



#2939

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

December 12, 2012

Michaele A. Totino
Regulatory Analyst
Independent Regulatory Review
Commission
333 Market Street, 14th Floor
Harrisburg, Pa. 17101

2012 DEC 12 PM 2:59

RECEIVED
IRRC

RE: Final-form regulation
No. 12-96 (IRRC No. 2939)
Unemployment Compensation, Active Search for Work

I am writing to respond to recent comments submitted by Representative William F. Keller, Community Legal Services and the Pennsylvania AFL-CIO regarding the above final-form regulation.

The UC Law requires a claimant to search for suitable work, not similar work.

The commentators erroneously assert that Section 401(b) of the Unemployment Compensation Law (UC Law), 43 P.S. §801(b), limits a claimant's job search responsibilities, for the entire duration of his UC claim, to positions that would provide employment and wages similar to those the claimant had prior to his unemployment ("similar positions") and are within a 45 minute commuting distance.

Section 401(b) provides, in pertinent part, that -

Compensation shall be payable to any employee who is or becomes unemployed, and who ...

(b)(1) Is making an active search for suitable employment. The requirements for "active search" shall be established by the department and shall include, at a minimum, all of the following:

- (i) Registration ... for employment search services ...
- (ii) Posting a resume ..
- (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 minute commuting distance (emphasis added).

The commentators fail to acknowledge that section 401(b) requires a claimant to search for suitable employment, not similar positions.

RE: Final-form regulation
No. 12-96 (IRRC No. 2939)
Unemployment Compensation, Active Search for Work
December 12, 2012
Page 2

Also, they fail to understand that the less demanding requirements for the third week for which a claim for compensation is filed through the eighth week for which a claim is filed are an exception to the general requirement. For these weeks, subsection (e)(1) of the regulation allows a claimant to limit his applications to similar positions that are within a 45 minute commuting distance, even if this limitation results in less than two job applications per week. During the ninth week for which a claim is filed and subsequent weeks for which claims are filed, subsection (e)(2) reinstates the general rule and requires the claimant to apply for not less than three positions each week that would provide "suitable employment" as defined in section 4(t) of the UC Law, 43 P.S. § 753(t). During the ninth claim week and thereafter, a claimant may continue to limit his job search to similar positions within a 45 minute commute, as long as adhering to that limitation will not result in less than three job applications per week. The claimant would be required to expand the scope of his job search beyond similar positions within a 45 minute commute to include other positions that would provide suitable employment if, and to the extent that, doing so is necessary in order to apply for at least three positions per week.

If a claimant is required to search beyond similar jobs within a 45 minute commute beginning with week nine, it is not because the regulation impermissibly expands upon the requirement to apply for suitable work. It is because the temporary period when the regulation allowed the claimant to be more selective in his job search has expired. Regardless, at no point does the regulation require the claimant to search for work that is outside the scope of section 401(b), i.e., suitable employment.

In section 401(b), the General Assembly, recognizing the Department's experience and expertise in administering the UC program, directs the Department to establish the requirements that a claimant must meet in order to actively search for work. However, the General Assembly specified three requirements regarding registration for employment services, posting a resume, and applying for positions, respectively. One of the statutorily mandated requirements is in section 401(b)(1)(iii): "[a]pplying for positions that offer employment and wages similar to those the claimant had prior to his unemployment and which are within a forty-five minute commuting distance." The commentators contend that section 401(b)(1)(iii) somehow trumps the requirement in the first sentence of section 401(b)(1) to apply for suitable work and allows the regulation to require only that a claimant search for similar jobs within a 45 minute commute throughout the entire UC claim.

This contention ignores the fact that the statute designates section 401(b)(1)(iii) as a "minimum" requirement regarding job applications. It also ignores the express directive to the Department in section 401(b)(1) to establish the requirements that a claimant must meet in order to actively search for work.

Moreover, when a claimant is initially unemployed, it is likely that positions offering suitable work would be limited to similar positions. However, as a claimant's unemployment becomes extended, "suitable work" within the meaning of the UC Law, and as interpreted by the courts, could include a broader range of jobs beyond similar positions or positions within a 45 minute commute. Allowing claimants to limit job applications to similar positions within a 45 minute commute for the entire duration of the UC claim, as the commentators advocate, would render section 401(b)(1) at odds with the body of law on suitable work and defeat the requirement in section 401(b)(1) to search for suitable employment, especially

RE: Final-form regulation
No. 12-96 (IRRC No. 2939)
Unemployment Compensation, Active Search for Work
December 12, 2012
Page 3

as that requirement applies to claimants who have been unemployed for an extended period.

The distinction between the requirements for weeks three through eight and the requirements for week nine and thereafter is consistent with the law on "suitable work."

As indicated above, for the third week for which a claim for compensation is filed through the eighth week for which a claim is filed, subsection (e)(1) of the regulation allows a claimant to limit his applications to similar positions that are within a 45 minute commuting distance. During the ninth week for which a claim is filed and subsequent weeks, subsection (e)(2) requires the claimant to apply for not less than three positions each week that would provide "suitable employment" as defined in section 4(t) of the UC Law.

Community Legal Services suggests that there is no legal basis to require a claimant to expand the scope of his job search beyond similar positions within a 45 minute commute to include other positions that would provide suitable employment (if doing so is necessary in order to apply for at least three positions per week) after the eighth claim week. To the contrary, the work search requirements in the regulation are consistent with the case law on "suitable work."

