From: Julia Simon-Mishel
To: LI, UCBR-RegComm
Cc: Trambley, Melissa
Subject: [External] PLA Comments on 12-120
Date: Monday, June 9, 2025 7:31:37 PM
Attachments: 6.9.25 PLA Comments on 34 PA. CODE CH. 101.pdf

Good evening,

Please find attached PLA's comments to the Proposed Rulemaking by the Unemployment Compensation Board of Review, (34 Pa. Code, Part VI, Chapter 101 , No. 12-120).

Best,
Julia Simon-Mishel

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PLA is currently working remotely, but I can still be reached at 215-981-3889.

Comments on Regulatory Package #12-120 (UC Appeals Regulations)
Submitted by Philadelphia Legal Assistance

June 9, 2025

Philadelphia Legal Assistance (PLA) 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.

PLA is a civil legal aid organization that represents low income individuals and their families in Philadelphia County. PLA has one of the only dedicated Unemployment Compensation Units in the country and represents over 500 jobless workers every year. PLA attorneys, paralegals, and law students consistently represent unemployment claimants in unemployment compensation referee hearings and appeals before the Unemployment Compensation Board of Review. Supervising Attorney Julia Simon-Mishel previously served by appointment on Pennsylvania's Benefit Modernization Advisory Committee and on the Pennsylvania Unemployment Compensation Advisory Council. She also recently served as a co-chair of the National Academy of Social Insurance's Unemployment Insurance Task Force. Given our heavy focus on unemployment compensation appeals, we have the experience and expertise to comment on the minutiae of the proposed regulatory changes.

PLA participated in the Board's process for updating its regulation and gave feedback on prior drafts. While we appreciate that the Board has codified some current practices, updated necessary language, and improved some processes, we remain deeply concerned about several areas of the proposed regulations below.

The Board's Expansive Changes to Telephone Hearings Prejudices Claimants

Pennsylvania Unemployment Compensation Referee hearings "shall be held within the county within the county in which the employe regularly reports to work." 43 P.S. § 825.1. In the proposed changes to its regulation, the Board is attempting an end-run around the statutory requirement of in-person hearings in a location that is reasonable to expect an employer and former employee to access.

34 Pa. Code § 101.127. Purpose and scope.

We strongly object to the removal of the opening purpose statement, as in-person testimony *remains* preferable to any form of remote testimony, and the UC Law still requires in-person testimony in most circumstances.

While telephone hearings have been permitted for over thirty years, the Board seeks to greatly expand its ability to unilaterally scheduled telephone hearings, and to expand into video conferences/hearings before there is actually any structure or support in place for this new technology.

Let us be clear: we support giving parties access to their hearings *by telephone* when *a party makes that request*. The proposed changes to the regulations, in part a long overdue response to the 2011 changes to section 505 of the UC Law (43 P.S. § 825, as amended June 20, 2011, by P.L. 16, No. 6) include improved procedures for both requesting and granting access by telephone.

However, the Board proposes two major changes that could substantially prejudice claimants, including most of our low-income clients. The Board proposes giving itself broad powers to schedule telephone hearings on its own motion, and makes telephone participation the default in any situation where a single party requests participation by telephone.

34 Pa. Code § 101.128. Scheduling of [telephone] <u>remote hearings</u> or testimony.

We strongly object to the addition of subsection (a)(4) which permits the tribunal to schedule remote hearings due to staffing or workload needs. While we appreciate the Board's desire to provide timely appeal hearings, this addition significantly undermines a claimant's **statutory right** to an in-person hearing. Claimants should not be forced to lose that right in order to have access to a timely hearing. We are further concerned that a future administration could choose to cut staff for the sole purpose of moving entirely to a telephone hearing model.

We are attorneys who have practiced before the Board for many years, and after several reads of these regulations it is still unclear to us, by the letter of the proposed changes, whether the Board intends to *only* schedule telephone participation for the party that requests it. We have strong concerns that such situations will be automatically turned into a telephone hearing unless the other party objects. This puts an unfair burden on the non-requesting party when the statutory default is in-person participation. **We strongly object to the removal of the previous subsection (c).** The removal of this subsection further implies that if one party requests telephone participation, the tribunal plans to schedule all parties for telephone participation.

In the new subsection (e), we do not agree with including "a party" in this section. The rules of party participation are clearly laid out above. This subsection provides a workaround, which should not be permitted, to the protections codified in subsection (b). We are fine with the provision if it allows witnesses, counsel, or authorized agents to testify remotely.

We are increasingly concerned that claimants who desire in person participation will be told they must wait longer for their hearing. PLA has already experienced multiple situations where hearings have been automatically scheduled as telephone hearings (unclear why), and when our client has timely requested in person participation, they have been informed they would need a continuance because the Referee will not be available in person on the day of the hearing. Oftentimes, claimants have been waiting on benefits for several months by the time their Referee hearing is scheduled. There is a coercive effect on a claimant who is told they must wait longer for in person participation when objecting, and most will accept telephone participation out of desperation.

The statutory presumption, and right, is that a party shall receive an in person hearing in the county in which they worked. In order to protect that right, there must be an additional protection built into the regulations, similar to the language below:

> <u>When a party has been granted the ability to participate by remote means, the non-requesting party shall still testify in-person unless they separately request remote participation.</u>

PLA also has significant concerns about weakening the integrity of the Referee hearing. Telephone hearings also present the risk of witness coaching. This is of special concern to claimants, who face employer witnesses that will be in a room with their supervisors during testimony. As Pennsylvania courts have noted, there is also the possibility of witness fraud, as there is no way to confirm the identity of the witness testifying by telephone.[1] Courts have also raised the concern that individuals may try to testify from documents that have not been shared with the opposing party or Referee.[2] Our advocates have been in telephone hearings during the pandemic where Referees have raised concerns about communication happening between party witnesses, or when it seems a witness is reading off a document not in evidence. The Board's proposed changes to Section 101.131(f) further weaken protections by allowing a party to add a new witness *at any time during the hearing*.

Finally, PLA knows that claimants, especially unrepresented claimants, struggle mightily to provide and use exhibits during telephone hearings. An expansion of telephone hearings

[1] *Knisley v. Unemployment Comp. Bd. of Review*, 501 A.2d 1180, 1182 (Pa. Commw. Ct. 1985)
[2] *Chobert v. Unemployment Comp. Bd. of Review*, 484 A.2d 223, 225 (Pa. Commw. Ct. 1984).

would result in more claimants and employers losing their ability to present documentary evidence necessary to meet their burdens. Unlike in-person hearings, where parties can bring exhibits with them, telephone hearings require parties to submit exhibits to the Referee's office prior to the hearing. While we approve of the flexibility the Board now provides for the submission of evidence in telephone hearings, it is difficult for parties to collect and provide exhibits, and many claimants struggle to create electronic versions to send to the Referee (as there is no guarantee mail will arrive in time). We have also had countless hearings that have been forced into continuances because the Referee for some reason did not have the previously submitted documents. Once exhibits have been properly presented, telephone hearings are often marred by clumsy attempts to use them in the hearing, as the two parties and the referee all stumble to find relevant information from different locations.

Vitally, the Board has not been clear in the proposed changes about whether it will mail copies of the appeal record to all parties participating by phone. The Board's current regulations state "the tribunal will enclose with the notice of hearing copies of the documents," however, many claimants have selected to receive their notices electronically. In factual reality, none of our clients will have access to the appeal record if they are only provided an electronic copy. Our clients do not have printers. Printing at a local office store is prohibitively expensive. Almost all of our clients only have access to their online UC portal **through their mobile phone**. They cannot simultaneously use their phone to participate in the hearing while trying to look at documents (assuming they could even find/read them on their phone). **The only acceptable procedural safeguard is for the Board to mail copies of the appeal record to all parties**.

Proposed Procedural Changes to Improve the Functioning of Telephone Hearings

PLA has participated in hundreds of unemployment telephone hearings and some of the following changes by the Board will improve the hearing experience for many claimants. However, they by no means transform telephone hearings into an acceptable "default" for unemployment compensation hearings.

- **34 Pa. Code § 101.131. Conduct of a [telephone] hearing by remote means.**

  We agree with the procedural safeguards added to this section in case parties encounter connection issues or are disconnected from the call. We also are glad to see language that gives the Board some flexibility in what systems it uses to initiate telephone hearings, including the potential for parties to initiate the hearing (most likely by calling into a conference call line), rather than relying on a party receiving a phone call from a Referee.

- **34 Pa. Code § 101.132. Representation by [telephone] remote means.**

We agree with the changes to allow advocates to participate in the same way as their clients, and to allow advocates to participate remotely even if their client is in person, if needed.

- **34 Pa. Code § 101.130. Notice of [testimony by telephone] <u>hearing with testimony by remote means</u> and use of documents.**

  We agree with the additional procedural safeguards and notices that have been added to this section for telephone hearings, although we are concerned with the overwhelming amount of information a party must process as part of these notices.

<u>The Board's Attempt to Expand to Video Hearings is Premature</u>

PLA defers to the extensive commentary by partner organization Community Legal Services on this aspect of the proposed regulations. The Board is attempting to regulate a process and technology that it has yet to develop. At this time, very few of our clients could successfully participate in a video hearing. Many lack broadband access in their homes and only have a mobile phone. PLA runs unemployment navigator services in the community twice and week and the majority of workers we interact with cannot even access their current online UC portal. It is ludicrous to suggest that video hearings would be workable at this time, and at best would create a lopsided (and unfair) hearing where employers are participating by video and claimants are only participating by audio. Before video hearings could be appropriate there would need to be significant resources available to assist claimants in participating by video, including but not limited to **a physical location they could access with available technology with IT support**.

There may be a time when video hearings are a preferred method of conducting unemployment hearings. But this is not that time. The Board should go through the process of proposing changes to allow video participation once there are more details that can be thoughtfully considered by stakeholders. And when they are willing to **put the financial resources** behind making video access truly available to all who want it.

<u>Considerable Expansion of the Board's Powers Threatens Due Process</u>

While we appreciate that the proposed changes below could at times be used to correct errors that harm claimants, we have significant concerns about the lack of finality and the minimal due process protections built into the proposal. We urge the IIRC to review the due process protections required by the Pennsylvania Supreme Court in unemployment matters, most

recently discussed in *Quigley v. Unemployment Compensation Board of Review*, 263 A.3d 574 (Pa. 2021). A copy of the opinion is attached as Appendix A.

If the Board takes any action to reopen a matter, **notice must always be given to the parties regardless of whether the Board intends to take additional testimony**. Additionally, if the Board intends to change the nature or outcome of the underlying decision, it must give the parties an opportunity to be heard on the matter.

- **34 Pa. Code § 101.84. Jurisdiction of appeal.**

  We **strongly object to the addition of subsection c.** The new language seems to imply that there is never any finality to a Referee decision. This potentially presents commingling effects where the Board places itself in the role of a party. It is also unclear what problem the Board is attempting to address with this change. We understand there may be clear errors that need to be resolved. However, any action by the Board to reopen a Referee decision that has gone final without an appeal **must** be accompanied by notice and an opportunity to be heard. There should also be some explicit time limit on Board action.

- **34 Pa. Code § 101.91. Post decision changes by the referee.**

  While this is helpful as a way of avoiding unnecessary appeals, we have a few concerns. If Referees will be permitted to vacate their own decision so that they can issue an amended decision, the amended decision must explain why the Referee has changed the ruling to ensure that the change is recorded and subject to potential appeal. The new Referee decision must also have a new appeal deadline.

- **34 Pa. Code § 101.113. Post decision changes by the Board**

  This seems to imply that the Board's ability to revisit a decision is not limited by any jurisdictional restrictions imposed by statutory appeal deadlines. However, we potentially see the value in the Board's ability to fix mistakes outside of the appeal deadline. To the extent the Board is permitted to vacate its own decision within the appeal period when no petition for review has been filed, the regulations **must require notice to the parties.** That notice must explain the reason for reopening a matter and give the parties an opportunity to be heard on the matter.

General Appeal and Hearing Procedures Comments

As stated above, PLA has extensive experience practicing before Unemployment Compensation Referees and is therefore providing detailed feedback on many of the procedural changes proposed by the Board.

34 Pa. Code § 101.2. Definitions.

We agree with the additions of "agency record" and "appeal record," and believe that specifically naming "CareerLink" in place of the prior language will be clarifying for those relying on the regulations.

We **strongly disagree** with the Board's attempt to create a new definition for a term that has a long standing and clear definition - "Telephone." The definition of the word "telephone" does *not* include video transmissions or video conferences and the Board is instead attempting to backdoor its ability to use video conferences/hearings when the legislature has **not** amended 43 P.S. § 825 to include that form of hearing. We have addressed our concerns about remote hearings more fully above.

34 Pa. Code § 101.51. Absence of party

We strongly agree with the addition of subsections (b) and (c), which provide rules, procedures, and protections if a party is delayed in attending a hearing. Previously, there has not been a consistent approach from Referee to Referee, or even by individual Referees with employers and claimants.

The proposed changes to subsection (a) permit dismissal of an appeal in the absence of a party, although the language is unclear whether that is permitted if only one party is missing. We agree that dismissal is a tool that *should* be used in certain cases. The regulations must set forth clear guidelines about when such an outcome is appropriate. Some Referees, already toeing the line of due process, often place themselves in the role of the adversary party if the appellant does not appear at the hearing. The decision to dismiss an appeal due to the absence of the appealing party should not be a matter within the Referee's discretion and should instead be **mandatory** when the appealing party is absent, regardless of which party holds the burden of proof on the issues before the Referee. This change would save the tribunal, Board, and parties time and resources. It also prevents gameplay, most often by employers who file meritless appeals just in the hope that the procedural barrier will deter the claimant from continuing to pursue the case.

Finally, in order for the right to dismiss the appeal to align with the new protections in subsections (b) and (c), subsection (a) should require the Referee to first establish for the record

that the appealing party has not requested a continuance of the hearing and did not given notice under § 101.51(b).

34 Pa. Code § 101.54. Records

We support the new language in subsection (b) that ensures party representatives can receive copies of the appeal case file. We also agree that the new language on procedures for handling electronically stored records is necessary.

Subsection (a.1) requires clarification. The new language can be easily misinterpreted or misapplied by Referees who may believe this subsection requires the automatic acceptance into evidence of all Service Center records. It is important that the Board clarify that other evidentiary objections must still be evaluated before the records are entered into evidence. There are often hearsay issues within documents prepared by the Service Center and authentication alone does not overcome the hearsay problem.

34 Pa. Code § 101.61. Dismissal if filing of appeal or application for further appeal is late.

These changes now align with current practice before the Board and Referees. We generally support these changes, but note that PLA consistently sees a scenario under this section that results in considerable waste of party and Board resources and causes prejudice to claimants. When Referees are given the discretion to schedule a hearing solely on timeliness, we often have clients whose appeals are dismissed, only to have that dismissal reversed by the Board. Because no testimony was ever taken on the merits, the Board must then **remand** the case to a Referee for further testimony, and then take the record under advisement for a full decision on the merits. This a) creates a waste of resources as the parties and Referee must hold a second hearing, b) extends the time to final decision for claimants who are desperately waiting for benefits, and c) creates a situation where parties are being asked to testify about events that occurred six to twelve months ago, when they may no longer have evidence about the separation and memories are less accurate.

We strongly support clarification that Referees must hold singular hearings that cover both the timeliness and the merits of each case

34 Pa. Code § 101.81. Filing of appeal from determination of Department.

We strongly support the proposed updates to this section. The new language in Subsection (c.1) is a great addition, but it is difficult to imagine a valid reason to find that an appellant did not intend to appeal a related determination by which the appellant is aggrieved. In fact, we see situations where parties must return for second hearings once it is discovered not all issues were

covered in the initial processed appeals. This does not seem like a situation where the efficient and equitable administration of benefits is aided by discretion. Especially given the difficulties our clients experience when they try to appeal determinations in the new online portal, we believe **it is vital that (c.1) use the language "shall" instead of "may"** to ensure that all relevant appealable matters are timely heard together.

