



February 27, 2014

Ms. Jeanne Paquette
Commissioner
Maine Department of Labor
54 State House Station
Augusta, ME 04333-0054

Dear Commissioner Paquette:

I am writing to follow up on the fact-finding review and interviews the U.S. Department of Labor (Department) conducted on the first-level appeals component of Maine's Unemployment Compensation (UC) program. In addition to providing a summary of our review, the Department has identified steps Maine should take going forward to ensure the integrity of an impartial hearings process.

As background, our fact-finding review was prompted by a combination of factors that included: (1) local press reports on a March 21, 2013, meeting at the Governor's Mansion that raised public concern about possible political interference in the state's UC appeals process (the subject of my letter to you dated April 12, 2013); (2) an April 15, 2013, letter to the Department from the Maine Employment Lawyers Association alleging these and other actions by the Governor and others in his administration interfered with the Maine UC hearings process in violation of federal statutory provisions governing fair hearings and prompt benefit payments; and (3) a memo written in March 2013, by Jennifer Duddy, Chair of the Maine Unemployment Insurance (UI) Commission, the second-level appeals authority, describing certain problems in (mostly first-level) hearing practices and recommending solutions.

Our fact-finding was conducted in two parts: (1) a case file review of appeal records, which Employment and Training Administration (ETA) program managers conducted over multiple days on site at the Maine Department of Labor's (MDOL) office in Augusta; and, (2) a series of interviews and document reviews by the Office of the Solicitor in the U.S. Department of Labor. Most of the interviews were conducted at MDOL's office in Augusta. A few were conducted via telephone.

Federal standard – fair hearing

The requirement for a fair hearing can be found at the Social Security Act (SSA), Section 303(a)(3), which requires a state law include a provision for "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." The same right to a hearing is extended to employers through Section 303(a)(1), requiring states to have "methods of administration" that ensure "full payment when due." These provisions provide the overarching requirements and statutory authority for ETA to establish levels of performance for appeals.

We look at performance of Lower Authority Appeals in the following ways:

- Timeliness – We interpret Sections 303(a)(1) and 303(a)(3) to require states to provide UC appeal hearings and decisions “with the greatest promptness that is administratively feasible.” (20 CFR 650.3(a)) A state complies substantially with this requirement for first-level appeals if it has issued at least 60 percent of all Lower Authority Appeals decisions within 30 days of the date of appeal, and 80 percent of all such appeals decisions within 45 days of the date of appeal. (20 CFR 650.4(b)) Historically, Maine has done quite well meeting these standards. The exception was during the most recent recession. When workload increased toward the end of 2008, Maine was unable to meet the demand, and cases began to backlog. This continued through the sustained recession until the third quarter of 2011. Since then, Maine has been meeting or exceeding these measures consistently.
- Aging – The average age of pending Lower Authority Appeals should not exceed 30 days. This Accepted Level of Performance (ALP) was established in Unemployment Insurance Program Letter (UIPL) No. 14-05, Change 2, *Performance Criteria for Appeals Case Aging Measures and the Starting Date for Measuring Nonmonetary Determinations Time Lapse*. This measure is relatively new (five years) so we do not have the same historical perspective. However, during recent years, Maine’s performance has tracked closely with the measure of timeliness. The average age of appeals increased during the heavy workload of the recession and has now returned to a level well below the 30-day standard.
- Quality – The quality of Lower Authority Appeals is determined based on criteria and guidelines contained in ET Handbook No. 382, *Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality*. Each quarter, the state randomly selects 20 cases for review. The state reviews cases using a checklist and criteria found in the Handbook, and then submits results to ETA. At the end of the year, ETA selects a subsample of 10 cases from those the state has reviewed and a review panel comprised of appeals experts from other states reviews the subsample and compares its findings with those of the state. For cases selected in calendar year 2012, the results for Maine were sent to you in my letter dated November 12, 2013. For cases selected in calendar year 2011, the results for Maine were sent to you in my letter dated October 17, 2012. The prior year’s results were sent to then-Labor Commissioner Robert J. Winglass by my letter dated March 8, 2012. In all three years, the conclusion noted: “The findings of the review indicate that Maine met quality standards for the cases selected in the sub-sample. This verifies your own review of the cases.”

