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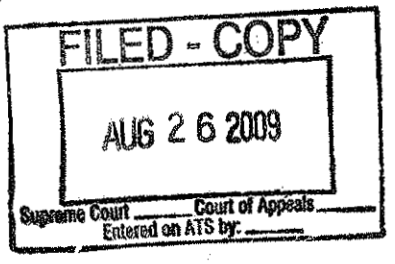
Creps v. Idaho Dep't of Labor Respondent's Brief Dckt. 36072

IN THE SUPREME COURT OF THE STATE OF IDAHO

RUTH A. CREPS, Claimant/Appellant, vs. STATE OF IDAHO, DEPARTMENT OF LABOR, Respondent.	)	SUPREME COURT NO. 36072-2009 BRIEF OF RESPONDENT DEPARTMENT OF LABOR



ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
R.D. Maynard, Chairman, Presiding

RUTH A. CREPS

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STATEMENT OF THE CASE

(1) Nature of the Case:

Appellant Ruth Creps appeals the decision of the Industrial Commission that denied her requested training for the executive Masters of Business Administration ("MBA") program from Boise State University ("BSU") based on its finding that the training was not available at a reasonable cost under 20 C.F.R. § 617.22(a)(6)(ii), when a lower cost training program was available and the traditional MBA training substantially similar in quality, content and results could be obtained from BSU at a lower cost. The material facts are the high cost of the requested executive MBA training program and the availability of a lower cost traditional MBA training program that results in the same MBA degree.

(2) Course of the Proceedings Below:

On July 24, 2008, Appellant applied for training assistance with Respondent, State of Idaho Department of Labor, ("Department") under its Trade Adjustment Assistance program ("TAA program"). Exhibit 5; Exhibit 5A. She requested training for the executive MBA program with BSU. Exhibit 5; Exhibit 5A.

On August 7, 2008, Jennifer Hemly, the Department's TAA Program Coordinator, issued a determination denying Appellant's request for training. Exhibit 6 (Appendix A). Ms. Hemly compared the requested training with BSU's traditional MBA program and found the cost of the requested training excessively high. Exhibit 6 (Appendix A).

On August 19, 2008, Appellant filed an appeal of the Department's determination to the Department's Appeals Bureau. Exhibit 7. On September 25, 2008, Appeals Examiner Gregory

Stevens conducted a hearing on the matter. R. p. 1; R. p. 11. Ms. Hemly appeared for the Department and Attorney Thomas Tharp appeared for the Appellant. R. p. 1; R. p. 11. Ms. Hemly testified on behalf of the Department and Appellant, and Cheryl Maille, Director of BSU's executive MBA program, testified on behalf of Appellant. R. p. 1; R. p. 11.

On September 29, 2008, the appeals examiner issued his decision. R. pp. 1-9; R. pp. 11-19. He reversed the Department's determination and found that under federal regulations, the executive MBA and the traditional MBA programs were not equal in content and quality and approved the training request. R. pp. 1-9; R. pp. 11-19.

On October 6, 2008, the Department filed a notice of appeal of the appeals examiner's decision with the Industrial Commission. R. p. 10. On October 10, 2008, the Department filed an amended notice of appeal and motion for a transcript and briefing. R. pp. 43-44. On October 14, 2008, the Industrial Commission issued its order establishing a briefing schedule. R. pp. 46-47. On October 16, 2008, Appellant filed a request for briefing and a conditional request for a hearing. R. pp. 50-53. On October 20, 2008, the Industrial Commission issued its order denying the request for a new hearing. R. pp. 54-56.

On November 7, 2008, the Department filed its brief. R. pp. 57-73. On November 19, 2008, Appellant filed her brief and attempted to add a new document into the record by way of an appendix in her brief. R. pp. 74-105. On November 28, 2008, the Department filed a Motion to Strike and an affidavit in support. R. pp. 107-113. On December 1, 2008, Appellant filed her reply to the Motion to Strike. R. pp. 114-116.

On January 8, 2009, the Industrial Commission issued its Decision and Order. R. pp. 118-126 (Appendix B). The Industrial Commission granted the Department's motion to strike the document in the appendix of Appellant's brief. R. pp. 119-120 (Appendix B). The Industrial Commission conducted a *de novo* review of the record and reversed the decision of the appeals examiner and denied Appellant's request for training approval, because the training was not the lowest cost option for such training under the federal regulations. R. pp. 118-126 (Appendix B).

On January 22, 2009, Appellant filed a notice of appeal of the Decision and Order of the Industrial Commission. R. pp. 127-130.

(3) Statement of Facts:

The TAA program is a federal program established under the Trade Act of 1974, as amended, and provides a variety of services to workers who are adversely affected by foreign trade. To qualify for TAA services and benefits, a petition must be filed with the U.S. Department of Labor ("U.S. DOL") requesting certification that workers are adversely affected by foreign trade. The TAA program offers a variety of benefits and reemployment services to assist unemployed workers to get suitable employment. Adversely affected workers must apply for and meet certain eligibility requirements for the benefits or services offered. The TAA program is administered by the Employment and Training Administration of U.S. DOL and the Department has executed an agreement to be an agent of U.S. DOL in administering the program in the state of Idaho.

The Trade Act imposes constraints on the total amount spent nationwide in any fiscal year in the TAA program. See 19 U.S.C. § 2296(a)(2)(A) (2008). The Department has, by

policy, set limits on the amount it spends on individual requests for training. On November 16, 2004, the Department amended its policy for the maximum amount it spends on individual training per fiscal year from $6,000 to $8,000. Exhibit 3. The Department also placed a $16,000 soft cap on the cost of an individual's entire training program. Exhibit 3. These costs included the cost of tuition, books and tools. Exhibit 3.

Appellant worked for Micron Technology as a program manager. Tr. p. 8, L. 18; p. 14, Ll. 12-15. Her employer laid her off on July 9, 2007. Exhibit 5; Exhibit 5A; Tr. p. 8, Ll. 18-24; p. 14, Ll. 12-15. Since Micron had certified with U.S. DOL and she was laid off, Appellant qualified to apply for training assistance. Tr. p. 8, Ll. 21-22. Appellant's employment history was pretty much technical; she managed programs and projects and had supervisory experience of about 10 to 15 years. Tr. p. 14, Ll. 18-22. At the time of her layoff, Appellant testified that she was making $96,000. Tr. p. 21, Ll. 16-18. However, the appeals examiner found that she actually earned $89,602 in her base period, April 2, 2006 through March 31, 2007.[1] Exhibit 9; R. pp. 2, 12.

On July 24, 2008, Appellant applied for TAA training benefits for the executive MBA program at BSU. Exhibit 5. The approximate cost of the training was $41,000. Exhibit 5; Tr. p. 6, Ll. 12-21.

On August 7, 2008, Jennifer Hemly, the Department's TAA Program Coordinator, issued a determination denying Appellant's request. Exhibit 6 (Appendix A); Tr. p. 5, Ll. 21-25;

[1] The appeals examiner took official notice of the Department's Employers Data and entered it into the record as Exhibit 9.

p. 6, Ll. 1-2. The determination stated the following reason for the denial:

> Per TAA Federal Regulations, CFR 617.22(6)(iii)(b) [sic][2] Allowable amounts for training. In approving a worker's application for training, the conditions for approval in paragraph (a) of this section must be found to be satisfied, including assurance that the training is suitable for the worker, is at the lowest reasonable cost, and will enable the worker to obtain employment within a reasonable period of time. An application for training shall be denied if it is for training in an occupational area which requires an extraordinarily high skill level and for which the total costs of the training are substantially higher than the costs of other training which is suitable for the worker.
>
> According to the information provided, the Executive MBA program at BSU costs $41,000, while the traditional MBA program at BSU costs approximately $14,000. A BSU representative confirmed that the end result of each program is the same. Therefore, the Executive MBA program cannot be approved due to the high cost.
>
> We encourage you to work with your case manager, Ruby Rangel, in order to select the training that best meets your needs and program requirements.

