

Form #5

SEP 29 3 14 PM '99

~~CONFIDENTIAL~~

Maret E. Lewis
Chairman, Board of Review

Janet E. James
Chairman

Harold E. Starr
Member

Susan W. Hastings
Member



Unemployment Compensation Board of Review

Offices located at 1321 Plaza East, Charleston

All communications should be addressed to the mailing address shown at the bottom of this page.

an equal opportunity/affirmative action employer

September 28, 1999

The Honorable Ken Hechler
Secretary of State
Building 1, Suite 157K
1900 Kanawha Blvd., East
Charleston, WV 25305

Re: Board of Review Procedural Rules

Dear Mr. Hechler:

Enclosed are the following to be filed in your office:

1. Board of Review Procedural Rules
2. Comments
3. Responses to Comments
4. Form #5, Notice of Agency Adoption of a Procedural Rule

If there are any questions concerning the filing of the Board of Review Procedural Rules, please contact Robert J. Smith, Chief Administrative Law Judge or Truman Sayre, Jr., Deputy Chief Administrative Law Judge, phone number 558-2636.

We look forward to a continuing relationship.

Sincerely,

Janet E. James
Chairman

JEJ:sc

Enclosures

Janet E. James
Chairman

Harold E. Starr
Member

Susan W. Hastings
Member



Unemployment Compensation Board of Review

Offices located at 1321 Plaza East, Charleston

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an equal opportunity/affirmative action employer

September 27, 1999

David B. McMahon
Attorney at Law
922 Quarrier Street
Suite 525
Charleston, West Virginia 25314

Dear Mr. McMahon:

The Board of Review responds to your comments to the proposed Board of Review Procedural Rules as follows:

1. You commented that Section 84-1-2.5 be amended by deleting the word "physical". Your comment is adopted. The word "physical" will be deleted from Section 84-1-2.5.
2. You commented that the title to Section 84-1-5.1 and the body of Section 84-1-5.2 be used for Section 84-1-6.1 and Section 84-1-6.2. Your comment is not adopted. Although you believe that the two sections seem to state the same thing, it is appropriate to leave each section separate.
3. You commented that Section 84-1-6.1 be amended to include the "needs of the litigants". Your comment is not adopted because the language of Section 84-1-6.1 includes "judicial efficiency", which includes the needs of the litigants.
4. You commented that Section 84-1-6.2 be amended to include "... Any party has a right to an in-person hearing in the state. Each party shall be advised of their right to request an in-person hearing at the same time and in that they are advised by the Board proposes that the hearing be held by telephone. [OR] All notices of telephonic hearing shall advise the parties of their right to request an in-person hearing. Your comment is not adopted because the present language of Section 84-1-6.2 complies with the criteria of Parks v. Board of Review, 425 S.E.2d 123 (WV, 1992).
5. You commented that Section 84-1-6.5.1.b should be amended to delete the word "apparent" and insert the word "known". Your comment is not adopted. The language of Section 84-1-6.5.1.b is consistent with the Rules of Professional Conduct, Client-Lawyer Relationship, Rule 1.5 Fees.

6. You commented that Section 84-1-6.7 be amended to include "This provision does not affect the burden of persuasion." Your comment is adopted. Section 84-1-6.7 will be amended to include "This provision does not affect the burden of persuasion."

7. You commented that Section 84-1-6.7.13 and 14 be added and amended to read,

"6.7.13 Other eligibility issues - claimant."

"6.7.14 Other disqualification issues - employer."

"6.7.X Whether a case is an eligibility or a disqualification issue - employer"

Your comment has merit. Although your exact language is not adopted, a new section will be added as follows: "6.7.14 Other issues as determined by the Administrative Law Judge at the hearing."

8. You commented to have a new section added, "Section 84-1-7" Record on Appeal to Circuit Court.

7.1 The record shall be filed and certified to the Circuit Court on appeal to the Circuit Court in compliance with this provision.

7.2 The following shall be included in the record filed and certified to the Circuit Court:

Findings of Fact and decision of the appeal tribunal.

Transcript of the hearing before the appeal tribunal and any other hearings.

All documents admitted into evidence at a hearing or by the Board.

All documents lodged in the record to vouch the denial of a motion to admit into evidence a document, testimony or other evidence.

All written memos, memorandums, and briefs filed while the case is before the appeals tribunal or the Board of Review.

Only those notices of hearings and other procedural notices that are themselves in dispute.

7.3 The following shall not be included in the record filed and certified to the Circuit Court unless admitted into evidence by the appeal tribunal at the hearing or by the Board of Review upon proper motion and ruling:

Requests for appeal

Fact finding reports

Initial claims determinations

Request for separation information forms

Deputy decisions

Other communication or documents considered by the Deputy or otherwise appearing in the file unless the communications or documents are admitted into evidence by the appeal tribunal in the hearing or by the Board of Review upon proper motion and ruling.

7.3 Each of the parties to the proceeding shall be sent one of the following:

7.3.1 An exact duplicate of the record forwarded to the Circuit Court, or

7.3.2 A letter or notice which lists with particularity the items included in the record and notifies the parties that a copy of the items in the record will be supplied upon request."

Your comment is not adopted. The comment was considered by the Board. The Board is in contact with the Circuit Court to establish a protocol for filing of the record in appeals to the Circuit Court. If you are inclined, you will be offered the opportunity to participate in that process between the Board and Circuit Court. Since there is an ongoing process to establish a protocol for filing of the record in appeals to the Circuit Court, the substance of your comment is not appropriate to be adopted.

9. You commented that Section 84-1-2.5 have the language "who must contend" stricken. Your comment is adopted. The words "who must contend" will be stricken.

