RECEIVED
IRRC

#2939

2012 MAY 29 AM 10: 35

COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

Comments by Community Legal Services on Proposed Title 34, Chapter 65 Regulations (Active Work Search Rules for Unemployment Compensation) Regulation ID# 12-96 (IRRC# 2939)

The proposed changes to the Title 34, Chapter 65 regulations relating to the active work search rules for unemployment compensation ("UC") are of particular interest to legal services advocates, many of whom exclusively represent UC claimants. These comments are submitted by Community Legal Services as representatives of the legal services community, the largest single group of representatives of UC claimants in the state.

Although we acknowledge that active work search regulations are needed, we oppose this package as drafted for both legal and policy reasons. The proposed regulations both exceed the scope of 43 P.S. § 801(b) ("Section 401(b)"), which enabled the Department to promulgate regulations on active work search, and fail to implement several key aspects on § 401(b). In addition, we are concerned that the regulations will, at best, confuse claimants and may, at worst, represent a violation of due process rights established by the United States Constitution. As well, the proposed regulations legally cannot apply to claimants before the date that they are enacted.

Our major concerns are outlined below and are described in more depth throughout these comments:

- **After eight weeks, claimants may be required to look for employment with lower wages, longer commutes, and different skill levels than previous held by the claimant.** This directly contradicts Section 401(b).
- **The proposed regulations contain no exception for situations where their application would be oppressive or subvert the intent of the law.** This exception is required by the Act.
- **The proposed regulations contain no exception for "good cause," required in other areas of UC.**
- **The proposed regulations ignore the Act's definition of and Pennsylvania decisional law on "suitable work".** The regulations propose a bright-line rule that after eight weeks, a job search needs to be expanded in specific ways. The Act and Pennsylvania case law apply a set of guidelines to the facts of each case with no bright-line.
- **Claimants are required to look for "suitable work" but are not given guidelines as to what may constitute suitable work.** Because searching for suitable work is now the lynchpin of maintaining weekly benefits, this vagueness should be remedied with new regulations by the Department on "suitable work."
- **A claimant who finds work after a period of unemployment and is again laid off after more than nine weeks, will immediately be required to use expanded work search criteria when looking for jobs, including jobs with lower pay and that are**

further from home in their search. This is in direct conflict with UC case law which only looks to the length of the current period of unemployment for the scope of suitable work.

- **The Department has not put forward a plan for how to meet its obligations to provide access to work search regulations for non-English proficient claimants.**
- **The Department intends to apply the proposed regulations to all claimants with an application for benefits date of January 1, 2012 or after.** These regulations cannot be used to deny benefits to any claimants for weeks that antedate their proper promulgation.

I. The Weekly Work Search Activities Proposed By the Department in Section 65.11(d) are Inconsistent with the Unemployment Compensation Act, Are Confusing, and Would Lead to Unintended Results

Section 65.11(d), which describes what types of activities are required for an active work search under the Unemployment Compensation Act ("the Act"), raises a number of critical issues for claimants. Subsection (2) far exceeds the scope of Section 401(b) and is therefore unlawful. In addition, the entirety 65.11(d) is confusing and provides little practical guidance to claimants as to what types of jobs they should be looking for.

A. 65.11(d)(2) is Inconsistent With Section 401(b) as it Grafts on Additional Requirements for Work Search Not Found in the Act

Section 401(b) establishes parameters for the active work search that is expected of UC claimants. In relevant part, it states:

> The requirements for "active search" shall be established by the department and shall include, ***at a minimum, all of the following*** ...
>
> (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.

Title 43 P.S. § 801(b)(1)(iii) (emphasis added).

Despite this clear delineation of the types of suitable jobs that the General Assembly had in mind, the Department in § 65.11(d)(2) has required claimants to expand their job search after the eighth week of the benefit year to jobs more than 45 minutes away from their home and outside of their normal occupation and salary range. This requirement is directly contrary to Section 401(b)(1)(iii) which only requires claimants to apply to jobs with wages similar to their prior employment and within a forty-five minute commuting distance. There is simply no statutory support whatsoever for an arbitrary 8-week bright line rule after which Section 401(b)(1)(iii) is no longer applicable.

