

12 NYCRR 460.1

12 N.Y. Comp. Codes R. & Regulations. 460.1

**OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF
THE STATE OF NEW YORK
TITLE 12. DEPARTMENT OF LABOR
CHAPTER VII. DIVISION OF UNEMPLOYMENT INSURANCE
SUBCHAPTER A. PRACTICE AND PROCEDURE BEFORE
ADMINISTRATIVE LAW JUDGES AND
APPEAL BOARD
PART 460. DEFINITIONS; GENERAL PROVISIONS
Current through September 30, 2010**

Section 460.1. Application of definitions.

Whenever used in this Subchapter:

(a) The term law means the Unemployment Insurance Law, constituting article 18 of the Labor Law of the State of New York as presently, previously or hereinafter constituted.

(b) The term commissioner means the Commissioner of Labor of the State of New York, Department of Labor or his successor in title, who shall be deemed a party to all proceedings before administrative law judges and the Appeal Board.

(c) The term administrative law judge means any person appointed by the commissioner as a referee pursuant to the law to hear and decide disputes in accordance with the provisions of the law and to conduct such other and further hearings in connection therewith as may be required by the board.

(d) The term department means the Department of Labor of the State of New York.

(e) Any word or term which is defined in the law shall have the same meaning when used in this Subchapter.

Section 460.2. Board sessions.

An executive session of the board shall be held on such day as may be designated by the chairman. A special session may be called at the request of any member, provided that notice thereof was given to each member at least one business day before the time set. A special session may be held without notice when all members are present. The chairman of the board shall preside at all sessions. He may designate any member of the board to preside and perform the duties of the chairman in his absence. A quorum shall consist of a majority of the board.

Section 460.3. Action by individual board member.

Any hearing, inquiry or investigation required or authorized to be conducted or made by the board may be conducted or made by any individual member thereof, and the order, decision or determination of such member of the board, shall be deemed the order, decision or determination of the board from the date of filing thereof in the department unless the board, on its own motion, or on application duly made to it, modifies or rescinds such order, decision or determination. The chairman may designate any member to preside at any hearing or conduct any investigation or inquiry on behalf of the board.

Section 460.4. Subpoenas and depositions.

(a)(1) A board member, the chief administrative law judge, a senior administrative law judge or the administrative law judge may issue subpoenas, whenever necessary, to compel the attendance of witnesses and the production of writings, books, contracts, papers, documents or other evidentiary matter. A subpoena duces tecum, unless directed to be issued by a board member, the chief administrative law judge, a senior administrative law judge or the administrative law judge, on his own motion, shall be issued only upon a showing of the necessity therefore by the party applying for its issuance. All of the aforesaid subpoenas shall be issued under the seal of the department.

(2) An attorney who shall have filed with the board a notice of appearance on behalf of any party may issue and cause to be served, subpoenas to compel the attendance of witnesses in accordance with sections 2302 and 2303 of the Civil Practice Law and Rules.

(3) Witnesses subpoenaed for any hearing shall be paid or tendered witness and mileage fees in advance in accordance with the provisions of section 2303 of the Civil Practice Law and Rules of the State of New York.

(4) A motion to quash, fix conditions or modify a subpoena shall be made promptly to the board or to the administrative law judge section to which the subpoena is returnable. A request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made before the board or the administrative law judge. Reasonable conditions may be imposed upon the granting or denial to quash or modify.

(b) A board member, the chief administrative law judge, a senior administrative law judge or the administrative law judge, whenever necessary, shall take or cause to be taken, depositions of witnesses residing within or without the State.

Section 460.5. List of authorized agents and attorneys.

(a) The board shall maintain lists of authorized agents and attorneys who are available to represent claimants in New York City and of agents who represent employers. An agent shall be registered as authorized to represent an employer by providing the board with a letter of authorization from the employer. An attorney, who is available to represent claimants, shall be included on this list upon providing to the board his name, business address and telephone number. Agents, authorized to represent claimants for a fee, shall be included on this list upon the certification of the board that the individual has complied with the requirements hereinafter set forth for the registration of representatives of claimants in New York City. Attorneys and authorized agents following their registration shall continue to be listed until such time as the board shall, upon due notice and in compliance with the procedures herein set forth, revoke or suspend such registration, or until such time as the attorney or agent requests, in writing, that his listing be canceled. No individual may be listed as an authorized agent or attorney while employed by the New York State Department of Labor.

(b) The board shall maintain such lists at its offices. Copies of these lists shall be made available for inspection at the offices of the board, or the administrative law judge section in New York City, and in

each local unemployment insurance office in New York City. The list shall be made available at these locations to any claimant requesting information or assistance with regard to obtaining representation at any hearing before the board or before an administrative law judge.

(c)

(1) No person shall be registered as an agent to represent claimants in New York City for a fee, unless he shall have met the following requirements:

- (i) he is a high school graduate or has received a high school equivalency diploma from an authority recognized by the Education Department of the State of New York;
- (ii) he has, as a minimum, at least 16 hours of experience, either for pay or as a volunteer, in legal or administrative proceedings. In lieu of the required hours of experience, an applicant may substitute credit hours for appropriate post-secondary courses which the applicant has successfully completed. Such appropriate courses shall include, but not be limited to, courses in administrative law, administrative procedure, labor law, unemployment insurance, or civil practice and procedure including evidence;
- (iii) in addition, the board, in its discretion, as a condition for registration or for continued registration, may administer examinations to non-attorneys to establish their competence as representatives; and
- (iv) he is of good moral character.

(2) An applicant for registration as an authorized agent shall file with the board an application, properly executed under oath or affirmation. The board may require the applicant to file any additional information it considers necessary.

(3) The board, if it denies an application for registration, shall inform the applicant, in writing, as to the reason(s) therefore. The applicant may, within 15 days after the mailing of the notice of denial, file a written appeal therefrom, together with his reasons in support thereof, by mailing such appeal to the board. Upon receipt of such appeal, the chairman of the board shall designate a member of the board, or an administrative law judge, or any other person to hold a hearing for the purpose of considering the applicant's appeal from the notice of denial. If the hearing is held before an administrative law judge or an individual who is not a member of the board, such designee shall conduct the hearing and submit a report to the board, including his recommendations on the appeal. Thereafter, the board shall issue a decision. Such decision shall be deemed the decision of the board when signed by at least one member of the board and when duly mailed and filed with the Department of Labor.

