STATE OF CALIFORNIA - GOVERNOR ARNOLD SCHWARZENEGGER
LABOR AND WORKFORCE DEVELOPMENT AGENCY
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
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MEMORANDUM

October 6, 2009

TO: Board Members

FROM: Kim Hickox, Staff Counsel

RE: Attached Regulations

Following is a summary of the purpose of the proposed change(s) to the regulations as well as an explanation of changes made to the regulations after considering written and oral comments received in August and at the public hearings held on September 1 and September 8, 2009.

Section 5300 Nepotism

Purpose of Change to Regulation
This is a new regulation. It was proposed to be added to our regulations because an audit done by the Bureau of State Audits (BSA) in 2008 found that our existing policy statement was an underground regulation. To rectify this issue, the BSA audit recommended that the Board adopt this policy as a regulation using the formal rulemaking process.
Change(s) since Public Hearings
None

Section 5400 Employment of Board Member

Purpose of Change to Regulation
This is a new regulation. It was proposed to be added to our regulations because an audit done by the BSA in 2008 found that our existing policy statement was an underground regulation. To rectify this issue, the BSA audit recommended that the Board adopt this policy as a regulation using the formal rulemaking process.
Change(s) since Public Hearings
None

Section 5002 Applicability of Administrative Procedure Act

Purpose of Change to Regulation
The purpose of the change to this regulation is to correct an oversight. Section 16 of the Administrative Procedure Act (APA), the part of the APA that makes the Judicial Code of Ethics applicable to administrative law judges, is applicable to the CUIAB. The change to this regulation makes it clear that this section of the APA is applicable to CUIAB.
Change(s) since Public Hearings
None

Section 5010 Case File, Audiovisual Record and Transcript

Purpose of Change to Regulation
The purpose of the change to this regulation is to correct an oversight and make our regulations and practice consistent with federal law which requires that we retain the case files for 36 months.
Change(s) since Public Hearings
None

Section 5052 Petition Procedures

Purpose of Change to Regulation
The purpose of the change to this regulation is to bring it into compliance with Unemployment Insurance Code (UIC) section 1222. Pursuant to the change to this regulation, in a tax case in which a petition was untimely filed, a taxpayer can show that an assessment was not received until a particular date, rather than the date the Employment Development Department says it was sent. The change allows the CUIAB to consistently apply the statute in a way that is favorable to the taxpayer.
Change(s) since Public Hearings
None

Section 5055 Electronic Hearing

Purpose of Change to Regulation
The purpose of the changes to this regulation is to make it consistent with ABx3 29 which amended UIC section 1951 to mandate that we permit a party or representative to participate in a telephone hearing upon the party's or representative's request and showing of good cause.
Change(s) since Public Hearings
Deleted consideration (v) availability (or non-availability) of hearing location or facility.

Section 5062 Conduct of Hearing and Evidence

Purpose of Change to Regulation
The purpose of the change to this regulation is to make it conform to the U.S. Department of Labor's quality review standards.
Change(s) since Public Hearings
None

Section 5102 New or Additional Evidence

Purpose of Change to Regulation
The purpose of the changes to this regulation is to speed up the board appeals process.
Change(s) since Public Hearings
None

Section 5105 Written Arguments and Briefs

Purpose of Change to Regulation
The purpose of the changes to this regulation is to speed up the board appeals process.
Change(s) since Public Hearings
None

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Addition to Title 22, California Code of Regulations

Chapter 5 California Unemployment Insurance Appeals Board -- Nepotism

Text of Proposed Regulation

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

§5300. Nepotism

The California Unemployment Insurance Appeals Board (CUIAB) may not discriminate in its employment and personnel actions on the basis of marital or familial status. Nothwithstanding this policy, the CUIAB retains the right to refuse to appoint a person to a position within the agency, or a particular subdivision thereof, wherein his/her relationship to another employee has the potential for creating adverse impact on supervision, security or morale, or involves a potential conflict of interest. The Chair of the CUIAB, or his or her authorized representative, shall have the authority and responsibility for determining if such a potential for adverse impact exists.