34 Pa. Code § 101.82. Time for filing appeal from determination of Department.

We support the updates that now explicitly name PA CareerLink and its role in the appeal process, as many of our clients utilize that method of appeal. We remain concerned that these changes do not address the significant barriers faced by certain claimants, who, without additional protections, will often lose the opportunity to ever be heard on the merit of their cases. This includes:

- Claimants with language barriers
- Claimants with disabilities
- Claimants with limited access or understanding of technology

For claimants in these categories, there should be a rebuttable presumption of good cause for a late appeal that is caused by the specified barrier.

34 Pa. Code § 101.89. Notice of decision.

The last sentence of this section is problematic, as the actual mailing date does not necessarily align with the date the decision is posted in the online system. We often see documents mailed after the alleged decision date, thereby shortening the available time for appeal for those claimants who receive their notices by postal mail. For decisions issued by mail, the Board must ensure there is an accurate "mailing date" on the notice and the appeal period must run from that date.

34 Pa. Code § 101.104. Allowance or disallowance of appeal.

We strongly support the additional scenarios that would require a remand hearing following an appeal to the Board.

Please reach out to Julia Simon-Mishel, Esq., (215) 981-3889 or Aaron Sommer, Esq., (215) 981-3890 with any questions.

Appendix A

Quigley v. Unemployment Comp. Bd. of Review

Supreme Court of Pennsylvania

March 9, 2021, Argued; November 17, 2021, Decided

No. 20 EAP 2020

Reporter
669 Pa. 645 *; 263 A.3d 574 **; 2021 Pa. LEXIS 3983 ***; 2021 WL 5349152

CAITLIN QUIGLEY, Appellee v. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, Appellant

Prior History: [*1]** Appeal from the Order of Commonwealth Court entered on January 28, 2020 at No. 1449 CD 2017 vacating/remanding the Order of the Unemployment Compensation Board of Review entered on August 8, 2017 at No. B-17-09-G-2764.

Quigley v. Unemployment Comp. Bd. of Review, 225 A.3d 914, 2020 Pa. Commw. LEXIS 105, 2020 WL 424870 (Pa. Commw. Ct., Jan. 28, 2020)

Counsel: For Unemployment Compensation Board of Review, Appellant: Tarczy, Janet Marie, PA Unemployment Compensation Board of Review, Harrisburg, PA; Reilly, Colleen Theresa, Pennsylvania Unemployment Compensation Board, Harrisburg, PA.

For Quigley, Caitlin, Appellee: Simon-Mishel, Julia Sarah, Public Benefits Unit, Philadelphia, PA; Sommer, Aaron Michael, Philadelphia Legal Assistance, Philadelphia, PA.

Judges: BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ. JUSTICE TODD. Chief Justice Baer and Justices Saylor, Dougherty and Wecht join the opinion. Justice Dougherty files a concurring opinion. Justice Wecht files a concurring opinion. Justice Donohue files a dissenting opinion. Justice Mundy files a dissenting opinion in which Justice Donohue joins.

Opinion by: TODD

Opinion

[*648] [575] JUSTICE TODD**

In this appeal, we consider whether Appellant, the Unemployment Compensation Board of Review ("Board"), erred in reversing the award of unemployment compensation ("UC") **[*649]** benefits to Appellee Caitlin Quigley ("Claimant") **[***2]** by *sua sponte* concluding she was ineligible for such benefits, where the issue of her eligibility was not raised in her appeal to the Board or below. After careful review, we determine that the Board did err, and, consequently, we affirm the decision of the Commonwealth Court, which reversed the Board's ruling and remanded.

[**576] I. Factual and Procedural Background

On April 7, 2017, Claimant was laid off from her job as the Director of Communication and Development of a Philadelphia area nonprofit service corporation. As a result, she applied for UC benefits with the Indiana County Unemployment Service Center ("service center") operated by the Department of Labor and Industry ("Department"). In the questionnaire

accompanying her application for benefits, she noted that she had been engaged in a "sideline business"[1] since 2015, which involved providing writing and editing services on a freelance basis to another nonprofit corporation, the Bread & Roses Community Fund. Claimant Questionnaire, 4/11/17 (R.R. at 6).[2] Claimant also indicated in the questionnaire that she anticipated a reduced income in 2017 from these activities, and she attached to the questionnaire, pursuant to its instructions, **[***3]** a copy of Schedule C of her 2016 federal tax return showing the income she had received from this sideline business during that year. At the time of her application for benefits, Claimant notified the service center, as noted in its records, that her **[*650]** phone would be disconnected for three weeks, and she indicated that the center should contact her by email. Unemployment Service Center Claim Record, 4/17/21 (R.R. at 3).

On April 12, 2017, the service center issued a "Notice of Determination," in which it ruled that Claimant was eligible to receive UC benefits, finding:

> Claimant did work in regular employment while engaged in the self-employment and the Claimant's regular earnings exceeded the net profit from the self-employment. . . . Claimant did not substantially increase her involvement in the self-employment following the loss of her regular employment and the Claimant is able and available for full-time work. As such, the Claimant's business qualifies as a sideline business and benefits are allowed under [Section 802(h)] of the [UC] Law. The Claimant's prorated earnings of $237.00 from the sideline business are deductible from her weekly benefit amount.

Notice of Determination, 4/12/17, at 1 (R.R. **[***4]** at 13).

After receipt of this decision, Claimant considered the amount of prorated income attributed to her sideline business (and deducted from her benefits) to be too high. Consequently, proceeding *pro se*, she filed a petition for appeal with the Department in which she explained the basis for her challenge:

> I believe that your determination overestimated the amount of income I will have from my sideline business. In my schedule C for 2016, it reflected a lot of 1099 income for two reasons: 1) before **[**577]** April 1, 2016, I worked on 1099 for the Philadelphia Area Cooperative Alliance for 30 hours a week and 2) I did a lot more work overall last year in my sideline business for Bread & Roses than I anticipate doing this year. My total income from my sideline business this year will be approximately $2,000. Please reconsider your determination based on this information. I understand that it makes sense to prorate it, but the sideline business is not a significant source of income for me.

[*651] Attachment 2B to Petition for Appeal, 4/18/17 (R.R. at 19) (emphasis deleted).

The Department scheduled a hearing before a referee[3] from the Philadelphia Referee Office on May 9, 2017 and provided Claimant with **[***5]** written notice of it. The notice indicated that the issue to be considered in the appeal was "[w]hether claimant is engaged in self-employment." Notice of Hearing, 4/26/17 (R.R. at 22). On April 30, 2017, Claimant sent an email to the referee's office requesting the hearing be continued until after May 25, 2017, and indicating that email was the best way to reach her. Email, 5/1/17 (R.R. at 32). The office did not reply to the email, but, instead, a representative called Claimant's phone number, which she had previously informed the Department was disconnected, and he left a voice message on Claimant's voicemail stating that the request for postponement was denied. Claimant avers that, because her phone service was disconnected at the time the message was left, she could not access her voicemail — a fact her recorded voicemail greeting

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[1] Under Section 802(h) of the Pennsylvania's Unemployment Compensation Law ("UC Law"), a claimant is ineligible to receive unemployment compensation benefits if he or she is engaged in self-employment, unless such self-employment activity constitutes a "sideline business" — that is, the activity began prior to the claimant being separated from full time work, the activity continued substantially unchanged after the claimant's separation, the claimant remains available for suitable full-time work, and the claimant's self-employment activity is not the primary source of his or her livelihood. 43 P.S. § 802(h); *Moshos v. UCBR*, 77 Pa. Commw. 493, 466 A.2d 258, 259 (Pa Cmwlth. 1983). If it is determined that a claimant is engaged in a sideline business, then the prorated amount of his earnings from that business is deducted from his weekly UC benefit. 43 P.S. § 802(h).

[2] R.R. designates references to the reproduced record of the administrative proceedings held in this matter.

[3] A referee is an individual employed by the Commonwealth of Pennsylvania and appointed to conduct hearings on appeals from benefits determinations under the UC Law. 43 P.S. § 753; 34 Pa. Code § 101.2.

purportedly relayed; thus, it was only on May 25, 2017, when her service was reconnected, that she first learned of the denial of the continuance. Petition for Reconsideration, 8/18/17 (R.R. at 55).

The hearing before the referee took place, as scheduled, on May 9, 2017, without Claimant in attendance. The Department did not participate in the hearing. **[***6]** In her decision, the referee described the issue which she considered in the hearing as "Is the claimant's income from self-employment deductible from UC, and, if so, to what extent?" Referee's Decision, 5/11/17, at 2 (R.R. at 40). The referee also noted that the service center had determined that Claimant's sideline business did not disqualify her from receiving benefits under Section 802(h); thus, the referee viewed the extant issue as "whether income from it is deductible from UC." *Id.*

Using data from her 2016 federal income tax return which she had attached to her questionnaire, the referee applied the **[*652]** relevant Department regulation, 34 Pa. Code § 65.121, to compute the weekly prorated income from Claimant's sideline business (which was thus required to be deducted from her UC benefits) as $228.34, instead of the Department's calculation of $237.00.

After receiving the referee's decision, which was sent by regular United States Mail to Claimant, she, again proceeding *pro se*, responded by filing a petition for appeal with the Board. In that petition, Claimant provided the following reason for her appeal:

> You are calculating my benefits based on my 2016 sideline business earnings, but I expect my 2017 sideline business **[***7]** earnings to be approximately $3,100 for the year, which is significantly lower than the amount shown on my 2016 Schedule C, which showed $11,784.00 in income. This is because I was paid as a **[**578]** 1099 contractor for my full-time work with the Philadelphia Area Cooperative Alliance between January 1 and March 31 of 2016 and then was converted into a W2 employee on April 1, 2016. My sideline business only has one client, Bread & Roses Community Fund, and I anticipate approximately $3,100 in earnings for 2017. Please calculate my reduction based on the $3,100 number and not the $11,784 number. My year-to-date sideline business income is $1,539 and I have done exactly half of the work I anticipate performing this year for the sideline business.

Attachment 1 to Petition for Appeal, 5/17/17 (R.R. at 49).

The Board did not conduct a hearing, but, instead, issued a decision on August 8, 2017 in which it ruled that Claimant was ineligible for benefits under Section 802(h). In its written adjudication, the Board did not accept the determinations of the Department or the referee that Claimant's freelance work qualified as a sideline business, but instead proceeded to apply the four-part test set forth above, *see **[***8]** *supra* note 1, for determining whether a self-employment activity disqualifies a claimant from receiving UC benefits. In applying this test, the Board ruled:

> **[*653]** The claimant concedes that she owned and operated an independent business, but failed to present competent evidence for the [Board] to conclude that she fit into the sideline activity exception because she failed to appear at the hearing in this matter.
>
> In her appeal, the claimant takes issue with the calculation of the Referee. However, it was the claimant's burden to prove that she fell within the sideline business exception to self-employment before any calculation can be made. Therefore, the Board does not address the calculation of her prorated weekly deductible amount because she did not meet her initial burden.

Board Decision, 8/8/17, at 1-2 (R.R. at 51-52). Based on this rationale, the Board reversed the referee's decision and denied Claimant benefits.

Claimant filed a petition for reconsideration of the Board's decision in which she asserted that the reason she did not attend the referee hearing was because she was out of town, and did not receive the voicemail message from the referee's office that her request for a continuance **[***9]** was denied because her phone was not working. Claimant averred that she had informed the Department about her malfunctioning phone, and highlighted her voicemail greeting stating that she did not have the ability to receive voicemail; nevertheless, the referee's office did not email her about the denial, even though she had indicated this was the preferable way for her to receive communications, nor did it inform her of its decision in writing by regular mail. Claimant stated her belief that these circumstances constituted good cause for her nonappearance, and that, had she testified, she could have "cleared up the issue" of the earnings she received from her business, as well as established "that the work at issue was a side business and never my primary form of income." Request for Reconsideration, 8/18/17 (R.R. at 55).

Claimant also challenged the failure of the Board to remand the matter to a referee rather than dismissing her claim, stating that "[i]nstead of giving me a remand hearing based on the unfairly denied continuance, the Board reversed the referee's **[*654]** finding of partial ineligibility and found me completely ineligible. I believe I have a right to a remand hearing in this **[***10]** case." *Id.*

The Board denied the request for reconsideration by order dated September 5, 2017. On October 12, 2017, Claimant, who **[**579]** remained unrepresented at that time, filed a petition for review of the Board's decision with the Commonwealth Court in which she challenged the Board's action of ruling that she was ineligible for benefits, when the purpose of her appeal was to challenge only the determination of the amount of her benefits.

On August 13, 2018, counsel from Philadelphia Legal Assistance, who currently represents Claimant before our Court, entered her appearance on Claimant's behalf. Thereafter, the Commonwealth Court ordered supplemental briefing on this question:

> In an administrative appeal under the [UC] Law, is the Referee or the Unemployment Compensation Board of Review authorized to change, *sua sponte*, the scope of a claimant's appeal to address an issue not raised by the separating employer or the claimant?

Quigley v. Unemployment Compensation Board of Review, 225 A.3d 914, 919 (Pa. Cmwlth. 2020) ("*Quigley*").[4]

[*655] Following that briefing, the court reversed in a 5-2 *en banc* decision authored by President Judge Mary Hannah Leavitt.[5] The court began its analysis by noting that the UC Law is remedial in nature, and, as such, the rules governing **[***11]** unemployment compensation proceedings should be given a liberal construction in accordance with this remedial purpose. The court then proceeded to consider whether the Board interpreted the relevant regulations applicable to this case consistent with this principle. The court identified two administrative regulations promulgated by the Department[6] - 34 Pa.Code § 101.87 (governing appeals from a decision of the Department), and 34 Pa. Code § 101.107 (governing appeals from a referee to the Board) — as establishing the powers and duties of the Board applicable to Claimant's appeal. These regulations provide:

> **§ 101.87 Issues considered on original appeal**
>
> When an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeal the tribunal shall consider the issues expressly ruled upon in the decision from which the appeal was filed. However, any issue in the case may, with the approval of the parties, be heard, if the speedy administration **[**580]** of justice, without prejudice to any party, will be substantially served thereby.

34 Pa. Code § 101.87. ("Regulation 101.87").

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[4] In granting supplemental briefing, the Commonwealth Court observed that, in Claimant's *pro se* pleadings to that tribunal, she had asserted as the basis for her requested relief that "the Board 'erred' and rendered a decision that was not 'fair' because the only purpose of her appeal was to determine the amount of her benefit, not her eligibility." *Quigley*, 225 A.3d at 918 n.6. The Commonwealth Court discerned that these assertions constituted "a challenge to the Board's authority to change the scope of her appeal." *Id.* We agree with the Commonwealth Court's assessment that Claimant's claim of error may be legitimately interpreted as encompassing the question of whether the Board *sua sponte* expanded the scope of its appellate review to consider an issue that was not raised by either her or her employer, and that no additional "magic words" were necessary for her to have preserved this issue for appellate review. *Id.* Respectfully, then, it is for this reason we do not accept the dissent's contention that the Commonwealth Court itself "*sua sponte* raise[d] an issue for its own consideration." Dissenting Opinion (Donohue, J.) at 1-2 n.1.

[5] Judge Leavitt was joined by Judges McCullough, Covey, Fizzano Cannon, and Ceisler. As discussed more fully herein, Judges Cohn Jubelirer and Wojcik each authored separate dissents, and each joined the other's dissent.

[6] See 43 P.S. § 761 (granting Department the "authority to adopt, amend, and rescind such rules and regulations" to administer and enforce the UC Law).