Federal standard – benefit determinations must be made by state merit staff

Section 303(a)(1), SSA, provides that a state’s receipt of a UC administrative grant is conditioned on the state law providing for “...[s]uch methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis...) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.” This merit staffing requirement, as interpreted in UIPL No. 12-01, *Outsourcing of Unemployment Compensation Administrative Functions*, requires that only merit staffed public employees determine claims. Because many decisions made by public employees affect the rights and property of individuals, these decisions must be made in a fair and unbiased manner. This requirement, that decisions on individuals’

entitlement to UC be made only by merit staffed employees, is consistent with the requirement that inherently governmental functions be carried out by merit staff, as required by section 303(a)(1), SSA, and Office of Management and Budget (OMB) Circular A-76, *Performance of Commercial Activities*, implementing federal procurement law.

The Department enforces this merit staffing requirement for the UC program, subject to the personnel standards established by the Office of Personnel Management. The Department, in determining whether states comply with this requirement, uses the general principles developed for the Federal merit staffing system, which recognize that, while some state UC activities are “commercial” in nature, “inherently governmental” functions such as claims determinations must be performed by state UC agency personnel.

Thus, when pressure, real or perceived, is exerted upon first-level appeals hearing officers to rule in favor of one side or the other, the persons or entities exerting that pressure are interfering with the decision about an individual’s rights, rather than having that decision made by a merit-staffed MDOL employee.

Case file review by ETA program managers

The purpose of this part of the fact-finding was to better understand how unemployment compensation decisions are made in Maine, and to establish a baseline for review of cases in the future. To this end, I sent two members of my staff to your office to review a sample of decided cases. The case file review was conducted on April 16, and April 30 through May 2, 2013.

Methodology. One set of allegations involved Governor LePage pressuring hearing officers to find in favor of employers rather than claimants. Therefore, it was necessary to look at cases where both parties had an interest. These were cases in which the outcome affected the employer’s tax rate under Maine’s experience rating system and determined the claimant’s eligibility for UC. Cases were selected for review by obtaining lists of cases with separation from employment issues (i.e., voluntary quits and/or discharge for misconduct). Four lists were generated from data compiled between January 1, 2013, and the date of the case review, as follows:

- Voluntary Quit where the Deputy’s¹ decision found the claimant disqualified for benefits and the decision was reversed by the Hearing Officer upon appeal by the claimant.
- Discharge for Misconduct where the Deputy’s decision found the claimant disqualified for benefits and the decision was reversed by the Hearing Officer upon appeal by the claimant.
- Voluntary Quit where the Deputy’s decision found the claimant qualified for benefits and the decision was reversed by the Hearing Officer upon appeal by the employer.
- Discharge for Misconduct where the Deputy’s decision found the claimant qualified for benefits and the decision was reversed by the Hearing Officer upon appeal by the employer.

¹ Deputies adjudicate and make initial determinations on UC eligibility. Those determinations may be appealed to DAH.

Five cases decided before March 21, 2013 (the date of the luncheon), were selected for review from each list and five cases decided after March 21, 2013, were selected from each list. Altogether, 40 cases were reviewed. Each case review took the record “as is,” to determine whether the hearing record supported the findings the hearing officer made; it did not consider evidentiary rulings or evidence that may not have been admitted into the record.

