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Independent Regulatory Review Commission

Regulatory Package #12-120 (UC Appeals Regulations)
Wrongly Authorizes Video Hearings that Are Not Yet in Place
And Disadvantages Parties Who Prefer In-Person Hearings

Submitted by Community Legal Services, Inc., June 9, 2025

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Community Legal Services (CLS) submits the following comments on the proposed amendments of Unemployment Compensation Board of Review ("the UCBR" or "the Board") to its appeals regulations at 34 Pa. Code Chapter 101.

CLS has played a leadership role in unemployment compensation ("UC") policy and representation since the beginning of our employment law representation more than 50 years ago. We have represented clients in hundreds of UC hearings. Our comments are informed by our extensive participation in the UC appeals system on behalf of our low-income clients.

We appreciate that the Board invited our input during its drafting period for this regulatory package and considered our submissions made in 2023 and 2024. We are pleased that some of our recommendations have been incorporated in these proposed regulations. We also recognize that parts of the proposed regulations modernize and conform the appeals process to existing practice, and otherwise improve the appeals process. This submission, however, focuses on proposals that we oppose on behalf of the low-income clients we serve.

In our view, the most important proposals in this regulatory package are those providing significantly greater scheduling of "remote" hearings, defined by the Board as encompassing both telephone hearings and video hearings. For that reason, our comments focus primarily on the proposals concerning those hearings.

I. Remote Hearings

By grouping them into the rubric of "remote hearings," the Board treats telephone and video hearings (think of Zoom or Teams as examples of the latter, although the platform that the Board would use is unknown) as though they are the same, and that the same procedures can apply to each. Plainly, they are not.

For one thing, UC telephone hearings have existed and been held since the 1980s. Video hearings do not exist as of this date. We are unaware of a single UC video hearing having ever being conducted in Pennsylvania.[1] Nor do we know of any steps taken by the UCBR to operationalize video hearings, such as purchasing software and hardware or contracting for technical assistance.

For another, the conduct of these telephone and video hearings do not create identical issues. Video would help referees judge credibility better than telephone hearings, as they can see the parties.[2] But video hearings are much more fraught with technology challenges, especially for UC claimants with limited access to technology and/or limited technological abilities.

For that reason, we address the two types of hearings separately, and make different recommendations for them. ***While we advocate that the circumstances under which telephone hearings or testimony can be scheduled should be more narrowly tailored and clearly allow an entitlement to in-person participation, we urge that video hearings should not be authorized until the necessary infrastructure, including support for claimants, is built.***

A. Video hearings should not be permitted at this time

We are not Luddites. We recognize that the day probably will come when video hearings will be commonplace in UC, and those hearings hopefully will be better than telephone hearings (it remains to be seen whether they will be better than in-person hearings, which seems unlikely.) However, that day is far from here. Implementation of video hearings will be disastrous without guidelines, guardrails, and significant investment, especially for our clients with technology limitations.

[1] We understand that video hearings are being conducted regularly in workers' compensation cases. Note, however, that workers' comp claimants usually have legal representation, while UC claimants usually do not.

[2] However, in-person hearings clearly are most conducive to judging credibility, not only because the referee can see the parties in person, but also because of the interactions of the parties in each other's presence where one is being untruthful.

1. Claimants' technology limitations

In our representation of UC claimants, a common refrain has been that our clients are "not good at technology." This is especially true for low-wage workers, older adults, and immigrants. Simply stated, there are tech haves and have-nots, the latter of whom will not adapt easily or well to video hearings.

Whereas in the past, most of our UC cases focused on the person's reasons for their loss of work, now lack of access to technology and/or lack of ability to use it have been the predominant issue in a large percentage of our UC cases. These cases have included problems with technology such as the UC case management system implemented by the PA Department of Labor & Industry ("the Department" or "DLI"), which claimants experience through the on-line application and then their personalized dashboards for administration of their claims; the CareerLink website, through which they must register for work; and the ID.me app for proving their identity.[3]

Our clients' technology problems begin with lack of access. They generally do not have reliable access to a laptop or a webcam. Some do not even have smartphones. Many do not have home access to the internet. Phone service and/or internet access is often lost by those who have not received UC benefits for months.