> **§ 101.107. Issues considered on appeal**.
>
> (a) In connection with the consideration of an appeal to the Board from the **[***12]** decision of a referee, the Board may consider an issue in the case though not expressly ruled upon in the decision of the Department or the referee and **[*656]** though not previously raised in the claim or appeal proceedings. However, issues not previously considered or raised will not be considered by the Board, either upon application for, or in the determination of an appeal unless the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.
>
> (b) The Board shall consider the issues expressly ruled upon in the decision from which the appeal was filed. However, any issue in the case, with the approval of the parties, may be determined though not expressly ruled upon or indicated in the notice of hearing, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.

34 Pa. Code § 101.107 ("Regulation 101.107").

The court first rejected the Board's argument that its right of review conferred by Regulation 101.87 was broad enough for it to consider issues other than the discrete issues raised by a claimant. The court noted that the issue of Claimant's eligibility in this matter was never in dispute, **[***13]** given that both the Department and the referee determined she was eligible for benefits because her self-employment met the criteria for being a sideline business, and neither her employer nor the Department contested this determination during the appeals process. Thus, in the court's view, it was "problematic" for the Board to transform the essential nature of the controversy from one involving the proper calculation of benefits to one involving eligibility. *Quigley*, 225 A.3d at 922. The court found that this transformation did not comport with due process, inasmuch as due process requires that "there must be a controversy between at least two of the parties at every stage of the appeal." *Id.*

The court next found the Board's reading of Regulation 101.107(b) to be "overly technical" and "restrictive," and also at odds with the remedial purpose of the UC Law. *Id.* In particular, the court highlighted the fact that "[e]ffectively, the Board dismissed Claimant's appeal because of her nonappearance at the Referee hearing." *Id.* The court pointed out this **[*657]** was at odds with its own prior precedent which indicated that a claimant's appeal should not be dismissed for this reason. *Id.* (quoting *Gadsden v. Unemployment Compensation Board of Review*, 84 Pa. Commw. 375, 479 A.2d 74, 76 (Pa. Cmwlth. 1984)). Moreover, the court concluded that dismissal **[***14]** on this basis also violated due process:

> The Referee denied Claimant a continuance and decided her appeal on the basis of the Department's records. The Board reversed because Claimant did not appear at the Referee hearing to prove her eligibility, and then the Board refused to give Claimant an opportunity to explain her nonappearance. Fundamental due process requires notice and an opportunity to be heard, and this constitutional principle must inform the Department's procedural rules for unemployment compensation appeals.

[581]** *Id.* The court additionally noted that this due process violation was compounded by the fact that Claimant intended to present evidence at the referee's hearing, but was precluded from doing so by the denial of the continuance, and that the Board also denied her request for reconsideration without explanation. The court thus determined that, because of these circumstances, the Board had improperly used Regulation 101.107(b) "as a 'gotcha' to deprive Claimant of the benefits to which she was entitled," by raising the issue of her eligibility for benefits *sua sponte*. *Quigley*, 225 A.3d at 923.[7]

The court next considered the question of whether the Board committed an additional violation of Claimant's **[***15]** due process rights because its actions constituted an improper commingling of prosecutorial and adjudicatory functions, in violation of our decision in *Lyness v. State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (Pa. 1992) (holding that state medical licensing board had violated doctor's due process rights by **[*658]** initiating a prosecution of the doctor for an ethics violation and then subsequently adjudicating that violation and revoking his license). The court observed that, in most unemployment cases, the typical parties are the employers and the claimant; however, in the court's view, various provisions of the UC Law and its interpretative regulations make the Department a "silent party in every unemployment compensation case." *Id.* at 923

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[7] The court also held that this reasoning applied equally to situations where a referee *sua sponte* rules that a claimant was ineligible for benefits, even though the Department determined that the claimant was eligible, and refuses to allow the claimant to present relevant evidence. *Id.* at 923 n. 13. As this appeal concerns the propriety of actions and a decision of *the Board*, we will not address this aspect of the Commonwealth Court's decision.

(citing 43 P.S. § 822 (requiring referees to "afford[] the parties *and the Department* reasonable opportunity for a fair hearing" and the Department to be notified of the time and place of the referee's hearing, as well as the referee's decision) and 34 Pa. Code § 101.90 (granting the Department the right to appeal to the Board) (emphasis original).

The court found that, after the service center had ruled Claimant to be eligible for benefits, Claimant could not have appealed that determination to the referee as she was not aggrieved by it; however, *the Department* ***[***16]*** could have appealed this eligibility determination if it desired, but chose not to do so. Likewise, the court noted that, if the Department disagreed with the referee's determination, it could have appealed the referee's decision to the Board; but, again, it did not do so. Thus, the court reasoned that the Board, by raising the issue on its own, "put itself in the role of the adversary, and in the case of self-employment, within the prosecutorial role of the Department. Such commingling of prosecutorial and adjudicatory functions is improper." *Id.* at 924.

The court remarked that, in *Lyness*, our Court emphasized that even the appearance of bias and partiality created when an administrative tribunal commingles prosecutorial and judicial functions — which it deemed the Board did in this case — to be sufficient to violate due process. In this regard, the court emphasized its perspective that the role of the Board is "solely adjudicatory," whereas, statutorily, the Department is the "'prosecutorial' actor" empowered to challenge any determination of a claimant's eligibility for benefits. *Id.* Thus, the court admonished that the Board "must not take on the Department's prosecutorial function by revisiting **[***17]** the referee's holding on benefit eligibility unless the Department raises that **[*659]** challenge." *Id.* The **[**582]** court regarded this separation to be of even greater importance, given that the Board is empowered by its governing regulations to review a decision of a referee even when no party has sought its review. *Id.* at 925 (quoting 34 Pa. Code § 101.101 ("Upon application to the Board . . ., *or on its own motion*, the Board may review an appeal which has been decided by a referee." (emphasis added))).

Because the Board never ruled on the issue Claimant had presented to it for appellate review — the computation of the amount of her weekly benefit rate — the court remanded to the Board to remand the case to a referee for consideration of this issue. *Quigley*, 225 A.3d at 925.

Judge Cohn Jubelirer dissented. She conceded that the UC Law has a remedial purpose and should be liberally construed; however, she disagreed with the majority that its construction of the Board's rules of procedure was justified as a result. Instead, in her view, the plain language of the UC Law granted the Board broad powers of review, chief of which was to be the ultimate fact finder in all unemployment proceedings. *Quigley*, 225 A.3d at 927 (Cohn Jubelirer, J., dissenting) (citing 43 P.S. § 824 ("The board shall have **[***18]** power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in cases where a further appeal is allowed by the board from the decision of a referee, may affirm, modify, or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence.")). Consistent with this duty, Judge Cohn Jubelirer read the language of Regulation 101.87, quoted *supra*, and the similar language in Regulation 101.107(b), likewise quoted *supra*, as requiring the Board to consider all issues which the Department "ruled upon." From her perspective, the Board did not need the approval of the parties to consider any issues which the Department had decided, or which had been ruled on in the decision being appealed from, notwithstanding the additional language in both rules which **[*660]** allows the Board to consider issues "with the approval of the parties." *Id.* at 928.

Judge Cohn Jubelirer rejected the majority's conclusion that the Board *sua sponte* raised the issue of Claimant's eligibility. She regarded Claimant as having placed the issue of her **[***19]** eligibility in question whenever she appealed the question of the proper deduction of her income, because, under the four-part test discussed *supra* to determine if self-employment activity qualifies as a sideline business under Section 802(h), it is necessary to examine a claimant's income to see if it was "the primary source of her livelihood"; hence, in a benefit determination, claimant's income is considered both for purposes of eligibility and to determine the weekly rate of unemployment compensation. *Id.* at 929. Thus, in Judge Cohn Jubelirer's view, "an appeal as to the rate of compensation, which requires a review of the claimant's self-employment income, necessarily implicates questions of eligibility and vice versa. An appeal as to one is an appeal as to both." *Id.*

Further, Judge Cohn Jubelirer interpreted the referee's decision as having "specifically held that Claimant was '**NOT DISQUALIFIED** from receiving compensation under [Section 802(h)].'" *Id.* at 930 (quoting Referee's Decision, *supra* (emphasis original)). Thus, she considered the referee to have "decided" or "ruled upon" this issue, thereby obligating the Board to review this issue under Regulations 101.87 and 101.107(b).

[583]** Turning to the majority's conclusions that the Board's actions deprived **[***20]** Claimant of fundamental due process, Judge Cohn Jubelirer rejected those as well. Regarding the failure of the referee to grant Claimant a continuance, Judge Cohn Jubelirer found that was the result of Claimant's own negligence, because she deemed Claimant not to have provided an adequate reason for her continuance request, nor did she follow up with the Department to inquire about the status of her request whenever she received no reply to her email. Further, Judge Cohn Jubelirer viewed the Board's actions as consistent with the plain language of 43 P.S. § 824 and Regulations 101.87 and 101.107(b); thus, in her assessment, the **[*661]** Board did not apply those sections in an overly technical and restrictive way so as to violate due process, as the majority concluded.

Lastly, Judge Cohn Jubelirer did not regard the Board's actions as contravening the tenets of *Lyness*, given that, from her perspective, Claimant put the issue of her eligibility before the referee and again before the Board because it was "inextricably intertwined" with the earnings issue she raised. *Quigley*, 225 A.3d at 933. Hence, Judge Cohn Jubelirer discerned no appearance of bias or impropriety caused by the Board's consideration of this issue which would implicate *Lyness*.

Judge Wojcik joined Judge **[***21]** Cohn Jubelirer's dissent and authored his own separate dissenting opinion. Judge Wojcik criticized the majority for addressing the issue of the Board's authority at all, as he did not interpret Claimant's petition for review as raising that issue. On the merits, Judge Wojcik rejected the majority's conclusion that Claimant was denied due process; rather, because she chose to proceed *pro se*, he regarded her as having taken the risk that her continuance would not be granted, and that the referee would address the question of her eligibility for benefits, a possibility for which he found she received adequate notice. From Judge Wojcik's perspective, because Claimant did not appear at the referee hearing (and so did not give evidence on the issue), it was improper for the referee to find her to be eligible for benefits. Thus, he considered the Board to have acted properly to correct what he perceived to be the referee's error.

The Board sought further review, which we granted to consider whether, in reversing the Board's decision, the Commonwealth Court misapplied the UC Law and our Court's decision in *Lyness* by limiting the Board's scope of review to only the issue Claimant raised in her appeal **[***22]** to the Board. *Quigley v. UCBR*, 237 A.3d 410 (Pa. 2020) (order).

II. Arguments of the Parties

We begin by considering the respective arguments of the parties on this question. The Board first argues that the Commonwealth Court mischaracterized the roles of the Department, **[*662]** the referees, and itself in the adjudication of UC claims, and then compounded its error by viewing the UC benefits claim review system as adversarial in nature. Rather, the Board explains that the UC system has always been intended as a process of neutral fact-finding and adjudication, which allows for hearings to supplement the information in the Department's claim files. The Board highlights that the overall claim's process is intended to "operate quickly, simply, and efficiently." Board Brief at 14, 16 (quoting *Harkness v. UCBR*, 591 Pa. 543, 920 A.2d 162, 168 (Pa. 2007) (plurality) (allowing nonlawyers to represent employers at UC referee hearings, as such representation does not amount to the practice of law)).

The Board asserts that this speed and informality is necessary to effectuate the **[**584]** UC Law's remedial objective of "allow[ing] funds to be obtained by persons unemployed through no fault of their own at the earliest point that is administratively feasible." Board Brief at 16 (quoting *Harkness*, 920 A.2d at 168). Thus, the Department **[***23]** swiftly responds to initial claims based on the records and information submitted by employers and employees, which it then examines. The Board notes that this stage of the process is informal and non-adversarial, and does not involve a hearing.

The Board explains that, following the Department's initial determination, which is not in the nature of an adjudication, a claimant or employer may appeal to a UC referee, who reviews the Department's determinations *de novo* after providing the parties with notice of the issues and an opportunity to be heard. The Board maintains that, based on this review, the referee is empowered by 43 P.S. § 822 ("Where an appeal from the determination or revised determination, as the case may be, of the department is taken, a referee shall, after affording the parties and the department reasonable opportunity for a fair hearing, affirm, modify, or reverse such findings of fact and the determination or revised determination, as the case may be, of the department as to him shall appear just and proper.") to subsequently affirm, modify, or reverse the Department's findings of facts and overall determinations. The Board notes that Regulation 101.87 further delineates the **[*663]** referees' scope of **[***24]** review, by requiring him or her to "consider the issues expressly ruled upon in the decision from which the appeal

was filed." Board Brief at 16 (quoting Regulation 101.87). Next, after affording the parties notice, the referee holds a brief hearing at which interested parties are given the opportunity to be heard; and after which the referee issues a concise decision in layman's terms setting forth the reasoning for his or her determination, which claimants and employers may then appeal to the Board.

The Board asserts that the General Assembly endowed it with expansive powers of review over claims raised in an appeal from a referee decision with its enactment of Section 824, which confers on it the authority to *sua sponte* review "'any claim . . . decided by a referee' and, based upon the evidence of record or additional evidence, to affirm, modify, or reverse the determination of the Department or referee granting or denying benefits." *Id.* at 18 (quoting 43 P.S. § 824).

Further, the Board submits that, in *Peak v. UCBR*, 509 Pa. 267, 501 A.2d 1383 (Pa. 1985), our Court found that Section 824 authorizes the Board to act as the ultimate arbiter of fact in UC cases by supplanting a referee's factual findings and credibility determinations with its own, and, thus, acts as the "ultimate finder **[***25]** of fact." *Id.* at 1385. The Board highlights that, in fulfilling this responsibility as the ultimate fact-finder, and final arbiter of credibility, it proceeds with the benefit of a full record and employs numerous administrative law attorneys. The Board maintains that the Commonwealth Court's decision limiting its role and duties is inconsistent with Section 824 and this Court's recognition that it has been given unique and broad powers by the General Assembly to fulfill its statutory mandate.

Next, the Board asserts that it did not misuse its procedural regulations to expand the scope of Claimant's appeal, but, rather, complied with both its statutory authority and the text of Regulations 101.87 and 101.107 by reviewing all issues which had been considered by the referee and the Department, which included Claimant's eligibility. The Board emphasizes that, in the past, the Commonwealth Court has approved **[*664]** of this process, as it **[**585]** has previously found that these regulations require the Board to "decide all of the issues the referee considered, *regardless of whether a party specifically raised the issue on appeal."* Board Brief at 24 (quoting *Black Lick Trucking, Inc. v. UCBR*, 667 A.2d 454, 457 (Pa. Cmwlth. 1995)) (emphasis original). Thus, the Board argues that it has jurisdiction to rule on a claimant's **[***26]** eligibility regardless of whether an "adversarial party" raises that issue on appeal, and that, by imposing such a requirement in this case, the Commonwealth Court thwarted its obligation to review, *de novo*, the issues the referee ruled on in Claimant's appeal, including the referee's determination that Claimant was not disqualified from receiving UC benefits under Section 402(h). *Id.* at 25.