10. You commented in Section 84-1-3.3 that the word "of" be deleted and the word "for" be added. Your comment is adopted. The word "for" will be substituted for the word "of".

11. You commented in Section 84-1-6.4.1.c. be amended to include a definition for "pro se". Your comment is adopted. The section will be amended to include "pro se", for instance, "appearing for oneself."

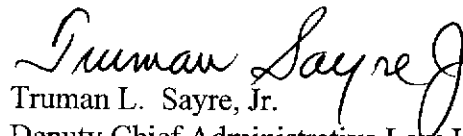
12. You commented that Section 84-1-6.3.2.c. be consistent with the amendment of Rule 45 of the Rules of Civil Procedure regarding subpoenas. Your comment is not adopted. Rule 45 of the Rules of Civil Procedure contains provisions which are not consistent with the Board of Review Procedural Rules.

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13. You commented that Section 84-1-6.9 be amended to include "change of law". Your comment is not adopted. The Board of Review may consider changes in the law, even though "change of law" is not a listed reason for a reconsideration.

I appreciate your attention in this matter. Your meaningful comments had contributed greatly to an improved Board of Review Procedural Rules.

Sincerely,


Truman L. Sayre, Jr.
Deputy Chief Administrative Law Judge

TLS/pd

DAVID B. McMAHON • ATTORNEY AT LAW

922 Quarrier St., Suite 525, Charleston, West Virginia 25314

Secretary 304-344-3144 • Fax 304-344-3145

Voice/VoiceMail 304-541-3620

e-mail wvdavid@access.mountain.net

April 13, 1999

Board of Review
Unemployment Compensation
112 California Avenue
Charleston, West Virginia 25305-0112

Re: Proposed Board of Review Procedural Rules.

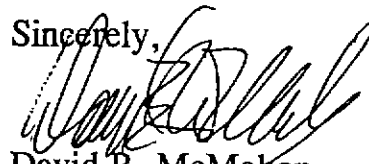
Dear Friends,

I am employed by an agency that represent low income persons with their civil legal needs. Attorneys for this agency or its sister agencies frequently represent claimants in Unemployment Compensation proceedings.

Even more frequently our potential clients appear without our representation. In West Virginia there is about 1 lawyer for every 500 people above the poverty line. We have 1 lawyer for every 16,000 people below the poverty line.

For those reasons we are very interested in the procedural rules and have submitted the attached comments. Thank you for your consideration of these comments.

Sincerely,



David B. McMahon
Attorney at Law

DBM/dbm

**COMMENTS ON
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW
PROPOSED PROCEDURAL RULES FILED MARCH 8, 1999**

Submitted by
David B. McMahon
Mountain State Justice, Inc.
922 Quarrier Street, Suite 525
Charleston, WV 25301
304-344-3144
April 12, 1999

SUBSTANTIVE

SECTION 2.5 -- Special Provisions.

Some people with mental impairments become entitled to unemployment compensation. I am no expert on the Americans With Disabilities Act on the matter, but it would probably be appropriate to include mental impairments here also, or just say "disabilities."

SECTION 6.1 and 2.

The body of Section 5.1 and the first sentence of 6.2 seem to state the same thing. I recommend using the title to 5.1 and the body of 5.2

SECTION 6.1 -- Place of hearing.

In determining the place for hearings consideration should also be given to the needs of the litigants, not just the state.

SECTION 6.2 -- Telephonic hearings.

As written this section fails to comply with the West Virginia Supreme Court case of Parks v. Board of Review, 188 W.Va. 447, 425 S.E.2d 123 (1992). It is true that the Parks case speaks in terms of an "objection" by a party to the telephone hearing. The rule does not require notification to the parties of their right to object. Failure to notify the parties of their right to object is not a good faith compliance with that decision, and probably fails a due process constitutional challenge. Without notice, only parties represented by lawyers who research the hearings statute or know of the Parks decision will in effect have the right to

object.

IF the Board agrees that the notice should be in the form, it is not sufficient to trust that the notice will be placed in the form without a rule requiring it. The form may get changed over the years for other reasons and without a basis in the rules the notice may get dropped. The composition of the Board may change and the notice in the form could get intentionally dropped without a rulemaking process. Without the provision in the rule a cause of action for failure to provide the notice can only be based on the case and not the rule.

I suggest that the language be changed as set forth below. The change to the first sentence would make that sentence applicable to interstate cases. Either of the proposed new sentences that follow would be sufficient for non-interstate cases.

“ . . . Any party has a right to an in-person hearing in the state. Each party shall be advised of their right to request an in-person hearing at the same time and in that they are advised that the Board proposes that the hearing be held by telephone. [OR] All notices of telephonic hearings shall advise the parties of their right to request an in-person hearing.

SECTION 6.5.1.b. Representative Fees -- preclusion of other employment.

I agree with the concept regarding this factor in the attorney's fee award amount. I am not sure that "if apparent to the client" is the appropriate test. Lay people often do not understand the conflict rules. I think the word "apparent" should be changed to "known", so the client will not be surprised by a fee request higher than others might charge.

SECTION 6.7 -- Initial Burden of Going Forward

I believe it is agreed that this provision is not meant to alter the burden of persuasion, only the initial burden of going forward. Since the two concepts are very close and easy to confuse, the following should be added for clarity. "This provision does not affect the burden of persuasion."

SECTION 6.7.13 and 14 (New proposals) -- Initial Burden of Going Forward.

-To cover all bases I suggest that new section 6.7.14 be added to read:

"6.7.14 Other disqualification issues - employer."