Exhibit 6 (Appendix A).

At the appeals hearing, Ms. Hemly testified that Appellant's request for TAA training did not meet the requirements of the federal regulation. Exhibit 6 (Appendix A); Tr. p. 6, Ll. 3-7. She conducted a comparison between BSU's traditional MBA program and the executive MBA program. She testified that both programs were two-year programs and ascertained the costs of the programs. The traditional MBA program costs approximately $14,000, whereas the executive MBA program costs $41,000. Exhibit 4; Exhibit 5; and Exhibit 5A; Tr. p. 6, Ll. 10-18, Ll. 21-25. She also talked to BSU's executive MBA program manager, Patrick Coyne, and reviewed the executive MBA program brochure in making her decision. Tr. p. 7, Ll. 1-15. Ms.

[2] The correct citation is 20 CFR § 617.22(b).

Hemly further testified that although the process in getting the MBA was different, the outcome of the two programs was the same degree, an MBA. Tr. p. 7, Ll. 16-25; p. 8, Ll. 1-9; p. 12, Ll. 9-17. Ms. Hemly testified that Patrick Coyne, executive MBA program manager, indicated that not many schools offered the executive MBA program nationwide, which led her to conclude that not many employers seek such a degree. Tr. p. 13, Ll. 2-6.

Evidence at the hearing established the differences between the two programs. The executive MBA program entrance requirements demanded applicants with more professional experience than the traditional MBA program. Ms. Hemly testified that the executive MBA program was geared toward people with six years of professional experience with steady career progression, current employment in middle to upper management and with professional growth potential. Tr. p. 7, Ll. 21-25; p. 8, Ll. 1-9; p. 9, Ll. 24-25; p. 10, Ll. 1-2. Ms. Maille, executive MBA program director, testified that it is geared to the needs of individuals with six years or more of management experience and work experience that exceeds this. Tr. p. 26, Ll. 10-19. She testified the current class has 12 years or more of management experience. Tr. p. 26, Ll. 10-19. The executive MBA program had a smaller class size and the courses were more integrated with respect to disciplines, rather than the traditional MBA's single discipline approach. However, the content of the disciplines taught were similar. Tr. p. 20, Ll. 5-13; p. 27, Ll. 2-8; p. 34, Ll. 6-8.

With respect to similarities between the programs, the record showed the following: Both programs are offered at BSU. Tr. p. 6, Ll. 12-13. The executive program had senior staff who had real world experience. Tr. p. 29, Ll. 23-25; p. 30, Ll. 1-2. The traditional MBA

program also had an instructor who had real world experience and was Appellant's former supervisor at Micron. He taught several of the core courses. Tr. p. 17, Ll. 10-18. The executive MBA program director testified several times that the end result of the traditional MBA program and the executive MBA program were the same degree. Tr. p. 27, Ll. 21-25; p. 28, Ll. 1-2; p. 40, Ll. 16-21. The executive director could not say that the traditional MBA program was not successful for candidates with a professional work history. Tr. p. 35, Ll. 11-15.

The executive MBA program is a self-supporting program within the university and the business college. Tr. p. 31, Ll. 22-24. Part of the big cost differential is in providing individualized coaching, guest speakers, senior faculty, books, materials, software and an open residency where they lodge and feed all of the executive MBA students off site and an evening session for the program. Tr. p. 29, Ll. 23-25; p. 30, Ll. 1-4, Ll. 16-19; p. 31, Ll. 22-25; p. 32, Ll. 1-5. BSU has partnered with a consortium made up of prominent businesses such as Idaho Power, Micron, Hewlett Packard and Simplot to put this program together and the companies provide input as to what is taught in the program. The members' companies send their leadership tier for succession planning to the program. Tr. p. 21, Ll. 2-5; p. 38, Ll. 1-24.

When questioned if the training offered by the executive MBA program was substantially similar in quality, content and results as offered by the traditional MBA program, the executive MBA program director could not testify in the affirmative, but testified that she thought it was better and you receive an MBA degree. Tr. p. 40, Ll. 16-21. She later testified that she was not knocking the traditional MBA program, and it was very good. Tr. p. 41, Ll. 8-9. During the hearing, Ms. Maille was unable to provide the name of a single employer that required an

executive MBA, or to provide the name of any employer that preferred an executive MBA in hiring an individual. Tr. p. 35, Ll. 3-6; p. 37, Ll. 21-25; p. 38, L. 1.

The primary reason Appellant enrolled in the executive MBA program was that she hoped to network with the people in her class to get a job. Tr. p. 15, Ll. 7-13. During the hearing, she was asked [after graduating from the executive MBA program] if she expected to get a higher paying job, and she testified that she is just trying to get a job comparable to what she was being paid. She thinks that the executive MBA program will make the difference in her getting employment, which she has failed to do through the traditional route of sending off her resume and networking. Tr. p. 21, Ll. 9-15.

ADDITIONAL ISSUES ON APPEAL

I.

Whether the Industrial Commission properly applied and interpreted the Trade Act and its regulations in denying Appellant's application for training for the executive MBA program when the cost of the requested training was excessively high and there was a lower cost traditional MBA program available from the same provider?

II.

Whether Appellant's failure to cite authority and present argument bars this Court's consideration of any additional issues set forth in her Notice of Appeal?

STANDARD OF REVIEW

(1) Appeals under the Trade Act:

An appeal of a determination or redetermination under the TAA program is subject to review in the same manner and extent as determinations and redeterminations under Idaho's Employment Security Law. See 20 C.F.R. §617.51(a) (2008); 42 U.S.C. §§ 503(a)(1), 503(a)(3) (2009); and Idaho Code § 72-1368(9).[3]

(2) Standard of Review of Decisions of the Industrial Commission:

On appeal from the Industrial Commission, this Court exercises free review of the Commission's legal conclusions, but will not disturb findings of fact if they are supported by substantial and competent evidence. *Giltner, Inc. v. Idaho Department of Commerce and Labor*, 145 Idaho 415, 418, 179 P.3d 1071, 1074 (2008). Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Cox v. Hollow Leg Pub and Brewery*, 144 Idaho 154, 157, 158 P.3d 930, 933 (2007). In determining whether substantial and competent evidence exists, the Court will not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Henderson v. Eclipse Traffic Control and Flagging*, __P.3d___, 2009 WL 1564538 (2009). Rather, it is up to the Commission to weigh the conflicting evidence and determine the credit and the weight to be given the testimony admitted. *Id.* When reviewing one of the Commission's decisions, the Court

[3] Appellant cites *Former Employees of Merrill Corporation v. U.S.*, 387 F.Supp. 2d 1336 (Ct. Intl. Trade 2005), for the proposition that provisions of the TAA are liberally construed to effectuate Congress' remedial intent. However, she omits the reference that there are also limitations to how far assistance extends. This case involved U.S. Department of Labor's denial of TAA certification.

will view all facts and inference in the light most favorable to the party who prevailed before the Commission. *Id.*

Whether an unemployment compensation claimant has satisfied statutory eligibility requirements is an issue of fact. *Id.* Thus, an eligibility determination will be upheld if it is supported by substantial and competent evidence. *Id.* The claimant carries the burden of providing that all eligibility requirements have been met. *Id.*

ARGUMENT

I.

