

**PART VI. UNEMPLOYMENT COMPENSATION BOARD  
OF REVIEW**

<b>Chap.</b>		<b>Sec.</b>
<b>101.</b>	<b>GENERAL REQUIREMENTS .....</b>	<b>101.1</b>

**Authority**

The provisions of this Part VI issued under section 203 of the Unemployment Compensation Law (43 P. S. § 763), unless otherwise noted.

**Source**

The provisions of this Part VI adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435, unless otherwise noted.

**CHAPTER 101. GENERAL REQUIREMENTS**

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**Subchapter A. GENERAL PROVISIONS**

- Sec.  
101.1. Scope.  
101.2. Definitions.

**§ 101.1. Scope.**

This part sets forth special rules of practice and procedure and governs proceedings before the Board.

**Source**

The provisions of this § 101.1 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**§ 101.2. Definitions.**

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

*Board*—The Unemployment Compensation Board of Review.

*Day*—A calendar day.

*Department*—The Department of Labor and Industry of the Commonwealth.

*Department appeal office*—A Department office responsible for unemployment compensation where an appeal may be filed and accepted, according to the Department-provided instructions accompanying a determination.

*Employment office*—A public employment office or branch thereof, operated by the Department or by another state or by the Federal Government under agreement with the Department.

*Party*—The Department, the claimant, the last employer of the claimant and another employer affected by the appeal proceedings.

*Personal delivery*—Delivery by or on behalf of a party that is not enumerated in § 101.82(b)(1)—(4) (relating to time for filing appeal from determination of Department) where a person personally files the appeal at a Board office or workforce investment office.

*Referee*—A referee of the Board.

*Tribunal*—The Board or one of its referees.

*Workforce investment office*—An office where the Department provides employment services under the Wagner-Peyser Act (29 U.S.C.A. §§ 49—49m). A workforce investment office may be identified as a Team Pennsylvania Career-Link.

#### Source

The provisions of this § 101.2 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended September 19, 2003, effective September 20, 2003, 33 Pa.B. 4674. Immediately preceding text appears at serial pages (228485) to (228486).

#### Notes of Decisions

##### *Issue Preclusion*

Although the unemployment compensation finding that there was no abuse addresses the identical issue confronted in this workers' compensation proceeding, such a finding, although identical and essential, does not preclude the litigation of whether claimant was injured in the course of employment. *Verbilla v. Workmen's Compensation Appeal Board*, 668 A.2d 601 (Pa. Cmwlth. 1995).

Issue preclusion did not apply where the first case was heard before the Unemployment Compensation Board and the pending case is with the Workers Compensation Board because to do so would be to hold, in effect, that claimant loses both cases based on the finding of an unemployment compensation referee even though significantly different procedures apply and different policies and goals are at stake in the workers' compensation proceeding. Therefore, a fresh determination of the factual issue by a Workers' Compensation Judge is warranted. *Verbilla v. Workmen's Compensation Appeal Board*, 668 A.2d 601 (Pa. Cmwlth. 1995).

## Subchapter B. PROVISIONS GOVERNING HEARINGS BEFORE THE DEPARTMENT OR REFEREE

### HEARINGS

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**Cross References**

This subchapter cited in 34 Pa. Code § 101.131 (relating to conduct of a telephone hearing).

**HEARINGS****§ 101.21. Conduct of hearings.**

(a) In a hearing the tribunal may examine the parties and their witnesses. Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties.

(b) The tribunal shall determine the order in which the evidence shall be presented in hearings. Within the discretion of the tribunal, the parties shall be permitted to present evidence and testimony which they believe is necessary to establish their rights.

(c) Hearings under this part shall be open to the public, subject to the availability of suitable and reasonable facilities. However, the tribunal conducting a hearing may close the hearing as to other than interested parties to the extent necessary to protect the interests and rights of the claimant or employer to a fair hearing.

**Source**

The provisions of this § 101.21 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions***Due Process*

The action of a referee in taking evidence from an employer and then concluding the hearing while the claimant and claimant's counsel wait in a hallway just outside does not meet due process standards. *Collins v. Unemployment Compensation Board of Review*, 415 A.2d 145 (Pa. Cmwlth. 1980).

Neither considerations of due process nor this section require the referee to assist claimants in a manner incompatible with the impartial discharge of the referee's duties; failure of the referee to advise a party on right to counsel, nature of proceeding, burden of proof, and applicable law does not constitute a violation of due process or the provision of this section. *Horvath v. Unemployment Compensation Board of Review*, 403 A.2d 1073 (Pa. Cmwlth. 1979).

While a referee may not improperly refuse to accept relevant, competent and material evidence, no deprivation of claimant's due process rights is shown if counsel for claimant is permitted to question opposition witnesses, does not object to the conclusion of the hearing, does not request that counsel's witnesses be permitted to testify, does not offer to produce additional probative evidence, and does not request a further hearing. *Healey v. Unemployment Compensation Board of Review*, 387 A.2d 1025 (Pa. Cmwlth. 1978).

*Evidence*

The referee's failure to advise a claimant as to the hearsay nature of certain evidence introduced into the record without objection does not constitute a breach of the referee's duty under this section. A referee is not required to advise a claimant on specific evidentiary questions or points of law. *Rohrbach v. Unemployment Compensation Board of Review*, 450 A.2d 323 (Pa. Cmwlth. 1982).

The admission of hearsay evidence by a referee is prejudicial to a claimant under this section and is cause for remand. *Wise v. Unemployment Compensation Board of Review*, 450 A.2d 314 (Pa. Cmwlth. 1982).

When the claimant testified that the evidence was submitted to the Board by letter and that claimant had no additional testimony to present and the letter was not in the record nor was it considered by the referee acting as hearing officer, or by the Board, the claimant did not receive a full and fair determination of his appeal. *Unemployment Compensation Board of Review v. Hoffer*, 360 A.2d 796 (Pa. Cmwlth. 1976).

In a proceeding before a referee for the Unemployment Compensation Board of Review, the spirit of this section is violated where there is a communications gap between the claimant and the referee, concerning consideration of evidence; such violation deprives the claimant of a full and fair determination of an appeal. *Unemployment Compensation Board of Review v. Hoffer*, 360 A.2d 796 (Pa. Cmwlth. 1976).

*General Comments*

Subsection (a) does not require the referee to advise a party on evidentiary questions or on specific points of law. *Simpson v. Unemployment Compensation Board of Review*, 395 A.2d 309 (Pa. Cmwlth. 1978).

*Record*

Where an unrepresented claimant submitted a psychological report to the service center, the referee did not provide every assistance in an impartial manner by offering several service center documents for admission into the record, but not the claimant's psychological report. *Lewis v. Unemployment Compensation Board of Review*, 814 A.2d 829 (Pa. Cmwlth. 2003).

*Record of Proceedings*

Not only is the referee required, at the minimum, to advise a claimant unrepresented by counsel of the right to have an attorney, to offer witnesses and to cross-examine adverse witnesses, but said advice should appear in the record to enable a full review of an appeal grounded on an alleged failure by the referee to afford the claimant due process. *Glammer v. Unemployment Compensation Board of Review*, 449 A.2d 78 (Pa. Cmwlth. 1982).

*Representation*

Where the petitioner refused to waive the right to legal representation after making a bona fide attempt to have counsel at the hearing, and where the petitioner apparently was without fault or com-

plicity in counsel's failure to appear, the petitioner was prejudiced by the referee's decision to proceed and was entitled to a remand. *Williams v. Unemployment Compensation Board of Review*, 484 A.2d 831 (Pa. Cmwlth. 1984).

#### *Testimony*

##### *Witnesses*

Where claimant's attorney elected not to have witnesses testify after the referee had questioned the relevance of the testimony, no refusal to permit testimony in contravention of claimant's due process rights has been established. *Wilkins v. Unemployment Compensation Board of Review*, 502 A.2d 283 (Pa. Cmwlth. 1985).

A referee's failure to notify a claimant that the Board could take steps to have a subpoena enforced when claimant's witness failed to appear was harmless error where the witness' testimony, had it been given and had it confirmed all that the claimant had alleged, would only have been cumulative. *Ehmann v. Unemployment Compensation Board of Review*, 483 A.2d 587 (Pa. Cmwlth. 1984).

#### *Unrepresented Claimants*

The regulation obligates a referee to inform a claimant of a right to counsel, to aid claimant in the examination and cross-examination of witnesses, and to give claimant assistance compatible with the impartially discharge official referee's duties. *Zimmerman v. Unemployment Compensation Board*, 836 A.2d 1074, 1078 note 5 (Pa. Cmwlth. 2003). The referee's conduct falls short of this standard when referee chastised claimant for not reading (and remembering) the terms of Non Competition Agreement, quarreled with Claimant's description of the Agreement, and, *sua sponte*, objected to Claimant's attempted testimony about employer's treatment of other employees allowed to work in spite of having agreed to a noncompete on grounds of hearsay. *Id.*

The regulation obligates a referee to inform a claimant of a right to counsel, to aid claimant in the examination and cross-examination of witnesses, and to impartially discharge official referee's duties. *Zimmerman v. Unemployment Compensation Board of Review*, 836 A.2d 1074, 1078 note 5 (Pa. Cmwlth. 2003). The referee's conduct falls short of this standard when referee chastised claimant for not reading (and remembering) the terms of Non Competition Agreement, quarreled with Claimant's description of the Agreement, and *sua sponte*, objected to Claimant's attempted testimony about employer's treatment of other employees allowed to work in spite of having agreed to a noncompete on grounds of hearsay. *Id.*

The claimant was provided with written notice of the hearing, which included notice of his rights. The claimant was also advised of his rights by the referee, and was afforded the opportunity to be heard throughout the trial. The referee, however, is not required to assume the role of the claimant's advocate. Therefore, the record reflects that the hearing was fair and impartial, and the claimant was afforded due process. *McFadden v. Unemployment Compensation Board of Review*, 806 A.2d 955 (Pa. Cmwlth. 2002).

The referee has a responsibility to assist a pro se claimant at a hearing so that the facts of the case necessary for a decision may be adequately developed. The referee failed to inform claimant that claimant could have requested a continuance of the hearing in order to secure and present testimony from employer. This evidence would have aided in the development of necessary factual determinations. *Coates v. Unemployment Compensation Board of Review*, 676 A.2d 742 (Pa. Cmwlth. 1996).

By virtue of this regulation, a claimant appearing at the referee's hearing without counsel is entitled to assistance from the referee in the development of the claimant's case and advice as to claimant's basic rights. *Jennings v. Unemployment Compensation Board of Review*, 675 A.2d 810 (1996).

Evidence that the referee assisted an uncounseled claimant as required under this section is sufficient to prove that claimant's right to present evidence and cross-examine adverse witnesses was in no way compromised. *Reed v. Unemployment Compensation Board of Review*, 522 A.2d 121 (Pa. Cmwlth. 1987).

To comply with subsection (a), an Unemployment Compensation Board of Review referee must advise an uncounseled claimant of the claimant's due process rights to be represented by counsel, to cross examine adverse witnesses, and to offer witnesses in the claimant's own behalf. The referee must render every assistance compatible with impartial discharge of the referee's duties; however, the referee is not required to become, and should not assume, the role of claimant's advocate. *Brennan v. Unemployment Compensation Board of Review*, 487 A.2d 73 (Pa. Cmwlth. 1985).

Where the referee failed to advise a pro se claimant of rights and to ask important questions concerning the reasons for claimant's termination of employment, the referee violated subsection (a) (responsibilities of the tribunal to a pro se party) and the case was remanded. *Tate v. Unemployment Compensation Board of Review*, 477 A.2d 54 (Pa. Cmwlth. 1984).

A claimant who elects to proceed without legal representation, and who receives all the assistance from the tribunal due under subsection (a), cannot be heard to complain on appeal that case might have been presented more effectively or with greater credibility with the assistance of counsel. *Rodgers v. Unemployment Compensation Board of Review*, 476 A.2d 1014 (Pa. Cmwlth. 1984).

Where, in violation of subsection (a), a referee has failed to advise an uncounseled claimant of the right to present and subpoena witnesses, the court will order a remand unless it can be shown that the referee's omissions were not prejudicial to the claimant or did not materially affect claimant's rights. *Finley v. Unemployment Compensation Board of Review*, 474 A.2d 431 (Pa. Cmwlth. 1984).

While a claimant appearing at the referee's hearing without counsel is entitled under subsection (a) to assistance from the referee in the development of a case and advise as to claimant's basic rights, claimant need not be shown any greater deference than would be afforded a claimant with an attorney. *Groch v. Unemployment Compensation Board of Review*, 472 A.2d 286 (Pa. Cmwlth. 1984).

Where a referee asked an unrepresented claimant if claimant wished to ask questions of the employer at the conclusion of employer's testimony and also explained claimant's right to subpoena the testimony of the writers of certain letters which had been excluded as hearsay, the referee had complied with subsection (a). *Ellis v. Unemployment Compensation Board of Review*, 471 A.2d 1281 (Pa. Cmwlth. 1984).

No remand was granted for an alleged violation of subsection (a) where the record indicated that the referee advised the claimant of the right to have an attorney represent claimant at the hearing, to present witnesses in his behalf and to cross-examine those witnesses presented against claimant. The referee was, also, not remiss in taking a more active role in the development of the claimant's case. *Barksdale v. Unemployment Compensation Board of Review*, 469 A.2d 716 (Pa. Cmwlth. 1984).

A referee discharged the obligations under subsection (a) by informing the claimant of the right to counsel, the right to offer witnesses and to cross-examine adverse witnesses. The referee does not fail in the discharge of those obligations because of a failure to ask if claimant understands these rights. *Oliver v. Unemployment Compensation Board of Review*, 450 A.2d 287 (Pa. Cmwlth. 1982).

The referee did not fail to perform the duties under subsection (a) merely because the referee neglected to define "able and available" and "work" prior to asking claimant whether she was able and available to accept work. *Ellison v. Unemployment Compensation Board of Review*, 431 A.2d 1094 (Pa. Cmwlth. 1981).

Fairness and the provisions of subsection (a) require an Unemployment Compensation Appeals Board referee to advise an uncounseled claimant of the right to be represented by counsel, offer witnesses and cross examine adverse witnesses in an unemployment compensation evidentiary hearing. *Katz v. Unemployment Compensation Board of Review*, 430 A.2d 354 (Pa. Cmwlth. 1981).

Conduct of a hearing was insufficient in light of this section when the referee failed to advise an uncounseled claimant of rights, gave claimant no meaningful opportunity to challenge hearsay documents upon which the employer's case was based or to cross-examine declarants, made no effort to solicit the claimant's views in an orderly manner designed to test the credibility of the employer's evidence, attempted to dismiss the claimant after the conclusion of the employer's submissions without questions or further proceedings, responded to the claimant's requests to speak in a manner designed to abbreviate the claimant's reply, and made no effort to clarify the claimant's challenge to the employer's evidence, but rather cross-examined claimant apparently for purposes of reinforcing the employer's case. *Unemployment Compensation Board of Review v. Ceja*, 427 A.2d 631 (Pa. 1981).