B. 65.11(d)(2) is Inconsistent with Pennsylvania "Suitability" Case Law

The requirement in 65.11(d)(2) that a claimant broaden her job search after only nine weeks ignores not only the clear mandate of Section 401(b)(1), but also the definition of suitable work found in 43 P.S. § 753(t) of the Act ("Section 4(t)"). Because the changes made to the Act by Act 6 of 2011 do not repeal prior Pennsylvania law on "suitable work," (indeed, Act 6 requires the Department to define "active search," not "suitable employment") existing statutory and case law on suitability must be harmonized with the new active work search rules.

"Suitable work" is defined by Section 4(t), which states:

> **"Suitable Work"** means all work which the employe is capable of performing. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to his health, safety and morals, his physical fitness, prior training and experience, and the distance of the available work from his residence. *The department shall also consider among other factors the length of time he has been unemployed and the reasons therefor, the prospect of obtaining local work in his customary occupation, his previous earnings, the prevailing condition of the labor market generally and particularly in his usual trade or occupation, prevailing wage rates in his usual trade or occupation,* and the permanency of his residence. However, notwithstanding any other provisions of this subsection no work shall be deemed suitable in which (1) the position offered is vacant, due directly to a strike, lockout, or other labor dispute, or (2) the remuneration, hours or other conditions of the work offered are substantially less favorable to the employe than those prevailing for similar work in the locality, or (3) as a condition of being employed, the employe would be required to join a company union, or to resign from, or refrain from joining, any bona fide labor organization.

43 P.S. §753(t) (emphasis added).

Interpreting this provision, the Pennsylvania Supreme Court in *UCBR v. Franklin & Lindsey*, stressed the need for "*reasonable opportunity* to obtain other employment in the area" of one's customary trade or occupation.[1] The *Franklin & Lindsey* court, as well as other courts interpreting the "suitability" provision, have explained that a claimant should be afforded sufficient time to find a job in his occupational field before he must accept a job of lesser pay or skill. Over time, a balancing should occur, whereby, as the length of the unemployment increases, a claimant's insistence on higher pay, beneficial hours and commuting distance, and traditional skill level decreases.[2]

There is no hard and fast rule dictating how long a claimant must be unemployed before a position paying substantially less or that is otherwise less desirable than the position previously held is deemed suitable. Rather, a fact intensive inquiry is required into each case to determine

---

[1] *See* UCBR v. Franklin & Lindsey, Inc., 438 A.2d 590 (Pa. 1981).

[2] *See, e.g.,* Shay v. UCBR, 227 A.2d 174 (Pa. 1967); Rising v. UCBR, 621 A.2d 1152 (Pa. Commw. 1993); Grenier v. UCBR, 505 A.2d 1363 (Pa. Commw. 1986); Eichman v. UCBR, 409 A.2d 1389 (Pa. Commw. 1980).

when it becomes appropriate for a claimant to compromise on pay, hours, or skill level when seeking suitable work.[3]

Requiring all claimants to broaden their job searches after only nine weeks without regard to the individual's circumstances and the labor market that the individual is in, ignores the clear language in both Sections 4(t) and 401(b)(1). Instead, the Department should allow for an individualized assessment for each claimant as to whether the applicant was looking for suitable work, given the specifics of that claimant's attributes and the local labor market for that individual. The Department certainly may suggest that people expand their job search as the length of unemployment increases, but it should not create a hard and fast rule applicable to all claimants.

C. 65.11(d)(2) Lacks Clarity to Put Claimants on Notice of What Types of Jobs to Seek. The Department Should Promulgate Regulations on What Constitutes Suitable Work to Clarify the Active Work Search Requirement

The requirements of 65.11(d)(2) are written so generally as to give no guidance to claimants as to what types of jobs to seek. By promulgating regulations on what constitutes suitable work, the Department would clarify active work search for claimants.