The Industrial Commission properly applied and interpreted the Trade Act and its regulations in denying Appellant's application for training for the executive MBA program when the cost of the requested training was excessively high and there was a lower cost traditional MBA training program available from the same provider.

A. Trade Act and federal regulations.

There is no dispute in this case that Micron secured the required certification from U.S. DOL and that Appellant was adversely affected by foreign trade making her eligible to apply for TAA program benefits. Under the Trade Act, an adversely affected worker may be eligible for training adjustment assistance, which includes payment of the cost of a qualified retraining program. Before the Department can approve TAA retraining benefits, it must determine that (1) there is no suitable employment for the worker, (2) the worker would benefit from appropriate training, (3) there is reasonable expectation of employment after completion of the training, (4) approved training is reasonably available to the worker, (5) the worker is qualified to undertake and complete the training, and (6) such training is suitable for the worker and available at a

reasonable cost. 19 U.S.C. § 2296(1)(A)-(F) (2008). The Secretary of U.S. DOL has promulgated regulations that must be considered in approving any training requests. See 20 C.F.R. § 617.22 (2008). All of the six factors must be satisfied in approving a worker's application for training. See 20 C.F.R. § 617.22(b) (2008).

There is no dispute that the central issue in this case is the cost of the requested training. 19 U.S.C. § 2296(1)(F) and 20 C.F.R. § 617.22(a)(6) are the applicable provisions of the law and regulation that deal with cost and require a determination of whether the requested training is suitable for Appellant and is available at a reasonable cost. 20 C.F.R. § 617.22(a)(6) states:

> *(6) Such training is suitable for the worker and available at a reasonable cost.*
> (i) Such training means the training being considered for the worker. Suitable for the worker means that paragraph (a)(5) of this section is met and that the training is appropriate for the worker given the worker's capabilities, background and experience.
> (ii) Available at a reasonable cost means that training may not be approved at one provider when, all costs being considered, training substantially similar in quality, content and results can be obtained from another provider at a lower total cost within a similar time frame. It also means that training may not be approved when the costs of the training are unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers. This criterion also requires taking into consideration the funding of training costs from sources other than TAA funds, and the least cost to TAA funding of providing suitable training opportunities to workers. Greater emphasis will need be given to these elements in determining the reasonable costs of training, particularly in view of the requirements in § 617.11(a)(2) and (3) that TAA claimants be enrolled in and participate in training.
> (iii) For the purpose of determining reasonable costs of training, the following elements shall be considered:
> (A) Costs of a training program shall include tuition and related expenses (books, tools, and academic fees), travel or transportation expenses, and subsistence expenses;
> (B) In determining whether the costs of a particular training program are reasonable, first consideration must be given to the lowest cost training which is available within the commuting area. When training, substantially similar in quality, content and results, is offered at more than one training provider, the

lowest cost training shall be approved;
***
Furthermore, 20 C.F.R. § 617.22(b) states:

> (b) *Allowable amounts for training.* In approving a worker's application for training, the conditions for approval in paragraph (a) of this section must be found to be satisfied, including assurance that the training is suitable for the worker, is at the lowest reasonable cost, and will enable the worker to obtain employment within a reasonable period of time. An application for training shall be denied if it is for training in an occupational area which requires an extraordinarily high skill level and for which the total costs of the training are substantially higher than the costs of other training which is suitable for the worker.

There are no reported court cases in Idaho that have interpreted the Trade Act, its regulations and the issues before this Court. There are cases in other jurisdictions that have addressed the issue of excessive cost of requested training in TAA programs and although they are not controlling, they are nevertheless instructive.

In *Nevarre v. Unemployment Compensation Board of Review*, 675 A.2d 361 (Pa. Cmmw. 1996), Nevarre applied for TAA training benefits to enter a physician's assistant program. He had been employed for eight and one-half years by a steel company as a systems analyst at a salary of $36,000 a year. The referee below concluded that the total cost of the requested TAA training was prohibitive and upheld the original determination denying the training request. The issue before the court was cost as it pertained to effectuating the TAA program.

The court found that the Trade Act did not place any specific monetary limits on the cost of individual training programs, but did have a limitation on the total annual funding for the TAA program. See 19 U.S.C. § 2296(a)(2) (2008), which sets the total amount of payments for training under the TAA program at $220,000,000. The court also recognized the Act creates obligations to re-train certain adversely affected workers for suitable employment. Under these

circumstances, the court found that state agencies must balance competing concerns among adversely affected workers within the TAA program. The court stated:

> Under these circumstances, some competing concerns may arise when a college educated, highly skilled applicant, who formerly worked at a high paying position, seeks TAA training. On one hand, it might be unfair and fiscally unsound for that applicant to receive much higher allowances than those provided to his or her fellow adversely affected, perhaps less skilled, workers; on the other hand, it might also be unfair not to recognize what is "suitable" for an individual applicant or to allow the positive background of the applicant, who is no less adversely affected, to become a detriment. Resolving the conflict requires state agencies to balance overall, collective costs against individual training requests. We emphasize that the state agencies no doubt have discretion in this area, as long as they follow the criteria set forth in the regulations.

Nevarre, 675 A.2d at 363, 364.

Nevarre argued that the regulations only required costs to be reasonable and that high costs are not necessarily unreasonable. He contended the sole relevant factor to be considered was if the requested cost of training was reasonable when compared to training costs as a physician's assistant with alternative providers. The court found Nevarre's contention ignored the requirement of taking into account the least cost to TAA funding of providing suitable training opportunities to the worker, and the requirement in 20 C.F.R. § 617.22(b) on allowable amounts for training which mandated denial of training if it was for training in an occupational area that required an extraordinarily high skill level and for which the total costs of the training were substantially higher than costs of other training which is suitable for the worker. The court found that the regulations supported the proposition that one may consider total costs in comparison to costs of other suitable training, not only to programs in one particular area of suitable training, in denying costs. The court found that the referee below had recognized this

and that the proposition was further supported by U.S. DOL's interpretation of the regulations in 59 Fed. Reg. 906 (January 6, 1994), where the agency stated:

> The 1988 Amendments clearly provide that State administering agencies shall approve training for individual workers at the lowest reasonable cost which will lead to employment and will result in training opportunities for the largest number of adversely affected workers. This means that State administering agencies should avoid approving training for occupations that require an extraordinarily high skill level relative to the worker's current skill[s] level and for which total costs of training[,] including transportation and subsistence, are excessively high.

Nevarre, 675 A.2d at 364, 365.

The court in *Nevarre* held that training costs that are comparable to costs among providers of similar training may nonetheless be denied as excessive or prohibitive and such denial may be sustained after weighing (1) factors such as total costs and (2) the total cost of a program as compared to costs of other training that would be suitable for the particular applicant.

In *Nevarre*, the record strongly supported the referee's conclusion. The evidence showed the cost of the requested training was four times the average cost of training in Pennsylvania. The court found the referee's conclusion also comported with the express aim of providing training assistance to the largest number of adversely affected workers on a limited total budget. The court further found that although the cost of the requested training and the comparison to the statewide average was compelling indication the program cost was excessively high, it did not conclusively establish that training should be denied. Standing alone, the finding ignored the applicant's background and capabilities and it might penalize the applicant who had the ability to succeed in a highly skilled position. The court also recognized that if the statewide average cost would provide suitable training for the applicant, then despite the fact that he met other

requirements of the Trade Act for subsidizing appropriate training, training benefits could be denied based on the expense of the training. Under the regulations, if areas of training other than the requested training program were also suitable and cost less, the applicant's training request could be properly denied. This proposition assumed that there was an examination of what was suitable for the applicant and some indication presented that there was a less expensive alternative to suitable training. The case was remanded for further fact finding.