-For clarity I would reword 6.7.13 to read:

“6.7.13 Other eligibility issues - claimant.”

-Provisions in the proposed rules shifting the burden of going forward to the claimant in a disqualification case could be subject to challenge. This change prejudices claimants. When there is a question whether the case is an eligibility or a disqualification case (in which these rules clearly give the burden to the claimant), the burden on that question should remain with the employer. A new provision after 6.7.4 should be added to read:

“6.7.X Whether a case is an eligibility or a disqualification issue -- employer.”

NEW SECTION -- Record on Appeal to Circuit Court

The mandate of Dala v. Board of Review, Circuit Court of Kanawha County, No. 87-AA-220, September, 1990, is still not being followed. I therefore suggest the following additional procedural rule. Inappropriate and unnecessary materials were still being sent to the Circuit Court when last I checked, although it has been a while. A copy of the decision is attached.

§§xx-x-7 Record on Appeal to Circuit Court.

7.1 The record shall be filed and certified to the Circuit Court on appeal to the Circuit Court in compliance with this provision.

7.2 The following shall be included in the record filed and certified to the Circuit Court:

Findings of fact and decision of the appeal tribunal.

Transcript of the hearing before the appeal tribunal and any other hearings.

All documents admitted into evidence at a hearing or by the Board.

All documents lodged in the record to vouch the denial of a motion to admit into evidence a document, testimony or other evidence.

All written memos, memorandums, and briefs filed while the case is before the appeals tribunal or the board of review.

Only those notices of hearings and other procedural notices that are themselves in dispute.

7.3 The following shall not be included in the record filed and certified to the Circuit Court unless admitted into evidence by the appeal tribunal at the hearing or by the Board of Review upon proper motion and ruling:

Requests for appeal

Fact finding Reports

Initial claims determinations

Request for separation information forms

Deputy decisions

Other communication or documents considered by the Deputy or otherwise appearing in the file unless the communications or documents are admitted into evidence by the appeal tribunal in the hearing or by the Board of Review upon proper motion and ruling.

7.3 Each of the parties to the proceeding shall be sent one of the following:

7.3.1 An exact duplicate of the record forwarded to the Circuit Court, or

7.3.2 A letter or notice which lists with particularity the items included in the record and notifies the parties that a copy of the items in the record will be supplied upon request.

TECHNICAL

SECTION 2.5

The words "who must contend" are not necessary.

SECTION 3.3

I suggest "Time Period for Filing Appeal."

SECTION 6.4.1.c.

Someone who is not a lawyer who reads these rules will not know that "pro se" means they can appear by themselves. I suggest interpreting the Latin. Black's Law Dictionary defines "pro se" as "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." The Black's Law Dictionary material should be made gender neutral of course.

SECTION 6.3.2.c.

Has this reference to Kanawha County Circuit Court Guidelines been checked since the amendment of Rule 45 of the Rules of Civil Procedure regarding subpoenas?

SECTION 6.9. -- Reconsideration.

I would add "change of law" here also to short cut an unnecessary appeal where the law has changed since the appeal tribunal decision.

Janet E. James
Chairman

Harold E. Starr
Member

Susan W. Hastings
Member



Unemployment Compensation Board of Review

Offices located at 1321 Plaza East, Charleston

All communications should be addressed to the mailing address shown at the bottom of this page.

an equal opportunity/affirmative action employer

September 27, 1999

Daniel L. Light, Director
Unemployment Compensation Division
Bureau of Employment Programs
112 California Avenue
Charleston, West Virginia 25305

Re: Response to comments to Board of Review
Procedural Rules

Dear Mr. Light:

The Board of Review responds to your comments to the proposed Board of Review Procedural Rules as follows:

1. You commented that Section 84-1-1.2 include West Virginia Code Section 21-A-7-4 (c). This comment is not adopted because Section 84-1-1.2 includes authority in the West Virginia Code for the Board of Review to promulgate procedural rules. West Virginia Code Section 21-A-7-4 (c) addresses the authority for the Board to hear and determine appeals and labor disputes.

2. You commented that Section 84-1-2.4 include the Board of Review, itself and as a board member. Your comment is partially adopted. The rule Section 84-1-2.4 will include the Board of Review. It is determined that "itself and as a board member" would be redundant.

3. (a) You commented that Section 84-1-2 include as a basic provision that the Unemployment Compensation Division of the Bureau of Employment Programs is referred to as the Unemployment Compensation Claims Office. This comment is adopted.

3. (b) You commented that Section 84-1-3.1, Section 84-1-5.1, and Section 84-1-5.2 insert Unemployment Compensation Claims Office and delete the Department of Employment Security. This comment is adopted.

4. You commented that Section 84-1-3.1 include filing an appeal with the Board of Review. This comment is adopted.

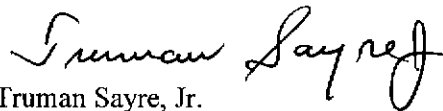
5. You commented that Section 84-1-3.2 include mail or fax an appeal to the Board of Review. This comment is adopted.

Mailing Address. 112 California Avenue, Charleston, West Virginia 25305-0112

6. You commented that Section 84-1-3.4 include that if a postmark is not legible or not reliable or absent or silent concerning the date, then the date of the appeal document or the date of delivery will be considered to determine the date of filing the appeal. Your comment has merit. Section 84-1-3.4 will be amended to include "if the postmarked date is not legible or absent, then the Board or its designee may consider other factors to determine if the appeal is timely."

I appreciate your attention in this matter. Your meaningful comments have contributed greatly to an improved Board of Review Procedural Rules.

Sincerely,

A handwritten signature in cursive script that reads "Truman Sayre, Jr.".

