U.S. DEPARTMENT OF LABOR
Manpower Administration

# A Guide to Unemployment Insurance Benefit Appeals Principles and Procedures

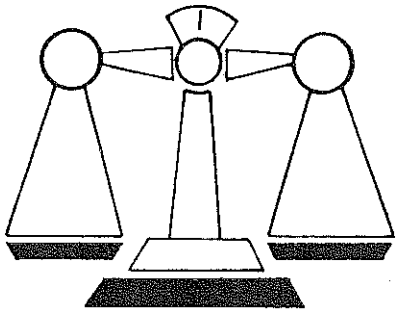

Table of Contents

## I Introduction.

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

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

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

Accordingly, to be sound and practical, as well as fair to claimants and to other interested parties, appeal and hearing procedures in this program must, as one respected authority has said, be "simple, speedy and inexpensive." (1)

Simplicity assures that parties may know and understand 'their rights; it precludes formal and technical procedures which place undue burdens on parties which tend to impair their ability to protect their rights. Speed assures the prompt payment of benefits when due. Low expense means that no individual may be deprived of his rights merely because he cannot afford to retain representation or to incur other expense in the pursuit of these rights. In addition, procedures should include making all parties aware of available assistance by claims and appeals personnel, so that they may exercise, as well as understand, their rights.

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(1) Robert M . Benjamin, Administrative Adjudication in the State of New York, 1942, at page 13.

A. Fair Hearing.

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

- "timely notice to all claimants of every material step in the proceeding"(2)
- "full opportunity to be heard in respect of all that bears upon the validity, extent and priority of their claims"(3)
- "to hear the evidence introduced against him" and "to know the claims of his opponent"(4)
- "to produce evidence and witnesses" and "to offer evidence in explanation or rebuttal"(5)
- "to cross-examine witnesses"(6)
- "to make argument"(7)
- "evidence adequate to support pertinent and necessary findings of fact" (8)
- "that the decision of the Board shall be governed by and based upon the evidence produced at the hearing"(9)
- "that the decision shall not be without substantial evidence taken at the hearing to support it."(10)

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(2) Pacific Live Stock Co. v. Oregon Water Board, 241 U.S. 440, 453 (1916)
(3) Ibid.
(4) Philadelphia Co. v. Securities and Exchange Commission, 175 F. 2d 808817 (CA DC, 1948), dismissed 337 U.S. 901 (1949)
(5) National Labor Relations Board v. Prettyman, 117 F.2d 786, 790 (CCA 6, 1941); 18 ALR 2d 556. See also Whitfield v. Hanges, 222 Fed. 745, 749, (CCA 8, 1915) Interstate Commerce Commission v. Louisville & Nashville Railroad Co. , 227 U.S. 88, 93 (1913). See also Swarney v. United States, 7 F.2d 515, 517 (CCA 8, 1925).
(6) Interstate Commerce Commission v. Louisville & Nashville Railroad Co., supra. See also The Ottawa, 70 USs. 268, 271 (1865); Philadelphia Co, v. Securities and Exchange Commission, supra; and Swarney v. United States, supra.
(7) Philadelphia Co. v. Securities and Exchange Commission, supra. See also Morgan v. Untied States, 298 U.S. 468, 480 (1936); WJR v. Federal Communications Commission, 174 F.2d 226 (CA DC, 1948). Reversed on other grounds337 U.S. 265(1949); and L.B. Wilson, Inc. v. Federal Communications Commission, 170 F. 2d 793 (CA DC, 1948).
(8) Morgan v. United States, 298 U.S. 468, 479 (1936).
(9) National Labor Relations Board v. Prettyman, supra. See also Morgan v. United States, supra; Interstate Commerce Commission v. Louisville & Nashville Railroad Co., supra; and Whitfield v. Hanges, supra.
(10) Whitfield v. Hanges, 222 Fed. 745, 749 (CCA 8, 1915). See also Morgan v. United States, supra.

As the courts have held, however, "No particular form of procedure is required to constitute due process in administrative hearings.'(11) What is required is elementary fairness--that is, that * * * the course of the proceeding shall be appropriate to the case and just to the party affected * * *."(12) The highly regarded Benjamin Report (13) expresses the view-Yong held in regard to this program that "the most satisfactory ffirocedures7may call for much more than due process alone would require.(14)

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

"Not only the attitude and conduct of the administrator but the form of the procedures themselves should be directed to making the person dealt with feel that he is being fairly dealt with . There is more involved here than the simple desirability that this should be so.

