

<b>EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210</b>	<b>CLASSIFICATION</b> UI Appeals
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**ADVISORY:** UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 20-11

**TO:** STATE WORKFORCE AGENCIES

**FROM:** JANE OATES  
Assistant Secretary

*Jane Oates*

**SUBJECT:** Revised Employment and Training (ET) Handbook No. 382, Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality

**1. Purpose.** To transmit the third edition of ET Handbook No. 382, Handbook for Measuring Unemployment Insurance (UI) Lower Authority Appeals Quality.

**2. References.** Social Security Act (SSA), Section 303(a)(3); Code of Federal Regulations (CFR), 20 CFR Part 650 – Standard for Appeals Promptness; *A Guide to Unemployment Insurance Benefit Appeals – Principles and Procedures*, USDOL, 1970; Unemployment Insurance Program Letter No. 26-90; *Requirement that UI Appeals Hearings Be Simple, Speedy, and Inexpensive*.

**3. Background.** Section 303(a)(3), SSA, requires state laws to provide for an opportunity for a fair hearing before an impartial tribunal for all individuals whose claims for UI are denied. ET Handbook No. 382 provides the Federal criteria used to measure the quality of appeal hearings conducted in the states.

**4. OMB Approval.** There are no reporting instructions in this Handbook; therefore, OMB approval is not required.

**5. Action Requested.** Administrators are requested to distribute this handbook to appropriate staff. This Handbook will be available electronically at: <http://wdr.doleta.gov/directives> under Employment and Training Handbooks.

**6. Inquiries.** Address all inquiries to the appropriate Regional Office.

**7. Attachment(s).** ET Handbook No. 382

<b>RESCISSIONS</b> None	<b>EXPIRATION DATE</b> Continuing
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**ET Handbook No. 382**  
**Third Edition**  
**March 2011**

HANDBOOK  
FOR  
MEASURING  
UNEMPLOYMENT INSURANCE  
LOWER AUTHORITY APPEALS  
QUALITY

U.S. DEPARTMENT OF LABOR  
EMPLOYMENT AND TRAINING ADMINISTRATION  
OFFICE OF UNEMPLOYMENT INSURANCE

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

**TABLE OF CONTENTS**

I. INTRODUCTION.....	3
II. <a href="#">QUARTERLY</a> EVALUATIONS .....	6
III. <a href="#">ANNUAL REVIEW</a> OF STATES' QUARTERLY SELF-EVALUATIONS.....	9
IV. CRITERIA FOR MEASURING THE QUALITY OF LOWER AUTHORITY APPEALS HEARINGS AND DECISIONS	
1. <a href="#">Pre-hearing/pre-testimony explanation</a> .....	11
2. <a href="#">Opening statement</a> .....	13
3. <a href="#">Exhibits</a> .....	14
4. <a href="#">Witnesses</a> .....	16
5. <a href="#">Order of testimony from each witness</a> .....	18
6. <a href="#">Opportunity to question own witness(es)</a> .....	19
7. <a href="#">Clear language</a> .....	21
8. <a href="#">Single point questions</a> .....	22
9. <a href="#">Clarification of statements, which include conclusions</a> .....	24
10. <a href="#">Confrontation</a> .....	26
11. <a href="#">Cross-examination</a> .....	28
12. <a href="#">Repetitive and/or irrelevant testimony</a> .....	30
13. <a href="#">Leading questions</a> .....	31
14. <a href="#">Control of interruptions</a> .....	33
15. <a href="#">Off the record</a> .....	35
16. <a href="#">Interpreters</a> .....	37
17. <a href="#">Continuances</a> .....	39
18. <a href="#">Closing the hearing</a> .....	41
19. <a href="#">Hearing within scope of notice</a> .....	42
20. <a href="#">Gratuitous comments</a> .....	44
21. <a href="#">Attitude</a> .....	45
22. <a href="#">Bias and prejudice</a> .....	47
23. <a href="#">Obtain reasonably available evidence</a> .....	49
24. <a href="#">Issue(s) clearly stated</a> .....	51
25. <a href="#">Findings supported by substantial evidence</a> .....	52
26. <a href="#">Findings of fact</a> .....	53
27. <a href="#">Required conclusions</a> .....	55
28. <a href="#">Logical reasoning</a> .....	56
29. <a href="#">Form, style and organization</a> .....	57
30. <a href="#">Decision states legal effect</a> .....	59
31. <a href="#">Understandable decision</a> .....	61
V. ANNUAL REVIEW	
1. <a href="#">Notice of hearing</a> .....	63
2. <a href="#">Finality date and further appeal rights</a> .....	65
FACSIMILE OF <a href="#">Evaluation score sheet</a> .....	67
<a href="#">APPENDIX A</a> – Sample Selection.....	68
<a href="#">APPENDIX B</a> – Appeals Principles and Procedures .....	84

## I. INTRODUCTION

“The right to appeal from a determination is a specific right, and it is essential all State unemployment compensation agencies provide the means for ensuring that hearings on appeals shall be fair to all persons concerned.” *Benefit Payment Procedures, Memorandum VII, Part I, Appeals Procedures; Social Security Board, August 2, 1938*

The U.S. Department of Labor’s (USDOL) responsibility for the oversight of the quality of states' unemployment compensation (UC) appellate processes is grounded in the Social Security Act (SSA). Under Section 302(a), SSA, the Secretary of Labor certifies states whose unemployment laws are approved under the criteria for certification under the Federal Unemployment Tax Act (FUTA) as eligible for an administrative grant for the “proper and efficient administration” of their UC law. Section 303(a)(1), SSA, requires states to have “such methods of administration...as are found by the Secretary of Labor to be reasonably calculated to ensure full payment of unemployment compensation when due.” Section 303(a)(3), SSA, conditions this certification on state law providing “an opportunity for a fair hearing, before an impartial tribunal, for all persons whose claims for UC have been denied.”

These provisions establish the Secretary of Labor's authority and responsibility for oversight of states' UC appellate processes. A need to measure the quality of lower authority appeals logically follows from this authority and responsibility. The criteria in this Handbook are derived from the above provisions of Federal law, as well as traditional concepts of what constitutes due process. States must meet these criteria to assure their appeals operations conform to and comply with Federal law.

From the beginning of the UC program, Federal officials recognized the mandate of these provisions to require that the appeal and hearing procedures account for the circumstances of unemployed workers and the special needs of the program. Appeal hearings must be held and disposed of in a timely manner to ensure payment is made “when due” to lessen the hardship of unemployment. The hearings must be fundamentally fair, recognizing the interests of the claimants, the employers, and the state agencies in making accurate UC decisions.

The need to conduct quality hearings while also disposing of them in a timely manner is reflected in the measures established to evaluate states’ appeals performance. No single measure of a state’s lower authority appeals operation tells the whole story. However, examining state performance using the three measures below, when considered together, gives a good overview of a state’s lower authority appeals performance:

- Time Lapse is a measure of how old a case was when decided,
- Case Aging is a measure of how old the cases are that have not been decided, and
- Lower authority quality is a measure of whether a “fair hearing” was provided using criteria established in this Handbook.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

As set out in [Unemployment Insurance Program Letter \(UIPL\) No. 26-90](#), appeal hearings must be simple, speedy, and inexpensive. This is the foundation for ensuring that appeal and hearing procedures are sound and practical, as well as fair, to claimants and to other interested parties. Simplicity in hearings assures that parties may know and understand their rights, as overly formal and technical procedures place undue burdens on parties. Speed in conducting and disposing of hearings helps to assure the prompt payment of benefits when due. Inexpensive hearings means no individual will be deprived of fundamental rights merely because s/he cannot afford representation or to pay for other expenses in the pursuit of these rights. Inexpensive also means that the state only expend the amounts necessary to properly and efficiently dispose of its appellate workload. Also see [Appendix B, A Guide to Unemployment Insurance Benefit Appeals – Principles and Procedures](#).

The appeal hearing must be fair both in form and substance. In addition, the hearing must *appear* fair both to the participants and to any casual observer. A hearing that is technically fair, but gives the appearance of unfairness, is unfair in practical effect.

The Lower Authority Appeals Quality Criteria set forth in this handbook is a culmination of efforts dating back to the mid 1970s in measuring performance and assuring state lower authority appeals operations provide a “fair hearing.” The annual peer review was established in the mid 1990s, and some states began incorporating the ETA Handbook 382 criteria in staff performance standards in addition to using the criteria as a training tool.

This third edition of the ETA Handbook 382 further clarifies each of the thirty-one criteria and updates the reference notes to strengthen consistency. Since the previous revision, many changes have occurred in the administration of state UC appeals operations. The number of states conducting telephonic hearings has increased and there is more automation in appellate procedures. This handbook is revised to more accurately reflect recent changes to appellate processes.

While some things have changed in the handbook, the quarterly self-reviews and the annual USDOL reviews remain in this revision. Readers will note however, that the “due process” elements are now streamlined to five core areas with an explanation about how these areas affect the review of due process.

The three components of the system for measurement of the quality review of the states' lower authority appellate processes are described below.

Component 1 – State Self-Evaluation. This component measures the overall quality of the case. The state evaluator determines if "good," "fair," "unsatisfactory," or "did not occur" should be assigned to each of the 31 criteria. Then, a percentage score for the entire case is calculated.

Component 2 – Identification of Number of Cases Failing "Due Process" Elements. This component is an optional evaluation of the previously scored cases to determine if an "unsatisfactory" score was given on any of the 5 criteria #10, #11, #19, #22, and #26 which address the fundamental elements of "due process" and "fair hearing". Since these 5 criteria are part of the 31 criteria scored in Component 1, no new scoring is necessary. Component 2 is strictly used as a management information measure to identify cases where the hearing officer needs to improve on the "due process" component(s) or where a state's practice may negatively impact scoring.

Critical Fair Hearing and Due Process Elements:

- Confrontation (Criterion #10) – an opportunity for confronting all opposing witnesses to know all the evidence presented by opposing parties.
- Cross-examination (Criterion #11) – an opportunity to question opposing witnesses.
- Hearing within scope of Notice (Criterion #19) – to limit the hearing to the issue(s) set forth in the hearing notice. Note: There are instances when issues can be added to the hearing if all parties agree.
- Bias and Prejudice (Criterion #22) – the hearing officer must conduct the hearing in a fair and impartial manner.
- Findings of Fact (Criterion #26) – the hearing officer must include all findings of fact necessary to resolve the issues and support the conclusions of law in the decision.

An "unsatisfactory" score in any of the five critical fair hearing and due process elements does not automatically result in a failing score for the hearing, but it should raise a management concern that an important aspect of the hearing may not have met an important quality standard. However, only a hearing with a total score below 85% is considered not to have met the minimum quality standard.

Component 3 – Annual Review. Each year USDOL coordinates with states to conduct a peer review of subsample cases that states have already evaluated. The annual review also evaluates the state's hearing notices and information provided to the parties about further appeal rights.

All states with annual workloads below 40,000 decisions in the prior calendar year will review a minimum of 20 randomly selected cases from each of the four quarters of the fiscal year (see Appendix A of this handbook for sampling methodology). This is the minimum sample size needed for statistical validity of the results. States with annual workloads exceeding 40,000 cases are required to select a 40 case sample per quarter to assure statistically reliable results. The determination of sample size (either 20 or 40 cases per quarter) for each state for the calendar year will be made prior to end of the first quarter of each calendar year, based on the state's workload during the prior calendar year. States will use the ETA 9054L – Lower

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

Authority Appeals Time Lapse report to obtain the workload counts. The total completed decisions (c1) from the 9054L report is used to calculate a state's calendar year workload. See ET Handbook 401, Unemployment Insurance Reports Handbook, Section V for the 9054L report.

The hearing officer's responsibility is to exercise good judgment in creating and developing a record about the human experiences in a wide variety of workplace settings. The need to provide timely hearings and accurate decisions is a challenge for every state agency. It would be impossible to develop criteria upon which all reasonable persons can agree. This instrument attempts to minimize variances in scoring among reviewers for similar events or non-events for each of the elements to maximize scoring consistency. Consistent scoring repeated over time is expected to increase the reliability of the results obtained from the use of this instrument. Evaluators and other observers should keep in mind that hearing officers are frequently required to react to a situation and make an immediate ruling, without the luxury of time to reflect on all cases.

## **II. QUARTERLY EVALUATIONS**

### **A. SAMPLING**

A random sample of 20 or 40 cases (depending on state workload) will be drawn and evaluated each quarter. These samples are not stratified. The evaluation should be completed and the results reported no later than the 20th day of the second month following the end of each quarter (e.g., for the quarter ending September 30, report no later than November 20). The sample should be drawn from the cases decided in the previous quarter. For example, in October, cases decided between July 1 and September 30 will be evaluated.

States which maintain automated records of appeals decisions may draw the quarterly sample using either random file or systematic sampling methods. States which do not maintain automated records of appeals decisions must use a manual systematic sampling approach. Appendix A provides more complete and detailed information about sampling.

The three skeleton data elements (see ET Handbook 402, Appendix B for descriptions) for each case selected must be entered in the electronic reporting system by the 15th day of the first month of each quarter, so that the validity of the sample size and sampled universe can be confirmed by USDOL.

### **B. ASSEMBLY OF CASE FILES**

A case file for each case in the sample should be assembled. This file should contain, at a minimum, a copy of: (1) the determination that was appealed, (2) the appeal, (3) the notice of hearing, (4) the recording of the hearing, (5) all exhibits introduced at the hearing, and (6) the hearing officer's decision. The files for the cases in the sample should be assembled as soon as

possible after the end of the quarter so that the evaluation of the cases can be completed prior to the required reporting date.

### **C. CASE EVALUATION AND SCORING**

The case evaluations should be done by individuals who are thoroughly familiar with the lower authority appeals process and the elements of this handbook, preferably individuals who are experienced supervisors of hearing officers. It is expected that the evaluator will need to give full attention to this activity with a minimum of interruptions. Interruptions during the evaluation of an individual case frequently necessitate listening to the recording a second time in order to be able to accurately assign scores to the individual criteria. The evaluator(s) should strive to be consistent in scoring each case, and if a state uses multiple evaluators, efforts should be made to achieve consistency among them. Each evaluator should exercise good judgment in deciding how many cases can be effectively evaluated per day and how much time should elapse between case evaluations to ensure that similar cases will be scored consistently.

After making note of the time on the score sheet, the evaluator should examine the appeal filed, the notice of hearing, listen to the recording of the hearing, examine any exhibits, read the decision, and then complete a score sheet for each case being evaluated.

Steps an evaluator should follow for completing the score sheet (ETA 9057) are:

- The score sheet must be fully completed as it will be used as the supporting document for electronically reporting the results of the evaluation.
- Complete the header information on the score sheet (ETA 9057). Specific instructions about the four data elements in the header are in Section V-7-4 and V-7-5 of Handbook 401.
- Score each of the thirty-one criteria by marking the appropriate score in the columns provided.
- Items 33 through 38 should be recorded and reported:
  - In Item 33, indicate whether the Hearing Officer's decision resulted in the potential allowance or denial of benefits;
  - In Item 34, indicate whether the decision affirms, reverses or modifies the determination that was the subject of the appeal;
  - In Item 35, record the date the decision was mailed to the parties;
  - In Item 36, record the date the decision was implemented. More specifically, the date all payable benefits were released, the date benefit payments were stopped or other action called for by the decision that was completed by the agency;
  - In Item 37, record if all the necessary case materials were available to the evaluator, if one or more necessary documents were missing, or if the recording of the hearing was unavailable or inaudible. If the decision is missing and/or the recording is missing or inaudible, the case should not be scored, but whatever data is available for Items 33 through 38 should be recorded and reported. Cases that



*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

- are not scored because of loss of the decision or the recording will not be included in the calculation of the percentage of cases "passing" for the quarter or the year.
- In Item 38, record the time in minutes, from start to finish, that was used by the evaluator to conduct the evaluation including the time used to complete the ETA 9057.

Note: **ANNUAL REVIEW (AR1) - NOTICE OF HEARING** and **ANNUAL REVIEW (AR2) - FINALITY DATE AND FURTHER APPEAL RIGHTS** criteria need not be scored by State evaluators during the regular quarterly self-evaluation process. These criteria will be scored as part of the annual federal review of the state's quarterly self-evaluations.

- o To determine the percentage score for a case, first calculate the sum of the scores recorded in each of the "Good", "Fair", "Unsatisfactory", and "Did Not Occur" columns of the score sheet. Second, subtract the sum of the "Did Not Occur" scores from 192 (maximum possible total points) to derive the number of points possible for the particular case. Third, add the points scored in the "Good" column and the points scored in the "Fair" column. Fourth, multiply the result of the third step by 100, then divide by the result of the second step. This result is the percentage score for the case. (See formula below.) Even though the percentage score will be electronically calculated when the data is reported to DOL, evaluators should make this calculation so they will have immediate knowledge of the quality of the case, and so it can be used later as an additional check of the accuracy of the data entry.

$$\frac{\text{Total Points}^1 \times 100}{\text{Possible Points}^2} = \text{Percentage Score}$$

1. Total Points = Total "Good" + Total "Fair"
2. Possible Points = 192 - "Did Not Occur" points

The electronic reporting system will automatically calculate the percentage score for the case after the score for each criterion has been entered. It will also identify any Critical Fair Hearing & Due Process Criteria that were scored "Unsatisfactory." Evaluators should be mindful that they need to complete the evaluations in time for the data to be electronically reported no later than the 20th day of the second month following the end of each quarter. For example, for the quarter ending September 30, report no later than November 20.

#### **D. REPORTING**

The data recorded on the evaluation score sheets (ETA 9057) will be entered in the state's electronic reporting system and transmitted to USDOL's required unemployment insurance

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

reports (UIR) database. The results of each quarterly evaluation are to be electronically recorded for transmittal as described in the latest edition of Unemployment Insurance Reports Handbook, ET Handbook 401 and UIR Users' Manual, ET Handbook 402. The evaluations should be completed and the results entered in the database and transmitted to USDOL no later than the 20th day of the second month following the end of each quarter. For example, for the quarter ending September 30, report no later than November 20.

### **III. ANNUAL REVIEW OF STATES' QUARTERLY SELF-EVALUATIONS**

The purpose of the annual appeals review is to ensure consistent interpretation of the criteria and guidelines for appeals quality set forth in this handbook and consistent reporting on the Lower Authority Appeals Quality Review report, ETA 9057. It is also used to identify areas where training or technical assistance may be needed.

A two week, annual review of the states' quarterly self-evaluations is conducted once a year, usually mid-to-late March or early April. Random samples of the cases evaluated by the states in the previous calendar year are reviewed. The review is done at the National Office (NO) by a team of volunteer state appeals experts and may include selected regional office staff.

The NO asks the Regional Offices (ROs) to invite states to nominate one of their Lower Authority Appeals Chief, supervisors, or key appeals staff to serve on the team. From the nominees, individuals from different states are selected. It has been the practice to select, at the least, five individuals who have previously served on the panel and at least five individuals who have not served. This mix of experienced and new review team members promotes continuity from one year to the next and provides, over time, an opportunity for all states to benefit from participating in the process.

The Review Team scores a subsample of a state's appeal cases against the thirty-one criteria, and they also score aspects of the notices of hearing and information about further appeal rights. The states of the selected volunteers are reimbursed by USDOL for travel expenses incurred for the two weeks spent in Washington, D.C. conducting the review.

As soon as a state has drawn and "locked the skeleton fields" for its quarterly sample for the quarter ending the calendar year (no later than January 15), the subsample for the annual review will be drawn automatically. This subsample will be either 10 or 20 cases depending on whether a state's quarterly sample was 20 or 40. USDOL will use the UIR electronic reporting system to determine which of a state's quarterly sample cases are required for the annual review.

Each case sent for the Annual Review should include copies or facsimiles of any materials and/or information routinely sent to the parties to appeal from the time the appeal is filed through and including the time the decision is mailed, plus copies of: (1) the determination that was appealed, (2) the appeal, (3) the notice of hearing, (4) the recording of the hearing; care should be taken to ensure that the copied recording is an accurate and complete (only one hearing per

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

copied recording), (5) all exhibits introduced at the hearing, (6) the hearing officer's decision, and (7) the score sheet completed by the state evaluator. Following the review process, these materials will be destroyed unless requested by the state for return.

**IV. CRITERIA FOR MEASURING THE QUALITY OF LOWER AUTHORITY  
APPEALS HEARINGS AND DECISIONS.**

The criteria for evaluating the quality of hearings and decisions are set forth in their entirety on the following pages. The first thirty-one of these criteria will be used by the states for their quarterly self-evaluations. There are two additional criteria addressing notices of hearing and information about further appeal rights that will also be evaluated.

## CRITERIA FOR UI LOWER AUTHORITY APPEALS HEARINGS

### **CRITERION 1: PRE-HEARING/PRE-TESTIMONY EXPLANATION.**

**PURPOSE** - At the start of the hearing, the hearing officer should clearly explain the procedures to be followed. The elements shall be covered in the recorded prehearing explanation or opening statement. The explanation must be clearly stated and delivered in an understandable manner.

#### **SCORING SEGMENT**

- Good (6): After recording began and before testimony was taken, the hearing officer clearly explained the hearing procedures. This explanation included: (a) the order of testimony, (b) the right to question witnesses, and (c) an opportunity for each of the parties to ask questions about the hearing process or procedures.
- Fair (3): The hearing officer allowed an opportunity to ask questions about the hearing process or procedures, but did not explain all of the elements (a) through (c).
- Unsatisfactory (0): The hearing officer did not explain the procedures or did not allow an opportunity to ask questions about the hearing process or procedures.
- Did not occur (6): A "Did Not Occur" score should be given if it is clear from the record that the parties and/or their representatives were fully familiar with the UI hearing process and the hearing officer omitted the explanation for this reason.

#### **REFERENCE NOTES - CRITERION 1.**

The intent of this criterion is to ensure that the parties understand how the hearing will be conducted, the rights and opportunities they will have to participate in the hearing, and to allow the parties to ask questions about the process or procedures before taking testimony. The explanation should be on the record since this minimizes the possibility of a remand if a party on further appeal asserts lack of understanding of the hearing process to explain the failure to fully present his/her case.

A "Good" score is achieved when the recording contains an explanation of the hearing procedures which includes an explanation of the order of testimony and the right to cross examination, and provides the parties an opportunity to ask questions about the hearing procedures. To achieve a "good" score in cases where only one party appears and there are no witnesses for that party, the hearing officer should explain the hearing process and ask if there are any questions before proceeding with the hearing. No deduction will be made when the hearing officer explained the procedures off record but obtains the parties assent on record that the procedures were explained consistent with (a) through (c).

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

A "Fair" score is given when the hearing officer employs an opening statement in such a way that makes it difficult for the parties to understand or assimilate, such as a rapid or "machine gun" statement, or when the hearing officer explained the procedures off record and only obtains the parties assent on record only that the procedures "were explained," but does not obtain acknowledgement that items (a) through (d) were explained and that the parties had no further questions about the hearing procedures.

An "Unsatisfactory" score will be given if the hearing officer did not identify all the procedure elements or if the explanation is not on the record.

**CRITERION 2: OPENING STATEMENT.**

**PURPOSE** - The opening statement should include the identification of the parties, those participating in the hearing, the date, the place of hearing, and the hearing officer. The hearing officer should also verify the parties' mailing addresses.

**SCORING SEGMENT**

Good (6): Before taking testimony the hearing officer identified: (a) himself or herself, (b) the parties and/or representatives participating in the hearing, (c) verification of the parties' address, (d) date of the hearing and place (or that it was a telephone hearing), (e) the determination appealed and the issues that would be considered, and (f) if the parties had any additional witnesses or representation not already identified.

Fair (3): The hearing officer omitted one or two of the elements (a) through (f).

Unsatisfactory (0): The hearing officer omitted three or more of the elements (a) through (f).

Did Not Occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 2.**

The intent of this criterion is to ensure that the hearing officer establishes a complete record of the hearing including identification of the hearing officer, the parties and their witnesses, attorneys or representatives, and verification of their addresses to ensure they receive a copy of the decision issued in the appeal. The hearing officer must identify the issues to be considered at the hearing. The hearing officer should explicitly state whether the hearing is being conducted in person or by telephone. The hearing officer should ask whether any one else will be participating in the hearing, other than the parties, to verify on the record that the parties are proceeding without additional witnesses or representation.

A "Good" score is achieved when the hearing officer provided and obtained the information to satisfy (a) through (f).

A "Fair" score is given if the hearing officer omitted or failed to provide or obtain one or two of the items listed in (a) through (f).

An "Unsatisfactory" score is warranted when the hearing officer omits three or more of the items listed in (a) through (f).

Criteria 1 & 2 are closely related and it is permissible for the hearing officer to intermingle the elements of the two criteria, if all necessary elements of both are present.

**CRITERION 3: EXHIBITS.**

**PURPOSE** - The hearing officer should handle exhibits correctly by properly identifying the exhibits for the record, manage any objections, and rule on any document admissibility concerns.

**SCORING SEGMENT**

- Good (6):           The hearing officer correctly handled exhibits in that s/he:
- (a) described and marked all exhibits;
  - (b) presented parties with an opportunity to review the exhibits and offer objections;
  - (c) authenticated evidentiary exhibits (to the extent possible) where questionable or challenged;
  - (d) received all competent, relevant and reasonably available exhibits;
  - (e) ruled on the admissibility of any documents offered as exhibits and gave an explanation if s/he denied admission.
- Fair (3):            The hearing officer received all competent relevant and reasonably available exhibits but failed to satisfy two of the requirements from (a) through (e) to achieve a “Good” score.
- Unsatisfactory (0):   The hearing officer failed to satisfy three or more of the requirements from (a) through (e) to achieve a “Good” score.
- Did not occur (6):   There were no exhibits tendered, marked or introduced, or no documents made reference to in statements or testimony that should have been marked or introduced.