65.11(d)(2) requires that nine weeks after the claimant's AB Date, the claimant must look for "suitable" positions without regard to his prior wages, the commuting distance to the job, and the type of employment. This requirement is vague to the point of meaninglessness. What constitutes "suitable" work in one's own field and within a reasonable commuting distance is the subject of reams of pages of court opinions and UCBR decisions. To require, on top of that, that a claimant try to decipher whether a job that is outside of his normal area of employment, wages, and a reasonable commuting distance is "suitable" puts too much burden on claimants and discretion in the hands of the Department.

Should a tax lawyer in Pittsburgh, for example, apply for criminal defense jobs in Harrisburg if he hasn't found a tax law job in Pittsburgh by week nine? Should that same tax lawyer be required to look for tax preparation work that does not require a law degree? What about food service work? The Department's regulations provide no guidance to answer this question, but suggest that that lawyer could lose benefits for failing to properly expand his search

A better solution would be to give more guidance to claimants as to what the Department means by "suitable work" by promulgating regulations on what constitutes suitable work. The active work search requirements move the concept of "suitable work" to a central component of the

---

[3] *See, e.g.,* Rising, 621 A.2d at 1154 (a period exceeding two months is a reasonable allowance of time to find a job commensurate with one's occupation); Davis v. UCBR, 455 A.2d 747, 750 (Pa. Commw. 1983) (although length of time a claimant is unemployed and the reasons therefore are factors to be considered when determining the suitability of a proffered position, there is no hard and fast rule dictating how long a claimant must be unemployed before a position paying substantially less than a position previously held is deemed suitable); Bethlehem Steel Corp. v. UCBR, 310 A.2d 697 (Pa. Commw. 1973) (Court held that four and one-half months of unemployment is approaching the limit of what might be considered appropriate to refuse to leave a craft). *Cf.* Neff Unemployment Case, 169 A.2d 338 (Pa. Super. Ct. 1961) (holding that it was reasonable to conclude that after eight weeks, the work that claimant previously performed was unavailable at the wages previously earned).

claimant's interaction with the UC system. The new importance of suitable work to every claimant should be recognized with better articulated rules as to what constitutes suitable work.

The new suitable work regulations should not create a rigid definition of what constitutes suitable work (which would contravene current case law) nor should they create rules so vague as to be meaningless. Rather, the suitable work regulations can articulate general principles as to what constitutes suitable work.

Claimants could be told, for example, that the longer they are looking for work, they should relax their job requirements for pay, commuting distance, and the precise field that the claimant would like to work in. As the claimant's job search extends from several weeks to several months, those requirements should relax even further.

Suitable work is a very fact-specific proposition. By giving general heuristics against which they can compare themselves, claimants will have an idea as to whether they are properly conducting their work search without creating bright-line rules that will not be applicable to all claimants.

Giving claimants more information about what constitutes suitable work comports with the 7th Circuit's decision in *Cosby v. Ward.*[4] In *Cosby,* the 7th Circuit found that Illinois' unemployment compensation law deprived claimants of their due process rights by failing to share with claimants the internal rules of thumb used to grant or deny claims based on the scope of work search performed.

Under the regulations submitted by the Department, the improper scheme in *Cosby* would be repeated: after nine weeks, claimants would be required to expand their work search in a very vaguely defined way. If a claimant fails to adequately expand his work search, he may be denied benefits despite never being told specific criteria that would be applied by the Department. By defining "suitable work" more clearly for claimants, Pennsylvania would avoid these due process concerns and would give claimants a leg up in properly performing their active work search.

D. The Department Should Presume Claimants to be Properly Conducting Active Work Search

As the proposed regulations for active work search are currently structured, a claimant is presumed to have conducted his or her active work search each week unless the Department finds otherwise in an audit. This comports with the remedial nature of the Act, which demands that the Act be liberally construed to the benefit of the claimant.[5] In the event of an audit, however, the presumption in the proposed regulations flips: the claimant is required to prove that he has properly completed active work search and, more specifically, that the jobs that he applied for are suitable.