To a considerable degree, the successful operation of any procedure requires cooperative effort by all the parties. Procedure fair on its face will go far to enlist such cooperation. (15)

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

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

(12)Whitfield v. Hanges, supra. See also Missouri ex rel. Hurwitz v. North, supra; and National Labor Relations Board v. Prettyman, supra.

(13)Robert M. Benjamin, Administrative Adjudication in the State of New York, 1942, a report to the Governor of New York.

(14)The Benjamin Report, page 12.

(15)Ibid

B. Purpose of the Statement.

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

C. Use of Terms.

For purposes of convenience and conciseness, the term "referee" has been used to refer to all first-appeal authorities, regardless of differences in statutory or State designation. Similarly, the term “board of review" has reference to all second-level administrative appeals bodies. In those instances in which the principle or recommended procedure is applicable to the functions of both a referee and a board of review, the term "appeal tribunal" is used.

## II. Administrative Appeals Hearings

### A. Administrative Hearings Compared to Court Trials

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

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

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

Additional differences between court proceedings and the appeal tribunal hearings are the result of provisions of the State unemployment insurance laws to the effect that appeal tribunals are not bound by common law and statutory rules of evidence. Consequently, while a tribunal may receive evidence at

the hearing which is not reliable, it should base its findings only on evidence which is substantial both as to quantity and quality.

B. Authority and Responsibilities of Appeal Tribunal

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

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

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

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

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

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

It is not enough for a hearing to be fair; a hearing must also give the appearance of fairness. A hearing that is technically fair, but gives an appearance of unfairness, is unfair in practical effect. An appeal tribunal which seems interested when the employer is testifying and somewhat bored when the claimant is testifying may, in fact, give the testimony of both full and fair consideration. The claimant,

however, who has noticed the tribunal's apparent concern with all the employer has said, and its seeming lack of interest as soon as the claimant began to testify, is likely to conclude that the hearing is unfair.

An. appeal tribunal bears the responsibility for pro- viding both a prompt hearing and a decision. Thus, the appeal tribunal should schedule a hearing within a very short time after the receipt of the appeal. The claimant can usually ill afford to wait, and frequently is unable to attend a delayed hearing because he has secured employment, moved to a new location or has various other reasons. To procrastinate the scheduling or the hearing of a case may deny the claimant a reasonable opportunity for a fair hearing and defeat

'Basic concept of the unemployment insurance program-- the prompt payment of benefits.'

C. Uniformity of Legal Interpretations

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

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

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

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

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

1. The right of the board of review to take over a case pending before a referee, or one in which the period for appealing from the referee's decision has not yet expired;
2. The right of the referee to refer questions of law to the board of review;
3. Conferences among referees;
4. Use of precedent manuals, materials and decisions;
5. Adequate training for referees.

D. Consistency Between Benefit and Coverage Decisions

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

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

E. Scope of Hearing

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

(1) An issue which has been determined and has become final should not be reopened--For example, assume a claimant was disqualified for a five-week period for refusing suitable work. The determination was not appealed and became final. During the five-week period, he was again disqualified for refusing another offer of work; this time he appealed. The appeal tribunal should confine the appeal hearing to the second work refusal;
(2) Beyond the issue upon which the appeal was based, or other issues raised by the parties or the appeal tribunal, any other issues considered should be only those discovered as a result of inquiry into matters germane to the appealed issue; in other words, the appeal tribunal should not permit a "fishing expedition" to seek out issues;
(3) Any issues, over and above those set forth in the notice of hearing, should not be heard or decided without first giving notice to the parties. In providing notice to the parties of a new issue, the referee should explain that issue to the parties and advise them of their right to an adjournment, if they so desire, in order to prepare for a hearing upon the new issue. If the parties are willing to continue without further notice, however, the referee should proceed to hear the new issue.