The Board insists that its obligation to conduct such a plenary review is rooted in its "ultimate responsibility to ensure that only those entitled to benefits receive them." *Id.* at 26. This responsibility derives in part from its asserted duty to protect the viability of the UC Compensation Fund[8], and ensure that only valid claims are paid from it. The Board asserts that requiring a party to raise the question of a claimant's eligibility in order for it to review whether this question was decided properly creates the risk that "a Department determination, based on minimal and possibly incompetent evidence, [will] stand as final, precluding review by the Board even if new evidence comes to light during the appeal process." *Id.* at 27. According to the Board, "[t]hat would allow an ineligible claimant to benefit **[***27]** from an error made by the Department in its review of limited facts in the first instance — a position that is anathema to the UC Law and the Board's 'super-adjudicatory' responsibilities" thereunder. *Id.*

[*665] The Board next asserts that the majority erred in finding that it acted as both prosecutor and adjudicator in violation of *Lyness*, which, in the Board's view, is inapplicable in the realm of UC cases. In this vein, the Board notes that our Court has recognized that *Lyness* does not govern administrative processes that do not involve an agency engaging in a prosecutorial function. Board Brief at 29 (citing *Krupinski v. Vocational Technical School, East Northampton County*, 544 Pa. 58, 674 A.2d 683, 686 (Pa. 1996) (holding that *Lyness*'s prohibition against commingling of prosecutorial and adjudicative roles as a matter of due process was not implicated by a school's use of statutory procedures to discipline an employee, because such procedures did not involve a "prosecution," which our Court defined as "the institution and carrying on of a suit in a court of law or equity, to obtain some right, or to redress and punish some wrong," and the disciplinary action did not provide redress nor impose punishment)). *Id.* at 28. The Board argues that the UC benefits claim adjudication system is analogous to the

[8] The "Unemployment Compensation Fund," 43 P.S. § 841, is a compulsory reserve fund statutorily established by the General Assembly in 1936 to ameliorate the deleterious effects of involuntary unemployment on the people of this Commonwealth. *Commonwealth v. Sun Ray Drug Company*, 360 Pa. 230, 61 A.2d 350, 351 (Pa. 1948). The fund is financed by excise taxes paid by employers and employees, as well as any penalties and interest assessed thereon. 43 P.S. § 841(a).

educational **[***28]** disciplinary proceeding at issue in *Krupinski* in that it is not prosecutorial or disciplinary in nature, but, rather, is "a fact-finding system set up to administer the UC Law and distribute funds to those who qualify." *Id.* at 29. Thus, the Board contends *Lyness* has no application, given that the Department does not function in a prosecutorial capacity, nor does it mete out discipline or revoke licenses. The **[**586]** Board further disputes the Commonwealth Court's conclusion that it somehow assumed a prosecutorial role merely because it assessed Claimant's eligibility for UC benefits, again renewing its contention that it was empowered by Section 824 to "find its own facts, assess credibility, and resolve all issues addressed by or within the purview of the Department or a referee." *Id.* at 30.

The Board also rejects the Majority's conclusion that it violated Claimant's due process rights by denying her notice and the opportunity to be heard on the question of eligibility. The Board contends that Claimant received adequate notice that her eligibility under Section 402(h) was at issue via the Department's determination, as well as in the Notice of Hearing **[*666]** for her appeal before the referee. The Board suggests that the Commonwealth Court **[***29]** has previously recognized that when the facts of record indicate that a claimant has been adequately apprised that a claim was at issue in proceedings before a referee, the claimant cannot later assert unfair surprise at the referee's adjudication of it. Board Brief at 32-33 (citing *Philadelphia Regional Port Authority v. UCBR*, 191 A.3d 68 (Pa. Cmwlth. 2018) (employer was not denied due process when Board affirmed the referee's decision upholding the grant of benefits based on the "Voluntary Layoff Proviso," 43 P.S. § 803(b), due to the fact that, though the UC service center determination did not specifically utilize this description of the statute, the service center, nevertheless, relied on that statutory provision in making its benefits determination)). Thus, the Board submits the Commonwealth Court's holding here conflicts with this precedent.

Moreover, the Board contends that Claimant was given an adequate opportunity to be heard through the scheduling of the hearing before the referee, but she did not avail herself of the opportunity to present evidence on the question of her eligibility because she did not attend, nor furnish an adequate reason to justify her non-appearance.

Finally, the Board argues that its determination that Claimant was ineligible for benefits was **[***30]** appropriate, as the only evidence before it which did not amount to uncorroborated hearsay was Claimant's admission that she owned and operated an independent business. To that end, the Board maintains that Claimant, by not appearing at the scheduled referee hearing, failed to meet her burden of proof by way of providing competent, admissible evidence.

Claimant responds by first arguing that our Court in *Lyness* emphasized that "even an *appearance* of bias and partiality must be viewed with deep skepticism, in a system which guarantees due process to each citizen." Claimant Brief at 18 (quoting *Lyness*, 605 A.2d at 1207) (emphasis original). Claimant asserts that the Board's action of unilaterally deciding what issues it will consider in an appeal, regardless of the scope of the appeal, violates due process by commingling **[*667]** prosecutorial and adjudicatory functions in a manner which creates the appearance of partiality and bias. Consequently, in Claimant's view, when the Board reverses a decision on eligibility in the manner it did here, it is effectively placing itself in an adversary prosecutorial role which, in such cases, is properly that of the Department.

While Claimant concedes that the structure of the UC system **[***31]** itself does not inherently violate due process by commingling adjudicatory and prosecutorial functions, she asserts that the Board's actions in denying benefits on an issue not raised by any party threatens to eliminate the "walls of division" that are part of the architecture of the UC appeals process **[**587]** and thereby create the threat or appearance of bias. *Id.* at 19.

Claimant asserts that, contrary to the Board's position, the UC appeals system is an adversarial system, as evidenced by the fact that the hearing process before the referee entails advising a claimant of his or her rights, including the right to chosen representation and to subpoena and cross-examine witnesses, and allocates to the litigants the burden of proof on various aspects of establishing a valid claim for UC benefits. Claimant avers that the Board's description of the process creates a false impression that it is entirely informal in nature, akin to a mere "gathering of associates." Claimant Brief at 21. Claimant also highlights that finality attaches to all decisions of the Board or referees when not appealed. Thus, in Claimant's view, the UC process, while not possessing all of the characteristics of a trial, nevertheless **[***32]** "carr[ies] all the trappings of adversarial proceedings." *Id.* at 22.

Claimant posits that *Wing v. UCBR*, 496 Pa. 113, 436 A.2d 179 (Pa. 1981) supports this contention, as, therein, our Court explained:

> An adversary system is created whenever the burden of proof is allocated to either party. Moreover, in Anglo-American law, the adversary system is highly lauded and considered the best means of bringing truth to light. The **[*668]** waiver rule is perfectly appropriate in unemployment compensation proceedings.

Claimant Brief at 22 (quoting *Wing*, 436 A.2d at 181).

Claimant suggests that this Court's recognition in *Wing* that the waiver doctrine applies to UC matters demonstrates how the Board's application of Regulation 101.107 in a manner which permits it to consider any issue it deems pertinent could lead to an absurd result — namely, that the Board may, on its own volition, review issues which have not been raised by the parties, but may also simultaneously deem an issue which a party *has* presented to be waived, if he or she did not expressly raise it before the lower tribunal.

Claimant also contends that the Board's reliance on *Peak, supra*, as granting it the broad power to raise and consider any issue, of its own volition, is misplaced, as the holding therein pertained only to the Board's ability to **[***33]** act as ultimate finder of *fact* and to rectify *factual* disputes. Claimant rejects the Board's assertion that it has the power to act as a "super adjudicator" over questions of law, and, thus, she propounds that it was improper for the Board to interject the legal issue regarding her eligibility for benefits into her appeal. Claimant Brief at 24.

Claimant maintains that several aspects of the UC appeals process also repudiate the Department's assumption of a prosecutorial role. Claimant points out that, while a typical unemployment appeal involves two parties — a claimant and an employer — as the Commonwealth Court found, the Department remains a silent party in all UC cases. Claimant avers this is evidenced by the fact that Section 822 requires the Department to be given notice of the time and place of a referee's hearing, and also mandates that the Board be notified of the referee's decision and the reasons for it. Further, Claimant points out that the Board's regulations specifically empower the Department to initiate an appeal from any decision issued by a referee or the Board. *Id.* at 25 (citing 34 Pa. Code § 101.90 (granting the Department 30 days to file an appeal of the Board's decision to the Commonwealth Court)). **[***34]** **[*669]** Claimant notes that the Department will appeal a Board decision whenever it deems the Board to have wrongly applied the UC Law. *Id.* (citing *Department of Labor and Industry, Office of Unemployment Benefits* ***[**588]*** *Policy v. UCBR*, 131 A.3d 597 (Pa. Cmwlth. 2016) (appeal from Board's determination that claimant had "good cause" under the UC Law for not registering for online job search services). Claimant argues that these rights of the Department, along with its statutorily conferred power to impose financial penalties on a claimant who makes false statements to receive unemployment compensation, evidences that the Department plays a prosecutorial role in the UC appeals process. Claimant maintains that, by *sua sponte* raising the issue of her eligibility, the Board essentially stepped into the Department's prosecutorial role, and impinged on her due process rights by depriving her of an impartial arbiter.

Claimant also rejects the Board's position that it must raise issues *sua sponte* in the interest of protecting the UC Compensation Fund, suggesting that our Court should repudiate the Board's position that its duty to protect the fund may override the Board's obligation to act as an impartial adjudicator. Claimant asserts that the Board's role as a "protector of the fund" merely provides it with the ability **[***35]** to investigate facts and create a complete factual record, but it does not endow it with the ability to raise issues of law without limitation. Claimant Brief at 29. Claimant argues that the Board's attempt to wield its responsibility to protect the fund as justification to raise an undisputed legal issue *sua sponte* "implies the 'possibility of bias under Pennsylvania law [] sufficient to raise the red flag of protection offered by the procedural guaranty of due process.'" *Id.* at 34 (quoting *Lyness*, 605 A.2d at 1208) (alterations original). Moreover, Claimant contends that, just as in *Lyness*, the fatal defect here lies in the Board's administrative regulations and its loose interpretation of them to claim the right to *sua sponte* raise legal issues not appealed by the parties. Claimant asserts that the Board's interpretation should not be allowed to stand as a matter of due process.

[*670] Claimant observes that *sua sponte* review of issues in the context of administrative proceedings has also been found by our Court to violate due process whenever parties are not provided with adequate notice and an opportunity to be heard on those issues. Claimant Brief at 35 (citing *Pa. Bankers Association v. Pa. Department of Banking*, 598 Pa. 313, 956 A.2d 956, 965 (Pa. 2008) (holding that the Department of Banking deprived a **[***36]** bank of due process when it granted the bank intervenor status in an administrative proceeding before the Department, but later rescinded that status on the basis of the bank's alleged lack of standing without providing it with notice and a hearing on this question)). Claimant argues that the Board's *sua sponte* reconsideration of her eligibility denied her notice and the opportunity to be heard on this issue, because she

never was apprised that she needed to defend her eligibility determination before the Board, nor offered the opportunity to furnish additional proof on this issue.

Moreover, Claimant highlights that the Board's employment of such an expansive and fundamentally unfair review process will deter claimants of modest means, who usually cannot afford the assistance of counsel due to the financial hardship caused by their unemployment, from pursuing narrow appeals, such as with respect to the calculation of benefits, because they will assess the risk of losing a favorable eligibility determination to outweigh the amount of additional compensation they would gain by pursuing the appeal. Claimant suggests that, if the Board is going to conduct this type of expansive review, **[***37]** it ought to include language in its determinations and notices to claimants warning them that a narrow appeal may place all issues in controversy, including those **[**589]** which were adjudicated in a claimant's favor in a prior stage of the UC proceedings.

Finally, Claimant disputes the Board's contention that the mere inclusion of a reference to Section 402(h) in the referee hearing notice as an issue to be decided was sufficient notice that her eligibility would be considered. She argues that the reference to this statutory provision was vague, because Section 402(h) implicates several distinct legal issues: whether a **[*671]** claimant is engaged in self-employment; whether such employment amounts to a sideline business; and what the net earnings of such activity were for purposes of remuneration. Claimant emphasizes that the referee's decision indicated that the only issue before her was whether Claimant's "income from self-employment [was] deductible from UC, and, if so, to what extent." Claimant Brief at 47. In sum, she maintains such inadequate notice of the scope of issues the Board would consider violated due process and, thus, its eligibility determination is void.

III. Analysis

As this appeal presents issues regarding the **[***38]** interpretation of the UC Law and its administrative regulations, which involve pure questions of law, our scope of review is plenary, and our standard of review is non-deferential. *Lowman v. UCBR*, 235 A.3d 278, 289 (Pa. 2020). As a general matter, our Court interprets the UC Law, and, correspondingly, regulations promulgated by Commonwealth administrative agencies to enforce and implement it, liberally in order to effectuate the law's manifest remedial purpose, which the General Assembly has indicated is of paramount importance through a statement of policy which it incorporated into this law over eight decades ago:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. Involuntary unemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivisions in the form of poor relief assistance. Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employes during periods when they become unemployed through no fault of their own. The **[***39]** principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need of protection against the hazards of unemployment and indigency. The Legislature, therefore, **[*672]** declares that in its considered judgment the public good and the general welfare of the citizens of this Commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

43 P.S. § 752; *Gillins v. UCBR*, 534 Pa. 590, 633 A.2d 1150, 1156 (Pa. 1993) (statement of legislative policy in Section 752 must be considered in interpreting all other provisions of UC Law). With these guiding principles in mind, we turn to the question of whether the Board was empowered under the UC Law, or its regulations, to raise *sua sponte* the legal issue of Claimant's eligibility for UC benefits in her appeal from the referee's decision.

Briefly, by way of background, the three-member Board, which is appointed by the Governor with the advice and consent of the Senate, is a statutorily created administrative board within the Department. 43 P.S. § 763(a). It is empowered "to **[**590]** hear appeals arising from **[***40]** claims for compensation, adopt, amend or rescind such rules of procedure, undertake such investigations, and take such action required for the hearing and disposition of appeals as it deems necessary and consistent with [the UC Law]." *Id.* § 763(d).

The Board's specific statutory authority with respect to adjudicating appeals from a decision of a referee is enumerated in Section 824 of the UC Law, which provides:

> The board shall have power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in cases where a further appeal is allowed by the board from the decision of a referee, may affirm, modify, or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence. When any claim pending before a referee is removed or transferred to the board, the board shall afford the parties and the department reasonable opportunity **[*673]** for a fair hearing. The parties and the department shall be duly notified of the board's final decision and the reasons therefor. A complete record shall be kept **[***41]** of each case heard before the board. All testimony at any hearing before the board, whether on appeal or otherwise, shall be taken by a reporter and recording device. An unabridged transcript and audio recording of the testimony shall be made available, at cost if not used for unemployment compensation purposes or a subsequent appeal, to the parties and their attorneys or other representatives upon written request to the board.

43 P.S. § 824.

Thus, this section, when read in accordance with the plain meaning of its terms as we must, *see* 1 Pa.C.S. § 1921; *Gavin v. Loeffelbein*, 651 Pa. 465, 205 A.3d 1209, 1221 (Pa. 2019), establishes that the Board's authority to hear an appeal from a decision of a referee is discretionary, and that, when the Board decides to consider an appeal of a referee's decision, it may "affirm, modify, or reverse" it "on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence." 43 P.S. § 824. This section, however, is silent as to what specific legal issues the Board can consider once it has allowed an appeal from a referee's decision.

As recounted above, the Board has asserted that, because Section 824 grants it the authority to "review any claim . . . decided by a referee" this permits it to, *sua sponte*, consider all legal issues **[***42]** implicated in the proceedings before the referee, even if they were not raised by a party during those proceedings. We disagree.