(4) Should the board approve an application, the applicant shall be registered upon submission to the board of a corporate surety bond in the amount of \$500, in a form approved by the board, for the benefit of claimants. Upon such registration, the board shall issue to the agent a registration card.

- (i) The board, after due notice and opportunity for hearing, may suspend or revoke the registration of any authorized agent shown to be incompetent, disreputable or who refuses to comply with these rules and regulations or who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead or threaten a claimant or prospective claimant, by word, circular, letter, or by advertisement.
- (ii) Disreputable conduct for which the registration of an authorized agent may be suspended or revoked includes, but is not limited to:
 - (a) conviction of any criminal offense under the laws of the United States, or of any state or territory, involving dishonesty or breach of trust;

- (b) giving false or misleading information or participating in any way in the giving of false or misleading information to the Department of Labor or any officer or employee thereof in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading. Facts or other matters contained in testimony, applications for registration, affidavits, declarations, reports, records kept in compliance with these rules and regulations, or any other document or statement, written or oral, are included in the term information;
 - (c) the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment or intimating that the authorized agent is able improperly to obtain special consideration or action from the board or officer or employee thereof;
 - (d) misappropriation of or failure to properly and promptly remit funds received from a client for the purpose of payment of taxes or other obligations due under the Labor Law;
 - (e) directly or indirectly attempting to influence, or offering or agreeing to attempt to influence the official action of any officer or employee of the Department of Labor by the use of threats, false accusations, duress or coercion;
 - (f) revocation or suspension of any admission to practice, license, registration, or enrollment by a duly constituted authority of any state, possession, territory, commonwealth, the District of Columbia, any Federal or State court of record, or any Federal or State agency, body or board; and
 - (g) such conduct at a hearing before the board or an administrative law judge which, if committed in a court of record, would be deemed contempt of court.
- (iii) Allegations of conduct by an authorized agent, which could be the basis for a revocation or suspension of the registration of such agent, may be filed, in writing, with the board, by any member of the board, any member of its staff, an administrative law judge, an employee of the Department of Labor, a claimant, or any other person having an interest in the matter. The allegation shall contain reference to the specific facts upon which it is based. Upon receipt, the board shall consider the allegations. In its discretion, it may conduct such investigation as it deems appropriate. If the board finds no basis for action, it shall inform the complainant, in writing, of that fact and the reason(s) therefore. If the board finds that there might be merit to the allegations, it shall schedule a hearing on due notice to all parties. The chairman of the board shall designate a member of the board or an administrative law judge, or any other person to hold such hearing. If the hearing is held before an administrative law judge or an individual who is not a member of the board, such designee shall conduct the hearing and submit a report to the board including his recommendation. The board shall then issue a decision with regard to the allegations. The decision shall include:
- (a) a statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law, or discretion presented on the record; and
 - (b) an order or revocation, suspension, or reprimand or an order of dismissal of the complaint. Such decision shall be deemed the decision of the board when signed by at least one member of the board and when duly mailed

and filed in the Department of Labor. A copy of said decision shall be mailed to all parties in these proceedings.

- (iv) In case the final order against the registrant is for a revocation of the registration, the registrant shall not thereafter be permitted to practice before the board or the administrative law judge section unless and until authorized to do so by the board as hereinafter provided. In case the final order against the registrant is for suspension, the registrant shall not thereafter be permitted to practice before the board or the administrative law judge section during the period of suspension. If a registration is revoked or suspended, the agent shall surrender his registration card to the board for cancellation, in the case of revocation, or for retention during the period of suspension.
- (v) Upon the issuance of a final order of revocation or suspension, the board shall revise its lists and the copies thereof and shall notify all locations where copies of the list may be kept. The board may give notice of its action to any appropriate courts or governmental departments or agencies by which the registrant had also been admitted to practice, licensed, registered or enrolled.
- (vi) The board may entertain an application for reinstatement from any person whose registration had been revoked after the expiration of five years following such revocation. Reinstatement may not be granted unless the board is satisfied that the applicant, thereafter, is not likely to conduct himself contrary to these rules and regulations, and that granting of such reinstatement would be in the public interest.

(d) All attorneys and registered representatives shall keep such records as the board may require. Such records shall include, but not be limited to, claimant's name, the case number(s), the benefits allowed, if any, the fee requested and the fee approved. All attorneys and registered representatives shall submit such other reports to the board as it may require. Each attorney and registered agent shall file a Notice of Appearance, in such form as designated by the board, with regard to each claimant whom he represents before the administrative law judge section or the board.

Section 460.6 Attorney and Registered Representative fee procedure.

(a) *Requirement for allowance of fees.* (1) In any proceeding under Article 18 of the Labor Law no fee for services rendered to a claimant in connection with any claim arising under this article shall be allowable unless such agent is registered with the appeal board or is an attorney.

(2) Each attorney and registered representative who represents a claimant on a fee basis in connection with a claim under Article 18 of the Labor Law shall execute a retainer agreement setting forth the terms of representation and the fee arrangement.

(3) When an attorney or registered representative represents a claimant in connection with any claim arising under Article 18 of the Labor Law, the board or administrative law judge shall ascertain whether such attorney or representative is appearing for the claimant on a fee basis and advise the claimant that fees approved by the board are payable by the claimant.

(4) Following the mailing of a final decision, the attorney or registered representative who seeks a fee for such representation shall provide the claimant with an itemized bill setting forth in detail the work actually performed on behalf of the claimant for which the attorney or registered representative seeks compensation. The itemized bill shall include:

- (i) the actual time spent in preparing for and providing representation;
- (ii) the number of hearings held in the matter;
- (iii) the costs and expenses incurred in representation as described in subdivision (c) (2) below;
- (iv) the hourly rate or method used to determine amount of fee requested which must be consistent with the fee arrangement specified in the retainer agreement; and

(v) the total amount of fee requested.

