

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

In the matter of:

Appeal number: **BR-115277**

CLAIMANT APPELLANT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Jodi Ferullo, a review examiner of the Division of Unemployment Assistance (DUA), to deny extended training benefits to the claimant following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

Following the claimant's separation from employment, she began collecting regular unemployment benefits with a benefit year expiration date of June 20, 2009. When these regular benefits were exhausted, she received federally funded extended benefits and emergency unemployment benefits. On May 17, 2010, the claimant submitted an application for training benefits, under G.L. c. 151A, § 30(c) ("training benefits"), which would have included 26 additional weeks of benefits and a waiver of the obligation to conduct an active work search while she attended a training program. In a determination, dated May 27, 2010, the DUA approved the waiver of the work search requirement, but found the claimant ineligible for the 26 weeks of training benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination and denied training benefits in a decision rendered on July 22, 2010. We accepted the claimant's application for review.

Training benefits were denied after the review examiner determined that the claimant had not commenced her training program during her benefit year, as required under G.L. c. 151A, § 30(c), and 430 CMR 9.04(2)(d). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the DUA's asserted benefit year ending date limitation on the commencement of training, as set forth in 430 CMR 9.04, is enforceable against a claimant who began training after her benefit year expired, but during a time when a federal benefit year extension was in effect, which, under the plain language of G.L. c. 151A, § 30(c), lifts all time limits related to Section 30 training.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant filed her claim for unemployment benefits on July 3, 2008 (claim sequence #003). The benefit year expiration of the claim is June 20, 2009.
2. The claimant was provided with an informational booklet upon filing her claim for unemployment benefits. The claimant did receive information from the Division regarding the Training Opportunities Program. (The claimant cannot recall the date when she first received information from the Division regarding training.)
3. The claimant received an extension of benefits. The claimant received unemployment benefits for the weeks ending July 5, 2008 through May 22, 2010 on the claim filed July 3, 2008 (claim sequence #003).
4. In April 2010 the claimant received additional information regarding Section 30 Training Benefits. Thereafter someone informed the claimant about the ABCD Living Works 'Active Living Elder Service' training program.
5. The claimant submitted a Training Opportunities Program Application, Form 1622. The training facility indicated was ABCD Learning Works. The program name was Active Living Elder Service with a start date of May 10, 2010 and a completion date of September 3, 2010. The application indicated that the program was five days per week with the total hours per week of twenty five and a placement rate of 70%.
6. The claimant submitted the completed Training Opportunities Program Application, Form 1622 on May 17, 2010.
7. The claimant began the training on May 10, 2010. The claimant was attending the program Monday through Friday from 9:00 A.M. to 3:30 P.M. The claimant is still in attendance in that training program.

8. Upon completion of the program the claimant will receive a certification in elder services. The certificate will allow the claimant to work as an activities coordinator, a case manager, an assistant to a day health program, an aid[e] in a nursing facility and/or for an office providing services for the elderly.
9. Although the training facility ABCD Learning Works has various programs, the program in which the claimant was attending is a new program. The facility has not yet fully completed that program to establish a placement rate.
10. On May 27, 2010 the claimant was issued Determination of Eligibility for Training Opportunity Benefits, Form 3720, indicating that 'you are approved for a waiver of work search requirements under Sec. 24(b) and the requirements to accept suitable work under Sec. 25(c). Although eligible to receive regular Unemployment Insurance benefits, you are not entitled to an extension of benefits up to twenty-six times your benefit rate because', whereupon it was checked under 'claimant eligibility', 'your training does not begin prior to the expiration of your Benefit Year End Date of your unemployment claim'. The claimant filed an appeal to that determination on June 7, 2010.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The claimant sought these training benefits, under G.L. c. 151A, § 30(c), as amended by Stat. 2009, c. 30, §§ 1 and 2, which as written both at the time of her application and today, provides as follows:

If in the opinion of the commissioner, it is necessary for an unemployed individual to obtain further industrial or vocational training to realize appropriate employment, the total benefits which such individual may receive shall be extended by up to 26 times the individual's benefit rate, if such individual is attending an industrial or vocational retraining course approved by the commissioner; provided, that such additional benefits shall be paid to the individual only when attending such course and only if such individual has exhausted all rights to regular and extended benefits under this chapter and has no rights to benefits or compensation under this chapter or any other state unemployment compensation law or under any federal law; provided, further, that such extension shall be available only to individuals who have applied to the commissioner for training no later than the fifteenth week of a new or continued claim but *the commissioner shall specify by regulation the circumstances in which*