**REFERENCE NOTES - CRITERION 3.**

An exhibit is a document, record, or other object which is made a part of the record or is formally introduced as evidence. Overall, the intent of this criterion is to ensure that the hearing officer builds as complete a record as possible including all competent, relevant, and material exhibits that are available; that these exhibits are properly described, authenticated, marked and entered into the record; and that the parties are made aware of their contents and provided with the opportunity to object, explain, or rebut.

Difficulty in scoring this category stems from variations in state practice regarding which documents are required, or permitted, to be made a part of the record of an appeal. Some state procedures require that the entire agency file be made part of the record as part of the opening of the hearing, some state procedures require that only the jurisdictional documents be marked as an exhibit; and some state procedures require exhibits to be marked and identified only when a party offers them as evidence or if the hearing officer intends to rely on them as part of the decision.

In reviewing a case, the scorer should make a distinction between jurisdictional documents marked for identification at the beginning of a hearing and documentary or other evidence that a party offers to prove its case or that the hearing officer may rely upon in making his or her decision. Identification and jurisdictional

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

documents (such as the benefits determination appealed, the request for hearing and the notice of hearing) are not marked as evidence to prove the case but to establish the record of appeal. As such, marking these documents does not require the technicalities required for admission of documentary evidence.

When a hearing is conducted by telephone, the hearing officer must confirm that an exhibit has been received by the party against whom it is offered. If the exhibit has not been received, the hearing officer must use good judgment in evaluating whether a continuance should be offered. If the exhibit is a party's only evidence on a particular point, and that point will be crucial in the ultimate decision to be made, it is recommended that a continuance be offered depending on the reason why the party did not send the document, or why it was not received. However, if the item is merely cumulative of other evidence, or not crucial to the ultimate decision that will be reached, there is no need to continue the hearing. Additionally, a party may waive his/her right to see the exhibit and allow the hearing officer to read its content or describe it.

All exhibits should be clearly described on the record and marked with an exhibit number or otherwise identified. Depending on the evidence code of a state, a document may need to be authenticated by a witness. The party against whom an exhibit is offered should be permitted the opportunity to ask questions about an exhibit and to object to its introduction as evidence. Of course, the hearing officer should explain, before marking an exhibit that both parties will be given an opportunity, at the appropriate time, to testify about any exhibit. An exhibit should be marked and given its appropriate weight under the state evidence code, if it is offered by a party on a relevant or material issue(s) of the appeal. If a party objects to an exhibit, the hearing officer must rule upon the objection.

In order to simplify scoring of this criterion, the difference between "Good," "Fair," and "Unsatisfactory" is based upon the number of elements the hearing officer meets to achieve a "Good" score.



**CRITERION 4: WITNESSES.**

**PURPOSE** - Parties and witnesses should be called and sworn, and the evidence developed, in logical order.

**SCORING SEGMENT**

Good (6):           The order of taking testimony was reasonable and flexible depending on the circumstances of each case. As a general rule, the party likely to have the most information should be called to testify first. In most cases, and consistent with many states' laws, this means that the party with the burden of proof should testify first. In a voluntary quit case, the claimant usually testifies first. In a discharge case, the employer and its witnesses usually testify first.

Fair (3):            The hearing officer permitted the introduction of some testimony in illogical sequence, but it did not substantially jeopardize the organization of the hearing and the presentation of evidence.

Unsatisfactory (0):   The hearing officer did not swear in a material witness, and/or did not take evidence in a logical order.

Did not occur (6):    The evidence was submitted without witnesses or sworn testimony.

**REFERENCE NOTES - CRITERION 4.**

A key distinction between an adjudicatory interview and an appeal hearing is that witnesses offer sworn testimony in a recorded setting. The intent of this criterion is to confirm that witnesses were sworn in on the record and that the hearing was conducted in a logical and orderly manner, although the hearing officer is permitted to exercise reasonable discretion and may be flexible dependent upon the particular circumstances of each case.

A "Good" score is achieved when the hearing officer followed a logical order of testimony. The hearing officer appeared to take into consideration which party bears the burden of proof and/or who possesses first hand information in determining the order of testimony. The order produced an easy flow of information and fact finding without the hearing officer resorting to aimless jumping back and forth between witnesses. A brief question to a party not currently testifying, to clarify an issue or to determine whether further foundation or explanation was necessary, will not result in point deduction. Additionally, if some special circumstance requires a witness' testimony be taken out of order, no point deduction is made.

A "Fair" rating should be scored when the hearing officer failed to meet the criteria for "Good" in some instances, but in a manner which did not seriously affect the fact-finding process. However, for the most part, the hearing officer adhered to a logical sequence of testimony.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" rating should be scored when the hearing officer did not swear in a material witness or lacked sound judgment in the order of testimony, thereby prolonging the hearing unnecessarily, or when testimony jumped back and forth between witnesses and/or issues. A material witness is defined as an individual whose testimony is relevant to the issue(s) being heard and possesses direct knowledge of the issue(s) under consideration.

**CRITERION 5: ORDER OF TESTIMONY FROM EACH WITNESSES.**

**PURPOSE** - The evidence from each witness should be developed in a logical order.

**SCORING SEGMENT**

Good (3): As each witness testified, the available evidence was developed in a logical and orderly manner, although the hearing officer was flexible as required by the circumstances.

Fair (1): The hearing officer permitted the introduction of some evidence in illogical sequence but this did not substantially jeopardize the organization of the hearing and/or the presentation of evidence. The hearing officer generally completed one line of inquiry before moving on.

Unsatisfactory (0): The hearing officer did not take the evidence in logical order and sequence.

Did Not Occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 5.**

The intent of this criterion is to move the testimony of each witness to a conclusion in a logical and orderly manner. The hearing officer must exercise responsibility and good judgment in managing the testimony of each witness. The goal is to obtain relevant information, under time constraints, with sufficient detail pertaining to the final incident of the issue(s) in order to render a quality decision once the hearing is closed.

A "Good" is achieved when the hearing officer exercised reasonable discretion in determining the order and sequence of the testimony. The hearing officer directed and controlled the testimony of a witness to obtaining material information and did not allow the witness, or a representative, to illicit information in a manner that confuses the record. The order should produce an easy flow of information and fact finding such that it is clear as to the specific event or incidents for which the witness is testifying.

A "Fair" rating should be scored when the hearing officer failed to direct or control the testimony of a witness such that the witness provided information on immaterial points or an in a illogical order, or when the hearing officer did not make sufficient efforts to direct or control the testimony provided and allowed the witness to ramble on or allowed a representative to ask questions that were immaterial or unnecessarily prolonged the hearing.

An "Unsatisfactory" rating should be scored when the hearing officer failed to swear in a witness, or failed to direct or control the testimony of a witness such that it was difficult or impossible to know whether the information the witness provided was relevant and material to the issues involved in the case.

**CRITERION 6: OPPORTUNITY TO QUESTION OWN WITNESS(ES).**

**PURPOSE** - The hearing officer must provide parties and representatives with a timely opportunity to question their own witnesses.

**SCORING SEGMENT**

- Good (9):                   The hearing officer informed the parties that they, or their representatives, could question witnesses on the party's own behalf. When necessary, the hearing officer assisted such party or representative in framing questions, and cautioned him or her not to make statements or arguments.
- Fair (3):                     Although the parties were advised that they could question their own witnesses, the hearing officer failed to assist when appropriate; or the hearing officer did not allow the parties to question their own witnesses in a timely manner.
- Unsatisfactory (0):       The hearing officer failed to provide the parties the opportunity to question their own witnesses.
- Did not occur (9):        The parties did not have witnesses to question or it was not necessary to inform them of this right, e.g., a party was represented by counsel or an experienced representative.

**REFERENCE NOTES - CRITERION 6.**

The intent of this criterion is to ensure that the hearing officer has provided the parties or their representatives the right to question their own witnesses in a timely manner, as some parties may be unaware of this right. A timely manner means before the hearing officer moves on to take testimony from other witnesses or the opposing party.

It is the responsibility of the hearing officer to provide the parties with assistance, as needed, and to question witnesses in a timely and proper manner. The hearing officer must be impartial when assisting a party in forming questions, and should avoid appearing to be an advocate for that party.

A “Good” score is achieved when the hearing officer informed the party, or their representative, of the right to ask questions of their witnesses and allowed them to do so. When assistance was clearly needed, the hearing officer provided it in an impartial manner.

A “Fair” score is given when the hearing officer informed a party, or its representative, of the right to ask questions of its witnesses, and allowed the questioning but either did not offer sufficient instructions about proper questioning techniques or failed to prevent a party from testifying during the questioning opportunity.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" rating should be scored when the hearing offer either failed to inform the party, or representative, of the right to ask questions of its witness, or failed to provide him or her an opportunity to do so, or did not provide meaningful assistance when it was clear the party was unable to do so in a proper manner.

**CRITERION 7: CLEAR LANGUAGE.**

**PURPOSE** - Throughout the hearing, the hearing officer should use language that is clear and understandable, avoiding unnecessary legal phrases and technical language.

**SCORING SEGMENT**

Good (6):                The hearing officer's language was clear and understandable at all times, with the possible exception of inconsequential instances. There was no unnecessary use of legal phrases or technical language.

Fair (3):                There were minor instances when the hearing officer's language was not clear and understandable, or legal phrases or technical language was used. "Minor instances" would be confined to those that would not have a significant bearing on the outcome of the case.

Unsatisfactory (0):    The hearing officer's language was not clear and understandable in significant and critical areas or unnecessary legal phrases and technical language was used at critical points in the hearing

Did Not Occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 7.**

The intent of this criterion is to ensure that the hearing and all discussion with parties is clear and understandable, and that the parties are not confused by legal phrases or technical language.

When it appears a party or witness does not understand what is being communicated or asked, the hearing officer has the responsibility to tactfully ask the party or witness if he or she understands, and rephrase statements or questions, if necessary.

References to form numbers and agency jargon should be avoided.

A "Good" score is achieved when the hearing officer used clear and understandable language and avoided references to technical terms or unnecessary legal phrases.

A "Fair" score is given when the hearing officer used some language that would not be easily understood by the average person but overall the language employed was understandable and during the minor occasions when technical terminology was used it did not appear to confuse or intimidate the parties.

An "Unsatisfactory" rating should be scored when the hearing officer corrupted the hearing record by employing language that was not easy to understand, or relied on such formal technical, or legal terms or phrases such that the parties were confused or intimidated.

**CRITERION 8: SINGLE POINT QUESTIONS.**

**PURPOSE** - Each question by the hearing officer should express only one point.

**SCORING SEGMENT**

Good (6): Each of the hearing officer's questions expressed only one point and, if more than one point was initially expressed, it was corrected.

Fair (3): Occasionally, the hearing officer asked a question with more than one point, but it did not interfere with the development of the testimony and/or did not result in the evidence being unclear on any dispositive element.

Unsatisfactory (0): The hearing officer repeatedly asked questions containing two or more points that confused the witnesses or resulted in answers responsive to only one point.

Did Not Occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 8.**

Ideally, the hearing officer should begin all questioning with a neutral technique. In this respect, questions should be in the form of “who, what, where, when, how or why” questions to elicit the specific information about the single point. See Criterion 9 for specific examples. Compound questions should never be asked if the answer relates to the substantive issues and the ultimate outcome.

A compound question is a question that asks more than one question, each of which requires a separate answer. Questions should relate to one point only so that neither the question nor the answer will be misunderstood. For example, a compound question such as "Didn't your supervisor, John Doe, discharge you?" would be unlikely to produce a clear answer. If the claimant answered “no,” it would be unclear if “no” was in response to the discharge, or that John Doe was not the claimant’s supervisor.

The hearing officer should not permit the parties, or their representatives, to ask compound questions without making a reasonable attempt to clarify the question or the response so the question and answer express one point only. The hearing officer may ask follow-up questions on any other point(s); as appropriate.

There are exceptions to this guideline. Compound questions, along with leading questions, see Criterion 13, are permissible for obtaining background information in order to move the hearing along.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

A “Good” score is achieved when the hearing officer asks mostly single point questions.

A “Fair” score is given when the hearing officer asked numerous questions that were not single point in nature but these did not hinder development of the record or result in unclear testimony.

An "Unsatisfactory" rating should be scored when the hearing officer asked numerous questions that were not single point in nature, and these questions seriously hindered development of the record, or resulted in unclear testimony of material and important issues in the case.



**CRITERION 9: CLARIFICATION OF STATEMENTS WHICH INCLUDE CONCLUSIONS.**

**PURPOSE** - The hearing officer should attempt to clarify statements which include conclusions, opinions, and ambiguous or unclear testimony.

**SCORING SEGMENT**

- Good (6):            When a witness responded with an opinion or conclusion, the hearing officer made a reasonable effort to develop the factual basis for the opinion or conclusion. When the testimony was not entirely clear or was ambiguous, the hearing officer questioned the witness(es) in an effort to get specific, clear responses.
- Fair (3):             The hearing officer attempted to develop the facts of a witness's statement, and/or asked sufficient questions in an attempt to clarify ambiguous or unclear testimony.
- Unsatisfactory (0):    The hearing officer's questioning of the witnesses demonstrated little or no effort to establish the factual basis for testimony that contained opinions or conclusions, or failed to clarify ambiguous or unclear testimony on material points in the case.
- Did not occur (6):    There were no statements which included conclusions or opinions and the testimony was clear and unambiguous and did not need clarification.

**REFERENCE NOTES - CRITERION 9.**

The intent of this criterion is to ensure that the hearing officer fulfills his or her obligation to require witnesses to testify to evidentiary facts, as distinguished from conclusions. It is essential that the hearing officer establish the factual basis for all testimony offered to determine if the witness is testifying from personal knowledge or otherwise competent evidence. All witnesses expressing opinions should be subjected to further questioning to establish the factual basis for the opinions whenever the testimony will be relied upon by the hearing officer in the decision.

For example, if the witness says that the claimant was warned about certain behavior the hearing officer must clarify the statement with appropriate open-ended questions. Who warned the claimant? How was the claimant warned? If the warning was in writing, do you have a copy of the document? If the claimant was verbally warned, who issued the verbal warning? Was the witness present during the warning? What specifically was said that constituted the verbal warning? What did the claimant say in response to the warning?

All of these additional questions are necessary to clarify the statement that the claimant was warned and to ascertain whether the witness is testifying from personal knowledge about the warning. The hearing officer must not accept general statements without developing the record to ensure the record contains sufficient information upon which to base the decision.

Similarly, when the claimant testifies he quit because he did not get a raise, additional questions need to be asked. Who hired you? What was said to you regarding your pay? What about possible raises during your employment? What specifically led you to expect a raise? Did you discuss your dissatisfaction with anyone? With whom did you discuss it? What specifically did you say? Did you ever tell anyone you would leave employment if your concerns were not addressed? These additional questions are necessary to ascertain whether the claimant's opinion that he should have received a raise does or does not support a finding that he had good cause to quit under state law.

Testimony by expert witnesses is admissible to provide additional information related to the facts in the record based on the expert's education, background, experience, training and study. This permits the expert to express an opinion on questions of fact relating to his or her particular expertise. For example, a qualified employment service representative can offer expert witness testimony on labor market conditions when the appropriate questions are asked to establish his/her status as a subject matter expert. The hearing officer should ask, on the record, questions about the expert witness's background and qualifications as an expert.

A "Good" score is achieved when the hearing officer actively asks specific questions to determine whether the witness is testifying from personal knowledge, and when opinion or conclusions are offered by a witness that the hearing officer asks enough questions to establish the factual basis, if any, for those opinions or conclusions, and when the hearing officer clarified, or attempted to clarify, ambiguous or unclear testimony on all material issues in the case.

A "Fair" score is given when the hearing officer asked questions about opinion or conclusory testimony but did not consistently do so for all witnesses, or for all opinions or conclusions offered, and/or the hearing officer occasionally allowed ambiguous or unclear testimony but not about testimony related to material issues of the case.

An "Unsatisfactory" rating should be scored when the hearing officer passively accepted opinions or conclusions of witnesses without asking additional questions to determine the personal knowledge of a witness or the factual basis for the opinion or conclusion, or failed to clarify ambiguous or unclear testimony on evidence related to significant material issues in the case.

**CRITERION 10: CONFRONTATION.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - There must be an opportunity for confrontation of all opposing witnesses to conduct a fair hearing.

**SCORING SEGMENT**

Good (9): Each party had the opportunity to be present during all testimony or present during the appeal (use of telephone hearings where all parties have the opportunity to participate and hear the witness(es) satisfies the confrontation requirement).

Fair (X): Not applicable - Do not use.

Unsatisfactory (0): The hearing officer denied the opportunity for confrontation.

Did not occur (9): There were no opposing witnesses.

**REFERENCE NOTES - CRITERION 10.**

The intent of this criterion is to ensure both parties are present and have an opportunity to hear and have knowledge of the evidence presented during the appeal.

A party must be present for all evidence. Excluding witnesses while others testify does not conflict with this criterion unless the witness is an "interested party" (claimant or employer).

A "Good" score is achieved when the hearing officer provided an opportunity for confrontation including the right to be present during all testimony, the opportunity to see all documents the hearing officer possesses that make up the record, and the opportunity to see all documents the opposing party presents unless the party waives the right to do so.

In a remand case, this criterion is satisfied if the absent party is mailed a copy of the recording of the previous hearing and acknowledges on the record receipt thereof.

A "Fair" score is given when the hearing officer accepts documents or testimony when one party is not present but the documents or testimony was on a point not material to the case and/or was not initiated by the hearing officer.

An "Unsatisfactory" rating should be scored when the hearing officer affirmatively obtains testimony or evidence without both parties being present on material points in the case, or failed to afford an absent party an opportunity to review the additional testimony or evidence obtained on a material issue before issuing a decision in the case.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements of this evaluation process.

Confrontation is distinguished from cross-examination which is discussed in Criterion 11.

**CRITERION 11: CROSS-EXAMINATION.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must afford a timely (before testimony from another witness) opportunity to cross-examine, properly control cross-examination, and provide appropriate assistance where necessary.

**SCORING SEGMENT**

Good (9):           The hearing officer provided the parties their right to timely cross-examine the opposing witnesses, and limited cross-examination to permissible bounds, and provided assistance in framing questions as necessary.

Fair (3):            The hearing officer informed the parties of their right to cross-examination, but did not offer it in a timely manner, or did not effectively control it, or did not provide assistance, when needed, but these failures did not corrupt the hearing record.

Unsatisfactory (0):   The hearing officer failed to afford the parties their right to cross-examination, or made no attempt to properly control the process to the point that cross-examination negatively affected the hearing record, or did not provide assistance when it was obvious a party was unable to form questions and was unable to proceed.

Did not occur (9):    There were no opposing witnesses.

**REFERENCE NOTES - CRITERION 11.**

The intent of this criterion is to ensure that all parties are afforded a timely opportunity to cross-examine opposing witnesses. The opportunity to cross-examination is a fundamental right and not a mere privilege. The purpose of cross examination is to permit a party to bring out, through questioning of the opposing party or witnesses, any contradictions and improbabilities or to raise doubts about the testimony or evidence presented by the opposing party.

The right to cross-examine is not diminished by reason of the fact that the parties are unrepresented by counsel. However, because the party may not be legally trained, the hearing officer may offer some assistance such as when a party appears to want to ask a question but makes a statement instead. The hearing officer may turn a statement into a question to demonstrate how one can ask questions of the opposing party.

The right to cross-examine should be offered immediately after a witness testifies and should not be delayed until all the witnesses for one side have concluded their direct testimony.

The right to cross-examine may be restricted, for example, when questions become unduly repetitious or when the cross-examiner harasses, argues with, or badgers the witness. Additionally, the cross examiner must not be permitted to testify during the cross examination.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

A “Good” score is achieved when the hearing officer offers the timely opportunity to cross-examine each witness, assists an unrepresented party who has difficulty framing questions, and effectively controls cross-examination by not allowing a party to testify during cross-examination or badger or harass opposing witnesses.

A “Fair” score is given if the hearing officer allows cross-examination but does not effectively control it by allowing the party to make statements during cross examination that "badger" the opposing witnesses without admonishment or fails to provide meaningful assistance to lay persons, as appropriate. A "Fair" score should be given if the cross-examination did not occur immediately after the witness testified.

An "Unsatisfactory" rating should be scored when the hearing officer fails to provide an opportunity for cross-examination, or makes no attempt to keep the questioner from badgering the witness to the extent that the failure to act negatively impacts the hearing record, or the hearing officer does not provide assistance during cross-examination when it was clearly needed and it can be said that the hearing officer effectively denied the party the right to cross examine.

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

**CRITERION 12: REPETITIVE AND/OR IRRELEVANT TESTIMONY.**

**PURPOSE** - The hearing officer should control repetitive or irrelevant testimony to keep the hearing moving toward a conclusion.

**SCORING SEGMENT**

Good (3):               The hearing officer diplomatically informed persons testifying that repetitious and irrelevant testimony was not necessary and added nothing to the hearing. The hearing officer did not question witnesses excessively or permit undue repetition or extensions of testimony by witnesses, or duplication of testimony from multiple witnesses, and testimony was limited to the issues.

Fair (1):                The hearing officer asked repetitive or irrelevant questions, or allowed testimony that was repetitious or irrelevant, but doing so did not burden the record and did not affect the final decision.

Unsatisfactory (0):    The hearing officer permitted frequent repetition of testimony, prolonged testimony, or irrelevant testimony; the hearing officer frequently asked repetitious or irrelevant questions of the witness(es).

Did Not Occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 12.**

This criterion is intended to keep hearings moving forward. The hearing officer should not ask, or allow any party to ask, questions that are repetitive or that address irrelevant matters, and should keep the witness(es) from providing irrelevant, immaterial, and/or unduly repetitious testimony.

The hearing officer should also ensure that answers given are responsive to the questions asked. For example, when a witness is unresponsive to a question from the hearing officer or a party, and the question is rephrased, the hearing officer should move on from that line of questioning if the witness is still unresponsive. The hearing officer should give the appropriate weight to the unresponsive testimony and should inform the person testifying of the consequences of continued nonresponsive or evasive answers.

A "Good Score" is achieved when the hearing officer properly controlled the hearing by not allowing repetitive or irrelevant testimony to be presented. A "Fair Score" is given when the hearing officer allowed some repetitive or irrelevant testimony to be presented but this did not burden the hearing record. This score may be given on those occasions when it is clear that the hearing officer permitted a party to "ramble on" because that party would undoubtedly have perceived that s/he had been denied the opportunity to fully state his/her position. An "Unsatisfactory" rating should be scored when the hearing officer allowed repetitive or irrelevant testimony that burdened the record, or consistently failed to require a witness to be responsive in testimony on material issues in the case.

**CRITERION 13: LEADING QUESTIONS.**

**PURPOSE** - The Hearing Officer should not ask, or allow others to ask improper leading questions on material issues upon direct examination.

**SCORING SEGMENT**

Good (6):                    The hearing officer did not ask, or permit a party to ask, improper leading questions about important facts.

Fair (3):                     The hearing officer asked, or permitted a party to ask, some improper leading questions but they did not inhibit the fair presentation of the evidence because the points on which they were asked were not material to the ultimate decision in the case.

Unsatisfactory (0):        The hearing officer asked, or permitted the parties to ask, without admonishment, improper leading questions on material factual matters in the case.

Did Not Occur (X):        Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 13.**

The intent of this criterion is to ensure that the hearing officer did not ask, or permit the parties to ask, improper leading questions upon direct examination. A leading question is one which suggests the answer. An improper leading question is one which is asked during direct examination and is suggestive of the answer regarding a fact which bears on a material issue in the case.

For example, an employer representative’s question to the employer that asks “Over the last week he was employed, Mr. Smith was always late to work, and that’s why you fired him, isn’t it?” suggests the answer, and precludes an explanation of what happened.

Upon direct examination, the hearing officer or parties should not ask improper leading questions to witnesses on factual matters which are material to the case and which the questioner intends to suggest a specific answer to the witness. If improper leading questions are asked by others, the hearing officer should curtail them and/or tell the questioner that answers to such questions will be given less weight in the consideration of the evidence.

Not all leading questions are impermissible. A hearing officer may use leading questions to expedite the hearing by obtaining background information on matters such as the name, address, and social security number of the party or witness, and similar information which is not a material point of dispute in the case. The hearing officer may ask leading questions on direct examination, if necessary, to develop the evidence as long as the questions do not inhibit the fair presentation of the facts. Additionally, leading questions of opposing witnesses are permissible during cross examination.



*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An exception relating to leading questions being permissible is when the witness is hostile, biased, or unwilling to cooperate. In this situation, the hearing officer must decide if any one of these conditions exists and proceed accordingly.

Further, if a witness cannot recall dates, names, places, times, etc., leading questions may be asked in order to refresh his/her memory.

A “Good” score is achieved when the hearing officer did not ask, or permit any party to ask, improper leading questions. No reduction in score is made when the hearing officer asks some leading questions that were not improper, usually those about background information.

A “Fair” score is given when the hearing officer asked some improper leading questions on points that were not in dispute, or on points which were not material to the outcome of the decision.

An "Unsatisfactory" rating should be scored when the hearing officer frequently asked, or allowed others to ask, improper leading questions that suggested answers on material points in the case.

**CRITERION 14: CONTROL OF INTERRUPTIONS.**

**PURPOSE** - The hearing officer should effectively respond to interruption of testimony and/or disruptive individuals at the hearing. This also means the hearing officer should refrain from inappropriate and unnecessary interruptions.

**SCORING SEGMENT**

- Good (6):           The hearing officer, in as tactful a manner as possible, effectively handled interruptions and/or disruptive individuals at the hearing and did not himself or herself interrupt unnecessarily.
- Fair (3):             The hearing officer allowed some interruptions that did not disrupt the hearing.
- Unsatisfactory (0):   The hearing officer's interruptions were inappropriate or s/he did not effectively control disruptions or interruptions by others.
- Did not occur (6):    There were no interruptions or disruptive individuals.

**REFERENCE NOTES - CRITERION 14.**

This criterion is intended to ensure that the hearing officer fulfills his/her obligation to prevent undue or improper interruptions during the testimony of the witness(es) and/or to control disruptive individuals. This intent also applies to the hearing officer interrupting unnecessarily.

