of overpayment is not sufficient to trigger an order of restitution. Section 28-42-68 requires a finding that the Claimant was "at fault" for the overpayment.

Now, since any finding of "fault" would be based on Claimant's misreporting of her income, the Department has the duty to show that she was informed of the correct way to do so — but did otherwise. However, the Department was not represented at the hearing before Referee Vukic. It provided no evidence or testimony that Claimant was educated regarding the proper manner

[8] Referee Hearing Transcript I, at 17-18.

in which to report her income. Accordingly, the Board of Review did not err in declining to find that Ms. Sylvia-Pianin was "at fault" and would be required to repay the excessive benefits she received.

2

The Leaving For Good Cause Case

The Preservation Society argues, in its Memorandum of Law, that the Board of Review's decision regarding Ms. Sylvia-Pianin's separation was unsupported by the record and that Claimant was not in a position where she had to precipitously resign due to circumstances beyond her control. Appellant's Memorandum of Law, at 9-12.

But the Director found, and the Referee agreed, that Claimant did not have good reason to quit. However, the Board of Review did not concur; it found that Ms. Sylvia-Pianin had good cause to quit because of a "breakdown of trust" that arose between Claimant and the Preservation Society' management. On this basis alone it reversed the Referee's decision and granted benefits to Ms. Sylvia-Pianin. Unfortunately, the decisions of this Court[9] and our Supreme Court[10] have not been

[9] White v. Department of Employment and Training Board of Review, A.A. 91-174 (Dist.Ct. 03/16/92)(Court, adopting Master's findings, affirms Board's denial of benefits where management's perceived lack of confidence in Claimant did not reach degree of compulsion necessary to justify resignation). Accord, Dexter v. Department of Employment and Training Board of Review, A.A. 93-231 (Dist.Ct. 06/22/94)(DeRobbio, C.J.)(Board found Claimant not

supportive of this theory. This Court, and the Board, has held that, except in the most egregious situations, the Employment Security Act does not permit benefits to workers who have quit because they were no longer comfortable in their working environment. Instead, it expects them to seek a new position before taking the drastic step of making themselves unemployed. In my view, the "breakdown of trust" alleged by Claimant does not justify a deviation from this long-held standard.

And let us dispel any notion that the Board awarded benefits to the Claimant based on her allegation of stress. It did not — and correctly so, since Claimant offered no medical evidence in support of such an allegation. As such, we cannot find (as a fact) anything beyond mere annoyance.

And so, conceding — as I must — that our review of Board of Review decisions is limited, I must nevertheless state my view that the decision rendered by

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entitled to benefits; affirmed where employer's criticism of one aspect of Claimant's job performance did not constitute harassment) and Tanzi v. Department of Employment and Training Board of Review, A.A. 93-172 (Dist.Ct. 05/03/94)(DeRobbio, C.J.)(Board found Claimant not entitled to benefits; affirmed where allegedly unfair criticism did not require Claimant to quit prior to seeking new employment). And conversely, see Furmanick v. Department of Employment Security Board of Review, A.A. No. 86-068 (Dist.Ct. 02/04/87)(SaoBento, J.)(Board's denial of benefits affirmed where Claimant resigned because she lacked confidence in new nursing supervisor.)

[10] See D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1040-41 (R.I. 1986)(Affirming District Court decision denying benefits where nexus was not shown between questioning about theft and Claimant's health issues).

the Board in this case stretches to the breaking point the constraints put upon this Court by the applicable standard of review. I find the Board's decision to be clearly erroneous and contrary to law.

V

THE MOOTNESS ISSUE

Having addressed the Preservation Society's main arguments regarding each of the two cases before the Court, I will now comment on a further issue it raised in its memorandum of law — whether the case is moot. The Preservation Society urges that it is not. Appellant's Memorandum of Law, at 13-14. For our part, we shall consider the issue in two ways — first, by evaluating whether the outcome of the instant case will have any practical effect on the parties; and second, by gauging whether that makes the case moot and whether the case is otherwise justiciable.

A

Government Agency Participants in the Unemployment System: 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[11] and its "experience rate"[12] — 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."[13] And within the balancing account, each employer has its own "employer's account."[14] 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.[15] Participation in the program — which is required by the Federal Unemployment Tax Act (FUTA)[16] — is not

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[11] 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).