F. Board of Review

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

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

## III. Filing and Perfecting Appeals

### A. Local Office

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

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

### B. Form of Appeal

1. Informal Filing Procedures. Any timely written statement, signed by an interested party or his representative, indicating dissatisfaction with a determination or the party's desire for its review, should be accepted as an appeal. No specified agency form should be required to constitute a valid appeal. The procedures for filing first-level and second-level administrative appeals should be as informal as possible. Applicable agency forms should be written in simple, nonlegalistic language. The right of appeal should not be limited by requiring a detailed or legally sufficient statement of the grounds or issues for appeal, since such a requirement would represent a restriction upon an unqualified right.

2. Completion of the Appeal Notice. Agency personnel should assist the appellant in completing the appeal form or notice, particularly if reasons are required by statute in the development of a concise statement of the reasons for appeal. The appeals request should

be signed by the appellant or his representative. It should include information upon which the appeal tribunal might determine the timeliness of the appeal and identification to facilitate the assembly of the pertinent records.

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

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

C. Time Within Which Appeals Must be Filed

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

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

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

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

D. Notice of Hearing

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

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

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

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

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

E. Payment of Benefits Pending Appeal

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

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

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

## IV. Preparation for the Hearing

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

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

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

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

### B. Time and Place of Hearing

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

1. Controlling Considerations in Scheduling Hearings. A definite time and place for hearing should be set for each appeal. Controlling considerations should be the prompt disposition of the appeal and the selection of a place of hearing which is reasonably convenient for each of the parties.

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

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

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

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

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

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

    b. Order of Scheduling Separate Hearings. The order in which separate hearings are scheduled should be determined by the nature of the issue in the appeal; i.e., the first testimony should be taken from the party that can offer evidence essential to establish the existence of that issue, so that the other party may understand and respond. For example, in "discharge" cases, the employer's testimony normally should be taken first; in voluntary leaving cases, the claimant's testimony should be taken first . Regardless of the scheduling order, the claimant must have the opportunity to know the evidence and arguments received at the hearing for the employer. He must also have an opportunity to explain and to rebut the evidence and arguments and to cross-examine the witnesses who testified at that hearing, either by submitting questions for that purpose, or where necessary, by a further hearing.

c. Procedure for Second Hearings. Whenever possible, separate hearings should be conducted by the same appeal tribunal. In the second hearing, the appeal tribunal should make available the testimony, other evidence, and arguments presented in the first hearing; it should afford the party who did not attend the first hearing the opportunity to present evidence and arguments and to test the probative value of the evidence presented at the first hearing. All exhibits admitted as evidence in the first hearing should be available for use at the second hearing.

d. Rights of All Parties to be Protected. In the situation under discussion, one interested party frequently will not be in attendance at a particular hearing. Accordingly, the appeal tribunal must be alert to the need for protecting the rights encompassed by "fair hearing" for all parties, including the party not present. This includes the right of a party to submit interrogatories for the purpose of examination and cross-examination in appropriate situations, to have adverse witnesses cross-examined by the appeal tribunal, and to know and to rebut evidence and arguments submitted by other parties. When- ever it appears that rebuttal testimony is needed, an additional hearing should be held for this purpose.

e. Notices of All Hearings to Each Party. Each party should receive notice or each hearing scheduled in the case, regardless of whether it is expected that he will attend a certain hearing. The notice to a party not expected to attend a hearing should include the basic purpose of the hearing, and a statement that he need not attend but may if he wishes to do so.

5. Physical Arrangements for the Hearing. Consistent with the concept or an appeal tribunal's impartiality, the hearing location should be in a. neutral place, preferably in a separate room. The hearing room or space should not be used by other personnel for the transaction of business while the hearing is in process. The hearing may be held informally at a desk, but a table at which the parties can be comfortably seated is preferable. The desk or table should be cleared of all papers and files not connected with the case being heard. The room should be free of interference from outside noises and street traffic, well lighted, and large enough to accommodate the number of individuals usually in attendance.

C. Hearing Preparation by Appeal Tribunal

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

D. Impartiality of the Tribunal and Challenges to Interest

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

Any party to an appeal should be allowed to challenge the interest of the appeal tribunal assigned to hear his case at any stage of the process until the decision becomes final. Unless the challenge to

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

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

E. Withdrawals, Postponements, Reopenings, and Subpoenas

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

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

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

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

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

   Reopenings may, on the other hand, be necessary to insure a reasonable opportunity for a fair hearing to a party who did not attend the scheduled hearing because he did not receive notice of the hearing in accordance with the requirements of the State's law and regulations or for other good cause (see UIPL 853 on reopenings). Lack of notice would invalidate the rest of the process--the hearing and decision--upon the protest of the party who failed to get the necessary

hearing notice. Necessarily, that party should have the right to reopening upon a request made within a reasonable time after he had been made aware that the hearing was scheduled or held.