If possible, the hearing officer should first tactfully remind participants of the hearing procedures, including a reminder that each individual will be allowed to present his or her testimony at a later time. The hearing officer must firmly prevent a disruptive individual from interrupting the flow of testimony.

The hearing officer should advise all parties that they are not permitted to comment or audibly react to the testimony of another, and should progressively warn disruptive individuals that such behavior may result in either a continuance of the hearing, or in an extreme case, exclusion from the hearing, if permitted under state law.

The hearing officer must not allow himself/herself to be interrupted during the course of the hearing. This includes taking nonemergency personal phone calls during the course of the hearing. The hearing officer should also refrain from unnecessary or inappropriate interruptions that diminish the quality of the hearing.

A “Good” score is achieved when the hearing officer effectively controlled the hearing by tactfully handling an interruption by a disruptive party, and the hearing officer did not interrupt unnecessarily or allow parties to unnecessarily.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

A “Fair” score is given when the hearing officer handled an interruption or disruptive individual but did so in a manner which was not tactful and/or allowed him or herself to occasionally interrupt unnecessarily.

An "Unsatisfactory" rating should be scored when the hearing officer failed to stop unnecessary interruptions, failed to make a reasonable effort to control disruptive individuals, or the hearing officer's interruptions were frequent, inappropriate, and/or unnecessary.

**CRITERION 15: "OFF THE RECORD".**

**PURPOSE** - The hearing officer should effectively control "off the record" situations and handle correctly "on the record" matters that occurred or were discussed "off the record."

**SCORING SEGMENT**

Good (6): The hearing officer handled "off the record" procedures well and granted a request to do so for good and sufficient purposes. The hearing officer allowed no one else to go "off the record" but himself/herself. On resuming the record, the hearing officer summarized the essentials of what took place and obtained the concurrence of the parties.

Fair (3): The hearing officer allowed parties to go "off the record" without establishing good and sufficient cause on the record, but the hearing officer did summarize for the record the "off the record" discussion and obtained concurrence from the parties of the accuracy of the summary.

Unsatisfactory (0): The hearing officer went "off the record" and failed to summarize and obtain concurrence from the parties "on the record" of what happened "off the record," or failed to repeat questions or testimony when the recording unexpectedly stopped or there was some other technical malfunction.

Did not occur (6): The hearing was not "off the record" for any reason.

**REFERENCE NOTES - CRITERION 15.**

The intent of this criterion is to build a record that is totally complete and without unexplained interruptions. Any interruption or break in the record must be covered by the hearing officer. The hearing officer may hear and grant a motion to go "off the record" from either of the parties.

If a party asks to speak briefly with counsel, or counsel with his/her client, the hearing officer should continue recording, but allow the party and counsel to step outside the hearing room for a private conversation. In this case, because the hearing officer did not go "off the record," no statement and concurrence is needed.

A "Good" score is warranted when the Hearing Officer: (a) goes "off the record" or grants a request to do so only for good and sufficient reasons; (b) allows no one to go "off the record" without his/her permission except when beyond his control, such as with machine failure; and (c) summarizes the "off the record" discussion and events and obtains the concurrence of the parties to the summary upon resuming the record.

A "Fair" score should be given if the hearing officer allows parties to go "off the record" without establishing good and sufficient reason for doing so.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" score should be given if the hearing officer went "off the record" and failed to summarize on the record what happened while "off the record" or failed to get a concurrence of the parties to the hearing officer's summary of what happened while "off the record."

For hearings that are being recorded by tape:

- On turning over the tape or putting in a new tape, the hearing officer should state s/he is going "off the record" to change the tape and, when returning to the record, state that the tape has been replaced and that nothing relating to the hearing transpired in the process.
- Concurrence from both parties must be obtained.
- If the tape runs out unexpectedly, creating a gap in the record, the hearing officer should repeat or ask the last speaker to repeat any missing portions of his/her statement. In these instances, concurrence of the witness and parties is required.

**CRITERION 16: INTERPRETERS.**

**PURPOSE** - The hearing officer should instruct and monitor an interpreter to insure she or he provides accurate interpretation.

**SCORING SEGMENT**

Good (6): When necessary, the hearing officer gave clear instructions to the interpreter as to how to interpret, and administered a special interpreter's oath. When necessary, the hearing officer established "on the record" that the interpreter was fluent in both languages. The hearing officer must require literal interpretation of the testimony of the witness, to the extent possible in the native language of the witness.

Fair (3): The hearing officer did not give clear instructions to the interpreter as necessary, but administered the special interpreter's oath and gave an appropriate admonition when the interpreter did not appear to be following instructions.

Unsatisfactory (0): The hearing officer (a) did not give an interpreter's oath, or (b) failed to take reasonable steps to ensure that the interpretation accurately reflected the testimony.

Did not occur (6): An interpreter was not used.

**REFERENCE NOTES - CRITERION 16.**

The intent of this criterion is to ensure that the testimony is accurately interpreted. State practices vary regarding interpretation procedures, including whether the witness may bring a friend or family member to translate, or whether a professional interpretation provider is used. In any event, the interpretation should be conveying the original meaning to the extent possible as it was spoken in the foreign language. When scoring this criterion, the reviewer may consider that a professional interpretive service usually does not require the same extent of instruction as a friend or family member. A hearing officer should exercise caution when allowing family members or friends to translate to ensure they understand their role is to translate in first person, to convey the original meaning of what is being spoken in the foreign language, and not to change the meaning or words used by the witness.

For example, in response to a question that was asked and translated, if the interpreter says, "S/he said that s/he heard . . . ," instead of "I heard," the interpreter is not providing a literal interpretation and the interpreter should be admonished to do so.

Objections to ambiguities in the interpretation need to be resolved so the record accurately reflects the interpreted testimony.

Generally, although consecutive interpretation is preferred to ensure a clear record some states have developed procedures for hearings where testimony and interpretation simultaneously occur, especially when an

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

experienced interpreter is used. If the testimony and interpretation overlap but the testimony is clear and audible then the reviewer should not reduce the score. However, if the testimony and interpretation overlap and the testimony is not sufficiently audible for recording purposes or results in confusion of the record, the hearing officer must provide proper instruction to the witness and interpreter.

A "Good" score is warranted if the hearing officer gave clear instructions to the interpreter on how questions and testimony are to be interpreted, and administers an appropriate oath to the interpreter. The hearing officer also conducted the hearing in such a way as to ensure that the interpretation accurately reflected the testimony and the proceedings.

A "Fair" score should be given if the hearing officer provided instructions to the interpreter but failed to administer the special interpreter's oath, or allowed some departure from the instructions but these did not affect the accuracy of the interpretation or the quality of the hearing record.

In distinguishing between a "good" and "fair" score, the reviewer should consider whether the interpretation is responsive to the question asked. If a question is asked, and the interpreter and witness engage in a conversation, with back-and-forth discussion, the hearing officer must admonish the interpreter to translate all statements made by the witness for the record or to repeat the question again, and remind the interpreter to provide literal interpretation.

An "Unsatisfactory" score should be given if the hearing officer failed to administer the special interpreter's oath and failed to provide instructions to the interpreter, unless a professional interpreter service is used, and it is clear this service was familiar with hearing protocol and procedures. Additionally, an unsatisfactory score should be given when the hearing officer clearly permitted the translator to "testify" for the witness, or consistently failed to admonish the interpreter when the instructions were not followed and this failure materially impairs the hearing record.

**CRITERION 17: CONTINUANCES.**

**PURPOSE** - After the hearing has begun the hearing officer should use good judgment regarding continuances.

**SCORING SEGMENT**

Good (3):               The hearing officer granted a necessary continuance when requested by either party or upon his/her own motion.

Fair (1):                The hearing officer granted a continuance where the need for such action was doubtful and not fully supported by the record.

Unsatisfactory (0):   The hearing officer granted a continuance for insufficient reasons or failed to order a continuance when necessary.

Did not occur (3):    A continuance was not requested or appropriate.

**REFERENCE NOTES - CRITERION 17.**

The intent of this criterion is to ensure timely disposition of cases to ensure prompt payment to individuals and the avoidance of unnecessary delay. The criterion evaluates continuances and not postponement decisions. A postponement occurs when a case is rescheduled prior to the opening of the hearing record. A continuance occurs when the hearing officer suspends the hearing record and reschedules the case for a later time and date.

Unwarranted continuances unreasonably delay the timely disposition of cases and may impose a hardship on the claimant, or an additional burden on an employer, who were prepared to proceed with the case on the date scheduled. Assuming proper notice is provided, a case should not be continued absent compelling or necessary reasons.

The hearing officer may grant a continuance for compelling and necessary reasons if the circumstances of the case warrant it. For example, new issues develop for which proper notice was not provided, or when an element of surprise is present that a party could not have reasonably anticipated and would become an issue if the case went forward. Additionally, if a material witness unexpectedly is unavailable for the hearing, the hearing may be continued in order to obtain his/her testimony. If parties to a telephone hearing are not furnished copies of exhibits, a continuance may be necessary to allow opportunity to review and object to documents. (See Criterion 3)

A "Good" score is warranted when the hearing officer granted a continuance only for good and sufficient reasons that were fully supported by the record.

A "Fair" score should be given if the hearing officer granted a continuance and the need for such action was doubtful or not adequately explained on the record.



*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" score should be given if the hearing officer granted a continuance for reasons that were not compelling; or were frivolous in nature or not supported by the record; or when the hearing officer did not order a continuance when the need for one was supported by the record and led to a party not being able to present evidence or testimony on a matter centrally in dispute.

**CRITERION 18: CLOSING THE HEARING.**

**PURPOSE** - The hearing officer should properly conclude the hearing by ascertaining whether the parties have anything to add.

**SCORING SEGMENT**

Good (6):               The hearing officer asked the parties prior to the end of the hearing if they had anything further to say or present.

Fair (3):                The hearing officer made a statement that the hearing was closed unless the parties stated that they had something further to say.

Unsatisfactory (0):    The hearing officer failed to ask this question at the conclusion of the hearing.

Did Not Occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 18.**

The intent of this criterion is to ensure that the parties have a full and fair hearing and are afforded ample opportunity to present their case. Affording the parties an opportunity to state anything additional at the conclusion of the hearing aids all subsequent reviewers of a case in their consideration of allegations that a party was not allowed to fully present evidence. Any wording which the hearing officer chooses which clearly accomplishes this result is permissible. The criterion will not be scored down for curtailing repetitive or irrelevant statements by the parties.

A "Good" score should be given when it is clear that the hearing officer offered the parties a final chance to present testimony or evidence. A hearing officer shall not be marked down when, after numerous attempts to properly conclude the hearing, one or both parties persists in offering repetitive or irrelevant testimony, and the hearing officer closes the record.

A "Fair" score should be given when the hearing officer demonstrates he or she is soliciting a "no" answer either by the words used to ask the question or the tone of voice employed.

An "Unsatisfactory" score should be given when the hearing officer ends the hearing abruptly without affording the parties an opportunity to make additional statements.

**CRITERION 19: HEARING WITHIN SCOPE OF NOTICE.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must conduct the hearing within the scope of the issues raised by the notice of hearing, and if new issues arise during the hearing, the hearing officer must provide proper notice of them.

**SCORING SEGMENT**

Good (9):                   The hearing officer conducted the hearing within the scope of the issues stated on the notice of hearing and if a new issue arose, properly explained the parties rights under state law to either waive notice and proceed or issue a continuance of the hearing.

Fair (X):                    Not applicable - Do not use.

Unsatisfactory (0):       The hearing officer did not conduct the hearing within the scope of the issues appearing on the hearing notice or which were raised during the course of the hearing. The hearing officer based his/her decision on new issues which were not properly noticed and/or failed to obtain waiver of the notice requirement before issuing a decision on these new issues.

Did Not Occur (X):       Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 19.**

The intent of this criterion is to ensure that the hearing and decision are based on issues to which the parties received proper notice or which the parties were willing to waive proper notice and agree to be decided. If a new issue arises during the hearing, the hearing officer must inform the parties that there is a new issue which could affect entitlement to benefits and that it needs to be covered (state law will determine whether the hearing officer has jurisdiction or must remand the case). The parties must be advised of their options to proceeding which may include a party insisting on proper legal notice of the issue, waiver of the notice and proceeding with the case, or asking for a continuance to bring forward testimony or evidence as to any new issues. Any waiver of notice must be on the record.

A “Good” score is achieved when the hearing is conducted with proper notice of the issue, or, if a new issue arises, if proper notice is waived.

An "Unsatisfactory" score should be given when the hearing and decision involve issues for which there was not proper notice and for which a waiver of proper notice was not obtained by the hearing officer.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

**CRITERION 20: GRATUITOUS COMMENTS.**

**PURPOSE** - The hearing officer should not interfere with the development of the case by making gratuitous comments or observations.

**SCORING SEGMENT**

Good (6):                   The hearing officer made no unnecessary comments or uncalled for remarks.

Fair (3):                    The hearing officer made one or two observations, not helpful or immediately pertinent to the issues, but not to the point of being objectionable.

Unsatisfactory (0):       The hearing officer made unnecessary comments or observations that diminished the quality of the hearing.

Did Not Occur (X):       Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 20.**

A gratuitous comment is a comment that is made which is either unnecessary or improper during the hearing. Generally speaking, it is not appropriate for the hearing officer to comment on the evidence presented. This criterion is intended to ensure that the hearing officer conducts a hearing that is both fair in appearance and in substance. It is intended to prevent the hearing officer from making uncalled for comments in an attempt to be "smart" or "funny," or making remarks that do not meet high standards of demeanor and decorum.

A "Good" score is achieved when the hearing officer refrained from engaging in gratuitous comments, and did not provide comments on the nature or quality of the evidence unless necessary to explore its admissibility. Cases should not be "scored down" for remarks which appear to have been intended to make the parties feel at ease.

A "Fair" score is given if the hearing officer did make some gratuitous comments but these were clearly not intended to offend or disrespect the parties or their evidence, or the hearing officer commented on the evidence but not in a derogatory manner.

An "Unsatisfactory" score should be given when the hearing officer made gratuitous comments which were offensive to the parties, witnesses, evidence or the decorum of the proceedings.

**CRITERION 21: ATTITUDE.**

**PURPOSE** - The hearing officer should display an attitude that allows the parties and representatives to speak freely in an orderly manner about the issues in the case.

**SCORING SEGMENT**

Good (6):                   The parties were made to feel at ease in offering testimony and in developing their case.

Fair (3):                    The hearing officer did not consistently make all parties feel at ease, but not to the extent that it affected the outcome.

Unsatisfactory (0):      The hearing officer's attitude was antagonistic or indifferent.

Did Not Occur (X):      Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 21.**

The intent of this question is to ensure that the hearing officer makes the necessary effort to put the parties and witnesses "at ease" as much as possible. It is important that the parties believe that the hearing is fair as well as for a fair hearing to be provided. The hearing officer must strive to leave the parties with the impression that a fair opportunity was provided to both parties to present testimony and evidence and that a fair decision will be rendered.

The hearing officer should exhibit care to make the parties and witnesses feel at ease with providing information and try to strike a balance between being too formal and too informal. Too much formality in mannerisms and tone of voice can be intimidating, and can give the impression that form is more important than substance. On the other hand, too little formality can lead to a loss of control of the hearing, as well as the appearance that the hearing officer is disinterested.

The hearing officer must take care to avoid demeanor that projects an attitude of dislike, boredom, lack of concern, disengaged, and the like. While this may be primarily a problem for in-person hearings, such an attitude may be discernable over the telephone, such as when the parties can hear the hearing officer typing, or speaking to someone else, or a sigh.

A "Good" score is achieved when the attitude of the hearing officer was professional, courteous, and the hearing officer attempted to allow the parties and witnesses to feel at ease in offering their information.

A "Fair" score is given when the attitude of the hearing officer was generally pleasant and professional during the hearing but there was an occasion during the hearing when the attitude of the hearing officer possibly did not make the parties feel at ease in offering testimony or evidence.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" score should be given when the hearing officer displayed a bad attitude during the hearing, such as, being consistently antagonistic, indifferent, or unprofessional which clearly interfered with the presentation of the parties or the witnesses in the case.

The score for Criterion 20, Gratuitous Comments, and/or Criterion 21, Attitude, should not negatively influence the scoring of Criterion 22, Bias and Prejudice. See Criterion 22 for a discussion of bias and prejudice.

**CRITERION 22: BIAS AND PREJUDICE.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must conduct the hearing in an impartial manner.

**SCORING SEGMENT**

Good (9):                   The hearing officer did not appear to demonstrate, or give the appearance of demonstrating, bias or prejudice toward any participant in the hearing. The intensity of questioning, type of questions asked, and/or the treatment of the participants, did not indicate bias or prejudice.

Fair (X):                     Not applicable - Do not use.

Unsatisfactory (0):       The hearing officer appeared to blatantly demonstrate bias or prejudice toward a participant, or the hearing officer's actions were reasonably perceived as doing so.

Did Not Occur (X):       Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 22.**

The intent of this criterion is to ensure that the hearing officer conducted the hearing in a fair and impartial manner. It is not enough that the hearing officer was not biased or prejudiced. The hearing officer must also avoid the appearance of bias or prejudice.

When it appears that the hearing officer blatantly treated any party in a biased or prejudiced manner, the criterion must be scored as unsatisfactory. For example, the hearing officer displays a negative or demeaning manner directed towards a party's attitude, vocabulary, mannerisms, career field, status, beliefs, appearance, age, sex, or religious beliefs, among other characteristics.

The hearing officer must control the hearing by asking important questions, limiting irrelevant testimony or improper statements, and being persistent in clarifying or determining the truth of a statement. However, at some point the attempt to clarify seemingly contradictory or inconsistent statements can be, or appear to be, badgering. At times one party may require more assistance than the other. Maintaining control and asking questions do not excuse bullying or badgering a party or witness. By the same token, offering assistance in a way that clearly is demeaning and disparaging would result in an unsatisfactory score.

The difference between a "Good" and "Unsatisfactory" score should be obvious. If the hearing officer clearly favors one party over the other in terms of the respect shown during the hearing, the questions asked, or the amount of time allowed for a response to questioning, the case should be marked down.



*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

A Fair or Unsatisfactory score for Criterion 20, Gratuitous Comments, and/or Criterion 21, Attitude, should not have a negative influence on scoring Criterion 22, Bias & Prejudice. In scoring Criterion 22, Bias & Prejudice, if the hearing officer was not blatantly biased or prejudiced, then this criterion should be scored as a "Good."

**CRITERION 23: OBTAIN REASONABLY AVAILABLE EVIDENCE.**

**PURPOSE** - The hearing officer must attempt to obtain the reasonably available competent evidence necessary to resolve the issue(s) in the case.

**SCORING SEGMENT**

Good (9):                   The hearing officer obtained competent evidence, reasonably available and necessary to resolve the issue(s) in the case.

Fair (3):                    The hearing officer obtained most of the evidence necessary to resolve the issue(s) of the case and the omissions were not prejudicial to the outcome of the case.

Unsatisfactory (0):       The hearing officer did not make a sufficient record to render a decision, because s/he did not obtain sufficient competent, available evidence to resolve the issue(s) in the case.

Did Not Occur (X):       Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 23.**

The intent of this criterion is to ensure that the hearing officer functions as a “fact-finder” and all available evidence are included as part of the record.

The unemployment insurance lower authority appeals hearing is not a contest between two opposite parties, with the hearing officer sitting on the sidelines. The hearing officer is in effect a seat of inquiry, responsible for getting complete and accurate facts. It is the responsibility of the hearing officer to ensure that the burden of proof lies upon the appropriate party in UI hearings.

A hearing officer needs to preserve the appearance of neutrality of the issue(s) being discussed yet ask the necessary questions to develop the facts of the issue for the record. It is the responsibility of the hearing officer to develop all the evidence that is reasonably available and to make a decision according to the dictates of the state law. State laws differ on the hearing officer’s obligations to obtain evidence. "Reasonably available" means that evidence or testimony which is available at the hearing and which is critical to the issue(s) to be decided.

In applying this criterion, consideration must be given to the adequacy of the hearing officer's attempts to develop the evidence on each issue: Was it sufficient to secure evidence that was necessary and reasonably available? For example, when attendance is an issue, a party may offer time keeping records. If the attendance record is a matter of dispute, it is incumbent upon the hearing officer to accept this evidence.

A “Good” score is achieved when the hearing officer made sufficient efforts to obtain the available evidence to resolve the material issues of the case.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

A “Fair” score is given if the hearing officer made an effort to obtain all of the reasonably available evidence but may have failed to accept available evidence tendered which might have had a bearing on a material point.

An "Unsatisfactory" score should be given when the hearing officer does not make a sufficient attempt to obtain available evidence or affirmatively prevents a party from presenting evidence on material issues in the case.

See Criterion 17, Continuances, and Criterion 3, Exhibits, for further information on issues and evidence.

**CRITERION 24: ISSUE(S) CLEARLY STATED IN THE WRITTEN DECISION.**

**PURPOSE** - The statutory issue(s) involved should be clearly and simply stated in the written decision.

**SCORING SEGMENT**

Good (3):                The written decision included, in simple language, all the statutory issues in the case.

Fair (X):                Not applicable - Do not use

Unsatisfactory (0):    The written decision either omitted some or all of the issues, or stated them in a convoluted manner that was incomprehensible.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 24.**

The intent of the criterion is to ensure that there is a clear understanding of what issue(s) the decision addresses. The statement should communicate clearly and effectively to the interested parties and other readers exactly what the issues were. It should also establish the boundaries of the decision.

At the beginning of the decision, early in the description of the case history, or at another appropriate spot, the issue(s) to be decided should be stated in simple terms for clear understanding and should include all the elements of the applicable statutory provision(s). This statement need not be in the precise language of the statute. For example, the decision may read, "The issue in this case is whether the claimant voluntarily left his employment without good cause."

A "Good" score is achieved when the issue statement is clearly stated in the decision.

An "Unsatisfactory" score is given when the issue statement is omitted from the decision, or when the issue statement is so overly complex that the average reader would not understand what issue(s) is being decided.

**CRITERION 25: FINDINGS SUPPORTED BY SUFFICIENT EVIDENCE.**

**PURPOSE** – Accepting the hearing officer's judgment of credibility, unless it is manifestly without basis, the findings of fact must be supported by sufficient evidence in the hearing record.

**SCORING SEGMENT**

Good (9):                The written decision's findings of fact section must be supported by substantial evidence.

Fair (X):                Not applicable - Do not use.

Unsatisfactory (0):    The findings of fact stated in the written decision were not supported by substantial evidence.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 25.**

The intent of this criterion is to ensure that the findings of fact are supported by evidence in the record and this evidence is of sufficient quality to support the findings.

In scoring this criterion, the evaluator does not decide whether all the necessary findings of fact were made, but whether the findings of fact made by the hearing officer are supported by substantial evidence in the hearing record. See Criterion 26 for findings of fact.

Only evidence that is properly entered into the record and which is officially and administratively "noticed" can be considered as a basis for the findings of fact.

The weight the hearing officer gives to the testimony and evidence in the case of contradictory evidence or testimony the hearing officer's judgment of credibility, should be accepted unless it is entirely without basis or is clearly unreasonable.

There is no "Fair" score. Either the findings of fact are supported by the evidence, or they are not.

The distinction between "Good" and "Unsatisfactory" is whether or not, on matters material to the decision, the findings of fact are supported by substantial evidence to support the ultimate outcome in the case. Substantial evidence has been defined as "such evidence, or such relevant or competent evidence, as a reasonable mind might accept as adequate to support a conclusion." It means simply, accepting the hearing officers internal authority to determine credibility on material points in dispute, is the evidence sufficiently well founded in the testimony and documentary evidence accepted to support the decision.

**CRITERION 26: FINDINGS OF FACT.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must make all of the findings of fact necessary to resolve the issues and support the conclusions of law included in the decision.

**SCORING SEGMENT**

Good (9): The decision contained all the necessary findings of fact. The decision clearly states the findings of fact upon which the hearing officer relied in the decision for each material point in the case. The findings of fact in the decision accurately reflect the testimony and are specific, relevant, and material to all major issues. The decision does not merely recite testimony as findings of fact.

Fair (3): The decision contained most of the necessary findings of fact pertinent to the material points. However, there was some recitation of testimony, or the findings were not clearly stated, or the findings were not relevant and material to the case.

Unsatisfactory (0): The findings of fact in the decision did not accurately reflect the testimony presented or did not contain the specific, relevant, and material findings of fact necessary to resolve material issues in the case upon which the hearing officer relied in the decision.

Did not occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 26.**

The intent of this criterion is to measure how accurate, and clearly stated, the findings of facts were used by the hearing officer in making the decision. The findings of fact represent the story of what happened in the case and should be expressed in logical order (usually chronological) and in unequivocal terms. The reader should be left with no doubt about what facts the hearing officer relied upon in making the decision. The findings of fact must be made on all the elements of the issue being decided. The findings must be accurate, specific, relevant, and material to all issues in the case.

Findings of fact are sometimes referred to as evidentiary findings or material points. The hearing officer must clearly and accurately identify the specific findings of fact for the material issues in the case since they are final (in most states) if supported by sufficient, competent evidence in the record. A reviewing authority must know what specific findings of facts were identified by the hearing officer in making the decision (as distinguished from a summary of evidence).

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

The findings of fact must be specific. If the hearing officer intends to document willful misbehavior based upon a prior warning, the hearing officer should specifically identify in the decision the nature of the warning. A finding that the claimant was “previously warned,” by itself, is insufficient since it does not permit the reader to know whether the warning was verbal or in writing, when it was issued and by whom, on what event the person was warned, and how it bears a relationship to demonstrating willful misbehavior in relation to the incident(s) which prompt an employment separation.

Similarly, in a voluntary leaving case, the decision should contain findings of fact specific to the situation; whether the quit was verbal, in writing, or in some other manner, what reasons (if any) were provided for quitting, and any other circumstances which are relevant to making a decision about whether the claimant had good cause under the state law for the voluntary leaving.

