THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BR-121844-TRA (TR 400.00)
A claimant, who missed the TRA application deadline because the school did not complete and submit its application to become an approved training program to DUA in time, was entitled to an extension of the deadline for good cause under the 2009 Amendments to the Trade Act.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny federal Trade Readjustment Allowance ("TRA cash") benefits under the Trade Act of 1974, as amended, 19 U.S.C. § 2101 et seq. (2009)("Trade Act")[1]. We assume jurisdiction to review pursuant to our authority under 19 U.S.C. § 2311(e), 20 C.F.R. § 617.51(a), and G.L. c. 151A, § 41. We reverse.

After the claimant's former employer became trade certified, she was approved for Trade Adjustment Assistance and subsequently requested an extension of the deadline to apply for TRA benefits. On August 5, 2011, the DUA Trade Unit denied the claimant's request. The claimant appealed that determination to the DUA hearings department. Following a hearing on the merits attended by both the claimant and the Trade Unit, the review examiner affirmed the determination and denied an extension of the application deadline in a decision rendered on January 23, 2012. We accepted the claimant's application for review.

An extension of the deadline for submitting an application for approved training was denied after the review examiner determined that the claimant had failed to establish extenuating circumstances for granting a 45-day extension of the enrollment deadline under 19 U.S.C. § 2291(a)(5)(A)(ii)(III). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

[1] The Trade and Globalization Adjustment Assistance Act of 2009 (Division B, Title I, Subtitle I of the American Recovery and Reinvestment Act of 2009, (Pub. L. No. 111-5).

The issue on appeal is whether a claimant is entitled to an extension of her TRA application deadline where the cause for missing the deadline was that the school did not complete and submit its application to become an approved training program in time.

Findings of Fact

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

1. The Trade Unit denied the claimant an extenuating circumstances extension on August 5, 2011.

2. The claimant appealed on August 24, 2011. The Trade Unit granted a late appeal on September 14, 2011.

3. The claimant applied for unemployment insurance benefits on November 2010 [sic].

4. The claimant's former employer became Trade Certified on January 21, 2011.

5. The claimant received notifications from the Trade Unit concerning required deadlines.

6. The claimant knew that she needed to apply for training by July 23, 2011.

7. The claimant submitted an extension request on July 22, 2011, because she knew that the program that she wanted to attend had not received approval for training. The school did not submit an application for its program until August 15, 2011.

8. The claimant could have attended an approved training program at a different school. The claimant considered this program more limited.

9. When the claimant submitted the extension request, she did not feel that she had enough time to switch her desired program to the other school.

10. The last day for a timely approved waiver or approval to start training occurred on July 23, 2011.

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 Department of Labor (DOL) trade-certified the claimant's former employer under petition # 74290.[2] Workers covered by petitions numbered between 70,000 and 79,999 are subject to the provisions of the 2009 Amendments to the Trade Act, as implemented in the DOL Training and Employment Guidance Letter (TEGL) No. 22-08 and Change 1, TEGL 16-10 and Change 1; as well as regulations codified at 20 C.F.R. parts 617 and 618 and 29 C.F.R part 90. TEGL 16-10, Change 2, p. 3 (Feb. 4, 2011).

As an adversely affected worker of a trade-certified company, the claimant was eligible to apply for TRA benefits under 19 U.S.C. § 2291, which provided, in pertinent part, as follows:

> (a) Trade readjustment allowance conditions. Payment of a trade readjustment allowance shall be made to an adversely affected worker . . . if the following conditions are met: . . . (5) Such worker – (A)(i) is enrolled in a training program approved by the Secretary under section 236(a), and (ii) the enrollment . . . occurs no later than the latest of—
>
> > (II) in the case of a worker whose most recent total separation from adversely affected employment . . . occurs before the date on which the Secretary issues a certification covering the worker, the last the last day of the 26th week after the date of such certification,
> >
> > (III) 45 days after the date specified in subclause . . . (II) . . . if the Secretary determines there are extenuating circumstances that justify an extension in the enrollment period . . . .

Also relevant is 19 U.S.C. § 2294, which provided, in relevant part, as follows:

> (b) Special rule with respect to State laws and regulations on good cause for waiver of time limits or late filing of claims
>
> Any law, regulation, policy, or practice of a cooperating State that allows for a waiver for good cause of any time limitation relating to the administration of the State unemployment insurance law shall, in the administration of the program under this chapter by the State, apply to any time limitation with respect to an application for a trade readjustment allowance or enrollment in training under this chapter.