(b) *Applications for fee approvals.* Attorneys and registered representatives appearing on a fee basis must apply to the board for approval of such fees in accordance with procedures set forth below.

(1) Each application for a fee approval shall consist of the following:

(i) a copy of the fully executed retainer agreement required by paragraph 2 of subdivision a of this section;

(ii) a copy of the itemized bill required by paragraph 4 of subdivision a of this section;

(iii) a statement identifying additional factors to be considered by the board in reviewing such application; and

(iv) a signed certification, on a form provided by the board, attesting to the accuracy of the itemized bill; that benefits were allowed in a final decision in connection with said representation; and that copies of the itemized bill, retainer agreement and any statement of additional factors have been given to the claimant.

(c) *Factors to be considered by the board.* (1) Claims for services rendered to a claimant by an attorney or registered representative shall not be enforceable unless approved by the board and shall in no event exceed the total benefit allowed. In approving any such fee, the board shall consider the following factors:

(i) the total benefits allowed;

(ii) the time spent in providing representation;

(iii) the legal and factual complexities involved;

(iv) the extent to which the hourly rate or other basis for the fees billed is consistent with the terms of the retainer agreement;

(v) any other factors as the board may deem relevant.

(2) *Standards for approving costs and expenses.* The board shall approve costs and expenses as follows:

- (i) Reasonable travel time and costs;
- (ii) Actual costs of copy charges;
- (iii) Witness fees in accordance with section 2303 of the Civil Practice Law and Rules;
and
- (iv) Other reasonable costs or expenses.

(d) *Board action on applications.* The board shall accept for filing every application that complies with the requirements of subdivision b of this section. The application shall be reviewed for reasonableness of the requested amount in light of the factors set forth at subdivision c of this section. If the requested amount is denied, in whole or in part, the board shall notify the parties setting forth the amounts denied, and the reasons for denial, and shall approve the balance requested.

(1) Applications for up to \$600.00 in fees and expenses shall be expedited and may be decided by the executive director or designee on behalf of the board.

(2) Applications for more than \$600.00 in fees and expenses shall be decided by individual board members on behalf of the board.

(3) Any fee awarded to an attorney or registered representative shall not exceed the total benefit allowed.

(e) *Prohibited payments.* No attorney, registered representative or other agent shall solicit or receive any fees, expenses or other money from a claimant, directly or indirectly, for representation before the board unless and until such amount has been approved by the board pursuant to this section, except as follows:

(1) An attorney may solicit and receive an amount up to \$600.00 as a retainer to be immediately deposited in an Interest on Lawyers Account (IOLA). Such amount remains the property of the claimant until and unless the board has approved an amount as a fee; and

(2) An attorney or registered representative may obtain a pre-approved credit card authorization for an amount up to \$600.00 from a claimant but shall not process said authorization for payment until after the fee has been approved in accordance with the procedures described in this rule.

(f) *Restitution.* If an attorney, registered representative or other agent receives a payment for representation of a claimant in violation of these provisions, such claimant may submit an application to the board for an order of restitution setting forth the reasons for the request.

(1) The chair of the board shall then designate a member, or an administrative law judge, to hold a hearing, upon due notice to all parties including the corporate surety (see §460.5 of these regulations), to consider the matter.

(2) If the hearing is held before an administrative law judge, the judge shall conduct the hearing and submit a report to the board, including a recommendation on the matter.

(3) Thereafter, the board shall issue an order on the matter. Such order shall be deemed an order of the board when signed by any member, duly mailed and filed. A copy of the order shall be mailed to all parties in these proceedings, including the corporate surety.

(g) *Reconsideration.* An attorney, registered representative or claimant who is dissatisfied with the approved fee may file an application with the board for reconsideration of the fee. Such application must be made in writing within 15 days of the mailing of the notice of the fee approval with a proof of service of the application on the other party. As soon as practicable after receipt of the application for reconsideration, the board shall issue a decision setting forth the fee awarded and the reason(s) for the decision. In the board's discretion, a hearing may be held on the issue of reconsideration of the fee.

(h) *Violations.* If the attorney or registered representative violates this section or fails to make restitution as ordered, the board may revoke the privilege of the attorney or registered representative from practicing before the board after due notice and an opportunity to be heard in accordance with the procedures described in paragraphs one through three of subdivision (f) of this section.

Section 460.7. Record on appeal to the court.

The record on appeal shall consist of:

- (a) the transcripts of all hearings held in connection with the case;
- (b) documents and exhibits properly accepted into the record pursuant to section 461.4, 463.2 or 463.3 of this Title; and
- (c) the appropriate documents which establish or indicate jurisdiction in the matter.

In the event of a dispute as to the contents of a record on appeal to the Appellate Division of the Supreme Court, Third Department, any party may cause the matter to be set down for a board hearing by the service of a notice of settlement of the record upon the other party or parties. The board hearing shall be held not less than four days after service of such notice. Such hearing should be scheduled before the board member who signed the board's decision, and oral argument may be allowed in the discretion of the board member. The successful party to an appeal to the court shall transmit the remittitur to the board for action. The board may conduct such further proceedings, within the authority of the remittitur, as is deemed appropriate and shall enter and file an order on each remittitur.

Section 460.8. Rules and regulations.

- (a) Any rule or regulation established by the board governing practice and procedure before administrative law judges and the board may be added to, amended, modified, rescinded or superseded by the board at any time.
- (b) An addition, amendment, modification, rescission or supersedure of any of these rules and regulations may be made by the board at any session, provided that all members are present, or written notice of the proposed addition, amendment, modification, rescission or supersedure was given to all members or was included in the notice of the meeting.
- (c) Notice of the adoption of an addition, amendment, modification, rescission or supersedure of any of these rules and regulations shall be given to the commissioner.
- (d) These rules and regulations shall be construed liberally to effectuate the purposes and provisions of the law.
- (e) These rules and regulations and any addition, amendment, modification, rescission or supersedure thereof shall be filed in the offices of the Department of State and of the department and shall be available to the public at the offices of the board and administrative law judge section.

Section 461.1. Request for hearing under subdivision 1 of section 620 (claimant case).