Summary of case review. The reviewers did not find any evidence of decisions being made on the basis of pro-employer or pro-claimant preference. The reviewers did identify several cases in which the appeals hearing officers might have come to a different conclusion. However, it was not the reviewers’ intent to substitute their judgment for the judgment of the Hearing Officer so long as there were sufficient findings of fact to support the outcome. There was one case in which the outcome was not supported by the findings of fact. That case was provided to the Chief Administrative Hearing Officer for review and possible reopening. The reviewers did not believe the case was decided based on any obvious preference to either employer or claimant but, rather, involved a misinterpretation of law as applied to the facts.

While the findings did not reveal any bias in decision-making, the case review gave us a starting point to identify any future biases that might occur. We will continue to monitor available reports to identify any significant changes in appeal or reversal rates for claimant-appellants and employer-appellants. Should any occur, we will repeat the review process outlined above to determine if any bias has developed. Our goal will be to ensure a level playing field for all parties.

To be clear, we will closely monitor Maine’s performance based on established Federal standards (described above) for Timeliness, Case Aging and Quality.

In addition to the above performance standards we look at for all states, going forward, we will pay closer attention to other data available on appeals in Maine. In particular, we will use data available on the ETA 5130 report to calculate reversal rates for claimant appeals and employer appeals. We will look specifically at the reversal rates for those categories for which cases were reviewed (Voluntary Quit and Misconduct). We will look to see if there is any discernible increase or decrease from what has been the norm for Maine. Over the past ten years, the reversal rate for claimants appealing to the Lower Authority Appeal level for Voluntary Quit and Misconduct combined is 31.3% while the reversal rate for employers is 32.2%. These numbers are remarkably close, which suggests there is no bias toward employers or claimants.

We are cautious about making generalizations related to reversal rates or comparing such rates among states or to a national average. There are simply too many potential factors leading to reversals. However, a significant change over a short period of time would warrant further review or investigation.

While the case review yielded no statistical evidence to indicate the meeting of March 21, 2013, had an immediate impact on decision-making by Maine DAH appeals hearing officers, the review (coupled with information from the interviews discussed below) suggests reason for concern and warrants continued attention from this office. In addition to the increased scrutiny indicated above, the Regional Office also will follow up with quarterly case reviews to monitor and ensure the ongoing impartiality of the hearing process.

Interviews and document reviews conducted by Office of the Solicitor

The purpose of this part of the fact-finding was to address two key questions: (1) whether certain practices in the state's UC first-level appeals process are inconsistent or out of conformity with federal UC law; and (2) whether interventions in that process by the LePage administration suggest noncompliance with federal UC program requirements.

Methodology. The Office of the Solicitor interviewed DAH hearing officers and other Maine state officials, and reviewed numerous documents and other information related to the state's UC process and the March 21 meeting. These included, for example: federal and state statutes, regulations, guidance, and case law governing the UC program, the UC process, and UC appeal hearings; federal and state statutes, regulations, and case law governing administrative hearings and evidentiary standards; documents and information on Maine state government, budget, and agency organization; press reports; materials published or posted by MDOL; and materials released by MDOL under Maine's Freedom of Access Act.

First Area of Concern – DAH evidentiary practices may be unduly restrictive. UIPL No. 26-90, *Requirement that UI Appeals Hearings be Simple, Speedy, and Inexpensive*, states the following: "Therefore, to comply with the requirements of Sections 303(a)(1) and 303(a)(3), appeals hearings must be simple, speedy, and inexpensive." ETA's *Guide to Unemployment Insurance Benefit Appeals Principles and Procedures (ETA Guide)* – interpreting the "when due" provision of SSA section 303(a)(1) and the "fair hearing" provision of SSA section 303(a)(3) sets guidelines for meeting this requirement. The ETA Guide sets forth procedures synthesized from the experience of several States and the principles on which such procedures are based. The procedures are sound and practical, as well as fair to claimants and to other interested parties. Our fact-finding revealed the following areas of concern:

- **DAH often excludes hearsay.** The *ETA Guide* recommends UC appeal tribunals actively work to get "full information" into the record, including the admission of reliable hearsay evidence and other reliable evidence. DAH often categorically excludes hearsay evidence without regard to its relevance or reliability, inconsistent with this guideline.