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

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

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

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

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

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

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

V. Hearings and Decisions

A. Conduct of Hearing

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

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

2. Informal but Dignified Hearings. The hearing should be conducted in an informal manner, but with dignity and decorum. Informality, in this sense, is not inconsistent with orderliness, and means only an absence of unnecessary technicalities. It provides flexibility that enables adjustment to various circumstances, such as a participant's ability to present information. The appeal tribunal should maintain control of the hearing and make it move forward in an orderly manner. Mannerisms suggesting impatience, or the lack of time for a full exploration of the facts, should be avoided.

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

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

   If a party is absent at the time set for hearing, the appeal tribunal should wait a reasonable time (at least 15 minutes) before starting the hearing. A

party who arrives after the hearing has begun but before it has been concluded, should be given a summary of what has previously occurred.

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

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

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

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

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

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

B. Representation.

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

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

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

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

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

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

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

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

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

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

   In some instances, both parties may be represented by counsel. When the counsel for each party is well versed in unemployment insurance law, procedures and precedents, there may be less need for the appeal tribunal to interrogate. At the same time, the appeal tribunal should maintain control and guide the development of the case, rather than merely permit opposing

counsel to "fight it out." To the extent that any representative fails to elicit the necessary information, the appeal tribunal should interrogate to develop this information.

C. Nonappearance of Parties.

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

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

If neither party appears at the hearing, and the record consists solely of the administrative file, the appeal notice, and the notice of hearing, the appeal tribunal should review the record for any patent error in the determination from which the appeal was taken. If an error is discovered the appeal tribunal should render a decision or remand the case to the agency for administrative correction.
If no error is apparent in the record, the appeal tribunal should issue a notice of dismissal of the appeal which contains a notice of right to reopen.

D. Record of Hearing

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

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

2. Transcript of Record. The record of the hearing need not be transcribed unless there is a further appeal. When the record is transcribed, the parties to the appeal should be given an opportunity to read and copy the transcript and the contents of the ease file. They should also be given the opportunity to correct the record and transcript in connection with an appeal. In informational material given to parties they should be advised of these rights, and the right to purchase a copy of the transcript, or obtain a copy of the transcript free of charge if authorized by the State law or practice.

E. Decision.

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

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

2. Prompt Preparation of Decision. It is not essential that a particular format be followed in the preparation of a decision. However, the decision should contain he following information:

   a. the names and identification of the parties;
   b. appearances;
   c. recital of jurisdiction of appeal tribunal;
   d. decision number ;
   e. date of appeal;
   f. place and date of hearing;
   g. date of mailing decision;
   h. authority making decision;
   i. a brief recital of the decision under review;
   j. a clear statement of the issue(s)involved, i.e., of the subject matter in controversy;
   k. the appeal tribunal's findings of fact and conclusions of law;
   l. a statement of rationale, explaining why the facts found lead to the conclusions of law which were reached;
   m. the administrative action taken, e.g., the extent to which benefits are allowed or disallowed, directions to the administrative agency for further proceedings, or other orders for disposition of the appeal;
   n. a statement (notice)of right to further appeal and the time limit for filing appeal; also, information as to the places and methods of filing appeal should be contained either in the notice of appeal rights or in separate informational material referred to in the notice. If the State law permits extension of the appeal period for good cause, such information also should be given.

4 Findings of Fact, Conclusions of Law, and Reasoning. Well-developed decisions of an appeal tribunal contain findings of fact, conclusions of law, and reasoning. Each of these elements is considered below.

a. Findings of Fact. The appeal tribunal's written decision should contain all relevant findings of fact supported by the record, and only such findings. Thus, before starting to write or to dictate its decision, an appeal tribunal first should make a careful review of the evidence. It is the appeal tribunal's responsibility to consider the reliability of the evidence offered, and the inherent probability or improbability of its truth. Accordingly, it is necessary that the tribunal evaluate the credibility of witnesses, including as necessary, their character, reputation, and demeanor, as well as the actual testimony received from them.