The term "claim" is not independently defined by the UC Law; however, it is axiomatic that, in construing the meaning of a term in a particular statutory provision, we consider how that term is utilized by other statutes within an overall statutory framework that pertains to the same subject matter. *Snyder Brothers v. PUC*, 650 Pa. 49, 198 A.3d 1056, 1076 (Pa. 2018). Accordingly, we read the term "claim," as used in Section 824, consistent with its usage in Section 763(d), quoted **[*674]** above, as both provisions concern the authority of the Board to conduct appellate review, and, thus, we construe "claim" to mean the overall "claim for compensation" being pursued by the unemployed individual — *i.e.*, the case itself, not a particular claim of legal or factual error as that term is used in the conventional appellate context. **[**591]** Hence, Section 824 establishes the Board's *right* to conduct appellate review of a claim for unemployment compensation; however, it does not define the *scope* of such review — that is, the legal issues which the Board is permitted to consider when hearing an appeal by a party. *See generally Pennsylvania State Police v. Pennsylvania State Troopers Association*, 540 Pa. 66, 656 A.2d 83, 85 n.4 (Pa. 1995) (noting that, as a general principle of appellate review, **[***43]** the scope of review refers to "the *matters* (or 'what') the appellate tribunal is permitted to examine," which includes the questions the appellate tribunal may review (emphasis original and internal quotation marks omitted)).

Contrary to the Board's contention, our decision in *Peak, supra*, does not support its position. In that case, our Court considered whether the Board was empowered by Section 824 to substitute its own credibility determinations for that of the referee regarding conflicting witness testimony on a disputed issue of fact — namely, whether the claimant had engaged in willful misconduct by disobeying an employer's rule not to take a lunch break whenever it would result in the workplace being unattended. The referee resolved the conflicting testimony in the evidentiary record in favor of the claimant, but the Board, upon reviewing the same evidence, reached the contrary conclusion that the employee had disobeyed the employer's instructions. In upholding the Board, we concluded that Section 824 confers authority on the Board to be "the ultimate finder of fact with power to substitute its judgment for that of its referees on disputed facts." *Peak*, 501 A.2d at 1385. However, we did not hold therein that the Board has the same **[***44]** plenary power under Section 824 to make such *de novo* rulings concerning issues of law. Instead, we find the Board's authority to consider particular issues of law in an appeal from a referee's decision derives **[*675]** from its own duly promulgated procedural rule specifically delineating the issues it will consider in such appeals — Regulation 101.107 — which provides:

> **§ 101.107. Issues considered on appeal**.
>
> (a) In connection with the consideration of an appeal to the Board from the decision of a referee, the Board may consider an issue in the case though not expressly ruled upon in the decision of the Department or the referee and though not previously raised in the claim or appeal proceedings. However, issues not previously considered or raised will not be considered by the Board, either upon application for, or in the determination of an appeal unless the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.
>
> (b) The Board shall consider the issues expressly ruled upon in the decision from which the appeal was filed. However, any issue in the case, with the approval of the parties, may be determined though not expressly ruled upon or indicated in **[***45]** the notice of hearing, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.

34 Pa. Code § 101.107 ("Regulation 101.107").[9]

[592]** As discussed *supra*, the Board argues that the referee "expressly ruled upon" the issue of Claimant's eligibility in her decision, and, as a result, it was authorized under the first clause of subsection (b) of this rule to consider this question in adjudicating Claimant's appeal.[10] Our review compels us to reject this assertion, inasmuch as we do not interpret the **[*676]** referee's decision as having "expressly ruled" on an issue regarding Claimant's eligibility. As detailed above, neither Claimant's employer nor the Department ever challenged the eligibility of Claimant to receive benefits because of self-employment before the referee. In fact, the Department expressly found that she *was* eligible and not engaged in self-employment by virtue of her sideline business; hence, there was, as the Commonwealth Court below found, no active controversy regarding this issue for the referee to decide.

Indeed, the referee herself described the Department's decision as confirming Claimant's eligibility, and she clearly stated that the sole issue **[***46]** she was considering in her decision was whether "the claimant's *income from self-employment* [was] deductible from UC, and, if so, to what extent?" Referee's Decision, 5/11/17, at 2 (R.R. at 40) (emphasis added). Further, after reciting the fact that the Department had determined that "the claimant's sole proprietorship did not disqualify her under Section [802(h)]," the referee stated "[t]he question remains as to whether income from it is deductible from UC." *Id.*

Thus, guided by the referee's own explanation of her decision-making process, and contrary to the view of the Board and the dissenting Justices, we interpret the referee's declaration that "Claimant is not disqualified from receiving compensation under [Section 802(h)]," *id.* at 3 (emphasis deleted), to have been merely a restatement of the *Department's* resolution of this issue, not the referee's own independent reasoned decision regarding this question, as she herself indicated that she did not consider that issue to be before her and did not otherwise indicate that she was making her own determination in this regard. Therefore, as eligibility was not decided by the referee, and thus not expressly "ruled upon,"[11] **[*677]** the first clause of **[**593]** subsection (b) of Regulation 101.107 did **[***47]** not authorize the Board to consider this issue.[12]

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[9] We find Regulation 101.87, entitled "Issues considered on original appeal," discussed above, to be inapplicable in delineating the parameters of the Board's scope of review of the legal issues in an appeal to it from a referee's decision, given that, by its plain terms, it governs an appeal taken from the Department's initial decision to a referee. *See* 34 Pa. Code § 101.87 ("When an appeal is taken from a decision of the Department . . . ."). Here, the Board was reviewing Claimant's appeal *from* the referee's decision.

[10] This view of the referee's decision is adopted by Justices Donohue and Mundy in their respective dissenting opinions.

[11] It is this lack of an express ruling by the referee on a disputed issue which differentiates this case from *Jordan v. UCBR*, 119 Pa. Commw. 375, 547 A.2d 811 (Pa. Cmwlth. 1988), cited by Justice Mundy in her dissent. *See* Dissenting Opinion (Mundy, J.) at 5-6. In *Jordan*, the Department's administrative predecessor, the Office of Employment Security, ruled that the complainant was ineligible for benefits because he had started a sideline business in contravention of his employer's rules, and, thus, was ineligible under Section 802(e) in light of this perceived willful misconduct. The Office of Employment Security also found that the claimant was ineligible under Section 802(h).

The claimant appealed both determinations to a referee, and the referee ruled that claimant was eligible under Section 802(e), but ineligible under Section 802(h). Claimant appealed the ineligibility determination under Section 802(h), but indicated in his appeal that he was not appealing that aspect of the referee's ruling that he was eligible under Section 802(e). Nevertheless, the Board found that, while claimant was

[*678] The remainder of subsection (b) allows the Board to consider "any issue in the case" but *only* "with the approval of the parties." 34 Pa. Code § 101.107(b). Clearly Claimant, as the sole party in the appeal (given the Department's nonparticipation), did not approve of having the issue of her eligibility revisited by the Board.

Turning to subsection (a) of Regulation 101.107, it allows the Board to "consider an issue in the case though not expressly ruled upon in the decision of the Department or the referee and . . . not previously raised in the claim or appeal proceedings," but *only* if such a ruling does not cause "prejudice to any party." 34 Pa. Code § 101.107(a). Here, as Claimant details, the Board's *sua sponte* consideration of her eligibility caused her substantial prejudice by depriving her of notice and the opportunity to be heard on this question.

As our Court has emphasized, "the basic tenets of due process apply with **[**594]** equal force in administrative proceedings as they do in judicial proceedings . . . [I]t is fundamental that the key principles underpinning due process include the requirements of notice and an opportunity to be heard." *Pa. Bankers Association v. Pa. Department of Banking*, 598 Pa. 313, 956 A.2d 956, 965 (Pa. 2008); *see also Vann v. UCBR*, 508 Pa. 139, 494 A.2d 1081 (Pa. 1985) **[*679]** (Board's procedural rules regarding appeals must comport with **[***48]** the guarantees of fundamental due process). Adequate notice in this context includes the "right to notice of the issues to be decided, and an opportunity to offer evidence in furtherance of such issues." *Pa. Bankers Association*, 956 A.2d at 965. The Board afforded Claimant neither notice that it would be considering the issue of her eligibility for benefits, nor the opportunity to be heard thereon. Claimant was not apprised after she filed her appeal, in which she questioned the *amount* of her benefits, that the Board would address her *eligibility* for benefits, an issue that had already been decided in her favor by the Department, and which neither the Department nor her employer contested before the Board. Given the seemingly settled nature of this question, and the lack of any evident dispute over the question of

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eligible under Section 802(h), he was ineligible under Section 802(e). Claimant appealed to the Commonwealth Court, arguing that the Board did not have jurisdiction to consider this issue as he had not raised it. The Commonwealth Court disagreed and noted that, under Regulation 101.107(b), the Board may consider issues expressly ruled on in a referee's decision, and it therefore could address the issue of claimant's eligibility under Section 802(e) as it had been "expressly ruled upon in the referee's decision." 547 A.2d at 813. Thus, unlike in the present case, the referee in *Jordan* rendered an express ruling on a disputed issue. In the instant matter, there was no dispute between the Department and Claimant over her eligibility; therefore, the referee was not required to, nor did she, "expressly rule[] upon" a disputed issue.

Additionally, we must respectfully reject Justice Mundy's assertion that, because Regulation 101.87 requires the referee to "consider the issues expressly ruled upon in the decision from which the appeal was filed," 35 Pa. Code 101.87, this preserves an issue for review by the Board even in the absence of an express ruling by the referee on the issue. *See* Dissenting Opinion (Mundy, J.) at 4 n.5. In our view, Regulation 101.107(b) does not provide that an issue is preserved for the Board's review merely because the referee may have "considered" the issue. To "consider" is commonly understood to mean "[t]o think carefully about," American Heritage Dictionary 189 (4th ed. 2001), or, as Justice Mundy characterizes it, to "examine." Dissenting Opinion (Mundy, J.) at 4 n.5. By contrast, Rule 101.107(b) requires that, to be preserved for the Board's review, the referee must have "expressly ruled" on the issue. We are not at liberty to disregard this clear language. Here, the referee may have "considered" the Department's resolution of the eligibility question, but she did not expressly rule on it.

[12] In her dissenting opinion, Justice Donohue posits that Claimant failed to carry her burden of proof on the question of her eligibility for benefits due to her failure to appear at the referee's hearing and to present evidence on this question. Respectfully, we disagree. As detailed above, at the time of her application, Claimant submitted an extensive questionnaire detailing the nature of her sideline business, freelance writing; the fact that her engagement in this business predated the loss of her full time job at the Philadelphia Area Cooperative Alliance and continued in the same manner at the time of her application; her attestation that the freelancing business would not constitute her primary source of income, nor render her unavailable for full time work; and that her income from that business never exceeded that which she earned at her full time job. Claimant Questionnaire, 4/11/17 (R.R. at 6). In support thereof, she also separately provided a copy of Schedule C of her 2016 federal tax return showing the income she had received from this sideline business during that year. Claimant acknowledged in filling out this questionnaire the penalties for making false statements thereon. *Id.* The Department further confirmed these details in a phone interview with Claimant. *Id.* Notably, the accuracy and veracity of this information, which established Claimant's eligibility for unemployment compensation under Section 802(e), *see Moshos, supra*, was never challenged by the Department, her employer, or the referee. Hence, in our view, it formed a proper basis for the Department's eligibility determination, and, given that there was no dispute as to the accuracy of this information, we fail to discern how Claimant's appearance at the referee's hearing was necessary to (re)establish her eligibility, which, again, was undisputed. Both the Department and the referee were entitled to rely on information contained in the Department's own records. *See* 34 Pa. Code § 101.51 ("If a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. In the absence of all parties, the decision may be based upon the pertinent available records.").

her eligibility, we find that no reasonable person in her position would be forewarned that the Board might reassess her eligibility.

Likewise, Claimant was not given a hearing by the Board on this question after it elected, *sua sponte*, to decide this issue, and terminate her UC benefits on this basis. The Board then compounded the prejudice by denying Claimant's motion for reconsideration or remand, thereby depriving **[***49]** her of her only chance to present additional evidence and argument on this question, given that the Board evidently deemed the records relied on by the Department and the referee insufficient to establish her eligibility. Accordingly, we find that, because the Board's actions in this matter were prejudicial to Claimant, the Board cannot avail itself of Regulation 101.107(b) as justification for its actions.

For all of the aforementioned reasons, we find the Board erred in reversing Claimant's award of unemployment compensation, and so affirm the order of the Commonwealth Court.[13][14] Jurisdiction relinquished.

[*680] [595]** Chief Justice Baer and Justices Saylor, Dougherty and Wecht join the opinion.

Justice Dougherty files a concurring opinion.

Justice Wecht files a concurring opinion.

Justice Donohue files a dissenting opinion.

Justice Mundy files a dissenting opinion in which Justice Donohue joins.

Concur by: DOUGHERTY; WECHT

Concur

[*681] JUSTICE DOUGHERTY

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[13] Given the circumstances of this case, we agree with the Board that our decision in *Lyness* is not implicated. Therein, the State Board of Medical Education and Licensure, acting on information provided by its own prosecuting attorney as the result of an investigation, commenced a disciplinary proceeding against a doctor for sexual misconduct, after finding probable cause existed to initiate such a process. The Licensure Board later voted to revoke the doctor's license as the result of its investigation. Our Court regarded the Licensure Board's actions as constituting "an unconstitutional intermingling of the prosecutorial and adjudicatory functions." *Lyness*, 605 A.2d at 1210. The key factor in our decision was the fact that the Licensure Board members who made the initial decision to prosecute the case were also "significantly involved" in its adjudication. *Id.* Thus, we regarded the potential bias, whether actual or perceived, created by the Licensure Board acting in the capacity of both prosecutor and judge in determining the doctor's professional fate, to be violative of his due process rights secured by our Commonwealth's Constitution. By contrast, the Board in this matter was not involved at all in the administrative decision-making process involving Claimant until she lodged her appeal from the referee's decision.

However, we express no opinion as to whether *Lyness* could be implicated in situations unlike the present matter, such as where the Board decides to utilize the authority conferred on it by Section 763(d) to investigate a UC claim, and then later adjudicates an appeal involving that claim. Likewise, we do not address whether *Lyness* could be implicated where the Board, on its own initiative, proceeds under Section 824 to *sua sponte* review a claim pending before a referee, or under 34 Pa. Code § 101.101 to *sua sponte* review a claim after the referee has rendered a decision even though no party has appealed, and thus acts outside the conventional adversarial framework for the presentation of appellate issues to the Board. *See generally Wing v. UCBR*, 496 Pa. 113, 436 A.2d 179 (Pa. 1981) (discussing adversarial system in UC proceedings).

[14] We reject the Board's argument that its asserted duty to protect the financial health of the UC Compensation Fund, by ensuring that only valid UC claims are paid, empowers it to *sua sponte* raise legal issues in a party's appeal from a referee's decision. The Board's asserted duty, while perhaps laudable, is not free-standing authority for it to conduct appellate review of referee's decisions unmoored from the advocacy of parties or principles of due process; rather, its appellate authority derives only from its enabling statutes, and the regulations it has promulgated pursuant thereto to govern appeals to the Board.

I fully join the majority opinion, and particularly its careful reading of the Unemployment Compensation Law, 43 P.S. §§751-919.10 (UC Law), and related regulations promulgated by the Department of Labor and Industry (Department) and the Unemployment Compensation Board of **[***50]** Review (Board). I write separately to respectfully buttress the majority's analysis in light of the distinctive standard of review applicable to administrative matters.

Unlike typical judicial appellate review for an abuse of discretion, our standard for reviewing appeals of administrative decisions draws from the statutory mandates of Section 704 of the Administrative Agency Law (Agency Law), which annunciates the parameters of an appellate court's final disposition. Specifically, "[w]e must affirm [the Board's] adjudication unless we determine that: it violates the appellant's constitution[al] rights; it is not in accordance with law; **it was reached in violation of applicable administrative procedure**; or any fact necessary to the decision is not supported by substantial evidence." *U.S. Steel Corp. v. UCBR*, 579 Pa. 618, 858 A.2d 91, 99 (Pa. 2004) (emphasis added), *citing* 2 Pa.C.S. §704; *see also, e.g.*, *Diehl v. UCBR*, 618 Pa. 592, 57 A.3d 1209, 1216 (Pa. 2012) ("[W]hen reviewing unemployment compensation cases, an appellate court must consider whether the findings of fact are supported by substantial evidence and whether there was a violation of the constitution or agency procedure or an error of law.") (citation and internal quotation omitted).