Truman Sayre, Jr.
Deputy Chief Administrative Law Judge

TLS/pd

March 11, 1999

Truman Sayre, Jr.
Deputy Chief Administrative Law Judge
Board of Review
112 California Avenue
Charleston, West Virginia 25305

Re: Suggestions to the proposed
Board of Review Procedural Rules

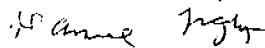
Dear Mr. Sayre,

I suggest that you consider making the following changes in the proposed Board of Review Procedural Rules:

1. §84-1-1.2. include WV Code §21A-7-4 (c).
2. §84-1-2.4. include the Board of Review, itself and as a Board Member.
3. A. §84-1-2. include as a Basic Provision that the Unemployment Compensation Division of the Bureau of Employment Programs is referred to as the Unemployment Compensation Claims Office.
B. §84-1-3.1., §84-1-5.1., and §84-1-5.2. Insert Unemployment Compensation Claims Office and delete the Department of Employment Security.
4. §84-1-3.1. include filing an appeal with the Board of Review.
5. §84-1-3.2. include mail or fax an appeal to the Board of Review.
6. §84-1-3.4. include that if the postmark is not legible or not reliable or absent or silent concerning the date, then the date of the appeal document or the date of delivery will be considered to determine the date of filing the appeal.

I appreciate the courtesy of you providing me a copy of the proposed Procedural Rules.

Sincerely,



Daniel Light - v - D: n.
~~Executive Secretary~~

Janet E. James
Chairman
Harold E. Starr
Member
Susan W. Hastings
Member



Unemployment Compensation Board of Review

Offices located at 1321 Plaza East, Charleston

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an equal opportunity/affirmative action employer

September 27, 1999

Ms. Diana Osborne, Director
Unemployment Compensation
Employers Service Corporation
PO Box 3389
Charleston, West Virginia 25333

Re: Response to comments to Board of Review
Procedural Rules

Dear Ms. Osborne:

I respond to your comments for the Board of Review Procedural Rules as follows:

1-2: You commented to include as a basic provision that the Unemployment Compensation Division of the Bureau of Employment Programs is referred to as the Unemployment Compensation Claims Office. This comment is adopted.

3.1, 5.1, and 5.2: You commented to insert Unemployment Claims Office and delete the Department of Employment Security. This comment is adopted.

6.4.2.c: You commented to add by corporate representative as a witness who can offer testimony and answer questions. Also, the corporate representative may offer evidence, object evidence, and identify issues or questions which the presiding judge will ask of the appropriate party or witness. This procedure for asking question is to protect the corporate representative from the unauthorized practice of law. This comment is subject to the Supreme Court of Appeals of WV definition of the practice of law, a copy of which is enclosed. Since it would not be appropriate to include the substance of the request in the Board of Review Procedural Rules, your comment is not adopted.

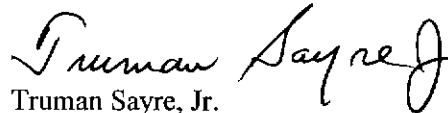
6.8: You commented to include an oral request as an option for requesting a continuance which is consistent with the current practice of the Board of Review. This comment is not adopted. The Board does not intend to change its practice and encourages parties to orally request a continuance and then follow up the oral request with a written request.

Mailing Address: 112 California Avenue, Charleston, West Virginia 25305-0112

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I appreciate your attention and cooperation to comment on the Board of Review Procedural Rules. Your comments resulted in a more meaningful and improved Board of Review Procedural Rules.

Sincerely,

A handwritten signature in cursive script that reads "Truman Sayre, Jr." The signature is written in black ink and is positioned above the printed name and title.

Truman Sayre, Jr.
Deputy Chief Administrative Law Judge

TLS/pd

DEFINITION OF THE PRACTICE OF LAW

It is essential to the administration of justice and the proper protection of society that only qualified persons duly licensed be permitted to engage in the practice of law. It is harmful to the public interest to permit anyone to represent falsely that he is qualified to perform legal services.

Unlicensed persons are excluded from the practice of law to protect the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the courts could exercise little, if any, control.

The principles underlying a definition of the practice of law have been developed through the years in social needs and have received recognition by the courts. It has been found necessary to protect the relation of attorney and client against abuses. Therefore it is from the relation of attorney and client that any definition of the practice of law must be derived.

The relation of attorney and client is direct and personal and a person, natural or artificial, who undertakes the duties and responsibilities of an attorney-at-law is nonetheless practicing law though such person may employ or select others to whom may be committed the actual performance of such duties.

The gravity of the consequences to society resulting from abuses of this relation demands that those assuming to advise or to represent others in matters connected with the law shall be properly trained and educated, and be subject to a peculiar discipline. The [That] fact, and the protection of society in its affairs and in the ordered proceedings of its tribunals, have developed the principles which serve to define the practice of law.

In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill.

More specifically but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. Nothing in this paragraph shall be deemed to prohibit a lay person from appearing as agent before a justice of the peace or to prohibit a bona fide full-time lay employee from performing legal services for his regular employer (other than in connection with representation of his employer before any judicial, executive or administrative tribunal, agency or officer) in matters relating solely to the internal affairs of such employer, as

distinguished from such services rendered to or for others. (As amended by order adopted June 27, 1961.)

Editor's notes. — The Definition of the Practice of Law was promulgated by the Supreme Court of Appeals on March 28, 1947, effective May 1, 1947, and amended by an order adopted June 27, 1961, effective July 1, 1961.

The bracketed word "That" was inserted by the editor.