   The facts which the evidence establishes should be recited, not the testimony. The findings need not be elaborate in form or content, but should be complete , concise, and stated in specific terms so as to support the conclusions of law.

b. Conclusions of Law. A conclusion of law represents the appeal tribunal's application of the law to the findings of fact in a particular case. There should be conclusions of law on ea.ch of the elements of proof required to support the decision on ea.ch of the issues.

c. Reasoning. An appeal tribunal should include in its decision a. statement of its reasoning, even though the reason may appear self-evident. The reasoning explains the decision. It serves to bridge the gap between the findings of fact and the conclusions of law. Example: The claimant left work without notice to the employer because he heard a rumor of an imminent layoff. He was held to have left work voluntarily without good cause. Rationale: When he left without notice, he foreclosed any opportunity for the employer to affirm or deny the rumor, and in fact, the rumor was without any foundation.

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

VI Evidence.

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

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

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

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

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

These tests of quality and quantity of evidence are not susceptible of precise definition. No clear line of demarcation is drawn between evidence which is sufficient and that which is not. However, a scintilla of evidence is not sufficient to meet either test, nor is mere uncorroborated hearsay or rumor.
It is of the utmost importance that appeal tribunals have a thorough knowledge of the criteria pertinent in weighing evidence. In addition to a working knowledge of the substantial evidence test, appeal tribunals should have a full understanding of the exclusionary rules of evidence, even though those rules are not applicable in unemployment insurance hearings.Such an understanding is invaluable in weighing evidence and determining its relative trustworthiness.

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

A. Testimony Under Oath or Affirmation. All testimony should be under oath or affirmation. Witnesses should be sworn individually, and interpreters should also be sworn.

B. All Evidence to Be Made a Part of the Hearing Record. The decision of the appeal tribunal in a case should be based solely upon matters in the hearing record. Accordingly, all evidence to be taken into account by the appeal tribunal in making its findings, conclusions, and decision, should be made a part of the hearing record. Except in unusual circumstances, the evidence should be presented and received at the hearing which is conducted for that purpose. The essential purpose is to assure that all parties are fully apprised of the evidence received or to be considered, and that they be given the opportunity to cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal. The hearing is for the purpose of affording parties the opportunity to exercise and protect their rights in these respects.

C. Exhibits. Documentary evidence and real evidence (physical objects) received in a hearing should be marked for identification and made a part of' the record. Such evidence should be properly authenticated or verified under oath or affirmation.

D. Best Evidence. Whenever possible, the best evidence should be obtained because it is the most reliable. The best evidence is original or primary evidence, as distinguished from secondary, and includes the best evidence which is procurable in the circumstances. For example, the best evidence of' what an individual did is that of' an eye witness; the best evidence of what an object looks like is the object itself. Similarly, a written instrument is itself' the primary or best evidence of' its existence and contents; a copy, or the recollection of a witness, is secondary evidence.

E. Affidavits and Unsworn Statements. It has been the practice in unemployment insurance hearings for appeal tribunals to accept affidavits and even unsworn statements in lieu of' the oral testimony of a party or witness. Whenever the party or witness is available, however, he should be required to appear and give his testimony orally and under oath or affirmation. The more material such evidence is to the issues in the hearing, the more important it is to obtain oral, sworn testimony. In addition, where the facts are material and the issue is in dispute, procedural fairness may require that the party or witness be called before the tribunal for the purpose of cross-examination.

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

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

It is erroneous, therefore, to condemn all hearsay as inherently untrustworthy, and it is just as erroneous to give equal weight to all hearsay or, in some instances, to give any weight to such evidence. The point is that hearsay evidence, like any other evidence, should be weighed for its intrinsic merit in accordance with the standards for judging trustworthiness of evidence and credibility of witnesses.

Another point to be kept in mind is that reception of hearsay evidence may necessitate bringing in the person who is reputed to have said or done something, or the author of the report, for

original testimony (i.e., the best evidence) and cross- examination. Therefore, it is ordinarily better to obtain the best evidence in the first instance, whenever it is possible.