Among those who have access to technology – usually by smartphone – not all can use it well. For example, functions such as uploading or downloading documents (or finding a document after downloading it) can be challenging for some. Others have trouble accessing email or navigating their UC portal or other websites. Many people cannot successfully use two-step verification. So many people have trouble accessing their password-protected UC portals that DLI has a unit tasked with giving people their login information and reseting passwords.

Most of our clients would have to use their smartphones for a video hearing (if they have one and can use its features). Participating in a hearing by smartphone would be very difficult, not only because of the small screen, but also because they could not meaningfully examine documents while participating.[4]

Most of our clients have little to no experience using Zoom, Teams or other similar videoconferencing platforms. Logging on to the hearing is likely to be a challenge. They would not intuitively know how to create the proper environment or how to best show their faces,

[3] The ID.me app is complex enough that many experienced computer users have had problems with it. We have former legal aid colleagues who practiced public benefits law who were stymied by using the ID.me app.

[4] Virtually none of our clients have access to scanners, copiers or printers that would help them access the documents being discussed at the hearing.

potentially unfairly affecting credibility determinations. This lack of experience alone would put them at a disadvantage in a video hearing with an employer who is accustomed to use of such technologies. In the context of a hearing for public benefits like UC, claimants' disadvantage in comparison to their opponents raises constitutional issues.

We recognize that many other UC claimants do have the technology experience, and perhaps the preference, to participate in video hearings. However, the technological divide between the haves and the have-nots should require the system to proceed cautiously with video hearings at this time.

2. No infrastructure for video hearings or support for claimants is in place

To the best of our knowledge, the Board has not acquired a video platform to conduct hearings. When it does so, the software will need to be customized and vetted before it can be deployed, especially given that it will be utilized by tens of thousands of claimants and employers.[5] It will need to be installed on the computers of the over 60 UC referees working across the Commonwealth, and they will have to be trained. Instructions for the parties using the software will be required. The state will also have to acquire equipment such as webcams and large video screens for referee offices.

Given the problems likely to be experienced by claimants, technical support for parties must be part of the planning, but we are unaware that it is. For instance:

- Who will help claimants who cannot download the software? Even if it is Zoom or Teams, many will not have it already installed.
- Who will troubleshoot technical problems before or during hearings?
- Will facilities be made available to claimants without video technology, and will support be available to them on the use of video technology at the facilities? These facilities would need to be private, ruling out many public facilities with computers.

Moreover, given these needed investments, we cannot comprehend how the "fiscal impact" statement (55 Pa. Bull. 3231-32) and Table 23 in the Regulatory Analysis Form fail to acknowledge the cost to the Board's implementation of this technology from scratch. In particular, this failure makes us concerned about any commitment to the support component that would be needed for claimants lacking technological sophistication, notwithstanding the standalone statement in the regulations that parties shall receive notice of how to obtain assistance. (Proposed 101.130(a)(3.1)). Without support, it is a given that not everyone will be able to meaningfully participate in video hearings.

[5] By contrast, DLI's case management software was modified and user-tested, and DLI staff were trained, for years before it was deployed. And still, massive problems abounded when it was deployed in 2022.

Finally, no regulatory environment exists to address these video-specific problems. Although House Bill 129 of 2021 would have required UC hearings to be transitioned to "primarily via videoconference," it did not become law after significant debate in both chambers of the General Assembly. Moreover, the issues that we have identified with video hearings, particularly around technological difficulties, have not been specifically addressed in the proposed regulations, raising constitutional issues. *See Knisley v. Unemployment Compensation Board of Review*, 501 A.2d 1180, 1182 (Pa. Commw. 1985)(finding that telephone hearings regulations were required to safeguard minimum due process rights of the parties and ensure that they were conducted uniformly by the referees).