The Act is remedial in nature with the fundamental purpose of providing economic security to those unemployed through no fault of their own. *See, e.g., Harkness v. Unemployment Comp.*

---

[4] *Cosby v. Ward*, 843 F.2d 967, 982 (7th Cir. 1988)

[5] *Fulton* v. Commonwealth, Unemployment Compensation Bd. of Review, 126 Pa. Commw. 363, 366 (Pa. Commw. Ct. 1989)

Bd. of Review, 591 Pa. 543, 553 (2007). The active work search requirement, then, should be interpreted and implemented to be in harmony with this fundamental purpose. The Department should presume that the claimant knows best what constitutes suitable work and what constitutes a reasonable job market and salary range for the claimant's individual skill level and life situation. Only in the case that the claimant has egregiously violated his duty to apply for suitable work should the Department find the claimant in violation of the active work search violations.

E. Read Literally, 65.11(d)(2) Will Require Union Members to Seek Non-Union Work in Their Field Only Nine Weeks After their AB Date

As it is written, §65.11(d)(2) may require that after eight unsuccessful weeks searching for a job, union members who are not associated with a hiring hall must search for non-union jobs. The key question would be whether non-union jobs are considered "suitable" for a union employee.

As a practical matter, to require a union-affiliated claimant to apply for a non-union job within his field could be bar the claimants from further employment within his union. This would be a great loss to the Commonwealth and an inefficient use of the Commonwealth's human capital.

The regulations should contain a clear statement in the regulations that union employees are not required to apply for non-union jobs within their trade or field.

F. Expanded Work Search at Week Nine Should Count from the Start of the Current Period of Unemployment Not From the Start of the Benefit Year

The proposed regulations require an expansion of work search in week nine based on consecutive weeks of the benefit year, not consecutive weeks of a claimant's unemployment. This violates Section 4(t)'s definition of suitable work as well as creates an absurd situation for claimants. Any required expansion of work search should be based on the number of weeks of unemployment not the number of weeks since the start of the benefit year.

The consecutive weeks of a claimant's benefit year does not always coincide with weeks of unemployment. For example, a construction worker may have several non-consecutive periods of unemployment as work comes and goes in his industry on a weekly basis. These non-consecutive periods of unemployment are often all part of the same benefit year. According to the Department's active work search requirements, that worker may be in his first week of a new period of unemployment but the twentieth week of his benefit year. Indeed, he may have worked a majority of those twenty weeks of his benefits year. Regardless of the fact that he just became unemployed, the current work search requirements would require that this highly skilled worker immediately expand his work search beyond his normal trade, hours, pay, and job location. This makes little sense for this worker or for the labor market and leads to unfair results.

Instead, the Department should look at each new period of unemployment when determining the adequacy of work search and the suitability of any given job. This approach is consistent with Section 4(t) and decisional law, which look solely at the time since an individual last worked, not when his or her benefit year began.

II. 65.11(e) Fails to Include Critical Exceptions Required by the General Assembly and UC Case Law

In additional to exceeding the scope of Section 401(b), the Department's proposed regulations also fail to include several critical exceptions created by the General Assembly for active work search. Without these exceptions, the Department's proposed regulations do not fully effectuate the law passed by the General Assembly and creates hardship for many that the act intended to exclude.

A. The Department's Regulations Fail to Implement a Required Statutory Exception for Situations Where Compliance Would Be Oppressive or Inconsistent with the Purposes of the Act

Section 401(b) contains an exception to work search when compliance would be oppressive or inconsistent with the purposes of the Act. 43 P.S. § 801(b)(6) requires:

> The department may waive or alter the requirements of this subsection in cases or situations with respect to which the secretary finds that compliance with such requirements would be oppressive or which would be inconsistent with the purposes of this act.