The referee did not fail to assist a claimant under subsection (a) in developing evidence since, although the referee did interrupt the claimant at one point to ask a question, the claimant was later asked twice by the referee whether claimant had any further testimony and the claimant was allowed to respond. *Russell v. Unemployment Compensation Board of Review*, 402 A.2d 1149 (Pa. Cmwlth. 1979).

—*Remand Appropriate*

A referee's failure to advise an unrepresented claimant of right to secure counsel, to cross-examine adverse witnesses, and to offer witnesses, as required by subsection (a) requires a remand for a new hearing. *Chapman v. Unemployment Compensation Board of Review*, 465 A.2d 111 (Pa. Cmwlth. 1983).

Claimant was prejudiced by the referee's failure to advise the claimant, under subsection (a), of claimant's rights to be represented by an attorney, present witnesses, and cross-examine adverse witnesses. *Allritz v. Unemployment Compensation Board of Review*, 463 A.2d 100 (Pa. Cmwlth. 1983).

The referee is required by subsection (a) to advise the claimant of her right to have counsel and to cross-examine adverse witnesses. Failure to do so was prejudicial error where the claimant, lacking counsel at the hearing, could have been disabled from establishing the truth of an alleged misunderstanding with the employer. *Mayberry v. Unemployment Compensation Board of Review*, 457 A.2d 182 (Pa. Cmwlth. 1983).

The improper exclusion of medical certification from evidence implies that the claimant was not given the assistance or advice required by subsection (a), and, where the Board concedes that the claimant did not receive a fair and impartial hearing, there is cause for remand. *Demmy v. Unemployment Compensation Board of Review*, 450 A.2d 327 (Pa. Cmwlth. 1982).

A referee's failure to instruct a claimant that the claimant had the right to cross-examine the employer's witnesses, coupled with a failure to afford the claimant the opportunity to do so, was prejudicial and is cause for remand. *Linke v. Unemployment Compensation Board of Review*, 450 A.2d 312 (Pa. Cmwlth. 1982).

If an unemployment compensation hearing referee fails to advise a claimant unrepresented by counsel of the claimant's rights, to aid claimant in examining or cross-examining witnesses, and to give every assistance compatible with the impartial discharge of the referee's duties, the case will be remanded to the Board for further action. *Stine v. Unemployment Compensation Board of Review*, 448 A.2d 117 (Pa. Cmwlth. 1982).

Failure of the referee to inform the petitioner of the right to have counsel, to present witnesses in his own behalf, and to cross-examine adverse witnesses was cause for remand in the absence of evidence from the record that petitioner waived the right to be advised or that petitioner's rights were not materially affected. *Bender v. Unemployment Compensation Board of Review*, 446 A.2d 1004 (Pa. Cmwlth. 1982).

Since neither claimant was represented by counsel at separate hearings before the referee, and at each hearing the referee failed to advise the claimants of their procedural rights, the cases must be remanded. *Lauer v. Unemployment Compensation Board of Review*, 445 A.2d 1353 (Pa. Cmwlth. 1982).

Since the claimant was not represented by counsel at the hearing before the referee, and the referee failed to advise claimant, as an uncounseled claimant, of claimant's procedural rights, the case must be remanded. *Hughes v. Unemployment Compensation Board of Review*, 445 A.2d 1352 (Pa. Cmwlth. 1982).

When the referee at an unemployment compensation hearing, in addition to not informing a pro se claimant of the right to counsel, to cross-examine, and to offer witnesses on claimant's behalf, did not ask claimant questions sufficient to enable claimant to emphasize the factual aspects of claimant's contentions which might have aided claimant in establishing a necessitous and compelling cause for

voluntary termination of her employment which would, if proven, allow claimant to receive benefits, the interests of fairness as contemplated by subsection (a) require a reversal of the referee's decision, and remand for a new hearing. *Bennett v. Unemployment Compensation Board of Review*, 445 A.2d 258 (Pa. Cmwlth. 1982).

The failure of the referee to advise an uncounselled claimant of the right to have an attorney, to offer witnesses and to cross examine adverse witnesses in accordance with the provisions of subsection (a) required the court to remand to the Board for a new evidentiary hearing at which the claimant, if uncounselled, shall be advised of such rights. *Hoffman v. Unemployment Compensation Board of Review*, 430 A.2d 1036 (Pa. Cmwlth. 1981).

#### Cross References

This section cited in 34 Pa. Code § 101.86 (relating to appeal hearings).

### § 101.22. Consolidated hearings.

When the same or substantially similar evidence is relevant and material to the matters at issue in the petition for appeal concerning claims filed by more than one individual or, in multiple appeals, filed by single individuals or their authorized representatives, the same time and place for considering each appeal and claim may be fixed; hearings thereon jointly conducted; a single record of the proceedings made; and evidence introduced with respect to an appeal or claim considered as introduced with respect to appeals or claims if, in the judgment of the Board or referee having jurisdiction of the proceeding, such consideration will not be prejudicial to any party.

#### Source

The provisions of this § 101.22 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Consolidated Decision*

A decision to use consolidated hearings under this section does not give the Board license to ignore the notice requirements contained in 34 Pa. Code § 101.85. *Allritz v. Unemployment Compensation Board of Review*, 463 A.2d 100 (Pa. Cmwlth. 1983).

##### *Test Case*

Although the consolidation of claims for the purpose of adducing evidence was proper when separate treatment would result in duplication of testimony, it is inappropriate to use one case as a "test case" if the factual situation of that case is different from other cases which will be prejudiced by the decision. *Woodhouse v. Unemployment Compensation Board of Review*, 404 A.2d 783 (Pa. Cmwlth. 1979).

### § 101.23. Continuance of hearing.

(a) Continuance of a hearing will be granted only for proper cause and upon the terms as the tribunal may consider proper. The inability of a party to attend a hearing because he received less than 7 days notice will be considered proper cause for continuance of a hearing.

(b) Within the discretion of the tribunal, a continuance will not, however, be granted merely because of the absence of a witness, unless it appears that the testimony and evidence he could give would be competent and relevant to the issues involved and that the information is essential to a proper determination of the case.

#### Source

The provisions of this § 101.22 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Abuse of Discretion*

Appellate court will not override a referee's denial of a continuance in unemployment compensation case unless there is an abuse of discretion *Skowronek v. Unemployment Compensation Board of Review*, 921 A.2d 555, 558-559 (Pa. Cmwlth. 2007).

The failure to grant a continuance based on counsel's last-minute requests and vague reasons for the need for a continuance did not constitute an abuse of discretion since the claimant is required to make a timely request in a manner consistent with reasonable procedural rules. *Liebel v. Unemployment Compensation Board of Review*, 570, 558 A.2d 579 (Pa. Cmwlth. 1989).

Petitioners' request for a continuance due to his incarceration was valid and the referee's refusal to continue the case and entry of a decision against the claimant violated his due process rights and was an abuse of discretion. *Thomas v. Unemployment Compensation Board of Review*, 543 A.2d 600 (Pa. Cmwlth. 1988).

Referee did not abuse his discretion in refusing to grant a continuance since claimant failed to make the required showing that the testimony of an absent witness would be competent, relevant and essential to a proper determination of the case. *Viglino v. Unemployment Compensation Board of Review*, 525 A.2d 450 (Pa. Cmwlth. 1987).

Where the hearing record showed that, at the time of the hearing, claimant's attorney was enroute to the hearing and would arrive in less than an hour, and that delaying the hearing would not have prejudiced the employer in any manner, the court held that the referee abused her discretion by refusing to grant a continuance. *Conrad v. Unemployment Compensation Board of Review*, 478 A.2d 930 (Pa. Cmwlth. 1984).

A referee did not abuse his discretion to deny a request for a continuance under this section, where the party requesting the continuance ignored notice to produce first hand evidence of employee's misconduct at the hearing. *Bethlehem Mines v. Unemployment Compensation Board of Review*, 459 A.2d 72 (Pa. Cmwlth. 1983).

A referee did not abuse the discretion afforded him under 34 Pa. Code § 101.23(b) by denying a continuance where the requesting claimant's counsel requested the continuance because a witness could not attend, but counsel failed to make the necessary showing that the witness' testimony would be competent, relevant, and essential to a proper determination of the case, having failed to even name the missing witness. *Steadwell v. Unemployment Compensation Board of Review*, 463 A.2d 1298 (Pa. Cmwlth. 1983).

##### *Continuance*

A referee's decision to refuse a request for a continuance under this section is not a proper subject of review without a clear showing of an abuse of discretion. *Bethlehem Mines v. Unemployment Compensation Board of Review*, 459 A.2d 72 (Pa. Cmwlth. 1983).

##### *Due Process*

Where claimant was present at hearing and testified, a co-worker testified on claimant's behalf and notarized statements from three co-workers were submitted, claimant had opportunity to be heard and

referee's refusal to grant a continuance did not amount to a denial of due process. *Viglino v. Unemployment Compensation Board of Review*, 525 A.2d 450 (Pa. Cmwlth. 1987).

#### *Essential Information*

Where "voluntary quit" claimant had 7 days notice of hearing (including Labor Day Weekend), where husband's testimony was necessary to determine whether his relocation was due to circumstances beyond his control, and where husband was away on business on hearing date, referee abused his discretion in refusing to grant continuance to permit husband to appear. *Flatley v. Unemployment Compensation Board of Review*, 500 A.2d 515 (Pa. Cmwlth. 1985).

#### *Sua Sponte*

The claimant should have been advised of his right to a continuance or the referee should have declared a continuance *sua sponte* in order to make arrangements with the phone company to have a four-party conference call to allow claimant's witnesses to testify. *Eddy v. Unemployment Compensation Board of Review*, 533 A.2d 191 (Pa. Cmwlth. 1987).

Where the technology did not exist to arrange a four-party conference call to include claimant's union representative, the referee should have advised the claimant of his right to request a continuance or *sua sponte* declared one in order to make arrangements for a four-way call. *Eddy v. Unemployment Compensation Board of Review*, 533 A.2d 191 (Pa. Cmwlth. 1987).

#### *Waiver*

Where claimant failed to object to continuance before referee and did not raise matter before Unemployment Compensation Board, issue cannot properly be raised before court. *Fleeger v. Unemployment Compensation Board of Review*, 528 A.2d 264 (Pa. Cmwlth. 1987).

### **§ 101.24. Reopening of hearing.**

(a) If a party who did not attend a scheduled hearing subsequently gives written notice, which is received by the tribunal prior to the release of a decision, and it is determined by the tribunal that his failure to attend the hearing was for reasons which constitute "proper cause," the case shall be reopened. Requests for reopening, whether made to the referee or Board, shall be in writing; shall give the reasons believed to constitute "proper cause" for not appearing; and they shall be delivered or mailed—preferably to the tribunal at the address shown on the notice of hearing or to the Unemployment Compensation Board of Review, Labor and Industry Building, Seventh and Forster Streets, Harrisburg, Pennsylvania 17121, or to the local employment office where the appeal was filed.

(b) A request for reopening which is received by the referee before his decision has been mailed to the parties shall be decided by the referee before whom the case is pending. If the request for reopening is allowed, a new hearing shall be scheduled with written notice thereof to each of the parties. At a reopened hearing, the opposing party shall be given the opportunity to object to the reopening if he so desires. If the request for reopening is denied, the referee shall append to the record the request, supporting material and the ruling on the request, so that it shall be subject to review on further appeal.

(c) A request for reopening the hearing which is not received before the decision was mailed, but is received or postmarked on or before the 15th day after the decision of the referee was mailed to the parties shall constitute a request for

further appeal to the Board and a reopening of the hearing, and the Board will rule upon the request. If the request for reopening is allowed, the case will be remanded and a new hearing scheduled, with written notice thereof to each of the parties. At a reopened hearing, the opposing party shall be given the opportunity to object to the reopening if he so desires. If the request to have the hearing reopened is denied, the Board will append to the record the request, supporting material and the ruling on the request, so that it shall be subject to review in connection with any further appeal to the Commonwealth Court.

(d) If a request for reopening is not received before the decision was mailed but is received or postmarked within 15 days after the decision of the Board was mailed to the parties, it will be accepted as a request for reconsideration and a reopening of the hearing and the Board will rule upon the request. If the request for reopening is allowed, the Board will vacate its decision and remand the case for further hearing, with written notice thereof to each of the parties. At a reopened hearing, the opposing party shall be given the opportunity to object to the reopening if he so desires. If the request to have the hearing reopened is denied, the Board will append to therecord the request, supporting material, and the ruling on the request, so that it shall be subject to review in connection with any further appeal to the Commonwealth Court.

#### Source

The provisions of this § 101.24 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended July 14, 1978, effective July 15, 1978, 8 Pa.B. 2002. Immediately preceding text appears at serial pages (32159) and (32160).

#### Notes of Decisions

##### *Additional Hearings Inappropriate*

The Unemployment Compensation Board of Review appropriately granted an additional hearing while still requiring additional testimony and evidence on the employer's claim that it did not receive notice. *Verdecchia v. Unemployment Compensation Board of Review*, 657 A.2d 1341 (Pa. Cmwlth. 1995).

Unemployment Compensation Board of Review's affirmance of referee's decision to dismiss due to claimant's failure to appear for hearing was improper where claimant made timely request for reopening the hearing and Board's order failed to indicate its conclusion in writing along with the reasons for that conclusion and failed to append its ruling to the record as required by this section. *Cannady v. Unemployment Compensation Board of Review*, 487 A.2d 1028 (Pa. Cmwlth. 1985).

In upholding the discharge of an employe for willful misconduct, the Court noted that this regulation did not require the referee to reopen a hearing for a party who was absent from the original hearing where that party did not present in writing good cause for his or her absence from the hearing. *Lee v. Unemployment Compensation Board of Review*, 458 A.2d 629 (Pa. Cmwlth. 1983).



There was no reason to require re-opening because of the absence of the employer from the referee's hearing, since the referee had evidence which could support the position of the employer, the employe had the burden of proving the case and the employe did not object at the hearing to the absence of the employer. *Shriner v. Unemployment Compensation Board of Review*, 400 A.2d 934 (Pa. Cmwlth. 1979).

*General Comment*

These regulations govern requests for an additional hearing by a party who did not attend a scheduled hearing. *Verdecchia v. Unemployment Compensation Board of Review*, 657 A.2d 1341 (Pa. Cmwlth. 1995).

*Proper Cause*

Employer's inconsistent explanations for failure to appear at scheduled hearing did not rise to level of "proper cause" required by this section, and the Board should not have remanded the case for a second hearing. *Sanders v. Unemployment Compensation Board of Review*, 524 A.2d 1031 (Pa. Cmwlth. 1987).