In the absence of an actual system to effectively and constitutionally provide video hearings, the Board should not have the abstract authority as provided by these proposed regulations to hold such hearings.[6]

B. The proposed regulations swing the pendulum too far in favor of telephone hearings

Aside from requiring travel, in-person hearings provide the superior procedure for adjudicating UC appeals. As described below, there are numerous problems with telephone hearings. For that reason, our preference is to retain the presumption of and entitlement to in-person hearings as the default.

The Board indicates that its intent is "to allow any party to attend a hearing by their preferred method of participation, whether in person or by remote means, in accordance with this subchapter." Proposed Sect. 101.127. That section also provides that "testimony by remote means may be received only if specifically authorized by this subchapter." *Id.*

Nevertheless, the proposed regulations disadvantage people who would choose in-person hearings, as discussed below. ***Our foremost concerns are: (1) the default for persons who have not requested remote participation should continue to be in-person participation; and (2) there should be a guarantee that anyone who wants to participate in person has the right to do so.***

[6] Given the breadth of new issues to be overcome for video hearings to be done effectively, it seems that a pilot project would make sense before such a system would go live statewide.

1. **Telephone hearings regularly feature problems not encountered in in-person hearings**

CLS has been involved in telephone hearing policy and in representation of clients in such hearings since the telephone regulations were enacted in the 1980s. During the pandemic, we represented dozens of clients in such hearings and had a crash course in the flaws of the process. These flaws include the following.

- **Credibility assessments and witness confrontation are more difficult.** Judging credibility and confronting witnesses are key components of UC hearings. Where there are disputes on what led to an employment separation, viewing the witnesses in each other's presence is critical to assessing credibility.

- **Contact and technology problems are common**: Parties, witnesses and representatives are regularly not reached or dropped from the call. Keeping up with parties' changing contact information is a challenge.

- **Providing and using documents is difficult**: While the notice of hearing and relevant documents are required to be mailed in advance, they are often not received in time for the hearing. Notice and documents transmitted via the online portal are a necessary addition, but that system often malfunctions and is likewise inaccessible to many. Few of our clients have printers and often must view online documents on a smartphone. Even when everyone has a copy of the exhibits, the referees and parties often cannot clearly follow documents being discussed during telephone hearings. Sometimes referees do not have the exhibits submitted by the parties, even though they were submitted properly and on time.

- **Background noise is common:** Telephone hearings often have background noise that impedes creation of an accurate transcript, as well as interferes with the conduct of the hearing in the moment.

- **Effective representation is compromised:** Representatives cannot confer with their clients in a telephone hearing when unexpected events arise, which may result in unfair outcomes.

We appreciate that proposed Section 101.130 improves the hearing process in some respects, such as rules on how to proceed if a participant is disconnected. However, most of these issues will remain. These remaining problems are strong reasons for curbing broad discretion for the appeals system to schedule telephone hearings on their own accord and for ensuring that claimants who want in-person hearings get them.

2. The Board and its referees should not have overbroad authority to schedule telephone hearings of their own accord

Proposed Sect. 101.128(a) enumerates circumstances under which the "tribunal" decides, on its own motion, to schedule a telephone hearing. Several are for good cause for which there is likely a consensus, such as compelling health and safety concerns or when the Governor has declared a disaster emergency. But two of the circumstances are problematic.

Subsection 101.128(a)(4) permits such scheduling when:

> (4) The tribunal determines there exists a compelling staff or workload need within one or more referee offices which requires the use of a hearing by remote means for the tribunal to provide a timely hearing subject to **consideration** of a party's objection to participating in the hearing by remote means. (Emphasis added).