The violation of an "applicable administrative procedure" relates not only to an agency's **[***51]** particular enabling statutes and regulations, but also to traditional principles of procedural due process. These are further codified in Section 504 of the Agency Law, which requires reasonable notice, a fair opportunity to be heard on the merits of the appeal, and a full and complete record. *See J.F. v. Dep't of Human Servs.*, 245 A.3d 658, 668-69, 673 (Pa. 2021), *citing* 2 Pa.C.S. §§504, 704.

[*682] The majority and concurring opinions have described in depth the manner in which the Department's and Board's actions have made the requisite meaningful notice and an opportunity to be heard inaccessible to this claimant. *See* Majority **[**596]** Opinion, slip op. at 34-35; Concurring Opinion, slip op. at 1-5 (Wecht, J.). Additionally, the Department, with its investigatory powers and duties to require the reports and records it deems necessary, *see* 43 P.S. §761, bears some responsibility for ensuring the record is complete.

Through the initial claim review process, the Department directs what information is necessary to support a claimant's eligibility. Here, because Claimant completed the Department's questionnaire specific to sideline business claimants, the Department informed her, via email and on the questionnaire itself, that the additional information necessary to support her eligibility was the Schedule **[***52]** C from her 2016 tax return, which she provided immediately. *See* Claimant Questionnaire, 4/11/17, at 2; UC Service Center Email, 4/11/17. The Department also required, under penalty of fraud, Claimant's dates of service at her last full-time employer, her responses to several yes or no questions regarding amounts of her time and income related to her sideline business, and her social security number, for use by the Department to verify her information. *See* Claimant Questionnaire, 4/11/17, at 1-3. Notably, in accord with its own regulations, the Department "will not issue a decision invalidating a claim until the claimant has been given an opportunity to refute any alleged facts or circumstances which are being considered as a basis for invalidating his claim." 34 Pa. Code §65.61. And, under the UC Law, upon the Department's determination of whether or not a claim is valid, "**[n]otice of such determination need not be given to the claimant if the claim is determined valid, but if the claim is determined invalid, notice shall be given by the department in writing to the claimant stating that the claim is invalid and the reason therefor.**" 43 P.S. §821(c)(2) (emphasis added). Claimant provided all of the information the Department **[***53]** deemed necessary to support her eligibility; presumably the Department performed its verification, **[*683]** no challenge was raised to the accuracy of the information Claimant provided, and because the claim was determined valid, claimant had no notice of any defects in her application that would warrant the later disqualification of her eligibility.

The Department then certified the contents of the claim file, upon which the referee and Board based their review. Notably, the Board's own regulations require the referee to provide unrepresented parties with "every assistance compatible with the impartial discharge of its official duties." 34 Pa. Code §101.21(a). In this case, among the first annotations at the top of Claimant's claim record is an entry dated April 21, 2017, stating, "[Claimant] IS REQUESTING CONTACT BE MADE BY EMAIL; PHONE WILL BE DISCONNECTED FOR APPROX 3 WEEKS[.]" Claim Record at 1. Claimant's continuance request was made on May 1 via email, to the email address provided in the Notice of Hearing as an appropriate means of contact. *See* Notice of Hearing, 4/26/17 at 3; Email to Referee, 4/30/17. The referee called Claimant's disconnected phone number and left a message indicating the continuance would **[***54]** be denied without further information. In my view, a brief glance at the claim record should have alerted the referee that a telephonic response to Claimant's request would not be

received prior to the scheduled hearing, and failed to provide minimal assistance compatible with the impartial discharge of the tribunal's duties.

Lastly, the Board believes it was required to disqualify Claimant because, as it claims, the only competent evidence of record was Claimant's checkmark in the "Yes" box on her sideline business questionnaire, **[**597]** to answer the question "Do you own all aspects of this business?" — while the remainder of the information in the claims file constituted "uncorroborated hearsay." Appellant's Brief at 36-37; Claimant Questionnaire at 1. As the majority observes, the Department's tribunals are entitled to rely on information contained in the Department's own records. Majority Opinion, slip op. at 32-33 n.12, *citing* 34 Pa. Code §101.51. I additionally observe the Department may do so as a result of its power and duty to collect and **verify** the essential information. In this regard, it is difficult to see how the information provided by **[*684]** Claimant was "uncorroborated." *See Vann v. UCBR*, 508 Pa. 139, 494 A.2d 1081, 1086 (Pa. 1985) (hearsay evidence admitted **[***55]** without objection may support a finding of fact if corroborated). As a result, absent any additional evidence offered by the Department to the contrary, I do not view the Board's sole finding of fact justifying its decision to disqualify Claimant — *i.e.*, "[t]he claimant owned and operated an independent business[,]" Board Decision, 8/8/17, at 1 — as supported by substantial evidence.

Accordingly, for the foregoing reasons, as well as those articulated by the majority, I conclude the Board reached its decision based upon violations of applicable administrative procedure, and the decision was not supported by substantial evidence. Though the dissenting opinions authored by my learned colleagues may appear to offer a facially reasonable alternate reading of the statute and regulations, in my respectful view, such an interpretation does not account for due process in cases where the claimant (experiencing the sudden burden of economic insecurity and its attendant obstacles, such as, plausibly, the loss of phone service) and the tribunal responsible for providing due process (benefitting from the expertise of a complement of attorneys, *see* Appellant's Brief at 11, 21) are ships passing in **[***56]** the night, given the claimant's communication of her limitations at every step.[1] In such matters, the Board's duty to protect the Unemployment Compensation Trust Fund from improper claims and unintended purposes is not effectuated through discretionary decisions that evade due process, which has the foreseeable consequence of diverting those reserves from their intended recipients by denying qualifying claims and prolonging litigation.

JUSTICE WECHT

I join the learned Majority opinion in full. I write separately to address in more detail the troubling procedural issues that **[*685]** occasioned this appeal. Specifically, the Unemployment Compensation Board of Review ("Board") *sua sponte* reviewed Caitlin Quigley's *eligibility* for unemployment compensation ("UC") benefits when only the *amount* of her UC benefits was at issue on appeal to the Board. By reaching for the threshold eligibility issue—even though that issue was uncontested and not ruled upon expressly by the referee in the proceedings below[1]—the Board deprived Quigley of notice and an opportunity to be heard on the question of her eligibility and dispensed completely with the adversarial process that is integral to our jurisprudence. **[***57]**

[598]** The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[2] The Supreme Court of the United States has held that the Due Process Clause affords, among other things, procedural protections against "the mistaken or unjustified deprivation of life, liberty, or property."[3] Although the guarantee of due process is ironclad, the form that such process takes is not. The process due in one circumstance may well differ from that due in another. Due process is flexible, inasmuch as its application

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[1] To the extent any inference about the timeliness of Claimant's continuance request may be drawn from the fact the request was made on April 30, 2017, *i.e.*, nine days before the scheduled May 9, 2019 hearing, I note the record also indicates the Notice of Hearing was mailed out to Claimant on April 26, 2017, four days prior to her request; it therefore appears she made her continuance request immediately following receipt of the Notice. *See* Notice of Hearing, 4/26/17, at 1.

[1] *See* Maj. Op. at 30.

[2] U.S. CONST. amend. XIV, § 1.

[3] *Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

to a given situation necessarily must correspond to the realities of the situation.[4] Due process applies with equal force, and is just as adaptive, in the context of administrative proceedings, such as those before us here.[5]

Although due process can take many forms, its most basic pillar is the guarantee of notice and an opportunity to be heard—a tenet by now so ingrained and incontrovertible in **[*686]** our jurisprudence as to require no citation. Nonetheless, the wisdom of the Supreme Court of the United States bears remembering:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt **[***58]** that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
> * * * *
> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
> * * * *
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . .[6]

Our legislature has recognized the fundamental nature of this principle, having long ago enshrined it in Pennsylvania's Administrative Agency Law.[7]

In this case, the Board considered Quigley's eligibility *sua sponte*. It did so in the absence of any notice that was reasonably calculated, under the circumstances, to apprise Quigley that the Board planned to review this issue on appeal. Consequently, the Board denied Quigley a meaningful choice **[***59]** between whether to appear or default, **[**599]** acquiesce or contest. In so doing, the Board denied her the due process of law:

> [D]ue process jurisprudence has never placed the onus upon the individual subject to the deprivation to anticipate such **[*687]** deprivation and launch a prophylactic challenge thereto. To the contrary, it is inherent in the concept of "notice" that the individual is to be provided with notice of adverse action; he is not expected to divine and preempt it.[8]

The Board's decision not to notify Quigley of its intent to review her eligibility for UC benefits thrust Quigley into the role of soothsayer. Perhaps Quigley could have known her eligibility was at risk had she gazed into a crystal ball, but even that would not suffice as notice under *Mullane*, its progeny, or any reasonable understanding of the meaning of, and burdens associated with, the concept of notice.

Because Quigley had no notice of the Board's intent to review her eligibility, the Board, *ipso facto*, deprived Quigley of an opportunity to be heard on that issue. Fictional hearings have been known to observe better procedure than this.[9] In fact, by

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[4] *See generally Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975) (outlining eleven hallmarks of a fair hearing ranging from an unbiased tribunal to judicial review).

[5] *See Kowenhoven v. Cty. of Allegheny*, 587 Pa. 545, 901 A.2d 1003, 1009-10 (Pa. 2006) ("Due process principles apply to quasi-judicial or administrative proceedings . . . .").

[6] *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313-14, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citations omitted).

[7] *See* 2 Pa.C.S. § 504 ("No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.").

[8] *Commonwealth v. Hamlett*, 234 A.3d 486, 515 (Pa. 2020) (Wecht, J., dissenting).

[9] Literature supplies the following example:

"Herald, read the accusation!" said the King.

proceeding without Quigley's involvement, the Board deprived *itself* of any possible **[***60]** input Quigley could have offered regarding her eligibility. Most, if not all, legal proceedings contain some fact or law that a litigant or her counsel could clarify, thereby informing the decision-maker and helping to ensure the fairness and reliability of the adjudication.[10] After all, the entire point of a hearing is to give the litigants an opportunity to reflect upon the pending controversy and then **[*688]** advance arguments in support of or against a position in order to aid the decision-maker in its deliberations.[11] Quigley received no such opportunity and, thus, lost through no fault of her own.[12]

[600]** Had the Board's *sua sponte* approach **[***61]** here been permitted to stand, it likely would have had a profound chilling effect upon claimants. Believing that they are entitled to greater UC benefits, but not wanting to risk the benefits that they already have secured, how many claimants would choose not to appeal a referee's decision lest the Board address some dispositive, though uncontested, issue that renders them ineligible for compensation? The least the Board could have done in this and similar cases involving *sua sponte* decisions without input from the losing party is grant reconsideration as a matter of course. Yet the Board declined to do even this much.[13] By **[*689]** failing to reconsider the issue of Quigley's eligibility, the Board refused to acknowledge the possibility that other, as-yet-unexplored facts and authorities could alter its decision. Rarely can a decision-maker produce a reliably thorough adjudication without some input from the affected parties.[14] At the least, a sound adjudication in such circumstances is unpredictable and likely fortuitous.

On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment-scroll, and read as follows:—

"The Queen of Hearts, she made some tarts

All on a summer day:

The Knave of Hearts, he stole those tarts

And took them quite away!"

"Consider your verdict," the King said to the jury.

"Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!"

> LEWIS CARROLL, *Alice's Adventures in Wonderland, in* ALICE IN WONDERLAND 1, 85 (Donald J. Gray ed., W. W. Norton & Co. 3d ed. 2013) (1865).

[10] *See Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999) ("[P]roviding the adversely affected party with notice and an opportunity to be heard . . . avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff's case.").

[11] *See Palko v. Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, 82 L. Ed. 288 (1937) ("The hearing, moreover, must be a real one, not a sham or a pretense.").

[12] The dissents authored by Judge Cohn Jubelirer and Judge Wojcik argue that, as a layperson who chose to represent herself, Quigley assumed the risk of an adverse outcome when she appealed the referee's decision to the Board. *Quigley v. Unemployment Comp. Bd. of Review*, 225 A.3d 914, 928 (Pa. Cmwlth. 2020) (*en banc)* (Cohn Jubelirer, J., dissenting) (citing multiple cases); *id.* at 935-936 (Wojcik, J., dissenting) (same). While it is true that *pro se* litigants are not entitled to any advantage because of their lack of legal training, *Triffin v. Janssen*, 426 Pa. Super. 57, 626 A.2d 571, 573 (Pa. Super. 1993), all of the cases cited in the dissents readily are distinguishable because the *pro se* litigants in those cases received notice and an opportunity to be heard. *See, e.g., Groch v. Unemployment Comp. Bd. of Review*, 81 Pa. Commw. 26, 472 A.2d 286, 288 (Pa. Cmwlth. 1984) ("[A] review of the record reveals that Claimant was clearly advised . . . of her right to appeal to the Board. She exercised this right . . . . Claimant was afforded the required *opportunity* to be heard throughout this proceeding. Her failure to avail herself of that opportunity before the referee is no cause for any remedial action on her behalf . . . .") (emphasis in original). Quigley, on the other hand, received neither notice nor a hearing when the Board *sua sponte* reviewed her eligibility for UC benefits. Accordingly, this is an instance in which the fault does not lie with the litigant herself.

[13] *See* Maj. Op. at 31 ("The Board then compounded the prejudice by denying [Quigley's] motion for reconsideration or remand, thereby depriving her of her only chance to present evidence and argument on this question."); *see also Quigley*, 225 A.3d at 922 n.11 (stating that the due process violation here was most egregious because, in part, the Board "denied [Quigley's] request for reconsideration of its adjudication with no explanation").

[14] *See Gardner v. Florida*, 430 U.S. 349, 360, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) ("[D]ebate between adversaries is often essential to the truth-seeking function . . . ."); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 88, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (Butler, J.,

This leads to my second point. *Sua sponte* decisions that forego notice and a hearing not **[***62]** only risk offending procedural due process, but they erode two vital aspects of the adversarial process: party control of litigation and the presence of a neutral decision-maker. The removal of these components diminishes the adversarial process and, by extension, public confidence in the law.[15]

[*690] **[**601]** Many jurists have identified this or that technique as the *sine qua non* of the adversarial process. For example, cross-examination, together with the Confrontation Clause, has famously been called "the greatest legal engine ever invented for the discovery of truth."[16] While such encomia are interesting in an academic sense, they could lead one to overlook the fact that the adversarial process is an amalgam that eludes easy distillation. It is a whole far greater than the sum of its many parts. In its simplest terms, the adversarial process is one in which legal disputes are resolved by **[***63]** having the parties present their conflicting views of fact and law before an impartial and relatively passive decision-maker.[17] While this generalization necessarily omits those outlier cases, such as Quigley's appeal to the Board, that do not conform perfectly to the textbook definition of the adversarial process, it nonetheless limns the general course taken by the majority of disputes in our legal system. Other models exist,[18] but the adversarial process reigns in this country, where we rely upon it in the main to produce accurate verdicts, while also respecting individual autonomy.[19]

[*691] With this definition of the adversarial process in mind, one sees clearly the *dramatis personae*, their respective roles, and the method to be used. Two rival sides, a neutral arbiter, the sharp clash of proofs, and the resulting impartial (not

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dissenting) ("It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it."). To be sure, there are some notable exceptions to the general bar on *sua sponte* decisions. *See, e.g., In re Adoption of K.M.G.*, 240 A.3d 1218, 1228 (Pa. 2020) (observing that subject matter jurisdiction may be raised by a court *sua sponte)*; *Commonwealth v. Hill*, 609 Pa. 410, 16 A.3d 484, 494 (Pa. 2011) ("Rule 1925 violations may be raised by the appellate court *sua sponte* . . . ."). These kinds of *sua sponte* decisions are crucial as they implicate the competency of a court to adjudicate the controversy presented or necessarily curtail the scope of review. However, the Board's decision here implicates neither jurisdiction nor issue preservation. Rather, the Board reviewed *sua sponte*, and without notice and a hearing, the uncontested, fact-intensive determination of Quigley's eligibility for UC benefits.

