

**Testimony for Public Oversight Roundtable on
The Department of Employment Services' Office of Unemployment Compensation
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**Councilmember Kenyan R. McDuffie, Chairperson
Committee on Jobs and Workforce Development**

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The Legal Aid Society of the District of Columbia has represented the interests of low-wage workers seeking unemployment compensation for many years. In 2005, Legal Aid began representing unemployment claimants before the DC Court of Appeals as part of the Barbara McDowell Appellate Advocacy Project. In 2009, Legal Aid worked with other advocates to support amendments to the DC Unemployment Compensation Act. These amendments, which passed in 2010, included important procedural protections for claimants in the appeals process and extended benefits to workers who lose their jobs to care for ill or disabled family members.

Beginning last fall, Legal Aid expanded its public benefits practice to represent claimants in administrative hearings at the Office of Administrative Hearings (OAH). Legal Aid also represents claimants in matters involving overpayments and miscellaneous agency errors at the Department of Employment Services (DOES). In the past twelve months, Legal Aid has counseled more than 80 low-income workers and provided full representation to an additional 20 workers.

My testimony is based on Legal Aid's experience serving low-income unemployment claimants. I will briefly address how disproportionately high levels of unemployment in the District's low-income communities leads the importance of approaching oversight of DOES operations with a sensitivity to poverty law issues. Then, I will address four areas of concern: a) lengthy delays in initial claims processing; b) preventable legal errors by claims examiners; c) an opaque and unresponsive overpayment recovery process; and d) language access concerns.

I. Background: Poverty and Unemployment

As the Council knows, while the unemployment rate in the District of Columbia is declining overall – down to 8.7% as of September 2012² – low-wage workers continue to

¹ The Legal Aid Society of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Over the last 80 years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers. Last year, more than 3,300 individuals came to Legal Aid for an initial interview during our open walk-in hours. Legal Aid currently works in the following four priority areas: public benefits (including unemployment insurance), consumer, family law, housing, and appellate.

² See Bureau of Labor Statistics, Local Area Unemployment Statistics (<http://www.bls.gov/lau/>).

suffer disproportionately high rates of unemployment. In Ward 8, unemployment is still at the Depression-era level of 21.9%.³ By contrast, unemployment in Ward 3 is 2.2%.⁴

Thus, the operations of the DOES Office of Unemployment Compensation disproportionately affect our low-income neighbors who are more likely to be unemployed. This includes workers throughout our city who clean our offices, prepare and serve our food, or provide home health care to those who are elderly or disabled.

While a sudden job loss is stressful for anyone, low-wage workers and their families do not have the economic resources necessary to keep them afloat between jobs. An efficient and effective unemployment compensation program prevents a free fall into poverty for individual workers and also protects local communities from economic decline.

II. Concerns and Recommendations

Below, I outline concerns about DOES's performance and recommended actions for improvement. I also share illustrative stories from claimants we have helped.

a. Delays in Initial Claims Processing

Legal Aid understands that DOES faces budgeting and staffing constraints. Due in part to the economic crisis that began in the fall of 2008, unemployment rates rose, thus causing an increase in initial claims for unemployment. However, since Legal Aid began representing workers at the administrative level in November 2011, we have routinely met claimants who have waited more than three (3) months for a determination of their qualification for unemployment benefits.

For low-income claimants, a delay in unemployment claims processing means additional weeks and months without benefits or even the opportunity to appeal an erroneous denial of benefits. Countless Legal Aid clients have lost their apartments or been unable to pay for transportation or needed medications while their initial claim for unemployment was pending before DOES.

For example, two weeks ago I counseled a worker who is still waiting for a determination on her initial claim for unemployment, which she filed in early August 2012. After nearly fourth months without employment or unemployment benefits, she is unable to pay her rent and is now homeless. Before coming to Legal Aid for help, she had repeatedly gone to her local DOES office and called her DOES Claims Examiner to no avail. After further follow up, we learned that the delay was due to the Employer's failure to respond to the Claims Examiner in his investigation of the circumstances surrounding her firing. While the Claims Examiner must make efforts to investigate each claim, the burden of proving a worker was fired is on the employer. An employer's failure to submit evidence should therefore have resulted in a decision awarding the

³ See DOES Office of Labor Market Research and Information (Sept. 2012) (<http://does.dc.gov>).