- (a) A claimant who is dissatisfied with an initial determination, or any other party affected by such determination, may request a hearing before an administrative law judge, pursuant to subdivision 1 of section 620 of the law, within 30 days after the mailing or personal delivery of such initial determination. A request for a hearing shall be deemed to be timely filed if such request is postmarked within 30 days of the appealing party's receipt of such determination, or if there is other proof of filing of same with the commissioner, such as a fax acknowledgment, a certificate of mailing, a stamped receipt by an agent of the commissioner, or an affidavit of personal service on the commissioner or her agent by a disinterested party. Absent proof to the contrary, an initial determination of the commissioner shall be deemed to have been mailed on the date recited on the initial determination and received by a party to whom it is addressed no later than five business days after the date on which it is mailed. The request for such hearing shall be filed at the local office. The request should be in writing stating the reasons therefore.
- (b) If an affected party, other than a claimant, requests a hearing on an initial determination which has held the claimant eligible to receive benefits, such party must submit a written statement of the factual basis or specific events which such party contends are the grounds for denying benefits to the claimant. This statement of the factual incidents which are in issue should be of sufficient particularity as to inform the claimant of the facts to which the claimant must be prepared to respond at a hearing. Prior to the hearing, a copy of this written statement must be sent to the claimant.

Section 461.2. Application for hearing by employer under subdivision 2 of section 620 (employer case).

Any employer who claims to be aggrieved by any determination, rule or order of the commissioner under any provision of the law, may apply to the commissioner for a hearing before an administrative law judge, pursuant to subdivision 2 of section 620 of the law, within 30 days after the mailing or personal delivery of notice of such determination, rule or order. A request for a hearing shall be deemed to be timely filed if such request is postmarked within 30 days of the appealing party's receipt of such determination, or if there is other proof of filing of same with the commissioner, such as a fax acknowledgment, a certificate of mailing, a stamped receipt by an agent of the commissioner, or an affidavit of personal service on the commissioner or her agent by a disinterested party. Absent proof to the contrary, an initial determination of the commissioner shall be deemed to have been mailed on the date recited on the initial determination and received by a party to whom it is addressed no later than five business days after the date on which it is mailed. The application for such hearing should be in writing stating the reasons therefore.

Section 461.3. Notice of hearing.

- (a) A hearing shall be scheduled promptly. The notice of hearing shall state the date, time, place and purpose of the hearing and shall be sent to the party requesting or applying for the hearing, to all other parties affected and to the commissioner at least five days before the date of hearing.
- (b) In the event that an attorney at law, or a representative, appears at an administrative law judge hearing on behalf of a party or files with the administrative law judge section written notice that he appears for any person who is involved as a party in a case or proceeding pending before an administrative law judge, copies of all subsequent written communications or notices sent to such party therein (other than subpoenas) shall be sent, at the same time, to such attorney at law, or representative.

Section 461.4. Conduct of hearing.

- (a) The administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. The administrative law judge shall conduct the hearing in such order and manner and with such methods of proof and interrogation as the judge deems best suited to ascertain the substantial rights of the parties. The administrative law judge may examine the parties and their witnesses. All parties shall be accorded full opportunity to present such testimony and to introduce documentary or other evidence as may be pertinent. At the commencement of the hearing, the administrative law judge shall identify all persons present and shall outline briefly the issues involved. No administrative law judge shall participate in any hearing in which the judge has an interest. Challenges as to the interest of an administrative law judge shall be decided by a chief administrative law judge or senior administrative law judge.
- (b) All testimony shall be under oath or by affirmation and a verbatim record of the proceedings shall be made. In lieu of an appearance, the commissioner may submit written statements, records or other documents prior to or at the hearing subject to the provisions of subdivision (h) of this section. Such statements, records or documents shall not be the basis for the decision of the administrative law judge unless they have been received into the record pursuant to the provisions of subdivision (j) of this section. Upon consent of all parties, evidence supplemental to that introduced at the administrative law judge hearing may be made part of the record.
- (c) Any party may appear in person or be represented by an attorney or agent. The administrative law judge may require such appearances as deemed to be necessary. All parties and their attorney or agent shall have the right to call, examine and cross-examine parties and witnesses. They have the right to offer relevant documents, records and other evidence which

the administrative law judge may only accept into the record pursuant to the provisions of subdivision (j) of this section. Parties, or their attorney or agent shall have the right to request that subpoenas be issued to compel the appearance of relevant witnesses or the production of relevant documents, records or other evidence. They have the right to request an adjournment of the hearing for good cause shown. Translation services shall be provided to parties in accordance with established legal requirements. During the conduct of the hearing, in accordance with established legal requirements, there shall be a translation of the entire proceeding and of all relevant parts of documents introduced into evidence. At the end of the hearing, each party has the right to make a relevant statement to explain or clarify relevant points which may not have been adequately developed during the hearing.

- (d) In the interest of the speedy administration of justice and without prejudice to the substantial rights of any party and for good cause shown and in the discretion of the administrative law judge, any issue in a case or any other issue related thereto may be heard and decided, though not specifically indicated in the notice of hearing. The administrative law judge must set forth on the record the reason for such action and must inform the parties of the intention to consider a new basis for denying or granting benefits, or to consider an issue not specifically indicated in the notice of hearing. The judge must inform the parties of their rights in this regard and must accord them an opportunity to request an adjournment to adequately prepare for such new basis or issue.
- (e) Whenever a case is assigned to an administrative law judge the hearing or any adjourned hearing thereon shall continue before the same administrative law judge until a final disposition thereof, unless the case is transferred pursuant to section 461.7 of this Part.
- (f) The chief administrative law judge, a senior administrative law judge or the administrative law judge may sever a case or may consolidate two or more cases where the interests of justice will be served and where there will be no prejudice to the substantial rights of any party.
- (g) The parties, or their duly authorized representatives, may stipulate that a specified case involving an issue affecting in common certain claimants be designated as a test case and that the parties be bound by the administrative law judge's decision in such case, subject to the right of appeal. The stipulation shall be filed with the administrative law judge.
- (h) Information from the department records and the case file shall be made available by the commissioner and by the administrative law judge to parties to the hearing or their representatives for the necessary preparation and presentation of the case. All parties shall have the right to call, examine and cross-examine other parties and witnesses with regard to such information.
- (i) During the conduct of a hearing, any party may request that the hearing or parts thereof be closed to the public or request that documents or parts thereof be marked as confidential. When a request for closure or confidentiality is made, all present at the hearing shall be heard on the application. Upon a showing of good cause, the administrative law judge may grant such closure or confidentiality. If granted, the record and case file shall be marked to show that there is an order of closure or confidentiality, and that order shall continue in effect unless otherwise determined as a result of judicial review.
- (j) In reaching a decision the administrative law judge shall consider and rely on only the evidence introduced at the hearing and those facts and law of which official notice has been taken. Official notice may be taken only in situations in which judicial notice might be taken in a court proceeding and in the same manner. The administrative law judge shall not consider, rely on, or refer to any document which has not been: (1) identified, with stated opportunity for any party to examine the document and comment, on the record; and (2) accepted for the record.