On its face, this may appear reasonable; timeliness is an essential requirement of an effective UC appeals system. However, this proposal opens the floodgates to allowing appeals administrators to broadly schedule telephone hearings on the grounds that resources are scarce – as they often are.[7] The UCBR can always find staffing or workload needs to justify the scheduling of remote hearings. The prospect of broad scheduling of telephone hearings is made only worse by the indication that the tribunal need only "consider" a party's objection to the remote hearing. So much for parties having the hearing of their choice. Proposed Sect. 101.127.

We also are concerned about the new language in Proposed Sect. 101.128(f), which provides a broad catch-all that could render the previous scheduling rules meaningless:

> (f) **Nothing in this rule precludes** the tribunal from **using its discretion** to schedule or allow a party, witness, counsel or authorized agent to participate in a hearing by a specific method of remote means while others participate in the hearing in person or by a different method of remote participation if, **in the judgment of the tribunal,** remote participation will not be prejudicial to any party. (Emphasis added).

The Board indicates in its Summary of Proposed Rulemaking that the purpose of this language is to allow what might be considered "split hearings" – say, one person appears in person and another appears by remote. (55 Pa. Bull. 3230). However, the "nothing in this rule" language suggests that a referee could jettison subsections (a) or (b) (the supposedly limited circumstances under which remote hearings are permitted to be scheduled) in any case of their choosing. If this is not the Board's intention, it should redraft the provision. If it is the Board's intention, we strongly object to it, as it would allow the exception to swallow the scheduling rules.

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[7] This provision's reference to workload "in one or more referee offices" shows that the proposed regulation is intended to be a method of administering the appeals system, as well as authorizing decisions of a single referee about their workload.

Moreover, proposed Sect. 101.128(f) clearly contemplates referees scheduling cases in which one party testifies by video and another by telephone, which could be done of their own initiative ("using its discretion"). We are concerned about how this scenario (should video hearings come to pass) could play out for claimants, especially those without the technology to participate in video hearings. If they were forced into phone hearings by the referee in lieu of appearing in person, they would be gravely disadvantaged by not being able to visibly appear to the referee while the other party did.

3. The proposed regulations do not provide for a party's "entitlement" to an in-person hearing

In the Summary of Proposed Rulemaking, the Board, in explaining proposed Sect. 101.127(a) ("Purpose and Scope"), states, "The proposed amendment affirms a party's entitlement to an in-person hearing." (55 Pa. Bull. 3230). We greatly welcome that expressed intent, as we believe that our clients should always have the opportunity to avail themselves of the highest quality hearing. However, neither those words nor the concept of an entitlement to an in-person hearing is expressed in the actual language of the proposed regulation, which states:

> (a) This subchapter is promulgated to provide the conditions under which testimony by remote means will be scheduled and received, to safeguard the due process rights of the parties, and to ensure that testimony by remote means is received under uniformly applied rules. Testimony by remote means may be received only if specifically authorized by this subchapter.

We strongly urge that Sect. 101.127 be amended to add the entitlement language found in the narrative.

Far from in-person hearings being an entitlement, other provisions of the proposed regulatory package can and will lead to persons who want in-person hearings not getting them. Consider the following:

- Remote participation on demand is practically guaranteed. Proposed Sect. 101.128(b) provides that the tribunal "will" schedule testimony or participation by remote upon party request. An exception is made at the objection of another party only if the referee determines that in-person participation is "necessary" to ensure a fair hearing, a very high standard. In practice, one party's preference for a remote hearing will cause many more of them to be scheduled, even over the objection of the other party.

- Notably, the Board intends to eliminate current Section 101.128(c), which provides that the testimony of others who did not request a telephone hearing will be received in person. This change means that when a remote hearing is scheduled at the demand of an employer,

for example, the claimant can no longer be certain that his participation would be scheduled to be in person. In fact, this deletion suggests that when one party requests a remote hearing, both parties will be scheduled for remote participation.

- Proposed Sect. 101.128(f) gives the referee "discretion" whether to allow one person to testify in person and another to testify by remote means. So even if the claimant scheduled for a video or telephone hearing based on the employer's preference requests to attend in person, their request may nonetheless be denied.