⁴ Id.

claimant benefits – not an extensive delay in processing her claim. She is still waiting for a Claims Examiner Determination.

We believe that many claims get processed expeditiously – some within 21 days. However, there remains a persistent problem with delayed claims processing that creates hardship for low-income claimants.

Recommendation:

- Require DOES to publicly publish data on the timeliness of claims processing, as reported to the Department of Labor in the State Quality Service Plan (SQSP).
- Require DOES to track initial claims processing delays *by claims examiner*, thus targeting claims examiners who fall behind deadline in order to provide additional training and supervision or corrective action, where appropriate.
- Recommend internal DOES policies to address claims processing delays, including transferring any unresolved claims after 60 days to a supervisor for expedited processing.

b. Preventable Errors in Claims Examiner Determinations

The majority of claimants who seek Legal Aid’s services have had their initial claims for unemployment insurance denied by a DOES Claims Examiner. These claimants wish to appeal their Claims Examiner Determination and request a hearing before OAH. As such, Legal Aid reviews multiple Claims Examiner Determinations each week for legal error. While many CEDs reflect an accurate factual investigation and fair application of unemployment law standards, there are persistent patterns of errors.

First, many Claims Examiner Determinations include typographical errors which create confusion and, at worst, may erroneously deny benefits. A recent claimant had been denied unemployment benefits even though her Claims Examiner Determination stated that the Employer failed to prove that she had committed misconduct. This should have resulted in her being found qualified for benefits, and it is unclear whether this was a typographical or a legal error. She is now appealing that determination for *de novo* review at OAH, which is the appropriate avenue for correcting the error but leaves her without benefits for another thirty (30) days.

Second, we see many Claims Examiner Determinations with errors in the Certificate of Service. The Certificate of Service includes a date which is used to calculate the 15 calendar day deadline for filing an appeal with OAH. Some Claims Examiner Determinations are mailed well after the date of the Certificate of Service, forcing the claimant to meet a “good cause or excusable neglect” jurisdictional standard at their OAH hearing. I have also seen determinations where the printed date is crossed-out and a new date (several days later) is handwritten over the top, presumably to reflect the actual date of mailing. This creates confusion for claimants and could lead to unrepresented claimants losing their appeals hearing due to lack of jurisdiction.

Third, and perhaps most commonly, we review Claims Examiner Determinations which contains preventable legal errors that could be ameliorated with more effective training and supervision of the Claims Examiners. For example, one of the most common legal errors we see is Claims Examiners who over-rely on findings of “gross misconduct”, which is a complete denial of unemployment benefits, even when alleged violations were minor or mitigating circumstances exist.⁵ In the past year, I reviewed 70 to 75 Claims Examiner Determinations that disqualified claimants from receiving benefits and most of those involved disqualification for misconduct. Of those, only one (1) determination found simple misconduct. Claimants who were late to work two days in a row due to a failure in child-care or who were accused of eating discarded food at a restaurant have been found to have committed gross misconduct.⁶

Recommendations:

- Require DOES to draft and implement quality-control standards, including increased supervisory review, or else make current quality-control standards publicly available for comment.
- Require DOES to provide additional training to Claims Examiners on eligibility and disqualification criteria.
- Claims examiners must be instructed to ask claimants about mitigating circumstances that would distinguish gross from simple misconduct and to compare the claimants’ alleged misconduct against the examples in the law.

c. Significant Delays in Overpayment Processing and Response to Waiver Requests.

Claimants who receive unemployment benefits are assessed overpayments when it is later determined that they improperly received benefits or otherwise received more benefits than they were due. The DOES Benefit Payment Control Unit investigates possible overpayments, makes determinations, and collects overpaid funds. DOES has the sole authority to waive overpayments, in its discretion, except in circumstances where the overpayment is being recouped from future unemployment benefits. See DC Code 51-119(d)(1); DOES v. Smallwood, No. 09-AA-719 (DC August 18, 2011).

⁵ In unemployment law, a worker who has been terminated is presumed qualified for unemployment benefits unless his or her employer presents sufficient evidence that he or she committed misconduct. There are two kinds of misconduct: gross and simple. Gross misconduct is a total disqualification from benefits in response to serious violations of the employer’s interest, including arson, intoxication, dishonesty, reasonable disregard of reasonable orders, or theft (or attempted theft). See 7 DCMR § 312.4. Simple misconduct includes minor violation of employer rules, such as conducting unauthorized personal activities during business hours; inappropriate or profane language; or, gross misconduct with mitigating circumstances. See 7 DCMR § 312.6. With a simple misconduct termination, a claimant is disqualified for 8 weeks but may still receive up to 18 weeks of benefits.

