



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## BOARD OF REVIEW DECISION

BR-115841 (Dec. 17, 2010) -- A majority of the Board held: (1) The evidence of the claimant's disability at the hearing was sufficient under 430 CMR 9.09 to permit the claimant to enroll in fewer than twelve community college credits per semester while attending her training program under G.L. c. 151A, sec. 30(c); (2) The benefit year application and enrollment deadlines under the DUA regulations are not enforceable against this claimant, because a federal benefit year extension was in effect at the time the claimant applied for and began her training program.

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 November 28, 2009. When these regular benefits were exhausted, she received federally funded 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 June 15, 2010, the DUA denied both the waiver of the work search requirement and 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 September 30, 2010. We accepted the claimant's application for review.

Training benefits were denied after the review examiner determined that the claimant failed to apply for or to begin her training program during her benefit year, and because the program which the claimant applied for was less than full-time. 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 issues before the Board are: (a) whether the DUA's asserted benefit year ending date limitations on the claimant's application for and commencement of training are enforceable against this claimant, who applied for and began training after her benefit year expired but during a time when a federal benefit year extension was in effect; and (b) whether there is sufficient evidence of the claimant's disability to allow the claimant to take less than twelve credits per semester.

### Findings of Fact

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

1. In December 2008, the claimant was laid off from her last employer.
2. The claimant was accepted and began attending the Lawrence Memorial Regis College Nursing Program in the evenings before she separated from her employment in December 2008.
3. The claimant filed her 10<sup>th</sup> sequence unemployment claim on December 4, 2008. The Benefit Year for this claim ended November 28, 2009. When the Benefit Year ended the claimant was determined to be eligible for a Federal Emergency Unemployment Compensation Program put into place due to the high rate of unemployment.
4. Each time they file a new claim, DUA sends the claimants an information packet which explains their rights and responsibilities under the Massachusetts Unemployment Insurance System. This information has, for at least the last 9 years, always included a statement explaining that they may be entitled to an extension of their unemployment benefits while in approved training, if they file their application for such training in a timely manner. Until 2009, the deadline for filing was the 15th compensable weeks of the claim. In 2009 the regulation was changed to allow for the application to be filed until the Benefit Year End date, if economic circumstances permit the provision of extended benefits or any other emergency unemployment benefits funded in whole or in part by the Federal Government.
5. The claimant became aware of the Section 30 Program through the above described information packet or some other means and, therefore, inquired about attending the Regis Nursing School Program, under the Section 30 Program. Someone at the DUA TOPs Unit told the claimant that the Regis Program was not approvable under Section 30. The claimant was not told by the TOPs Unit Personnel what the requirements for an approved program would be, under the Section 30 Program. She was also not told by them that an application would have to be filed before the end of the benefit year in order to be approved for an extension of benefits under Section 30.

6. At Regis College the claimant presented documentation, from 2009, indicating that she had two diagnoses which this school found warranted educational accommodations. The school, therefore, made an agreement with the claimant that it would allow her: to take tests in a separate room; additional time to take tests; use of a privacy board and ear plugs during tests; an hour of additional time before clinical work to review patient charts and medications and to plan her care; and a quiet area at clinical sites to plan and document patient care without distractions. The claimant agreed that she would seek test taking assistance from a specific member of the nursing faculty; use media labs with computer assisted learning programs to reinforce content; seek assistance from the Student and Alumni Affairs Coordinator regarding information on organizational skills, study skills and test taking skills; and immediately arrange for private tutoring for her nursing courses, if her nurse course grade fell below 80%.
7. The claimant involuntarily left the Regis Nursing Program in October of 2009 due to an incident with a patient.
8. After leaving the above described program the claimant met with her Counselor at the MRC who approved her continuing to take classes toward a nursing degree and approved financial assistance for such a course of study.
9. The claimant applied to the Simmons College Nursing Program in November 2009 but was not accepted based on her test scores. She applied to the Mass Bay College Nursing Program in January 2010 but the school was not accepting applicants until the [fall] of 2011. In February 2010 the claimant applied to the North Shore Community College Nursing Program but the program was full and not accepting new applicants until the [fall] of 2011.
10. The claimant applied to the Quincy College Nursing Program in March and April of 2010. After taking the admissions test three times she was accepted in to the next available opening for the [fall] 2010 semester.
11. The claimant completed a Phlebotomy Program in order to make her more employable.
12. On May 17, 2010, the claimant filed a Training Opportunities Program Application, to attend an Associate Degree in Nursing Program offered at Quincy College. This was the 75<sup>th</sup> compensable week of her claim.
13. At the time she filed the Training Opportunities Program Application the claimant was receiving Emergency Unemployment Compensation Benefits under a program funded by the Federal Government.