Where written application for reopening of a hearing was made to the Board and there is no evidence that the referee or the Board appended to the record the request, any supporting material, and the ruling on the request, a dismissal of the claimant's appeal will be reversed and the record remanded for a determination of "proper cause" for claimant's failure to attend the referee's hearing. *Ortiz v. Unemployment Compensation Board of Review*, 481 A.2d 1383, 1385 (Pa. Cmwlth. 1984).

*Regulation Inapplicable*

Referee did not reopen hearing under this section, where the referee agreed to continue hearing in order to receive employer's testimony. *Fleeger v. Unemployment Compensation Board of Review*, 528 A.2d 264 (Pa. Cmwlth. 1987).

**Cross References**

This section cited in 34 Pa. Code § 101.104 (relating to allowance or disallowance of appeal).

**WITNESSES**

**§ 101.31. Subpoenas.**

The issuance of subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records and documents, may be obtained on application to the Board, referee, or at any local employment office. In no case may a subpoena be issued to require the appearance of a witness before the tribunal unless his residence is within 100 miles of the place fixed for his appearance.

**Source**

The provisions of this § 101.31 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions**

*Discretion*

The issuance of a subpoena is a matter of discretion; thus, a claimants' assertion that issuance was mandatory was without merit. *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66 (Pa. Cmwlth. 1996).

The holding of *Zukoski v. Unemployment Compensation Board of Review*, 106 Pa. Cmwlth. 270, 525 A.2d 1279 (1987), placing discretion in the Board regarding the issuance of subpoenas, does not

relieve the Board of its obligation to issue subpoenas in cases where the issuance of the subpoena would lead to relevant and probative testimony. *Hamilton v. Unemployment Compensation Board of Review*, 532 A.2d 535 (Pa. Cmwlth. 1987).

*Subpoena Sua Sponte*

Absent a timely application by a proper party to the controversy, the referee does not have a duty to subpoena witnesses *sua sponte*. *Farmland Industries, Inc. v. Unemployment Compensation Board of Review*, 478 A.2d 524 (Pa. Cmwlth. 1984).

**§ 101.32. Distance.**

When the testimony of a witness whose residence is more than 100 miles from the place of hearing is deemed necessary, the referee before whom the hearing is being held may submit to the referee whom the witness can more conveniently appear, questions propounded by the parties to the appeal proceeding for the purpose of receiving the testimony of that witness. The referee to whom such questions are referred shall schedule a hearing and, if necessary, subpoena before him the witness by whom the questions are to be answered.

**Source**

The provisions of this § 101.32 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**§ 101.33. Expenses.**

(a) A witness required by subpoena to attend a hearing before the tribunal shall be allowed witness fees and mileage at the rate fixed by the Department. The fees and mileage shall be approved by the tribunal before whom the witness was required to appear.

(b) In the hearing of each case, the tribunal shall list the names and addresses of witnesses who appeared at the hearing, together with the witness fee and the mileage allowed each witness. In each case the fees and expenses for witnesses properly subpoenaed shall be included as part of the expense of the appeal proceeding under section 506 of the Unemployment Compensation Law (43 P. S. § 825).

**Source**

The provisions of this § 101.33 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**§ 101.34. Failure to appear.**

(a) When a person refuses, fails or neglects to comply with a subpoena issued under the Unemployment Compensation Law (43 P. S. § 826), or refuses, fails or neglects to produce books, papers, correspondence, memoranda or other records and documents, a party to the appeal proceedings may request the Board to petition a Court of Common Pleas having jurisdiction to require the person subpoenaed to appear and give testimony and to produce the books, papers, correspondence, memoranda or other records and documents described in the subpoena.

(b) The request to the Board shall be in writing and shall set forth the facts as to the issuance and service of the subpoena, including a description of the books, papers, correspondence, memoranda or other records and documents as contained in the subpoena, and a statement as to the residence and present whereabouts of the person subpoenaed. The Board will give notice by mail to the person alleged to have refused, failed or neglected to comply with the subpoena, and unless, within 5 days after the mailing of the notice, he shows cause why he did not comply, the Board may proceed to compel such compliance as provided in this part.

#### Source

The provisions of this § 101.34 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Evidence—Cumulative*

It was harmless error to fail to inform the petitioner of the right to request the Board to petition the Court of Common Pleas to require the appearance of a person subpoenaed because the documentation and testimony which would have been provided would have been merely cumulative evidence and in support of issues not in dispute. *Beamer v. Unemployment Compensation Board of Review*, 552 A.2d 774 (Pa. Cmwlth. 1989).

A referee's failure to notify a claimant that the Board could take steps to have a subpoena enforced when claimant's witness failed to appear was harmless error where the witness' testimony, had it been given and had it confirmed all that the claimant had alleged, would only have been cumulative. *Ehmann v. Unemployment Compensation Board of Review*, 483 A.2d 587 (Pa. Cmwlth. 1984).

##### *Notice*

Since the Board is required to give notice and opportunity to be heard to a noncomplying person when it is attempting to enforce a subpoena, the same notice must be given when the Board is acting through an agent. *Guida v. Wentzel*, 11 Pa. D. & C.3d 564 (1979).

### COUNSEL

#### § 101.41. Approval of counsel fees.

(a) Under section 702 of the Unemployment Compensation Law (43 P. S. § 862), an individual claiming compensation in a proceeding before the Board or referee, may be represented by counsel or other authorized agent. Ordinarily, the amount of the fee for the service may be agreed upon between the claimant and counsel or authorized agent. However, if an issue is raised as to the amount of the fee, a petition or other written communication may be filed with the Board setting forth in detail the nature and extent of the services rendered to the claimant, the amount of benefits to which the claimant was potentially entitled at the beginning of the current benefit year, and the amount of compensation obtained by the claimant.

(b) In connection with the consideration of a petition or other written communication that raises an issue as to the amount of the fee for services rendered,

the Board will apply the rule that the fee charged or received for the service may not exceed 5% of the amount of benefits to which the claimant was potentially entitled at the beginning of his current benefit year, except that in mass or token appeal proceedings involving multiclaimants, if an issue is raised as to the amount of the fee, the Board reserves within its discretion the right to determine the amount of the fee to be approved, which will depend upon the circumstances prevailing with regard to the particular proceeding.

(c) The Board will make an order upon a petition or other written communication without a hearing. Notice of an order will be served upon both the claimant and counsel or authorized agent. The order will become final 10 days after the mailing of the notice thereof, unless objections to the order are filed. Objections to the order will be disposed of and decided in such manner as the Board may prescribe.

#### Source

The provisions of this § 101.41 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Board Approval*

The Unemployment Compensation Board did not need to approve counsel fees where there was no issue raised as to the amount of the fees earned by an attorney. *Department of Public Welfare v. Ziegler*, 542 A.2d 226 (Pa. Cmwlth. 1988).

##### *Representation Before the Board*

Individuals claiming unemployment compensation may be represented by counsel or other duly authorized agent in proceedings before the Unemployment Compensation Board; corporations, however, must be represented by legal counsel. *Harkness v. Unemployment Compensation Board*, 867 A.2d 728, 732 N.6 (Pa. Cmwlth. 2005).

## PROCEDURE

### § 101.51. Absence of party.

If a party notified of the date, hour and place of a hearing fails to attend a hearing without proper cause, the hearing may be held in his absence. In the absence of all parties, the decision may be based upon the pertinent available records. The tribunal may take such other action as may be deemed appropriate.

#### Source

The provisions of this § 101.51 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Issuance of Subpoenas and Nonappearance*

Claimants failed to make the requisite offer of proof establishing entitlement to the initial issuance of subpoenas. Moreover, assuming arguendo that the referee erred in denying these subpoenas originally, any error was cured by subsequent issuance of the subpoenas. Because none of the claimants appeared at the second hearing, to avail themselves of this second opportunity to be heard, they cannot legitimately claim to have been prejudiced by a lack of due process. Finally, a proper cause inquiry for nonappearance does not impermissibly reallocate the burden of proof in a willful misconduct setting. *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66 (Pa. Cmwlth. 1996).

*Pertinent Available Records*

As both the unemployment compensation claimant and employer failed to appear for a scheduled hearing before the referee, the referee and the Unemployment Compensation Board of Review could either decide the case based on the “pertinent available records” or reschedule the hearing. *Clairton Municipal Authority v. Unemployment Compensation Board of Review*, 639 A.2d 921 (Pa. Cmwlth. 1994).

*Proper Cause*

Claimant’s negligent misreading of hearing date on notice of hearing was not “proper cause” under this section which would invalidate Board decision based on evidence presented at a hearing held, in claimant’s absence. *Savage v. Unemployment Compensation Board of Review*, 491 A.2d 947 (Pa. Cmwlth. 1985).

The dismissal, based upon the claimant’s failure to appear, of an appeal from a finding of noneligibility for benefits based upon the self-employment of the claimant, was reversed when the Board failed to determine if there was proper cause for claimant’s absence as required by this section. *Eckert v. Unemployment Compensation Board of Review*, 483 A.2d 1059 (Pa. Cmwlth. 1984).

*Referee’s Decision*

Where the claimant fails to attend the referee’s hearing without “proper cause”, the referee must issue a decision on the merits with findings of fact based upon the evidence of record, including any testimony that the employer may wish to offer in support of its burden of proof. *Ortiz v. Unemployment Compensation Board of Review*, 481 A.2d 1383 (Pa. Cmwlth. 1984).

Section 502 of the Unemployment Compensation Law (43 P. S. § 822), when read together with this section, reveals the legislation’s intention that referees decide unemployment cases on their merits, even in the absence of a party or indeed both parties. *Gadsden v. Unemployment Compensation Board of Review*, 479 A.2d 74 (Pa. Cmwlth. 1984).

Where the employer was notified of the date, hour and place of the hearing, and the referee waited for the employer to appear, it was not erroneous for the referee to conduct the hearing in the employer’s absence. *Torsky v. Unemployment Compensation Board of Review*, 474 A.2d 1207 (Pa. Cmwlth. 1984).

In upholding the discharge of an employe for willful misconduct, the Court noted that 34 Pa. Code § 101.51 allows the referee to hold a hearing without one party or all parties if they have all been duly notified. *Lee v. Unemployment Compensation Board of Review*, 458 A.2d 629 (Pa. Cmwlth. 1983).

*Waiver of Opportunities*

Because claimant has neglected to establish proper cause for nonappearance, he waived his opportunity to request a continuance or telephonic conference, waiting until the day of trial to assert unavailability, and failed to address the exact nature and probative worth of his testimony from another proceeding, neither the referee nor the Board erred in refusing to admit claimant’s PLRB testimony. *Flores v. Unemployment Compensation Board of Review*, 686 A.2d 66 (Pa. Cmwlth. 1996).

**§ 101.52. Investigations.**

(a) Where, in the determination of an appeal, the report of an investigation is to be used adversely to the interests of any party, the report, if objected to, may not be introduced as evidence and considered in the disposition of the appeal unless a continued hearing has been held at which the persons who furnished the information contained in the report appeared and the party adversely affected was

afforded an opportunity for cross-examination and rebuttal. If the person who furnished the information appears but the party adversely affected fails to appear, the latter shall be deemed to have been afforded a reasonable opportunity for cross-examination and rebuttal.

(b) The tribunal may continue the hearing of an appeal and make an investigation either in person or through an investigator or other designated person when the hearing has failed to produce sufficient evidence to establish adequate findings as to the material facts or where there is reason to doubt the reliability of the evidence submitted, and when efforts to compel the attendance of the party or witness whose evidence is desired have failed. Information obtained in this manner shall be introduced into the record of evidence only under the same conditions (applicable to other investigations) as prescribed in subsection (a).

**Source**

The provisions of this § 101.52 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions**

*Pertinent Available Records*

As both the unemployment compensation claimant and employer failed to appear for a scheduled hearing before the referee, the referee and the Unemployment Compensation Board of Review could either decide the case based on the "pertinent available records" or reschedule the hearing. *Clairton Municipal Authority v. Unemployment Compensation Board of Review*, 639 A.2d 921 (Pa. Cmwlth. 1994).

**§ 101.53. Notice.**

Mailing of notices, orders or decisions of a referee, or of the Board to the parties at their last known addresses as furnished by the parties to the referee, the Board or the Department, shall constitute notice of the matters therein contained.

**Source**

The provisions of this § 101.53 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions**

*Last Known Address*

Where the claimant informed OES at some point of her mistake and furnished them with the correct address, the court reversed the referee's action of dismissal and remanded the record to the Board of Review for a hearing on the matter of whether the notice of the referee's hearing was mailed to the claimants' last known address. *Gadsden v. Unemployment Compensation Board of Review*, 479 A.2d 74 (Pa. Cmwlth. 1984).

**§ 101.54. Records.**

(a) The proceedings of appeal hearings, at both referee and Board levels shall be recorded and preserved for a period of 2 years. The record need not be transcribed unless a further appeal is filed. In the event an application for further appeal is filed from the decision of a referee, the record shall be transcribed and

transmitted to the Board, together with records and documents in the appeal proceeding. At any time the Board may require the complete record of a case, or a part thereof, to be transcribed and filed with the Board.

(b) When an interested party or his representative requests information from the file of the Board in order to present and maintain the issues at a hearing before a referee or the Board, or in an appeal to the Court, such information (including the hearing transcript, where the record has been transcribed) shall be made available at a reasonable time to the party and his representative, without charge, at the office of the referee to whom the case was assigned or at the central office of the Board in Harrisburg, Pennsylvania, whichever is more convenient to the interested party or his representative, for examination, copying and making notations therefrom. An examination of the file shall be permitted only for purposes relating to the Unemployment Compensation Law (43 P. S. §§ 751—882) and for no other proceeding or purpose.

#### Source

The provisions of this § 101.54 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Due Process*

The failure of the Board to furnish a transcript of the hearing of the referee when requested is a violation of due process and deprives a claimant of the statutory right to file a brief prior to adjudication. *Moyer v. Unemployment Compensation Board of Review*, 388 A.2d 772 (Pa. Cmwlth. 1978).

##### *Grounds for Reversal*

Except in extraordinary circumstances, asserted inadequacy of the record is not grounds for reversal of an administrative agency's decision. *Walsh v. Unemployment Compensation Board of Review*, 329 A.2d 523 (Pa. Cmwlth. 1974).



**§ 101.55. Withdrawal or discontinuance of appeal.**

A party who has filed an appeal may withdraw and discontinue it with the approval of the tribunal before whom the appeal is pending. Forms for withdrawal of appeal may be obtained from the office of the Board, a referee or a local employment office.