A recitation of testimony is impermissible since it is not a finding of fact but a summary of a party’s viewpoint. Findings of fact on matters irrelevant to the outcome of the case are unnecessary and should be avoided. Prior to issuing the decision, the hearing officer should review the findings to ensure the findings of fact accurately reflect the evidence, are clearly stated, material and relevant to all issues, and clearly supports the conclusion of law upon which the decision is based.

A "Good" score is warranted if the decision clearly and accurately states the facts found, and the facts found are material and relevant to all of the issues involved in the case.

A "Fair" score is warranted if the decision contains some inaccurate facts on minor points that do not affect the outcome, or contains some unclear facts, or irrelevant facts but these do not affect the reader’s understanding of how the facts support the decision outcome.

An "Unsatisfactory" score should be given if the decision contains findings of fact that do not accurately reflect the hearing record, or fails to make specific, necessary findings of fact needed to resolve the issues, or where the majority of facts found constitute a recitation of testimony such that it is unclear what facts are being relied upon by the hearing officer in making the decision.

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management identify training issues to improve the "due process" component(s), or where a state’s practice may negatively impact this criterion. Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

**CRITERION 27: REQUIRED CONCLUSIONS.**

**PURPOSE** - The decision should contain the conclusions of law required to resolve the issue(s) in the case.

**SCORING SEGMENT**

Good (6):               The decision contains the necessary conclusions of law.

Fair (X):                Not applicable - Do not use.

Unsatisfactory (0):   The decision does not contain the necessary conclusions of law.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 27.**

The intent of this criterion is to ensure that the hearing officer has indicated his/her final conclusion on each issue involved.

The conclusions of law represent the hearing officer's application of the law to the facts of the case. Following the language of the appropriate statute, it tells the parties the legal standard that will be applied to the facts of the case and that mandate the result of the case.

For example, in a misconduct issue for absence without notice, the specific provision in the law should be referred to by quoting it or by explaining it in simple terms with, when necessary, an explanation of a term such as "misconduct." The conclusion of law might be, "The claimant is disqualified since "misconduct connected with the work" includes instances when an employee who has been previously warned about attendance is absent without proper notice to the employer. This statement resolves the issue and should be supported by the hearing officer's findings that the claimant had been absent, had been warned, and had not given notice to his employer, with further appropriate details.

A "Good" score is warranted when the decision contains the conclusions of law setting forth the legal standard which applies to the material issue(s) in the case.

"Fair" is not used.

An "Unsatisfactory" score is warranted when the necessary conclusions of law are not stated in the decision, or are stated in such an unclear manner that the average reader would not understand what legal standard governs the material issues being decided.



**CRITERION 28: LOGICAL REASONING.**

**PURPOSE** - The decision should state logical reasons for the outcome that are consistent with the findings of fact and the conclusions of law.

**SCORING SEGMENT**

Good (6):               The hearing officer stated logical reasons for the decision consistent with the findings of fact and applied those facts in a logical manner to the conclusions of law.

Fair (3):                 The reasoning was not fully stated or contained some inconsistencies but, when read as a whole; the decision is understandable both factually and legally.

Unsatisfactory (0):    The reasoning and rationale in the decision were not stated or did not logically follow from the findings of fact to the conclusions of law.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 28.**

The intent of this criterion is to measure how well the decision is written such that a reasonable person will know upon reading the decision that it has a sound basis, in law and fact, for the outcome. The intent is not to second guess the decision of the hearing officer. Whether reasonable minds might differ in the outcome is not the standard. The reasoning in the decision cannot be inconsistent with the findings of fact or the conclusions of law applied. The explanation of the decision should be reasonably drawn from the findings of fact, be understandable, and adequately covers only the factors in the provision of the law relating to the issue.

The reasoning should be consistent with the findings of fact and the conclusions of law. The reasoning should use clear, concise, and understandable terms without unnecessary elaboration, and without reliance upon immaterial considerations. The facts should not be repeated as reasoning, nor should new facts be entered. The reasoning should include an explanation to the parties why material contentions were either accepted or rejected, and explain the basis for it.

A "Good" score is given when the reasoning of the hearing officer is clear in the decision, including that the findings of fact and conclusions of law are consistent and relevant to the material issues. Deduction will not be made when the hearing officer addresses specific legal or factual contentions raised by the parties. A "Fair" score may be given when, after consideration of all the facts and law, the reasoning is understandable and has a rational basis in law and fact even though there may be some minor inconsistencies or some incompleteness in addressing minor points.

An "Unsatisfactory" score should be given when the reasoning is not clearly stated, or when the reasoning is inconsistent with the law and facts of the case, or when there is such incompleteness in analysis or so many internal inconsistencies that it is difficult to understand the outcome.

**CRITERION 29: FORM, STYLE, AND ORGANIZATION.**

**PURPOSE** - The decision should be well organized as to form and style. It should be noted that this criterion does not address content.

**SCORING SEGMENT**

Good (3):                The decision was organized so that the issues in the case, the findings of fact, the rationale, the conclusions of law, and the ruling were clearly outlined.

Fair (1):                 Although the various portions of the decision merged with one another, it was clear which statements were findings of fact and which were conclusions of law.

Unsatisfactory (0):    The decision was not organized and it was difficult to understand.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 29.**

The intent of this criterion is to ensure that each segment of the decision is stated distinctly for clarity, correct administrative adjudication procedures, and compliance with legal requirements. This criterion refers to the outline or form of the decision not to the content of the decision. The content of the decision is covered in other criteria.

The written decision is of the utmost importance. It is the culmination of the hearing process, and must be adequate for judicial review. The decision should include the following elements: 1) a statement of the issue(s) being decided; 2) the findings of fact; 3) the rationale or reasoning -- based on the findings of fact and the applicable statute; 4) the conclusions of law -- based upon the findings of fact and reasons, and showing the final judgment of the hearing officer on the issue(s); 5) the "decision outcome" -- the action to be taken by the agency in accord with the decision; and 6) information on further appeal rights if a party disagrees with the written decision.

While there is no standard or prescribed order for the above listed elements and some acceptable formats may merge some of them, each element should be clearly identifiable.

A "Good" score is achieved when the decision is well organized and contains an issue statement, a statement of the findings of fact, the conclusions of law, the rationale for the outcome, a decision statement and further appeal rights.

A "Fair" score is given when the decision contains each of the above but the organization makes it unclear to the average reader which section represents each of the above.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" score should be given when the organization of the decision is such that it would confuse the average reader of the issue, facts, law, reasoning or outcome of the case, or does not include all of the described elements, including further appeal rights.

**CRITERION 30: DECISION STATES LEGAL EFFECT.**

**PURPOSE** - The written decision should contain a clear and correct statement of the legal effect of each issue covered.

**SCORING SEGMENT**

- Good (3): In the decision paragraph, the hearing officer correctly identified the determination(s) appealed and stated whether the determination is affirmed, reversed, or modified. If a determination is reversed or modified, the decision explained the reversal or modification in sufficient detail to allow the parties to understand it and the administrative agency enough information to implement the decision.
- Fair (1): The decision paragraph states whether the determination(s) is affirmed, reversed, or modified. However, the decision paragraph did not specify the administrative action the agency must take to implement the outcome.
- Unsatisfactory (0): The decision paragraph did not correctly identify the determination appealed, or it did not state whether the determination was affirmed, reversed, or modified, or the decision paragraph states an improper outcome in relation to the findings of fact and conclusions of law.
- Did not occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 30.**

The decision paragraph informs the parties of the ultimate outcome of the case and directs the administrative agency to affirm, reverse, or modify a specific determination(s) which is the subject of the appeal. The hearing officer must identify the determination(s) that is being ruled upon and accurately state the result in a style and format that easily informs the reader of the outcome.

The decision paragraph should also direct the administrative agency of actions to be taken; e.g., if a disqualification is imposed, the specific date the disqualification begins and what action, under state law, the claimant must take to overcome it, and any further actions the administrative agency should investigate e.g. if a previously undetected, unrelated eligibility issue arose during the hearing that should be resolved before benefits are paid as the result of a job separation ruling that the hearing officer was unable to address during the hearing.

A “Good” score is achieved if the decision paragraph correctly identified the determination(s) appealed and stated whether it is "affirmed," "reversed," or "modified" as appropriate. If modified, the decision paragraph clearly and specifically stated the modification and informed the administrative agency of the action to take as a result of the modification. For example, "The determination dated (state date) is modified to reflect that the claimant quit without good cause and is disqualified the week of (date) and the (X) weeks immediately

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

following ending on (date)". Any similar wording showing the administrative action required to implement the decision may be used.

A "Fair" rating should be given if the decision paragraph meets all of the requirements for "good" but does not specify the administrative action.

An "Unsatisfactory" score should be given if the decision paragraph fails to correctly identify the determination(s) the decision is ruling upon, fails to state whether the determination is affirmed, reversed or modified, or the decision is inconsistent with the facts and conclusions of law. An example could be the affirmed decision is noted but the facts and conclusions of law clearly reflect the hearing officer meant to reverse the determination.

**CRITERION 31: UNDERSTANDABLE DECISION.**

**PURPOSE - The decision should be worded so that it is understandable to most claimants and employers and it should have a professional appearance.**

**SCORING SEGMENT**

- Good (6): The language used in the decision contains words that are easy to understand to the average reader, avoids unnecessary legal jargon, technical verbiage or other “shop talk,” and contains no or limited grammatical, typographical or other errors. The decision is clear and concise and avoids using objectionable or abrasive words or phrases. The decision is neat and professional in appearance.
- Fair (3): The decision contains some legal jargon, or technical verbiage or some unfamiliar words, or contains some grammatical, typographical or other errors, but these did not substantially impair the average reader in understanding the decision.
- Unsatisfactory (0): The decision contains uncommon words that could not be easily understood by the average reader. The decision contained too much legal jargon, technical verbiage or “shop talk” such that the reader was left without a clear understanding of the rationale or outcome of the decision, or the decision contained such numerous grammatical, typographical or other errors that they adversely affected the coherence of the decision.
- Did not occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 31.**

The intent of this criterion is to ensure that the hearing officer issues a written decision that can be understood by the parties and the agency. The decision must be clear, concise and worded in “plain English” to the level of understanding of most people. It should be written clearly and tactfully, and should appear neat and professional.

A "Good" scored is achieved when the language used in the decision is understandable to ordinary persons, is clear, tactful and concise, and the decision is free of all but minor grammatical, typographical or other errors. A deduction will not be made when the hearing officer cites a statutory provision, or court case, if there was some attempt to explain it in terms the ordinary person will understand.

A "Fair" score should be given if the decision meets the qualifications above except that it contains some words that may be difficult for readers to understand, uses some legal jargon or technical verbiage without an attempt to explain these terms so that the average person can understand them, and/or contains some grammatical, typographical or other errors but these do not significantly impair the ability of the reader to understand the rationale or outcome of the decision.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

An "Unsatisfactory" score is warranted when the decision uses overly complex words or phrases that are not easily understood by the average person, or overly resorts to unnecessary legal jargon, technical verbiage or "shop talk" that significantly detracts from the reader's ability to understand the decision rationale or outcome, or which contains such numerous grammatical, typographical or other errors that reflect negatively on the reader's ability to have confidence in the decision. Simply put, if after reading the decision, the reader does not know who prevailed and why, the criteria should be scored "Unsatisfactory."

**ANNUAL REVIEW (AR1): NOTICE OF HEARING.**

**PURPOSE** - The notice of hearing should clearly identify the parties, the date, time and place of hearing and the issues involved in the appeal to be addressed or identify whether there was an informed waiver.

**SCORING SEGMENT**

Good (6): The hearing notice clearly lists all parties to whom the hearing notice was mailed. The date and time of the hearing is prominently displayed. The notice should state whether the hearing shall be conducted in person or by telephone.

If the hearing is scheduled in person, the notice provides the address of the hearing. No deduction will be made if the place of hearing is listed, for example, as "Employment Security Office, 1100 W 10, Jasper, MA."

If the hearing is scheduled as a telephone hearing, the notice must advise the parties how they will participate, and give instructions, providing a telephone number to be contacted or by listing the phone to call.

The issues must be stated as required under state law and must be sufficiently clear so as to allow the parties to adequately prepare for the hearing, e.g., "whether the claimant will be disqualified from benefits because of his or her reason for separation from work."

Fair (3): The notice of hearing complied with the elements listed under "Good", but the notice did not adequately state the issue(s), or failed to provide clear instructions regarding how to participate in the hearing. A generalized statement that the hearing will discuss the correctness of a determination is not sufficient to provide adequate notice. For example all, of the parties were notified, but it does not clearly state the issue.

Unsatisfactory (0): The notice of hearing was not sent to an interested party, or it did not state the date and time of the hearing, or it did not state the issue in sufficient detail so that the parties could understand why they were being summoned to participate in the hearing.

Did not occur (X): Not applicable - do not use.

**REFERENCE NOTES - NOTICE OF HEARING (AR1).**

The notice of hearing is the official document notifying the parties that an appeal has been filed, and will be heard by the hearing officer on a specific date and time. The intent of this criterion is to ensure that the document provides adequate notice of the hearing and gives the parties an opportunity to prepare for it. The notice should indicate all the parties who have been given notice of the hearing, and in the case of a telephone hearing, it should provide specific information regarding how to participate.



*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

For a telephone hearing, the notice must adequately state how the parties will participate. For example, "Parties should call the toll free number above at least 15 minutes before the hearing to notify the hearing officer of the number to be called for the hearing." Or, "Failure to keep a telephone line open at the above schedule date and time for the hearing may result in an unfavorable decision if the hearing officer is unable to reach you at the telephone number listed above. Note to employer: at least 24 hours before the scheduled hearing above, please provide the deputy clerk with the name and telephone number of the person who will represent the employer at the hearing."

A "Good" score is given if the hearing notice covers all of the required information and does so in a way that can be understood by the parties. No deduction will be made if a hearing proceeds without a notice of hearing when there was either actual notice or a waiver of notice to any new issues involved in the appeal.

A "Fair" rating is given if the notice provides the date, time, and place of the hearing but does not adequately state the issue(s) or fails to provide clear information on how to participate in the hearing.

An "Unsatisfactory" score is given if the hearing notice does not identify one or more interested party since there can be no fair hearing without proper notice. Additionally, if the notice of hearing omits the date and time, or fails to list the issue(s) involved, it cannot be said to constitute adequate notice unless this has been waived by the parties.

**ANNUAL REVIEW (AR2): FINALITY DATE AND FURTHER APPEAL RIGHTS.**

**PURPOSE** - The decision should clearly and understandably state the date that the decision will become final unless appealed within the timeline provided under state law, and shall provide information regarding the rights of further review or appeal.

**SCORING SEGMENT**

Good (3):           The decision clearly states when the decision is final and that the party adversely affected may appeal. For example, a statement such as "This decision becomes final 14 days after the date of mailing" is sufficient if the date of mailing is clearly identified. A statement such as "See the attached brochure for further appeal rights" is adequate to advise the parties that further appeal rights are available.

Fair (X):            Not applicable - Do not use.

Unsatisfactory (0):   The decision does not clearly set out the number of days to appeal before it becomes final or does not indicate that further appeal rights are available.

Did not occur (X):   Not applicable - do not use.

**REFERENCE NOTES - FINALITY DATE AND FURTHER APPEAL RIGHTS (AR2).**

The intent of this criterion is to ensure that the parties understand their right to appeal the decision and the deadline for doing so provided under state law. The appeal rights must be prominently displayed in the decision and must specifically inform the parties of the procedure they must follow if they disagree with the decision. If the state law contains a particular requirement to effectuate an appeal (such as that the appeal must be mailed, faxed or filed electronically) it should be stated. If a state law contains some provision for an absent party to request a reopening of the case, it should be stated in the appeal rights or a reference to information about how an absent party can request a reopening should be provided.

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

PLEASE SEE ET HANDBOOK 401, UI Reports Handbook for the ETA 9057 Lower Authority Appeals Quality Review report.  
 A facsimile of the State Evaluation Score Sheet is listed here.

	G - 6	F - 3	U - 0	D - 6		
1. EXPLANATION	G - 6	F - 3	U - 0	D - 6		G = GOOD; F = FAIR; U = UNSAT; D = DID NOT OCCUR  <u>COMMENTS</u>
2. OPENING STATEMENT	G - 6	F - 3	U - 0			
3. EXHIBITS	G - 6	F - 3	U - 0	D - 6		
4. WITNESS ORDER	G - 6	F - 3	U - 0	D - 6		
5. ORDER OF WITNESSES' TESTIMONY	G - 3	F - 1	U - 0			
6. QUESTION OWN WITNESS	G - 9	F - 3	U - 0	D - 9		
7. CLEAR LANGUAGE BY H.O.	G - 6	F - 3	U - 0			
8. COMPOUND QUESTIONS	G - 6	F - 3	U - 0			
9. CLARIFIED TESTIMONY	G - 6	F - 3	U - 0	D - 6		
10. CONFRONTATION	G - 9		U - 0	D - 9		
11. CROSS-EXAMINATION	G - 9	F - 3	U - 0	D - 9		
12. REPETITIVE TESTIMONY	G - 3	F - 1	U - 0			
13. LEADING QUESTIONS	G - 6	F - 3	U - 0			
14. INTERRUPTIONS	G - 6	F - 3	U - 0	D - 6		
15. "OFF THE RECORD"	G - 6	F - 3	U - 0	D - 6		
16. INTERPRETERS	G - 6	F - 3	U - 0	D - 6		
17. CONTINUANCES	G - 3	F - 1	U - 0	D - 3		
18. CONCLUSION OF HEARING	G - 6	F - 3	U - 0			
19. WITHIN SCOPE OF NOTICE	G - 9		U - 0			
20. GRATUITOUS COMMENTS	G - 6	F - 3	U - 0			
21. ATTITUDE	G - 6	F - 3	U - 0			
22. BIAS AND PREJUDICE	G - 9		U - 0			
23. OBTAIN AVAILABLE EVIDENCE	G - 9	F - 3	U - 0			
24. ISSUE STATEMENT	G - 3		U - 0			
25. FINDINGS SUPPORTED BY EVIDENCE	G - 9		U - 0			
26. FINDINGS OF FACT	G - 9	F - 3	U - 0			
27. NECESSARY CONCLUSIONS INCLUDED	G - 6		U - 0			
28. LOGICAL REASONING	G - 6	F - 3	U - 0			
29. FORM AND STYLE	G - 3	F - 1	U - 0			
30. DECISION STATES LEGAL EFFECT	G - 3	F - 1	U - 0			
31. UNDERSTANDABLE DECISION	G - 6	F - 3	U - 0			
32. TOTAL POINTS SCORED (OPTIONAL)						
33. INTENT OF DECISION	A - ALLOW; D - DENY					
34. EFFECT ON APPEALED DETERMINATION.	A - AFFIRM; R - REVERSE; M - MODIFY					
35. DATE OF DECISION (MMDDYYYY)						
36. DATE IMPLEMENTED (MMDDYYYY)						
37. CASE MAT. STATUS: OK; TI(RECORDING INAUD.); TM(RECORDING MISS.); DM(DOCS. MISS.) IM (RECORDING INAUD. & DOCS. MISS.); MM (RECORDING & DOCS. MISSING)						
38. TIME REQUIRED FOR EVALUATION OF CASE IN MINUTES.						

## **APPENDIX A**

### **Sample Selection**

Appendix A explains the procedures for selecting the samples for lower authority appeals review. Explanations of options have been included; each state should select the option best suited to their particular operation. The option preferred by the U.S. Department of Labor National Office (NO) will be indicated with reasons for the recommendation.

#### **WHAT DOES SAMPLING REQUIRE?**

The sampling methodology for lower authority appeals contains five distinct steps:

1. Identify, find, or gather data elements for sampling the universe files;
2. Extract or collect data to create the universe files;
3. Determine which transactions to select for the sample;
4. Select the cases to review; and
5. Create output reports and files of the selected cases.

How these five steps are accomplished is the state's choice. Not all states have the same level of automation, and varying file structures may lend themselves to different sampling approaches.

The state may use an automated or manual method to create the universe files and select the samples. Throughout this section of the Appendix, both methods will be discussed. Various details and tips on how to determine the best approach for your state is also provided.

#### **Step 1 - Gather Data for the Sampling the Universe**

##### *Collect Required Data*

The first step is to gather or have access to the sample universe (ALL of the particular transactions to be reviewed). It is essential that every transaction or item meeting the criteria be included. This means that all possible sources or locations of the transactions must be searched. For example, since appeal decisions may be generated and stored in various units, check to be certain they will all be included in the universe.

Be sure to check that only valid transactions are included. Refer to the definitions in the UI Reports Handbook No. 401 to determine which records should be included. ETA 5130 Benefit Appeals Report and ETA 9054 Appeals Time Lapse are the reports to review.

For instance, episodic claims programs such as Extended Benefits, Disaster Unemployment Assistance, Trade Readjustment Allowances along with disposed by other than decision, such as a dismissal, are not valid in terms of the definitions for the sample universe.

Depending upon the automation level of the Appeals Unit, the creation of the universe may require the extraction of data from a computer (mainframe or PC) or the keeping of a manual list or searching file drawers.

If an automated sampling method is chosen, the state's Information Technology (IT) staff is responsible for creating the universe files which contain the requested information. The NO has developed specifications of the minimum data needed for each sampling of the universe. The IT staff is responsible for creating the programs and/or utilities to extract or gather the requested data elements.

Each sample being reviewed will be selected from a universe which includes the lower authority appeals which were dated within the three months in the preceding quarter, which is referred to as the review quarter. The date the appeal decision was issued determines in which quarter's universe that record will be included.

#### *Schedule Data Capture*

In building the universe files, lower authority appeals should be captured as they occur.

This is important as the desired transaction may be superseded by a subsequent transaction and the desired information may no longer be readily available. This may be especially true in highly automated states where data fields are often overlaid with the most recent information.

Some states may be able to reconstruct events by using daily transaction logs maintained in their data processing environment. It is still better to capture the transactions as they occur during the time period to be reviewed.

In manual record storage systems, the transaction source information is tracked by a filing system. The universe to be sampled should be isolated in some manner so that the integrity of the data will not be compromised with it is time to select the sample.

***HINT:** Once the elements for the universe files have been identified and the extraction program created, the quality reviewer should examine a small cross section of the records to verify that the data elements are correct and the proper time frames are being followed.*

*After the quality reviewer has approved the data elements and time frame, the IT staff should establish procedures for building the universe files, selecting the sample cases and saving the universe files.*

## **Step 2 - Collect Data to Create the Universe**

### *Data Collection*

Save the universe files. Each state has the option to collect the data for the universe files any way they choose. If the necessary file is automated, the IT staff must create a file of the

transactions that make up the universe. The SWA can either write a program to create the universe file or use commercial software. The resulting transaction files can then be used as input into a sample selection program such as PICKNMBR, which is described later in this appendix.

For files not automated, the state must collect the information manually. This can be accomplished many ways but a simple method can be the creation of a list. For example, as lower authority appeals are completed, each hearings officer will record the docket number and the date of the appeal was heard. Throughout the quarter, the list is updated. At the end of the quarter, the list is assembled as the universe and the number of completed appeals are sequentially numbered and counted.

States **MUST** save the universe files from which samples are selected for data validation purposes for one year.

### **Step 3 - Determine Records for the Sample**

*Perform Calculations*                      The third step is to determine which records to select for the sample. The formulas used to determine which records to select must be the formulas provided by the NO, or alternative formulas approved by the NO.

To perform the calculations, three numbers are needed:

1. Total Records in the universe - Once the universe has been created, a count of all the transactions in the universe must be performed. This count is represented by "P" in the calculations.
  
2. Number of Records to Sample – The number of cases to sample for lower authority appeals quality depends on the total number of lower authority appeals decisions reported by the state in the preceding calendar year from ETA 9054 Appeals Time Lapse report, cell C1. States reporting 40,000 or more decisions completed from the previous calendar year will sample 40 decisions each quarter for quality review. States reporting fewer than 40,000 decisions in the preceding calendar year will sample 20 decisions each quarter for quality review. State may sample larger numbers if they choose, but all the decisions sampled must be reviewed and entered into the Unemployment Insurance Report (UIR) database in order to preserve the validity of the sample.

**Note:** Interval sampling can be implemented with no difficulty in states whose automated systems allow appeals disposed of by withdrawal, dismissal, or “no show” to be identified by code and excluded from the universe. If these types of disposals are indistinguishable and cannot be excluded from the universe before sampling, there are three alternatives to pursue.

- The first, and possibility easiest, method would be to add a marker with which to indicate those lower authority appeals in which an actual hearing led to a decision. The marked appeals would constitute the universe for pulling a random sample by interval sampling.
  - As a second alternative, IT could be asked to randomize the lower authority appeals file transactions within the quarter being reviewed. Randomizing routines are readily available, and once the file is randomized, the quality reviewers can begin drawing their sample from the top of the list, examining each record to be certain it meets criteria before saving it to the sample list. As many records as necessary can be pulled and examined until the required number is obtained, and the result will be a random sample for valid appeals decisions.
  - A third approach requires running the sampling routine three times. First, draw a random sample of twenty decisions from the universe, removing them. Then draw a second sample of 5 decisions from the remaining universe, removing them. And finally, draw a third sample of 3 decisions for the universe remaining. If all twenty of the first sample are valid hearings decisions, the next two samples will not be needed. If only 15 of the first sample are valid, move to the second sample of 5. If all of them are valid, stop. But if only 4 of them are valid, the third sample will be needed. The drawback here is that to preserve sample integrity, all of the valid cases from the third sample must be reviewed and entered, even if only one is needed.
3. Random Number. This is the third critical number necessary to perform the sample calculations. It is represented as “R” in the formulas. Random numbers are distributed by the National Office for each calendar year, may be generated on the state’s IT system, or may be obtained from any statistics manual.

### **FORMULAS TO IDENTIFY RECORDS FOR QUALITY SAMPLES**

The following are the steps needed to determine which records to select for the sample. These steps must be repeated for each sample that will be selected.

