National Association of Unemployment Insurance Appeals Professionals

Navigator

Fall 2018

The 2018 NAUIAP Annapolis Conference a Hit!

Andy Rübsam, Attorney Supervisor
Wisconsin Department of Workforce Development, Unemployment Insurance Division

Did you know that George Washington resigned his commission as Commander-in-Chief of the Army to the Continental Congress in 1783 at the State House in Annapolis, Maryland? You would have learned that, and much more, had you attended the June 2018 NAUIAP Annual Conference in Annapolis, Maryland. My first NAUIAP conference will hopefully not be my last.

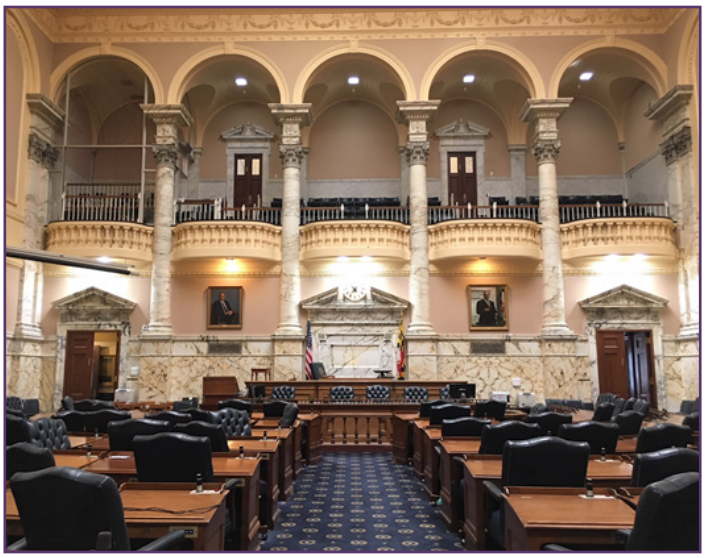
The weeklong conference was replete with timely, relevant, and valuable sessions for the betterment of unemployment insurance hearings. To enjoy all the spoils of Father's Day, I elected to travel on Monday morning. So, I pass no judgment on Monday morning's presentations, which I assume were delightful. The agenda was jam-packed with greatness and the colonial seaside city of Annapolis propelled the conference experience to great heights.

The plenary sessions and workshops focused on a variety of topics. ETA hearing criteria that were most frequently identified as needing improvement during a national review were rightly selected for emphasis. Other topics presented included Disaster Unemployment Assistance, training new higher authority members, evidence (which should be a topic every year), reasonable assurance, misconduct involving social media, identity theft, and drug testing. Representatives of Maryland's Lower Appeals Division presented a mock hearing to show the potential difficulties when dealing with represented parties. The ethics presentation was uncommonly interesting.

The regional breakout session was some of my most productive time spent during the conference. We all face similar issues of funding, staff, and maintaining metrics—sharing best practices can help make successful management decisions. The evening event at the United States Naval Academy was the highlight of the trip, which featured a lovely presentation in honor of President Jayson Myers, and an opportunity to build more connections with colleagues across the nation.

Though my return flight was delayed due to weather, resulting in a humbling overnight stay at one of the lesser hotels near the Detroit airport, I returned home more knowledgeable than when I arrived—with an affection for Annapolis and a hope that the NAUIAP conference will return there. A final plea: great conferences like these are only what we make them. Volunteer to organize or present a topic at future NAUIAP conferences.

Andy Rübsam is an attorney supervisor at the Wisconsin Department of Workforce Development, Unemployment Insurance Division.



President's Column

Amanda P. Hunter, Deputy General Counsel and Clerk
Florida Reemployment Assistance Appeals Commission

The 2018 NAUIAP Annual Conference was held in Annapolis, Maryland, from June 17-21, 2018. More than 100 members attended the conference and, because of the hard work of Donna Watts-Lamott and the many conference volunteers from the state of Maryland, the conference was a success. We especially appreciated the attendees from the U.S. Department of Labor's Employment and Training Administration, and their willingness to serve as presenters. Thank you!

In mid-September, I had the opportunity to make a presentation to many of the nation's UI Directors as part of the 2018 National Association of State Workforce Agencies (NASWA) Workforce Summit & UI Directors' Conference. This was a tremendous opportunity to showcase the benefits of membership in NAUIAP, and I am sincerely grateful to Julie Squire, NASWA's Policy Director and General Counsel, for extending the invitation.