the 15 week application period shall be tolled; provided, however, that such circumstances shall include an individual's need to address the physical, psychological and legal effects of domestic violence, as well as any period in which economic circumstances permit the provision of extended benefits or any other emergency benefits funded in whole or in part by the federal government; provided, further that the claimant shall begin training in the first available program which is a reasonable distance from the claimant's residence, as determined by the commissioner; provided, further, that the commissioner, in his discretion, may extend the period once for not more than two weeks for any applicant whose initial application is denied; and provided, further, that any benefits paid to an individual under the provisions of this paragraph which would not be chargeable to the account of any particular employer under the provisions of section fourteen shall be charged to the solvency account. An individual eligible to receive a trade readjustment allowance under Chapter 2 of Title II of the Trade Act of 1974, as amended, shall not be eligible to receive additional benefits under this section for each week the individual receives such trade readjustment allowance. An individual eligible to receive emergency unemployment compensation, so-called, under any federal law, shall not be eligible to receive additional benefits under this section for each week the individual receives such compensation. (Emphasis added.)

The review examiner based her decision upon the DUA regulations that were promulgated to interpret the above statutory provision. Specifically, 430 CMR 9.04, provides, in relevant part, as follows:

(2) A claimant who applies to the Director for training shall have his or her total benefits extended up to 26 times his or her benefit rate after exhaustion of all Extended Benefits, Extended Unemployment Compensation, or other Federal extended unemployment benefits. Such benefits shall be paid only during the period the individual is attending the training course approved by the Director under 430 CMR § 9.06 and if:

(d) the claimant begins training in the first available program ... for which he or she has been approved ... *In no case may the claimant commence training after the expiration of a claimant's benefit year. (Emphasis added.)*

Even a cursory reading of the language, under G.L. c. 151A, § 30(c), reveals that it nowhere contains any reference to a benefit-year-ending date deadline. A related benefit-year time limitation had existed in G.L. c. 151A prior to 1958, when amendments to the predecessor of the present G.L. c. 151A, § 30(c), removed it. St. 1958, c. 437, § 2. In light of the legislative history

of this section, which we have described in detail in the marginal note below¹, we think the notion that DUA has somehow retained the implied right to set via regulation a benefit year ending limitation on any aspect of the Section 30 retraining program lacks both logic and persuasiveness.

According to the express provisions of current G.L. c. 151A, § 30(c), a claimant may be eligible for training benefits if she: is attending a course approved by the commissioner; has exhausted all rights to regular unemployment benefits, extended benefits, and emergency unemployment benefits; and has met the 15-week application deadline². Nothing in the statutory language of G.L. c. 151A, § 30(c), imposes a benefit-year-enrollment deadline.

To be sure, there is a time limit in this section for applying for training benefits, but it must be tolled under a number of circumstances. As a general rule, G.L. c. 151A, § 30(c), requires that claimants file their applications for training benefits within the first 15 compensable weeks of their claim. However, the statute provides that, when the economy is experiencing a deep enough recession to trigger extended benefits or other federal emergency benefit extensions, the 15-week application deadline “*shall be tolled.*” This tolling during federal benefit extension periods is mandatory rather than permissive, and it is stated without any temporal qualification. In May, 2010, when the claimant began her training program, Congress was funding both extended benefits and emergency unemployment benefits.³ Therefore, it was a period during which the 15-week application period was tolled. It would be absurd to toll the application deadline during a period of extended or emergency benefits and not also extend the enrollment date.

Since G.L. c. 151A, § 30(c), does not impose a benefit year training commencement deadline, the authority for denying training benefits to the claimant was the DUA regulation, not the statute. We recognize that “[A] properly promulgated regulation has the force of law ... and

¹ Under the pre-1958 law, the maximum number of training benefits was 10 weeks, which when added to the then-maximum of 26 weeks of regular state benefits would total to 36 weeks, and the statute then not unreasonably required that a claimant’s additional weeks of training benefits had to be “receive[d] during his benefit year”. G.L. c. 151A, § 30, as amended by St. 1956, c. 719, § 6. In the 1958 amendments, the maximum number of weeks of training benefits was lengthened to 18, and the benefit year ending date limitation was eliminated. *See* St. 1958, c. 437, § 2. At the time this legislation was pending, Massachusetts was in the midst of a severe economic recession and Governor Furcolo was seeking a 13-week federal benefit extension. It is clear from the Governor’s statement of record on the Senate bill that was subsequently enacted as Chapter 437 that, in the context of a total benefit duration which as contemplated in the proposed legislation and sought-after federal extension would have summed to 57 weeks (26 weeks of regular benefits, plus 13 weeks of federal benefits, plus 18 weeks of training benefits), the elimination from the language of G.L. c. 151A, § 30, of the benefit year ending date limitation on when these benefits could be received was not a mere scrivener’s error. Rather, striking this limitation from the statute was a necessary change, for the very simple reason that while a benefit year ends 52 weeks after the claimant first begins collecting benefits, unemployed workers would potentially be able to collect benefits for up to 57 weeks. *See* Statement of Governor Foster Furcolo March 31, 1958, concerning Senate 660, amending G.L. c. 151A.