14. The claimant expects to receive funding from the MRC to participate in the Quincy College Nursing Program.
15. The Quincy College Nursing Program, if successfully completed, will qualify the claimant to take an exam to become a Registered Nurse.
16. During the [s]ummer of 2010, the claimant took a computer class which would be required during the [fall] 2011 semester and a History Class that would be required during the Spring 2012, for completion of the Quincy College Nursing Program.
17. The Quincy College Nursing Program began on September 1, 2010 and is expected to be completed May 18, 2012.
18. The program requires the completion of 67 credits to get a degree. The claimant had completed at least 24 credits prior to September 1, 2010, the first day of the program.
19. The claimant is enrolled to take one 7 credit class during the [fall] 2010 semester. This class is called Fundamentals of Client Care. The normal semester schedule for a full time student in the program would be 5 classes totaling 17 credits. The claimant has already completed the 4 non-nursing classes which make up the remaining 10 credits.
20. The Fundamentals of Client Care requires 4 hours of class attendance a week, a 2 hour lab and 8 hours of clinical practice. The expectation is that the average student will need to: study 3 hours for each hour of class, spend at least 2 hours preparing for lab; and 4-5 hours of homework preparing for clinical practice.
21. The claimant plans to take 10 credits in the [spring] 2011 semester. The normal semester schedule for a full time student in the program would be 17 credits but the claimant has already completed the classes which make up the additional 7 credits.
22. The claimant plans to take 3 credits in each of the 2 summer 2011 sessions.
23. The claimant plans to take 10 credits in the [fall] 2011 and [spring] 2012 semesters. The [fall] semester would normally be 17 credits and the [spring] semester would normally be 16 credits for a full time student in the program. The claimant either has already taken the classes which make up these additional credit hours or will be taking them during the summer.
24. Quincy College offers a Part Time Associate Degree Nursing Curriculum.

25. Due to the high demands of its full time program, Quincy College discourages students from working in excess of 24 hours per a week while in the Full Time Nursing Program.
26. On June 15, 2010, DUA issued a determination that the claimant was not entitled to a waiver of Section 24 “work search” requirements or of Section 25 (c) “acceptance of suitable work” requirements while attending the Quincy College Associates Degree. She was also not found to be entitled to an extension of her unemployment benefits up to 26 times her benefit rate while attending the program.
27. The reasons give for the denial of these Section 30(c) benefits were:
  - a. The training did not begin prior to the expiration of the claimant’s Benefit Year End date;
  - b. She was able, available and actively seeking full time work while in training;
  - c. The training program was not full time as the claimant was taking less than 12 full-time College credits per semester.
28. The reason given for the denial of the extension of benefits was that the claimant did not apply by the 15th compensable week of her claim.
29. The claimant was determined to be entitled to regular unemployment, if otherwise eligible, as the program was part time and therefore did not cause her to be unavailable for full time work.
30. The claimant has indicated a willingness to enroll in a Spanish class in order to fulfill the full time requirements under Section 30. This class is not required in order for the claimant to complete her nursing degree but would be helpful in the field of nursing.
31. The claimant exhausted all unemployment benefits and extended emergency benefits that she was entitled to prior to August 20, 2010, the date of the hearing on this matter.

#### 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.)

*Applying for and commencing training after the benefit year expired.*

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 below<sup>1</sup>, 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.

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. When the economy is experiencing a deep enough recession to trigger extended benefits or other federal emergency benefit extensions, the statute provides that 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. There are no other deadlines in the statute relating to the timing of applications for, or receipt of, training benefits.

In March, 2010, when the claimant applied for training benefits, Congress was funding both extended benefits and emergency unemployment benefits. *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). Therefore, circumstances at the time of her application required the tolling of the 15-week application deadline.

It is apparent that the review examiner’s denial of the claimant’s training application was based exclusively upon DUA regulations. The requirement for the claimant to submit her application to DUA before her benefit year expired is in 430 CMR 9.06, which provides, in pertinent part, as follows:

- (3) The 15-week application period shall be tolled or extended, except that *in no event shall the 15 week period be tolled or extended beyond the claimant’s benefit year*, if any of the following conditions occur:

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<sup>1</sup> 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 “[received] 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 from 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.

(d) If economic circumstances permit the provision of extended benefits or any other emergency unemployment benefits funded in whole or in part by the federal government, the 15 week application period shall be extended *until the end of the claimant's benefit year*. (Emphasis added.)