In our experience of working with claimants, even having an opportunity to ask to be scheduled to appear in person when already scheduled for a telephone hearing is an illusory one. The biggest impediment is that such a change in the scheduling is usually accompanied by a continuance. If a claimant is not receiving benefits, they will not realistically be in a position to request a continuance based on their preference for an in-person hearing. They also are likely to be fearful of antagonizing the authority figure (the referee) by making the request.

Advocates already have had the experience that when they have asked for in-person attendance for their client, the response is that the referee will not be in the office that day, and therefore a continuance would be required. We can also anticipate that an increase in remote hearings based on these regulations may logically lead the appeals administrators to employ referees who work only remotely and do not have permanent offices. If scheduled with such a referee, the claimant seeking in-person appearance would need to be assigned to another referee, perhaps with a delay, which might also incentivize the exercise of discretion to deny the request. Moreover, referees themselves may prefer to participate remotely, which could weigh against exercising their discretion to permit the in-person testimony.

Taken together, these provisions would indicate that a request by one party for a remote hearing will in all likelihood control the nature of the hearing for the non-requesting party. If this is not the Board's intention, it must plainly say so. Otherwise, the proposed regulations clearly go against the stated intention in the Summary of Proposed Rulemaking.

The Board should return to the rule that the party not requesting a remote hearing should be scheduled to participate in person, with instructions about their right to opt out and how to do so. This is the scheduling method that would truly preserve an entitlement to an in-person hearing.

II. Other Issues

A. Mandatory Batching of Appeals (Proposed Sect. 101.81(c.1))

In general, we strongly support the addition of the regulation under §101.81 (c.1):

(c.1) The tribunal may consider an appeal from a determination of the Department to be an appeal of all related determinations by which the appellant is aggrieved. The tribunal may consider the contents of the appeal, including the reason or reasons stated by the appellant for the appeal and the date of any other determinations when deciding whether a valid appeal has been filed from these other related determinations.

This new regulation was made necessary by the Department's adoption of "Benefits Modernization" ("Ben Mod") through its new case management system. Prior to Ben Mod, determinations by the Department typically were rendered in one consolidated document that addressed all necessary issues. Therefore, an appeal of the unified determination constituted an appeal of all of the issues therein.

The new software is much more prone to issuing multiple, or split, determinations on specific issues. Sometimes, so many determinations are issued that claimants are hopelessly (and understandably) confused. They often file a single appeal when they intended to appeal all adverse determinations, not understanding that the single appeal will probably be construed as putting only the single determination/issue appealed before the referee.

This provision of "batching" together of appeals to related determinations conforms to some more recent practice of the Board and avoids unnecessary confusion and inconsistency among different referee decisions. An appellant should not have to file multiple appeals of all related and duplicative determinations issued by the Department, and all should be considered by the tribunal simultaneously.

However, we believe such "batching" should be mandatory on the tribunal, and suggest that the language above be edited as such (changes in bold):

(c.1) The tribunal **shall** consider an appeal from a determination of the Department to be an appeal of all related determinations by which the appellant is aggrieved. The tribunal **shall** consider the contents of the appeal, including the reason or reasons stated by the appellant for the appeal and the date of any other determinations when deciding whether a valid appeal has been filed from these other related determinations.

Mandatory batching of appeals is not only fairer to the parties under the changed circumstances. It also avoids unfairly inconsistent application by referees.

Should the UCBR be concerned about results of mandatory batching that they see as inappropriate, the solution is to more narrowly tailor the regulation to those results. For instance, an exception

could be written for not batching if a finding of good cause not to do so is made, or the regulation might specify that it applies to only determinations issued at the same time by the Department.

B. Time for filing appeals from determination of Department (Proposed Sect. 101.82)

While concerns about determining the timeliness of an appeal might seem hyper-technical, the fate of a great many appeals depends on whether a particular set of circumstances are considered timely under the controlling regulations. For this reason, we are concerned with several ways that this proposed regulation falls short.