Section 461.5. Investigation.

Whenever an investigation, inquiry, payroll audit or other examination is necessary in deciding a case, the chief administrative law judge, a senior administrative law judge or the administrative law judge, upon notice to all parties, may request such investigation, inquiry, payroll audit or other examination to be made. A hearing may be adjourned pending receipt of the report of such investigation, inquiry, audit or examination. The provisions of section 461.4(h) of this Part shall apply to such report.

Section 461.6. Adjournment of hearing.

- (a) A party requesting an adjournment must establish good cause for the request. The administrative law judge may, on the judge's own motion and for good cause, adjourn the hearing. Whenever a judge determines that a hearing is to be adjourned, the judge shall set forth on the record what constitutes the reason and the good cause for the adjournment. When adjournments are granted, the case shall be rescheduled on an expedited basis.
- (b) The notice of adjourned hearing shall be in conformity with the provisions of section 461.3 of this Part. Upon an adjournment for failure of one or more parties to appear, the notice of adjourned hearing shall state that upon default of such party at the adjourned hearing, the case may be closed and a decision rendered as the circumstances warrant.

Section 461.7. Transfer of case.

- (a) In the absence, disability or disqualification of an administrative law judge or for other good cause, a case assigned to an administrative law judge may be transferred to another administrative law judge designated by the chief administrative law judge or a senior administrative law judge.
- (b) By order of the chief administrative law judge, a senior administrative law judge or the administrative law judge, a case may be transferred from one designated place of hearing to another for the convenience of parties or witnesses and as the interests of justice may require.
- (c)
 - (1) When all the parties and their witnesses are unable to attend a hearing at the same time and place, the chief administrative law judge, a senior administrative law judge, or the administrative law judge, may direct that the testimony of the parties and their witnesses be taken separately by the same or a different administrative law judge at convenient places within the State upon due notice to all parties. Each party shall have the right to inspect the file, to rebut any evidence given, and to cross-examine other parties and witnesses, in person if practicable, or by written interrogatories. When split hearings are held, the first hearing shall be recorded on a cassette, and the administrative law judge shall play the cassette recording at the second hearing. Such hearing shall be conducted in a manner which ascertains the substantial rights of the parties and is in conformity with the other provisions of this Part. The decision in a case in which separate hearings are so held shall be rendered by any administrative law judge who heard the case and shall be based upon the complete record.
 - (2) Hearings may also be held by means of telephone conference calls when it is practicable and in the interest of justice. Such hearing shall be conducted in a manner which ascertains the substantial rights of the parties and is in conformity with the other provisions of this Part.

Section 461.8. Reopening.

On application duly made, an administrative law judge may reopen a case where a decision was rendered upon or following the default of a party affected thereby or following the withdrawal of a request for hearing by a party. Such application shall be made to the chief administrative law judge or a senior administrative law judge who thereupon shall designate an administrative law judge to act upon the application. If such party shows good cause for his default or for his withdrawal of his request for a hearing, he shall be entitled to a hearing on the merits and the case shall be heard at the same time the application is acted upon.

Section 462.1. Rendition, content and revision.

- (a) The administrative law judge shall render his decision in writing within five days after the hearing is concluded. The decision shall contain a statement of the issues, the findings of fact, the conclusions and the reasons therefore.
- (b) On his own motion or on application duly made, the administrative law judge may revise the decision for the purpose of correcting clerical, arithmetical or typographical errors. If the administrative law judge is absent, disabled, disqualified or no longer serving, the chief administrative law judge or a senior administrative law judge may designate an administrative law judge to consider the application and if granted, to make the necessary revision.

Section 462.2. Notice of right of appeal.

The decision shall be accompanied by a notice of the right of appeal therefrom and the method by which such appeal may be taken.

Section 462.3. Transmittal and filing.

Copies of all decisions and of all revisions thereof shall be sent promptly to the commissioner and to all other parties affected thereby and shall be filed promptly in the department at a place designated by the commissioner.

Section 463.1. Notice of appeal.

- (a) Generally. In any notice of appeal, the party appealing should state the reasons therefore.
- (b) By claimant. A claimant may appeal, pursuant to section 621, subdivision 1 of the law, by filing a notice of appeal at the designated local office, or at any office of the administrative law judge section, or at the office of the appeal board, within 20 days after the mailing or personal delivery of the administrative law judge decision.
- (c) By employer in a claimant case. In a claimant case, under section 621, subdivision 1 of the law, the employer may appeal within 20 days after the mailing or personal delivery of the administrative law judge decision, provided the employer appeared at the administrative law judge hearing, by filing a notice of appeal at the designated local office, or at any office of the administrative law judge section, or at the office of the appeal board.
- (d) By employer in an employer case. An employer may appeal from an administrative law judge decision on a contested determination, rule or order of the commissioner, pursuant to section 621, subdivision 2 of the law, within 20 days after the mailing or personal delivery of the administrative law judge decision, provided the employer appeared at the administrative law judge hearing, by filing a notice of appeal with the commissioner at the designated office, or at any office of the administrative law judge section, or at the office of the appeal board.
- (e) By commissioner. The commissioner may appeal from the administrative law judge decision in any claimant or employer case, pursuant to section 621, subdivisions 1 and 2 of the law, by filing a notice of appeal, in any of the offices designated in subdivisions (b), (c) and (d) of this

section, within 20 days of the mailing or personal delivery of such decision, whether or not the commissioner appeared or was represented at the administrative law judge hearing.