To be sure, 430 CMR 9.06(3)(d), does provide for a tolling of the 15-week deadline when a federal benefit extension is in effect. However, it qualifies tolling beyond what is otherwise authorized by the statute, by limiting the tolling to the end of the claimant's benefit year.

We recognize that “a properly promulgated regulation has the force of law ... and 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 a window of time within which she may file her application, which the statute expressly confers when federal benefit extensions are in effect, we conclude that it cannot be enforced against the claimant. 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); see also 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).

The requirement that the claimant did not qualify for training benefits if she commenced her training program after her benefit year expired is found in 430 CMR § 9.04, which 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.)

However, nothing in the statutory language of G.L. c. 151A, § 30(c), imposes a benefit year enrollment deadline. 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 deadline. As stated above, it further requires that application to be tolled during a period of extended or emergency benefits. We believe it would be absurd to toll the application deadline and not also extend the enrollment date. To enforce the regulation's benefit year enrollment deadline in this instance would conflict with the underlying statute and deprived the party of rights conferred to her by legislation.

*The Effect of the Claimant's Disability on the "Full-Time Enrollment" Requirement*

A further basis for the review examiner's denial of training benefits was that the claimant's credit load did not meet the requirements for approval of her training program under 430 CMR 9.05, which provides, in relevant part, as follows:

(2) Training programs must meet certain measurable standards ... (b) Be a full-time course, providing at least 20 hours of supervised classroom training per week; provided, however, that: (1) if the program is offered by a community college ... this requirement shall be met if the program provides a minimum of 12 credits each semester....

The claimant argued, and the review examiner considered, whether, due to the claimant's disability, the concededly reduced schedule of courses that she was taking ought to be considered to be "full-time." The pertinent regulatory provisions on this question are as follows:

430 CMR 9.09 provides as follows:

Nothing in 430 CMR 9.01 through 9.08 shall be deemed to exclude a qualified individual with a disability from training benefits under M.G.L. c. 151A, § 30(c).

"Disability" is defined under 430 CMR 9.03, which provides, in relevant part, as follows:

Disability: a physical or mental impairment that substantially limits a major life activity (including but not limited to ... learning, reading, concentrating, thinking ... and working) of such individual....

As the findings show, the claimant took courses over the summer in order to reduce her fall semester course load to seven credits and her spring course load to ten credits. She intended to continue doing so the following academic year. At the hearing, the claimant presented undisputed evidence that she did this because she suffered from high levels of anxiety connected to her Attention Deficit Disorder.<sup>2</sup> The findings revealed that the claimant required

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<sup>2</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director, Department of Employment and Training, 64 Mass. App. Ct 370, 371 (2005).

accommodations in other respects in order to succeed in a college level program. Finding #6 refers to Exhibit #13, a Regis College Student Services memo that granted the claimant extended time, testing in a separate room, a privacy board and ear plugs to prevent distractions, tutoring, counseling for organizational skills, and so forth. It is also apparent from finding #8 that the claimant is receiving services from the Massachusetts Rehabilitation Commission (MRC) to enable her to be successful in her nursing program. Despite all of this evidence, the review examiner concluded that the claimant failed to provide sufficient evidence of a disability to warrant a waiver of the minimum 12-credit requirement under 430 CMR 9.05(2)(b)(1). We disagree.

Individuals only qualify for MRC services if they have a disability that substantially impedes their ability to work. *See* 107 CMR 4.07(1)(a)<sup>3</sup>. In combination, the evidence showing the claimant's eligibility for MRC services, her learning accommodations from the college, and the unrefuted testimony about her disabilities in the record is sufficient to show that she is a qualified person with a disability. Under 430 CMR 9.09, she may not be excluded from receiving training benefits on the basis that she is taking less than twelve credits per semester.

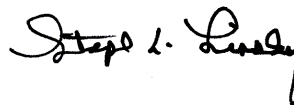
We, therefore, conclude as a matter of law that the denial of training benefits to this claimant during a period of emergency unemployment benefits, because she applied for and commenced her training program after the expiration of her benefit year is unlawful under G.L. c. 151A, § 30(c). Moreover, in light of her disability, 430 CMR 9.09 permits the claimant to take less than twelve credit hours per semester.

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

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - December 17, 2011**



John A. King, Esq.  
 Chairman



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 18, 2011**

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<sup>3</sup> Disability for purposes of MRC services is similar to DUA's definition. Under 107 CMR 4.07(1)(a), a person is eligible for MRC services if she "Has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment...."