W. Va. Law Review. — As to acts of real estate broker constituting unauthorized practice of law, see 69 W. Va. L. Rev. 59 (1966).

Position of circuit judge as part-time, paid instructor at a state college does not constitute the practice of law. Op. Att'y Gen., Sept. 3, 1974.

Rule

- 1.0. Board
- 2.0. General
- 3.0. Admission
- 3.1. Application
- 3.2. West
- 3.3. Bar exam
- 3.4. Review
- 4.0. Admission
- 4.1. Application
- 4.2. Requirement
- 4.3. Criminal
- 4.4. Multiple
- 4.5. Notice
- 4.6. Reside
- 5.0. Requirement
- 5.1. District

Editor's
Admission
on December
Amendments
may be for
affected rules
The form
the Practice
1985, effective
by orders of
January 1,
October 3,
October 13.

Rule 1.0
(a) Members
Supreme
seven years
Board shall
respective
appropriate
year. Any
by appointment
(b) Re
misconduct
that the
Board shall

WEST VIRGINIA:
Post Office Box 3389
Charleston, WV 25333-3389
(304) 556-1100 phone
(304) 342-4036 fax

VIRGINIA:
Post Office Box 1567
Abingdon, VA 24212-1567
(540) 676-3603 phone
(540) 676-0152 fax



April 13, 1999

PENNSYLVANIA:
Post Office Box 617
Washington, PA 15301-0617
phone (724) 223-9339
fax (724) 223-9266

KENTUCKY:
1510 Newtown Pike, Suite H
Lexington, KY 40511-1255
phone (606) 225-1680
fax (606) 225-1790

Mr. Robert J. Smith
Chief Administrative Law Judge
Board of Review
112 California Avenue
Charleston, WV 25305-0112

Re: Procedural Rules

Dear Judge Smith:

I have reviewed the proposed Procedural Rules and would like to request the following changes:

1-2: Include as a Basic Provision that the Unemployment Compensation Division of the Bureau of Employment Programs is referred to as the Unemployment Compensation Claims Office.

3.1, 5.1 and 5.2: Insert Unemployment Claims Office and delete the Department of Employment Security.

Add **6.4.2.c** by corporate representative as a witness who can offer testimony and answer questions. Also, the corporate representative may offer evidence, object to evidence, and identify issues or questions which the presiding judge will ask of the appropriate party or witness. This procedure for asking questions is to protect the corporate representative from the unauthorized practice of law.

Amend **6.8** to include an oral request as an option for requesting a continuance which is consistent with the current practice of the Board of Review.

Thank you for taking these suggestions into consideration.

Sincerely,

Diana L. Osborne, Director
Unemployment Compensation
(304) 556-1174

DLO/sje

Janet E. James
Chairman

Harold E. Starr
Member

Susan W. Hastings
Member



Unemployment Compensation Board of Review

Offices located at 1321 Plaza East, Charleston

All communications should be addressed to the mailing address shown at the bottom of this page.

an equal opportunity/affirmative action employer

September 27, 1999

Walt Auvil
Attorney at Law
1208 Market Street
Parkersburg, West Virginia 26101

Re: Proposed Board of Review Procedural Rules

Dear Mr. Auvil:

I respond to your comments to the Board of Review Procedural Rules as follows;

Section 84-1-2.1. You commented that "Delegation of authority" - the current practice requires continuances to be sought solely from the Board itself. This often works well, but the absence of the power to grant a continuance on behalf of an Administrative Law Judge does cause problems on occasion. For instance, when one appears at a hearing and subpoenaed individuals fail to appear or produce documents subpoenaed it can, depending on the circumstances, prejudiced the other party's ability "to receive and consider.....evidence and information relevant to the termination of the right to the parties." This comment has merit, but is not adopted because Administrative Law Judges do have the authority to grant continuances.

Section 84-1-2.1, as written, complies with your request or comment. Significantly, Administrative Law Judges never have been prohibited from granting continuances.

Section 84-1-6.3.2d. You commented "Non compliance" Is the Circuit Court of Kanawha County required to hear these matters or can they be heard by other circuit courts? My concern is that reaching Kanawha County and getting a ruling on non compliance might be even more difficult to do in a timely manner than it would be in other circuit courts. Your comment is adopted. Section 84-1-6.3.2d, will delete to the Circuit Court of Kanawha County, West Virginia, and substitute "a circuit court of West Virginia".

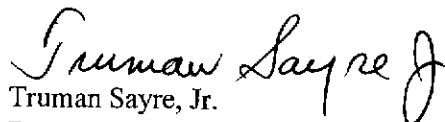
Section 84-1-6.5.1. You commented that "representation fees" the 8 factors listed are those recognized in case law is relevant to a courts consideration of fees under the West Virginia Human Rights Act. This is an obvious touch tone for the Board's consideration of the issue and do not suggest that it is wrong. However, having litigated fees quite a bit under these factors, let me suggest that much word processing could be avoided at little or no risk of reduction in justice to counsel or parties by instituting a

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“matrix” on hourly fees based on experience. Such a matrix has been approved by the Department of Justice for fees paid to private counsel and litigation against the government. A copy is enclosed. Simplicity and ease of application - no complex multi-factor test with vague, hard-to-define criteria. You work the hours, you get the pay. Your comment is not adopted. The language to determine if a lawyer’s fee is reasonable was obtained from the Rules of Professional Conduct, Rule 1.5.Fees. When petitioning the Board of Review for approval of an attorney’s fee pursuant to West Virginia Code Chapter 21-A-10-5, counsel is encouraged to provide the Board of Review with any matter which may be helpful to determine if the attorney’s fee is reasonable, under the circumstances. However, the Board is inclined to also consider the criteria listed in the Rules of Professional Conduct.