- (f) Notice of receipt of appeal. The board shall send notice of receipt of appeal to the commissioner, the claimant, the employer and their duly designated representatives. Each notice of receipt of appeal to the board shall include the following statement and the parties shall be granted the following rights:
- (1) All communications should cite the above appeal number.
 - (2) The appeal board usually decides appeals without a new hearing. It relies on evidence taken at the administrative law judge hearing and the written arguments of the parties on appeal. The board will not consider any evidence not introduced at the administrative law judge hearing unless all parties consent or it is made part of the record at a further hearing. In its discretion the board may hold an additional hearing.
 - (3) Each of the parties may submit, in writing, requests to inspect the minutes of the hearing, or statements, documents or briefs to be considered in connection with this appeal. Two copies of such written requests, statements, documents or briefs must be mailed, within seven days from the date of this notice, addressed to the Unemployment Insurance Appeal Board, P.O. Box 15126, Albany, NY, 12212-5126. An attorney-at-law, or representative, must mail a copy of the statement, document or brief to each of the other parties, and their attorneys and representatives, and certify to the board that this has been done. Each party may submit such statement, document or brief only once. Subsequent statements, documents or briefs will be returned to the party.
 - (4) Upon written request, arrangements may be made to inspect the minutes of the administrative law judge hearing or to borrow the minutes for the purpose of making a copy thereof at the party's expense. The request to make such arrangements must be made within seven days from the date of the notice of receipt of appeal. In such event, the time to submit written statements, documents or briefs shall be 20 days from the date when that party is sent notice that the transcript is available for inspection or copying.
 - (5) If another party submits statements, documents or briefs on this appeal, you will receive copies and will have 12 days to reply in writing. The 12 days to reply is measured from the date when the copies were mailed to you. A party may submit a reply at only one time. Subsequent replies will be returned to the party.
 - (6) Any party may make a written request for an extension of the above time limits to submit a statement, document, brief or reply. The request must give the specific reasons why the time limit cannot be met. Extensions will only be granted if the request establishes good cause to excuse the delay. Unless an extension has been granted, any submission mailed after the times specified here shall be returned to the party.
 - (7) Parties may be represented by lawyers or other persons of their choice on appeal before the appeal board. For representing a claimant, a lawyer or agent registered by the appeal board may charge a fee. Before the claimant pays the representative any fee, the fee must be approved by the appeal board. No other person may charge a fee for representing a claimant. If you do not have enough money to hire a lawyer or registered agent, you may be able to get one free through your local Legal Aid Society or Legal Services Program.
 - (8) If you have any questions, contact the board at the above address.

Section 463.2. Conduct of appeal.

- (a) The board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the appeal and any hearing thereon in such order and manner and with such methods of proof and interrogation as it deems best suited to ascertain the substantial rights of the parties.
- (b) The board may decide any case appealed to it on the basis of the record and of evidence previously submitted in such case or, in its discretion, may hear argument or hold a further hearing. No member of the board shall participate in a hearing or decision of any appeal in which the member has an interest. Challenges as to the interest of any member shall be decided by the other members of the board.
- (c) In the interest of the speedy administration of justice and without prejudice to the substantial rights of any party and for good cause shown and in the discretion of the board, any issue in a case or any other issue related thereto may be heard and decided though not specifically indicated in the notice of appeal or notice of hearing. However, the board must set forth on the record its reason for such action. The board must inform the parties of its intention to consider a new basis for denying or granting benefits, or to consider an issue not specifically indicated in the notice of hearing. The board must inform the parties of their rights in this regard and must accord them an opportunity to request an adjournment to adequately prepare for such new basis or issue.
- (d) The board may sever an appeal or may consolidate two or more appeals where the interests of justice will be served and where there will be no prejudice to the substantial rights of any party.
- (e) The board shall transmit copies of papers submitted to it by parties in connection with appeals to the other parties, where it appears to the board that such papers have not already been served on the other parties. Any such party may respond thereto in writing within 12 days. Extensions of this time limit are subject to the provisions of section 463.1 of this Part. Copies of any response received will also be provided to opposing parties by the board, where it appears to the board that the papers have not been served on the other parties. Evidence supplemental to that introduced at the board or administrative law judge hearing shall not be considered or relied upon by the board except upon the consent of all parties to the appeal.
- (f) At any stage of an appeal the board may remand the case for such purpose as it may direct to an administrative law judge designated by the chief administrative law judge. Such a remanded case shall be placed promptly upon the administrative law judge's calendar for hearing.
- (g) Information from the department records and the appeal file shall be made available by the commissioner and by the board to parties on the appeal or their representatives for the necessary preparation or presentation of the appeal.
- (h) In the interest of justice and without prejudice to the substantial rights of any party, and upon good cause shown, the board, on its own motion or on application duly made to it, in its discretion, may excuse a default of a party at any stage of a case or appeal. A party who shows good cause for the default shall be entitled to consideration of the case or appeal as if no default had occurred.

Section 463.3. Board hearing.

- (a) Any party on the appeal may make application for a hearing before the board, setting forth the reasons therefore.
- (b) At any hearing granted or directed by the board, the board may limit the parties to oral arguments or, in its discretion, may permit the calling of witnesses or the introduction of

further evidence. Any party on the appeal may appear in person or be represented by an attorney or agent to present argument or further evidence. On its own motion, the board may require such appearances as it deems necessary. Within the limits set by the board when it determines to permit the calling of witnesses or the introduction of further evidence, all parties and their attorney or agent shall have the right to call, examine and cross-examine parties and witnesses, and shall have the right to offer relevant documents, records and other evidence which the board may only accept into the record pursuant to the provisions of section 463.2 of this Title or subdivision (c) of this section. Parties, or their attorney or agent, shall have the right, within the purposes of the hearing set by the board, to request that subpoenas be issued to compel the appearance of relevant witnesses or the production of relevant documents, records or other evidence. They have the right to request an adjournment of the hearing for good cause shown. Translation services shall be provided to parties in accordance with established legal requirements. During the conduct of the hearing, in accordance with established legal requirements, there shall be a translation of the entire proceeding and of all relevant parts of documents introduced into evidence. At the end of the hearing, and within the limits set by the board in determining the purpose of the hearing, each party has the right to make a relevant statement to explain or clarify relevant points which may not have been adequately developed during the hearing.