- A count of the total number of transactions in the universe must be performed. If automated, the state’s IT staff can supply this number. This number is represented by "P" in the calculations.
- Determine the number of cases to sample. Based on the number of lower authority appeal decisions reported by the state in the previous calendar year, determine the number of cases to sample for each. The letter "N" represents sample size in the calculations.
- Obtain a random number. In the calculations, "R" represents the random number, which can be obtained from the NO, from a statistics handbook, or from the IT system. The random number must be a decimal between 0 and 1 and must be at least three digits (for example,



.729). For states with large universes, the random number must contain four digits, if the sampling interval is greater than 1,000.

After the above mentioned numbers are identified, several calculations must be performed.

### Balanced Systematic Sampling

## **CALCULATIONS**

First, determine the sampling interval (K), by dividing the sample size into the universe size. If the result of this calculation is not a whole number, round the result to the nearest integer.

$$K = P/N \text{ (round to the nearest integer)}$$

Second, determine the starting point (I) within the universe. This is accomplished by multiplying the sampling interval (K) by the random number (R) and rounding to the nearest integer.

$$I = (R * K) \text{ (round to the nearest integer)}$$

Next, "N" cases must be selected. This is accomplished by selecting pairs of cases (J) until all the cases have been identified. First, the number of pairs must be determined by:

$$\text{If } N \text{ is even, } J = 0, 1, 2, \dots ( \frac{1}{2} N - 1 )$$

$$\text{If } N \text{ is odd, } J = 0, 1, 2, \dots \frac{1}{2}(N - 1) - 1, \text{ the remaining case is calculated separately.}$$

Once the number of pairs is determined, the cases are selected by using the following formulas:

$$I + JK \quad \text{and} \quad (P - JK) - I + 1$$

The remaining (odd) case is calculated by:

$$I + \frac{1}{2}(N - 1)K$$

## **CALCULATIONS EXAMPLES**

Example 1:  $P = 43, N = 5, R = .261$

$$K = 43/5 = 8.6 = 9 \text{ (rounded)}$$

$$I = (.261 * 9) = 2.349 = 2 \text{ (rounded)}$$

Since  $N = 5,$

$$J = \frac{1}{2} (5 - 1) - 1 = 1$$

The following records would be selected:

	$\frac{I + JK}{2 + (0*9) = 2}$	$\frac{(P - JK) - I + 1}{(43 - 0*9) - 2 + 1 = 42}$
when J = 0		
when J = 1	$2 + (1*9) = 11$	$(43 - 1*9) - 2 + 1 = 33$

The remaining case is calculated by:  $I + \frac{1}{2} (N - 1)K$

$$2 + \frac{1}{2} (5 - 1)9 = 20$$

Records 2, 11, 20, 33, and 42 would be selected for the sample.

Example 2: P = 244, N = 10, R = .743

$$K = 244/10 = 24.4 = 24 \text{ (rounded)}$$

$$I = (.743 * 24) = 17.832 = 18 \text{ (rounded)}$$

The following records would be selected:

18, 42, 66, 90, 114, 131, 155, 179, 203, 227.

### *Systematic Sampling*

Under certain circumstances, balanced systematic sampling can result in the selection of duplicate sample cases, especially if the population is small. To avoid duplicates, systematic sampling can be used as an alternative selection method.

First, a skip interval is computed by dividing the number of records in the sampling frame (P) by the number of records to be sampled (N). The first sample case selected is determined by multiplying the skip interval by the random start number (R), which is obtained as described for *balanced systematic sampling*. The product of the skip interval and the random start number is rounded to the nearest integer. If the rounded integer is zero, the case corresponding to the rounded skip interval is selected as the first case in the sample.

## **CALCULATIONS EXAMPLES**

Number of Records in the Sampling Frame (P) = 118

Random Start Number (R) = .261.  
Total Number of Cases to be Sampled (N) = 20.  
Skip interval (K) =  $118 / 20 = 5.9$   
Initial case selected (I) =  $.261 \times 5.9 = 1.54 = 2$  (rounded)

Record 2 in the sampling frame is the first record selected for the sample. Subsequent cases are selected using systematic sampling.

1. Select the initial sample case as described above.
2. Select the next (N-1) cases by adding multiples of the skip interval (K), rounded to the nearest integer, to the case number of the initial selection (I):  $I + \text{round}(JK)$ , where  $J = 1, 2, \dots, (N - 1)$ .

In the example, cases 2, 8, 14, 20, 26, 32, 37, 43, 49, 55, 61, 67, 73, 79, 85, 91, 96, 102, 108, and 114 will be selected from the sampling frame of 118 records.

If the last case designated for selection by the sampling algorithm is greater than the size of the sampling frame (P), the case will be selected from the beginning of the sampling frame. That is, the sampling frame will be considered to be circular. For example, if the last case selected is  $P + 1$ , the 1st case in the sampling frame will be selected.

The general rule is:

if  $(I + \text{round}(JK)) > P$ , select case H, where  $H = [(I + \text{round}(JK)) - P]$  and  $1 \leq H < I$ .

#### *Other Automated Approach*

The state may choose to use another automated method of identifying which records will constitute the sample. However, it is imperative that the formulas described on the previous pages or an alternative method approved by the National Office be used to ensure that the sample selection is non-biased.

### **Steps 4 & 5 - Select Cases and Create Sample Files**

The last steps of the sampling process involve the creation of files containing the selected sample cases. These steps use the universe file from step two and the calculated record numbers from step three to create the sample file. The calculated record numbers from step three identify which records from the universe file will comprise this file.

The sample case file must contain, at a minimum, the skeleton fields identified in ET Handbook 402. The skeleton fields for lower authority appeals are the case identification, the decision date, and the case docket number.

States are responsible for creating the programs/utilities necessary to extract the data elements for the universe files for each quarterly sample. USDOL cannot provide programming resources to write or modify sample selection routines.

The NO sampling system consists of two COBOL programs which were developed for the Tax Performance System (TPS) samples: PICKNMBR and SAMPS0nn. The TPS SAMPS0nn programs, specifically the TPS Status Determination sample selection program, can serve as a general model for the development of a sample selection program specific to the Appeals Quality program. It would require extensive modifications for use in selecting lower authority appeals samples. States are discouraged from undertaking this task.

The PICKNMBR program can be used for every sample process. The calculations performed by this program are designed to ensure a non-biased systematic sample. This program is not dependent on the method used to select sample cases.

The PICKNMBR program can be used if the universe is:

- not stored using the NO format; or if
- kept as transactions occur.

PICKNMBR Processing – The narrative below describes the processing steps that are performed in the PICKNMBR program. These processing steps are also illustrated in the flowchart format.

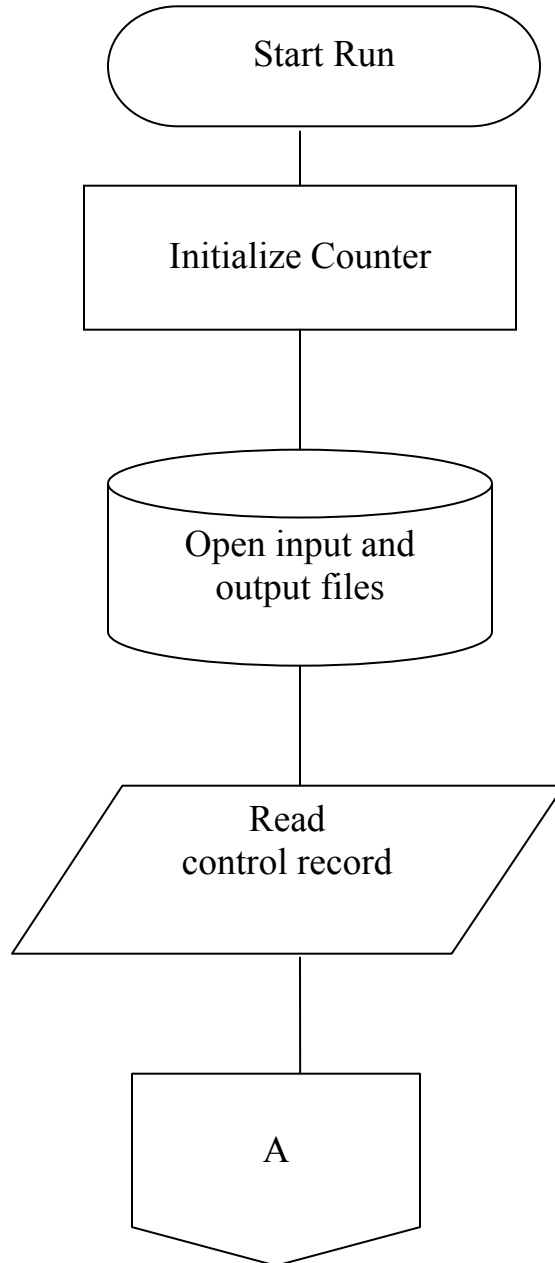
- 0000-DRIVER-ROUTINE – this section is the main routine for the program. This routine calls all of the other routines.
- 0010-LISTING-HEADING; 0020-LISTING-HEADING – these sections control printing of the report page and column header information, line count, and page advancement
- 0011-CS011, 0031-CS031, 0041-CS041, 0042-CS042, 0043-CS043, 0051-CS051, 0061-CS061 – these sections identify lower authority appeals and corresponding year/quarter fields for the activity being processed.
- 0100-OPEN-ROUTINE – this section opens the input file CNTRL-DATA, and output files SELECT-NUMBERS, PICKNUM-LIST and reads the CNTRL-DATA file.
- 0110-CNTL-OPTION – this section determines which function is being processed.
- 0120-CNTL-ERROR – this section validates the three CNTRL-DATA file fields

CNTRL-RANDOM-ALF, TRANS-REC-CNTRL-ALF, and SAMPLED-NMBR for non-numeric values. These fields must be numeric for the program to execute. To assist in the validation, a STOP-FLAG field is incremented by a certain amount. As a result, a comparison is made between the incremented STOP-FLAG and a value in the range 0 through 7. Within this range, different error messages will be displayed depending upon the error detected, and then the program is terminated.

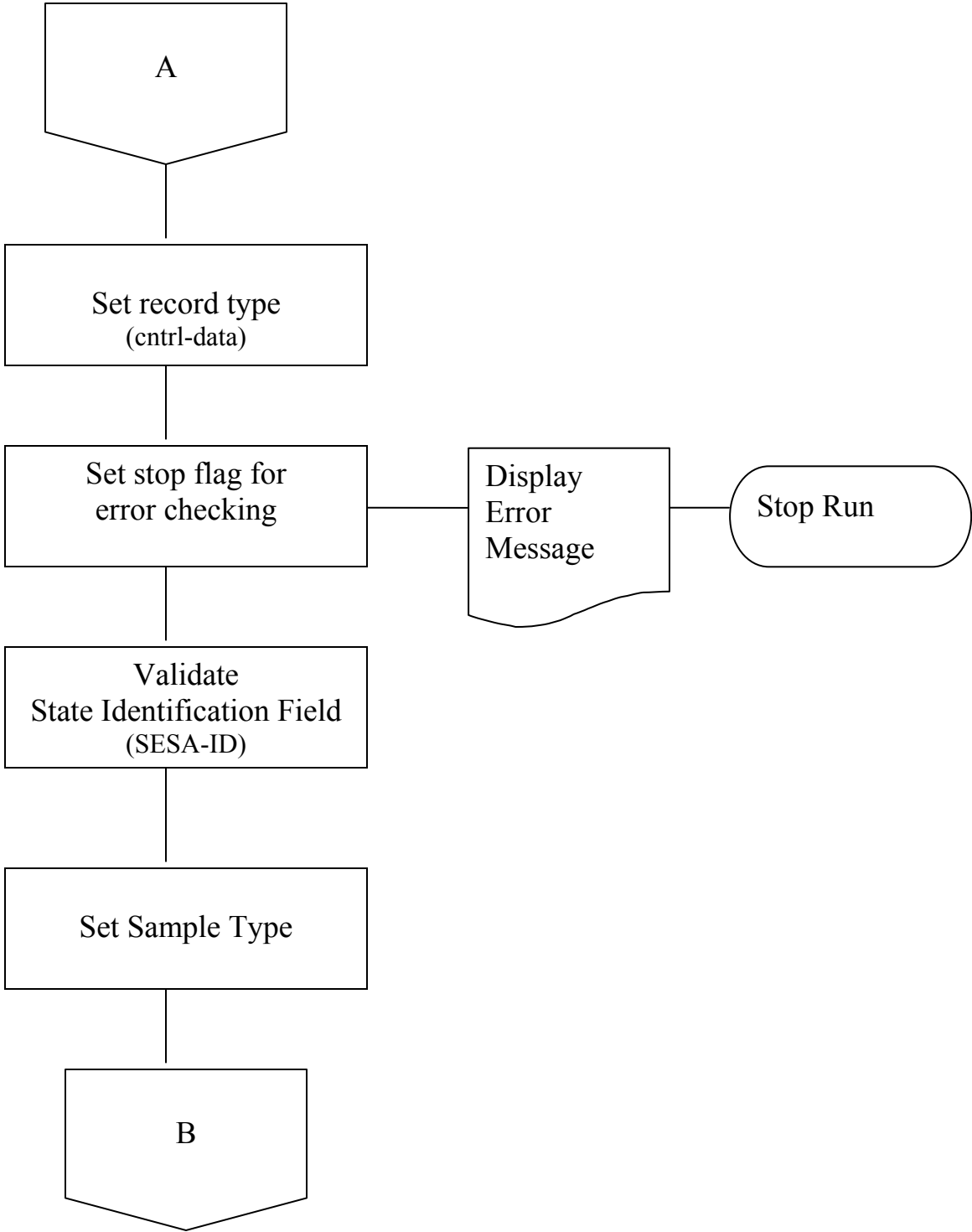
- 0130-FIPS-TABLE – this section searches SESA-ID in the FIPS table to find the exact state name associated with its abbreviation.
- 0140-SPL-TABLE – this section searches the SAMPLE-TYPE field of the CNTRL-DATA file for a corresponding match in the sample table (SPL-TYPE-DATA). If a match occurs, the sample type abbreviation is replaced by the exact sample type description to be utilized in the output report formats.
- 0200-CALC-SKIP-INTERVAL – this section calculates the SKIP-INTERVAL (K) utilizing the following  $K=P/N$ . P: the total number of records, N: sample size.
- 0300-INITIAL-CASE – this section calculates the initial sample case number (I). It is determined by truncating the result of  $I = R * K + 0.5$ . The INITIAL-CASE field (I) is defined as a 5-position numeric integer. The right side of the equation  $I = R * K + 0.5$  yields a real number, thus allowing (I) to truncate the result of the calculation. R: CNTRL-RANDOM-ALF, and K: SKIP-INTERVAL.
- 0310-CHECK-ODD-EVEN – this section determines whether the number of records (N) to be selected for the sample (SAMPLED-NMBR) is either odd or even. If (N) is odd, the 0320-ODD-RTN procedure is executed.
- 0320-ODD-RTN – this routine calculates the additional number that was described in the random function formula. The equation is as follows:  $ONE-MORE-REC = I + \frac{1}{2} (N - 1) * K$ .
- 0330-CREATE-REC – this routine writes the calculated record numbers to an output data file (SELECT-NUMBERS) and an output print file (PICKNUM-LIST). A record counter (MATCH-CNTR) is incremented by one each time a record is added to the files.
- 0400-REMAINING-NUMBER – this section performs the calculations to determine the remaining numbers for the sample. As the balanced systematic sample of the random function formula, if N is even, N/2 pairs of records are selected. If N is odd, the iteration number is as follows: 0, 1, 2, .....  $\frac{1}{2} (N - 1) - 1$  and  $\frac{1}{2} (N - 1) - 1$  pairs of records are selected.
- 0500-CALC-SKIPINTERVAL – this section will calculate the SKIP-INTERVAL-B for a transaction sample size less than 200 using the equation  $K = P/N$  (K not rounded).

- 0600-CALC-INITIAL-CASE – this section calculates the initial sample case number (I) for transaction sample size less than 200. It is determined by truncating the result of  $I = R * K + 0.5$ .
- 0700-SELECTED-NUMBERS – this section performs the calculations to determine the numbers to select for the sample. This procedure is based on the transaction sample size less than 200. The second record is calculated by adding the skip interval (not rounded) to the initial case (truncated) and rounding the result. The remaining numbers are calculated by adding the skip interval to the previous (not rounded) number and then rounding the result. This process is continued until all the records have been calculated.
- 0800-CHK-SPL-NBR – this section verifies that the number of records written to the SELECT-NUMBERS files equals the number of records to be sampled (SAMPLED-NMBR) in the CNTRL-DATA file. If these fields are not equal, the error message is displayed.
- 0900-TRAILER-LIST – this section prints the information that was used to perform the calculations and select the record numbers.
- 9999-CLOSE-FILE – this section closes the files CNTRL-DATA, SELECTED-NUMBERS, and PICKNUM-LIST.