We appreciate your attention and cooperation in providing comments to the Board of Review Procedural Rules. Your participation and attention have improved the meaningful quality of the Board of Review Procedural Rules.

Sincerely,


Truman Sayre, Jr.
Deputy Chief Administrative Law Judge

TLS/pd

P & A

Pyles & Auvil

Attorneys At Law

1208 Market Street
Parkersburg, West Virginia 26101
304/485-3058

March 26, 1999

Truman L. Sayre
Deputy Chief Administrative Law Judge
Unemployment Compensation Board of Review
112 California Avenue
Charleston, WV 25305-0112

Re: Proposed Board of Review Procedural
Rules

Dear Mr. Sayre:

Thank you for providing the proposed "Board of Review Procedural Rules" for review and comment. I will address these matters seriatim.

§84-1-2.1: "Delegation of Authority." - The current practice requires continuances to be sought solely from the Board itself. This often works well, but the absence of the power to grant a continuance on behalf of an Administrative Law Judge does cause problems on occasion. For instance, when one appears at a hearing and subpoenaed individuals fail to appear or produce documents subpoenaed it can, depending on the circumstances, prejudice the other party's ability "to receive and consider . . . evidence and information relevant to the determination of the rights of the parties."

§84-1-6.3.2.d: "Noncompliance." Is the Circuit Court of Kanawha County required to hear these matters or can they be heard by other circuit courts? My concern is that reaching Kanawha County and getting a ruling on noncompliance might be even more difficult to do in a timely manner than it would be in other circuit courts.

§84-1-6.5.1: "Representation Fees." The eight factors listed are those recognized in case law as relevant to a court's consideration of fees under the West Virginia Human Rights Act. This is an obvious touchstone for the Board's consideration of the issue and do not suggest that it is wrong. However, having litigated fees quite a bit under these factors, let me suggest that much word processing could be avoided at little or no risk of reduction in justice to counsel or parties by instituting a "matrix" on hourly rates based on experience. Such a matrix has been approved

Truman L. Sayre
Mar. 26, 1999
page 2

by the Department of Justice for fees paid to private counsel in litigation against the government. A copy is enclosed. Simplicity and ease of application - no complex multi-factor test with vague, hard-to-define criteria. You work the hours, you get the pay.

Of course, the Board must reserve the right to regulate the reasonableness of hours worked, and, ultimately, the fee charged. But why foment litigation over fees?

Also, how can a contingent fee be "reasonable" in an unemployment claim? Maybe I am missing something, but I do not see it.

Very truly yours,

Walt Auvil / JB

Walt Auvil

WA/jb

Enclosure

Return-Path: <listmom@softlnk.com>
Sender: MWELA-Mail@softlnk.com
Errors-To: listmom@softlnk.com
Reply-To: MWELA-Mail@softlnk.com
X-Listserver: Macjordomo 1.1 - Macintosh Listserver
Date: Wed, 22 Jul 1998 12:56:46 -0400
From: Tom Gagliardo <gagliardo@nela.org>
To: Multiple recipients of MWELA-Mail <MWELA-Mail@softlnk.com>
Subject: Laffey Rates

Thanks to Anjali Kumar for obtaining the updated Laffey rates.

Laffey Matrix 1996 - 1999

Experience	1996-97	1997-98	1998-99
20 years +	\$325	\$330	\$335
11-19 years	\$280	\$285	\$290
9-10 years	\$230	\$235	\$240
4-7 years	\$190	\$195	\$195
1-3 years	\$150	\$155	\$155
Paralegals/ law clerks	\$80	\$85	\$85

TITLE 84

**BOARD OF REVIEW
PROCEDURAL RULES**

SERIES 1

SEP 23 3 45 PM '99

OFFICE OF THE ATTORNEY GENERAL
STATE OF WEST VIRGINIA

Procedural Rules to govern the initiation and conduct of hearings in contested unemployment claims before the Board of Review and its subordinate tribunals.

§84-1-1. General

1.1 Scope.-- These procedural rules shall govern the conduct of hearings in contested unemployment compensation claims before the Board of Review and its subordinate tribunals.

1.2 Authority.-- West Virginia Code §§21A-4-9(3), 21A-7-7, 21A-7-13.

1.3 Filing Date.--

1.4 Effective Date.--

1.5 Repeal of Former Rule.-- These procedural rules repeal and replace the Regulations of the Board of Review for the Department of Employment Security filed in the Secretary of State's office December 27, 1968 and effective March 1, 1969.

§ 84-1-2. Basic Provisions.

2.1 Delegation of Authority.-- The Board of Review may delegate authority necessary for the fair and efficient administration of the office to the Chief Administrative Law Judge or to such other person as the Board deems fit. These powers shall include, but are not limited to, ruling on motions, continuance requests and fee petitions.

2.2 Purpose.-- The purpose of the hearing process shall be to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of the Commissioner's decisions and determinations with regard to the granting or denial of any award, or the entry of any Order, or the granting or denial of any modification or change with respect to former findings. Orders or awards are made pursuant to the West Virginia Unemployment Compensation Law, West Virginia Code, §21A-1-1 et seq., as amended.

2.3 Appeal Tribunal.-- An Administrative Law Judge or a panel of Administrative Law Judges or the Board of Review in unemployment compensation claims or labor dispute cases.

2.4 Special Provisions.-- The Board and its subordinate tribunals shall take reasonable measures to accommodate persons appearing before them with impairments or language barriers.

2.5 The Unemployment Compensation Division of the Bureau of Employment Programs is referred to as the Unemployment Compensation Claims Office.