- (c) The board shall consider and rely on only the evidence introduced at some hearing and those facts and law of which official notice has been taken. Official notice may be taken only in situations in which judicial notice might be taken in a court proceeding and in the same manner. The board shall not consider, rely on, or refer to any document which has not been:
 - (1) identified, with stated opportunity for any party to examine the document and comment, on the record; and
 - (2) accepted for the record during some hearing before the board or an administrative law judge.
- (d) All testimony shall be under oath or by affirmation and a verbatim record of the proceedings shall be made. The board may accept written statements, records or other documents submitted by parties or their representatives in lieu of testimony.
- (e) Under the direction of the board member presiding, a designated member of the board staff may assist him in the conduct of a hearing.
- (f) The hearing shall be held at the office of the board at New York City or elsewhere in the State as the board may designate. In the discretion of the board, hearings may be held by means of telephone conference calls.
- (g) A party requesting an adjournment must establish good cause for the request. The board may, on its own motion and for good cause, adjourn the hearing. Whenever the board determines that a hearing is to be adjourned, the board must set forth on the record what constitutes the reason and the good cause for the adjournment.
- (h) During the conduct of a hearing before the board, any party may request that the hearing or parts thereof be closed to the public or request that documents or parts thereof be marked as confidential. When a request for closure or confidentiality is made, all present at the hearing shall be heard on the application. Upon a showing of good cause, the board may grant such closure or confidentiality. If granted, the record and case file shall be marked to show that there is an order of closure or confidentiality, and that order shall continue in effect unless otherwise determined as a result of judicial review.

Section 463.4. Notice of hearing.

- (a) The notice of hearing shall state the date, time, place and purpose of the hearing and shall be sent to the party appealing, to all other parties affected and to the commissioner at least five days before the date of hearing.
- (b) In the event that an attorney-at-law, or a representative-at-law files with the board a notice of appeal on behalf of any party, or appears at a board hearing on behalf of a party, or submits a brief or memorandum or statement on behalf of any party or files with the board written notice that he appears for any person who is involved as a party in a case or proceeding pending before the board, copies of all subsequent written communications or notices sent to such party therein (other than subpoenas) shall be sent, at the same time, to such attorney-at-law, or representative.

Section 463.5. Investigation.

Whenever an investigation, inquiry, payroll audit or other examination is necessary in deciding a case, the board, upon notice to all parties, may request such investigation, inquiry, payroll audit or other examination to be made and thereupon shall direct that a hearing be held. A hearing may be adjourned pending receipt of the report of such investigation, inquiry, audit or examination. The provisions of section 463.2(g) of this Part shall apply to such report. All parties shall have the right to call, examine and cross-examine other parties and witnesses with regard to such report.

Section 463.6. Reopening.

- (a) On its own motion or on application duly made to it, the board, in its discretion, may reopen a decision.
- (b) On its own motion or on application duly made to it, the board, pursuant to section 534 of the law, may modify or rescind its order, decision or determination. If an application for such reopening is not received by the board or postmarked within 30 days after such order, decision or determination, the application must contain an explanation for the delay. If good cause for the delay has not been established by the explanation, the board may, without further notice to the parties, deny the application by an order which shall be sent to all parties. If an application is not denied by an order of the board for this reason, notice of reopening or notice of receipt of the application to reopen shall be sent to all parties and their duly designated representatives. The notice shall advise the parties of their basic rights while the reopening is pending. The parties shall have the same rights as those set forth in sections 463.1 and 463.2 of this Part with regard to an appeal. The board may, in its discretion, schedule a hearing for argument or to receive further evidence. The board may adhere to, modify or rescind its prior decision or may deny the application to reopen.
- (c) On its own motion or on application duly made to it, the board, pursuant to subdivision 3 of section 620 of the law, may modify or rescind an administrative law judge decision, where no appeal was duly taken. If an application for such a reopening is not received by the board or postmarked within 25 days after the administrative law judge decision, the application must contain an explanation for the delay. If good cause for the delay has not been established by the explanation, the board may hold a hearing, upon due notice to all parties, regarding the timeliness of the request for the board to reconsider the administrative law judge decision. The board may, without further notice to the parties, dismiss the appeal or deny the application by an order which shall be sent to all parties. If an application is not thus dismissed or denied, notice of reopening or notice of receipt of the application to reopen shall be sent to all parties and their duly designated representatives. The notice shall advise the parties of their basic rights while the reopening is pending. The parties shall have the same rights as those set forth in sections 463.1 and 463.2 of this Part with regard to an appeal. The board may, in its discretion, schedule a hearing for argument or to receive further evidence. The board may affirm, modify or reverse the administrative law judge decision or may deny the application to reopen.

- (d) Whenever the board reopens a decision pursuant to this section, it shall state the reasons therefore in its decision.

Section 464.1. Rendition, content and revision.

- (a) The board shall render its decision in writing promptly. Where the decision is not unanimous, the majority shall control. The board may affirm or reverse, wholly or in part, or may modify the appealed decision or may make such order, decision or determination as may be necessary. The decision shall contain a statement of the issues, the findings of fact, the conclusions and the reasons therefore.
- (b) On its own motion or on application duly made to it, the board may revise or resettle its order, decision or determination as it deems necessary.
- (c) The decision of the board shall be accompanied by a notice of the right to appeal therefrom to the Appellate Division of the Supreme Court, Third Department, pursuant to section 624 of the law.

Section 464.2. Transmittal and filing.