This policy applies to individuals who are related by blood, marriage, domestic partnership, or adoption, and includes the following relationships: spouse, domestic partner, child, step-child, parent, stepparent, grandparent, grandchild, brother, sister, half-brother, half-sister, aunt, uncle, niece, nephew, parent-in-law, daughter-in-law, son-in-law, brother-in-law and sister-in-law. In implementing this policy, it is lawful to ask an applicant to state whether he or she has a spouse or relative as defined in this policy who is presently employed by the CUIAB, but such information may not be used as a basis for an employment decision except as stated herein.

When two existing employees marry or register as domestic partners, and a determination has been made that the potential for creating adverse impact as described above exists, the CUIAB shall make

reasonable efforts to minimize problems of supervision, security or morale through reassignment of duties, relocation or transfer.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Addition to Title 22, California Code of Regulations

Chapter 6 California Unemployment Insurance Appeals Board – Employment of Board Member

Text of Proposed Regulation

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

§5400. Employment Of Board Member

It is the policy of this Board that no appointed member shall be eligible to serve in any civil service position at the California Unemployment Insurance Appeals Board for one year from the day the member last served as an appointed member.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5002

GENERAL

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5002 AS SHOWN BELOW:

§ 5002. Applicability of Administrative Procedure Act

The applicability to the agency of the administrative adjudication provisions of the Administrative Procedure Act, which are set forth in Chapters 4.5 and 5 of Part 1 of Division 3 of Title 2 of the Government Code, is as follows:

(a) Articles 1, 2, 3, 4, 6, 7, ~~and~~ 8, and 16 of Chapter 4.5 are applicable.

(b) Article 9 of Chapter 4.5 is applicable, except Government Code section 11440.50, which is not.

(c) Article 12 of Chapter 4.5 is applicable, except that any authority of the board or an administrative law judge to make an order under Government Code section 11455.30 is subject to the limitations of the code, including, but not limited to, code sections 1956 and 1958.

(d) Article 5 of Chapter 4.5 is not applicable except Government Code section 11420.30, which is.

(e) Articles 10, 11, 13, 14, and 15 of Chapter 4.5 are not applicable.

(f) Chapter 5 is not applicable.

Note: Authority cited: Section 11400.20, Government Code; and Section 411,

Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5010

GENERAL

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5010 AS SHOWN BELOW:

§5010. Case File, Audiovisual Record and Transcript

(a) The provisions of this rule apply except as otherwise ordered or required by law.

(b) The agency shall maintain the case file, the audiovisual record, and any transcript that has been prepared for at least ~~13~~ 36 months after the last date of service of any decision or order, and may thereafter destroy them.

(c) A party, a person who observes an electronic hearing pursuant to rule 5062(o), or an employee or agent of the agency may review all or part of a case file, audiovisual record, or transcript that has been prepared.

(d) Upon request by a party or a person who observes an electronic hearing pursuant to rule 5062(o), the agency shall permit that person to use, without charge, such facilities or equipment as may be reasonably necessary to review all or part of a case file, audiovisual record, or transcript that has been prepared.

(e) Upon request by a party, at a charge of $ 5, the agency shall provide that party a copy of any or all documents in a case file.

(f) Upon request by a party, at a charge of $ 5, the agency shall provide that party a copy of all or part of an audiovisual record.

(g) Upon request by a party, at a charge of $ 5, the agency shall provide that party a copy of all or part of a transcript that has been prepared.

(h) A party shall not be charged for copies if it shows that payment would cause it financial hardship.

(i) A request for copies shall include either payment for the applicable charge or a showing of financial hardship.

(j) Notwithstanding any other provision of this rule, a claimant shall not be charged for copies.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5052

FIELD OPERATIONS

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5052 AS SHOWN BELOW:

§ 5052. Petition Procedures

(a) Except with respect to a petition regarding a penalty assessed pursuant to section 1142, 1143, or 1144 of the code, the department may file and serve its answer to the petition within 30 days after the agency serves the petition. If no answer is filed and served within that time, the petition may be scheduled for hearing without an answer.

