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PROPOSED SUBSTITUTE LANGUAGE AND TESTIMONY RE HB 5232

AAC HEARINGS BEFORE THE ADMINISTRATOR AND THE EMPLOYMENT
SECURITY APPEALS DIVISION UNDER THE UNEMPLOYMENT COMPENSATION
ACT

March 8, 2012

My name is Susan Nofi-Bendici, I am the Deputy Director at New Haven Legal Assistance. I also regularly represent clients at their unemployment compensation hearings. I am speaking today on behalf of Connecticut's Legal Services Programs in opposition to HB 5232.

This bill makes changes to unemployment hearings at both the first-level administrator hearings point as well as to appeal hearings before a referee. The first-level hearings are informal and claimants usually participate by telephone, although they can choose to meet with the adjudicator in person. Legal Services would like to see claimants retain their rights to an in-person hearing at the first level - rather than in-person hearings being granted only at the administrator's discretion. However, we recognize that this change would not be a dramatic one.

More importantly, parties who lose a first-level telephone hearing can appeal and have a second chance to make their case. They can appeal and get a *de novo*, in-person hearing before an appeals referee. We object to the proposed changes to the referee hearings because they would effectively eliminate in-person hearings for claimants in much of the state.

Referee hearings are critical because they are the only evidentiary hearings held in unemployment compensation cases. These hearings are where the claimant is afforded due process: where parties can introduce evidence, call witnesses and examine the evidence against them, object to evidence offered by the other party and cross-examine opposing witnesses (Regs., Conn. State Agencies § 31-237g-29). Although claimants and employers have the right to appeal a referee's decision to the higher authority Board of Review, those appeals are on the record only: the Board does not hold hearings on the merits and rarely accepts additional evidence. The Superior Court does not retry the facts or hear evidence in unemployment cases and it cannot disturb the findings of fact when those depend on the weight of the evidence and the credibility of witnesses. Conn. Practice Book § 22-9. The referee hearing is truly the only "day in court" for parties in unemployment proceedings. These hearings are now

held throughout the state at appeals division offices in Bridgeport, Hamden, Hartford, Norwich and Waterbury.

Currently, the vast majority of referee hearings are held in-person. The Appeals Division regulations already allow referees to conduct hearings by telephone (Regs., Conn. State Agencies § 31-237g-29) and in some cases a telephone hearing is adequate, suitable and convenient for the parties. In most cases however, a telephone hearing is not adequate or appropriate. These cases often turn on credibility determinations by the referee, which the Board will generally not overturn. The evidence in unemployment appeals usually includes documents: disciplinary records, employment application, timecards, schedules, vacation requests, employer handbooks, policies, medical records and leave requests. Evidence may also include visual evidence such as photographs or video taken by an employer's security cameras or with a party's cell phone. It is physically impossible for a party to examine this evidence over the telephone. Even if the referee reads each and every document into the record, the parties cannot determine whether these documents are what they purport to be and make meaningful objections if they are not.

The appeals division regulations currently have no requirement that parties submit or exchange evidence in advance of the referee hearing. Almost all claimants in unemployment appeals are self-represented. Jobless claimants representing themselves in an unemployment appeal may not have ready access to a fax machine or the resources to photocopy and mail their evidence in advance of the hearing. The appeals division does not currently offer technology that would allow parties to access the records in their case online, or submit their own exhibits electronically. The appeals division does not offer hearings by video conference. For all of these reasons, the right to an in-person hearing is essential to due process.

HB 5232 would effectively remove the right to an in-person hearing, by deleting the requirement that referee proceedings be conducted "throughout the state in such places as are reasonably convenient for the parties". In its original legislative proposal to OPM, DOL indicated that the appeals division is planning to consolidate offices into a centralized location and that the proposed statutory revision "will remove any implication that there is a preference for in-person hearings". The right to be heard in-person at a centralized office in another part of the state is not meaningful to an unemployed worker who relies on public transportation or who cannot afford the cost of gas to travel to the hearing.

Representatives from Legal Services met with DOL staff, including representatives from the Appeals division, earlier this week. DOL staff were sensitive to our concerns and tried to assure us that their underlying intent was not to discontinue in-person hearings. However, there is nothing in the language of this bill that would preserve a party's right to an in-person hearing. Legal Services strongly feels that language preserving in-person hearings must be affirmatively placed in this proposal in order to protect our clients' due process rights.

We recognize that resources are scarce and that the agency has an obligation to run its operations as efficiently as possible. We recognize that the planned office consolidations will mean an increase in phone hearings and we recognize that the courts and administrative agencies are starting to use video conferencing technology. Therefore, we do not object to the addition of the language "by telephone or other electronic means" to the statute. However, we do object to the remaining proposed changes to Conn. Gen. Stat. § 31-237j(b) and propose the following alternative to Section 2(b) of the proposed bill language:

(b) The referees shall have state-wide jurisdiction and venue, and referee proceedings shall be conducted throughout the state in such places as are reasonably convenient for the parties or [(1)] by telephone or other electronic means. [or (2) in person at such locations within the state as designated by the appeals division.]

By leaving the "reasonably convenient" locations language intact, both employers and claimants may request an in-person hearing at the closest Connecticut Labor Department location in those cases where a phone hearing is inadequate to comport with due process and the requirements of Regs., Conn. State Agencies § 31-237g-29.

Proposed Substitute Language for HB 5232 from Legal Services

Section 2(b):

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