**Source**

The provisions of this § 101.55 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**DISMISSAL AND DISQUALIFICATION****§ 101.61. Dismissal if filing of appeal or application for further appeal is late.**

(a) If an appeal from a decision of the Department or an application for further appeal appears to have been filed beyond the applicable time limit, the tribunal shall advise the appealing party in writing that it appears not to have a jurisdiction because of the late filing, and that the appeal or application for further appeal will be dismissed without a hearing unless the appealing party notifies the tribunal in writing within the succeeding 15 days from the date of such notice, that he contends the appeal or application for further appeal was timely filed and that he desires a hearing. If no reply from the appealing party is received within the 15-day period, or if the appealing party does not request a hearing, the tribunal shall dismiss the appeal or application for further appeal.

(b) If an appeal has been filed from a decision of the Department, which appears to have been filed beyond the applicable time limit, and a request for a hearing is received within the 15-day period, the case shall be assigned to a referee for hearing on the issue of the timeliness of the appeal, and on the merits, if it appears that the appeal was in fact timely filed. Notice of the hearing will be mailed to the last known post office address of each interested party. If the referee finds that the appeal was not timely filed, he shall issue a decision only on this issue. If the referee finds that the appeal was timely filed, he shall issue a decision not only on the issue of the timeliness of the appeal, but also on the merits of the case.

(c) If an application for further appeal has been filed, which appears has been filed beyond the applicable time limit, and a request for a hearing is received by the Board within such 15-day period, the case shall be assigned to a referee to conduct a hearing for and on behalf of the Board on the issue of the timeliness of the application for further appeal, and on the merits, if it appears that the appeal was in fact timely filed. Notice of the hearing shall be mailed to the last known post office address of each interested party. If the Board finds that the application for further appeal was not timely filed, the Board will issue a decision only on this issue. If the Board finds that the application for further appeal was timely filed, the Board will proceed to either allow or disallow the applica-

tion for further appeal, and notification thereof shall be mailed to the last known post office address of each interested party. If the application for further appeal is allowed, the Board will proceed to review the established record and render a decision on the merits of the case.

#### Source

The provisions of this § 101.61 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended July 14, 1978, effective July 15, 1978, 8 Pa.B. 2002. Immediately preceding text appears at serial pages (32164) and (32165).

### § 101.62. Disqualification to participate in hearing or decision.

(a) No referee, member of the Board or employe of the Department shall participate in the hearing or determination of any case in which he himself is an interested party. The Board will designate an alternate to serve in the absence or disqualification of any referee.

(b) A referee or member of the Board may be challenged at any time by an interested party prior to the disposition of an appeal by the referee or the Board, whichever is the subject of the challenge. A challenge to the referee may be presented orally at a scheduled hearing conducted by the designee of the Board and made a part of the record, or a written challenge may be filed with the Board. The challenge to a referee will be decided by the Board. A challenge to a member of the Board may be presented orally at a scheduled hearing before the Board or its designee and made a part of the record, or a written challenge may be filed with the Board. The challenge to a particular Board member shall be decided by the other Board members. If it is not feasible for the other Board members to reach a decision, the Board will request the Secretary of the Department to make a decision on the challenge.

#### Source

The provisions of this § 101.62 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Waiver*

Employer cannot reasonably claim a violation of due process where the employer waived their right to challenge a member's impartiality by failing to make a timely motion for recusal under these regulations. *Stone Container Corp. v. Unemployment Compensation Board of Review*, 657 A.2d 1333 (Pa. Cmwlth. 1995).

The provisions of this subsection (a) do not prevent one who has acted as a hearing officer in a case from later testifying as a witness in a proceeding before a referee as the regulation is intended to prevent participation in those cases where an outside interest is concerned. *Evans v. Unemployment Compensation Board of Review*, 484 A.2d 822 (Pa. Cmwlth. 1984).

**COPIES OF TESTIMONY****§ 101.71. Copies on request.**

If a party to a proceeding shall file with the referee or the Board, a statement that a transcribed copy of the record of the testimony, or a part thereof, is necessary to a proper presentation of his case, either before the referee or the Board, a transcribed copy of the record of the testimony, or an indicated part thereof, shall be furnished to him without charge. In the event of an appeal from the decision of the Board to the Commonwealth Court, a party may request a transcribed copy of the record of the testimony, and it shall be furnished without charge.

**Source**

The provisions of this § 101.63 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions***Inadequate Record*

Except in extraordinary circumstances, asserted inadequacy of the record is not grounds for reversal of an administrative agency's decision and a remand for further hearing when the means for obtaining such relief from the agency are not employed; there are no conceivable circumstances for remand, absent application to the agency, when the alleged missing evidence is not offered in proof. *Walsh v. Unemployment Compensation Board of Review*, 329 A.2d 523 (Pa. Cmwlth. 1974).

*Notice*

Alleged inadequacies in a notice of right to appeal to the Unemployment Compensation Board of Review given in a referee's decision denying benefits do not entitle a claimant to nunc pro tunc consideration of an untimely appeal because due process does not require an agency to provide notice of right to appeal when the agency or the legislature has established a duly published procedure for hearing or appeal, and the procedure for appeal to the Board is clearly enunciated in statutes and regulations. *Dilenno v. Unemployment Compensation Board of Review*, 429 A.2d 1288 (Pa. Cmwlth. 1981).

The Unemployment Compensation Board of Review has no duty to provide a party with notice of right to appeal, since the procedure for appealing from the decision of a referee is clearly enunciated in statutes and the regulations of the Board. *Mogil v. Unemployment Compensation Board of Review*, 413 A.2d 480 (Pa. Cmwlth. 1980).

The failure of the Board to furnish a transcript of the hearing of the referee when requested is a violation of due process rights and deprives a claimant of the statutory right to file a brief prior to adjudication. *Moyer v. Unemployment Compensation Board of Review*, 388 A.2d 772 (Pa. Cmwlth. 1978).

*Transcript*

The failure of a notice of right to appeal to inform a claimant of the right to request oral argument and present a brief or further testimony does not constitute a denial of due process, since the statutes and regulations concerning appeals from decisions of the referee clearly set out the procedure for such appeals. *Walker v. Unemployment Compensation Board of Review*, 381 A.2d 1353 (Pa. Cmwlth. 1978).

**Subchapter C. APPEALS FROM DETERMINATIONS OF  
DEPARTMENT**

Sec.

- 101.81. Filing of appeal from determinations of Department.
- 101.82. Time for filing appeal from determination of Department.
- 101.83. Notification of filing of appeal.
- 101.84. Jurisdiction of appeal.
- 101.85. Notice of appeal hearing.
- 101.86. Appeal hearings.
- 101.87. Issues considered on original appeal.
- 101.88. Decision on original appeal.
- 101.89. Notice of decision.
- 101.90. Further appeal.

**§ 101.81. Filing of appeal from determination of Department.**

(a) Appeal forms may be obtained from a Department appeal office, a workforce investment office or the Board's appeals system administrator in Harrisburg and from the Department website ([www.dli.state.pa.us](http://www.dli.state.pa.us)).

(b) Information about filing an appeal may be obtained from a Department appeal office, Board office and the Department's website. The Department will provide appeal instructions with each determination, including the address and fax number of a Board office, workforce investment office or a Department appeal office where appeals may be filed.

(c) An appeal from a determination of the Department shall be filed with a Department appeal office, a workforce investment office or a Board office and shall contain the following information:

- (1) The name and address of the claimant.
- (2) The Social Security number of the claimant, if known.
- (3) The date of the determination which is being appealed.
- (4) The reasons for appeal.
- (5) The name and address of the appellant.

(d) Upon receipt of an appeal, the Department or the Board will docket and process the appeal form.

(e) The Board will consider a written objection to the Department's determination as an appeal and process it under subsection (c) if the appellant does not complete the Department-provided appeal form.

**Source**

The provisions of this § 101.81 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended September 19, 2003, effective September 20, 2003, 33 Pa.B. 4674. Immediately preceding text appears at serial pages (259528) to (259529).

**Notes of Decisions***Proper Appeal*

Unemployment compensation claimant adequately preserved for appellate review all issues related to his appeal of referee's decision to the Unemployment Compensation Board of Review even though he only stated that he did not agree with the decision; job center and referee considered whether claimant engaged in willful misconduct and parties raised no objections during the proceedings. *Ductmate Ind. v. Unemployment Compensation Board of Review*, 949 A.2d 338 (Pa. Cmwlth. 2008).

Although the unemployment claimant's petitions for appeal from the job center did not raise any issues specifically, the issues which were decided by the job center were the same issues addressed by the referee and were subsequently discussed by the Unemployment Compensation Board of Review. Thus, pursuant to §§ 101.87 and 101.107, the referee and Board correctly considered the Claimants' appeals. *Black Lick Trucking, Inc. v. Unemployment Compensation Board of Review*, 667 A.2d 454 (Pa. Cmwlth. 1995).

Commonwealth Court could not consider documents relied upon by the Employer which were not part of the record. The documents, if part of the record, would not constitute a valid appeal because these documents did not manifest employer's intent to appeal a determination under section 501(e) of the Unemployment Compensation Act (43 P.S. § 821(3)). *Pa. Turnpike Commission v. Unemployment Comp. Bd. of Review*, 991 A.2d 971 (Pa. Cmwlth. 2009).

**Cross References**

This section cited in 34 Pa. Code § 101.82 (relating to time for filing appeal from determination of Department); and 34 Pa. Code § 101.102 (relating to form and filing of application for further appeal from decision of referee).

**§ 101.82. Time for filing appeal from determination of Department.**

(a) A party seeking to appeal a Department determination shall file an appeal in the form and manner specified in § 101.81 (relating to filing of appeal from determination of Department) and this section on or before the 15th day after the date on which notification of the decision of the Department was delivered personally to the appellant or mailed to him at his last known post office address.

(b) A party may file a written appeal by any of the following methods:

(1) *United States mail.* The filing date will be determined as follows:

(i) The date of the official United States Postal Service postmark on the envelope containing the appeal, a United States Postal Service Form 3817 (Certificate of Mailing) or a United States Postal Service certified mail receipt.

(ii) If there is no official United States Postal Service postmark, United States Postal Service Form 3817 or United States Postal Service certified mail receipt, the date of a postage meter mark on the envelope containing the appeal.

(iii) If the filing date cannot be determined by any of the methods in subparagraph (i) or (ii), the filing date will be the date recorded by the Department, the workforce investment office or the Board when it receives the appeal.

(2) *Common carrier.* An appeal may be delivered by a common carrier of property which is subject to the authority of the Pennsylvania Public Utility Commission or the United States National Surface Transportation Board. The date of filing is the date the document was delivered to the common carrier, as established by a document or other record prepared by the common carrier in the normal course of business. If the date of delivery to the common carrier cannot be determined by the documents in the record, the date of filing will be the date the workforce investment office, Board or Department appeal office received the appeal.

(3) *Fax transmission.*

(i) The filing date will be determined as follows:

(A) The date of receipt imprinted by the Department, the workforce investment office or the Board's fax machine.

(B) If the Department, the workforce investment office or the Board's fax machine does not imprint a legible date, the date of transmission imprinted on the faxed appeal by the sender's fax machine.

(C) If the faxed appeal is received without a legible date of transmission, the filing date will be the date recorded by the Department appeal office, the workforce investment office or the Board when it receives the appeal.

(ii) A party filing an appeal by fax transmission is responsible for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.

(iii) A fax transmission is timely filed if it is received by the Department appeal office, workforce investment office or Board before midnight on the last day of the appeal period in accordance with this subsection.

(4) *Electronic transmission other than fax transmission.* The date of filing is the receipt date recorded by the Department appeal office or the Board's electronic transmission system, if the electronic record is in a form capable of being processed by that system. A party filing by electronic transmission shall comply with Department instructions concerning format. A party filing an appeal by electronic transmission is responsible for using the proper format and for delay, disruption, interruption of electronic signals and readability of the document and accepts the risk that the appeal may not be properly or timely filed.

(5) *Personal delivery to a workforce investment office or the Board.* The filing date will be the date the appeal was personally delivered to the workforce investment office or the Board during its normal business hours.

#### Source

The provisions of this § 101.82 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended July 14, 1978, effective July 15, 1978, 8 Pa.B. 2002; amended September 19, 2003, effective September 20, 2003, 33 Pa.B. 4674. Immediately preceding text appears at serial pages (259259) to (259530) and (284883) to (284884).

#### Notes of Decisions

##### *Basis of Appeal*

Claimant's statement on Appeal form—"I do not agree with this decision"—was insufficient to state the basis of an appeal; there must be some indication of what error occurred and where the tribunal should focus its attention. *Merida v. Unemployment Compensation Board of Review*, 543 A.2d 593 (Pa. Cmwlth. 1988); appeal dismissed 570 A.2d 1320 (Pa. 1990).

##### *Burden of Proof*

When the Bureau dismissed an appeal as untimely based on a receipt date beyond the appeal period and the letter bearing the postmark date of appeal had allegedly been misplaced through the negligence of the Bureau, the appellant bore the burden of presenting evidence that administrative irregularity, fraud, or its equivalent caused the failure to appeal on time. *Trans-Eastern Inspection, Inc. v. Unemployment Compensation Board of Review*, 420 A.2d 1354 (Pa. Cmwlth. 1980).

##### *General Comments*

The Unemployment Compensation Board of Review is bound to follow its own regulations in determining the perfection date of an appeal. *Vereb v. Unemployment Compensation Board of Review*, 676 A.2d 1290 (Pa. Cmwlth. 1996).

The language of this section reveals the need for appellants to “specifically advise” that they are filing an appeal. *First National Bank of Bath v. Unemployment Compensation Board of Review*, 619 A.2d 801 (Pa. Cmwlth. 1992).

#### *Initiation of Appeal*

In unemployment compensation cases, the date of filing of an appeal to the Unemployment Compensation Board of Review is determined from the postmark appearing on the envelope in which the appeal form was mailed. This regulation does not recognize the placing of an appeal in the mail as the initiation of the appeal, but recognizes only the postmark date. *Sellers v. Workmen’s Compensation Appeal Board*, (HMT Constr. Servs.), 687 A.2d 413 (Pa. Cmwlth. 1996); appeal granted 699 A.2d 737 (Pa. 1997); affirmed 713 A.2d 87 (Pa. 1998).

The employer’s notation accompanying the Request for Relief from Charges form specifically advised the Bureau that it was appealing the Notice of Financial Determination thereby meeting the requirements of subsection (c). *LTV Steel Company, Inc. v. Unemployment Compensation Board of Review*, 620 A.2d 629 (Pa. Cmwlth. 1993).

#### *Nunc Pro Tunc Appeals*

Appellant before the Unemployment Compensation Board who files an appeal late because the appellant was hospitalized may be allowed to file appeal nunc pro tunc. *Cook v. Unemployment Compensation Board of Review*, 671 A.2d 1130 (Pa. 1996).