Since its inception in 1981 as the National Association of Unemployment Insurance Appellate Boards, NAUIAP has provided unique training resources tailored specifically for UI appeals professionals. These training resources have, to date, included newsletters and extensive presentation materials from our annual conferences. I am now pleased to announce that the next phase of our training resources will include webinars that address hot topics in UI appeals. The first webinar has been tentatively scheduled for this fall, and a second webinar will be offered next spring. If you would like to suggest a topic to be covered in a webinar, please send an email to info@nauiap.org. We'd love to hear from you.

Finally, I am honored to serve as President of NAUIAP this year and to do so with an outstanding Board of Governors. In October, the Board will meet to continue our planning for the 2019 NAUIAP Conference to be held in Indianapolis, Indiana, from June 23-27, 2019. I hope you will begin making plans to attend the conference.

Annual Conference *in* Annapolis 2018

Minnesota: Handling Late Appeals

Rachel Cornell, Unemployment Law Judge
Minnesota Department of Employment and Economic Development

Decisions from Minnesota's unemployment law judges are appealable directly to the Minnesota Court of Appeals. Appellants must exhaust their administrative remedies before appealing to a three-judge Appeals Court panel, however, in Minnesota, that no longer means consideration by a higher authority.

Greetings from Minnesota! The land of Sky Blue Water, Paul Bunyan, and no "good cause" exception to a late appeal. That's right! Our statute has no exceptions to the appeal period. The Minnesota Court of Appeals has ruled in only one instance that an appeal was timely filed outside of the deadline, which involved an applicant who stopped requesting benefits, moved, and had no reason to expect that the department would audit his account.

Minnesota has developed a system for identifying when appeals are late, and has assigned particular ULJs the task for making these decisions. Determinations are mailed to applicant's last address of record. If an applicant (or employer) files an appeal that is late, it is sent to one of our unemployment law judges ("ULJs"). Under Minnesota Law, appeals must be in writing. The ULJ judge reads the determination, appeal and anything else in the file. The ULJ is looking for anything that could have been a timely appeal, but was not properly identified. That unemployment law judge then can (1) dismiss the appeal as late and mail a dismissal order (2) order a hearing on the issue of whether the applicant made a timely appeal or (3) order a hearing on the merits, if the ULJ found a timely appeal.

Because Minnesota has no good cause exception to filing a late appeal, the ULJ must ensure that parties are given proper notice before dismissing an appeal as untimely. When the ULJ reviews a determination, she must ensure that the correct appeal date was printed on the determination. Proper notice also includes notice of any overpayment that is caused by the determination. If the payment was not included in the determination, or was wrong (the wrong amount listed), this is improper notice and the appeal period did not run. Proper notice also includes notice that the overpayment must be repaid. If the ULJ determines that the determination did not provide proper notice, the appeal period did not run and the applicant or employer's appeal is considered timely and a hearing is ordered on the merits.

If the ULJ judge finds that the employer or applicant submitted something in writing within the appeal period, next she must determine whether or not the written submissions constitutes an appeal to the determination. Minnesota Statutes, section 268.103, subdivision 2, paragraph (b), states that a written statement delivered or mailed to the department that could reasonably be interpreted to mean the applicant is in disagreement with a specific determination or decision is considered an appeal. Sometimes employers and applicants submit written statements within the appeal period that are unclear. For example, Applicant A has two separate determinations holding her ineligible for unemployment benefits. Applicant A submits a letter to the department which states, "I disagree with the determination." The letter does not identify with which determination the applicant disagrees. If the letter submitted by Applicant A would be a timely appeal to a determination, the unemployment law judge may order a hearing to determine which issue the applicant intended to appeal.

If there is no evidence that the applicant or employer submitted anything that can reasonably be interpreted as an appeal within the appeal period and the parties were given proper notice, the appeal is dismissed as untimely. This is the most common scenario. Minnesota has no good cause exception for failing to file a timely appeal, so once the unemployment law judge has determined that there was no timely appeal, any reasons provided by the late appealing party are not taken into consideration. If the appeal is untimely, it is dismissed.