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

H. Stipulation of Fact. A stipulation of fact entered into by the parties may be received in evidence at the discretion of the appeal tribunal. In appropriate cases, stipulations save time at the hearing because they dispense with necessity for proof. In view of the appeal tribunal's responsibility regarding the obtaining of evidence, however, the appeal tribunal should be satisfied that the parties understand the nature of any stipulation and its effect upon their rights, and that the stipulation is factually correct. Acceptance of the parties' stipulation does not preclude the appeal tribunal from obtaining additional evidence on the points covered by the stipulation or on related matters.

I. Presumption of Fact. A presumption of fact is an inference drawn from facts admitted in the case or otherwise satisfactorily established by the evidence. A presumption of course may be rebutted by credible evidence to the contrary. For example, it would be proper to presume that a letter mailed in the due course of business, properly addressed, and bearing the correct amount of postage, reached its destination, but such a presumption would be rebutted by credible evidence that the letter did not reach its destination.

J. Official Notice. An appeal tribunal may, on its own motion or at the request of a party, take official notice of a fact material to an issue in a hearing. Generally, only clearly indisputable facts should be the subject of official notice. Thus, official notice may be taken of (a) such facts as are so generally known or of such c notoriety within the State that they cannot reasonably be the subject of dispute, (b) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy, and (c) generally recognized technical or scientific facts within the appeal tribunal 's knowledge. Parties should be notified, either before or during the hearing, of any facts of which official notice is taken, and be afforded an opportunity to contest the correctness of the facts so noticed.

K. Expert and Opinion Evidence. Expert evidence is testimony given in relation to some scientific, technical, or professional matter by a person who is qualified to speak authoritatively by reason of his special training, skill, or familiarity with the subject. Expert testimony may be in the nature of facts, or the opinion of the witness based on facts already proved. For e:xample, an employment service representative with the requisite qualifications may give expert testimony as to current labor force conditions in a community with respect to certain occupations, or prevailing wages in a certain occupation and locality or other matters within his specialized knowledge or authoritative experience. Findings and conclusions of appeal tribunals should be based upon expert testimony only to the extent that it is given by a person with the requisite qualifications.

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

There are some matters, however, on which the opinions of lay persons might be credible evidence. For example, mw1y mature persons who are not "experts" may give reasoned and substantiated opinion testimony as to why they believe another person appeared at a certain time to be intoxicated, in pain, angry, fearful, joyful, or the like.

L. Privileged Communications. The appeal tribunal should respect privileged communications which are accorded such status by State law. Generally, communications between clergy and penitent, attorney and client, and doctor and patient are privileged, and in some States communications between dentist and patient, and registered nurse and patient, are also privileged. Unless the privilege is waived by the penitent, client, or patient, as the case may be, neither he nor the person rendering the professional service to him may be required to disclose the subject matter of the communication or the advice given. Confidential communications between husband and wife are similarly privileged, but here, too, the privilege may be waived. The appeal tribunal should advise the parties of the rule of privilege recognized in the State, and the circumstances in which it is waived, whenever the matter arises in the course of a hearing.

M. Self-incrimination. The privilege against self-incrimination is constitutionally protected, but like privileged communications, this privilege also may be waived. Many State laws have a special provision relating to self-incrimination and, in addition, provisions respecting immunity from prosecution. Whenever a matter involving self-incrimination or immunity arises in the course of a hearing the parties should be advised by the appeal tribunal as to the particulars of the privilege, waiver, and immunity applicable in that State.

N. Meaning of Selected Terms.

1. Competent Evidence. Generally, this term refers simply to evidence which is admissible and relevant. In some connections, however, it has been deemed to convey the same meaning as best, or primary, evidence. In common usage it sometimes means the testimony of a person who is not disabled from giving testimony by reason of age, insanity, or other legal infirmity.

2. Credible Evidence. Evidence which is worthy of belief. A witness's credibility refers to that quality of the person which renders his evidence worthy of belief on account of his good reputation for veracity, his intelligence, his knowledge of the circumstances, and his disinterested relation to the matter in question. More- over, in deciding upon the credibility of evidence presented by a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies; whether he was actually present at the transaction; whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

3. Direct Evidence. Evidence of the existence of a fact in question, without the intervention of evidence of any other fact. It is distinguished from circumstantial evidence, which is often

called indirect. Direct evidence is, by way of example, testimony to facts by witnesses who saw acts done or heard words spoken.