In *Marshall v. Commissioner of Jobs and Training*, 496 N.W. 2d 841 (Minn. App. 1993), Marshall lost his job as a senior financial analyst and applied for TAA training benefits with the Minnesota State Office of Jobs and Training to attend law school. He had a B.A., an M.BA. and eight years of experience as an accountant, treasurer/comptroller/chief financial officer and financial analyst. The commissioner's representative denied Marshall's request for training because of the cost of law school, which exceeded $27,000, and based on Marshall's background. The commissioner concluded that training as a lawyer was not reasonable or necessary for the applicant to obtain suitable work under 19 U.S.C. § 2296(a)(1)(F).

The court found that the Trade Act was designed to give workers whose job functions have virtually disappeared because of foreign competition an opportunity to become proficient in a new trade. It also found that although professional training was allowed under the statute, it was not meant to allow a person with a professional degree, who had reasonable job prospects or options, the opportunity to acquire a second professional degree simply to enhance employment. Thus, the court held that an applicant wanting to enhance an already existing professional degree bore a heavy burden to demonstrate that such training is reasonable or necessary.

In *Marshall*, the department had submitted statistical information that employment opportunities for Marshall's qualifications were available and would be increasing. The record also showed that applicant had applied for suitable jobs, but was not selected. The court found that the commissioner's representative weighed the evidence that Marshall was currently employable against the significant cost of the program and determined that the training was not justified and found that the decision to deny applicant's request was not arbitrary or capricious.

In *Wilder v. Employment Security Commission of North Carolina*, 173 N.C.App. 429, 618 S.E. 2d 863 (N.C. App. 2005), Wilder had a B.S. in electrical engineering, a masters degree in computer science and 21 years of experience in telecommunications. He applied for TAA training benefits. The employment security commission appeals referee found that suitable employment was available to claimant and that a second masters degree was not considered to be suitable for the intent of the program and denied the request.

Among the issues addressed by the court was whether the second masters degree was suitable for claimant under 19 U.S.C. § 2296(a)(1)(F) and 20 C.F.R. § 617.22(a)(6)(i). The court found under the regulation, training is suitable for a worker when appropriate given the worker's capabilities, background and experience. The court cited *Marshall v. Commissioner of Jobs and Training*, 496 N.W. 2d 841 (Minn. App. 1993), and found that the statute was designed to give adversely affected workers an opportunity to become proficient in a new trade. It also found an individual who already possessed a marketable professional degree bore a heavy burden to establish that an additional professional degree is suitable. The court also quoted U.S. DOL's policy for the TAA program set forth in 59 Fed.Reg. 906, 924 (Jan. 6, 1994).

The court indicated in light of the goal of the TAA program and the heavy burden on an individual who already possessed a marketable professional degree, the court held that the employment security commission did not err and affirmed the denial of TAA training request. The court found that a second master's degree in mathematics was not suitable given the worker's capabilities, background and experience.

B. The Commission properly found by operation of law that the Department could deny training at a high cost when a lower cost program was available.

The Industrial Commission properly found that by operation of law, the Department could deny training at a high cost when a lower cost program was available. R. p. 125 (Appendix B). 20 C.F.R. § 617.22(a)(6)(ii) provides that a training request may be denied "when the costs of the training are unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers." 20 C.F.R. § 617.22(a)(6)(ii) (2008). The record clearly shows that BSU offered a lower cost program, the traditional MBA program. Tr. p. 6, Ll. 10-13. The cost of the traditional MBA program was $14,000 and the cost of the executive MBA program was $41,000. Exhibit 4; Exhibit 5; Exhibit 5A; Tr. p. 6, Ll. 10-18. Testimony at the hearing established that the outcome of the two programs was the same degree, an MBA. Tr. p. 12, Ll. 9-17.

The Industrial Commission's findings and conclusion also comport with other requirements of the federal regulation addressing reasonable cost. The decision considers the least cost to the TAA funding of providing suitable training opportunities to the worker under 20 C.F.R. § 617.22(a)(6)(ii). It is also in accord with 20 C.F.R. § 617.22(a)(6)(iii)(B) which states, "In determining whether the costs of a particular training program are reasonable, first

consideration must be given to the lowest cost training which is available within the commuting area." 20 C.F.R. § 617.22(a)(6)(iii)(B) (2008). Here, the traditional MBA program was the lowest cost training available within the commuting area. Tr. p. 6, Ll. 10-25. Appellant's application shows that she resides in Boise, Idaho. Exhibit 5; Exhibit 5A.

The decision also complies with 20 C.F.R. § 617.22(b) that mandates the denial of an application for training, when it is for an occupation that requires an extraordinarily high skill level and for which the total costs of training are substantially higher than the costs of other training that is suitable. The record shows that the executive MBA program is geared for middle to high functioning executives. Ms. Hemly, TAA coordinator, testified that the executive MBA program was geared toward people who have six years of professional experience with steady career progression, current employment in middle to upper management and with professional growth potential. Tr. p. 7, Ll. 21-25; p. 8, Ll. 1-6; p. 9, Ll. 24-25; p. 10, Ll. 1-2. Ms. Maille, executive MBA program director, also testified that the executive MBA program is geared to the needs of individuals with six years or more of management experience, and with work experience exceeding that. She further testified the current class has 12 years or more of management experience. Tr. p. 26, Ll. 10-19. The record further showed that the executive MBA program was a special program created by and for a consortium of prominent businesses in the area to send their leadership tier for succession planning. Tr. p. 21, Ll. 2-5; p. 38, Ll. 1-24.

The record shows the cost of the executive MBA program was substantially higher than the traditional MBA program. The traditional MBA program was $14,000, and the executive MBA program was $41,000. Exhibit 4; Exhibit 5; Exhibit 5A; Tr. p. 6, Ll. 12-21.

Evidence in the record also supports the fact that the traditional program was suitable for Appellant. Work is suitable for the worker when one examines the worker's personal qualifications to undertake and complete the approved training. See 20 C.F.R. §§ 617.22(a)(5)(i) (2008) and 617.22(a)(6)(i). Ms. Hemly, TAA coordinator, testified that Appellant met the requirements of suitability for the executive MBA program. Tr. p. 10, Ll. 16-19. Likewise, the traditional MBA program would be suitable for Appellant, because the outcome of the traditional MBA program and the executive MBA program was the same, an MBA. Tr. p. 12, Ll. 12-15; p. 27, Ll. 21-25; p. 28, Ll. 1-2; p. 40, Ll. 16-21. Ms. Hemly indicated that the Department had no issues with approving an MBA for Appellant, but because it is the same outcome, the Department would go with the low cost provider. Tr. p. 42, Ll. 17-21.

The court in *Nevarre, supra,* held that training costs could be denied as excessive or prohibitive after weighing (1) factors such as total costs and (2) the total cost of a program as compared to costs of other training that is suitable for the particular applicant. In this case, the Department examined the total cost of the requested training and compared it to the cost of other training that was suitable for Appellant, the traditional MBA program. Tr. p. 6, Ll. 10-25. The Department also found that the traditional program was suitable for Appellant. Therefore, the Industrial Commission properly denied Appellant's request for training.