A party may request reconsideration of the dismissal order. If the parties request reconsideration, a ULJ reviews the file. The ULJ looks everywhere where a timely appeal could have been misfiled. The ULJ reads through any documents received during the appeal period, to see if anything in those documents could be reasonably interpreted as disagreeing with the specific determination. That ULJ then can (1) affirm the dismissal order (2) order a hearing on the issue of whether the applicant made a timely appeal, or (3) if the ULJ found a timely appeal, the ULJ will order a hearing on the merits.

These reviews for timely appeals are generally assigned to ULJs separately and apart from their regular caseload, to be worked as needed and as possible. Some of Minnesota's more efficient ULJs finish their regular duties and request additional work, and occasionally ULJs who are serving as a back-up judge, who are not needed to hold hearings, will be assigned this work. Because the workload is not assigned to a particular person, managers need to communicate well and stay on top of the flow. In times of recession, likely due to the dire economic realities of getting reemployed, there are more communications from parties wishing to appeal determinations that have jurisdictional question.

[1] *Godbout v. Department of Employment and Economic Development*, 827 N.W.2d 799, (Minn. App. 2013). Since this case was published, the Department has adopted a notice convention that tells all applicants they must keep their address up-to-date with the Department for four years, in case their account is audited. Few cases, if any, meet the *Godbout* factors any longer.

[2] Minnesota's Request for Reconsideration process was outlined in *"Minnesota's Request for Reconsideration Process: Collapse of Higher Authority," Navigator,* Winter 2018.

Spotlight

SPOTLIGHT ON IOWA

Emily Chafa, UI Appeals Bureau Manager
Iowa Workforce Development

In Iowa, the lower authority UI Appeals Bureau is part of Iowa Workforce Development (IWD), a state agency that includes the initial UI adjudicators and other UI functions (fraud investigations, collections, tax, misclassification, program integrity and RESEA programs). The higher authority Employment Appeals Board is part of another state agency, the Department of Inspections and Appeals. The central panel ALJs are part of a separate division of the Department of Inspections and Appeals. The central panel ALJs handle appeals involving former IWD employees. The IWD UI Appeals ALJ handle almost all other appeals from initial UI decisions.

The UI Appeals Bureau processed 13,501 appeals in 2017, and will most likely handle that number this year. All of our state agency ALJs must be attorneys who are licensed to practice law in Iowa. The current group of UI Appeals Bureau ALJs have a variety of prior experience and expertise, bringing this depth and breadth to their daily work and to the unit as a whole. All 14 UI Appeals ALJs and our support staff work in a central office location in Des Moines, Iowa. (In recently renovated office space, in mostly soundproof offices.) Most hearings are conducted via telephone, using the Clear2there system. Each ALJ averages four or five hearings per day, five days per week. Either party may request an in-person hearing. These requests are routinely granted. The in-person hearings are held in fourteen designated locations around the state. The ALJs travel to these locations for in-person hearings as needed. A focus on improving processes and emphasizing teamwork led to a rewarding 90% average compliance rate with the USDOL 30 day timeliness standards for the past two years. This trend should continue for the foreseeable future.

We are in the midst of a modernization project, with OnPoint Technology. Iowa will soon have a unified "OPTimum" system for all UI matters. The agile process is enlightening, as various agency UI experts, IT experts, and project managers work together to make this dream a reality.

Iowa's higher authority Employment Appeal Board (EAB) consists of three individuals who are appointed by the governor. The EAB members are not necessarily attorneys. The EAB members listen to the lower authority hearing recordings and review the exhibits for every case appealed to them. The EAB meets on a regular basis to discuss the pending appeals and reach a decision to affirm, reverse, remand or modify the ALJ's decision. The EAB is supported by two attorneys with years of relevant experience and expertise. The EAB routinely issues 100% of its decisions within 45 days. The EAB becomes the named party for the agency and defends its decisions in further appeals to the district court and appellate courts.

COMMITTEE SPOTLIGHT: THE AGENDA COMMITTEE

Laurel Klein Searles*, Chief of Appeals
Kansas Department of Labor

Structure
The Agenda Committee is comprised of a chairperson and approximately ten members. The chairperson serves on the Board of Governors and was appointed by the President. The Agenda Committee would welcome additional members. Anyone wishing to serve on the Agenda Committee should contact Emily Chafa at Emily.chafa@iwd.iowa.gov.com. Additionally, there will be a sign-up sheet at the annual Conference in June in Indianapolis, Indiana.