[15] *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring) (stating that the adversarial process is the best way to "generat[e] the feeling, so important to a popular government, that justice has been done"). The ancient Greeks, progenitors of our democracy, also understood the primacy of the adversarial process:

ATHENA: Two sides are here, and only half is heard.

* * * *

My contestants,

summon your trusted witnesses and proofs, your defenders under oath to help your cause. And I will pick the finest men of Athens, return and decide the issue fairly, truly—— bound to our oaths, our spirits bent on justice.

AESCHYLUS, *The Eumenides*, *in* THE ORESTEIA 227, 250, 253 (Robert Fagles trans., Penguin Books 1977) (458 B.C.E.).

[16] *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (cleaned up).

[17] *See, e.g., United States v. Sineneng-Smith*, __ U.S. __, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) ("In both civil and criminal cases, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.") (cleaned up).

[18] *See, e.g.*, John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206-10 (1979) (describing the inquisitorial process in German criminal trials); *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "inquisitorial system" to mean "[a] system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry").

[19] *See Pearson v. Ohio*, 488 U.S. 75, 84, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) (stating that the adversarial process "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question") (cleaned up); *see also Castro v. United States*, 540 U.S. 375, 386, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

infallible) judgment. Upset this dialectic, and the machinery of our jurisprudence can falter. This is precisely what happened when the Board *sua sponte* reviewed Quigley's eligibility for UC benefits.

Within our adversarial system, "zealous advocacy is not only tolerated, it is **[***64]** expected,"[20] yet the Board reviewed Quigley's eligibility unaided by any advocacy—either for or against. This should have signaled to the Board the need for restraint.[21] Notwithstanding **[**602]** the dearth of advocacy, the Board pressed on, addressing the eligibility issue under the aegis of its "super[-]adjudicatory responsibilities" as the defender of the UC Compensation Fund.[22] By pursuing such an agenda, rather than limiting itself to those issues squarely before it on appeal, the Board engaged in conduct that is incompatible with a neutral decision-maker's duty "to hold the balance nice, clear, and true."[23] Accordingly, Quigley's appeal to the Board was the antithesis of a party-controlled proceeding before a neutral decision-maker.[24] The Board assumed the mantle of omniscient **[*692]** inquisitor, reducing Quigley to a bystander in her own appeal.[25]

If "[t]he validity and moral authority of a conclusion largely depend on the mode by which it was reached,"[26] then the Board's decision here is bankrupt on both counts.[27] A scrupulously neutral decision-maker accedes to party control of the proceeding, and, in turn, that control lends the enterprise its legitimacy. Moreover, it is that legitimacy **[***65]** which endows judicial and quasi-judicial bodies with their authority, as they have few tools to secure compliance with their decisions. As Alexander Hamilton observed:

> The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .[28]

Thus, the integrity of that judgment is paramount. It is best secured by strict adherence to the adversarial process.

Dissent by: MUNDY; DONOHUE

Dissent

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[20] *Am. Civil Liberties Union of Pa. v. Pa. State Police*, 232 A.3d 654, 670 (Pa. 2020).

[21] *See United States v. Fruehauf*, 365 U.S. 146, 157, 81 S. Ct. 547, 5 L. Ed. 2d 476 (1961) (declining to rule upon issues "which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests").

[22] *See* Board's Br. at 27 (cleaned up).

[23] *See Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927).

[24] *See McNeil v. Wisconsin*, 501 U.S. 171, 183 n.2, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) ("What makes a system adversarial . . . is . . . the presence of a judge who does not . . . conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.").

[25] *See Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.") (cleaned up).

[26] *McGrath*, 341 U.S. at 171 (Frankfurter, J., concurring).

[27] *See Mapp v. Ohio*, 367 U.S. 643, 677, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961) (Harlan, J., dissenting) (stating that ruling on an issue not raised by the parties is unlikely "to promote respect either for the Court's adjudicatory process or for the stability of its decisions").

[28] ALEXANDER HAMILTON, *The Federalist No. 78, in* WRITINGS 420, 421 (Joanne B. Freeman ed., The Library of America 2001) (1788).

JUSTICE MUNDY

The issue presented in this appeal is whether the Unemployment Compensation Board erred as a matter of law by considering whether Caitlin Quigley (Claimant) was ineligible for unemployment compensation (UC) benefits pursuant to Section 402(h) of the Pennsylvania Unemployment Compensation Law[1] (UC Law)[2] in its review of a decision by a UC referee upholding **[***66]** an award of benefits to Claimant. I join in full the well-reasoned Dissenting Opinion authored by Justice Donohue, which concludes the Board did not err in considering whether Claimant was ineligible for UC benefits under Section 402(h) of the UC Law. I write separately to further elaborate on the administrative process surrounding claims for UC benefits. **[**609]** Section 501(a) of the UC Law provides that when a claimant files an application

for UC benefits the Department must "promptly **[***67]** examine" the application, "determine whether or not the application is valid," and provide notice to the claimant and each base-year employer of whether the claimant is eligible for benefits under Section 401 of the UC Law, 43 P.S. § 801 (setting forth the "Qualifications Required to Secure Compensation."). 43 P.S. § 821(a).

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

[*703] The UC Law sets forth the procedure under which a party may appeal an initial determination of the Department. Additionally, the Department has adopted procedural regulations which govern UC appeals.[3] When a party appeals the initial determination of the Department, the UC Law provides that an appeal may proceed to a referee or directly to the Board. However, most appeals proceed to a referee first. Section 502 of the UC Law authorizes a reviewing referee to "affirm, modify, or reverse" the determination of the Department. 43 P.S. § 822. Section 101.87 of the Department's regulations provides that "when an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim" for compensation and the referee "shall consider the issues expressly ruled upon in the decision from which the appeal was filed." 34 Pa. Code § 101.87.

Parties may appeal a referee's decision to the Board, who is the final **[***68]** arbiter in UC matters. *See Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review*, 949 A.2d 338, 342 (Pa. Cmwlth. 2008); *see also Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383, 1385 (Pa. 1985). Section 203(d) of the UC Law imposes upon the Board the duty "to hear appeals from claims for compensation." 43 P.S. § 763(d). Pursuant to Section 504 of the UC Law, the Board is authorized to "affirm, modify, or reverse" the determination or decision under review. 43 P.S. § 824. In doing so, Section 101.106 of the Department's regulations allows the Board to "review both the facts and the law pertinent to the issues involved on the basis of the evidence previously submitted, or direct the taking of additional testimony." 34 Pa. Code § 101.106. As provided by Section 101.107(b) of the Department's regulations, the Board "shall consider the issues expressly ruled upon in the decision from which the appeal was filed." 34 Pa. Code § 101.107(b).

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[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§ 751-919.10.

[2] Section 402(h) of the UC Law provides that a claimant is ineligible for UC benefits in any week in which he or she

is engaged in self-employment: Provided, however, [t]hat an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity . . . while customarily employed by an employer in full-time work whether or not such work is in 'employment' as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the [D]epartment.

43 P.S. § 802(h).

[3] Section 201(a) of the UC Law grants the Department the power to adopt rules and regulations. 43 P.S. § 761(a).

Sections 101.87 and 101.107(b) of the Department's regulations provide that in its review of an appeal, the reviewing **[*704]** referee and the Board "shall consider the issues expressly ruled upon in the decision from which the appeal was filed." 34 Pa. Code. §§ 101.87, 101.107(b). We have previously recognized "[t]he word 'shall' by definition is mandatory, and it is generally applied as such" except where the context indicates otherwise." *Chanceford Aviation Props., L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 592 Pa. 100, 923 A.2d 1099, 1104 (Pa. 2007). Therefore, upon review of the foregoing regulations, it is clear that all issues the Department addressed in its initial determination "the referee **[***69]** should likewise address, and the Board in turn should decide all of the issues the referee considered, regardless of whether a party specifically raised the issue on appeal to the Board." *Black Lick Trucking, Inc. v. Unemployment Comp. Bd. of Review*, 667 A.2d 454, 457 (Pa. Cmwlth. 1995); *see also Jordan v. Unemployment Comp. Bd. of* ***[**610]*** *Review*, 119 Pa. Commw. 375, 547 A.2d 811, 812-813 (Pa. Cmwlth. 1998).

In the present case, the record reflects that in its initial determination the Department examined whether Claimant was ineligible for UC benefits pursuant to Section 402(h) of the UC Law. Reproduced Record (R.R.) at 013.[4] As such, pursuant to the mandate of Section 101.87 of the Department's regulations, the referee was required to consider whether Claimant was ineligible for UC benefits under Section 402(h) of the UC Law in its review of the Department's initial determination regardless of whether a party raised the issue. The record indicates the referee complied with this mandate as the referee expressly concluded in her decision that Claimant that was "NOT DISQUALIFIED from receiving compensation under" Section 402(h) of the UC Law. R.R. at 041 (emphasis omitted). Therefore, because the referee specifically examined[5] whether Claimant was ineligible under Section 402(h) **[*705]** of the UC Law, the Board, under Section 101.107(b) of the Board's regulations, was required to consider this issue regardless of whether a party raised the issue. The Board did so and ultimately **[***70]** concluded based upon the record before it that Claimant was ineligible for UC benefits under Section 402(h) of the UC Law. R.R. at 051-052.

In this regard, Claimant's case is similar to *Jordan*. There, the claimant was employed by a company in the business of refinishing furniture and kitchen cabinets. While employed with this company, the claimant began refinishing furniture and kitchen cabinets on the side, in his spare time. The employer viewed the claimant's activities as directly competing with its business and, as such, terminated the claimant's employment. Thereafter, the claimant filed for UC benefits. Upon review, the Department determined Claimant was ineligible for benefits under Section 402(e)[6] and (h) of the UC Law. The claimant appealed to a referee who, upon review, concluded that the claimant was eligible for benefits under Section 402(e) but was ineligible under Section 402(h). The claimant then "filed an appeal with the Board in which he indicated that he was appealing the referee's denial of benefits under 402(h) but was not appealing the referee's decision that he was not ineligible for benefits under 402(e)." *Jordan*, 547 A.2d at 812. The Board reversed the referee and concluded that the claimant was **[**611]** ineligible for benefits under both Section 402(e) and (h).

[*706] The claimant appealed **[***71]** the Board's decision to the Commonwealth Court. Before that court, the claimant argued that "the Board did not have jurisdiction to address the issue of whether he was ineligible for benefits under Section 402(e)" because he only appealed the referee's decision with respect to his ineligibility under Section 402(h). *Jordan*, 547 A.2d at 812. The Commonwealth Court disagreed. The court reviewed Sections 101.87 and 101.107(b) of the Department's

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[4] The pagination of the reproduced record filed by the Board in this matter does not comply with Pennsylvania Rule of Appellate Procedure 2173, Pa.R.A.P. 2173. However, for ease of discussion, I cite to the reproduced record as submitted by the Board.

[5] The Majority concludes that the referee did not expressly rule on the issue of whether Claimant was ineligible for UC benefits pursuant to Section 402(h) of the UC Law. Majority Opinion at 30. The Majority acknowledges that the referee specifically wrote that Claimant was not disqualified from receiving UC benefits under Section 402(h) of the UC Law, but concludes that this is simply "a restatement of the Department's resolution of this issue, and not the referee's own independent reasoned decision regarding this question." Majority Opinion at 30. Respectfully, I cannot agree with this conclusion as such an understanding would not comport with the mandate of Section 101.87 of the Department's regulations that the referee "shall consider the issues expressly ruled upon in the decision from which the appeal was filed." 34 Pa. Code § 101.87. As the Department considered whether Claimant was ineligible for benefits under Section 402(h), the referee was likewise required to examine the issue.

[6] Section 402(e) of the UC Law provides that a claimant is ineligible for UC benefits where his or her "unemployment is due to [] discharge or temporary suspension from work for willful misconduct connected with [] work, irrespective of whether or not such work is 'employment' as defined in this act." 43 P.S. § 802(e).

regulations and after review concluded that "while [the] claimant did not want the Board to review the issue of whether he was ineligible for benefits under Section 402(e), that issue was expressly ruled upon in the referee's decision from which the present appeal was filed." *Jordan*, 547 A.2d at 814. As such, the Commonwealth Court held that "the Board had jurisdiction to rule on" whether the claimant was ineligible for UC benefits under Section 402(e). *Jordan* 547, A.2d at 813.

Here, while Claimant may not have wished the Board to examine whether she was ineligible for UC benefits under Section 402(h), that issue was expressly examined by the Department and the referee and, therefore, the Board was compelled to address the issue by Section 101.107(b) of the Department's regulations. In light of this, I cannot conclude that the Board erred as a matter of law by examining an issue the Department's regulations required it to **[***72]** examine. Accordingly, as I would reverse the order of the Commonwealth Court, I must dissent.

Justice Donohue joins this dissenting opinion.

JUSTICE DONOHUE

The hallmarks of procedural due process are "notice and an opportunity to present evidence and legal argument." *Vann v. UCBR*, 508 Pa. 139, 494 A.2d 1081, 1084 (Pa. 1985). The Majority **[*693]** agrees with the Commonwealth Court that Quigley's procedural due process rights were violated when the Unemployment Compensation Board of Review ("Board") sua sponte concluded that she was ineligible for unemployment compensation benefits, where the issue of her eligibility was not raised in her appeal to the Board or below. Maj. Op. at 1.[1] **[**603]** However, the record reveals that a "sua sponte" characterization of the Board's review of Quigley's eligibility is incorrect. The issue of eligibility was raised with the filing of Quigley's claim and expressly ruled upon by both the Department of Labor and Industry ("Department") and the referee. According to the Unemployment Compensation Law ("UCL")[2] and the Department's regulations, the Board was required to review the referee's decision, which included the issue of Quigley's eligibility for benefits. It was under no obligation to advise the claimant that it would be exercising **[***73]** its statutory authority to conduct this review. Therefore, it was not required to give notice that the issue of Quigley's eligibility was subject to its review. Furthermore, Quigley had an opportunity to be heard on her claim before the referee, and the Board was not required to provide a hearing to take additional evidence. Accordingly, I dissent.

[*694] The threshold issue attending any claim for unemployment compensation benefits is eligibility, as many exclusions may apply that could foreclose the receipt of benefits, including, in this case, self-employment. 43 P.S. § 802 (Ineligibility for compensation).[3] decision in *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383 (1985) by misapplying *Lyness v. State Bd. of Med.*, 529 Pa. 535, 605 A.2d 1204 (1992) to improperly limit the scope of the Board's review solely to

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[1] At the outset, I am troubled by the Commonwealth Court's request for supplemental briefing from the parties to address the Board's scope of authority. Although neither party raised that issue, this additional issue led to the Commonwealth Court's decision, which this Court agreed to review and a majority of this Court now affirms. *Quigley v. UCBR*, 225 A.3d 914, 919 (Pa. Commw. 2020); *Quigley v. UCBR*, 237 A.3d 410 (Pa. 2020) ("Did the Commonwealth Court violate the Unemployment Compensation Law and this Court's

[2] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§ 751-919.10.