By failing to include this exception in its proposed active work search regulations, the Department has ignored a critical aspect of Section 401(b) and has failed to effectuate the intent of the General Assembly.

A key principle of statutory interpretation is that "[e]very statute shall be construed, if possible, to give effect to all its provisions."[6] In creating regulations, the Department must similarly ensure that those regulations encompass the entirety of the statute and do not render superfluous certain provisions by failing to implement them.[7] By failing to include this exception in the work search rules, the Department has not given the language of the legislature any effect.

The Department may argue that because the General Assembly used the word "may" in this provision, the Department is not required to create a waiver procedure. To follow this interpretation would be to render § 401(b)(6) meaningless. Rather, the word "may" in the Act suggests that the Department has discretion in applying this exception to particular cases; it does not, on the other hand, allow that the exception may be ignored and not be implemented in regulations.

---

[6] 1 Pa.C.S.A. § 1921(a).

[7] *See, e.g., Daly v. Hemphill*, 411 Pa. 263, 191 A.2d 835 (1963) (stating that "the Legislature cannot be deemed to intend that its language be superfluous and without import. Every word, sentence or provision in a statute must be given effect in construction of the statute."); *Loeb Estate*, 400 Pa. 368, 373 (1960) (holding that "[w]here the language of a statute is plain and clear, administrative interpretations and practice cannot change or avoid the statute.").

In sum, in order to conform with the Act, the Department's rules must include and define the exception of Section 401(b)(6).

B. The Department Has Failed to Include a Good Cause Exception for People Whose Failure To Comply with the Rules Was Not Willful

Generally, UC law recognizes "good cause" for a rules violation.[8] A good cause exception should similarly apply to individuals who were unable to comply with the Department's rules or understand the work search requirements but tried in good faith to follow them. Because the active work search rules are so new and because education of claimants is so critical, claimants should not suffer overpayments if they did not understand the rules.

In addition to establishing substantive rule s for work search, the proposed regulations create a significant record keeping burden on claimants where previously there was no such burden. Claimants are expected to keep and maintain for two years a weekly log of multiple work searches and an additional work search activity. Unforeseen life circumstances often conspire to destroy records, prevent individuals from keeping proper records in the first place, or prevent meaningful work search activities.

A victim of domestic violence, for example, may not have access to her work search records if they are in her former residence with her abuser and may not be able to apply for the requisite number of jobs as she flees to safety with her children. An individual who suffered a home fire or a basement flood or moved because of foreclosure or financial difficulties may have lost her records during her misfortune. Although these examples may seem out of the ordinary for most individuals, often people who suffer these problems become unemployed and people who become unemployed suffer these problems. Requirements of claimants must take into account the potential pitfalls that may be common in claimant's lives.

Because of the countless plausible instances where records may not be available or claimants may not be able to search for work due to exigent circumstances, the Department should adopt a "good cause" exception to the record keeping and work search requirements. In the instance where someone has good cause for a failure to readily produce work search documents, that individual could sign a sworn statement that the proper work search activities took place and describe them to the extent possible. This statement should act as the equivalent of properly maintained and produced work search records in good cause circumstances. A similar declaration could be used for a claimant who was unable to search for the requisite number of jobs due to an emergency situation.

---

[8] For example, good cause for non-compliance with an employer rule arises from illness, Thompson v. UCBR, 723 A.2d 743 (Pa. Commw. 1999) (citing Brillhart v. UCBR, 67 Pa. Commw. 437, 447 A.2d 697 (1982)); apprehension of injury, Belton v. UCBR, 43 Pa. Commw. 438, 402 A.2d 571 (1979); hardship due to physical handicap, Schwab v. UCBR, 58 Pa. Commw. 387, 427 A.2d 789 (1981); hospitalization, Offset Paperback v. UCBR, 726 A.2d 1125 (Pa. Commw. 1999); or physical inability to comply, Johnson v. UCBR, 54 Pa. Commw. 469, 422 A.2d 223 (1980). Noncompliance may also be justified by an emergency, Porter v. UCBR, 68 Pa. Commw. 639, 450 A.2d 243 (1982); lack of knowledge of the rule, Williams v. UCBR, 32 Pa. Commw. 641, 380 A.2d 932 (1977); or vagueness of the rule, UCBR v. Bacon, 25 Pa. Commw. 583, 361 A.2d 505 (1976).