Duties
The primary duty of the Agenda Committee is to establish the agenda for the annual conference. The Agenda Committee not only sets the agenda for the conference, but also secures the speakers as well.

The Agenda Committee meets via telephone conference shortly after the annual conference to discuss what went well, what could be improved, and what we hope to see in the future. There is an initial brainstorming session in which members offer ideas of topics of interest for the following conference. Additionally, the Agenda Committee accepts ideas of topics via email and reviews feedback from the prior conference. At the fall Board meeting, the Board works towards setting a comprehensive agenda for the next conference based upon the input of the Agenda

Committee
After the tentative agenda is set, the Agenda Committee begins looking for prospective speakers for the conference. After the agenda is established and the agenda secured, the Board will vote to finalize the agenda at the spring Board meetings. After that, the agenda committee will work with the speakers to ensure that PowerPoint presentations and additional materials are submitted in a timely manner.

Time Commitment
The Agenda Committee meets through telephone conference calls approximately four times per year with periodic email exchanges between committee members. Additionally, the committee works at the annual conference to ensure that it runs smoothly.

Joining the Agenda Committee gives members an opportunity to directly impact the topics and speakers at the annual conference. It also provides the chance to develop relationships with colleagues around the country while promoting the mission of NAUIAP. Please consider joining the Agenda Committee. We would love to have you!

Laurel Klein Searles has left the Kansas Department of Labor.

Growth and Learning in Minnesota:
A Model for Training and Keeping Good Hearing Officers

Munazza Humayun, Unemployment Law Judge
Minnesota Department of Employment and Economic Development

Minnesota has had a robust training program for its new hearing officers (called "Unemployment Law Judges," or ULJs) for the past decade. Six cohorts of new hires have now gone through this program.

This year, the Minnesota Unemployment Insurance Program hired and trained its most recent cohort of new ULJs. Because the appeals division was at its lowest staffing level in years, the challenge was to prepare this group of three judges to become proficient in a shorter period without compromising the quality or depth of the training. Having a tested structure in place for the training and making a few thoughtful changes to it allowed the trainers to do this.

Integrating training and practice:

"Several years ago," says Sasha Mackin, Supervising Unemployment Law Judge, "we believed that you needed to learn all aspects of the unemployment insurance law before holding your first hearing. We've now done away with that approach." As they designed the training program this year, Mackin and Supervising Unemployment Law Judge Christine Steffen added the new judges to the hearing calendar much earlier than was typical for previous cohorts of new judges: these new judges held their first hearings within three weeks after beginning training. They started with single-party hearings that were relatively straightforward (such as those involving failure to meet the eligibility requirement of participating in reemployment assistance services). As they eased into a fuller hearing schedule, the trainers were careful to pair training about specific legal issues with hearings on those issues. For example, hearings involving discharges for employment misconduct were scheduled for the new judges immediately after they completed a training module on the law governing employment misconduct.

In practice, this meant that the new ULJs were performing the job for which they were hired and applying the newly learned skills and knowledge as they continued participating in formal training for several weeks. Removing the hard dividing line between training and the start of actual job duties had the added benefit of giving new judges opportunities to ask questions and receive feedback from supervisors about their first few hearings without feeling as though they were now expected to be completely "on their own."

Keeping what works:

As with judges-in-training in previous years, trainers had this group listen to both live and recorded hearings conducted by experienced judges, write decisions based on those hearings and receive feedback, and conduct mock hearings of their own. A number of experienced judges also took a more active role in training the new group on the law and the practical aspects of the job, sometimes as part of a panel, other times in pairs.

Meanwhile, the trainers remained sensitive to individual differences in learning styles. "If someone learned a skill best by concentrated, repeated practice, we would schedule them to hold several hearings in a row on a particular type of legal issue," said Steffen, who has coordinated the training program for many years and has championed the idea of customizing training to accommodate individual learning styles. For the ULJs who learned most effectively by reading written materials, trainers also prepared handouts for each module.