#### *Postmark*

An envelope bearing no postmark, containing the employer’s appeal of a referee’s determination, was not received by the Department within 15 days of the mailing date of the determination, and therefore, the appeal could not be deemed mailed on postmark date. *Darroch v. Unemployment Compensation Board of Review*, 627 A.2d 1235 (Pa. Cmwlth. 1993).

A postmark which indicates that an appeal was mailed within the 15-day period satisfies the requirement for filing within the required time, even if the appeal is received after the end of the appeal period. *UGI Utilities, Inc. v. Unemployment Compensation Board of Review*, 776 A.2d 344 (Pa. Cmwlth. 2001).

This section, as drafted does not recognize placing an appeal in the mail as the initiation of the appeal matter, it recognizes only the postmark date. *Edwards v. Unemployment Compensation Board of Review*, 639 A.2d 1279 (Pa. Cmwlth. 1994).

If the postmark on the envelope of the mailing of a decision differs from the “decision mailing date,” an appellant may rely on that postmark as the date on which notification of the decision was actually mailed and as the date on which the appeal period begins. *Raichle v. Board of Unemployment Compensation Board of Review*, 535 A.2d 694 (Pa. Cmwlth. 1988).

An appeal postmarked November 13 was not timely filed when the 15-day period for filing appeals expired November 12, since subsection (d) provided that if an appeal to the Board was delivered by mail, then the date of the initiation of the appeal shall be determined from the postmark appearing upon the envelope in which the appeal was mailed. *Williams v. Unemployment Compensation Board of Review*, 461 A.2d 643 (Pa. Cmwlth. 1983).

The postmark rule to determine mailing date was reasonable and a late mailing was not excusable in the absence of a deprivation by the Board of the claimant’s right to appeal via fraud, negligence or wrongful conduct. *Hoffman v. Unemployment Compensation Board of Review*, 382 A.2d 797 (Pa. Cmwlth. 1978).

#### *Timeliness*

Appealing party in unemployment compensation case is responsible for the readability of fax sent for appeal purposes; party choosing to communicate by fax for any purpose accepts the risk of any delay, disruption, interruption of electronic signals, and readability of the document. *Skowronek v. Unemployment Compensation Board of Review*, 921 A.2d 555, 559 (Pa. Cmwlth. 2007).

Board’s dismissal of appeal for untimeliness is affirmed based upon the regulation that when the litigant selects e-mail as the medium for appeal, the litigant assumes the risk that the appeal may not

be timely filed for traditional reasons nunc pro tunc relief is not appropriate. *McClellan v. Unemployment Compensation Board of Review*, 898 A.2d 31, 34 (Pa. Cmwlth. September 27, 2006).

Date counsel placed claimant's appeal in the mail with the correct amount of postage constituted the "filing" date for the purpose of determining whether claimant's appeal was timely filed, rather than the date counsel initially placed the appeal in the mail that was returned for insufficient postage. *Shea v. Unemployment Compensation Board of Review*, 898 A.2d 31, 34 (Pa. Cmwlth. 2006).

Where unemployment compensation hearing referee failed to retain envelope that claimant's appeal was mailed in and failed to date-stamp the appeal when it was received, it was proper for the Unemployment Compensation Board of Review to consider testimony from claimant and her husband to determine whether claimant's appeal was timely. *Cumberland Valley Animal Shelter v. Unemployment Compensation Board of Review*, 881 A.2d 10, 13 (Pa. Cmwlth. 2005).

Under pre-amended regulation, unemployment compensation appeal sent by facsimile transmission that arrived at receiving fax machine after close of business on the last day of appeal period that was hand-stamped with receipt date was filed on time within the meaning of the law as the regulations do not impose any time-of-day restrictions upon a claimant's appeal period. *Dumberth v. Unemployment Compensation Board*, 837 A.2d 678, 683 (Pa. Cmwlth. 2003).

An appeal to the Unemployment Compensation Board of Review must be filed within 15 days after the date of the referee's decision, or that decision becomes final and the Board has no jurisdiction over the matter. *UGI Utilities, Inc. v. Unemployment Compensation Board of Review*, 776 A.2d 344 (Pa. Cmwlth. 2001).

In that the date of mailing, for the purpose of establishing the date by which an employee must initiate an appeal from a grant of unemployment compensation benefits, was the postmark date, an appeal postmarked on the day after the filing deadline was not properly filed and the Unemployment Compensation Board of Review did not have jurisdiction to consider the merits of the case. *Edwards v. Unemployment Compensation Board of Review*, 639 A.2d 1279 (Pa. Cmwlth. 1994).

Hand-delivery of an appeal one day late constituted untimeliness, and it was not unreasonable for the Board to reject the appeal. *Moss v. Unemployment Compensation Board of Review*, 557 A.2d 839 (Pa. Cmwlth. 1989).

#### Cross References

This section cited in 34 Pa. Code § 101.102 (relating to form and filing of application for further appeal from decision of referee).

### § 101.83. Notification of filing of appeal.

Notice of an appeal having been filed shall be furnished by the local employment office wherein the appeal was filed, to the central office of the Board and to each party to the claim proceedings, by personal delivery or by mailing it to his last known post office address.

#### Source

The provisions of this § 101.83 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

### § 101.84. Jurisdiction of appeal.

(a) The Board may hear and dispose of an appeal without referring it to a referee. However, unless the Board assumes original jurisdiction, the appeal shall be assigned promptly to a referee for hearing.

(b) The Board may also remove or transfer an appeal pending before a referee at any time. When an appeal pending before a referee is transferred by the Board to another referee a hearing shall be held before the referee by whom the appeal is to be decided.

**Source**

The provisions of this § 101.84 adopted August 26, 1970, effective August 27, 1 Pa.B. 435.

**§ 101.85. Notice of appeal hearing.**

(a) The tribunal by which the appeal is to be heard shall schedule the appeal promptly for hearing and give at least 7 days' notice of the hearing to the parties and their counsel or authorized agent of record, specifying the date, hour and place of hearing and specific issues to be covered at the hearing.

(b) Exclusive of cases which involve an issue as to the amount or sufficiency of wages of a claimant in covered employment, an exception may be made to the 7-day rule and hearings may be scheduled upon shorter notice, but not less than 3 days, so that newly received appeals may be included in the itinerary of the referee of scheduled hearings at outlying points. If a hearing is scheduled with less than 7 days' notice, affected parties shall be instructed to notify the referee immediately, if it is not convenient for them to attend the hearing. If it is inconvenient for an affected party to attend a hearing on short notice, the appeal shall be rescheduled promptly for hearing.

(c) If hearings on more than one appeal are to be scheduled and conducted jointly, each party shall be notified in his notice of hearing that a joint hearing



will be held, that a single record of the proceedings will be made and that evidence introduced with respect to an appeal will be considered as introduced with respect to all.

#### Authority

The provisions of this § 101.85 amended under sections 203(d) and 505 of the Unemployment Compensation Law (43 P. S. §§ 763(d) and 825).

#### Source

The provisions of this § 101.85 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended April 7, 1989, effective April 8, 1989, 19 Pa.B. 1550. Immediately preceding text appears at serial pages (124283) to (124284).

#### Notes of Decisions

##### *Scope and Review*

This and other provisions of the unemployment compensation regulations support the view that referee and Board properly refused to rule on issue which was not raised before the Office of Employment Security. *Glesk v. Unemployment Compensation Board of Review*, 525 A.2d 1249 (Pa. Cmwlth. 1987).

##### *Notice*

The Board's failure to give notice to a claimant of hearings held to receive evidence from claimant's employer and "similarly situated" claimants is a violation of notice requirements contained in subsection (a) and requires a remand. *Allrutz v. Unemployment Compensation Board of Review*, 463 A.2d 100 (Pa. Cmwlth. 1983).

### **§ 101.86. Appeal hearings.**

(a) Hearings shall be held at places determined by the tribunal which shall be reasonably convenient to each of the parties concerned. During the hearing each party shall be given the opportunity to submit testimony or evidence in support of his contentions. Also, each party shall have the right to present oral or written argument and be afforded the opportunity to reply to the arguments and contentions of the other parties.

(b) If the scheduled hearing is not in the county where the claimant regularly reports for work, the employer may make a written request that a separate hearing be scheduled in such county, and such request shall be granted where it is established that it is impracticable because of the distance for the employer or his representative to attend the regularly scheduled hearing in the area where the claimant is located.

(c) The hearing of an appeal from the decision of the Department shall be conducted in the manner provided in § 101.21 (relating to conduct of hearings).

#### Source

The provisions of this § 101.86 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

Where the claimant's employer testified at the referee's hearing by means of a telephone conference call and referred to documents in his possession, the provisions of this section require that the claimant be given access to the documents to refer to in cross-examining or that the documents be proved accurate and offered into evidence. *Chobert v. Unemployment Compensation Board of Review*, 484 A.2d 223 (Pa. Cmwlth. 1984).

#### § 101.87. Issues considered on original appeal.

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

#### Source

The provisions of this § 101.87 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Basis of Decision*

Referee's reliance on a legal theory not relied upon by the Office of Employment Security will not result in a reversal of the referee's decision unless reliance on the issue results in surprise or prejudice to the claimant. *Hine v. Unemployment Compensation Board of Review*, 520 A.2d 102 (Pa. Cmwlth. 1987).

##### *Compensation Denied*

Denial of unemployment compensation solely on the basis of section 3 of the Unemployment Compensation Law does not violate the provisions of this regulation when the claimant is dismissed from employment due to conviction of welfare fraud and is therefore unemployed as a result of her own fault. *Wilson v. Unemployment Compensation Board of Review*, 428 A.2d 288 (Pa. Cmwlth. 1981).

##### *Evidence*

The Unemployment Compensation Board of Review may only consider the merits of issues delineated in the Bureau of Employment Security's determination notice. *Hanover Concrete Co. v. Unemployment Compensation Board of Review*, 402 A.2d 720 (Pa. Cmwlth. 1979).

This regulation requires that the evidence adduced and the determination made at the referee's hearing be limited to the legal issue ruled on by the Bureau in its notification of ineligibility for benefits. *Corressel v. Unemployment Compensation Board of Review*, 385 A.2d 615 (Pa. Cmwlth. 1978).

The evidence adduced at the referee's hearing must be limited to the reasons stated in the notice of ineligibility given to the claimant by the Bureau. *Bilsing v. Unemployment Compensation Board of Review*, 382 A.2d 1279 (Pa. Cmwlth. 1978).

##### *Expressly Ruled Open*

The Department is deemed to have ruled on all matters and issues relating to a claim for benefits. Therefore the Board erred when it considered the merits of issues not delineated in the O.E.S.'s determination notice. *Harwood v. Unemployment Compensation Board of Review*, 531 A.2d 823 (Pa. Cmwlth. 1987).

This and other provisions of the unemployment compensation regulations support the view that the referee and Board properly refused to rule on issue which was not raised before the Office of Employment Security. *Glesk v. Unemployment Compensation Board of Review*, 525 A.2d 1249 (Pa. Cmwlth. 1987).

*General Comment*

This section limits the referee to a consideration of those issues expressly ruled upon by the Office of Employment Security from which the appeal was filed. *Sterling v. Unemployment Compensation Board of Review*, 474 A.2d 389 (Pa. Cmwlth. 1984).

This section merely limits the referee to considering issues raised by the action of the Office of Employment Security, unless the parties agree otherwise. *Gould v. Unemployment Compensation Board of Review*, 466 A.2d 750 (Pa. Cmwlth. 1983).

*Issues Properly Considered*

Where the Bureau's initial determination in favor of the claimant stated only that she had been an employee and not an independent contractor, but the employer's appeal to the referee also raised the issue of voluntary termination, the referee was mistaken in his belief that he could not hear the second issue. *Sharp Equipment Co. v. Unemployment Compensation Board of Review*, 808 A.2d 1019 (Pa. Cmwlth. 2002).

Although the unemployment claimant's petitions for appeal from the job center did not raise any issues specifically, the issues which were decided by the job center were the same issues addressed by the referee and were subsequently discussed by the Unemployment Compensation Board of Review. Thus, pursuant to §§ 101.87 and 101.107, the referee and Board correctly considered the Claimants' appeals. *Black Lick Trucking, Inc. v. Unemployment Compensation Board of Review*, 667 A.2d 454 (Pa. Cmwlth. 1995).

Where demotion was raised in the context of litigation of the issue of "cause of a necessitous and compelling nature," the court found that the Office of Employment Security had considered the issues for purposes of this regulation. *Greco v. Unemployment Compensation Board of Review*, 560 A.2d 300 (Pa. Cmwlth. 1989).

The Board had the authority to consider the claimant's ineligibility under its ability to review the issues expressly ruled upon in the referee's decision, despite the claimant's desire not to have that issue reviewed on appeal. *Jordan v. Unemployment Compensation Board of Review*, 547 A.2d 811 (Pa. Cmwlth. 1988).

Claimant, who recognized that willful misconduct was a potential issue, consented, by his conduct, to an issue not raised in the Office of Employment Security determination and was not prejudiced by the referee's decision to consider willful misconduct instead of voluntary guilt as a basis for denying benefits. *Brooks v. Unemployment Compensation Board of Review*, 547 A.2d 493 (Pa. Cmwlth. 1988).

Where referee did not rule on claimant's work performance, but gave claimant opportunity for extension of proceedings with notice that issue of work performance was to be addressed, claimant, who refused extension, could not claim unfair surprise so as to preclude the referee or Board from ruling on an issue. *Shearer v. Unemployment Compensation Board of Review*, 527 A.2d 615 (Pa. Cmwlth. 1987).

Referee properly considered and ruled upon issue on appeal, despite fact that employer did not reopen inquiry into issue, since Office of Employment Security had expressly ruled upon and delineated issue in its determination notice. *Wilder & Miller v. Unemployment Compensation Board of Review*, 525 A.2d 852 (Pa. Cmwlth. 1987).

Where the claimant did not consent to consideration of section 402(e) of the Unemployment Compensation Law (43 P. S. § 802(e)) and the Bureau did not rule on the issue, the referee could not change the legal basis for denial of unemployment compensation at the hearing level. *Giddens v. Unemployment Compensation Board of Review*, 516 A.2d 866 (Pa. Cmwlth. 1986).

A referee on appeal must consider only those charges of willful misconduct delineated in the OES determination notice; therefore, to allow a critique of other conduct against which charge the

employer is unprepared to defend or explain is fundamentally unfair and, absent mutual consent of its consideration, is prohibited. *Comp v. Unemployment Compensation Board of Review*, 478 A.2d 503 (Pa. Cmwlth. 1984).