§84-1-2. General Appeals.

3.1 Right of Appeal.-- Any party wishing to appeal a Deputy Commissioner's decision may do so by filing an appeal with the local office of the Unemployment Compensation Claims Office where the claim was originally filed or where the claimant last reported or with the Board of Review.

3.2 Appeal in Writing.-- An appeal from a Deputy Commissioner's determination shall be made either in person at the local office using the appropriate appeal forms or by letter mailed or faxed to the local office or with the Board of Review. All such letters should include the following elements:

3.2.1. Name of the claimant and the employer.

3.2.2. Date of the Deputy's decision.

3.2.3 Statement of intention to appeal the decision.

3.2.4. Signature of the requesting party or counsel.

3.3. Time Period For Filing Appeal.-- Any appeal shall be filed within eight (8) calendar days after the decision has been mailed to the claimant and last employer as provided in West Virginia Code §21A-7-8.

3.4 Late Appeals.-- All appeals must be filed in accordance with the time periods set forth in these rules. The postmark date is the filing date. If the last filing day for an appeal falls on a weekend, or a state or federal holiday, postmarkings for the next business day will be accepted. If the postmarked date is not legible or absent, then the Board or its designee may consider other factors to determine if the appeal is timely. For good cause shown, the Board or its designee may accept and process a late appeal. A decision refusing a late appeal may be appealed to the Board.

3.5 Notice of Hearing.-- Notice of the date, time, and place of appeal hearing shall be mailed to all interested parties and their counsel at least ten (10) days in advance of the hearing date unless such time period is waived. This notice shall inform the parties of their respective rights and duties in relation to the pending proceeding.

3.6 Withdrawal of Appeal.-- If, after filing a notice of appeal, the appealing party decides to withdraw the appeal, the party must do so by filing a written notice of withdrawal to the Board.

3.7 Composition of Appeal Tribunal.-- All appeals from the decision of a Deputy shall be heard by an appeal tribunal composed, as the Board or its designee may direct, of either a single Administrative Law Judge, three Administrative Law Judges, a member of the Board, or the Board itself. West Virginia Code §21A-7-7.

3.8 Time Period for Decision.-- A decision shall be issued within twenty-one (21) days after the date the hearing is concluded and shall be mailed to all parties.

§84-1-4. Labor Dispute Cases.

4.1 Notice of Hearing.-- Notice of the date, time, and place of the hearing shall be sent to all interested parties at least ten (10) days in advance of the hearing date. This notice shall also inform the parties of their respective rights and duties in relation to the pending proceeding. In labor dispute cases involving more than ten claimants, where all or some claimants are represented by counsel, then notice to the represented claimants shall be sufficient if mailed to the represented claimant's counsel.

4.2 Composition of Labor Dispute Appeal Tribunal.-- All cases relating to a labor dispute or to a disqualification under West Virginia §21A-6-3 (4) shall be heard by an appeal tribunal composed either of three Administrative Law Judges or of the Board itself, as the Board may direct. West Virginia Code §21A-7-7.

4.3 Time Period for Decision.-- Upon consideration of all evidence, the appeal tribunal shall make a decision within fourteen (14) days after the date of the hearing and shall notify all interested parties of its findings and decision. West Virginia Code §21A-7-7a.

§84-1-5. Appeal From Appeal Tribunal's Decision.

5.1 Right to Appeal.-- Any party wishing to appeal an appeal tribunal's decision may do so by filing a written notice of appeal with the Board or with the local office of the Unemployment Compensation Claims Office where the claim

was originally filed or where the claimant last reported.

5.2 Appeal in writing.-- An appeal under this section shall be made either in person or by letter mailed to the Unemployment Compensation Claims Office or to the Board office. All such letters should include the following elements:

5.2.1 Name of the claimant and the employer.

5.2.2 Date of the decision.

5.2.3 Statement of intention to appeal the appeal tribunal's decision.

5.2.4 Signature of the appealing party or counsel.

5.3 Time period for Filing Appeal.-- Any appeal shall be filed within eight (8) calendar days after the decision has been mailed to the claimant and last employer as provided in West Virginia Code §21A-7-9.

5.4 Late Appeals.-- All appeals must be filed in accordance with the time periods set forth in these rules. For computation purposes, the postmark date is considered the filing date. If the last filing day for an appeal falls on a weekend, state or federal holiday, postmarkings on the next business day will be accepted. For good cause shown, the Board or its designee may accept and process a late appeal.

5.5 Review by the Board on its Own Motion.-- Within eight days following a decision by an appeal tribunal, and in the absence of an appeal by a party, the Board may, on its own motion, order a hearing before the Board on the claim or any issue involved therein.

5.6 Transcription.-- Once an appeal has been duly filed with the Board, a transcript of the appeal tribunal proceeding shall be prepared and mailed to all interested parties and their representatives.

5.7 Notice of Hearing.-- Notice of the date, time, and place of appeal hearing shall be sent to all interested parties and their counsel at least ten (10) days in advance of the hearing date.

5.8 Motions for Additional Evidence.-- Motions to present additional evidence will not be granted upon appeal to the Board except for good cause shown. To establish good cause, a party must demonstrate that the evidence was not available prior to the appeal tribunal hearing or that he or she did not know, nor reasonably could have known, of the evidence in question at that time. Any party having good cause to offer additional evidence should forward a written request to

the Board for an opportunity to present such evidence. A copy of such request must be served on all parties.

5.9 Withdrawal of Appeals.-- If, after filing a notice of appeal, the appealing party decides to withdraw the appeal, the party must do so by filing a written notice of withdrawal to the Board.