Refresher training for seasoned judges:

Recognizing that experienced judges also benefit from periodic in-depth review of certain topics, supervisors used this year's training program for new ULJs as an opportunity for experienced ULJs to also brush up on their knowledge of both substantive and procedural law. All ULJs were invited to attend specific sessions that interested them. Supervisors also identified ULJs who needed refresher training on certain topics—including a few ULJs who had previously worked at the Department and had recently been rehired after several years of working elsewhere—and had them attend the training sessions on those topics. This also gave the new ULJs a chance to spend some time with and get to know their peers.

Mackin and Steffen say they continue to learn from the training experiences of each new cohort. Reimagining training not as a one-time event but as an investment for increased employee engagement and retention has meant making a commitment to ongoing training for all ULJs, not only for those who are new. The appeals division now holds quarterly brown-bag lunch meetings, led by one or two judges, with a guided, in-depth discussion of a legal issue. The division also sometimes invites subject-matter experts--employment-law attorneys, licensed substance abuse treatment professionals, and criminal defense attorneys, for example--to teach in-house CLE seminars for ULJs. "Formal training makes a difference," Mackin says. The new ULJs, who now have full hearing schedules and a confidence born of several months of learning, practice, and feedback, agree.

Reflections on Annapolis

Jack Canfield, Chairman
Board of Review, West Virginia

So, okay... (kids all start sentences with this, I don't get it.) Mr. Facemire (owner of a wood processing plant, banker, and businessman), former Senator Yost (factory workers' and labor representative), and moi, (former Commissioner of what is now Work Force West Virginia) are sitting at a table in Annapolis; the three of us are Mountaineers from "Almost Heaven, West Virginia." We are three citizen members of the Board. The really nice lady from another state at our table remarks, "Well… we have three citizen members on our Board of Review in our state, and they make really STRANGE decisions." My buddy, Mr. Facemire, says, "Hello? I resemble that remark!" And all of us had a great laugh and were on a ride for a great friendship the rest of the week.

Takeaway: We made so many new friends, and we appreciate that the organization is paying more attention to us, the higher authority appeal boards.

We were at the Nashville conference a few years ago—nice folks, but there wasn't much for Board of Review members. As one who grew up next to Patsy Cline's house and who, as a disc jockey, played Don Gibson, I loved the Country Music Hall of Fame. But we needed specifics for us folks on the Boards. Thank you, Annapolis, for the great agenda additions!

So, come on down. If you want updates on social media cases, unemployment trends nationwide, a discussion on what exhibits to admit, or a discussion on "shy bladder" cases (I'm not making this up), come on down. You will be happy you did.

We in West Virginia made many friends and we'll be back. Thank you Annapolis, and especially The Level Restaurant down the street. Our Maryland hosts and hostesses were great. The Naval Academy was great, even though it rained. Mr. Facemire and Mr. Yost enjoyed a cruise on the Chesapeake. Sorry, I get sick on sailboats, but give me a cruise on the ocean and I'll be there.

Anyhow, just want you to know it was fun. And educational. And helpful. You really, really, do learn from talking with folks who walk in the same shoes you do.

See you next year?

And… announcing the Annual NAUIAP Convention in Indianapolis, Indiana

June 23-27, 2019

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Best Practices in Exhibit Management

J. S. Cromwell, Chair
Oregon Employment Appeals Board

How to identify best practices in exhibit management when those very words suggest a value judgment, or matter of opinion? And when best practices are sometimes constrained by technology? The Department of Labor's Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality states that an ALJ scores a "good" rating with respect to exhibits if he or she:

(a) described and marked all exhibits;

(b) presented parties with an opportunity to review the exhibits and offer objections;

(c) authenticated evidentiary exhibits (to the extent possible) where questionable or challenged;

(d) received all competent, relevant and reasonably available exhibits; [and]

(e) ruled on the admissibility of any documents offered as exhibits and gave an explanation if s/he denied admission.

See ET Handbook No. 382, 3rd ed, March 2011.

Beyond satisfying those criteria, however, truly effective exhibit management involves managing other competing interests, including time, case aging, and parties' expectations and behavior. Despite those challenges, it is, in the end, worth the time and effort. Hearing records are regularly reviewed, internally and externally, for quality control purposes, and by the HAA, agency, trial court, appellate court, or some combination thereof. It is therefore not enough that the ALJ has quickly dealt with parties' offered exhibits, or that the ALJ understands which documents were admitted or excluded as exhibits. Nor is it enough that the ALJ's rulings make sense to the ALJ at the time of the hearing, or that information supporting the ALJ's rulings exists somewhere in the LAA office's files. The record compiled at the hearing must also be clear, reproducible, and efficiently reviewable. In consideration of those factors, and in collaboration with Oregon's higher and lower authority appeals, here are some suggestions for best practices in exhibit management, and why they're worth our time.