Under Maine law, agencies in their administrative hearings may only admit evidence that is "the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." Our fact-finding suggests that DAH hearing officers regularly exclude hearsay, finding it rarely fits this definition; that they may be excluding as inadmissible hearsay documents not subject to cross-examination (effectively instituting an absolute right to cross-examine); and, that they are discounting factors that make evidence reliable enough to be admissible.

This practice has implications for claimants, employers, and the UC appeals process overall. Excluding hearsay evidence takes on particular importance because DAH appeal hearings are *de novo*, which, in a UC context, often means hearing officers give no deference to the deputy's determination and do not consider evidence not introduced *again* for purposes of the appeal. Failure to consider all available evidence without weighing its probative value may lead to error, and prejudice further appeals.

- **Hearing officers discourage or disallow evidence they deem repetitive, even if corroborative.** For example, at times a hearing officer will not allow a witness to corroborate the testimony of a prior witness, but then rule against the party whose witnesses were excluded for lack of evidence. Hearing officers appear to be misapplying the concept of corroboration.
- **Other evidentiary practices.** Hearing officers are, at times, excluding documents solely because they were not submitted in advance of the hearing, even when the need for the document only becomes apparent *during* the hearing. Some hearing officers also are excluding evidence about events that occurred after the separation, even when it supports a party's argument about the reason for the separation. These practices can potentially lead to exclusion of relevant, reliable evidence.

Simple, informal hearings help parties understand their rights without having to retain legal counsel, help hearing officers develop a robust factual record, and further the ultimate goal of prompt payments to eligible claimants (and prevent payments when benefits are not "due"). DAH practices should be reviewed to determine if they comply with the UIPL.

Second Area of Concern – Certain DAH practices generate inconsistency in the Maine UC appeals system. ETA interprets federal law to require uniformity of UC legal interpretations. Some DAH practices result in interpretive inconsistencies in the Maine UC appeals process.

- **Failure to treat UI Commission decisions as precedent.** To help achieve UC legal uniformity, the *ETA Guide* states decisions of higher UC appeal tribunals and state courts "are considered as binding upon lower tribunals" in deciding questions involving the interpretation of law. DAH does not treat Commission decisions as precedent and rarely discusses them. We note that some states' higher authority appellate bodies designate specific cases as precedential.
- **Exclusion of appeal file.** As part of the appeals process, deputies automatically send an appeal file to DAH. However, it appears hearing officers "never" or "almost never" use that information ("30-day material"), and even require authentication before admitting into evidence the Deputy's Decision, the key document underlying the appeal to DAH. While *de novo* hearings – and the requirement claimants and employers introduce evidence anew – are common at the UC first-level appeals stage across jurisdictions, it is unusual for first-level appeal bodies to exclude and/or largely disregard the appeal file, as the DAH practice appears to do. The exclusion of the 30-day material could be limiting hearing officers' understanding of the facts, prejudicing the parties, and generating additional dissonance between UC decisions or interpretations.

Third Area of Concern – Intervention by the Governor and his political appointees in DAH's day-to-day operations could be perceived as an attempt to unduly influence the hearings process. Under federal law, UC appeal hearings must be fair and impartial both in *fact* and *appearance*. Political interference or undue political influence, even in appearance, can potentially destabilize the appeals process (by, for example, affecting hearing officer deliberations or morale), undermine the credibility of a state's UC program, and generate additional workload (more appeals, for example), which may result in delays in decisions or benefit payments (for example, because of resulting backlogs).