² Both the DUA and the review examiner disqualified the claimant based upon when she began her training program, *not* when she submitted her application for training benefits to DUA. Our decision, therefore, is limited to the claimant’s commencement date.

³ *See* Continuing Extension Act of 2010, P.L. No. 111-157, enacted April 15, 2010; U.S. Department of Labor Unemployment Insurance Program Letter No. 04-10, Change 2 (April 16, 2010).

must be accorded all the deference due to a statute...” Ciampi v. Commissioner of Correction, 452 Mass. 162, 166 (2008), *quoting* Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 723, *cert. denied sub nom*, Formaldehyde Inst., Inc. v. Frechette, 464 U.S. 936 (1983). However, deference does not mean abdication. Ciampi, 452 Mass. at 166. Because the regulation in this instance conflicts with the statute and deprives the claimant of the opportunity to obtain the training benefits that she is otherwise entitled to, enforcement of the regulation’s enrollment deadline would be inconsistent with the statutory purpose. *See* Duarte v. Commissioner of Revenue, 451 Mass. 399, 408 (2008) (Appellate Tax Board, a G.L. c. 30A tribunal, while lacking the “inherent common law authority” to declare a Departmental regulation to be void on its face, could permissibly rule that the regulation was invalid as applied to a party and could not be enforced against him where the regulation in question conflicted with the underlying statute and deprived the party of rights conferred to him by the statute); Demoranville v. Commissioner of Revenue, 457 Mass. 30, 36 (2010) (Appellate Tax Board has power to declare a DOR statute unconstitutional as applied to a party).

Finally, we analyze the current provisions, under G.L. c. 151A, § 30(c), in light of recent federal legislation. In the Assistance for Unemployed Workers and Struggling Families Act, Title II of Division B of Public Law No. 111-5, enacted February 17, 2009, Congress offered up to \$7 billion in unemployment compensation “modernization incentive payments” to states that could show the U.S. Department of Labor (DOL) that their laws included certain benefit provisions. In response, the Legislature in Massachusetts amended G.L. c. 151A, § 30(c), to increase the number of weeks of training benefits available from 18 to 26 weeks. St. 2009, c. 30, §§ 1 to 3, signed by the Governor on July 2, 2009. DOL has published guidance on how states may satisfy the requirements for obtaining the modernization incentive payments. With respect to training benefits, DOL stated that in order to place individuals in appropriate training as soon as possible, a state law *may* provide that the individual be enrolled in training no later than the end of the benefit year. DOL Unemployment Insurance Program Letter (UIPL) No. 14-09, Change 1, Attachment, CH 1-3, (March 19, 2009). However, the Massachusetts Legislature, which made several substantive changes to the language of G.L. c. 151A, § 30(c), some months after the issuance of this Program Letter, did not enact such a benefit year limitation. Consequently, where DOL has made it clear that limitations on the timing of training are matters that must be addressed through state law but the Legislature has chosen not to do so, benefits should not be denied on the basis of when the approved training program commences.⁴

Therefore, we conclude as a matter of law that the denial of training benefits to the claimant because she commenced her approved training program after the expiration of her benefit year is unlawful, under G.L. c. 151A, § 30(c).

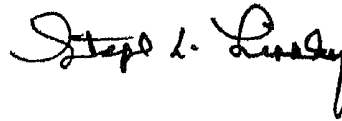
⁴ We think that it is worth pointing out that the regulations in question were promulgated in draft form on August 7, 2009, subsequent to both the DOL Program Letter and the legislative amendments to G.L. c. 151A, § 30(c). While the benefit year limitation on enrollment in training had existed in prior versions of 430 CMR 9.04(d), it was reasserted in the August, 2009 promulgation after the DUA had notice from the DOL Program Letter that such limitations required a statutory basis.

The review examiner's decision is reversed. The claimant is eligible for training benefits, under G.L. c. 151A, § 30(c).



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - December 6, 2010



Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT - January 5, 2011