Although a remand is normally required to cure any prejudice to the claimant resulting from a change in legal theory from that found in the original Office of Employment Security determination, such a remand was not necessary where the case had previously been remanded and reheard numerous times and it was evident that the claimant had not been prejudiced by the change in legal theory from the original OES determination to the final Board order. *Clark v. Unemployment Compensation Board of Review*, 471 A.2d 1309 (Pa. Cmwlth. 1984); appeal after remand 497 A.2d 261 (Pa. Cmwlth. 1985); appeal denied 527 A.2d 546 (Pa. 1987).

If the Office of Employment Security notifies a claimant of ineligibility by reason of willful misconduct, the referee and the Board of Review may not determine that it is a case of a voluntary quit. The matter will be remanded for further consideration of the issue ruled on by the Office of Employment Security. *Feinberg v. Unemployment Compensation Board of Review*, 448 A.2d 664 (Pa. Cmwlth. 1982).

Since the evidence adduced and determinations made at the referee's hearing are limited to the legal issues ruled on by the Bureau, to allow a determination of a legal issue which the claimant is unprepared to defend or explain is fundamentally unfair and will not be allowed. *Goodman v. Unemployment Compensation Board of Review*, 447 A.2d 1127 (Pa. Cmwlth. 1982).

If the Office of Employment Security expressly rules upon an issue, the referee on appeal may rule upon that issue, even if the claimant does not intend to reopen inquiry into that particular issue. *Lenz v. Unemployment Compensation Board of Review*, 432 A.2d 1149 (Pa. Cmwlth. 1981).

#### *Party Approval*

Referee properly refused to consider whether claimant's switch to part-time employment constituted a voluntary termination of full-time employment without cause of a compelling nature, since claimant would not agree to have that issue determined. *Wilder & Miller v. Unemployment Compensation Board of Review*, 525 A.2d 852 (Pa. Cmwlth. 1987).

Where the parties have consented, under this section, to have a referee rule on an issue not addressed by the Office of Employment Security decision, but where the referee declined to reach the issue, the Unemployment Compensation Board of Review should obtain a second independent expression of the parties' consent to rule on the unaddressed issue, under 34 Pa. Code § 101.107(b). *Bennett v. Unemployment Compensation Board of Review*, 491 A.2d 314, 318 (Pa. Cmwlth. 1985) (dissenting opinion).

#### *Remand*

The Board had the authority to remand to the referee to determine the issue of voluntary termination, which had been properly raised by the employer. *Sharp Equipment Co. v. Unemployment Compensation Board of Review*, 808 A.2d 1019 (Pa. Cmwlth. 2002).

#### *Waiver*

In unemployment compensation proceedings employer waived issue of whether claimant was fired for willful misconduct, and thus ineligible for benefits, where the theory was not raised before Bureau of Employment Security but was first advanced in Commonwealth Court. *Wing v. Unemployment Compensation Board of Review*, 436 A.2d 1179 (Pa. 1981).

### **§ 101.88. Decision on original appeal.**

The tribunal shall affirm, modify or reverse the decision of the Department as shall appear just and proper from the evidence submitted. The decision shall be rendered promptly after the conclusion of the hearing and shall set forth the following:

- (1) The names and addresses of parties involved, appeal number and claimant's social security number.

- (2) A history of the case, including the date of application for benefits, claim week ending dates, date of appeal and identity of appellant.
- (3) The date and nature of the determination (decision) being appealed.
- (4) Findings of fact.
- (5) Reasons for the decision.
- (6) Conclusions of law.
- (7) The order.

#### Source

The provisions of this § 101.88 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Decision*

Because the alleged unwritten assurance of the referee that he would issue a decision in favor of the claimant did not conform to the requirements of 34 Pa. Code § 101.88 (relating to decision on original appeal) and because there was no copy mailed to the parties as required by 34 Pa. Code § 101.89 (relating to notice of decision), there was no formal decision issued. *Zinicola v. Unemployment Compensation Board of Review*, 407 A.2d 474 (Pa. Cmwlth. 1979).

##### *Dismissal of Appeal*

The dismissal, based upon the claimant's failure to appear, of an appeal from a finding of noneligibility for benefits based upon the self-employment of the claimant, will be reversed where the referee has failed to make the required findings of fact as to self-employment as required by paragraph (4), but rather dismisses the claim merely because of claimant's failure to attend the hearing, and where the claimant states reasons for his failure to appear in his petition for appeal to the Board, which reasons are not evaluated by the Board to determine if they constitute proper cause for claimant's absence. *Eckert v. Unemployment Compensation Board of Review*, 483 A.2d 1059 (Pa. Cmwlth. 1984).

##### *Findings of Fact*

Board's failure to comply with the mandates of Unemployment Compensation Law (43 P. S. § 824), as well as with this section promulgated by Board itself, warranted vacation of order and remand for further proceedings, where Board did not make findings of fact or conclusions of law based on evidence presented to referee, but instead based on appeal of claimants' partner. *McGoldrick v. Unemployment Compensation Board of Review*, 526 A.2d 461 (Pa. Cmwlth. 1987).

#### Cross References

This section cited in 34 Pa. Code § 101.109 (relating to decision of Board).

### **§ 101.89. Notice of decision.**

A copy of the decision of the tribunal shall be mailed promptly to the parties to the proceedings, and their counsel or authorized agent at their last known post office addresses. The decision shall be dated as of the day of mailing of the copies thereof.

**Source**

The provisions of this § 101.89 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions**

The mailing of a referee's decision in an employment compensation case to an address with an incorrect zip code was an administrative breakdown allowing an employer to take an untimely appeal. *U. S. Postal Service v. Unemployment Compensation Board*, 620 A.2d 572 (Pa. Cmwlth. 1993).

Because the alleged unwritten assurance of the referee that he would issue a decision in claimant's favor did not conform to the requirements of 34 Pa. Code § 101.88 (relating to decision on original appeal) and because there was no copy mailed to the parties as required by 34 Pa. Code § 101.89 (relating to notice of decision), there was no formal decision issued. *Zinicola v. Unemployment Compensation Board of Review*, 407 A.2d 474 (Pa. Cmwlth. 1979).

**§ 101.90. Further appeal.**

(a) Within 15 days after the decision of a referee, the claimant, the Department or an affected employer may file an application for a further appeal with the Board.

(b) The decision of the Board on an original appeal will become final the date it is rendered. Within 30 days after the decision of the Board becomes final, the claimant, the Department or an affected employer may file an appeal with the Commonwealth Court.

**Source**

The provisions of this § 101.90 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended July 14, 1978, effective July 15, 1978, 8 Pa.B. 2002. Immediately preceding text appears at serial pages (9417) to (9418).

**Notes of Decisions***Notice of Right to Appeal*

Alleged inadequacies in a notice of right to appeal to the Unemployment Compensation Board of Review given in a referee's decision denying benefits do not entitle a claimant to *nunc pro tunc* consideration of an untimely appeal because due process does not require an agency to provide notice of right to appeal when the agency or the legislature has established a duly published procedure for hearing or appeal, and the procedure for appeal to the Board is clearly enunciated in statutes and regulations. *Dilenno v. Unemployment Compensation Board of Review*, 429 A.2d 1288 (Pa. Cmwlth. 1981).

The Unemployment Compensation Board of Review has no duty to provide a party with notice of right to appeal, since the procedure for appealing from the decision of a referee is clearly enunciated in statutes and the regulations of the Board. *Mogil v. Unemployment Compensation Board of Review*, 413 A.2d 480 (Pa. Cmwlth. 1980).

The failure of a notice of right to appeal to inform a claimant of the right to request oral argument and present a brief or further testimony does not constitute a denial of due process, since the statutes and regulations concerning appeals from decisions of the referee clearly set out the procedure for such appeals. *Walker v. Unemployment Compensation Board of Review*, 381 A.2d 1353 (Pa. Cmwlth. 1978).

#### **Subchapter D. APPEALS FROM DECISION OF REFEREE**

Sec.

- 101.101. Review by Board.
- 101.102. Form and filing of application for further appeal from decision of referee.
- 101.103. Notification of filing of application for further appeal.
- 101.104. Allowance or disallowance of appeal.
- 101.105. Notice of hearing.
- 101.106. Scope of review.
- 101.107. Issues considered on appeal.
- 101.108. Appeal hearings.
- 101.109. Decision of Board.
- 101.110. Notice of decision of Board.
- 101.111. Reconsideration by Board.
- 101.112. Appeal from decision of Board.

#### **Notes of Decisions**

Alleged inadequacies in a notice of right to appeal to the Unemployment Compensation Board of Review given in a referee's decision denying benefits do not entitle a claimant to *nunc pro tunc* consideration of an untimely appeal because due process does not require an agency to provide notice of right to appeal when the agency or the legislature has established a duly published procedure for hearing or appeal, and the procedure for appeal to the Board is clearly enunciated in statutes and regulations. *Dileno v. Unemployment Compensation Board of Review*, 429 A.2d 1288 (Pa. Cmwlth. 1981).

The Unemployment Compensation Board of Review has no duty to provide a party with notice of right to appeal, since the procedure for appealing from the decision of a referee is clearly enunciated in statutes and the regulations of the Board. *Mogil v. Unemployment Compensation Board of Review*, 413 A.2d 480 (Pa. Cmwlth. 1980).

The failure of a notice of right to appeal to inform a claimant of the right to request oral argument and present a brief or further testimony does not constitute a denial of due process, since the statutes and regulations concerning appeals from decisions of the referee clearly set out the procedure for such appeals. *Walker v. Unemployment Compensation Board of Review*, 381 A.2d 1353 (Pa. Cmwlth. 1978).

#### **§ 101.101. Review by Board.**

Upon application to the Board (petition for further appeal to the Board), or on its own motion, the Board may review an appeal which has been decided by a referee. Notice of the removal of a case to the Board shall be mailed to the last known post office address of each interested party.

**Source**

The provisions of this § 101.101 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**§ 101.102. Form and filing of application for further appeal from decision of referee.**

A party shall file an appeal from a referee's decision in accordance with §§ 101.81 and 101.82 (relating to filing of appeal from determination of Department; and time for filing appeal from determination of Department).

**Source**

The provisions of this § 101.102 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended September 19, 2003, effective September 20, 2003, 33 Pa.B. 4674. Immediately preceding text appears at serial page (255873).

**Notes of Decisions***Jurisdiction*

An improper signature which may have technically violated the regulations of the Board regarding the perfection of an appeal does not create a jurisdictional issue capable of being raised in the first instance on judicial review if the appeal was instituted within the 15-day statutory time period. *Clowney v. Unemployment Compensation Board of Review*, 421 A.2d 515 (Pa. Cmwlth. 1980).

*Proper Appeal*

Although the unemployment claimant's petitions for appeal from the job center did not raise any issues specifically, the issues which were decided by the job center were the same issues addressed by the referee and were subsequently discussed by the Unemployment Compensation Board of Review. Thus, pursuant to §§ 101.87 and 101.107, the referee and Board correctly considered the Claimants' appeals. *Black Lick Trucking, Inc. v. Unemployment Compensation Board of Review*, 667 A.2d 454 (Pa. Cmwlth. 1995).

**Cross References**

This section cited in 34 Pa. Code § 101.111 (relating to reconsideration by Board).

**§ 101.103. Notification of filing of application for further appeal.**

Notice of the application for the allowance of an appeal (petition for further appeal) shall be furnished by the local employment office wherein such application was filed, to the central office of the Board and to each party to the claim proceedings, by personal delivery or by mailing it to his last known post office address.

**Source**

The provisions of this § 101.103 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions***Adequate Notice*

A claimant who was informed orally by an unemployment office employe of the former employer's appeal of the referee's decision and received written notification enabling him to attend an evi-

dentiary hearing scheduled by the Board received adequate notice of appeal pursuant to the requirements of this regulation, and the claimant was not prejudiced by the Board's action. *Neimeic v. Unemployment Compensation Board of Review*, 430 A.2d 697 (Pa. Cmwlth. 1981).

*Inadequate Notice*

If an employer appeals an adverse decision to the Board and the claimant does not receive the notice required by this regulation, the right of the claimant to oral or written argument under 34



Pa. Code § 101.104(e) (relating to allowance or disallowance of appeal) is violated. *Mileski v. Unemployment Compensation Board of Review*, 379 A.2d 643 (Pa. Cmwlth. 1977).

*Presumptions*

If a claimant alleges nonreceipt of the notice of appeal required under this regulation and the record is silent on the point, notification will not be presumed. *Mileski v. Unemployment Compensation Board of Review*, 379 A.2d 643 (Pa. Cmwlth. 1977).

**§ 101.104. Allowance or disallowance of appeal.**

(a) The Board may allow or disallow any application for a further appeal without hearing, solely on the basis of the application and the record.

(b) If the further appeal is disallowed, the Board will enter an order of disallowance, notification or a copy of which order shall be mailed to each party, his counsel or authorized agent, at their last known post office addresses.

(c) If the further appeal is allowed by the Board, or if the Board removes an appeal from the referee to the Board and on its own motion assumes jurisdiction of the appeal, notification shall be mailed to the last known post office address of each interested party. The Board will review the previously established record and determine whether there is a need for an additional hearing. Under section 504 of the Unemployment Compensation Law (43 P. S. § 824), the Board may affirm, modify or reverse the decision of the referee on the basis of the evidence previously submitted in the case, or the Board may direct the taking of additional evidence, if in the opinion of the Board, the previously established record is not sufficiently complete and adequate to enable the Board to render an appropriate decision. The further appeal shall be allowed and additional evidence required in any of the following circumstances:

(1) Whenever the further appeal involves a material point on which the record below is silent or incomplete or appears to be erroneous.

(2) It appears that there may have been a denial of a fair hearing under the rules.

(3) Under § 101.24 (relating to reopening of hearing) a request for reopening received after the decision of the referee was issued which constitutes a request for further appeal to the Board.

(d) If the Board determines that a further hearing is necessary, the case shall be remanded to a referee for the purpose of scheduling another hearing, at which hearing the referee shall serve as a hearing officer for the Board, to receive from the parties the additional information as may be pertinent and material to a proper conclusion in the case. After the record has been completed, the entire file and record of evidence shall be returned to the Board for its consideration and the further action as may be deemed appropriate.

(e) Whether or not another hearing is scheduled in connection with the further appeal, any of the interested parties may file a written request for oral or written argument. In response to the request, or on a motion by the Board, oral argument may be scheduled before the Board, at which time written briefs with

five copies may be submitted for the consideration of the Board. Otherwise, the normal time allowed for submitting written argument shall be 7 days from the date of the request, which, with the approval of the Board, may be extended due to extenuating circumstances. Each party shall be afforded the opportunity to reply to the arguments and contentions of the other parties.

#### Source

The provisions of this § 101.104 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended January 19, 1979, effective January 20, 1979, 9 Pa.B. 250. Immediately preceding text appears at serial page (9420).