C. <u>There is substantial and competent evidence to support the Industrial Commissions' findings of fact and conclusions of law that the executive MBA program and the traditional MBA program were substantially similar in quality, content and results.</u>

The Industrial Commission found that the traditional MBA program and the executive

MBA program were comparable under the TAA criteria. R. p. 124 (Appendix B). The Industrial Commission properly found and concluded that although the process of obtaining an MBA might differ between the executive MBA and traditional MBA programs, there was no solid evidence that the executive MBA program differed substantially in content, quality and results. R. p. 124 (Appendix B). Instead, the Commission found that the executive MBA program is a specialized program geared toward a specialized group of individuals. R. p. 124 (Appendix B).

20 C.F.R. § 617.22(a)(6)(ii) provides that "available at a reasonable cost means that training may not be approved at one provider when, all costs being considered, training substantially similar in quality, content and results can be obtained from another provider at a lower total cost within a similar time frame. " The Industrial Commission found that the subject matter of the two programs did not differ substantially and specifically referred to the testimony of the executive MBA director, Ms. Maille. R. p. 123 (Appendix B). Ms. Maille's testimony established that the content of the programs were similar in that both programs taught accounting, marketing and human resources, but that the courses in the executive MBA program were taught in an integrated manner rather than by a single discipline. Tr. p. 27, Ll. 2-12.

The Industrial Commission further found that Ms. Maille acknowledged that the two programs resulted in the same MBA degree, which led the Industrial Commission to conclude that although the structure was different, the content is either the same or very similar to have the same end result. R. p. 123 (Appendix B). The record fully supports the Industrial Commission's findings and conclusions. Ms. Maille testified several times that the end result of the two

programs is the same. Tr. p. 27, Ll. 21-25; p. 28, Ll. 1-2; p. 40, Ll. 16-21. Ms. Maille's testimony was further corroborated by Ms. Hemly's conversation with Mr. Coyne, the executive MBA program manager, who told Ms. Hemly the outcomes of the two programs were essentially the same, an MBA degree. Tr. p. 12, Ll. 12-15.

The Industrial Commission also found that there may be some difference in the executive MBA and traditional MBA programs regarding quality, noting the executive MBA may offer an arguably higher quality classroom experience, but there was no indication that the quality is deemed so much higher to be sought or favored by the workforce. R. p. 123 (Appendix B). The evidence in the record supports the Industrial Commission's findings. Ms. Maille was unable to provide any specific employer that would require an executive MBA, or even name a specific employer who would prefer an executive MBA over a traditional MBA in making a hiring decision. Tr. p. 35, Ll. 3-10; p. 37, Ll. 21-25; p. 38, L. 1. Also, Ms. Hemly's conversation with Patrick Coyne indicated there are minimal executive MBA programs nationwide, which made her believe that employers aren't really looking for an executive MBA. Tr. p. 13, Ll. 1-6. Ms. Hemly also indicated that as a Department employee, she works with employers and she sees job listings and requirements and she has never seen a job listing that requires an executive MBA. Tr. p. 42, Ll. 14-17.

The record further established that when the executive MBA program director was questioned if the executive MBA program was substantially similar in quality, content and results, she could not testify in the affirmative, but qualified her answer by stating it was better and that one received an MBA degree. Tr. p. 40, Ll. 16-21. She further testified that she was not

knocking the traditional MBA program and that it was in fact a very good program. Tr. p. 41, Ll. 8-9. The record also established that both programs are offered by BSU and had instructors with real world experience. Tr. p. 6, Ll. 10-13; p. 17, Ll. 15-18; p. 29, Ll. 23-25; p. 30, Ll. 1-2.

Finally, the Industrial Commission found that although the executive MBA program may provide Appellant with a network of classmates that may result in a higher paying job than the traditional MBA, there was nothing in the record that suggested the traditional MBA program would prepare Appellant for jobs that would not meet the suitability standards defined in 20 C.F.R. § 617.22(a)(1)(i). R. p. 124 (Appendix B). The Industrial Commission concluded that considering the purpose of the TAA program, it could not discount the traditional MBA program simply because the worker desires to be in a program geared toward a specific group of individuals when the traditional MBA would fulfill the same retraining objective. R. p. 124 (Appendix B). There is nothing in the Trade Act or TAA regulations that requires the Industrial Commission to make a finding with respect to the lower cost program providing suitable employment, nor is the analysis necessary for the denial of the Appellant's requested training in this case.

Appellant contends that the *Marshall* and *Wilder* cases are instructive and then attempts to distinguish the facts of the instant case from them. The portion of these cases she references has no bearing on the issues before the Court. She contends that the Department offered no statistic to rebut her evidence at the hearing as the department did in *Marshall*. In *Marshall*, the department submitted statistics to show that "employment opportunities" were available for the applicant under 20 C.F.R. § 617.22(a)(1) in denying training benefits. The regulation determines

whether there is no suitable employment available for an adversely affected worker. Similarly, Appellant references the portion of the *Wilder* case dealing with suitable employment. These cases are not helpful because the issue of whether there is suitable employment for Appellant is not an issue in this matter.

Appellant argues that the Industrial Commission improperly applied the reasonable cost rules of 20 C.F.R. § 617.22(a)(6)(i) by completely disregarding the regulatory definition of "suitable employment", when considering the availability of training substantially similar in quality, content and results at a lower cost than the executive MBA program. Appellant misunderstands the regulation dealing with "suitable employment" as set forth in 20 C.F.R. § 617.22(a)(1) and training "suitable for worker" under 20 C.F.R. § 617.22(a)(6)(i). Suitable employment is one of the six factors that the Department must examine in order to determine if a training request must be approved. There is no requirement in the reasonable cost regulation to even consider suitable employment. Suitable employment is not an issue in this case.

Appellant argues that the Industrial Commission's decision is against the "great weight of evidence" and that it should be set aside as arbitrary, capricious and an abuse of discretion. She fails to make any specific references to the record to support her contention and only makes a general reference to her and Ms. Maille's testimony. Contrary to Appellant's assertions, much of the evidence relied upon by the Industrial Commission in fact came from Appellant's own witness, the executive MBA director, Ms. Maille.

Appellant contends that the Trade Act and regulations contemplate maximum flexibility to meet the goal of finding suitable employment for the individual based on their background.

Appellant cites the *Nevarre* case as authority for this proposition. Contrary to Appellant's assertion, the court in *Nevarre* found the intent of the TAA program mandated that state administrative agencies approve training for individual workers at the lowest reasonable cost which will lead to employment and will result in training opportunities for the largest number of adversely affected workers. Also, flexibility in the TAA program is limited due to the constraints on the total amount spent in any fiscal year in training and is also limited for the Department because of its policy on the maximum it spends on individual training. Exhibit 3. See *Ostapenko v. Department of Employment and Economic Development*, 2006 WL 2129769 (Minn.App. 2006), (upholding denial of training request where cost exceeded limits set by department based on the number of workers who needed training). The record shows that the primary reason Appellant enrolled in the executive MBA program was so she could network with people in the class to get a job. Tr. p. 15, Ll. 7-13. The statute is not meant to allow a person with a professional degree who has reasonable job prospects or options the opportunity to acquire a second professional degree simply to enhance employability. *Marshall,* 496 N.W. 2d at 843.