III. The Proposed Regulations Do Not Account For Practical Problems With Compliance Created by the Very Fact of Unemployment

There are practical problems that many claimants may encounter by virtue of their unemployment or by virtue of other life issues. The Department must account for these problems and ensure that there are remedies to them.

A. Claimants May Have Limited Internet Access, Which Will Make it Hard to Register on CareerLink, Apply for Jobs on CareerLink, and Conduct Other Required Activities

In the Regulatory Analysis Form ("RAF"), question 14, the Department states that there will be minimal to no cost to claimants under these regulations. The Department points to the fact that many of the required work search activities such as registering for and uploading a resume to CareerLink may be done online. Other work search activities are free.

The Department fails to consider the many claimants who either never had internet access or had to end their access when they became unemployed due to financial constraints. To the extent that an individual cannot easily use a home or work internet connection to perform required work search activities, many of these individuals will have to travel to their local CareerLink center. Unfortunately, there are only 65 CareerLink centers throughout the state, with many of these concentrated in the state's urban areas. Individuals who live in a rural area, far away from a CareerLink, could conceivably spend hundreds of dollars a month in gas and toll costs (if they own a car) and lose full days of job search time on public transportation (if they do not own a car).

These additional costs to claimants must be considered when making active work search regulations. By allowing for the most flexible work search possible and by failing to include a waiver when it would be oppressive to enforce the work search rules, as required by 43 P.S. § 801(b)(6), the Department will unnecessarily and unfairly exclude people from receiving unemployment benefits when their lack of work search was through no fault of their own.

B. The Department has Legal Obligations to Ensure Meaningful Access to the Work Search Rules and Documentation for Limited English Proficient UC Claimants.

The Department must take reasonable steps to provide active work search information in the languages understood by limited English proficient (LEP) UC claimants who, by definition, have a limited ability to read, write, speak or understand English and therefore would face significant and unfair challenges complying with the proposed job search requirements without language assistance.

Reasonable steps include providing written information about, and instructions for, compliance with active work search regulations in frequently encountered languages such as Spanish; establishing access to bilingual staff and/or oral interpretation services at all required points of contact; and providing notice of the availability of free language assistance. To provide notice of the availability of free language assistance and how to obtain that assistance, the Department, at

a minimum, should post simple signs at CareerLink sites and include a translated tag line with every notice. The Department already does some of these things for its other services, but needs to extend these services to the work search context as well.

Federal laws provide the framework for Pennsylvania's legal obligation. Title VI of the Civil Rights Act of 1964, and related U.S. Department of Labor regulations, prohibit recipients of federal financial assistance from discriminating on the basis of national origin, which includes conduct that has a disproportionate effect on LEP persons. Similarly, the Workforce Investment Act of 1988 and implementing regulations similarly prohibit discrimination on the basis of national origin. 29 U.S.C. §2938; 29 CFR 37.1 *et seq.* Recipients of Workforce Investment Act funds should make reasonable efforts to meet the particularized language needs of limited-English-speaking individuals who seek services or information from the recipient. 29 CFR §37.34.

The U.S. Department of Labor has published guidance for recipients of federal financial assistance regarding the Title VI prohibition against national origin discrimination affecting limited English proficient persons. The 2003 guidance reinforces the Commonwealth's baseline obligation to take reasonable steps to ensure meaningful access through the provision of oral and written language assistance. Costs associated with providing meaningful access to LEP persons are allowable program costs. In addition, the guidance warns that the quality of language services "is critical in order to avoid serious consequences to the LEP person and to the recipient [of federal funding]." 68 Fed. Reg. 32290, 32295 (May 29, 2003).