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

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

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

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

[16] See 26 U.S.C. § 3304(a)(6)(B) and 26 U.S.C. § 3309(a)(2). It has been said that

mandatory; but if a governmental or charitable employer opts out of the program, it must enter the contribution system.[17]

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.[18]

Finally, although, strictly speaking, it is not a component part of the reimbursing employer system (it applies generally), it is appropriate to note the

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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).

17 Gen. Laws 1956 § 28-43-30.

18 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 thusly ": 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>."

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 also bars repayment — by the Claimant — of any (and all) benefits received. It is this provision that makes the instant case (the leaving-for-good-cause case) financially moot as to Ms. Sylvia-Pianin.

B

Principles of Justiciability and Mootness

Our Supreme Court has held that the first requirement for the exercise of jurisdiction is an "actual, justiciable controversy"[19] as the Court (and, by extension, the inferior courts) will not take on "an abstract question or render an advisory opinion."[20] Justiciability requires a plaintiff with standing and a "legal hypothesis

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[19] 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).

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

which will entitle the plaintiff to real and articulable relief."[21] 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."[22] Furthermore, a case which is justiciable when filed will be deemed moot if "… events occurring after the filing have deprived the litigant of a continuing stake in the controversy."[23]

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."[24] Generally, a matter of "great public importance" is one which "will usually implicate important constitutional rights, matters concerning a person's livelihood, or matters

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21 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)).

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

23 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).

24 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.

concerning voting rights."[25] In Foster-Glocester Regional School Committee v. Board of Review (R.I. 2004)[26] the Court found that the issue presented — the evidentiary value to be given to prior recorded testimony in unemployment hearings — met this standard.[27]

C

Discussion

This Court cannot afford the Preservation Society any practical relief from the financial burdens that Ms. Sylvia-Pianin's claim for unemployment benefits has placed upon it — but only a moral victory (and a partial one, at that) — because it participates in the unemployment system as a reimbursing employer. As such, it does not pay contributions based on its payroll and its contribution rate, but re-pays the Department of Labor and Training for any benefits it provides to former employees of the society — whether or not truly justified. Reimbursing employers accept the risk that the Director, a Referee, or the Board of Review might make an unsound award of benefits from time to time. It has been my experience that such

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

[26] 854 A.2d 1008 (R.I. 2004).

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

a misguided result is not necessarily (or usually) attributable to patent error on the part of the administrative decision-maker. Oft-times, a faulty result is mandated by the evidence (or lack thereof) contained in the record under review. In any event, this is the path the Society has chosen — it must take the bad with the good.

And of course under § 28-44-40, Ms. Sylvia-Pianin cannot be ordered to repay the benefits she received on her job-termination claim — which she received as a result of the Board's decision.

Notwithstanding this reality, I have evaluated the merits of the Preservation Society's arguments. I have done so, even though I do not believe this case has a particularly important issue at its core,[28] because neither the Department nor the Board of Review filed a memorandum opposing its appeal. In these circumstances, it seemed to me the arguments of the Society deserved at least fair consideration. And so, I have done that, recommending affirmance on the partial-benefits case, reversal on the leaving-for-good-cause appeal.

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[28] The issue of whether a "breakdown in the relationship" is sufficient to justify the payment of benefits under § 28-44-17 has been litigated many times by workers with regard to many fields of endeavor. The instant case does not, in my view, constitute a question of such importance that it must be considered even in a case that is moot.

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.[29] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[30]

Upon careful review of the evidence, I conclude that the Board's decision that Claimant cannot be ordered to make restitution for the excess partial unemployment benefits she received is not clearly erroneous in view of the reliable, probative, and substantial evidence of record — and the applicable law. And for the reasons stated above, I conclude that the decision of the Board of Review on the issue of Claimant's eligibility for benefits relating to her departure from the employ of the Preservation Society was clearly erroneous in light of the reliable,

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

[30] Cahoone, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986) and Gen. Laws 1956 § 42-35-15(g), supra at 13-14 and Guarino, supra at 14, n. 3.

probative, and substantial evidence of record and affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4).

I therefore recommend that the Decision of the Board of Review in number 20133379OP (A.A. No. 2013-198) be AFFIRMED and its decision in case number 20133380OP (A.A. No. 2013-199) be REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

DECEMBER 22, 2014