Appellant argues that the Industrial Commission failed to consider the academic admission requirements that she would have had to complete in order to enroll in the traditional program, and she contends that the executive MBA program would achieve the regulatory goals of obtaining suitable employment at the earliest possible date. She also contends that the MBA program could exceed the 104 week period allowed for completion of training under the TAA program as required by 20 C.F.R. § 617.15. Appellant is inviting this Court to re-weigh the

evidence in this matter. In determining whether substantial and competent evidence exists, the Court will not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Henderson, supra.* Also, these arguments present new issues that were not brought up below, and it is inappropriate for this Court to entertain new issues on appeal. This Court will not consider arguments raised for the first time on appeal. *Excell Construction, Inc. v. State of Idaho Department of Labor*, 141 Idaho 688, 116 P.3d 18 (2005). In the event the Court does consider these issues, the record clearly established that the traditional MBA program was a two year program. Tr. p. 6, Ll. 10-25. Also, the TAA regulations in considering an application for training does not require that the applicant secure suitable employment at the soonest date, but to enable the worker to obtain employment within a reasonable period of time. See 20 C.F.R. § 617.22(b). Appellant's argument also ignores the other requirement that she must meet for the Department to approve the training that it be at the lowest reasonable cost.

D. The Industrial Commission properly applied and interpreted the Trade Act and federal regulations in denying Appellant's application for training.

The Industrial Commission properly applied the law and regulation in denying Appellant's requested training. It correctly referenced the regulation dealing with whether training is available at a reasonable cost, 20 C.F.R. § 617.22(a)(6)(ii). Upon finding no controlling cases in Idaho, it looked to other jurisdictions for guidance citing the *Wilder* and *Nevarre* cases. R. p. 122 (Appendix B). In making its decision, the Industrial Commission properly recognized the competing interest among adversely affected workers that the Department must balance, and indicated that "state agencies are under a mandate to allocate

training dollars in a manner that the greatest number of workers will derive the greatest benefit for the lowest cost"... and correctly concluded that "Consequently, the needs of the many will often outweigh the needs of the few". R. p. 122 (Appendix B). This, in accord with U.S. DOL's policy for the TAA program to train the largest number of adversely affected workers on a limited total budget. See *Nevarre*, *supra*, reference to 59 Fed. Reg. 906 (January 6, 1994). The Industrial Commission also properly recognized the discretion accorded the Department because of the variation in the skills of the worker and the availability of jobs in the labor market area. R. p. 122 (Appendix B). The court in *Nevarre*, *supra*, recognized the competing concerns among highly skilled workers and other adversely affected workers and found that in resolving the conflict, state agencies must balance overall collective costs against individual training requests. The court emphasized that the state agencies have discretion in the area as long as they follow the criteria set forth in the regulations.

Appellant argues the Industrial Commission erred by applying the comparative cost rules 20 C.F.R. § 617.22(a)(6)(ii) and 20 C.F.R. § 617.22(a)(6)(iii).[4] She contends the regulations compel the Department to compare program costs between two programs only when they are available from separate competing providers. 20 C.F.R. § 617.22(a)(6)(ii) states "Available at a reasonable cost means that training may not be approved at one provider when, all costs being considered, training substantially similar in quality, content and results can be obtained from another provider at a lower total cost within a similar time frame. It also means that training may

[4] The Industrial Commission never cited or referenced 20 C.F.R. § 617.22(a)(6)(iii) in its decision. R. pp. 118-125 (Appendix B).

not be approved when the costs of the training are unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers. " 20 C.F.R. § 617.22(a)(6)(ii) (2008). The regulation does not expressly prohibit consideration of the same provider offering two separate programs resulting in the same degree, an MBA, nor does the regulation expressly require training providers be separate competitors. Here, BSU is the provider of the requested executive MBA program, a self supporting program within the university and business college, and it is also the provider of another traditional MBA program. Tr. p. 6, Ll. 8-13; p. 31, Ll. 22-23. Appellant's argument, like the TAA applicant in *Nevarre*, *supra*, ignores the aim of the TAA program and fails to consider the other provisions of the TAA regulations - taking into account the least cost to the TAA funding of providing suitable training opportunities to the worker in 20 C.F.R. § 617.22(a)(6)(ii) and the mandate in 20 C.F.R. § 617.22(b) to deny training if it is for training in an occupational area that requires an extraordinarily high skill level and for which the total costs of training are substantially higher than the cost of other suitable training. Comparing the two programs would promote the express policy of the TAA program of providing training assistance to the largest number of adversely affected workers on a limited total budget.

Appellant also argues that the TAA program regulations comport with logical market principles. There is nothing in the TAA regulation that even remotely mentions market principle and such principle is irrelevant to any of the issues before this Court.

Appellant finds error with the Industrial Commission's reliance on the *Wilder* and the *Nevarre* cases and its finding that state agencies such as the Department are under a mandate to

allocate training dollars in a manner that the greatest number of workers will derive the greatest benefit for the lowest cost. She also contends that there is no "evidence in the record that such a Hobson's choice was presented in this case or considered by the Department in denying Appellant's application for TAA training assistance." Appellant's argument is without merit and would require the Industrial Commission and this Court to make its analysis of the issues in a vacuum. Her contention also ignores the reality of how the TAA program is administered by state agencies. The TAA program is constrained by the statutory ceiling for total annual funding for training under 19 U.S.C. § 2296 and state agencies such as the Department must balance the individual requests for training with the overall collective costs of training within the program.

Appellant's gross mischaracterization of the TAA program policy as a Hobson's choice coupled with her contention that there is no evidence in the record of the mandate or that the Department even consider the policy in denying her training request is misguided and show her misunderstanding of the TAA program. U.S. DOL's policy for the TAA program is implemented by way of application of the law and TAA regulations to each individual training request received by the Department. The Department's determination, dated August 7, 2008, denied Appellant's requested training because of the availability of the lower cost program and the excessively high cost of the requested training. Exhibit 6 (Appendix A); Tr. p. 5, Ll. 21-25; p. 6, Ll. 1-7. The determination also set out the regulation on allowable cost verbatim and stated that, "An application for training shall be denied if it is for training in an occupational area that requires an extraordinary high skill level and for which the total costs of the training are substantially higher than the cost of other training which is suitable for the worker." Exhibit 6

(Appendix A). Contrary to Appellant's assertion, the Department did conduct an individualized investigation into her request for training, however, because it did not meet the requirements of the TAA regulation it was denied. Tr. p. 5, Ll. 21-25; p. 6, Ll. 1-25; p. 7, Ll. 1-25; p. 8, Ll. 1-24. Appellant's contention is not supported by the record.

II.

Appellant's failure to cite authority and present argument bars this Court's consideration of any additional issues set forth in her Notice of Appeal.

Appellant presented no argument in her opening brief on the following issues:

> a. The Decision and Order of the Idaho Industrial Commission should be vacated because the issue raised by IDOL and purportedly addressed by the Commission was moot at the time the Decision and Order was entered because IDOL certified that Creps met all the criteria for requested training reimbursement under the Trade Adjustment Assistance Act; and
>
> b. The Idaho Industrial Commission erred by reversing the Appeals Examiner's determination that Creps met the criteria required to receive federal funding pursuant to the Trade Adjustment Assistance Act for retraining in the Executive MBA program at Boise State University.

R. p. 128.

I.A.R. 35 sets forth the requirements of appellant's brief and among the requirements is that: "The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefore, with citations to the authorities, statutes and parts of the transcript and record relied upon."

Appellant's opening brief fails to comply with I.A.R. 35. Furthermore, when issues cited on appeal are not supported by propositions of law, authority or argument, they will not be considered by the Court. *St. Alphonsus Regional Medical Center v. Bannon*, 128 Idaho 41, 44,

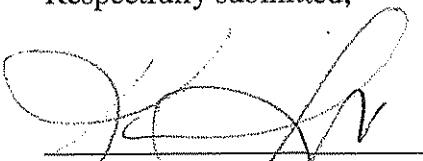
910 P.2d 155, 158 (1995).