4. Probative Evidence. Evidence having the effect of proof, tending to prove, or actually proving. It is evidence carrying quality of proof and having fitness to induce conviction of truth. Probative evidence might therefore be defined more appropriately for unemployment insurance purposes as "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

5. Relevant Evidence. The term "relevant evidence" may be broadly defined as that which bears directly, as distinguished from collaterally, upon the point or facts in issue, and which tend to prove or disprove the matters in issue. It is not confined to evidence which is addressed with positive directness to the point, but is that which, according to the common course of events, either taken by itself or in connection with other facts, tends to prove or render probable the existence or non-existence of facts which are in issue.

6. Weight of Evidence. The weight of the evidence on an issue ls on that side of the issue on which the evidence is the most credible. Thus, weight of evidence means greater weight, and is not materially different in meaning from preponderance of evidence.

7. Preponderance of Evidence. Evidence may be considered as preponderant when, fairly considered and weighed; it produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition.

8. Proof. The term "proof" properly means anything which serves to convince the mind of the truth or falsehood of a fact or proposition. Proof, therefore, is the effect of evidence, or the establishment of a fact or proposition by evidence; evidence is the medium or means by which a fact or proposition is proved or disproved.

9. Admission. An admission against interest is any statement made by a party, or attributable to him, which tends to establish or disprove any material fact in the case against him. An admission pertains to relevant facts, as distinguished from matters of law or opinion.

VIII. Burden of Proof.

The term "burden of proof" denotes the burden of establishing the truth of a given proposition by the necessary quantum of evidence. The concept of burden of proof connotes not only a risk of non-persuasion but also a duty of persuasion, that is, an active duty or function of adducing a quantum of evidence sufficient to meet the risk. While rules as to burden of proof may be useful in judicial and quasi-judicial proceedings in which there are adverse parties, there is serious doubt that the introduction of such rules in unemployment insurance cases is conducive to justice or the attainment of the purposes of the unemployment insurance program.

Rules as to the burden of proof, while partaking of substance, are yet so closely related to presumptions and other procedural considerations that their introduction in unemployment insurance hearings tends to impair the nontechnical character of such proceedings and divert attention from the merits of a claim to technical niceties. In the atmosphere thus created, there would be serious danger that the State

agency, regarding itself as an adverse party, would assume a hostile or at least indifferent attitude and, instead of cooperating to the end of discovering all the facts, would leave to the claimant a task which generally, he is probably ill-prepared to perform.

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

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

The hearing is not a contest between two opposite parties, with the appeal tribunal sitting on the sidelines. The appeal tribunal is in effect a board of inquiry, responsible for getting complete 111.Ild accurate facts. It is that responsibility of appeal tribunals which appropriately substitutes for a burden of proof on the parties in unemployment insurance hearings.

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

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

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

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

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

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

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

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

VIII. Mass Appeals.

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

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

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

1. Special Files and Procedures . Special files and procedures may be necessary to effect a consolidation of appeals or a token hearings proceeding. This may involve action on the part of local offices as well as by the appeal tribunal.
2. Pre-hearing Conferences. A pre-hearing conference may be used to obtain the agreement of the parties to the individual appeals as to such details as: (a} determination of the various classifications of cases; (b) the selection of representatives who will receive notice of hearing for the interested parties in the various case classifications; (c) the number of hearings which may be necessary; and (d) stipulations of uncontroverted facts .
3. Consolidated Hearings. In a hearing on consolidated appeals all of the cases are heard, although with the agreement of the parties' evidence introduced in one case may be considered equally applicable to other cases.
4. Token Hearings. This procedure is initiated by the parties and the appeal tribunal agreeing in advance that the hearing and decision in the test case selected by the parties and the appeal tribunal shall apply to and be binding upon all of the parties. All of the parties to be bound by the final decision in the test case are represented in the test case hearing and any appeal from the decision following such hearing. The parties' representative usually would be one or more attorneys, or might be a union officer or employee .
5. Individual Rights of Fair Hearing. Great care should be exercised to preserve fair hearing rights of individuals involved in consolidated appeals and token hearings. To insure that the representatives may act for the parties, and that the parties consent to the procedure and to the acts and agreements of their representatives, each of the parties should affirmatively authorize the representatives to act for him in the case. Further, all parties should be permitted to attend the hearings and should receive individual copies of all decisions in the case.