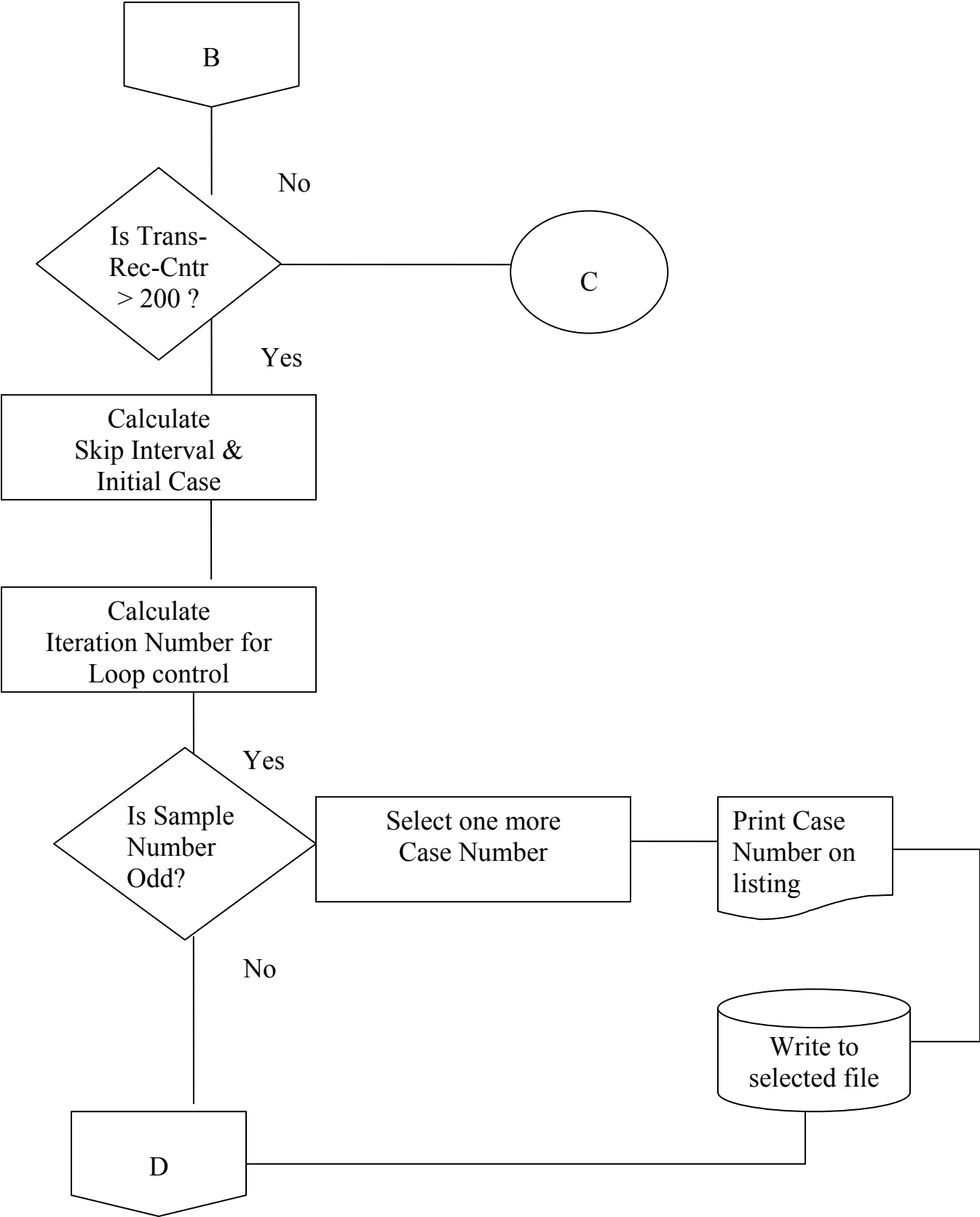
**PICKNMBR**



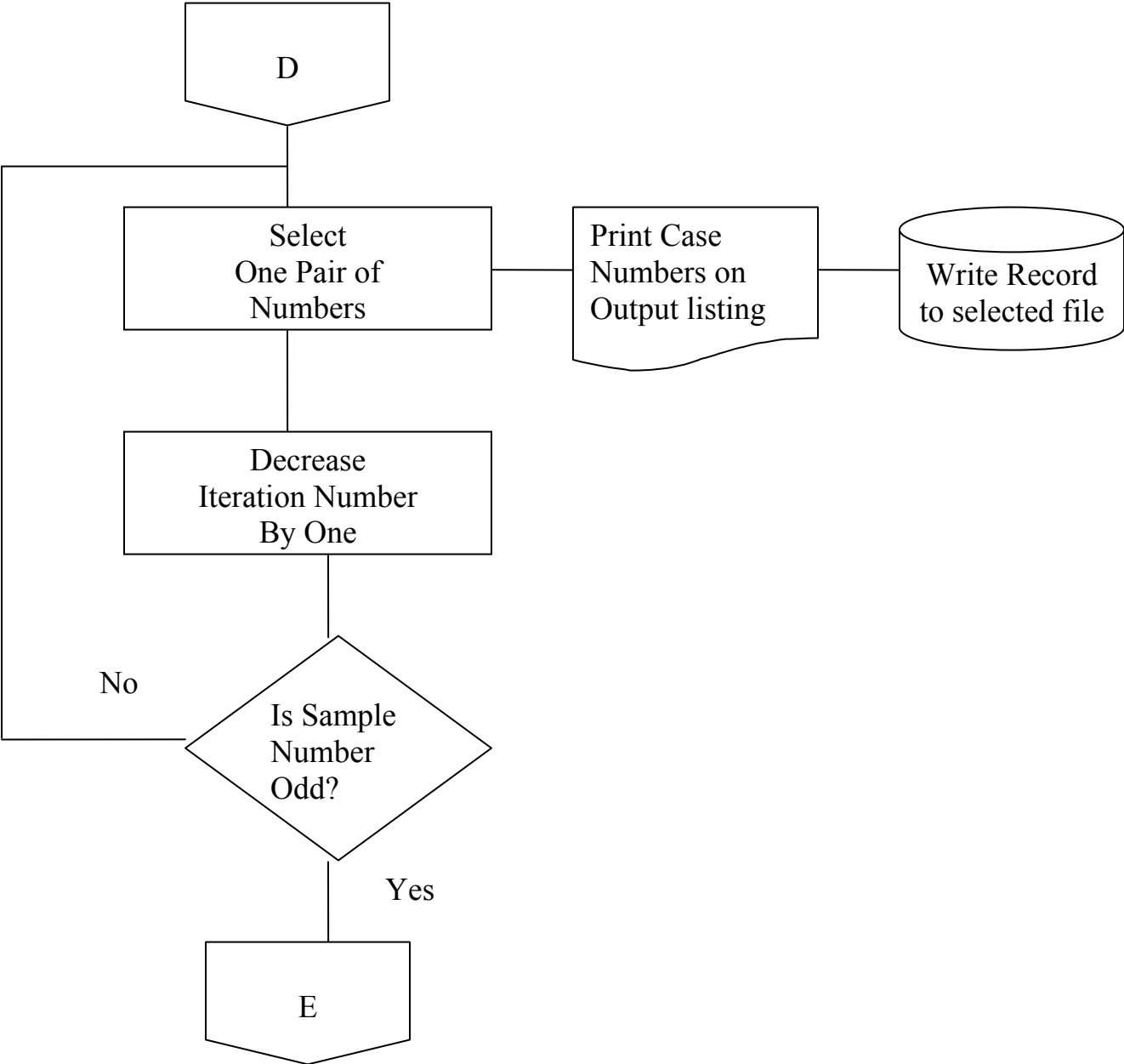
**PICKNMBR**



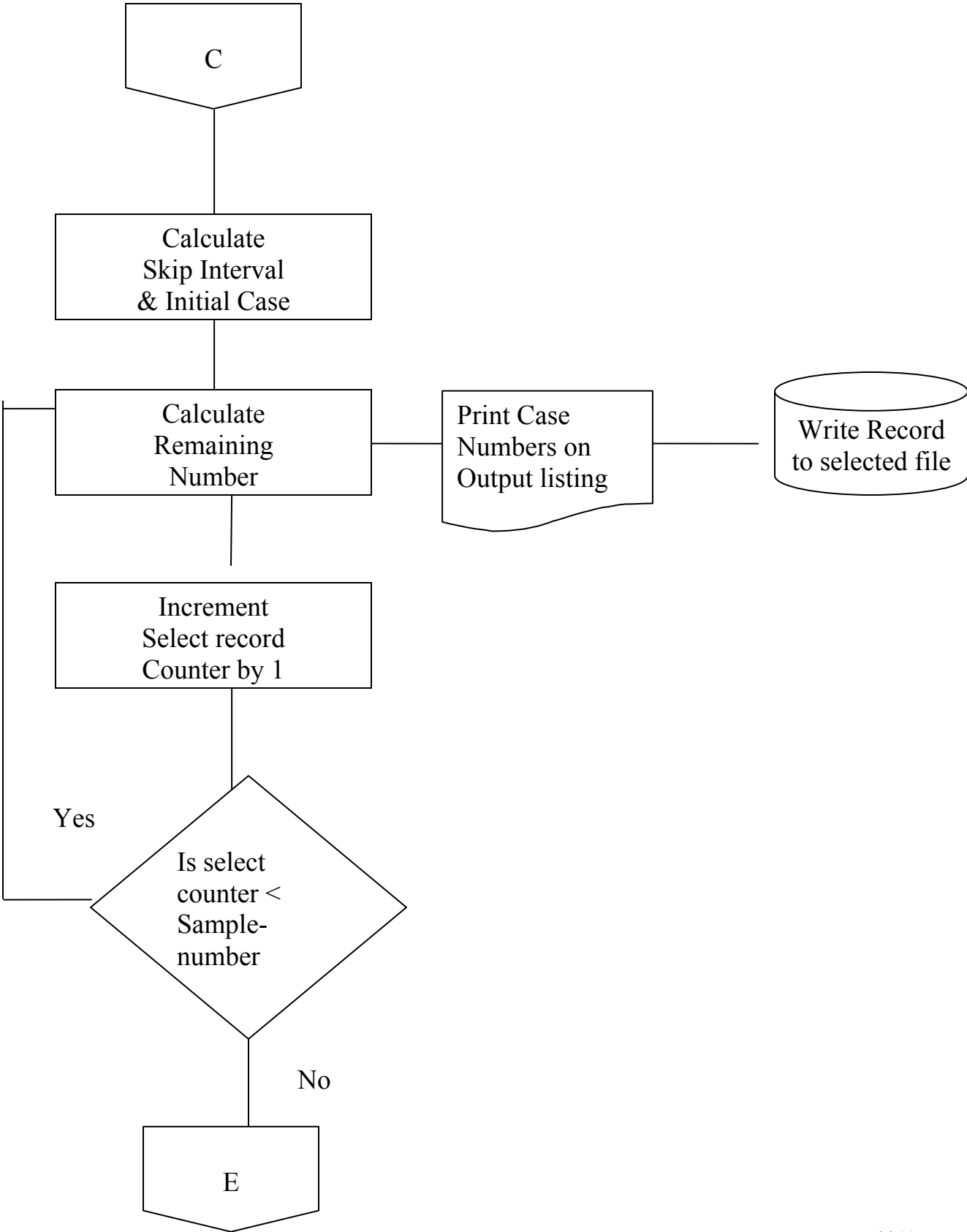




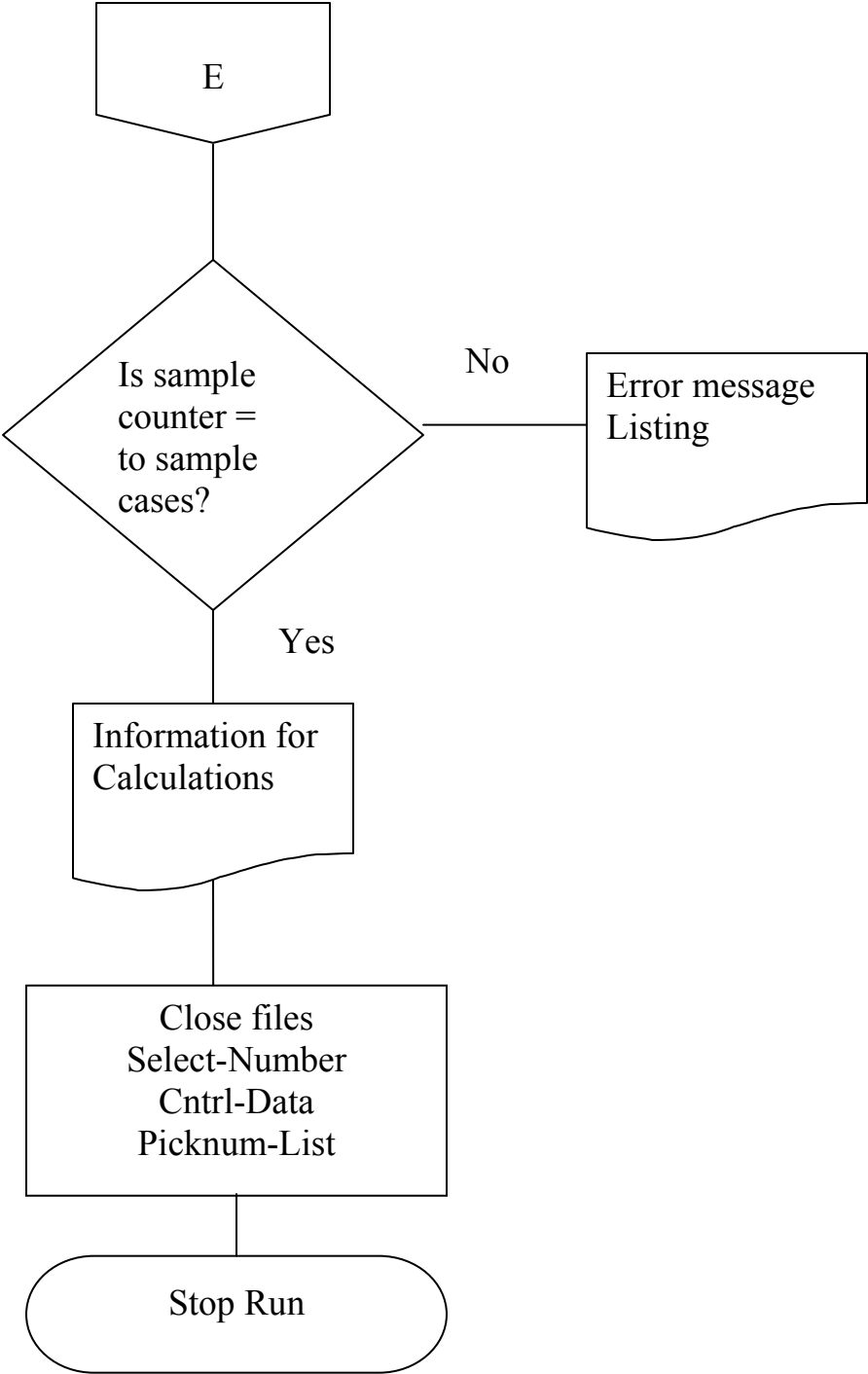
PICKNMBR



PICKNMBR



PICKNMBR



## **APPENDIX B**

### **A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures**

*The original hardcopy was produced by U.S. Department of Labor, Manpower Administration, Unemployment Insurance Service, Office of State Operations, Division of Determinations and Hearings in January 1970. The front and back cover of the hardcopy document was in the color of yellow. Most individuals refer to the Guide to Unemployment Insurance Benefit Appeals Principles and Procedures as the “yellow book.” The book is reproduced as written.*

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*ET Handbook No. 382, 3<sup>rd</sup> Edition*  
*Handbook for Measuring UI Lower Authority Appeals Quality*

A  
Guide to  
Unemployment  
Insurance  
Benefit Appeals  
Principles  
and  
Procedures



A Guide to Unemployment Insurance Benefit Appeals  
Principles and Procedures

Table of Contents

	<b>Page</b>
<b>Introduction .....</b>	<b>1</b>
<b>Fair Hearing .....</b>	<b>1</b>
<b>Purpose of the Statement.....</b>	<b>3</b>
<b>Use of Term .....</b>	<b>3</b>
<b>Administrative Appeals Hearings .....</b>	<b>4</b>
<b>Administrative Hearings Compared to Court Trials .....</b>	<b>4</b>
<b>Authority and Responsibilities of Appeal Tribunal.....</b>	<b>4</b>
<b>Uniformity of Legal Interpretations.....</b>	<b>6</b>
<b>Consistency between Benefit and Coverage Decisions .....</b>	<b>7</b>
<b>Scope of Hearing .....</b>	<b>7</b>
<b>Board of Review .....</b>	<b>8</b>
<b>Filing and Perfecting Appeals.....</b>	<b>8</b>
<b>Local Office.....</b>	<b>9</b>
<b>Form of Appeal .....</b>	<b>9</b>
<b>Time within Which Appeals Must Be Filed.....</b>	<b>9</b>
<b>Notice of Hearing .....</b>	<b>10</b>
<b>Payment of Benefits Pending Appeal.....</b>	<b>11</b>
<b>Preparation for the Hearing .....</b>	<b>11</b>
<b>Review of Appeals Case upon Receipt in Appeal Section .....</b>	<b>11</b>
<b>Time and Place of Hearing.....</b>	<b>12</b>
<b>Hearing Preparation by Appeal Tribunal.....</b>	<b>14</b>
<b>Impartiality of the Tribunal and Challenges to Interest.....</b>	<b>14</b>
<b>Withdrawals postponements, Reopenings, and Subpoenas .....</b>	<b>15</b>
<b>Interstate Appeals .....</b>	<b>17</b>
<b>Hearings and Decisions .....</b>	<b>17</b>
<b>Conduct of Hearing.....</b>	<b>17</b>
<b>Representation.....</b>	<b>18</b>
<b>Nonappearance of Parties .....</b>	<b>20</b>
<b>Record of Hearing.....</b>	<b>20</b>
<b>Decision .....</b>	<b>21</b>

A Guide to Unemployment Insurance Benefit Appeals  
Principles and Procedures

Table of Contents (continued)

	<b>Page</b>
<b>Evidence</b> .....	<b>23</b>
<b>Testimony under Oath or Affirmation</b> .....	<b>24</b>
<b>All Evidence to be Made a Part of the Hearing Record</b> .....	<b>24</b>
<b>Exhibits</b> .....	<b>24</b>
<b>Best Evidence</b> .....	<b>24</b>
<b>Affidavits and Unsworn Statements</b> .....	<b>24</b>
<b>Hearsay</b> .....	<b>25</b>
<b>Business Records</b> .....	<b>25</b>
<b>Stipulation of Fact</b> .....	<b>26</b>
<b>Presumption of Fact</b> .....	<b>26</b>
<b>Official Notice</b> .....	<b>26</b>
<b>Expert and Opinion Evidence</b> .....	<b>26</b>
<b>Privileged Communications</b> .....	<b>27</b>
<b>Self-incrimination</b> .....	<b>27</b>
<b>Meaning of Selected Terms</b> .....	<b>27</b>
<b>Burden of Proof</b> .....	<b>28</b>
<b>Mass Appeals</b> .....	<b>31</b>



# A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

## I. Introduction

This guide for appeals and hearings sets forth procedures synthesized from the experience of the several States and the principles on which such procedures are based. The procedures are sound and practical, as well as fair to claimants and to other interested parties. However, it should be understood that while the procedures expressed here are appropriate for most cases, other procedures are equally effective for some cases.

The “fair hearing” provision in section 303(a)(3) of the Social Security Act requires a reasonable opportunity for workers whose claims are denied to be heard by an impartial tribunal in an adjudicatory proceeding which assures them of elementary fairness. The “methods of administration” provision in section 303(a)(1) requires that procedures for appeals and hearings be reasonably calculated to pay benefits promptly when due. From the outset of the unemployment insurance program it has been recognized by both State and Federal officials that the mandate of these sections is for appeal and hearing procedures that take account of the circumstances of unemployed workers and the special needs of the program.

Payments of unemployment insurance are of comparatively small amounts; they represent at best a partial wage replacement calculated to do no more than pay for basic, non-deferrable necessities; and unless paid promptly they do not serve their purpose. Further, claimants are workers who are unemployed and typically are unrepresented. Finally, each agency has a great volume of claims which it must handle.

Accordingly, to be sound and practical, as well as fair to claimants and to other interested parties, appeal and hearing procedures in this program must, as one respected authority has said, be “simple, speedy and inexpensive.”<sup>1</sup> Simplicity assures that parties may know and understand their rights; it precludes formal and technical procedures which place undue burdens on parties which tend to impair their ability to protect their rights. Speed assures the prompt payment of benefits when due. Low expense means that no individual may be deprived of his rights merely because he cannot afford to retain representation or to incur other expense in the pursuit of these rights. In addition, procedures should include making all parties aware of available assistance by claims and appeals personnel, so that they may exercise, as well as understand, their rights.

### A. Fair Hearing

Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law:

- “timely notice to all claimants of every material step in the proceedings”<sup>2</sup>

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<sup>1</sup> Robert M. Benjamin, *Administrative Adjudication in the State of New York*, 1942, at page 13.

<sup>2</sup> Pacific Live Stock Co v. Oregon Water Board, 241 U.S. 440, 453 (1916).

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

- “full opportunity to be heard in respect of all that bears upon the validity, extent and priority of their claims”<sup>3</sup>
- “to hear the evidence introduced against him” and “to know the claims of his opponent”<sup>4</sup>
- “to produce evidence and witnesses” and to “offer evidence in explanation or rebuttal”<sup>5</sup>
- “to cross-examine witnesses”<sup>6</sup>
- “to make argument”<sup>7</sup>
- “evidence adequate to support pertinent and necessary findings of fact”<sup>8</sup>
- “that the decision of the Board shall be governed by and based upon the evidence produced at the hearing”<sup>9</sup>
- “that the decision shall not be without substantial evidence taken at the hearing to support it.”<sup>10</sup>

As the courts have held, however, no particular form or procedure is required to constitute due process in administrative hearings.”<sup>11</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Philadelphia Co. v. Securities and Exchange Commission, 175 F.2d 808, 817 (CA DC, 1948), dismissed 337 U.S. 901 (1949).

<sup>5</sup> National Labor Relations Board v. Prettyman, 117 F.2d 786, 790 (CCA 6, 1941); 18 ALR 2d 556. See also Whitfield v. Hanges, 222 Fed. 745, 749 (CCA 8, 1915).

Interstate Commerce Commission v Louisville & Nashville Railroad Co., 227 U.S. 88, 93 (1913). See also Svarney v. United States, 7 F.2d 515 517 (CCA 8, 1925).

<sup>6</sup> Interstate Commerce Commission v. Louisville & Nashville Railroad Co., supra. See also The Ottawa, 70 U.S. 268, 271 (1865O: Philadelphia Co. v. Securities and Exchange Commission, supra; and Svarney v. United States, supra.

<sup>7</sup> Philadelphia Co. v. Securities and Exchange Commission, supra. See also Morgan v. United States, 298 U.S. 468 480 (1936); WJR v. Federal Communications Commission, 174 F.2d 226 (CA DC, 1948), reversed on other grounds, 337 U.S. 265 (1949); and L.B. Wilson, Inc., v. Federal Communications Commission, 170 F.2d 793 (CA DC, 1948).

<sup>8</sup> Morgan v. United States, 298 U.S. 468, 479 (1936).

<sup>9</sup> National Labor Relations Board v. Prettyman, supra. See also Morgan v. United States, supra; Interstate Commerce Commission v. Louisville & Nashville Railroad Co., supra; and Whitfield v. Hanges, supra.

<sup>10</sup> Whitfield v. Hanges, 222 Fed. 745, 749 (CCA 8, 1915). See also Morgan v. United States, supra. See also Morgan v. United States, supra.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

What is required is elementary fairness—that is, that “... the course of the proceeding shall be appropriate to the case and just to the party affected ...”<sup>12</sup> The highly regarded Benjamin Report<sup>13</sup> expresses the view long held in regard to this program that “the most satisfactory procedures may call for much more than due process alone would require.”<sup>14</sup>

The recommended procedures are designed to effectuate the objectives discussed above. Whether these or other equally suitable alternatives are adopted, it should be kept in mind that more than mere form of procedure is involved:

“Not only the attitude and conduct of the administrator but the form of the procedures themselves should be directed to making the person dealt with feel that he is being fairly dealt with. There is more involved here than the simple desirability that this should be so. To a considerable degree, the successful operation of any procedure requires cooperative effort by all the parties. Procedure fair on its face will go far to enlist such cooperation.”<sup>15</sup>

Insomuch as this guide may foster those ideas and encourage simplification of appeals and hearings procedures in the States, it will have accomplished its purpose.

### B. Purpose of the Statement

Whether or not a hearing is a “fair hearing” depends on what is done, in the recognition of, and giving effect to, some right of a party. It is from this standpoint that this statement undertakes to emphasize various methods and procedures by which the goals of a “fair hearing” may be reached. The statement, however, does not purport to express requirements of Sections 303(a)(3) and 303(a)(1), although it is consistent therewith.

### C. Use of Terms

For the purposes of convenience and conciseness, the term “referee” has been used to refer to all first-appeal authorities, regardless of differences in statutory or State designation. Similarly, the term “board of review” has reference to all second-level administrative appeals bodies. In those

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<sup>11</sup> National Labor Relations Board v. Prettyman supra. See also Federal Communications Commission v. WJR, the Goodwill Station Inc., 337 U.S. 265, 275 (1949); Missouri ex. Rel. Hurwitz v. North, 271 U.S. 40, 42, (1926); and Ballard v. Hunter, 204 U.S. 241, 255-257 (1907).

<sup>12</sup> Whitfield v. Hanges, supra. See also Missouri ex rel. Hurwitz v. North, supra and National Labor Relations Board v. Prettyman, supra.

<sup>13</sup> Robert M. Benjamin, Administrative Adjudication in the State of New York, 1942, a report to the Governor of New York.

<sup>14</sup> The Benjamin Report, page 12.

<sup>15</sup> Ibid.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

instances in which the principal or recommended procedure is applicable to the functions of both a referee and a board or review, the term “appeal tribunal” is used.

### II. Administrative Appeals Hearings

#### A. Administrative Hearings Compared to Court Trials

Unemployment Insurance administrative appeal tribunals, in contrast to court judges, should actively participate in the development of the facts in a case, even where the parties are represented. Among the reasons for an appeal tribunal’s more active participation in the development of facts is the direct interest of the public in the decision of an unemployment insurance appeal. In an ordinary civil suit, the public’s interest is limited, since the proceedings usually affect only the particular individuals involved. Costs or damages, if any, will ordinarily not be paid out of the public purse. In unemployment insurance appeals, however, the public has a direct interest that benefits be paid to the eligible unemployed and that the unemployment fund shall not be depleted by payments to claimants who are not entitled to benefits.

The unemployment insurance appeal tribunal has the task of discovering the facts and making affirmative findings. It may not rely on the parties to present their cases and facts, as they understand them, without its assistance. If they do not know enough to ask the right questions, it is the tribunal’s duty to conduct the examination and to get full information into the record. These responsibilities of an appeal tribunal may be contrasted with the less active functions of a judge in a jury or non-jury adversary proceeding, where the parties must bear the burden of making out their cases.

The informal hearing process is well adapted to the needs of benefit claimants. Such claimants are usually unemployed at the time of the appeal; often they are in need of money. Any delay in the payment of benefits is a severe burden upon them. They are unversed in legal procedures and unable to make formal presentations of their cases. The sums involved, moreover, are not usually large enough to justify them in hiring lawyers. Thus, an appeal tribunal should not only supervise the hearing, in order to insure the protection of all rights, but should assume the responsibility for eliciting the facts.

Additional differences between court proceedings and the appeal tribunal hearings are the result of provisions of the State unemployment insurance laws to the effect that appeal tribunals are not bound by common law and statutory rules of evidence. Consequently, while a tribunal may receive evidence at the hearing which is not reliable, it should base its findings only on evidence which is substantial both as the quantity and quality.

#### B. Authority and Responsibilities of Appeal Tribunal

An appeal tribunal’s responsibility for adjudication requires complete independence of action on the part of the tribunal. The appeal tribunal serves, in effect, as both judge and jury. In addition, it is obligated to get the evidence by questioning witnesses and, if necessary, by subpoenaing

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

witnesses and records and ordering investigations. It is the tribunal's responsibility to get all the facts and to apply the law and the reasoning fairly and wisely. This great responsibility requires that the appeal tribunal be completely independent in obtaining facts and making decisions. Its responsibility is not lessened in any degree by the possibility that a higher authority may later review its decision. A referee, for example, has no way of knowing that this will occur when he is called on to hear and decide a specific case. In fact, only a comparatively small percentage of a referee's decisions are further adjudicated. Therefore, the referee should act—and be allowed, to act—in every instance as though this is the parties' last opportunity for a full and fair hearing and decision in that case.

Under some State laws, appeal tribunals organizationally are a part of the State agency. When is so, the appeal tribunal should make certain that such a connection does not cloud its judgment or diminish its resolution for the proper discharge of its duties. Whatever the organizational structure the tribunal's authority and responsibility for providing a fair hearing and making a proper decision remain the same.

The need for a broad authority on the part of a referee arises, in part, from the fact that the parties to the appeal, especially when they are unrepresented by attorneys, may not be relied upon to define all the issues, or to offer complete proof. A further consideration is the need to avoid needless delays in the adjudication of a case or an additional appeal on the same claim.

By way of example, if the appeal is from a disqualification imposed for voluntary leaving, the referee should be authorized. If it is warranted by the facts elicited at the hearing, to find that the claimant was not available for work. Similarly, if the record raises the issue of a work refusal by the claimant after the date of appeal but before the date of hearing, the referee should be authorized to decide that point also, assuming that the determination upon it has not become final.

An appeal tribunal should approach each case with an open mind; its concern should be to provide a fair hearing and a prompt and just decision under the law.

“(The judge) shall know nothing about the parties, everything about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friends; nothing for his patron; nothing for his sovereign. If, on one side, is the executive power, and the Legislature and the People—the sources of his honors, the givers of his Daily bread—and on the other an individual nameless and odious, his Eye is to see neither, great nor small; attending only to the “trepidations Of the balance.”—  
Rufus Choate (1853)

The importance of an appeal tribunal's attitude cannot be overemphasized; the results of its work will be, to a considerable degree, a reflection of the tribunal's attitude. It should not be impressed by the identity of the interested parties or their representatives, or by the personal conduct of such individuals at the hearing. The appeal tribunal's only interest should be to provide a fair hearing, and to make a just decision under the law.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

It is not enough for a hearing to be fair; a hearing must also give the appearance of fairness. A hearing that is technically fair, but gives an appearance of unfairness, is unfair in practical effect. An appeal tribunal which seems interested when the employer is testifying and somewhat bored when the claimant is testifying may, in fact, give the testimony of both full and fair consideration. The claimant, however, who has noticed the tribunal's apparent concern with all the employer has said, and its seeming lack of interest as soon as the claimant began to testify, is likely to conclude that the hearing is unfair.

An appeal tribunal bears the responsibility for providing both a prompt hearing and a decision. Thus, the appeal tribunal should schedule a hearing within a very short time after the receipt of the appeal. The claimant can usually ill afford to wait, and frequently is unable to attend a delayed hearing because he has various other reasons. To procrastinate the scheduling or the hearing of a case may deny the claimant a reasonable opportunity for a fair hearing and defeat a basic concept of the unemployment insurance program—the prompt payment of benefits.

### C. Uniformity of Legal Interpretations

The parties to an appeal, claims determination personnel, and the public expect reasonable consistency of principle, reasoning, and result in appeals decisions involving similar sets of facts. In attaining such a goal, decisions of higher tribunals are considered as binding upon lower tribunals, while those of coordinate tribunals may be considered as persuasive, but not binding.

To illustrate, referees, in deciding questions involving the interpretation of law, should follow decisions of the board of review and of the State courts. Decisions of fellow referees, opinions of agency counsel and of attorneys general, and agency interpretative regulations and policy statements are considered as persuasive, but not binding.

Referees should be encouraged to discuss cases among themselves in order to apply uniform interpretations. If a referee cannot agree with a fellow referee's interpretation, he should decide the case on the basis of the interpretation he believes to be correct or should refer the question to the board of review.

Following the previous interpretation of higher tribunals does not mean blind obedience by lower tribunals. The lower tribunal, for example, should compare the facts before it with those in the higher tribunal's case in order to determine if sufficient similarity of circumstances exists for it to apply the rule of the higher authority's decision.

Consistency of interpretation is not self-enforcing. It is attainable only through specific devices designed to achieve that result. A party's right of appeal is the basic device for this purpose, but it should be supplemented by procedures such as:

1. The right of the board of review to take over a case pending a referee, or one in which the period for appealing from the referee's decision has not yet expired;
2. The right of the referee to refer questions of law to the board of review;

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

3. Conference among referees;
4. Use of precedent manuals, materials and decisions;
5. Adequate training for referees.

### D. Consistency Between Benefit and Coverage Decisions

An appeal tribunal may not deny benefits to a claimant whose benefit rights are dependent upon his status as a covered worker, merely because the status of his employer was decided in an earlier employer status or contribution proceeding to which the claimant was not a party. The denial of benefits, on the basis of such a prior determination in a contribution proceeding, would deprive the claimant of a fair hearing on his claim for benefits, since he would not have been given notice and opportunity to be heard on the issue. In other words, any determination made as the result of an employer- liability proceeding is not binding on the claimant unless he was a party to that proceeding. The fair hearing requirement is as applicable to questions involving the eligibility or disqualification provisions of State laws.

State agencies, depending upon their organizational structure, utilize various methods for dealing with conflicts between benefit and coverage decisions. While some agencies decide such issues in liability hearings to which the claimant is joined as a party and other agencies decide the issues in benefit hearings to which the employer is joined, such proceedings should result in a decision which determine both the employer's liability and the claimant's right to benefits without the necessity for further proceedings. In such proceedings the information available in the employer status unit should be presented in evidence, but such information is not binding on the appeal tribunal nor is a prior decision on liability binding on the claimant or appeal tribunal in a subsequent benefit proceeding.

### E. Scope of Hearing

Appeal tribunals should be authorized to receive evidence upon, and to decide all issues or questions of law which arise during the course of the hearing, subject to the following limitations:

1. An issue which has been determined and has become final should not be re-opened—For example, assume a claimant was disqualified for a five-week period for refusing suitable work. The determination was not appealed and became final. During the five-week period, he was again disqualified for refusing another offer of work; this time he appealed. The appeal tribunal should confine the appeal hearing to the second work refusal;
2. Beyond the issue upon which the appeal was based, or other issues raised by the parties or the appeal tribunal, any other issues considered should be only those discovered as a

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

result of inquiry into matters germane to the appealed issue; in other words, the appeal tribunal should not permit a “fishing expedition: to seek out issues;

3. Any issues, over and above those set forth in the notice of hearing, should not be heard or decided without first giving notice to the parties. In providing notice to the parties of a new issue, the referee should explain that issue to the parties and advise them of their right to an adjournment, if they so desire, in order to prepare for a hearing upon new issue. If the parties are willing to continue without further notice, however, the referee should proceed to hear the new issue.