Since Appellant failed to meet all six criteria under 19 U.S.C. § 2296 and the regulations at 20 C.F.R. § 617.22, the Industrial Commission properly denied Appellant's request for training.

CONCLUSION

Based on the foregoing, the Department respectfully requests that this Court affirm the decision of the Industrial Commission.

Respectfully submitted,



KATHERINE TAKASUGI
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26th day of August, 2009, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

Thomas R. Tharp
1212 N. 5th Street
Boise, ID 83702

Kenna Andrus

Kenna Andrus

IDAHO
DEPARTMENT OF LABOR
C.L. "BUTCH" OTTER, GOVERNOR
ROGER B. MADSEN, DIRECTOR

August, 7 2008

Ruth Creps
10 Daggett Rim Rd.
Boise, ID 83716

[redacted]

Dear Mrs. Creps

Thank you for your Trade Act benefits application. While you are entitled to request training through Trade, certain criteria must be met in order for training to be approved. Unfortunately, TAA cannot approve your request for training to complete the Executive MBA program at Boise State University (BSU). The reason TAA cannot approve this request is listed below:

Per TAA Federal Regulations, CFR 617.22 (6) (iii) (b) Allowable amounts for training. In approving a worker's application for training, the conditions for approval in paragraph (a) of this section must be found to be satisfied, including assurance that the training is suitable for the worker, is at the lowest reasonable cost, and will enable the worker to obtain employment within a reasonable period of time. An application for training shall be denied if it is for training in an occupational area which requires an extraordinarily high skill level and for which the total costs of the training are substantially higher than the costs of other training which is suitable for the worker.

According to the information provided, the Executive MBA program at BSU costs $41,000, while the traditional MBA program at BSU costs approximately $14,000. A BSU representative confirmed that the end result of each program is the same. Therefore, the Executive MBA program cannot be approved due to the high cost.

We encourage you to work with your case manager, Ruby Rangel, in order to select the training that best meets your needs and program requirements.

Best Regards,

Jenny Hemly
TAA Coordinator

cc: Ruby Rangel
Daniel Holmes
File

PROTEST RIGHTS

This letter may be considered to be a determination. If you disagree with this determination, you have FOURTEEN (14) DAYS from the date of mailing to file a protest. A protest must be in writing and must be signed. The protest can be filed in person, mailed, or faxed to any local Department of Labor Job Service Office. If the protest is mailed, it must be postmarked no later than the last day to protest. If no protest is filed, this determination will become final and cannot be changed.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUTH A. CREPS, Claimant/Respondent, vs. IDAHO DEPARTMENT OF LABOR, Appellant.	**IDOL # 8091-T-2008** **DECISION AND ORDER** FILED JAN 0 8 2009 INDUSTRIAL COMMISSION

Appellant, Idaho Department of Labor, appeals to the Industrial Commission a Decision issued by Idaho Department of Labor ("IDOL" or "Department") allowing Claimant, Ruth A. Creps, her request for training. On October 10, 2008, IDOL submitted a briefing request which was granted in our Order dated October 14, 2008. On October 16, 2007, Claimant submitted her own request for briefing as well as a request for a new hearing. Claimant's request for a hearing was denied in our Order filed October 20, 2008. However, that Order referred Claimant back to the briefing schedule found in our October 14, 2008 Order. IDOL submitted their brief on November 7, 2008. On November 19, 2008, Claimant filed her brief. Included with Claimant's brief was additional evidence submitted as Appendix A. On November 28, 2008, IDOL filed a Motion to Strike Appendix A. Claimant submitted her response to IDOL's Motion to Strike on December 1, 2008. We will address that issue below.

The undersigned Commissioners have conducted a *de novo* review of the record pursuant to Idaho Code § 72-1368(7) and opinions issued by the Idaho Supreme Court. The Commission has relied on the transcript of the hearing the Appeals Examiner held on September 25, 2008, along with the exhibits [1 through 9] admitted into the record during that proceeding.

MOTION TO STRIKE

As stated above, Claimant's brief included an additional document that was not submitted into the evidentiary record during the Appeals Examiner's hearing. IDOL filed a Motion to Strike this document on the basis that it is not part of the evidentiary record and, therefore, is not in accordance with Rules 4(B) and 7(A) of the Rules Appellate Practice and Procedure (RAPP). (IDOL's Motion to Strike, filed November 28, 2008.) Claimant contends that Appendix A is rebuttal evidence to newly established assertions made by IDOL in its brief. (Claimant's Reply to IDOL's Motion to Strike, filed December 1, 2008.) Further, Claimant argues that IDOL's Motion to Strike does not challenge the intrinsic validity, provide new information concerning TAA funding constraints applicable to Claimant, nor does it demonstrate any prejudice. (Claimant's Reply to IDOL's Motion to Strike, filed December 1, 2008.) Claimant asks the Commission to take judicial notice of this evidence.

RAPP 4 (B) provides that written argument must be based upon the evidence established in the evidentiary record. RAPP 7(A) provides, in pertinent part, that the evidentiary record consists of:

> "either the tape recording or the transcript of any hearing conducted by the appeals examiner, together with the exhibits admitted into evidence by the Appeals Examiner...The Commission may also consider written argument submitted by an interested party. Written argument must be based upon evidence established in the record."

In other words, a party's brief is not an appropriate vehicle in which to submit additional evidence before the Commission.

Here, a portion of Claimant's argument is based upon a document that was not previously admitted into the record. Claimant has not expressly requested that the record be augmented to include this proposed evidence. Instead, Claimant requests that we take judicial notice of this

document. However, judicial notice requires that the evidence is a well-known and indisputable fact. We find it difficult to place the proposed evidence within this preview. Furthermore, we find that the record includes exhibits, testimony, and extensive briefing. Ample evidence was provided for the issue in this claim. As such, we find justice does not require that additional evidence be submitted in order to complete the evidentiary record. Therefore, IDOL's Motion to Strike Appendix A of Claimant's brief is GRANTED. The Commission will consider all of Claimant's brief excluding Appendix A.

FINDINGS OF FACT

Based on the evidence and testimony set forth at the Appeals Examiner's hearing, the Commission sets forth its own Findings of Fact as follows:

1. Claimant lost her job with Micron as a program manager in July, 2007. In her base period of April 2, 2006 through March 31, 2007, Claimant earned $89,602.23 with this Employer.

2. On July 24, 2008, Claimant applied for Trade Adjustment Assistance to enter into an executive MBA program at Boise State University. The total cost of the program, including books, tuition and costs, is approximately $41,000.

3. On August 7, 2008, Jennifer Hemly, Trade Adjustment Assistance Coordinator for the Idaho Department of Labor, issued a Determination denying Claimant's request. This denial was due to the inflated cost of the program and that Boise State University offered a traditional MBA program for approximately $14,000.

4. Both options are two year programs and result in the same degree. However, the two programs differ in that the executive MBA program entrance requirements demand applicants with more professional experience than the traditional MBA program. Additionally, class sizes are smaller and the courses themselves are more integrated in subject matter, rather than the traditional MBA's single discipline approach.

DISCUSSION

Claimant lost her position as a program manager with Micron. Because Claimant lost her job due to no fault of her own in a trade related restructuring, Claimant was qualified to apply for Training Adjustment Assistance ("TAA"). Claimant applied for the executive MBA ("EMBA") program at Boise State University ("BSU"). The total cost of the two year program was estimated at $41,000, inclusive of books, materials and fees. However, IDOL denied that request because BSU offered a traditional MBA for approximately $14,000. The two programs ended with the same degree and both were two year programs. Based on the exceedingly high cost of the EMBA and because IDOL believes that the traditional MBA is also suitable training for Claimant, IDOL denied Claimant's application for TAA benefit for the EMBA.