#### Notes of Decisions

##### *Discretion of the Board*

The Unemployment Compensation Board of Review has wide latitude to order a remand hearing and thus this section does not require a de novo hearing. *Stop-N-Go of Western Pennsylvania, Inc. v. Unemployment Compensation Board of Review*, 707 A.2d 560 (Pa. Cmwlth. 1998).

It is clearly within the Board's discretion to remand a case for purposes of receiving additional evidence in situations when the Board deems the record inadequate. *Cooper Industries, Inc. v. Unemployment Compensation Board of Review*, 555 A.2d 969 (Pa. Cmwlth. 1989).

When an application for appeal is made it is within the Board's discretion to permit the taking of additional evidence whenever the record below is silent, incomplete or erroneous regarding a material point or there appears to have been a denial of a fair hearing. *Browning-Ferris Industries of Pennsylvania, Inc. v. Unemployment Compensation Board of Review*, 532 A.2d 1266 (Pa. Cmwlth. 1987); appeal denied 541 A.2d 1139 (Pa. 1988).

The Board's failure to address the merits of the claimant's appeal during a remand hearing was not error because the Board has discretionary power to decide when a remand hearing is necessary and what issues may be addressed during the hearing. *Harrison v. Unemployment Compensation Board of Review*, 457 A.2d 238 (Pa. Cmwlth. 1983).

This section grants wide latitude to the Board in ordering a remand. *Clowney v. Unemployment Compensation Board of Review*, 421 A.2d 515 (Pa. Cmwlth. 1980).

The decision to grant a remand is within the Board's discretion. *Shriner v. Unemployment Compensation Board of Review*, 400 A.2d 934 (Pa. Cmwlth. 1979).

##### *Evidence*

The Board did not violate subsection (c) by considering evidence of the fact that the claimant had received an associate degree in applied science even though this evidence was not produced at the referee's hearing but learned by the Board from the claimant's petition for appeal from the referee's decision, since there was sufficient evidence in the record that the claimant had in fact received formal electronics training. *Ellwood City Hospital v. Unemployment Compensation Board of Review*, 457 A.2d 231 (Pa. Cmwlth. 1983).

##### *Further Hearing*

A further hearing on the claimant's health problems is inappropriate if the claimant admits quitting voluntarily because of dissatisfaction with her new work schedule and claimant's physician testifies that he advised claimant against quitting. *Martin v. Unemployment Compensation Board of Review*, 407 A.2d 96 (Pa. Cmwlth. 1979).

When the claimant admits to having engaged in acts constituting willful misconduct and does not request a hearing, it is not an abuse of discretion for the Board of Review to disallow an appeal since it is not required to provide a hearing as a matter of right and may decide an appeal without taking

additional evidence or hearing oral arguments. *Chambers v. Unemployment Compensation Board of Review*, 318 A.2d 422 (Pa. Cmwlth. 1974).

#### *Petition for Appeal*

A letter sent by an employer to a referee, in which the employer demanded that the matter be turned over to higher authorities, was a petition of appeal and was properly treated as such under § 101.104(c) and (d). *Shriner v. Unemployment Compensation Board of Review*, 400 A.2d 934 (Pa. Cmwlth. 1979).

#### *Referee's Decision*

Employer was prejudiced by referee's decision to "discredit completely and eviscerate the value" of evidence admitted. *Philadelphia Electric Company v. Unemployment Compensation Board of Review*, 565 A.2d 1246 (Pa. Cmwlth. 1989).

#### *Right to Argument*

When the Board files a decision and order without notifying the claimant that his request for oral argument has been denied and without allowing time for the claimant to file a written brief in lieu of oral argument, there is a denial of the claimant's statutory and due process right to file a brief. *Sacks v. Unemployment Compensation Board of Review*, 429 A.2d 136 (Pa. Cmwlth. 1981); appeal after remand 459 A.2d 461 (Pa. Cmwlth. 1983).

If an employer appeals an adverse decision to the Board but the claimant does not receive notice of appeal as required under 34 Pa. Code § 101.103 (relating to notification of filing of application for further appeal), the right of the claimant to oral or written argument under 34 Pa. Code § 101.104(e) is violated. *Mileski v. Unemployment Compensation Board of Review*, 379 A.2d 643 (Pa. Cmwlth. 1977).

### **§ 101.105. Notice of hearing.**

(a) If the Board determines that a further hearing is necessary, the tribunal shall give at least 7 days' notice of the scheduled hearing to the parties and their counsel or authorized agent of record, with specific instructions regarding the date, hour and place of hearing, and specific issues to be covered at the hearing.

(b) If hearings on more than one appeal are to be scheduled and conducted jointly, each party shall be notified in his notice of hearing that a joint hearing will be held, that a single record of the proceedings will be made and that evidence introduced with respect to an appeal will be considered as introduced with respect to all.

#### **Authority**

The provisions of this § 101.105 amended under sections 203(d) and 505 of the Unemployment Compensation Act (43 P. S. §§ 763(d) and 825).

#### **Source**

The provisions of this § 101.105 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended April 7, 1989, effective April 8, 1989, 19 Pa.B. 1550. Immediately preceding text appears at serial page (126521).

**Notes of Decisions***Preservation of Issues*

The Board did not commit an error of law when it refused to remand a matter for the taking of additional testimony because the claimant failed to preserve the issue of a due process denial. *Dehus v. Unemployment Compensation Board of Review*, 545 A.2d 434 (Pa. Cmwlth. 1988).

**§ 101.106. Scope of review.**

In connection with the consideration of an appeal to the Board from the decision of a referee, the Board may review both the facts and the law pertinent to the issues involved on the basis of the evidence previously submitted, or direct the taking of additional testimony. In any case the Board may limit the parties to oral argument or the filing of a written argument or both.

**Source**

The provisions of this § 101.106 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions***Illustrative Cases*

The Unemployment Compensation Board of Review's finding that the claimant was unable and unavailable for work improperly relied solely upon evidence not admitted into evidence and the Board's failure to take additional testing restricted the Board's review to the evidence submitted to the referee. *Pifer v. Unemployment Compensation Board of Review*, 639 A.2d 1293 (Pa. Cmwlth. 1994).

*Limitations on Review*

Board did not err by failing to consider letter attached as exhibit to brief; Board is restricted to review of the evidence submitted at hearing. *Tener v. Unemployment Compensation Board of Review*, 568 A.2d 733 (Pa. Cmwlth. 1990).

Because the Board is restricted to review of evidence previously submitted, post-hearing factual communications to the Board may not be considered. *Perrelli v. Unemployment Compensation Board of Review*, 426 A.2d 1272 (Pa. Cmwlth. 1981).

**§ 101.107. Issues considered on appeal.**

(a) In connection with the consideration of an appeal to the Board from the decision of a referee, the Board may consider an issue in the case though not expressly ruled upon in the decision of the Department or the referee and though not previously raised in the claim or appeal proceedings. However, issues not previously considered or raised will not be considered by the Board, either upon application for, or in the determination of an appeal unless the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.

(b) The Board shall consider the issues expressly ruled upon in the decision from which the appeal was filed. However, any issue in the case, with the approval of the parties, may be determined though not expressly ruled upon or

indicated in the notice of hearing, if the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.

#### Source

The provisions of this § 101.107 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

#### Notes of Decisions

##### *Additional Hearings*

The Court was not required to remand for an additional hearing regarding violations of 43 P. S. § 804(a) when violations of 43 P. S. § 801(b) had already been proved, determination under section 801(b) involved substantially the same evidence already presented and the same finding was made by the Board under section 804(a). *Schaeffer v. Unemployment Compensation Board of Review*, 467 A.2d 67 (Pa. Cmwlth. 1983).

Subsection (a) does not preclude the Board or the courts from remanding for consideration of an issue that has not been waived by failure to raise it before reaching Commonwealth Court since the issue was raised before the Board. *Gould v. Unemployment Compensation Board of Review*, 466 A.2d 750 (Pa. Cmwlth. 1983).

The Board properly vacated its decision that a claimant was ineligible for benefits under the provisions of 43 P. S. § 752, which was not considered by the referee. The provisions of 34 Pa. Code § 101.107 prohibit the Board from considering issues not previously considered, but neither the Board nor the court is precluded from remanding to the referee for disposition of the eligibility issue. *Gould v. Unemployment Compensation Board of Review*, 430 A.2d 731 (Pa. Cmwlth. 1981).

##### *Basis of Decision*

Section 101.107 prohibits a referee from basing a decision on a legal issue other than the one found in the OES determination. However, although a remand is normally required to cure any prejudice to the claimant resulting from a change in legal theory from that found in the original Office of Employment Security determination, such a remand was not necessary where the case had previously been remanded and reheard numerous times and it was evident that the claimant had not been prejudiced by the change in legal theory from the original OES determination to the final Board order. *Clark v. Unemployment Compensation Board of Review*, 471 A.2d 1309 (Pa. Cmwlth. 1984); appeal after remand 497 A.2d 261 (Pa. Cmwlth. 1985); appeal denied 527 A.2d 546 (Pa. 1987).

##### *Burden of Proof*

There was no error in the Unemployment Compensation Board's shifting of the burden of proof to the employer to show that claimant was discharged for willful misconduct as the referee received permission from both parties to proceed under either section of the Administrative Agency Law. *Feinburg v. Unemployment Compensation Board of Review*, 635 A.2d 682 (Pa. Cmwlth. 1993); appeal denied 652 A.2d 840 (Pa. 1994).

Claimant was not denied due process by the shifting of the burden of proof before the Board when it changed the basis for disqualification from 43 P. S. § 802(e) to 43 P. S. § 802(b). Both parties were aware that the question was whether a discharge occurred or whether the claimant initiated the separation and both parties came to the hearing prepared to prove their version of the facts and rebut the other side's testimony. *Kligge v. Unemployment Compensation Board of Review*, 491 A.2d 325 (Pa. Cmwlth. 1985).

##### *Constitutional Rights*

It was a violation of employer's due process rights to a full hearing to disallow employer from raising an issue and hold that the regulations prevent the Board from recognizing that the Bureau did

not rule upon an issue which was not waived. *Classic Personnel v. Unemployment Compensation Board of Review*, 617 A.2d 66 (Pa. Cmwlth. 1992).

#### *Expressly Ruled Upon*

The Board had the authority to consider the claimant's ineligibility for benefits under section 402(e) of the act (43 P. S. § 802(e)) despite the claimant's desire not to have that issue reviewed on appeal because the Board has the ability to review issues expressly decided by the referee. *Jordan v. Unemployment Compensation Board of Review*, 547 A.2d 811 (Pa. Cmwlth. 1988).

This and other provisions of the unemployment compensation regulations support the view that the referee and Board properly refused to rule on an issue which was not raised before the Office of Employment Security. *Glesk v. Unemployment Compensation Board of Review*, 525 A.2d 1249 (Pa. Cmwlth. 1987).

A decision by the Unemployment Compensation Board of Review may properly be vacated if it is based upon an issue which had not previously been considered by either the Office of Employment Security or the referee. *Gould v. Unemployment Compensation Board of Review*, 430 A.2d 731 (Pa. Cmwlth. 1981).

#### *Notice of Hearing*

"Notice of hearing" subsection (b) refers to the notice required to be sent to the parties pursuant to 34 Pa. Code § 101.105(a) when, upon appeal to the Board from a referee's decision, the Board determines that a further hearing is necessary. *Torsky v. Unemployment Compensation Board of Review*, 474 A.2d 1207 (Pa. Cmwlth. 1984).

When the Board disallows a claimant's appeal from the referee's decision on different grounds from that relied upon or considered in the referee's determination, but fails to provide the required notice of hearing indicating the issues to be considered and fails to actually hold a hearing, the case will be remanded to the Board for a hearing and provision of the required notice of the issues to be considered. *Libonate v. Unemployment Compensation Board of Review*, 426 A.2d 247 (Pa. Cmwlth. 1981).

#### *Proper Appeal*

Although the unemployment claimant's petitions for appeal from the job center did not raise any issues specifically, the issues which were decided by the job center were the same issues addressed by the referee and were subsequently discussed by the Unemployment Compensation Board of Review. Thus, pursuant to §§ 101.87 and 101.107, the referee and Board correctly considered the Claimants' appeals. *Black Lick Trucking, Inc. v. Unemployment Compensation Board of Review*, 667 A.2d 454 (Pa. Cmwlth. 1995).

#### *Subsection (b)*

Board acted within its powers under subsection (b) in ruling upon an issue which referee had remanded to OES, since the parties had agreed to have the referee decide the issue and the parties were not prejudiced by the Board's action. *Bennett v. Unemployment Compensation Board of Review*, 491 A.2d 314 (Pa. Cmwlth. 1985).

#### *Waiver*

In unemployment compensation proceedings employer waived issue of whether claimant was fired for willful misconduct, and thus ineligible for benefits, where the theory was not raised before Bureau of Employment Security but was first advanced in Commonwealth Court. *Wing v. Unemployment Compensation Board of Review*, 436 A.2d 1179 (Pa. 1981).

**§ 101.108. Appeal hearings.**

(a) If the Board determines that a further hearing is necessary, such hearing shall be held at a location to be determined by the Board and shall be conducted in the manner provided in the general rules as set forth in this part. Hearings for taking additional evidence shall be held at places reasonably convenient to the parties concerned.

(b) Where an appeal is remanded to a referee for the taking of additional evidence, the referee shall either render a new decision or submit the entire file and completed record of testimony for Board consideration and determination, as directed in the remanding order of the Board.

**Source**

The provisions of this § 101.108 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**Notes of Decisions***Evidence*

Board's failure to comply with the mandates of Unemployment Compensation Law (43 P.S. § 824), as well as with this section promulgated by Board itself, warrants vacation of order and remand for further proceedings, where Board did not make findings of fact or conclusions of law based on evidence presented to referee, but instead based on appeal of claimants' partner. *McGoldrick v. Unemployment Compensation Board of Review*, 526 A.2d 461 (Pa. Cmwlth. 1987).

*Remand Hearing*

It is clearly within the Board's discretion to remand a case for purposes of receiving additional evidence in situations when the Board deems the record inadequate. *Cooper Industries, Inc., v. Unemployment Compensation Board of Review*, 555 A.2d 969 (Pa. Cmwlth. 1989).

A remand to a referee for a new decision under subsection (b) of this section does not give the employer an unfair advantage where the employer's evidence does not materially differ from one hearing to another. *Lowe v. Unemployment Compensation Board of Review*, 460 A.2d 870 (Pa. Cmwlth. 1983).

The Board's failure to address the merits of the claimant's appeal during a remand hearing was not error because the Board has discretionary power to decide when a remand hearing is necessary and what issues may be addressed during the hearing. *Harrison v. Unemployment Compensation Board of Review*, 457 A.2d 238 (Pa. Cmwlth. 1983).