(b) If an untimely petition fails to specify the reason for the delay, an administrative law judge may serve notice requiring the petitioner to specify the reason by filing and serving it within 20 days after service of such notice. If the petitioner fails to comply, an administrative law judge may order the petition dismissed.

(c) If an untimely petition is filed within the additional 30 days provided by code section 1222, and the reason specified by the petitioner shows that there is no good cause for the untimeliness, an administrative law judge may order the petition dismissed.

(d) If an untimely petition is filed beyond the additional 30 days provided by code section 1222, and the petitioner fails to specify lack of service of the notice of assessment or a basis for estoppel of the department, the petition may be ordered dismissed.

(e) An untimely petition that is not otherwise allowed or dismissed in accordance with this rule shall be scheduled for hearing. If the

untimely petition was filed within the additional 30 days provided by code section 1222 and the petitioner shows good cause for the untimeliness, the untimely petition shall be allowed; if ~~or an untimely~~ a petition was filed beyond the additional 30 days provided by code section 1222 and the petitioner shows lack of service of the notice of assessment, the date service was effected upon the petitioner shall be used to determine if the petition was untimely under section 1222; if an untimely petition was filed and the ALJ finds that the filing of the petition was delayed due to departmental action for which ~~or that~~ estoppel ~~of the department~~ is appropriate, the untimely petition shall be allowed; otherwise it shall be ordered dismissed.

(f) An administrative law judge may serve notice of intention to render a decision or order on a petition without a hearing. Within 20 days after service of such a notice, any party may file and serve an application for a hearing. A hearing shall be granted upon such an application, except as provided in the next subsection of this rule. If no such application is filed and served within that time, an administrative law judge may proceed to render a decision or order on the petition without a hearing.

(g) A hearing is not required on a petition for refund if the petitioner had a prior hearing involving the same issues on a petition for reassessment. If so, an administrative law judge may serve notice of intention to render a decision on the petition for refund without a hearing. Within 20 days after service of such notice any party may file and serve an application for a hearing on the petition for refund setting forth any new or additional evidence it may wish to present. Within 20 days after service of such an application, any other party may file and serve a response. After considering any such application and any such response, an administrative law judge may either grant a hearing on the petition for refund, or deny it and proceed to render the decision upon the basis of the record of the hearing on the petition for reassessment.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5055

FIELD OPERATIONS

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5055 AS SHOWN BELOW:

§ 5055. Electronic Hearing

(a) For good cause, an administrative law judge on his or her own motion or upon application of a party or representative ~~witness~~, ~~an administrative law judge~~ may schedule or conduct all or part of a hearing as an electronic hearing if each party participating in the hearing has the opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

(b) ~~Good cause for scheduling an electronic hearing is presumed~~ Considerations in determining good cause under this provision shall include, but are not limited to:

(i) ~~for the department if there is no department branch office within a 50 mile radius from the place of the hearing~~ transportation barriers or travel distance required for attendance at an in-person hearing, for any party or witness;

(ii) ~~for any other party, excluding any representative, if it has no residence or office within a 50 mile radius from the place of the hearing~~ hardship caused by time away from current employment or other responsibilities that would be required of a party or witness in order to attend an in-person hearing;

(iii) ~~for a representative if a hearing is scheduled as an electronic hearing for its client, and the representative will be at the client's~~

~~location during the hearing; or~~ inability to secure care for children or other family members that would prevent travel to an in-person hearing;

(iv) ~~for a witness if the witness resides outside a 50 mile radius from the place of the hearing.~~ other hardships or impediments as explained by the party making the application for an electronic hearing;

(c) ~~If notice that a hearing is scheduled as an electronic hearing for any party is served at least 10 days before the date of the hearing, e~~ Each party shall file with the Agency and serve upon all parties any additional documents~~, including any statement the party intends to constitute its appearance,~~ no later than the 7th day after service of the notice of hearing, unless otherwise specified by an administrative law judge.