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[2] Exhibit #1 is a Trade Unit record that includes the federal petition number for the claimant's former employer. While not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

There was no dispute that the claimant requested an extension of the TRA deadline before July 23, 2011. At issue is whether there were extenuating circumstances or good cause to warrant awarding the extension.

In its written submission to the Board urging the Board to affirm the review examiner's decision, the Trade Unit stated that the fact that the school: (1) had not completed the application process, and (2) had not received all of the transcripts from the claimant's former academic institutions were not "extenuating" because the claimant had been afforded ample time between her layoff and the July 23, 2011 deadline to research and request training at an approved school.

According to the DOL, the 2009 Amendments extended the enrollment deadline from 8 weeks to 26 weeks after certification in order to allow a worker to "actively engage in a longer job search before making a decision about training, and to make full use of the case management services . . . to choose an appropriate training program." TEGL 22-08 at A-17. The claimant's former employer was trade-certified on January 21, 2011 and it appears that the claimant had been actively working with her trade counselor since at least February, 2011.[3]

The claimant offered a great deal of undisputed testimony about how she spent this time, which the review examiner did not incorporate into the findings of fact. The claimant testified that she looked extensively for a non-IT position or training in other fields, because she had been outsourced twice. She testified that she and her trade counselor ultimately realized that training in another field would not be approved because: (1) it would not lead to a placement of at least 80% of her prior salary, and (2) the claimant needed to update her IT skills in order to be marketable. The claimant described three programs that she found: (1) a Microsoft certificate, which did not match her foundation of skills and experience; (2) a 6 course Merrimack Community College certificate; and (3) a Southern New Hampshire University ("SNHU") bachelor's degree program, which would have provided more employment options than the limited 6 course community college program. Finally, she testified that she began working with SNHU a month before the deadline and was told her July 23, 2011 deadline would not be a problem. It is evident that the claimant did not wait until the last minute to begin the TRA application process.

The review examiner denied the extension after concluding that the claimant could have enrolled in another suitable training program, which had already been approved. However, at the hearing, the Trade Unit representative conceded that a degree-granting program was not comparable to a 6 course certificate program. Thus, there was no basis to conclude that the latter was an alternate option.

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[3] Exhibit #3 provides the employer's trade certification date. Exhibit #1 shows that the claimant's TAA application was submitted on February 18, 2011. These facts are undisputed. *See* Bleich, 447 Mass. at 40, and Allen of Michigan, 64 Mass. App. Ct. at 371.

Under the 2009 Amendments, states were given wide latitude in applying the good cause provisions to missed deadlines. TEGL 16-10, p. 3 (Dec. 15, 2010). In 2011, Congress went a step further, providing that states *must* extend time limits for applying for TRA or enrolling in training if there is good cause. *See* Trade Adjustment Assistance Extension Act of 2011, Public Law 112-40, sec. 212(b)(Oct. 21, 2011); TEGL 10-11, C.6 (Nov. 18, 2011). Among the factors states are required to consider are whether the worker acted in a manner that a reasonably prudent person would have acted under similar circumstances and whether there were factors beyond the worker's control that prevented the worker from taking timely action to meet the deadline. TEGL 10-11 at C.6.

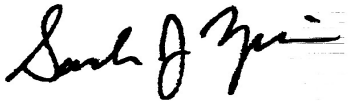
In the present case, the claimant demonstrated that: (1) she spent the 26 weeks actively searching for work and a suitable training program, (2) she worked diligently with her trade counselor and the training provider to meet the July 23, 2011 TRA application deadline, and (3) the only reason she missed it was that the college needed three more weeks to complete its end of the paperwork. Since she had no control over SNHU's ability to timely submit its application for approval, we conclude that there was good cause to extend the claimant's 26-week TRA deadline.

We, therefore, conclude as a matter of law that under 19 U.S.C. § 2294(b), the claimant provided good cause for extending her July 23, 2011 TRA application deadline in order to enroll in an approved training program at SNHU.

The review examiner's decision is reversed. The claimant is entitled to TRA benefits if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 27, 2012

John A. King, Esq.
Chairman



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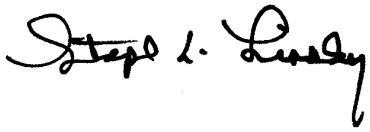
Member



Stephen M. Linsky, Esq.
Member

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- April 26, 2012

AB/rh