5.10 Quorum.-- All appeals from the decision of an appeal tribunal shall be heard by at least two Board members.

5.11 Notice of Decision.-- Upon consideration of all evidence, the Board shall issue a decision within fifteen (15) days of the conclusion of the hearing and mail a copy to all parties.

§84-1-6. General Hearing Procedures and Policies.

6.1 Time, Place, and Manner of Hearing.-- Upon receipt of a duly filed appeal of the decision of a deputy commissioner, or following the Commissioner's referral of a labor dispute case, the Board shall set the date, time, and place at which a hearing will be conducted. Location of the hearings shall be set by the Board at its discretion to achieve judicial efficiency.

6.1.1 Notice of Hearings.-- Notice of the date, time, and place of hearing shall be sent to all interested parties at least ten (10) days in advance of the hearing date.

6.1.2 If a continuance of the hearing is granted, the ten (10) day notice requirement may be waived.

6.2 Telephonic Hearings.-- The Board, in its discretion, may schedule appeal tribunal hearings telephonically. Any party has a right to an in-person hearing. In a case where a party is not a resident of the State of West Virginia and does not have an office or business location in the State of West Virginia, the Board may permit that party to appear telephonically.

6.3 Rules of Evidence and Procedure.-- In the conduct of the hearings, neither the Board of Review nor its subordinate tribunals shall be bound by the usual common law or statutory rules of evidence or by the formal rules of procedure, except as provided for by these rules.

6.3.1 Discovery.-- There shall be no discovery in claims or cases before the Board or an Appeal Tribunal.

6.3.2 Subpoenas.-- The presence of a witness or production of evidence may be obtained by the issuance of a subpoena or a subpoena duces tecum by the Board or its designee.

6.3.2.a Request.-- A subpoena may be requested verbally or in writing from the Board or its designee.

6.3.2.b Service.-- Subpoenas may be served or accepted in any manner provided for by the rules of civil procedure with the exception that a party may serve a subpoena. Regardless of the method, service is not the responsibility of the Board.

6.3.2.c Fee.-- Subpoenaed witnesses who testify at the hearing will be paid witness fees in accordance with the guidelines of the Circuit Court of Kanawha County, West Virginia.

6.3.2.d Noncompliance.-- If a person refuses to comply with a subpoena, the Board may apply to a circuit court of West Virginia to compel production of the testimony or evidence sought.

6.4 Representation.-- All representation before the Board and its subordinate tribunals must comply with the following guidelines.

6.4.1 Individuals. Any claimant or employer, who is a natural person, may appear at and represent him or herself or may be represented by an attorney duly licensed or authorized to practice law in the State of West Virginia.

6.4.2 Corporations. A corporate employer may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia. However, an employee of a corporation may testify at a hearing without the presence of counsel.

6.4.3 Government. A government employer, whether federal, state, or local, or the Unemployment Compensation Claims office, may be represented only by an attorney duly licensed or authorized to practice law in the State of West Virginia. However, an employee of a government employer or of the Unemployment Compensation Claims office may testify at a hearing without the presence of counsel.

6.5 Representation Fees.-- In any claim where a claimant is represented by counsel, any fee charged the claimant must be approved by the Board. Such fee may be contingent or based on an hourly rate or a fixed amount. An attorney's fee shall be reasonable.

6.5.1 The factors to be considered by the Board or its designee in determining whether to approve a fee shall include the following:

6.5.1.a The time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly.

6.5.1.b The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.

6.5.1.c The fee customarily charged in the locality for similar legal services.

6.5.1.d The amount involved and results obtained.

6.5.1.e The time limitations imposed by the client or by the circumstances.

6.5.1.f The nature and length of the professional relationship with the client.

6.5.1.g The experience, reputation, and ability of the attorney or attorneys performing the services.

6.5.1.h Whether the fee is fixed or contingent.

6.6 Argumentation.-- The Board may limit the parties to oral argument, or the filing of written argument, or both.

6.7 Initial Burden of Going Forward.-- The initial burden of going forward shall fall as denoted below. Once this initial burden has been met by the designated party, the burden may shift between the parties as directed by the presiding official. This provision does not affect the burden of persuasion. This provision should be read and interpreted in conjunction with West Virginia Code §21A-6-1 and 21A-6-3.

6.7.1 Quit Without Good Cause – Claimant.

6.7.2 Quit for Personal Reasons – Claimant.

6.7.3 Quit for Educational Reasons – Claimant.

6.7.4 Discharge for Misconduct – Employer.

6.7.5 Failure to Accept Suitable Work–Unemployment Compensation Claims Office or Employer.

6.7.6 Existence of Labor Dispute or Work Stoppage – Employer

6.7.7 Receipt of Other Compensation–Unemployment Compensation Claims Office or Employer.

6.7.8 Sports or Athletics – Claimant.

6.7.9 Illegal Aliens – Unemployment Compensation Claims
Office or Employer.

6.7.10 Vacation – Employer.

6.7.11 Federal Benefits – Unemployment Compensation Claims
Office or Employer.

6.7.12 Fraud – Unemployment Compensation Claims Office or
Employer.

6.7.13 Eligibility – Claimant.

6.7.14 Other issues as determined by the Administrative Law
Judge at the hearing.

6.8 Continuance of Hearing – Continuances shall be granted only upon the request of a party for good cause shown. After a hearing date has been set, a party may file in a timely fashion a written motion with the Board setting forth in detail the reasons why such a continuance is necessary. Further, the requesting party shall serve the motion on all interested parties in a timely fashion.

6.9 Reconsideration – Requests or motions for reconsideration will not be considered except those involving administrative or clerical error.