(d) If a hearing is scheduled as an electronic hearing for any party, but notice ~~of such electronic hearing~~ is not served at least 10 days before the date of the hearing, an administrative law judge, if practicable, shall specify and inform each party of the time and means for filing and serving any additional documents~~, including any statement the party intends to constitute its appearance~~. No proof of service is required unless specified by an administrative law judge.

(e) The agency shall serve the documents in the case file a reasonable time before a hearing scheduled as an electronic hearing for any party, if practicable.

(f) The parties retain the right to a rescheduling of a hearing if documents are not filed and served in accordance with these provisions, or to waive service as long as they have an opportunity to review those documents at the hearing.

(g) Notwithstanding the scheduling of an electronic hearing, any party or witness ~~may~~ retains the right to participate in person, and, if warranted by the circumstances, an administrative law judge may require any party participating in a hearing to be present at the hearing.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5062

FIELD OPERATIONS

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5062 AS SHOWN BELOW:

§5062. Conduct of Hearing and Evidence

(a) A party appearing in a hearing shall have his or her evidence and witnesses and be ready to proceed.

(b) An administrative law judge shall consider only those issues in a department action which are appealed, petitioned, or noticed by the agency. A related issue shall not be considered unless a waiver is obtained from all parties. If the department amends the action which is appealed or petitioned, the scope of an administrative law judge's consideration extends to the amended department action, provided that the department either serves it on all other parties at least 10 days before the hearing, or all other parties waive such service.

(c) Testimony shall be taken only on oath, affirmation, or penalty of perjury.

(d) Each party shall have these rights:

(i) to review the case file;

(ii) to call and examine parties and witnesses;

(iii) to introduce exhibits;

(iv) to question opposing witnesses and parties on any matter

relevant to the issues even though that matter was not covered in the direct examination;

(v) to impeach any witness regardless of which party first called the witness to testify; and

(vi) to rebut the evidence against it.

(e) Except as otherwise prohibited by law, any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(f) An administrative law judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or to prevent injustice, undue burden, or prejudice.

(g) The rules of privilege shall be effective to the extent that they are required by law to be recognized at the hearing.

(h) In a proceeding in which conduct that constitutes sexual harassment, sexual assault, or sexual battery is alleged, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is subject to the limitations set forth in Government Code section 11440.40.

(i) Evidence of communications made in settlement is subject to the limitations of Government Code section 11415.60. Evidence of communications made in alternative dispute resolution under Article 5 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, commencing with section 11420.10, is subject to the limitations of Government Code section 11420.30. Evidence of communications made in mediation is subject to the limitations of Evidence Code section 1152.5.

(j) An administrative law judge may exclude an untimely exhibit, including an untimely statement that a party intends to constitute its

appearance pursuant to rule 5061(c).

(k) An administrative law judge may order the taking of interrogatories and depositions inside or outside the state, upon such terms and conditions as may be just.

(l) An administrative law judge may question any party or witness and may introduce exhibits.

(m) The taking of evidence in a hearing shall be controlled by the administrative law judge in a manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the administrative law judge shall identify and explain the issues and the order in which evidence will be received.

(n) A hearing shall be open to public observation unless an administrative law judge orders closure or makes other protective orders pursuant to Government Code section 11425.20 or Unemployment Insurance Code section 2713.

(o) If an electronic hearing is open to public observation, members of the public may be physically present at the place where the administrative law judge is conducting the hearing, and any member of the public who is so present may review the case file, the audiovisual record, and any transcript that has been prepared.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5102

APPELLATE OPERATIONS

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5102 AS SHOWN BELOW:

§5102. New or Additional Evidence

(a) A party who files a board appeal, also known as a board appellant, has the right to file an ~~An~~ application to present new or additional evidence. ~~shall be filed and served within 10 days after service of a board appeal or its content pursuant to rule 5008(e).~~ Except as otherwise provided in this rule or specified by the agency, the application shall be filed and served at the same time the board appeal is filed. If the agency extends the time to file a board appeal, the time to file and serve the application shall also be extended to the same date the board appeal is filed.