Copies of all decisions and of all revisions thereof shall be sent promptly to all parties. Copies of the board decisions shall be filed in the department at a place designated by the commissioner and copies shall be kept on file at the board offices. Such decisions shall be open to the public for inspection, but without revealing the names or other identifying information of any of the parties or witnesses involved.

Section 465.1. Purpose and scope.

There is a strong public policy in this State for public access to judicial and administrative proceedings. The records in the case files of the board and of its administrative law judge sections shall be made available for inspection in accordance with the provisions of this Part.

Section 465.2. Access officer.

- (a) The executive secretary is designated as the records access officer for all records. The records access officer shall maintain an office for access at the principal place of business of the board, and has discretionary authority to establish such other offices or such other places or locations as deemed appropriate to provide access to records for inspection.
- (b) The records access officer is responsible for coordinating the response to requests for access to records and for assuring that agency personnel:
 - (1) maintain an up-to-date subject matter list;
 - (2) assist the requester in identifying requested records, if necessary;
 - (3) upon locating the records, take one of the following actions:
 - (i) make records available for inspection; or
 - (ii) deny access to the records in whole or in part and explain in writing the reasons therefore;
 - (4) upon request for copies of records:
 - (i) make a copy available upon payment or offer to pay established fees, if any; or

- (ii) permit the requester to copy those records, provided that this does not jeopardize the preservation and safekeeping of the records;
- (5) upon request, certify that a transcript or photocopy is a true copy of a record in the files of the board; and
- (6) upon failure to locate records, certify that:
 - (i) the board is not the custodian for such records; or
 - (ii) the records of which the board is a custodian cannot be found after diligent search.

Section 465.3. Subject matter list.

- (a) A reasonably detailed current list, by subject matter, of all records in the possession of the board shall be maintained, whether or not available for public inspection and copying pursuant to the Freedom of Information Law.
- (b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.
- (c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list.

Section 465.4. Fees.

- (a) There shall be no fee charged for:
 - (1) inspection of records;
 - (2) search for record; or
 - (3) any certification pursuant to this Part.
- (b) A fee for copies of records may be charged provided that:
 - (1) the fee for photocopies shall be 25 cents per page for copies not exceeding 8 1/2 x 14 inches; and
 - (2) the fee for reproducing all other items shall not exceed the actual reproduction cost, which shall be the average unit cost for copying an item, excluding fixed costs such as operator salaries.

All requests for photocopies or for reproduction shall be made to the records access officer. Payment for photocopies or for reproduction shall be by check or money order, payable to the Department of Labor.

- (c) Nothing herein shall prohibit private arrangements, between a hearing reporter and a requester, for the reporter to prepare a certified transcript of the proceedings, provided that:
 - (1) the transcript does not violate any closure or confidentiality that has been granted; and
 - (2) a certified copy of the transcript is thereafter included in the case file.

- (d) The board shall supply a copy of the hearing transcript to any claimant who requires translation assistance in order to prepare the appeal to the board from a decision by the administrative law judge, provided the claimant has signed a certification that the person is in need of translation assistance and has paid a fee of \$1. Payment for such copy shall be by check or money order payable to the Department of Labor.

Section 465.5. Hours.

Requests for access to case files shall be accepted and files produced between 9 a.m. and 4 p.m. on regular business days on which the Department of Labor offices are open.

Section 465.6. Access.

- (a) The records shall be available to the public, subject to the limitations set forth in this Part. Requests for access to records shall be in writing.
- (b) The records access officer has the discretion to designate the office of the administrative assistant or any other offices as the appropriate place at which requests for access to records may be made.
- (c) The request for access to records should be sufficiently detailed to identify the record. Where possible, the requester should supply the case number assigned to the file which contains the record.
- (d) The records access officer shall respond to a request for access to a record within five business days after receipt of the request. If, for any reason, more than five business days are required to respond to such a request, receipt of the request shall be acknowledged within five business days. The acknowledgement shall state an estimate of the date when a reply will be made. When the requested record is available for access, the records access officer shall so advise the requester.
- (e) Other than hearing transcripts, no part of a case file may be removed by the requester from the location where access is granted unless the records access officer has determined that such removal does not jeopardize the preservation and safekeeping of the record. Hearing transcripts may be removed subject to such conditions as the records access officer may, from time to time, establish.
- (f) When a record is made available for access, the requester shall be required to sign an acknowledgement that access was granted within any closure or confidentiality rulings which have been established.

Section 465.7. Denial of access.

- (a) The denial of access to records shall be in writing, setting forth the reason for such denial and advising the requester of the right of appeal to the chairman of the board.
- (b) If no response is made to a request for records within five business days after its receipt, the request shall be deemed to have been denied. If access to records is neither granted nor denied within 10 business days after the date of acknowledgement of receipt of a request, this may be construed as a denial of access that may be appealed.
- (c) Any person denied access to a record may appeal within 30 days of a denial. Such appeals shall be decided by the chairman of the board or such other members of the board as may, from time to time, be designated.
- (d) The time for deciding an appeal from denial of access shall commence upon receipt of a written appeal which shall include:

- (1) the date of the appeal;
- (2) the date of the request for the record;
- (3) the case number last assigned to the file which contains the record;
- (4) a statement of whether the denial of access was in writing or by failure to provide the record promptly, as required by this Part; and
- (5) the name and address of the requester.

(e) The chairman of the board or a designee shall transmit to the Committee on Open Government, Department of State, Albany, NY, copies of all appeals upon receipt thereof.

(f) The requester shall be informed of the decision, in writing, within 14 business days of the receipt of a written appeal. The decision, whether made by the chairman of the board or by a member of the board who has been designated for such purpose, shall be deemed to be the decision of the board when it is duly mailed to the requester and to the Committee on Open Government.

(g) A final denial of access to a record, as provided in subdivision (f) of this section, shall be subject to court review, as provided in article 78 of the Civil Practice Law and Rules.

Section 465.8. Public notice.

A notice shall be posted at the public reception area of the board and of each of the principal offices of its administrative law judge sections. The notice shall contain:

- (a) the job title, business address and business telephone number of the records access officer; and
- (b) the principal location where records may be seen.

Section 465.9. Severability.

If any provision of this Part or of the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons and circumstances.