The definition of "suitable work" in section 4(t) of the UC Law provides that one of the factors to be considered in determining if work is suitable is "the length of time [the claimant] has been unemployed" When applying this factor, the Pennsylvania Supreme Court has stated that a claimant must have a "reasonable opportunity" to obtain employment commensurate with the claimant's training and experience. *UCBR v. Franklin and Lindsey, Inc.*, 497 Pa. 2, 4-5, 438 A.2d 590, 591 (1981). However, a reasonable opportunity is not an indefinite opportunity. "We think the most important factor in this type of case is the length of time that the claimant has been unemployed. A claimant's particularity for desired employment must decrease as his length of unemployment increases." *Donnelly v. UCBR*, 330 A.2d 544, 547 (Pa. Cmwlth. 1975).

In cases where the claimant had been unemployed only a short period of time, the courts have found work that differed from their previous employment with regard to job skills or wages to be unsuitable. *Franklin and Lindsey, supra* (five days), *Department of Education v. UCBR*, 890 A.2d 1232 (Pa. Cmwlth. 2006) (two weeks), *Ellwood City Hospital v. UCBR*, 457 A.2d 231 (Pa. Cmwlth. 1983) (one week), *United States Steel Corporation v. UCBR*, 310 A.2d 94 (Pa. Cmwlth. 1973) (six days).

However, in cases where the claimant was unemployed eight weeks or more when he refused an offer of work that was different than the claimant's previous employment or provided lesser wages, the courts have found the offered employment to be suitable. *Rising v. UCBR*, 621 A.2d 1152 (Pa. Cmwlth. 1993) (two months), *Rich v. UCBR*, 479 A.2d 668 (Pa. Cmwlth. 1984) (eight weeks), *Jenkins v. UCBR*, 410 A.2d 980 (Pa. Cmwlth. 1980) (two months), *Donnelly, supra* (three and one-half months), *Neff Unemployment Compensation Case*, 169 A.2d 338 (Pa. Super. 1961) (eight weeks), *Cicerella Unemployment Compensation Case*, 137 A.2d 853 (Pa. Super. 1957) (three months).

To the extent that the regulation requires a claimant to expand the scope of the positions for which he will apply after claiming eight weeks of benefits, the regulation is consistent with case law on "suitable work."¹

The regulation is not flawed in the absence of a "good cause" provision.

As explained in the Preamble, because the General Assembly did not include a "good cause" exception to the work search requirements in the statute, the Department did not include such an exception in the regulation. The absence of a good cause provision in the regulation does not "impose a strict liability standard on unemployed workers," as Community Legal Services suggests. The functional equivalent of a good cause provision already exists.

Section 401(b) of the UC Law and subsection (f)(6) of the regulation allow the Department to "waive or alter the [work search requirements] in cases or situations with respect to which the Secretary finds that compliance with such requirements would be oppressive or ... inconsistent with the purposes of the" UC Law. If the Department is adjudicating a claimant's eligibility for benefits for a week when the claimant did not make the requisite number of job applications, and if circumstances that would make a disqualification oppressive or inconsistent with the UC Law are disclosed through fact-finding, the Department may waive the work search requirements for that week.

The regulation establishes straightforward and uncomplicated job application requirements that claimants can understand and the Department can administer.

During the third week through the eighth week for which a claim is filed, the regulation requires a claimant to apply for two positions per week; provided, that the claimant may limit his applications to similar positions within a 45 minute commute. During the ninth claim week and later weeks, a claimant must apply for three positions each week.

Although these job application requirements are straightforward and uncomplicated, Community Legal Services refers to them as "complex." If the commentators view the existing work search rules in the regulation as complex, it is difficult to understand why they would prefer to determine the type and number of jobs a claimant must apply for, and when a claimant must expand his work search, based on a myriad of variables. They assert that the work search requirements should be fluid based on factors such as the claimant's skills in relation to available jobs, economic conditions, average UC claim duration, labor market, rural v. urban residence, individual claimant circumstances, etc.

Clearly, job search rules that would fluctuate based on one or more of the above factors would be more complicated and more difficult for claimants to understand than the rules in the regulation.

¹ In its comments to the notice of proposed rulemaking, Community Legal Services asserted that the regulation was inconsistent with case law on suitable work. In the Preamble to the final-form rulemaking the Department explained that the regulation is, indeed, consistent with case law. Now, Community Legal Services dismisses the case law as coming "from decades ago."

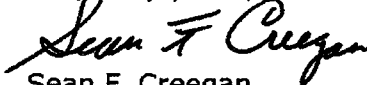
RE: Final-form regulation
No. 12-96 (IRRC No. 2939)
Unemployment Compensation, Active Search for Work
December 12, 2012
Page 5

Moreover, as the Department indicated in the Preamble, during 2011, 530,009 individuals filed applications for UC benefits and received at least one compensation payment. Given this volume of incoming claimants, the Department is not able to craft personalized work search rules for each individual. For this reason the regulation contains work search criteria that are applicable to the overall claimant population.

The Department remains confident that the regulation is consistent with section 401(b) of the UC Law and properly implements the General Assembly's requirement that UC claimants make "an active search for suitable work." Moreover, the regulation is faithful to the meaning of "suitable work" in the UC Law at the early and later stages of a claimant's unemployment. Beginning with the framework supplied by section 401(b), the Department used its best judgment to craft a regulation that would not impose burdensome requirements but at the same time would establish a meaningful work search regimen. The Department encourages the Commission to approve this final-form regulation.

Thank you for reviewing the Department's response to the recent comments regarding the regulation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sean F. Creegan". The signature is fluid and cursive, with the first name "Sean" and last name "Creegan" clearly distinguishable.

Sean F. Creegan
Deputy Chief Counsel