1. Identify and mark everything

Parties often offer large packets of documents into evidence, often marked in a manner inconsistent with other documents offered into evidence or inconsistent with the ALJ's usual practice. A best practice is to re-mark documents so they display a consistent numbering style. It is worth our time to re-mark exhibits for ease of reference during the hearing for efficiency's sake when the LAA must compile the record for review, and to provide the HAA (or other reviewing body) with a complete record capable of efficient review.

When preparing for a hearing, make the process of reviewing and referring to exhibits as easy as possible. For example, a best practice for handling a voluminous record during a hearing is to either print the documents or download and save them to discretely marked folders on a secure network drive, thus allowing for ease of navigation and reference to the documents during the hearing.

Oregon's ALJs often receive large bundles of documents from parties consisting of a variety of documents. Although an ALJ could deal with a party's documents by, for example, identifying the "employer's documents," marking the collection of documents as "Exhibit 1" and admitting them into evidence, that results in several missed opportunities to develop a clear and efficiently reviewable record. At a minimum, the ALJ should individually identify each of the "employer's documents;" for example, describe on the record that those documents include "a two-page final written warning dated March 17, 2018, a twelve-page attendance policy, the one-page termination letter dated April 2nd, etc."

The best practice in this scenario, however, would be to identify each document the employer submitted, mark each of them with a separate exhibit number and paginate each exhibit, allowing not only for ease of reference during the hearing, but also for clarity on review. Although describing and marking the documents parties offer into evidence in such detail is time-consuming, it is worth the time spent. LAA offices cannot compile a record for review, and HAA cannot review "the record," if the record transmitted by the LAA for review is incomplete. HAA confusion about what the record includes necessitates remands, and remands, although sometimes necessary, are never the desired outcome of a hearing. In addition, and more importantly, unclear records implicate the fundamental fairness of the proceedings. If unemployment insurance professionals cannot determine from the ALJ's descriptions and contents of the hearing record what was and was not considered as evidence during the hearing, surely laypersons appearing before the ALJs at those hearings cannot possibly hope to have understood on what basis the ALJ decided their case.

2. Curate

The large packets of documents parties often offer into evidence do not always contain only information that is relevant and material to the issue to be decided at the hearing. It is not always clear, however, what is and is not relevant and material until some testimony has been taken. Therefore, while there is a tendency in some jurisdictions to identify, mark, and admit exhibits into evidence pre-hearing, the best practice is to wait until some testimony has been taken before ruling on the admissibility of exhibits, and admitting only those exhibits that are necessary to developing a complete record.

It is admittedly faster and easier to admit "the employer's packet" into evidence as "Exhibit 1" at the beginning of the hearing, and move on to the other business of conducting the hearing. By doing so, however, the ALJ is creating an unclear record that is difficult and time-consuming to review. If the ALJ admits all 42 pages of the employer's handbook, for example, when only a single paragraph on a single page is relevant to the work separation, the ALJ and any reviewing body must still review all 42 pages to reach a decision in the case. In the process of reviewing 41 irrelevant pages of policy, the import of the single paragraph on a single page can easily be lost. Waiting until the hearing is in progress, curating the documents to include as exhibits only those that are relevant and material to the issue to be decided, and excluding the rest, is therefore the best practice.

Illegible documents and photographs should never be admitted into evidence. If the documents cannot be rendered legible by adjusting the documents' sizes or settings using software common

in the jurisdiction in which they were submitted, the documents should, without exception, be excluded. Unreadable documents cannot be probative of any issue that is before the ALJ. The best practice with respect to illegible documents is to notify the party who submitted them pre-hearing and give the party the opportunity to resubmit the documents.