The Governor has denied threatening or intimidating hearing officers, and has stated his concern is simply to ensure they are following the law. Whether UC appeal hearings are fair to all parties is a legitimate concern. That said, our fact-finding interviews suggest that LePage administration officials have intervened in the UC first-level appeals process. Our fact-finding revealed that labor commissioners have, on occasion, become directly involved in DAH decision-making, such as interviewing staff-level hearing officers and/or their supervisors about specific rulings. The level and nature of this participation has, at times, exceeded the normal management prerogative of managing the day-to-day operations of DAH and could be perceived as an attempt to influence the appeals decision-making process in favor of employers. When added to this internal MDOL pressure, the Governor's direct intervention could be interpreted as an attempt to intimidate or direct hearing officers to view employers more sympathetically.

Federal law requires states to institute UC program procedures that are efficient and reasonably ensure payment of benefits "when due." Our fact-finding suggests intervention by the LePage administration, up to and including the March 21 meeting, could have negatively impacted the Maine UC appeals process in ways that are still developing, and could become clearer – and more measurable – in the months ahead. For example, as press reports and certain documents MDOL released under Maine's Freedom of Access Act in the wake of the March 21 meeting reflect, the administration's intervention has prompted at least some hearing officers to adopt defensive post-hearing practices, like taking longer to write decisions favoring claimants to make sure the decisions cannot be criticized as anti-employer. These appeal dynamics could, over time, compound the DAH workload, leading to delays in payments to certain eligible claimants (out of conformity with the federal "when due"/timeliness requirement) and in resolution for parties (out of conformity with the fair hearing requirement).

Conclusion. On the question of hearing procedure, our fact-finding suggests there are legitimate concerns about practices in Maine's first-level appeal hearings, and important questions about how and whether those practices – including certain evidentiary standards and the failure to assign precedential value to second-level appeal decisions – comply with federal UC fair hearing requirements.

While systemic practice problems exist, the response by the LePage administration raises concerns as well. Evidence suggests that, even before the Governor's direct participation on March 21, political appointees in MDOL had intervened in DAH operations and quasi-judicial decision-making with what could be perceived as a bias toward employers, endangering the fair hearings process. Therefore, we conclude hearing officers could have interpreted the expectations communicated by the Governor on March 21 as pressure to be more sympathetic to employers. The defensive practices described above could potentially delay first-level appeals decisions beyond federal requirements that ensure claimants receive benefit payments "when due," or delay the prompt resolutions required to ensure all parties receive a fair hearing. All of this could, in turn, also lead to a diminution of trust in the fairness of UC hearings.

Recommendations

To address the concerns expressed in this fact-finding, the state is encouraged to take the following steps:

- Maine should review state statutes, regulations and practices and consider some of the more generous evidentiary UC appeals practices suggested in The Guide. While a step in the right direction, the procedures DAH put in place in spring 2013 to receive additional documents are limited and not sufficient to cure what appears to be a longstanding prejudice against certain types of evidence. The state should institute a training regimen to assure consistency in the conduct of hearings and the preparation of decisions.
- Maine should establish uniform standards for inclusion of agency documents in the case file and determine the weight those documents should be given under the evidentiary law of the State of Maine.
- The Department understands that, in 2012 and the early months of 2013, a group of officials with a stake in the state's UC program – including officials from MDOL, the UI Commission, and the Maine Attorney General's office – had been engaged in good faith negotiations to resolve DAH practice issues. The Department strongly encourages these officials to resume negotiations to settle the evidentiary and practice issues identified in this analysis.
- The Department strongly encourages the Maine Attorney General to identify, and MDOL and the UI Commission to implement, improvements in the UC appeals process to achieve greater consistency with state law and fairness and integrity in the UC program. Maine might, for example, consider establishing a precedent manual which identifies Commission and state court decisions involving the interpretation of law. DAH could use the precedent manual as a reference for future decisions.
- The Governor and his political appointees must ensure the UC appeals process is insulated from outside pressures that might compromise even the appearance of fairness and impartiality. The administration also must ensure hearing officers are free from actual or perceived intimidation. In particular, the administration must make clear no personnel action will be taken against hearing officers over this matter.

If you have any questions, please contact me.

Sincerely,



Holly C. O'Brien
Regional Administrator