Approval of training under the TAA is governed by federal regulations expressed in 20 C.F.R. 617.22(a) (2006). Under that provision, it is up to IDOL to determine whether Claimant has met six criteria in order to receive training benefits. Those criteria include: 1) there is no suitable employment (which may include technical and professional employment) available for an adversely affected worker; 2) the worker would benefit from appropriate training; 3) there is a reasonable expectation of employment following completion of such training; 4) training approved by the Secretary is reasonably available to the worker from either governmental agencies or private sources (which may include area vocational technical education schools, as defined in 19 U.S.C. § 2302, and employers); 5) the worker is qualified to undertake and complete such training; and 6) such training is suitable for the worker and available at a reasonable cost. 20 C.F.R. 617.22. A claimant must satisfy all six criteria in order to be approved. In this case, the only criterion at issue is the last requirement, whether the training is suitable for the worker and available at a reasonable cost. There is no disagreement that

Claimant satisfied the other five criteria. (Hearing Transcript, p. 10.)

Therefore, the focus of this debate centers on whether or not the EMBA and the traditional MBA are so similar that cost becomes the only consideration. "Available at a reasonable cost" is defined in 20 C.F.R. 617.22(a)(6)(ii)(2006), stating in pertinent part:

> Available at a reasonable cost means that training may not be approved at one provider when, all costs being considered, training substantially similar in quality, content and results can be obtained from another provider at a lower cost within a similar time frame. It also means that training may not be approved when the costs of the training are unreasonably high in comparison with the average costs of training other workers in similar occupations at other providers.

IDOL argues that the traditional MBA is the most cost effective program and results in the same degree. Claimant disagrees and believes that the EMBA differs in quality and content. Therefore, we are tasked with determining whether the EMBA truly differs in quality, content and results from the traditional MBA.

There are no published cases in Idaho addressing the various provisions under the TAA. Therefore, we look to other jurisdictions for guidance. There are a few decisions addressing whether a claimant is entitled to a specific type of training. However, we can locate no published decisions addressing a conflict between two available training programs.

Courts addressing requests for training authorization have consistently noted that state agencies, such as IDOL, are under a mandate to allocate training dollars in a manner that the greatest number of workers will derive the greatest benefit for the lowest cost. Wilder v. Employment Security Commission of North Carolina, 618 S.E.2d 863 (2005), Nevarre v. Unemployment Compensation Board of Review, 675 A.2d 361 (1996). Consequently, the needs of the many will often outweigh the needs of the few. Further, because of the variation in the skills of workers and the availability of jobs in labor market areas, state administering agencies

are accorded a great deal of discretion in making these decisions so long as they comply with the applicable Federal Regulations.

Here, Claimant is in the position of having many years of professional experience. Due to this experience, Claimant is eligible for a program geared specifically towards executives obtaining their MBA degree. Even though the traditional and executive MBA achieve the same degree, Claimant argues that the class size, instructors, and networking with classmates are not available or differ significantly from the traditional MBA program. (Transcript, p. 15, ll. 3-13.) To support her contention, Claimant provided substantiating testimony from the Director of Executive Education and of the EMBA program, Cheryl Maille. According to Ms. Maille, the EMBA program is geared toward executives who already have over six years of experience. (Transcript, p. 26, ll. 10-13.) Further, EMBA differences include a smaller class size, classes are taught in a more integrated nature, and the instructors have the capacity to teach executives. (Transcript, p. 27, ll. 2-8; pp. 29-30, ll. 23-4; p. 34, l. 8.) Ms. Maille's testimony does not show that the subject matter of the two programs differ substantially, only the method of teaching differs. Ms. Maille acknowledged that the two programs result in the same degree, an MBA. This leads us to believe that although the structure of the two programs differs, the information taught, i.e. the content, is either the same or very similar to have the same end result.

We note that there may be some difference in the programs regarding quality. Certainly a smaller class size and more one-on-one counseling with professors would benefit any student. However, there is no indication that this program is sought or favored over a traditional MBA by the workforce. Ms. Maille was unable to provide specific employers who would require an EMBA over a traditional MBA. (Transcript pp. 37-38, ll. 21-1.). While she may speculate that employers would prefer a candidate to have an EMBA, without additional evidence for support,

we find this to be mere speculation. Therefore, while the MBA may offer a student an arguably higher quality classroom experience, there is no solid evidence that the quality is deemed so much higher as to be sought after in the workforce.

Therefore, while the process of obtaining an MBA might differ, there is not solid evidence that the EMBA substantially differs substantially in the content, quality and result. Instead, the EMBA appears to be a specialized program geared toward a specialized group of individuals instead of a substantially dissimilar program. Because of this, we are not persuaded that the EMBA program differs substantially in content or quality. Both parties agree that the end result is the same.

Claimant's desire to take the most specialized path to her career goal is laudable and her desire to attain the training that will guarantee her the highest possible wage within that career is reasonable. However, the TAA is a remedial program. The purpose of that program is to provide Claimant and similarly situated workers with the means of obtaining training to become employable again in suitable work. Claimant has not persuaded us that the programs are so dissimilar in the training they offer in Claimant's chosen career that they are not comparable in the context of the TAA criteria. The training provided by the executive MBA program may provide Claimant with a network of classmates that may result in higher paying jobs than would the training provided by the traditional MBA. However, there is no evidence in this record to suggest that the traditional MBA program would prepare Claimant for jobs that would not meet the suitability standard defined in 20 C.F.R. 617.22(a)(1)(i). Considering the purpose of TAA, we cannot discount the traditional MBA program simply because the worker desires to be in a program geared towards a specific group of individuals when the traditional MBA would fulfill the same retraining objective.

The language of 20 C.F.R. 617.22(a)(6)(ii) makes it clear that IDOL may not approve training at a higher cost when a lower cost program is available. Clearly, the traditional MBA program at BSU is the lowest cost program that offers Claimant the training she generally seeks. Although the loss of her employment qualified Claimant for assistance under TAA, the training Claimant selected had to meet all six of the criteria under 20 C.F.R. 617.22(a) before IDOL could authorize funding. Claimant is free to seek other means of funding training through the program of her choice, but because Claimant's choice of training does not satisfy the "lowest cost" requirement of 20 C.F.R. 617.22(a)(6), Claimant's request for support under TAA for the executive MBA cannot be approved.

CONCLUSION OF LAW

Claimant's request for training approval and allowances while in training under 20 C.F.R. 617.22 is denied, because it is not the lowest cost option for that training as required by 20 C.F.R. 617.22(a)(6).

ORDER

Based on the foregoing analysis, the Decision of the Appeals Examiner is REVERSED. Claimant's request for training approval and allowances while in training under 20 C.F.R. 617.22 for the executive MBA is denied. This is a final order under Idaho Code § 72-1368(7).

DATED this 8 day of January, 2009.

INDUSTRIAL COMMISSION

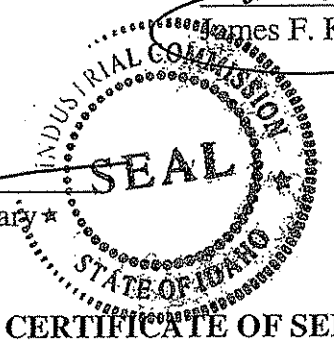
R.D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

James F. Kile, Commissioner

ATTEST:

Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January, 2009 a true and correct copy of **Decision and Order** was served by regular United States mail upon each of the following:

RUTH A CREPS
1212 N 5TH
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