### F. Board of Review

A board of review serves as the second and final administrative appeal Tribunal on benefit issues, and has the final administrative responsibility for establishing interpretations of law. To carry out its responsibilities, the board of review should have the authority to remove to itself any appeal pending before the referee; in this connection, a referee should be authorized to certify questions of law to the board of review. While a board of review should be authorized to decide second-state appeals on the basis of the record developed by a referee, it should not be merely a reviewing body, but should take the necessary steps to complete a hearing record which is inadequate. When necessary, the board should refer a case to a referee for additional testimony or take such testimony itself.

A board of review should be liberal in the acceptance of additional evidence of additional evidence and should make any such evidence received a part of the record. When additional evidence is taken on an appeal to the board of review, the procedure should include all of the elements of a fair hearing applicable to referee hearings. The decision of the board of review should conform to the principles suggested for referee’s decisions.

## III. Filing and Perfecting Appeals

### A. Local Office

Written notices of determinations may be said to affect the appeals process. To the extent that such notices are well prepared, they enable an interested party to understand the basis for the agency’s action and to make an intelligent decision as to whether or not to file an appeal from the determination.

While this statement is not about local office procedures as such, it should be noted that local office personnel exercise a vital function in the appeal process. It is the local office staff to whom claimants, particularly, look for assistance in connection with their appeal rights, since local offices are their normal point of contact with the State agency. Local office personnel should be prepared to explain determinations which may be the subject of appeal, assist in the completion of appeal notices, and advise on such matters as the actual right of appeal, the manner and time of filing appeals, and the manner in which appeal hearings are conducted.



## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

### B. Form of Appeal

1. **Informal Filing Procedures.** Any timely written statement, signed by an interested party or his representative, indicating dissatisfaction with a determination or the party's desire for its review, should be accepted as an appeal. No specified agency form should be required to constitute a valid appeal. The procedures for filing constitute a valid appeal. The procedures for filing first-level and second-level administrative appeals should be as informal as possible. Applicable agency forms should be written in simple, non-legalistic language. The right of appeal should not be limited by requiring a detailed or legally sufficient statement of the grounds or issues for appeal, since such requirement would represent a restriction upon an unqualified right.
2. **Completion of the Appeal Notice.** Agency personnel should assist the appellant in completing the appeal form or notice, particularly if reasons are required by statute in the development of a concise statement of the reasons for appeal. The appeals request should be signed by the appellant or his representative. It should include information upon which the appeal tribunal might determine the timeliness of the appeal and identification to facilitate the assembly of the pertinent records.

If the statute gives the board of review discretion to accept or reject applications for review on the basis of the adequacy of the reasons for requesting a review, the appellant should be advised to include his reasons for appeal, and he should be furnished with necessary assistance.

3. **Filing Appeal by Mail or Personal Delivery.** Interested parties should be allowed to file an appeal by mail or by delivery (in person or by messenger or agency) at any employment security office.

### C. Time within Which Appeals Must be Filed

An appeal should be considered to have been filed as of the time of mailing or delivery to any employment security office of any written statement, signed by the appellant or his representative, indicating dissatisfaction with a determination or the party's desire for its review. An appeal, so initiated, should be considered timely if it was made within the period of time established under State law for the filing of an appeal.

Under State law contrasting considerations have entered into the establishment of the time limits within which appeals may be filed from initial determinations and from first-and-second-level administrative appeals decisions. On the one-hand, there is a need for a short appeal period, since benefits may not be payable until a determination has become final. On the other hand, there is need for sufficient time for an interested party to consider whether he wishes to exercise his right of appeal or to seek advice on appealing.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

A few situations relating to the timeliness of appeals are discussed below:

1. Although an appellant may be required to complete an appeal form before a hearing is held, the date of that form does not necessarily determine the timeliness of his appeal. If a written statement indicating the appellant's intention to appeal was made previously, the timeliness of the appeal should be determined by the date of the earlier statement.
2. An appeal should be considered to have been filed as of the date of its delivery to any representative of the agency or, if mailed, as of the date of the postmark on the envelope. An appeal that is mailed but has no postmark date should be considered if, on the basis of customary mail delivery practice and of the actual date of delivery, it may be presumed to have been mailed within the appeal period. The appellant should not have to incur the risk of delays in the delivery of mail or of any errors by the agency in dating or routing the appeal.
3. An appeal tribunal should be authorized to disregard delay in perfecting an appeal within the prescribed period, when such delays result from circumstances beyond the appellant's control. If an appeal is filed late because of some agency error, for example, the appeal should be deemed timely.

### D. Notice of Hearing

Parties should be given adequate and timely notice of proceedings that may affect their rights.

The notice of an appeal hearing may be the first direct communication from the appeal tribunal to the parties. Because it plays an important part in enabling the parties to understand the hearing process, it should be prepared with care.

1. Content of Hearing Notice. The appeal tribunal's notice of hearing should state clearly:
  - a. the calendar date and the specific hour of the hearing;
  - b. the place of hearing—street address, floor, and designated room;
  - c. the purpose of the hearing and a statement of the issues, including references to the applicable statute, rule or regulation;
  - d. the necessity for attending the hearing and the disadvantage resulting from failure to attend;
  - e. such procedural rights as the right to present testimony and other evidence to relative to the appeal, to bring and to subpoena witnesses and records; to be represented; to submit briefs; to present oral argument; to challenge the appeal tribunal's interest;
  - f. information concerning requests for postponement, continuation and reopening of the hearing; and

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

g. advice as to where further information or assistance may be obtained.

Since the hearing notice may be the appeal tribunal's only prehearing communication with the parties, it may be used also to request information as to whether a party will attend the hearing and, if not, whether he wishes to withdraw the appeal, or to postpone the hearing.

2. Time Allowed to Prepare for Hearing. Hearing notices should be mailed to the interested parties sufficiently in advance of the hearing date to enable the parties to prepare for the hearing and to make any necessary arrangements for their representation and for the attendance or witnesses, but not so long that the parties may forget about the hearing. One to two weeks' notice is sufficient. Regulations often prescribe a minimum of seven days' notice.

### E. Payment of Benefits Pending Appeal

The payment of benefits not in dispute at the time an appeal is filed should not be delayed pending a decision upon the appeal. For example, if the appeal involves only the question of whether the claimant's weekly benefit amount should be higher, that portion of the benefit amount which is not in dispute should be paid immediately without regard to the pending appeal.

Similarly, if the only apparent issue in an appeal is the propriety of a given period of disqualification or of ineligibility, the claimant should be paid benefits for those weeks claimed following the disqualification period and preceding a decision on the appeal. For example, where the disqualification in issue is for a fixed period of six weeks benefits should be paid to an otherwise eligible claimant for the seventh week and thereafter. If the disqualification period is variable as from one to ten weeks, benefits should not be withheld after the tenth week.

Withholding or benefits not in dispute penalized a claimant who files an appeal. If he had decided to accept the disqualification and not to appeal, he would have been paid the benefits not to dispute. He should be paid such benefits even if he files an appeal.

## IV. Preparation for the Hearing

### A. Review of Appeals Case Upon Receipt in Appeals Section

After an appeal has been received and recorded in the appeals section, it should be reviewed to ascertain what actions are necessary to ready the appeal for hearing. Care should be taken that the entire administrative file (local office file and that of any other agency office having pertinent information) is obtained. A complete file will be better understood and might serve to avoid delays in the later processing of the appeals.

When the review discloses a need for the attendance at the hearing of agency personnel or other individuals, aside from the interested parties, a request should be made for such individuals' presence at the hearing. Subpoenas should be issued as necessary.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

A word of caution may be needed as to those appeals which appear, on the surface, to be untimely. Such an appeal should not be dismissed automatically but, instead, should be scheduled for hearing so that the appellant will have the opportunity to establish that the appeal had been filed timely or, if permitted by State law, that he had good cause for the untimely appeal.

### B. Time and Place of Hearing

Ordinarily, hearings should be scheduled in the order in which they are received, and at the locations to which the claimants report and file their claims for benefits. In the great majority of instances, hearings are scheduled with the expectation that all parties in interest will attend the same hearing.

1. **Controlling Considerations in Scheduling Hearings.** A definite time and place for hearing should be set for each appeal. Controlling considerations should be the prompt disposition of the appeal and the selection of a place of hearing which is reasonably convenient for each of the parties.
2. **Scheduling Hearing in Thinly Populated Areas.** When claimants are widely scattered in thinly populated areas, a choice must sometimes be made between holding hearings promptly or holding them nearer the claimant's residence. In such cases, the appeal tribunal may request claimant's to travel greater distances than usually required, so that it may concentrate enough hearings at a single location to justify hearings there. Care must be exercised to assure that the advantages of an earlier hearing are not outweighed by travel time, cost, or distance sufficient to deter claimants from appearing. A choice should be offered to claimants in such cases, as to whether they prefer a prompt hearing at some distance from home, or a less prompt one at a closer location, but in no case should claimants be required to expend unreasonable amounts of time and money to attend hearings.

In some instances, the interested parties may be willing to forego the Statutory time allowed for preparation for the hearing in order to take advantage of the appeal tribunal's presence in the locality and to receive an earlier hearing in order to take advantage of the appeal tribunal's presence in the locality and to receive an earlier hearing than otherwise would be possible. In obtaining such consent, the appeal tribunal should assure itself that dispensing with the customary notice would not deprive the parties of the opportunity, necessary for the fair hearing process, to make adequate preparation for the hearing.

3. **Scheduling Hearings in Metropolitan Areas.** In metropolitan areas where suburban residents often work in the suburban work areas, greater promptness in hearings may be achieved through the scheduling of hearings at a single, or central location. When a central hearing location is not feasible because local travel patterns, costs, and parking problems, etc., would cause hardship to many claimants, hearing locations which conform to local claims office patterns are recommended.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

4. Separate Hearings (Intrastate Appeals). Ordinarily, claimants and interested employers will attend a single hearing. a single hearing ordinarily should be held, most often at or near the office in which the claim was filed. The selection of such a hearing location is justified to assure claimant a reasonable opportunity for a fair hearing, and because an employer is normally better able to afford the travel than an unemployed claimant. In some instances, employer at a single hearing may not be feasible, as in the case where the places of residence (or business) of the claimant and the employer are a considerable distance apart and it is impracticable for a employer to attend a hearing at a place convenient for the claimant.

- a. When Separate Hearings May be Scheduled. Separate hearings may be scheduled only when the distance involved makes it impracticable for the employer to attend a hearing at a place convenient for the claimant, or in other special circumstances such as the inability of a necessary witness to attend a single hearing. Further, even though the distance or the circumstances involved might justify separate hearings, a single hearing should always be held if the parties agree.

Separate hearings may be scheduled only if the procedure followed preserves the essential rights of the claimant. Necessarily, therefore, the authority to allow separate hearings should be discretionary with the referee and strictly limited.

- b. Order of Scheduling Separate Hearings. The order in which separate hearings are scheduled should be determined by the nature of the issue in the appeal; i.e., the first testimony should be taken from the party that can offer evidence essential to the existence of that issue, so that the other party may understand and respond. For example, in “discharge” cases, the employer’s testimony normally should be taken first; in voluntary leaving cases, the claimant’s testimony should be taken first. Regardless of the scheduling order, the claimant must have the opportunity to know the evidence and arguments received at the hearing for the employer. He must also have an opportunity to explain and to rebut the evidence and arguments and to cross-examine the witnesses who testified at the hearing, either by submitting questions for that purpose, or where necessary, by a further hearing.
- c. Procedure for Second Hearings. Whenever possible, separate hearings should be conducted by the same appeal tribunal. In the second hearing, the appeal tribunal should make available the testimony, other evidence, and arguments presented in the first hearing; it should afford the party who did not attend the first hearing the opportunity to present evidence and arguments and to test the probative value of the evidence presented at the first hearing. All exhibits admitted as evidence in the first hearing should be available for use at the second hearing.
- d. Rights of All Parties to be Protected. In the situation under discussion, one interested party frequently will not be in attendance at the particular hearing. Accordingly, the appeal tribunal must be alert to the need for protecting the rights encompassed by “fair hearing” for all parties, including the party not present.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

This includes the right of a party to submit interrogatories for the purpose of examination and cross-examination in appropriate situations, to have adverse witnesses cross-examined by the appeal tribunal, and to know and to rebut evidence and arguments submitted by other parties. Whenever it appears that rebuttal testimony is needed, an additional hearing should be held for this purpose.

- e. Notices of All Hearings to Each Party. Each party should receive notice of each hearing scheduled in the case, regardless of whether it is expected that he will attend a certain hearing. The notice to a party not expected to attend a hearing should include the basic purpose of the hearing, and a statement that he need not attend but may if he wishes to do so.
5. Physical Arrangements for the Hearing. Consistent with the concept of an appeal tribunal's impartiality, the hearing location should be in a neutral place, preferably in a separate room. The hearing room or space should not be used by other personnel for the transaction of business while the hearing is in process. The hearing may be held informally at a desk, but a table at which the parties can be comfortably seated is preferable. The desk or table should be cleared of all papers and files not connected with the case being heard. The room should be free of lighted, and large enough to accommodate the number of individuals usually in attendance.

### C. Hearing Preparation by Appeal Tribunal

The appeal tribunal's own preparation for hearing a case should include a pre-hearing review of the entire case record. In making such a review, the appeal tribunal should note any apparent discrepancies in the information previously obtained. It should determine what lines of inquiry are needed to ascertain the salient facts as expeditiously as possible.

### D. Impartiality of the Tribunal and Challenges to Interest

The essence of a fair hearing lies in the manifest impartiality of the appeal tribunal. An appeal tribunal should be free not only of any personal interest or bias in the appeal before it, but also of any reasonable suspicion of personal interest or bias.

Any party to an appeal should be allowed to challenge the interest of the appeal tribunal assigned to hear his case at any stage of the process until the decision becomes final. Unless the challenge to interest clearly is a nuisance or dilatory action, another tribunal should be assigned to hear the case. If the challenge is made after a hearing has been held, a new hearing should be scheduled before another referee, who would then decide the case; or the appeal may be removed to the board of review for decision on the basis of the record any additional evidence which the board may consider necessary. If a party challenges the interest of a referee after he has issued his decision, the challenge should be considered as an appeal to the board or review.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

The conduct of an appeal tribunal in the hearing room and in the presence of the parties should be highly circumspect; demonstrating at all times its lack of personal interest or bias in the proceedings before it.

### E. Withdrawals, Postponements, Reopenings, and Subpoenas

1. Withdrawals. A request for withdrawal should not be granted automatically for several reasons: withdrawal may be contrary to the best interest of the party requesting it' or the request may be based upon misunderstanding or misinformation; or granting the request may give finality to a clearly erroneous benefit determination.

An interested party's request to withdraw his appeal should be granted whenever the appeal tribunal is satisfied that; (a) the party understands the effect which a withdrawal of the appeal would have; (b) the request is not the result of any coercion, collusion, illegal waiver of benefit rights or of other violations of law, and (c) the benefit determination is not clearly erroneous.

2. Postponements, Adjournments, and Continuances. Fairness and promptness are the key factors in deciding whether to allow requests for the postponement, adjournment or continuance of a hearing.

Ordinarily, a party's request should be granted if it is based, for example, on his need for additional time to obtain necessary evidence, and should be denied if it is clear that it is merely a delaying action. Often, however, requests for postponements and continuances are the result of conflicting commitments of the parties, their representatives, or of their witnesses because such requests pose difficult questions for an appeal tribunal, it is important to try to avoid full information as to the nature of the hearing and the evidence that will be sought. Careful scheduling of hearings and notice period are helpful in reducing requests for postponement and rescheduling of the hearing.

3. Reopenings. In a case where the parties appeared at the scheduled hearing, the reopening of the case for taking further evidence before a decision has been made is within the appeal tribunal's discretion. Thus, an appeal tribunal may reopen a case and schedule an additional hearing on its own motion, in order to avoid making a decision based upon inadequate facts.

Reopenings may, on the other hand, be necessary to insure a reasonable opportunity for a fair hearing to a party who did not attend the scheduled hearing because he did not receive notice of the hearing in accordance with the requirements of the State's law and regulations or for other good cause (see UIPL 853 on reopenings). Lack of notice would invalidate the rest of the process—the hearing and decision—upon the protest of the party who failed to get the necessary hearing notice. Necessarily, that party should have the right to reopening upon a request made within a reasonable time after he had been made aware that the hearing was scheduled or held.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

A party may have other good cause for not attending a scheduled hearing. What is “good cause” is necessarily a judgmental matter. Some “causes” are clearly “good” beyond dispute others are not; some causes can be determined “good” only on the basis of what a reasonable man would do if he were in the party’s circumstances. If there is any real doubt, the hearing should be reopened and the matter heard on its merits.

The parties must have a reasonable period of time in which to apply for reopening. What is reasonable depends upon the circumstances in the particular case. Ordinarily, a period of 7 to 10 days after the scheduled hearing appears to be a reasonable time within which to entertain requests.

4. Subpoenas. A subpoena is a legal order requiring the person to whom it is addressed to appear at a specific time and place to testify as a witness. A subpoena duces tecum requires the designated person to produce at a hearing specific documentary evidence such as books, papers, or records. Subpoenas represent a compulsory process for obtaining evidence which might not be obtainable otherwise. Where a subpoenaed party fails to appear at a hearing, it may be necessary to resort to the courts to compel attendance. A party’s request for issuance of a subpoena should be granted freely, unless it is clear that such a request is unreasonable, frivolous, made for the purpose of harassment, or is not needed to secure attendance of a witness or production of documents.

In order to expedite the appeals process and to avoid postponements or additional hearings, parties should be encouraged to submit subpoena requests enough in advance of the hearing so that the subpoenas may be timely issued and served. Because such advance requests are not always feasible, however, parties must be free to request and have subpoenas issued at any time before the close of the hearing.

Certain costs—such as the process server’s fee and the tender to the witness of his daily attendance and mileage fee—are usually involved in the service of subpoenas. It is not reasonable to expect claimants to pay or advance these costs or to assume the burden of making such service themselves. If the claimant were to bear such costs or else be unable to obtain service of a subpoena he has requested, his right to a subpoena would in effect depend upon his ability to pay for its service. Such a result would infringe on his opportunity for a fair hearing since it would hamper him in obtaining evidence. Appropriately, the costs of claimant’s subpoenas are payable out of granted administrative funds.

Subpoenas (personal and duces tecum) may be issued, not only as the request of a party, but also on the appeal tribunal’s own motion. Such authority is necessary to enable the tribunal to discharge its responsibility for eliciting all pertinent facts. Parties should be given adequate advance information, not only as to the nature of the hearing and of the evidence that will be sought, but also as to the tribunal’s authority to issue subpoenas desirable in that it services to reduce the necessary evidence; this is desirable in that it serves to reduce the necessity for actually exercising authority.



# A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

## F. Interstate Appeals

Interstate Appeals should be processed in accordance with the procedures set forth in Chapter 8000, Part V of the Employment Security Manual.

## V. Hearings and Decisions

### A. Conduct of Hearing

1. Public Hearings. The requirement that unemployment insurance benefit insurance benefit appeal hearings be open to the public is an attribute of fair hearing reflecting historic Anglo-American objections to a star-chamber type of proceeding. Public access to the hearing provides assurance that the parties will be treated fairly by the appeal tribunal.

Essential as it is to fair hearing that the hearing normally be open to the public, it is equally necessary that the appeals tribunal have authority either on its own motion or at the request of a party to close the hearing to the public for good cause. When testimony to be presented is expected to deal with intimate or scandalous matters, for example, the appeal tribunal may reasonably conclude that there is good cause to exclude the public from the hearing.

2. Informal but Dignified Hearings. The hearing should be conducted in an informal manner, but with dignity and decorum. Informality, in this sense, is not inconsistent with orderliness, and means only an absence of unnecessary technicalities. It provides flexibility that enables adjustment to various circumstances, such as a participant's ability to present information.

The appeal tribunal should maintain control of the hearing and make it move forward in an orderly manner. Mannerisms suggesting impatience, or the lack of time for a full exploration of the facts, should be avoided.

The appeal tribunal should listen with perception to information presented by the parties. The tribunal is equally responsible for creating a relaxed and undisturbed atmosphere which is conducive to the free flow of information, for aiding the parties in presenting their cases, and for obtaining, through its own participation, all necessary facts.

3. Reception of Hearing Participants. When the hearing is called, the participants should be admitted politely to the hearing location. The reception should be pleasant and reassuring to the parties and witnesses. Effort should be made to acknowledge the presence of each individual by word; motion, or visual contact. The appeal tribunal should look for indications of timidity or lack of assurance by any of the participants. It unobtrusively should provide assuring directions as to where they should wait, and the manner in which

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

they will be advised of the start of the hearing. Whenever possible, it should offer an approximation of the length of time they will be required to wait for the hearing.

If a party is absent at the time set for hearing, the appeal tribunal should wait a reasonable time (at least 15 minutes) before starting the hearing. A party arrives after the hearing has begun but before it has concluded, should be given a summary of what has previously occurred.

4. The Hearing Process. The appeal tribunal should identify itself by name and title, and should address all participants by their formal names, never by first names or nicknames. Even though the appeal tribunal may know the agency personnel, the claimant, the employer or their representatives, it should avoid personal conversations or other conduct at the hearing which might suggest camaraderie detrimental to objectivity or fairness.

The appeal tribunal should begin the hearing by summarizing the record and the issues, and should explain the manner in which the hearing will be conducted. Such explanations should be adapted to the needs of each hearing situation.

Especially when one or both parties are represented, questions may arise as to the sequence of testimony. In view of the many and diverse factors to be considered, the sequence of receiving testimony should be left to the appeal tribunal's discretion. Ordinarily, the appeal tribunal should hear first the existence of the issue in the appeal. For example, in "discharge" cases, the employer's testimony normally should be taken first; in voluntary leaving cases, the claimant's testimony should be taken first.

The appeal tribunal should avoid using technical legal terms, especially when a party is not represented. When such terms are used, a simple, nontechnical explanation of their meaning should be given the unrepresented parties.

Parties are entitled to cross-examine opposing parties and witnesses. Appeal tribunals may also cross-examine to meet their responsibilities for establishing the facts in a case. An appeal tribunal should avoid the attitude and tactics often associated with cross-examination in adversary proceedings, and adopt, instead, techniques better described as "examination for the purpose of clarifying evidence."

Before the hearing is concluded, the appeal tribunal should ask each party whether the wishes to present argument and it should explain that argument affords the parties an opportunity to present their views as to a proper decision in the case, as well as the reasons for their views.

### B. Representation

1. Right to Representation. A party should have the right to be represented in an appeal. Without representation, he would be limited to his own abilities and the assistance which an appeal tribunal may afford him in the handling of the appeal and in the presentation of

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

his case. An appeal tribunal, however, may exclude from the hearing any representative whose conduct is unethical or disruptive.

To protect claimants, fees payable to their representatives for services should either be limited in amount or made subject to approval by the appeal tribunal.

2. (a) Representation by Legal Counsel. A party has the right to be represented by legal counsel in an appeal.

(b) Representation by Lay Personnel. If permitted by State law, representation by individuals who are not lawyers should be allowed. The informal character of the proceedings makes this both feasible and desirable.

If under State law representation may not be by individuals who are not lawyers, care should be taken not to exclude from the hearing individuals who, although they may not qualify as representatives, may nevertheless have information which would make them useful as witnesses.

3. Legal Aid Services for Claimants. While a referee is responsible for assisting all parties as necessary to assure them fair and equal treatment, situations may arise in which an indigent claimant may wish representation by counsel. In such instances, the appeal tribunal should know enough about legal aid services available to such persons so as to advise him how such services might be obtained.

4. Appeal Tribunal's Responsibility to Parties – Represented and Unrepresented. An appeal tribunal's responsibilities remain the same, whether or not one or more of the interested is represented at the hearing. Thus, the appeal tribunal should guide the development of the case and control all questioning. Beyond this, the tribunal should participate directly in the interrogation process, as necessary, to assure (1) that the hearing is fair to all parties (2) that it is conducted expeditiously, and (3) that all facts necessary for a proper decision are obtained.

When only one party is represented, the appeal tribunal has a greater responsibility to interrogate the unrepresented party, not only from the standpoint of developing the facts, but also to assist him in presenting fully his side of the case. It is equally important that the tribunal assist the unrepresented party to cross-examine and to oversee and control the questioning of an unrepresented party by the representative of the other party.

Notwithstanding an intensive direct examination of a party by his own representative, it is good practice for an appeal tribunal to direct additional questions to such a party in order to make certain that the necessary factual information has been obtained. A subsidiary advantage of such questioning, in some cases, might be the added assurance to an unrepresented party that no undue advantage had been taken of him as the result of his lack of representation.

In some instances, both parties may be represented by counsel. When the counsel for each party is well versed in unemployment insurance law, procedures and precedents,

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

there may be less need for the appeal tribunal to interrogate. At the same time, the appeal tribunal should maintain control and guide the development of the case, rather than merely permit opposing counsel to “fight it out.” To the extent that any representative fails to elicit the necessary information, the appeal tribunal should interrogate to develop this information.

### C. Nonappearance of Parties

Appeals should not be dismissed automatically because one or both of the parties fail to appear at the hearing. The appeal tribunal should award or deny benefits only if the ascertainable facts justify it.

If one or both parties fail to appear, the appeal tribunal should proceed with the hearing and obtain the testimony of those present. On the basis of the testimony and the record, the appeal tribunal may decide the case. It should reopen the case, however, upon receiving a timely request and a showing of “good cause” for nonappearance. However, if the appeal tribunal finds that additional evidence is needed for the proper adjudication of the claim, it is the obligation of the appeal tribunal to postpone the hearing in order to secure the testimony of the parties or witnesses or the documentary evidence which is needed.

If neither party appears at the hearing, and the record consists solely of the administrative file, the appeal notice, and the notice of hearing, the appeal tribunal should issue a notice of dismissal of the appeal which contains a notice of right to reopen.