[3] Section 402(h) of the UCL, 43 P.S. § 802(h), is known as the self-employment exclusion and contains the sideline business exception:

An employe shall be ineligible for compensation for any week--

* * *

(h) In which he is engaged in self-employment: Provided, however, That an employe who is able and available for fulltime work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work whether or not such work is in "employment" as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source **[***75]** of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

43 P.S. § 802(h). *See Lowman v. UCBR*, 235 A.3d 278 (Pa. 2020) (setting forth test for determination of self-employment under Section 802(h)).

the issues raised by the appellant?"). Respectfully, the Commonwealth Court does not have the authority to sua sponte raise an issue for its own consideration. It must decide an appeal as it is filed. In my view, the appropriate disposition of this appeal is to vacate the decision of the Commonwealth Court and remand for a decision based on the issues raised by the appellant. Because the Majority decides the merits of the issue raised by the Commonwealth Court, I write to express my dissenting view. **[***74]** The Department had to consider the income from Quigley's editing business to determine both her eligibility (whether sideline business exception to self-employment exclusion applied) and the calculation of benefits (reduction of benefits based on the amount of sideline business income). 43 P.S. §§ 802(h), 804. Because, in this context, the income inquiry relates to eligibility and the rate of compensation, I agree with Judge Cohn Jubelirer that review of one component necessarily involves review of the other. *Quigley v. UCBR*, 225 A.3d 914, 929 **[**604]** (Pa. Commw. 2020) (Cohn Jubelirer, J., dissenting) ("An appeal as to one is an appeal to both.").

Quigley raised the eligibility issue when she disclosed her editing business to the Department, Transcript of Testimony, 5/9/2017 (hereinafter, "T.T."), Exhibit # 4 (Claimant Questionnaire, 4/11/2017, ¶ 6), and she had the burden of proving that the income from her editing business did not disqualify her from receiving benefits. *Kress v. UCBR*, 23 A.3d 632, 636 (Pa. Commw. 2011). The Department recognized the eligibility issue — "There is a sideline business eligibility issue." T.T., Exhibit # 3 (Notice of Determination, 4/12/2017, ¶ 1). Based **[*695]** solely on Quigley's application, which asserted the pure conclusion of law that she engaged in a sideline business, the Department expressly resolved the eligibility issue in her favor, finding that she was engaged in a sideline business, not self-employment, and, therefore, she was "eligible for benefits beginning with waiting week ending 4/8/2017 under Section 402(h) of the Pennsylvania UC Law." T.T., Exhibit # 3 (Notice of Determination, 4/12/2017, at 1). Because Quigley received income **[***76]** from her self-proclaimed sideline business, the Department then calculated the amount of income to be deducted from her weekly unemployment compensation benefits, concluding that a "prorated weekly deductible amount [of] $237" was required. *Id.* (Notice of Determination, 4/12/2027, ¶ 4).

On appeal, Quigley challenged only the calculation of the deduction based on her 2016 income from editing. Petition for Appeal, 4/18/2017, Attachment (Email to ra-li-u-cappeals@pa.gov, April 18, 2017). The record before the referee consisted only of the "UC File Folder." T.T., at 1. It confirms the referee's understanding that the income generated from Quigley's editing business was relevant to her eligibility and to the rate of compensation. The referee's "Notice of Hearing" contained the following text: "SPECIFIC ISSUES to be considered in this appeal ... #18 - Section 402(h)—Whether claimant is engaged in self-employment." T.T., Referee Exhibit #1 (Notice of Hearing, 4/26/2017, at 1). In reviewing Quigley's appeal, the referee further stated the issue as: "Is the claimant's income from self-employment deductible from UC, and, if so, to what extent?" Referee's Decision & Order, 5/11/2017, at 2.

The **[***77]** Majority's construct of this record ignores the fact that the Notice of Hearing specifically indicated that the claimant's engagement in self-employment, and therefore her eligibility, was at issue. Likewise, the first part of the second issue noted by the referee — "is the claimant's income from self-employment deductible from UC" — squarely requires a determination that Quigley was engaged in a sideline business and therefore eligible, leading to the second part of the issue — "and, **if so**, to what extent." In my view, to read the Notice of **[*696]** Hearing and the referee's decision to exclude the eligibility issue requires a complete contortion of words.

Nothing in the record supports the Majority's assertion that the referee did not rule on the eligibility issue or provide her "own independent reasoned decision" regarding eligibility. Maj. Op. at 31. To the contrary, the record indicates that the referee made findings of facts and discussed the relevant law, including the self-employment exclusion, the sideline business exception, and the computation of weekly earnings provisions, and then made conclusions of law based on her application of the law to the facts. T.T., Exhibits ## 4, 5; Referee's **[***78]** Decision & Order, 5/11/2017, at 1-3. The referee affirmed the Department's determination of eligibility, expressly stating in her order that Quigley **[**605]** "is **NOT DISQUALIFIED** from receiving compensation under" Section 402(h) of the UCL. Referee's Decision & Order, 5/11/2017, at 3 (emphasis in original).

Agreeing with the Commonwealth Court, the Majority opines that the referee did not expressly rule on the eligibility issue because there was "no active controversy regarding this issue for the referee to decide." Maj. Op. at 30. The Majority's view of Quigley's claim for benefits is divorced from the relevant facts of record in this case. In her application, Quigley submitted a questionnaire and a Schedule C to her 2016 tax return to support her conclusion that she was self-employed in a sideline business (a statutorily defined status). On appeal to a referee for the finding of eligibility for benefits in the amount awarded, Quigley did not appear for the hearing where the specific issue to be determined was whether she was self-employed and engaged in a sideline business and entitled to benefits in an amount to be determined. The Department's Service Center's

determination of eligibility was not being "challenged" **[***79]** in an adversarial manner. Instead, at the hearing, the claimant had a burden of proof to meet: provide evidence that she was statutorily entitled to benefits and, if so, provide evidence to support a calculation of the benefits she should receive. On appeal to the Board, it was free to review the record (the application questionnaire and a Schedule C to her 2016 tax return) and **[*697]** make the ultimate determination on eligibility. Having taken an appeal, the statute clearly places the burden on the claimant to establish the nature of her self-employment because without that predicate proof, no award of benefits can be made.

The Majority's view that absent a contest by the employer, a finding of self-employment cannot be the subject of a referee's inquiry cannot be correct. While some unemployment compensation eligibility requirements can be conceded by an employer, e.g., not a voluntary quit or no willful misconduct, an employer is without knowledge or information to support a concession on the claimant's assertion of a statutory exception from the self-employment exclusion. That information is exclusively within the knowledge of the claimant. The Majority's rationale and holding means that **[***80]** an employer can force payment of UC benefits even if the claimant is not entitled to benefits and that neither the referee nor the Board can require proof by the claimant where a claimant appeals from the amount of benefits awarded. While the unemployment compensation law must be liberally construed in favor of awarding benefits, the result endorsed by the Majority is untenable.

The referee expressly ruled that Quigley was not disqualified from receiving benefits by her editing business, and the Board, in recounting the procedural history of this case, acknowledged that the Department "**issued a determination** granting benefits to the claimant under Section 402(h) of the Unemployment Compensation Law ... [and] the **Referee issued a decision** affirming the Department's determination under Section 402(h) ... ." Decision and Order, 8/8/2017, at 2 (emphasis supplied). Thus, the Board was required to consider the eligibility issue as part of its review. Although the Department and referee make decisions regarding eligibility, the Board is the ultimate fact finder. *Ductmate Indus., Inc. v. UCBR*, 949 A.2d 338, 342 (Pa. Commw. 2008). According to Section 504 of the UCL, on appeal from a referee's decision, the Board "shall have power ... [to] review any claim ... decided by[] a referee and ... may affirm, modify, **[***81]** or reverse" the referee's determination "on the basis of the evidence **[*698]** previously submitted in the case." 43 P.S. § 824; Maj. Op. at 28 ("Section 824 establishes **[**606]** the Board's *right* to conduct appellate review."). According to the Department's regulations, the appellate "tribunal **shall consider the issues expressly ruled** upon in the decision from which the appeal was filed." 34 Pa. Code § 101.87 (emphasis supplied). *See also* 34 Pa. Code § 101.107(b) ("The Board **shall consider the issues expressly ruled upon** in the decision from which the appeal was filed.") (emphasis supplied)). Because the referee expressly ruled on the eligibility issue, that issue was squarely before the Board when it exercised its discretion to review the award based on Quigley's appeal to it. Quigley's eligibility was not raised sua sponte. The UCL and Department regulations required the Board to review eligibility, which was an issue at every stage of the proceeding. I cannot discern any basis to require notice by the Board to a claimant that it will exercise its statutory authority. Respectfully, in my view, the Majority effectively rewrites the statute to reach its conclusion.

Based on its premise that the eligibility issue was not expressly ruled upon, the Majority further claims **[***82]** that Quigley was prejudiced "by [the Board] depriving her of ... the opportunity to be heard" on the question of eligibility. Maj. Op. at 34. In support, the Majority cites 34 Pa. Code § 101.107(a), which provides: "[I]ssues not previously considered or raised will not be considered by the Board, either upon application for, or in the determination of an appeal unless the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record." The Majority's reasoning is unsound because Section 101.107(a) applies when an issue was not previously considered or raised. As demonstrated, Quigley raised the eligibility issue when she applied for benefits, and the Department and referee expressly ruled on it. Thus, the Board was required to review it.

Furthermore, Quigley cannot dispute that she had an opportunity to be heard. She received a Notice of Hearing, advising her of a referee hearing scheduled for May 9, 2017 which, as recounted, notified her that her eligibility was at issue. On **[*699]** April 30, 2017, nine days before the hearing, she sent an email to the Board requesting a continuance[4] until "after the date of May 25,

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[4] Included within the hearing notice was a provision titled "Continuance of Hearing":

If you cannot attend the hearing for any reason, you may request a continuance (postponement) of the hearing. You should do this as soon as possible. The Referee will grant this only for "proper cause" and upon terms that he/she deems proper. If a continuance is granted, a rescheduling will follow. **Requests for a continuance must be made in writing**.

T.T., Referee Exhibit #1 (Notice of Hearing, 4/26/2017, at 3) (emphasis in original).

2017" because she was "not able to appear in **[***83]** person on [May 9, 2017]." Email to RA-LI-UCBR-Philadelp@pa.gov, 4/30/2017. The next morning, May 1, 2017, a referee identified as "Beth" called Quigley and left a voicemail message "stating [the] request for continuance had been denied," explaining that "the hearing office cannot hold cases until the end of the month," and asking "for a reason for her not being able to attend the hearing." T.T., Referee Exhibit #3 (Report of Telephone Call on Hearings, 5/1/2017). Quigley did not respond.

Fatal to Quigley's request for relief are the facts that, at no time prior to the May 9, 2017 hearing, did she provide a "proper cause" reason for a continuance pursuant to 34 Pa. Code § 101.23(a)[5] or take any **[**607]** measures to confirm the status of her continuance request. Perhaps she believed that the documents she submitted on behalf of her benefits claim were sufficient to establish **[***84]** eligibility and that her one-time email communication was sufficient to secure a continuance.[6] Nevertheless, **[*700]** because she chose not to confirm her request for a continuance or appear at the referee hearing, Quigley gave up her opportunity to submit sufficient evidence to demonstrate her eligibility and the proper deduction occasioned by her editing business income. T.T., at 1; Referee's Decision & Order, 5/11/2017, at 2. Critically, Quigley did not request that the hearing be reopened,[7] an option that may have provided her with a second opportunity to provide proper cause for her absence and to be heard on the merits of her claim. Despite Quigley's failure to take advantage of this remedy to reopen the record, the Majority expresses distress over the Board's denial of Quigley's request for reargument before it. Majority Op. at 31. This was not an abuse of discretion and patently did not "compound" a problem with the Board's decision-making process. On two occasions, Quigley purely and simply did not follow easy rules. Pro se litigants are not entitled to relief from their disregard of opportunities presented to them. The Majority's decision to turn a blind eye to these record facts is **[***85]** baffling to me.

[*701] The Board was not required to give Quigley another hearing. The Board had discretion to "allow or disallow any application for further appeal without hearing, solely on the basis of the application and the record." 34 Pa. Code § 101.104(a). Where the Board allows an appeal, it "will review the previously established record and determine whether there is a need for an additional hearing." *Id.* § 101.104(c).[8] **[**608]** Based on the previously established record, the Board exercised its

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[5] "Continuance of a hearing will be granted only for proper cause and upon the terms as the tribunal may consider proper." 34 Pa. Code § 101.23(a).

[6] On April 19, 2017, prior to the email request for a continuance, Quigley left a telephone message requesting that the Service Center contact her by email because her phone would be out of service for three weeks. Unemployment Service Center Claim Record, Annotation 170419 DHA7. She apparently presumed that her dictates as to her preferred method of communication would be followed even though she did not receive any confirmation. Justice Dougherty, in concurrence, points out that the Board's regulations require the referee to provide unrepresented parties with "every assistance compatible with the impartial discharge of its official duties." Concurring Op. at 3 (Dougherty, J.) (citing 34 Pa. Code 101.21(a)). Assuming for the sake of argument that this regulation pertains to scheduling matters, it does not relieve the applicant of exercising the most basic modicum of diligence in confirming that the continuance had or had not been granted. While I believe it is unreasonable for a claimant to presume that the individual preferences of a multitude of applicants for benefits can be accommodated by a government entity, it is cavalier for an applicant for benefits to fail to confirm the Service Center's intent to comply with the request for individualized treatment.

[7] Included within the hearing notice was a provision titled "Reopening after Scheduled Hearing":

If you are prevented from attending the scheduled hearing because of a compelling reason, you may request to have the hearing reopened. You must set forth the specific reasons and circumstances that are alleged to constitute "proper cause" for non-appearance at the scheduled hearing.

T.T., Referee Exhibit #1 (Notice of Hearing, 4/26/2017, at 3). *See also* 34 Pa. Code § 101.24(a) (providing that absent party must file written request to reopen case, identifying the "proper cause" reasons for not appearing at scheduled time), and 34 Pa. Code § 101.104(c)(3) ("The further appeal shall be allowed and additional evidence required ... [where u]nder § 101.24 (relating to reopening of hearing) a request for reopening received after the decision of the referee was issued which constitutes a request for further appeal to the Board.").

[8] However, the Board must accept an appeal and take additional evidence where, inter alia, the record below is silent, incomplete or erroneous regarding a material point or there appears to have been a denial of a fair hearing. 34 Pa. Code § 101.104(c)(1-2). Notably, Quigley does not argue that she was entitled to present additional evidence because the record was silent, incomplete, or erroneous regarding the question of her eligibility or that she was denied a fair hearing. It would have been disingenuous to claim that she was denied a fair hearing because she failed to appear at the scheduled hearing and made no effort to exercise her right to attempt to reopen the record.

discretion as the final arbiter of eligibility and rejected Quigley's claim on the existing record, holding that she failed "to present competent evidence for the [Board] to conclude that she fit into the sideline activity exception." Decision and Order, 8/8/2017, at 1.[9]

In sum, the record confirms that Quigley had the requisite notice of the eligibility issue from the filing of her claim for unemployment compensation benefits and throughout the appeal **[***86]** process. Quigley had the opportunity to submit evidence in support of her claim for benefits and her challenge to the deduction amount, but she did not appear at the referee hearing due to her own inaction, not the denial of due process. The Board was required to review the referee's express ruling on Quigley's eligibility for benefits, but it was not obligated to provide an additional hearing. I discern no abuse of discretion **[*702]** or error of law by the Board. Accordingly, I would reverse the Commonwealth Court's order.

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[9] Justice Dougherty provides a thoughtful argument that the Board's decision was "based upon violations of applicable administrative procedure, and the decision was not supported by substantial evidence." Concurring Op. at 5 (Dougherty, J.). Although Justice Dougherty may have articulated grounds to affirm the Commonwealth Court "for any reason," the issue of whether the Board properly exercised its discretion as the final arbiter of Quigley's eligibility is not before this Court. Our grant of review was limited to whether the Commonwealth Court's decision unduly restricted the Board's scope of review. I maintain that it did.