1. Good cause

In addition to often unique circumstances that have been found to constitute "good cause" that renders an otherwise late appeal timely, there are several significant barriers that regularly prevent parties from filing appeals within the 21 days. Problems with technology, whether because of breakdown in the systems through which appeals can be submitted or because the filer is unable to effectively use the technology despite their best attempts, are common. Similarly, disability and language difficulties of the party often present formidable barriers.

"Good cause" should be addressed by adding the following language to Sect. 101.82(a):

> (a) A party seeking to appeal a Department determination shall file an appeal in the form and manner specified in § 101.81 (relating to filing of appeal from determination of Department) and this section no later than 21 days after the ''determination date'' on the determination, **except for good cause.**

Also, a new subsection should be added containing a regulation for good cause. In addition to the bases defined by caselaw, it should include:

- Late appeals caused by technology barriers;
- Late appeals caused by disability barriers; and
- Late appeals caused by language barriers, such as documents in English.

2. Protection for filers using email

Proposed Sect. 101.82(4)(iii) retains the essence of the prior regulation, putting the risk of technological disruption on the filer using email to appeal

> (iii) A party filing by email or by another designated electronic message system shall comply with instructions concerning format. A party filing an appeal by email or by another designated electronic message system is **responsible** for using the proper format and **for delay, disruption, interruption of electronic signals and**

> **readability of the document and accepts the risk that the appeal may not be properly or timely filed.** (Emphasis added.)

By contrast, Proposed Sect. 101.82(4.1)(ii), governing appeals through the Department's case management system, takes a more reasonable approach to potential technology failures:

> (ii) If the filing is untimely as a result of system or technological failure of the Pennsylvania UC Claims System, **the date of filing will be redetermined through the adjudicatory process.** The Board will make available to the Referee relevant Department records regarding system outages when a party alleges a late filing due to system or technological failure and **the appellant may also submit additional testimony and evidence to be considered by the tribunal in the adjudication of the timeliness of the appeal.** (Emphasis added.)

These two types of electronic communication both sometimes experience failures, and those failures should be treated comparably. In fact, we have sometimes had to resort to filing by email *because* the case management system was not permitting appeals to be file. Moreover, putting the risk on the appellant undermines attempts to encourage people to file by electronic means. Proposed Sect. 101.82(4)(iii) should be amended to be consistent with the more reasonable provisions of Proposed Sect. 101.82(4.1)(ii).

C. Board Powers and Time Limitations

Several proposed regulations provide extraordinary power to the Board to intervene in referee decisions of its own accord.

- In a completely new regulation, Proposed Sect. 101.84(c) permits the Board to "review on its own motion any claim decided by a referee." Participation by the parties is required only if the record is reopened.

- Proposed Sect. 101.91 allows the Board, so long as there has not been an appeal and within the appeal period, to set aside a referee decision on its own motion "necessary to correct a mistake, including an error of law, and may thereafter make new findings and issue an amended decision on the basis of evidence previously submitted in this case, or after reopening of the record." Parties are given notice and an opportunity to participate only if the record is reopened.

- Similar to Sect. 101.91, Proposed Section 101.113 permits post-decision changes on the Board's own motion "to correct a mistake, including an error of law, technical error or administrative mistake…." No time limit is provided for such changes.

In each of these regulations, the parties receive notice and an opportunity to participate only if the record is reopened, upon which a hearing is scheduled.

We do not believe that these broad powers that the Board gives itself to make these changes comport with the due process rights of parties. We suggest the following:

- Parties should always receive notice and an opportunity to weigh in when the Board, of its own motion, decided to review a referee's decision, not only when the record is reopened.

- We also strongly support time limitations on the ability the Board to make independent decisions on appeals or reopen previously decided appeals, in furtherance of the concepts of finality and repose.

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