(b) A party who responds to a board appeal, also known as a board respondent, may file and serve an application to present new or additional evidence only if authorized by the agency. Prior to the board modifying or reversing the results of an administrative law judge's decision or order, the agency shall notify a board respondent that it is authorized to make an application to present new or additional evidence. If authorized, the board respondent shall file and serve the application within 12 days after the agency sends notice, or within such other time as the agency may specify.

(c) Notwithstanding (b) above, the board may correct a clerical error in a decision or order of an administrative law judge, or set aside the order or decision, without authorizing a board respondent to file an application to present new or additional evidence.

(d)~~(b)~~ An application to present new or additional evidence shall state the nature of the evidence, the materiality of such evidence, and the reasons why such evidence was not introduced at the hearing before the administrative law judge. If the new or additional evidence is documentary in nature, the applicant shall attach the evidence to the application. No such evidence shall be considered by the board unless the board admits it.

(e)~~(c)~~ Whenever the board on its own motion or upon the application of a party grants the taking of new or additional evidence, the matter may be remanded to an administrative law judge for that purpose. The issues at such hearing shall be limited to those issues designated by the board.

(f)~~(d)~~ However, if the matter is not remanded and only documentary evidence is to be admitted, the agency shall serve the evidence and give each party 10 days thereafter to file and serve a response to it.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Amendment of Title 22, California Code of Regulations, Section 5105

APPELLATE OPERATIONS

Text of Proposed Regulatory Changes

NOTE: Language to be deleted is shown in ~~strikeout~~ format; language to be added is shown in underline format.

AMEND SECTION 5105 AS SHOWN BELOW:

§5105. Written Argument and Briefs

(a) ~~Except as otherwise provided by this rule or specified by the agency, a~~ A party who files a board appeal, also known as a board appellant, has the right to ~~may~~ file ~~and serve~~ written argument. ~~within 12 days after service of the board appeal or its content pursuant to rule 5008(e).~~ Except as otherwise provided by this rule or specified by the agency, written argument shall be filed and served at the same time as the board appeal is filed.

(b) A ~~party~~ board appellant has the right to request a copy of ~~that requests~~ all or part of the record for the purpose of filing written argument. Such request for a copy of the record shall be made and served at the same time the board appeal is filed. ~~pursuant to rule 5010, within 12 days after service upon it of the board appeal or its content pursuant to rule 5008(e),~~ If a copy of the record is provided pursuant to this section, the board appellant may file and serve written argument within 12 days after the agency sends it the record, or within such other time as the agency may specify.

(c) If the agency extends the time to file a board appeal, the time to file written argument shall also be extended to the same date the board appeal is filed. If the agency extends the time to file a board appeal, the time to request a copy of the record shall also be extended to the same date the board appeal is filed.

~~(c)~~(d) A party who responds to a board appeal, also known as a board respondent, may file and serve written argument only if authorized by the agency. Prior to modifying or reversing the results of the administrative law judge's decision, the agency shall serve a copy of the record and authorize a board respondent to file written argument. If authorized, the board respondent may file and serve written argument within 12 days after the agency sends it the record, or within such other time the agency may specify.

~~(d)~~(e) Notwithstanding (d) above, the board may correct a clerical error in a decision or order of an administrative law judge, or set aside the order or decision, without serving a copy of the record or authorizing a board respondent to file written argument.

~~(e)~~(f) Any person may apply for permission to file a brief as a friend of the board. If granted, any such brief shall be filed and served in accordance with instructions of the board.

Note: Authority cited: Section 11400.20, Government Code; and Section 411, Unemployment Insurance Code. Reference: Sections 1951, 2712 and 3262, Unemployment Insurance Code.