⁶ Other common legal errors include: 1) Failure to investigate “good cause” reasons for quitting a job, once a voluntary quit has been proven by the employer; 2) Misunderstanding the “voluntary quit” standard, which requires a volitional act by the claimant which led to the job loss and was not compelled by the employer; 3) Misunderstanding the “intent” requirement in misconduct determinations.

Even when claimants have meritorious waiver arguments – for example, when the overpayment accrued without fault on their part and they cannot afford to pay it back – many wait months or even more than a year for a response to their request for waiver. Telephone calls to DOES go unanswered and DOES continues to collect the overpaid funds, for example, by intercepting DC tax returns.

One of my Spanish-speaking clients received unemployment benefits for nearly eleven (11) months before DOES reversed its earlier determination and found her ineligible for benefits. An overpayment notice was issued in English, and when my client called the Claims Examiner to determine why she was being asked to return eleven months of benefits, she did not receive an explanation of how to appeal or file a waiver request. This was three years ago. For the next two years, she called and went to the DOES office but was never told how to request a waiver of the overpayment. Finally, she received at a free legal clinic assistance with drafting a waiver letter in English, which she submitted in January 2012. She still has not received a response, despite frequent phone calls. She became my client this summer, and I submitted a supplemental waiver letter on her behalf in August 2012. As of this date, we have yet to obtain any response from DOES to either of her waiver letters, or to my emails or phone calls.

Another Legal Aid client received approximately 20 months of unemployment benefits (including federal extension benefits) ending in March of 2012. Last month, 8 months after she stopped receiving benefits, she received a bill for nearly \$9,000 (representing almost her entire payment) in allegedly overpaid benefits without proper notice informing her of her appeal rights. Legal Aid is helping her investigate the cause of this overpayment.

These long delays in identifying alleged overpaid benefits – coupled with the broad waiver discretion and a lack of responsiveness from the Benefit Control Unit in response to waiver requests – are problematic, raise due process concerns.

Recommendation:

- Publish existing DOES guidelines for overpayment investigations and the process of notifying claimants of the overpayment, in order to ensure meaningful opportunities for claimants to review and challenge alleged overpayments;
- Publish standards for acceptance of waiver requests (including hardship and “no fault” standards); and,
- Increase staffing and/or supervision to ensure timely processing of waiver requests.

d. DOES Service for Claimants with Limited or No-English Proficiency and Compliance with the Language Access Act.

In the past year, Legal Aid has served dozens of unemployment claimants with limited or no English proficiency, including claimants who communicate in Spanish, French, Vietnamese, Amharic, and American Sign Language (ASL). We encourage DOES to continue to improve its customer service and notice for limited or no English

proficiency customers in accordance with the Language Access Act, see DC Code § 2-1901 *et al.* DOES, as a “covered entity with major public contact,” is a “covered entity” within the meaning of the Act. See D.C. Code § 2-1931(3)(B)(v).

For example, the Language Access Act requires DOES to provide written translations of “vital documents,” which include documents that inform claimants of their “rights” and “eligibility for benefits.” *See* DCMR 4-1226.1. A Claims Examiner Determination is plainly such a “vital document,” since it relates to her eligibility for benefits and rights to appeal eligibility determinations. I am not aware of any claimant who has received a Claims Examiner Determination in one of the languages named by the Language Access Act, nor have I seen any mailings for claimants which include notice of appeal rights – including the expedited 15 calendar day deadline to file a hearing request with OAH.

Recommendation:

- At minimum, provide a multi-lingual insert into all Claims Examiner Determination mailings with a notice of appeal rights to OAH;
- Provide translation of vital documents into the languages covered by the Language Access Act, including Claims Examiner Determinations, Audit Notices, and Notices of Overpayment; and
- Review customer service plans at each DOES office to ensure effective service for limited or no English proficiency clients in accordance with the Language Access Act.

Conclusion

Legal Aid presents our concerns about DOES performance in the hope that our recommendations will help the agency improve the quality of its services.