**§ 101.109. Decision of Board.**

The Board may affirm, modify, or reverse the findings of fact and the decision of the referee as shall appear just and proper on the basis of all the evidence submitted in the case. The decision shall set forth information described in § 101.88 (relating to decision on original appeal).

**Source**

The provisions of this § 101.109 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**§ 101.110. Notice of decision of Board.**

A copy of the decision of the Board shall be mailed to the parties to the proceedings, and their counsel or authorized agent, at their last known post office addresses. The decision shall be dated as of the time of the mailing of such notice.

**Source**

The provisions of this § 101.110 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435.

**§ 101.111. Reconsideration by Board.**

(a) Within 15 days after the issuance of the decision of the Board, as may be determined by the provisions of § 101.102 (relating to form and filing of application for further appeal from decision of referee), any aggrieved party may request the Board to reconsider its decision and if allowed, to grant further the opportunity to do the following:

- (1) Offer additional evidence at another hearing.
- (2) Submit written or oral argument.
- (3) Request the Board to reconsider the previously established record of evidence.

(b) The requests will be granted only for good cause in the interest of justice without prejudice to any party. The parties will be notified of the ruling of the Board on each such request. The request for reconsideration and the ruling of the Board shall be made a part of the record and subject to review in connection with any further appeal to the Commonwealth Court.

**Source**

The provisions of this § 101.111 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended July 14, 1978, effective July 15, 1978, 8 Pa.B. 2002. Immediately preceding text appears at serial page (32171).

**Notes of Decisions***Denial of Application*

The Board's denial of an application for rehearing was not an abuse of its discretion where there is no allegation that the additional evidence was not available at the time of the referee's hearing and there is no explanation for a 9 month delay between discovery of the additional evidence and the rehearing request. *Department of Auditor General v. Unemployment Compensation Board of Review*, 484 A.2d 829 (Pa. Cmwlth. 1984).

*Denial of Reconsideration*

The Board is acting properly in refusing to grant a request for reconsideration if the only evidence a claimant has to offer upon reconsideration is evidence which he has already offered in the referee's hearing. *Keiper v. Unemployment Compensation Board of Review*, 434 A.2d 874 (Pa. Cmwlth. 1981).

*Failure to Petition*

The validity of an employer's no-solicitation rule, used as a basis for denying unemployment benefits to claimant for willful misconduct when he repeatedly violated the rule, was not subject to being

reconsidered on remand of the case, notwithstanding employer's agreement to revoke the rule after completion of the case, when employer's agreement remained outside the record due to claimant's failure to petition for reconsideration of the board's decision in light of this additional evidence. *Stratigos v. Unemployment Compensation Board of Review*, 486 A.2d 557 (Pa. Cmwlth. 1985).

#### *Good Cause*

The Board's grant of a request for reconsideration where legal theories or authorities were previously unconsidered constituted "good cause" and not an abuse of discretion, even absent a clear statement that its prior decision was erroneous. *Georgia-Pacific Corp. v. Unemployment Compensation Board of Review*, 630 A.2d 948 (Pa. Cmwlth. 1993).

Where an employer requested and received a continuance of a hearing because no one with firsthand testimony was available, then failed to provide a witness with firsthand knowledge at the rescheduled hearing, the action of the Board in granting employer's request for reconsideration to provide firsthand testimony was not taken for good cause as required by subsection (b). *Bennett v. Unemployment Compensation Board of Review*, 470 A.2d 203 (Pa. Cmwlth. 1984).

#### *Grant of Reconsideration*

The Board must clearly set forth in the record the basis upon which it grants reconsideration of a decision; allegations unsubstantiated by any evidence of record cannot support a decision of the Board to reopen a case, particularly where the appellant has not been given the opportunity to refute such allegations. *Greich v. Unemployment Compensation Board of Review*, 427 A.2d 299 (Pa. Cmwlth. 1981); reversed and remanded 440 A.2d 681 (Pa. 1982).

#### *Inadequate Record*

Except in extraordinary circumstances, the court will not reverse or remand an agency decision on the ground of inadequacy if the record where means provided for the same relief from the agency are not utilized, especially where the court is not told what evidence should be included in the record but has not been. *Walsh v. Unemployment Compensation Board of Review*, 329 A.2d 523 (Pa. Cmwlth. 1975).

#### *Reconsideration*

The employer's failure to appear at a hearing held only 15 miles away in a town where the Bureau's office was located is not grounds for reconsideration if the employer gives no reason for failing to appear. *Flanagan v. Unemployment Compensation Board of Review*, 407 A.2d 471 (Pa. Cmwlth. 1979).

The Unemployment Compensation Board of Review abused its discretion in granting the employer's reconsideration petition, in which it alleged that the Board's decision was based upon hearsay evidence, where any hearsay objection or question regarding credibility should have been made before it requested reconsideration from the Board. *Enslie v. Unemployment Compensation Board of Review*, 740 A.2d 775 (Pa. Cmwlth. 1999).

#### *Timeliness*

A claimant's failure to request reconsideration within fifteen days of the Board's decision prior to filing an appeal of the Board's decision with the court was not a failure to exhaust his administrative remedies where the claimant's reasons for his failure to appear at the referee's hearing were already in evidence at the time the Board rendered its decision. *Eckert v. Unemployment Compensation Board of Review*, 483 A.2d 1059 (Pa. Cmwlth. 1984).

The Court will not determine whether an appeal notice is misleading where the notice is not part of the record before it and will not remand for a determination of whether the appeal notice was misleading since the claimant failed to submit a petition for reconsideration to the Board within the fifteen day period specified in this section raising that issue. *Kustafik v. Unemployment Compensation Board of Review*, 462 A.2d 947 (Pa. Cmwlth. 1983).

A disappointed litigant before the Board may file a petition for rehearing or reconsideration with the effect that the limitation of time for appeal from the original adjudication, as well as the decision on the petition for rehearing, is measured from the entry of the latter decision, if such a petition is timely filed. *Walsh v. Unemployment Compensation Board of Review*, 329 A.2d 523 (Pa. Cmwlth. 1974).

### § 101.112. Appeal from decision of Board.

(a) An order of the Board disallowing a further appeal from the decision of a referee, or the decision of the Board where an appeal is allowed, shall become final the date it is rendered.

(b) Within 30 days after the order or decision of the Board becomes final, the claimant, the Department, or any affected employer may take an appeal to the Commonwealth Court.

#### Source

The provisions of this § 101.112 adopted August 26, 1970, effective August 27, 1970, 1 Pa.B. 435; amended July 14, 1978, effective July 15, 1978, 8 Pa.B. 2002. Immediately preceding text appears at serial page (32171).

#### Notes of Decisions

##### *Interlocutory Order*

An attempt to appeal an order for an additional hearing granted by the Unemployment Compensation Board is not an attempt to appeal a final order within the meaning of the Administrative Agency Law, and is interlocutory in nature. The provisions of 34 Pa. Code § 101.112 (relating to appeal from decision of Board) do not require the Board to give an adverse party an opportunity to oppose a request for reconsideration before it is acted upon. *Unemployment Compensation Board of Review v. Holley*, 353 A.2d 905 (Pa. Cmwlth. 1976).

## Subchapter E. TELEPHONE HEARINGS

Sec.

101.121—101.126. [Reserved].

101.127. Purpose and scope.

101.128. Scheduling of telephone testimony.

101.129. Procedures subsequent to scheduling.

101.130. Notice of testimony by telephone and use of documents.

101.131. Conduct of a telephone hearing.

101.132. Representation by telephone.

101.133. Data maintenance requirement.

#### Authority

The provisions of this Subchapter E issued under sections 203 and 505 of the Unemployment Compensation Act (43 P. S. §§ 763 and 825), unless otherwise noted.

**§§ 101.121—101.126. [Reserved].****Source**

The provisions of these §§ 101.121—101.126 adopted April 7, 1989, effective April 8, 1989, 19 Pa.B. 1550; corrected April 21, 1989, effective April 8, 1989, 19 Pa.B. 1731; readopted July 2, 1993, effective July 3, 1993, 23 Pa.B. 3125; reserved December 26, 1997, effective December 27, 1997, 27 Pa.B. 6809. Immediately preceding text appears at serial pages (207529) to (207533).

**§ 101.127. Purpose and scope.**

(a) In-person testimony is normally preferable to testimony by telephone; however, there can be reasons to justify receiving testimony by telephone. This subchapter is promulgated to provide the conditions under which testimony by telephone will be scheduled and received, to safeguard the due process rights of the parties, and to ensure that testimony by telephone is received under uniformly applied rules. Testimony by telephone may be received only if specifically authorized by this subchapter.

(b) When the general rules of this chapter conflict with this subchapter, this subchapter controls.

**Source**

The provisions of this § 101.127 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

**§ 101.128. Scheduling of telephone testimony.**

(a) The tribunal may schedule, on its own motion, testimony by telephone of a party or witness when it appears from the record that the party or witness is located at least 50 miles from the location at which the tribunal will conduct the hearing, without regard to State boundaries.

(b) The tribunal may schedule testimony by telephone of a party or witness, at the request of one or more parties, when one of the following applies:

(1) The parties consent to the receipt of testimony by telephone.

(2) The party or witness is reasonably unable to testify in person due to a compelling employment, transportation, or health reason, or other compelling problem.

(c) Only a party or witness scheduled to testify by telephone, or identified prior to the taking of testimony in accordance with § 101.131(f) (relating to conduct of a telephone hearing), may testify by telephone, and the testimony of each other party or witness shall be received in person.

(d) The tribunal will promptly rule on a request that testimony be taken by telephone after a reasonable attempt has been made to inform the parties of the request, the basis for the request, the regulations under which telephone testimony can be taken, and the right of a party to object. The basis for the request, the position of the parties, if known, and the ruling will be documented on the record.

(e) A party or witness scheduled to testify by telephone will be permitted to testify in person.

**Source**

The provisions of this § 101.128 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

**§ 101.129. Procedures subsequent to scheduling.**

(a) If a party moves to withdraw consent to the receipt of testimony by telephone prior to the taking of testimony, the tribunal will allow the withdrawal if it is found that the consent was not freely and knowingly given.

(b) An objection to the receipt of testimony by telephone shall set forth the reasons in support thereof and shall be promptly communicated to the tribunal, but may not be asserted subsequent to the taking of testimony.

(c) The tribunal will promptly rule on objections to testimony by telephone after a reasonable attempt to obtain the position of the other party. The basis for the objection, the position of the other party, if known, and the ruling will be documented on the record.

**Source**

The provisions of this § 101.129 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

**§ 101.130. Notice of testimony by telephone and use of documents.**

(a) When testimony by telephone is to be taken, the tribunal will mail the notice of hearing to the parties and, if known, to their counsel or authorized agent at least 14 days in advance of the hearing. The hearing notice will indicate:

(1) The date and time of the hearing in prevailing Eastern time.

(2) The names of counsel, authorized agent, parties and witnesses, if known, who are scheduled to appear or testify by telephone.

(3) The deadline by which the tribunal is to receive documents, if any, from all parties.

(4) The hearing will be tape recorded.

(b) When testimony by telephone is to be taken, the tribunal will send a copy of this subchapter with the notice of hearing. If the tribunal finds that an unrepresented party has not received a copy of this subchapter, a copy will be provided and the hearing will be rescheduled.

(c) A party intending to testify, to offer the testimony of witnesses, or to be represented by telephone, shall, in advance of the beginning of the hearing, supply the tribunal with the name, location and telephone number of the persons who will so appear.

(d) When scheduling a telephone hearing, the tribunal will enclose with the notice of hearing copies of the documents upon which the initial determination was based. These copies will accompany the notices of hearing to all parties, and their counsel or authorized agent, if known.

(e) When any testimony will be given from or with the aid of a document not previously distributed to the parties by the tribunal, the party expecting to introduce the document shall deliver it to the tribunal, and the tribunal shall distribute it to each other party and, if known, counsel or authorized agent before or at the beginning of the testimony. The tribunal may require that the documents be delivered up to 5 days in advance of the hearing. See § 101.131(h) (relating to conduct of a telephone hearing).

**Source**

The provisions of this § 101.130 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

**Cross References**

This section cited in 34 Pa. Code § 101.131 (relating to conduct of a telephone hearing).

**§ 101.131. Conduct of a telephone hearing.**

(a) Before testimony is received, the tribunal will advise all parties of the right to object to telephone testimony and to request an in-person hearing in compliance with Subchapter B (relating to provisions governing hearings before the Department or referee).

(b) A party may pursue an objection to telephone testimony at the hearing and shall set forth reasons in support thereof. If the objection is sustained, the tribunal will reschedule the hearing at a later date, either in person or by telephone, in accordance with Subchapter B or this subchapter. If the objection is not sustained, the tribunal may proceed with the hearing in accordance with this subchapter.

(c) At the start of the hearing, the tribunal will state on the record the time and telephone numbers at which the tribunal initiates the contact with any party, witness, legal counsel or authorized agent who is to testify or appear by telephone.

(d) The proceedings of the hearing will be tape recorded to preserve the record. A person testifying or appearing by telephone will be advised by the tribunal that the proceedings are being tape recorded.

(e) The tribunal will permit parties a reasonable opportunity to question other parties or witnesses testifying by telephone for the purpose of verifying the identity of the parties or witnesses. Falsification of identity may subject the parties or witnesses to prosecution and punishment.

(f) A party or witness not identified to the tribunal and all other parties before the beginning of the testimony will not be permitted to testify by telephone. Testimony taken or given in violation of this subsection will be excluded from consideration.

(g) A person may not prompt or direct the testimony of a witness testifying by telephone. Testimony taken or given in violation of this subsection may be excluded from consideration by the tribunal, with or without an objection from a party.

(h) A document not provided as required by § 101.130(e) (relating to notice of testimony by telephone and use of documents) may not be admitted nor testimony given or taken from it unless consent has been requested from and given by all parties. Testimony taken or given in violation of this subsection will be excluded from consideration, as will the document.

(i) The oath or affirmation administered to parties or witnesses testifying by telephone shall indicate that the parties or witnesses will not testify from documents that are not in the record and that their testimony will not be prompted or directed during the hearing by any other person.

**Source**

The provisions of this § 101.131 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

**Cross References**

This section cited in 34 Pa. Code § 101.128 (relating to scheduling of telephone testimony); and 34 Pa. Code § 101.130 (relating to notice of testimony by telephone and use of documents).

**§ 101.132. Representation by telephone.**

The counsel or authorized agent of a party may appear at a hearing by telephone, with the approval of the tribunal.

**Source**

The provisions of this § 101.132 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

**§ 101.133. Data maintenance requirement.**

The Board will compile and maintain data on the scheduling and receipt of testimony by telephone.

**Source**

The provisions of this § 101.133 adopted December 26, 1997, effective December 27, 1997, 27 Pa.B. 6807.

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(239434) No. 280 Mar. 98

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