### D. Record of Hearing

1. Developing the Hearing Record. The hearing record compiled by an appeal tribunal must be clear and complete. Such a record becomes the basis for the Appeal tribunal’s findings of fact and may become the record that is reviewed by the board of review or a court. It is essential, therefore, that the appeal tribunal prepares the hearing record with great care.

Evidence must be in the record to support each of the findings of fact. All documents considered by the appeal tribunal in making its decision, including the administrative file, should be expressly received for the record and clearly identified. Testimony should be given under oath or affirmation and should be recorded verbatim. The record should clearly show the identity of the person speaking and of those of whom he speaks. For example, persons referred to as “he” “you,” etc., should be identified for the record. Further, proper names should be spelled out for the record when they are first mentioned.

2. Transcript of Record. The record of the hearing need not be transcribed unless there is a further appeal. When the record is transcribed, the parties to the appeal should be given an opportunity to read and copy the transcript and the contents of the case file. They should also be given the opportunity to correct the record and transcript in connection

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

with an appeal. If informational material is given to parties they should be advised of these rights, and the right to purchase a copy of the transcript, authorized by the State law or practice.

### E. Decision

1. Need for a Written Decision. An appeal tribunal's decision should be in writing. It serves many purposes, the most important which is to help the parties to understand the outcome of the case and the findings of fact and conclusions of law upon which the decision was based. It is only through such an understanding that the parties have an adequate basis for deciding whether to institute a further appeal. For the State agency, the appeal tribunal's decisions show how the law is applied to various sets of facts, and so serve as a guide today-to-day administration. For the public, the appeal tribunal's decisions illustrate, in a specific way, just how the program works. Finally, if an appeal is taken to the courts, the inclusion of clear and convincing reasoning in an appeal tribunal's decision will explain and support its findings of fact and conclusions of law.

To accomplish these purposes, the decision should be written in clear, nontechnical language that will be understood by laymen. The decision should include all essential points and should omit nonessential detail.

2. Prompt Preparation of Decision. It is essential that an appeal tribunal's decision be prepared promptly, since benefits in dispute may have been withheld pending the outcome of the appeal. It is administratively desirable, if only for guidance, to fix a specific number of days after the conclusion of the hearing within which the decision should be written and issued.
3. Content of Decision. It is not essential that a particular format be followed in the preparation of a decision. However, the decision should contain the following information;
  - a. the names and identification of the parties;
  - b. appearances;
  - c. recital of jurisdiction of appeal tribunal;
  - d. decision number;
  - e. date of appeal;
  - f. place and date of hearing;
  - g. date of mailing decision,
  - h. authority making decision;
  - i. a brief recital of the decision under review;

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

- j. a clear statement of the issue(s) involved, i.e., of the subject matter in controversy;
  - k. the appeal tribunal's findings of fact and conclusion of law;
  - l. a statement of rationale, explaining why the facts found lead to the conclusions of law which were reached;
  - m. the administrative action taken, e.g., the extent to which benefits are allowed or disallowed, directions to the administrative agency for further proceedings, or other orders for disposition of the appeal;
  - n. a statement (notice) of right to further appeal and the time limit for filing appeal; also, information as to the places and methods of filing appeal should be contained either in the notice of appeal rights or in separate informational material referred to in the notice. If the State law permits extension of the appeal period for good cause, such information also should be given.
4. Findings of Fact, conclusions of Law, and Reasoning. Well developed decision of an appeal tribunal contain findings of fact, conclusions of law, and reasoning. Each of these elements is considered below:
- a. Findings of Fact. The appeal tribunal's written decision should contain all relevant findings of fact supported by the record, and only such findings. Thus, before starting to write or to dictate its decision, an appeal tribunal first should make a careful review of the evidence. It is the appeal tribunal's responsibility to consider the reliability of the evidence offered, and the inherent probability or improbability of its truth. Accordingly, it is necessary that the tribunal evaluate the credibility of witnesses, including as necessary that the tribunal evaluate the credibility of witnesses, including as necessary, their character, reputation, and demeanor, as well as the actual testimony received from them.  
  
The facts which the evidence establishes should be recited, not the testimony. The findings need not be elaborate in form or content, but should be complete, concise, and stated in specific terms so as to support the conclusions of law.
  - b. Conclusions of Law. A conclusion of law represents the appeal tribunal's application of law to the findings of fact in a particular case. There should be conclusions of law each of the elements of proof required to support the decision on each of the issues.
  - c. Reasoning. An appeal tribunal should include in its decision a statement of its reasoning, even though the reason may appear self-evident. The reasoning explains the decision. It serves to bridge the gap between the findings of fact and the conclusion of law. Example: The claimant left work without notice to the employer because he heard a rumor of an imminent layoff. He was held to have left work voluntarily without good cause. Rationale. When he left without

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

notice, he foreclosed any opportunity for the employer to affirm or deny the rumor, and in fact, the rumor was without any foundation.

5. Mailing of Decision. A written copy of the appeal tribunal's decision should be mailed to each interested party. (See D.2., page 26 and 3.n., page 27.)

### VI. Evidence

Simple and informal proceedings are appropriate to unemployment insurance hearings for many reasons, including the need for promptness in the final disposition of benefit rights and the fact that claimants generally are not represented because the small sums of money involved usually do not warrant the expense of paid representation. Accordingly, the statutes and rules of procedure governing such hearings generally provide that appeal tribunals are not bound by common law or statutory rules of evidence, or by common law or statutory rules of evidence, or by technical or formal rules of procedure.

Moreover, trial techniques and technicalities of legal proof characteristic of court proceedings are out of place in unemployment insurance hearings, and the exclusionary rules applicable to admissibility of evidence in court proceedings should not be adopted or used. Any evidence pertaining to the issues in a case should be received as a matter of course. Although evidence which is not relevant or which is repetitious or technical rules of exclusion to preclude admission of such evidence. If a hearing is properly controlled and guided by the appeal tribunal, few problems of irrelevant or repetitious evidence should arise.

By dispensing with exclusionary rules of evidence in unemployment insurance hearings, appeal tribunals avoid the somewhat artificial question of what evidence should be admitted or excluded. The much more important and practical question is the weight that should be given to particular evidence. The liberal practice in admitting evidence, however, imposes upon the appeal tribunal a greater responsibility in weighing the evidence received.

Every finding of fact should be supported by evidence which is sufficient in both quality and quantity. The quality of evidence desired is best characterized in a decision of Judge Learned Hand as "the kind of evidence on which responsible persons are accustomed to rely in serious affairs." In other words, the quality is the same as that upon which thinking people make important decisions affecting their personal lives and business affairs. "Quality" thus has reference simply to the trustworthiness of evidence. It is implicit that side of the issue on which the evidence is the most credible.

The quantity of evidence desired to support a decision on an issue should be sufficient credible evidence that a court, upon reviewing the decision, would conclude that is supported by substantial evidence. The quantity of evidence required under the substantial evidence test has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In order to be substantial, evidence must be strong enough to raise a presumption of fact and must be sufficient, when undenied, to establish the fact.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

These tests of quality and quantity of evidence are not susceptible of precise definition. No clear line of demarcation is drawn between evidence which is sufficient and that which is not. However, a scintilla of evidence is not sufficient to meet either test, nor is mere uncorroborated hearsay or rumor.

It is of the utmost importance that appeal tribunals have a thorough knowledge of the criteria pertinent in weighing evidence. In addition to a working knowledge of the substantial evidence test, appeal tribunals should have full understanding of the exclusionary rules of evidence, even though those rules are not applicable in unemployment insurance hearings. Such an understanding is invaluable in weighing evidence and determining its relative trustworthiness.

Appeal tribunals also should know other aspects of evidence and the decision making process, including reception of evidence, making up a record, degrees of proof required to sustain findings and decisions, substitutes for evidential proof, meaning of terms, and other matters. While a complete treatment of the subject of evidence cannot be included in this Guide, some points of particular significance to unemployment insurance hearings are briefly set forth below.

- A. Testimony Under Oath or Affirmation. All testimony should be under oath or affirmation. Witness should be sworn individually, and interpreters should also be sworn.
- B. All Evidence to Be Made a Part of the Hearing Record. The decision of the appeal tribunal in a case should be based solely upon matters in the hearing record. Accordingly, all evidence to be taken into account by the appeal tribunal in making its findings, conclusions, and decision, should be made a part of the hearing record except in unusual circumstances, the evidence should be presented and received at the hearing which is conducted for that purpose. The essential purpose is to assure that all parties are fully apprised of the evidence received or to be considered, and that they be given the opportunity to cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal. The hearing is for the purpose of affording parties the opportunity to exercise and protect their rights in these respects.
- C. Exhibits. Documentary evidence and real evidence (physical objects) received in a hearing should be marked for identification and made a part of the record. Such evidence should be properly authenticated or verified under oath or affirmation.
- D. Best Evidence. Whenever possible, the best evidence should be obtained because it is the most reliable. The best evidence is original or primary evidence, as distinguished from secondary, and includes the best evidence which is procurable in the circumstances. For example, the best evidence of what an individual did is that of an eye witness; the best evidence of its existence and contents; a copy, or the recollection of a witness, is secondary evidence.
- E. Affidavits and Unsworn Statements. It has been the practice in unemployment insurance hearings for appeal tribunals to accept affidavits and even unsworn statements in lieu of the oral testimony of a party or witness. Whenever the party or witness is available,



## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

however, he should be required to appear and give his testimony orally and under oath or affirmation. The more material such evidence is to the issues in the hearing, the more important it is to obtain oral, sworn testimony. In addition, where the facts are material and the issue is in dispute, procedural fairness may require that the party or witness be called before the tribunal for the purpose of cross examination.

- F. Hearsay. Literally, this term refers to what a witness says he heard another person say. It also refers to a report or rumor as to what a person said or did. Under the exclusionary rules of evidence, hearsay generally is inadmissible over the objection of an opposing party. But, if no objection is made, hearsay evidence is admitted for whatever it may be worth. In addition, even under the exclusionary rules of evidence, there are a number of recognized exceptions to the general rule against the admissibility of hearsay evidence. One of these exceptions, pertaining to business records, is discussed below. In unemployment insurance hearings, hearsay should be admitted if it is relevant.

The principal objections to hearsay evidence are directed to the infringement of confrontation and cross-examination and the inherent untrustworthiness of the evidence. The weakness of hearsay is that it does not derive its value solely from the credibility of the witness or report, but rests mainly on the veracity and competence of the person being quoted or the author of the report. Thus, hearsay is second-hand evidence, as distinguished from original evidence. Yet, it is acknowledged that the trustworthiness of hearsay evidence ranges from that which is wholly unreliable to that which is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

It is erroneous, therefore, to condemn all hearsay as inherently untrustworthy, and it is just as erroneous to give any weight to all hearsay or, in some instances, to give any weight to such evidence. The point is that hearsay evidence, like any other evidence, should be weighed for its intrinsic merit in accordance with the standards for judging trustworthiness of evidence and credibility of witnesses of evidence and credibility of witnesses. Another point to be kept in mind is that reception of hearsay evidence may necessitate bringing in the person who is reputed to have said or done something, or the author of the report, for original testimony (i.e., the best evidence) and cross-examination. Therefore, it is ordinarily better to obtain the best evidence in the first instance, whenever it is possible.

- G. Business Records. One of the recognized exceptions to the hearsay rule is with respect to evidence contained in entries made in the records of a business in the usual course of the operation of that business. The exception embraces only those entries which are made systematically in the regular routine and usual course of the business, and does not embrace entries made as isolated transactions or incidents or for a specific purpose which is the subject of the litigation or hearing.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

- H. Stipulation of Fact. A stipulation of fact entered into by the parties may be received in evidence at the discretion of the appeal tribunal. In appropriate cases, stipulations save time at the hearing because they dispense with necessity for proof. In view of the appeal tribunal's responsibility regarding the obtaining of evidence, however, the appeal tribunal should be satisfied that the parties understand the nature of any stipulation and its effect upon their rights, and that the stipulation is factually correct. Acceptance of the parties' stipulation does not preclude the appeal tribunal from obtaining additional evidence on the points covered by the stipulation or on related matters.
- I. Presumption of Fact. A presumption of fact is an inference drawn from facts admitted in the case or otherwise satisfactorily established by the evidence. A presumption of course may be rebutted by credible evidence to the contrary for example, it would be proper to presume that a letter mailed in the due course of business, properly addressed, and bearing the correct amount of postage, reached its destination, but such a presumption would be rebutted by credible evidence that the letter did not reach its destination.
- J. Official Notice. An appeal tribunal may on its own motion or at the request of a party, take official notice of a fact material to an issue in a hearing. Generally, only clearly indisputable facts should be the subject of official notice. Thus, official notice may be taken of (a) such facts as are so generally known or of such common notoriety within the State that they cannot reasonably be the subject of dispute, (b) specific facts of immediate and accurate determination by which are capable of immediate and accurate determination by resort to easily accessible technical or scientific facts within the appeal tribunal's knowledge. Parties should be notified, either before or during the hearing, of any facts of which official notice is taken, and be afforded an opportunity to contest the correctness of the facts so noticed.
- K. Expert and Opinion Evidence. Expert evidence is testimony given in relation to some scientific, technical, or professional matter by a person who is qualified to speak authoritatively by reason of his special training, skill, or familiarity with the subject. Expert testimony may be in the nature of facts, or the opinion of the witness based on the nature of facts, or the opinion of the witness based on facts already proved. For example, an employment service representative with the requisite qualifications may give expert testimony as to current labor force conditions in a community with respect to certain occupations, or prevailing wages in a certain occupation and locality or other matters within his specialized knowledge or authoritative experience. Findings and conclusions of appeal tribunals should be based upon expert testimony only to the extent that it is given by a person with the requisite qualifications.

Expert and opinion testimony should in every case be substantiated by the witness with reasons and explanation. Witnesses who give expert or opinion testimony are subject to cross examination upon their qualifications and their expert or opinion testimony.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

There are some matters, however, on which the opinions of lay persons might be credible evidence. For example, many mature persons who are not “experts” may give reasoned and substantiated opinion testimony as to why they believe another person appeared at a certain time to be intoxicated, in pain, angry, fearful, joyful, or the like.

- L. Privileged Communications. The appeal tribunal should respect privileged communications which are accorded such status by State law. Generally, communications between clergy and penitent, attorney and client, and doctor and patient are privileged, and in some States communications between dentist and patient, and registered nurse and patient, are also privileged. Unless the privilege is waived by the penitent, client, or patient, as the case may be, neither he nor the person rendering the professional service to him may be required to disclose the subject matter of the communication or the advice given. Confidential communications between husband and wife are similarly privileged, but here, too, the privilege may be waived. The appeal tribunal should advise the parties of the rule of privilege recognized in the State, and the circumstances in which it is waived, whenever the matter arises in the course of a hearing.
- M. Self-incrimination. The privilege against self-incrimination is constitutionally protected, but like privileged communications, this privilege also may be waived. Many State laws have a special provision relating to self-incrimination and, in addition, provisions respecting immunity from prosecution. Whenever a matter involving self-incrimination or immunity arises in the course of a hearing, the parties should be advised by the appeal tribunal as to the particulars of the privilege, waiver, and immunity applicable in that State.
- N. Meaning of Selected Terms.
  - 1. Competent Evidence. Generally, this term refers simply to evidence which is admissible and relevant. In some connections, however, it has been deemed to convey the same meaning as best, or primary, evidence. In common usage it sometimes means the testimony of a person who is not disabled from giving testimony by reason of age, insanity, or other legal infirmity.
  - 2. Credible Evidence. Evidence which is worthy of belief. A witness' credibility refers to that quality of the person which renders his evidence worthy of belief on account of his good reputation for veracity, his intelligence, his knowledge of the circumstances, and his disinterested relation to the matter in question. Moreover, in deciding upon the credibility of evidence presented by a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies; whether he was actually present at the transaction whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

3. Direct Evidence. Evidence of the existence of a fact in question, without the intervention of evidence of any other fact. It is distinguished from circumstantial evidence, which is often called indirect. Direct evidence is, by way of example, testimony to facts by witnesses who saw acts done or heard words spoken.
4. Probative Evidence. Evidence having the effect of proof, tending to prove, or actually proving. It is evidence carrying quality of proof and having fitness to induce conviction of truth. Probative evidence might therefore be defined more appropriately for unemployment insurance purposes as “the kind of evidence on which responsible persons are accustomed to rely in serious affairs.
5. Relevant Evidence. The term “relevant evidence” may be broadly defined as that which bears directly, as distinguished from collaterally, upon the point or facts in issue, and which tends to prove or disprove the matters in issue. It is not confined to evidence which is addressed with positive directness to the point, but is that which, according to the common course of events, either taken by itself or in connection with other facts, tends to prove or render probable the existence or non-existence of facts which are in issue.
6. Weight of Evidence. The weight of the evidence on an issue is on that side of the issue on which the evidence is the most credible. Thus, weight of evidence means greater weight, and is not materially different in meaning from preponderance of evidence.
7. Preponderance of Evidence. Evidence may be considered as the preponderant when, fairly considered and weighed; it produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition.
8. Proof. The term “proof” properly means anything which serves to convince the mind of the truth or falsehood of a fact or proposition. Proof, therefore, is the effect of evidence, or the establishment of a fact or proposition by evidence; evidence is the medium or means by which a fact or proposition is proved or disproved.
9. Admission. An admission against interest is any statement made by a party, or attributable to him, which tends to establish or disprove any material fact in the case against him. An admission pertains to relevant facts, as distinguished from matters of law or opinion.

### VII. Burden of Proof

The term “burden of proof” denotes the burden of establishing the truth of a given proposition by the necessary quantum of evidence. The concept of burden of proof connotes not only a risk of nonpersuasion but also a duty of persuasion, that is, an active duty or function of adducing a quantum of evidence sufficient to meet the risk. While rules as to burden of proof may be useful

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

in judicial and quasi-judicial proceedings in which there are adverse parties, there is serious doubt that the introduction of such rules in unemployment insurance cases is conducive to justice or the attainment of the purpose of the unemployment insurance program.

Rules as to the burden of proof, while partaking of substance, are yet so closely related to presumptions and other procedural considerations that their introduction in unemployment insurance hearings tends to impair the nontechnical character of such proceedings and divert attention from the merits of a claim to be serious danger that the State agency regarding itself as an adverse party, would assume a hostile or at least indifferent attitude and, instead of cooperating to the end of discovering all the facts, would leave to the end of discovering all the facts, would leave to the claimant a task, which, generally, he is probably ill-prepared to perform.

In construing the unemployment insurance law and determining claims thereunder, the State agency should keep in constant view the broad items of the program. It is the primary duty of the agency to pay all just claims under the law and not merely those which claimants compel it to pay. It has no legitimate interest in denying a claim unless the claim does not fall within the terms of the law. When the case is pending before an appeal tribunal, it would seem to be the duty of the agency not to take specific issue on the theory that claimant has the burden of proof on that issue, but rather to cooperate in presenting all the evidence available to it, whether favorable or unfavorable to claimant.

The inappropriateness of technical rules as the burden of proof in unemployment compensation cases is further illustrated by the functions of appeal tribunals. While they are quasijudicial tribunals in the sense that they hear and determine controversies with respect to claimants' rights under the law, their position and functions are not altogether like those of a court. In our system of jurisprudence, a judge much more closely resembles an umpire than an investigator, and, whatever may be his full powers, a judge does not ordinarily make independent factual investigations. The situation is entirely different before an appeal tribunal. Appearance without counsel and, at least in the absence of union membership, without competent representation of any kind, is the rule rather than the exception. The small sums of money involved in claims, moreover, unusually will not warrant the expense of paid representation. If, therefore, claimants were required on appeal to depend upon their own resources it is doubtful that such a procedure would be conducive the disclosure of truth and the attainment of justice. On the other hand, claimants should not be permitted to prevail because of the State agency's failure to adduce disqualifying facts which the appeal tribunal, through its own resources, is able to elicit.

The hearing is not a contest between two opposite parties, with the appeal tribunal sitting on the sidelines. The appeal tribunal is, in effect a board of inquiry, responsible for getting complete and accurate facts. It is that responsibility of appeal tribunals which appropriately substitutes for a burden of proof on the parties in unemployment insurance hearings.

In the light of these considerations technical rules as to burden of proof are unrelated to the realities and the necessities of the situation and somewhat foreign to the nature of the proceedings.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

As already indicated, while it is inappropriate in unemployment insurance hearings to apply technical rules as to burden of proof in the sense of an active duty to adduce the quantum of evidence necessary to success on a given issue, there is nevertheless a risk of nonpersuasion with respect to each issue. The term “risk of nonpersuasion” is used, not as connoting any active burden or duty, but solely as denoting the risk, incurred by one party or another with respect to a given issue, that he will not prevail on that issue unless the tribunal, from the evidence before it (by whomsoever adduced), is satisfied, i.e., persuaded, the party who has the risk should not prevail. Who bears the risk should depend partly upon the nature of the issue, the terms of the statute, and what allocation of the risk is more appropriate to the attainment of a just adjudication.

A distinction should be drawn between eligibility conditions and disqualifications. Eligibility conditions include both monetary and nonmonetary requirements which must be met by claimants in order to obtain benefits, and are designed to establish attachment to the labor force. Monetary requirements—such as the amount of employment wages earned—test past attachment; nonmonetary requirements—the ability to work, availability for work, registration, serving of a waiting week, and the like—measure current attachment. Disqualifications, however, are related to the cause of the claimant’s unemployment—either by his own act, such as voluntarily leaving without good cause, discharge for misconduct, refusal of suitable work, or because of other circumstances, as in the case of labor disputes, fraud, or receipt of other income.

A further distinction relates to the period of time during which benefits may be denied. A monetary determination may result in a claimant’s complete exclusion from benefits; a nonmonetary eligibility determination may result in denial of benefits for as long as the condition causing the ineligibility persists; a disqualification may result in denial of benefits for a specified number or weeks or until the disqualification is “purged,” regardless of whether the claimant is otherwise eligible.

Generally speaking, an appeal tribunal cannot properly award benefits to a claimant if it is not stratified that the claimant has met the eligibility condition. In this limited sense the claimant bears the risk of nonpersuasion with respect to each such issue. That risk may be great or small, depending upon the nature of the issue and upon other circumstances. Ordinarily, there should be little difficulty in determining, so far as questions of fact are concerned, whether claimant is unemployed, whether he has made a claim for benefits, whether he has served a sufficient waiting period, and whether he has earned sufficient qualifying wages. Generally, the fact that the claimant has registered for work and has continued to seek work should be sufficient to satisfy the appeal tribunal of his ability to work and availability for work in the absence of facts which cast doubt upon his ability, readiness, and willingness to work.

With respect to disqualification provisions, the risk of nonpersuasion should generally be borne, not by the claimant, but by the State agency or the employer as the case may be. That is to say, unless, upon the evidence, the appeal tribunal is affirmatively satisfied or the existence of facts calling for the imposition of a disqualification, claimant will be entitled to benefits if he has complied with the conditions precedent to eligibility.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

In every case, the parties should cooperate fully and reveal pertinent facts that are peculiarly within their own knowledge. In the case of the State agency, such cooperation should be deemed a public duty. The fact that the risk of nonpersuasion on an issued may be on one of the parties does not relieve other parties of their duty to cooperate.

The above considerations form the rationale against the “burden of proof concept” in unemployment insurance hearings. If appeal tribunals include such considerations whenever the subject of burden of proof arises in a case, it should become apparent to the courts and to other interested parties that this concept is inappropriate to administrative hearings. Rules governing practice and procedure before appeal tribunals should emphasize the differences between such hearings and court trials, and the necessarily different procedural requirements respective of each.

### VIII. Mass Appeals

Appeals may be consolidated for a single hearing when the same, or substantially the same, evidence is relevant to the issue involved in each of the several appeals, assuming that no party’s rights are prejudiced by this procedure. Such consolidation should be permissive, rather than mandatory upon the parties. Labor dispute cases, for example, often are processed as mass appeals. By consolidating such appeals, the same time and place may be set for hearing, a single record may be made, and the evidence introduced with respect to one appeal may be considered as having been introduced with respect to each of the individual appeals.

As an alternative to the consolidation of appeals, another procedure gaining prominence is the token hearings procedure. In this procedure, one of the cases is selected as a test case for each of the one or more identifiable classes of cases involved in the mass appeals. This procedure has the advantage of involving fewer active participants in the appeal proceedings than might be involved in a consolidation of all the cases.

Some of the specific procedures involved in the consolidation of appeals and the alternative token hearings procedures are discussed below.

1. Special Files and Procedures. A pre-hearing conference may be used to obtain the agreement of the parties to the individual appeals as to such details as: (a) determination of the various classifications of cases; (b) the selection of interested parties in the various case classifications; (c) the number of hearings which may be necessary; and (d) stipulations of uncontroverted facts.
2. Pre-hearing Conferences. A pre-hearing conference may be used to obtain the agreement of the parties to the individual appeals as to such details as (a) determination of the various classifications of cases; (b) the selection of representatives who will receive notice of hearing for the interested parties in the various case classifications; (c) the number of hearings which may be necessary; and (d) stipulations of uncontroverted facts.

## A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

3. Consolidated Hearings. In a hearing on consolidated appeals all of the cases are heard, although with the agreement of the parties evidence introduced in one case may be considered equally applicable to other cases.
4. Token Hearings. This procedure is initiated by the parties and the appeal tribunal agreeing in advance that the hearing and decision in the test case selected by the parties and the appeal tribunal shall apply to and be binding upon all of the parties. All of the parties to be bound by the final decision in the test case are represented in the test case hearing and any appeal from the decision following such hearing. The parties' representative usually would be one or more attorneys, or might be a union officer or employee.
5. Individual Rights of Fair Hearing. Great care should be exercised to preserve fair hearing rights or individuals involved in consolidated appeals and token hearings. To insure that the representatives may act for the parties, and that the parties consent to the procedure and to the acts and agreements of their representatives, each of the parties should affirmatively authorize the representatives to act for him in the case. Further, all parties should be permitted to attend the hearings and should receive individual copies of all decisions in the case.