

INDEPENDENT REGULATORY REVIEW COMMISSION DISAPPROVAL ORDER

Commissioners Voting:

Public Meeting Held December 13, 2012

Silvan B. Lutkewitte, III, Chairman, dissenting
George D. Bedwick, Vice Chairman
John F. Mizner, Esq.
Lawrence J. Tabas, Esq., dissenting
Dennis A. Watson, Esq.

Order Issued February 15, 2013
Regulation No. 12-96 (#2939)
Department of Labor and Industry
Unemployment Compensation; Active
Search for Work

On April 19, 2012, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Department of Labor and Industry (Department). This rulemaking amends 34 Pa. Code § 65.11. The proposed regulation was published in the May 5, 2012 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on November 5, 2012.

This final-form regulation implements portions of Act 6 of 2011 (Act). In accordance with the Act, this regulation establishes the specific search criteria necessary for unemployment compensation claimants (claimants) to conduct an active search for suitable employment.

In its development of the final-form regulation, we recognize that the Department made a considerable effort to respond to issues raised at the proposed stage. However, we find that this final-form regulation is not in the public interest. As explained further below, we find that the final-form regulation does not meet the criteria in the Regulatory Review Act of consistency with the statute and reasonableness. In addition, because the regulation is inconsistent with the statute, it does not appear to be aligned with the intent of the General Assembly when it passed the Act. 71 P.S. §§ 745.5b(a), (b)(3)(i) and (b)(3)(iv).

Section 401(b)(1) of the Act requires claimants to make an “active search for suitable employment” in order to maintain eligibility for unemployment compensation. Section 401(b)(1) requires the Department to establish search requirements that *shall* include, *at a minimum*, *all* of the following (emphasis added):

- (i) Registration by a claimant for employment search services offered by the Pennsylvania CareerLink system or its successor agency within thirty (30) days after initial application for benefits.
- (ii) Posting a resume on the system’s database, unless the claimant is seeking work in an employment sector in which resumes are not commonly used.
- (iii) Applying for positions that offer employment and wages similar to those the claimant had prior to his unemployment and which are within a forty-five (45) minute commuting distance.

The regulation implements these provisions through a two-tiered search requirement, where the type of search performed is based upon the number of weeks for which a claim for compensation is filed. Specifically, Section 65.11(e) of the regulation requires the following:

(1) During each week from the third week of the benefit year for which a claim for compensation is filed through the eighth week of the benefit year for which a claim for compensation is filed, the claimant shall apply for employment as follows:

- (i) Except as provided in subparagraph (ii), the claimant shall apply for at least two positions that would provide suitable employment under section 4(t) of the law (43 P.S. § 753(t)).
- (ii) The claimant may limit his applications to positions that would provide employment and wages similar to those the claimant had prior to his unemployment and are within a 45 minute commuting distance. (Section 401(b)(1)(iii) of the law, 43 P.S. § 801(b)(1)(iii)).

(2) During the ninth week of the benefit year for which a claim for compensation is filed and each week thereafter for which a claim for compensation is filed, the claimant shall apply for employment as follows:

- (i) The claimant shall apply for at least three positions that would provide suitable employment under section 4(t) of the law (43 P.S. § 753(t)).
- (ii) The claimant may prioritize the types of positions for which he will apply in the following order:

(1) Positions described in paragraph (1)(ii).

(2) Other positions, to the extent that expanding the scope of the positions for which he will apply beyond the positions described in paragraph (1)(ii) is necessary in order to apply for at least three positions each week.

It is the Department's position that the phrase "at a minimum" in the Act, authorizes the Department to expand the job search requirements during and after the ninth week to positions that are beyond a 45-minute commuting distance and positions that do not provide employment and wages similar to those the claimant had prior to his/her unemployment. The Department further explains that the requirement for claimants to search for positions outside the statutory requirements would not expand the scope of suitable employment. We disagree.

The Act does not specify the number of applications a claimant must file in order to conduct an active search for suitable employment; however, it does limit the search requirement to similar employment and wages within a certain commuting distance. While a claimant can certainly choose to go beyond these requirements, the Act does not compel the claimant to do so. To instruct otherwise would seem to render Section 401(b)(1)(iii) of the Act obsolete and result in an inconsistent application of the Act.

Additionally, the Department's interpretation appears to be inconsistent with the intent of the General Assembly when it implemented the Act. The statute does not state that the minimum requirements should change based upon the number of weeks during which a claimant submits claims for compensation. Section 401(b)(1) sets forth what the minimum active search "shall" include and does not contain language that would allow the Department to alter these minimum requirements. Consequently, we find that work search requirements in the final-form regulation are not consistent with the legislative intent of the Act.

Additionally, in our comments on Section 65.11(e)(2) of the proposed rulemaking (this subsection was designated as (d)(2) in the proposed version of the regulation), we questioned the ability of claimants to accrue and "bank" searches conducted in excess of the minimum two applications required per week during weeks three through eight. Specifically, our comments stated:

... Should a claimant exhaust all potential employment options for similar work prior to the ninth week, this subsection does not provide credit to claimants for these past searches. If claimants cannot apply prior searches to comply with this subsection, are they unfairly penalized for their efforts to find jobs within their field?

The Department responded that claimants are not unfairly penalized and that "despite the aggressiveness of a claimant's prior work search efforts, or the fact that a job application is pending, nonetheless the claimant is still unemployed and the requirement to continue to search for work is appropriate." We disagree and contend that the prohibition on "banking" applications is not reasonable as it will discourage claimants from applying for positions in the first eight weeks.

As discussed above, we have determined that the work search requirements in this regulation are not consistent with the statute and the intention of the General Assembly. Additionally, we find the prohibition on "banking" job applications to be unreasonable. Therefore, we find that the promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

The regulation # 12-96 (IRRC # 2939) from the Department of
Labor and Industry

was disapproved on December 13, 2012.



A handwritten signature in dark ink, appearing to read "Silvan B. Lutkewitte, III". The signature is written in a cursive, flowing style.

Silvan B. Lutkewitte, III, Chairman