In Oregon, parties are required to submit documentary evidence to the ALJ prior to the hearing, and provide a copy of all documentary evidence to the other parties. The best practice if a party fails to do so is therefore to exclude the evidence. If a state's laws and/or rules allow deviations from that requirement, however, the ALJ may allow exceptions if the party establishes the evidence is dispositive. In that case, best practice is for the ALJ to admit or provisionally admit the documentary evidence as an exhibit, hold the record open to receive the documents if necessary, and send a copy of the exhibit to the parties with the final order. Under all circumstances, due process requires that the ALJ allow the opposing party(ies) the opportunity to object to the ALJ's admission of the exhibit, even if doing so means allowing the party to submit the objections after the conclusion of the hearing.

3. Be thorough

Just as important as ensuring that the irrelevant and immaterial submissions are excluded from evidence is the ALJ's obligation to develop a thorough record. In Oregon, the ALJ's statutory obligation is to "ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the administrative law judge in the case." ORS 657.270(3). But what if the party did not submit the documents into evidence at the hearing? Or what if the party submitted a copy of the materials to the ALJ but did not provide a copy to the other parties? At a minimum, the ALJ must offer parties the opportunity to testify about the information contained in the documents that are being excluded from evidence. That might include allowing the party to read the documents, describe their contents, describe a photograph or describe what is on a video recording.

In some instances, the ALJ might establish pre-hearing that the party's offered exhibit must be excluded from evidence and explain at that point that the party will have the opportunity to testify about the contents. That is often the end of the inquiry. Best practice requires that the ALJ follow up with the party during their testimony and expressly give parties the opportunity to testify about the excluded documentary evidence. For example, the ALJ should ask, "Have you communicated the relevant portions of your exhibit," or "Is there any part of the document that you need to read into evidence?" The ALJ may always interrupt such a reading if it appears the evidence is irrelevant or immaterial. Generally speaking, though, when a party whose exhibit has been excluded does not prevail at the hearing, the first argument they make in favor of reversal is often that the hearing was unfair, and the ALJ erred because the ALJ rejected their documentary evidence. The best answer to that argument is evidence in the record that the party's exhibit was properly excluded, and, even if it was not, that the party was not prejudiced by any error because the ALJ gave the party the opportunity to submit the information into evidence in an alternative format, thus resolving the party's claims of ALJ error and due process violations.

4. Offers of proof

Offers of proof are key to avoiding remands. Whenever an ALJ rejects a party's offered evidence, whether a document, photo, video, witness or request for a continuance to provide a document, the best practice is to allow the party to make an offer of proof by asking the party to describe the offered material and explain what it would have shown had the ALJ allowed it into evidence. Not only does the offer of proof allow the party the opportunity to convince the ALJ that the material should be admitted, it puts the party's reasons for wanting to submit the material on the record, and allows the ALJ to put their ruling – and its basis – on the record. Offers of proof give the reviewing body a clear record to review, and allow the reviewing body to determine whether the ALJ's evidentiary ruling was or was not correct on its merits rather than having to remand for having excluded potentially relevant and material evidence from the record.

5. Don't neglect the record

In the process of developing a clear and thorough evidentiary record, it can be easy to overlook the importance of creating a record of LAA and ALJ rulings on procedural matters. The fact of the matter is, though, that those rulings are subject to HAA review. In Oregon, for example, the LAA's administrative rules allow parties to request continuances and postponements, and establish "good cause," "undue hardship," and promptness standards governing whether those requests should be allowed. See OAR 471-040-0021; OAR 471-040-0026. Those rulings are then subject to review by Oregon's HAA for abuse of discretion. In the absence of a well-developed record as to who moved for a continuance or postponement, why they were asking, what was the ruling, and why was that ruling reached – i.e. how were the standards set forth in the administrative rule applied – and in the face of a claim that the LAA or ALJ erred in denying the party's request, there is little evidence upon which to uphold the ruling, thus necessitating remand. It is therefore best practice for the LAA and ALJ to develop the record whenever a party requests postponement or a continuance, and to ensure that the record includes not only the LAA's or ALJ's ruling, but also the reason for the ruling.

In sum, while these best practices in exhibit management can be time-consuming, in the end they might actually result in efficiencies within the LAA's office and downstream to the reviewing bodies by creating clear and reproducible records that contain only relevant and material information, avoiding remands, and ensuring that all parties appearing in unemployment insurance hearings are afforded due process in the conduct of the hearings and receive a full and fair opportunity to present their cases.

Special thanks to Presiding ALJ John Lohuis and ALJ Carey Meerdink of Oregon's Office of Administrative Hearings for their contributions of time and resource material for this article.