In 2011, the U.S. Department of Labor issued Unemployment Insurance Program Letter No. 30-11, "to remind states of their obligations to provide meaningful access to the Unemployment Insurance (UI) program for individuals with limited English proficiency and to provide guidance to states about reasonable efforts that should be taken to help ensure individuals understand their rights and responsibilities related to UI." The Program Letter emphasizes that each state has a responsibility to formulate policies and practices to effectively communicate with individuals, including LEP individuals. In the context of active work search, this includes translating the active work search materials to the most common languages used by LEP claimants.

IV. The Active Work Search Rules Cannot Be Enforced on Claimants for Weeks Before the Rules are Properly Promulgated

In its submission to the IRRC, the Department states that the regulations regarding work search would affect all claimants who file an application for benefits that takes effect on or after January 1, 2012 ("AB date").[9] ***The proposed active work search rules submitted by the Department cannot disqualify claimants for UC benefits for weeks before the effective date of the rules.***

The Departments proposed regulations are a rule making, and thus cannot take effect until the rules have been properly promulgated under the Commonwealth Documents Law ("CDL"), the Regulatory Review Act ("RRA"), and the Commonwealth Attorneys Act ("CAA"). In addition, after they take effect, they cannot apply to claimants for weeks of unemployment before the promulgation date. For the purposes of active work search, this means that the requirements set

[9] Proposed Rulemaking Section C "Affected Persons," 42 Pennsylvania Bulletin 18 at 2379 (May 5, 2012).

forth by the Department in its active work search rules cannot act to exclude any claimant from benefits for weeks prior to the proper promulgation of the rules.

Previous active work search rules implemented by the Department were struck down by Pennsylvania courts for failing to comply with the regulatory review process. In *Orbera v. UCBR*[10], the Office of Employment Security ("OES") implemented work search rules pursuant to statute in an Unemployment Compensation Bulletin, very similar to a work search flyer sent to claimants by the Department in February. The OES bulletin defined an active work search to include five contacts a week with employers, on five different days—clearly beyond the plain language of the statute which failed to define an "active work search." Because the OES's work search definition was binding on all claimants, the Commonwealth Court ruled that it was a substantive rule, not a policy. The Court struck the OES' rule because it was not promulgated in compliance with the CDL and determined that it could not be given controlling effect. The Supreme Court of Pennsylvania struck down enforcement of a similar rule in *Lapota v. UCBR.*[11]

In short, the active work search rules cannot be used to disqualify claimants for any week before the rules are properly implemented under the CDL, RRA, and CAA.

V. Conclusion

Finally, it bears mentioning that the proposed active work search rules have the potential to disqualify from benefits a large number of claimants each year. Florida recently implemented similar work search rules. In the time period from August 1, 2011 through April 14, 2012, Florida denied 66,740 people unemployment benefits because of a failure to properly conduct active work search. The sheer number of individuals denied benefits in just eight and a half months in Florida due to work search speaks to the need for the Department to be as flexible as possible in implementing the active work search requirements. The purpose of the statute is to encourage individuals to search for work while they are unemployed. It is not intended to be a penalizing statute for those who cannot maintain proper paperwork or those who suffer from events outside of their control.

For further discussion of these points, contact
Sharon M. Dietrich, Esquire: 215.981.3719 | sdietrich@clsphila.org
Michael Hollander, Esquire: 215.981.3794 | mhollander@clsphila.org

Submitted by:
Sharon Dietrich, Community Legal Services, Inc.
Michael Hollander, Community Legal Services, Inc.

Submitted, May 29, 2012

[10] Orbera v. Unemployment Compensation Bd. of Review, 497 A.2d 693 (Pa. Commw. 1985)
[11] Lopata v. Unemployment Compensation Bd. of Review, 507 Pa. 570, 576, 493 A.2d 657, 660 (Pa. 1985).