Testimony for the Council of the District of Columbia
Agency Performance Oversight Hearing: The Department of Employment Services
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Councilmember Marion Barry, Chairperson
Committee on Workforce & Community Affairs

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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. Since 2005, Legal Aid has represented 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 for compelling family reasons, such as caring for ill or disabled family members.

In the fall of 2011, Legal Aid began representing unemployment claimants in administrative hearings at the Office of Administrative Hearings (OAH). Legal Aid also represents claimants before the Department of Employment Services (DOES) in overpayment cases. In the past eighteen months, Legal Aid has counseled more than 110 low-income workers and provided full representation or pro bono placements to an additional 30 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.

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[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.

I. Background: Poverty and Unemployment

As the Council knows, while the unemployment rate in the District of Columbia is declining overall – down to 8.5% as of December 2012[2] – low-wage workers continue to suffer disproportionately high rates of unemployment. In Ward 8, unemployment is still at the Depression-era level of 21.6%.[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 in 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 recommendations 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 the fall of 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. I have met many low-wage workers who lost their apartments or have been unable to pay for transportation or needed medications while their initial claim for unemployment was pending before DOES.

For example, last November I counseled a worker who waited nearly four months for a determination on her initial claim for unemployment. After three months, she was unable to pay her rent and became 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

[2] See Bureau of Labor Statistics, Local Area Unemployment Statistics (http://www.bls.gov/lau/).
[3] See DOES Office of Labor Market Research and Information (Dec. 2012) (http://does.dc.gov).
[4] Id.

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 have resulted in a decision awarding the claimant benefits – not an extensive delay in processing her claim. She eventually received a determination denying her benefits. She appealed to the Office of Administrative Hearings and the DOES determination was reversed.

I am not aware of any current mechanism whereby DOES must report regularly and publicly on the processing time for initial claims. We believe that many claims get processed in a timely manner – some within 21 days, the goal of Department of Labor regulations. However, there remains a persistent problem with delayed claims processing that creates hardship for low-income claimants.

Recommendation:

- Require DOES to periodically (and publicly) report data on initial claims processing, including the number of claims processing in 21 days, 45 days, or more than 60 days.
- 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 denied. As such, Legal Aid reviews multiple Claims Examiner Determinations each week for legal error. While some determinations reflect an accurate factual investigation and fair application of unemployment law standards, there are persistent patterns of errors.

Typographical Errors. First, many of the Claims Examiner Determinations we see include typographical errors which create confusion and, at worst, may erroneously deny benefits. In one of my recent cases, the Claims Examiner Determination stated that the employer presented evidence proving misconduct – a disqualifying determination – but concluded that the claimant was eligible for benefits. Because these two statements are legally incompatible, the Administrative Law Judge ordered DOES to amend the determination. As it turned out, DOES did intend to disqualify my client – though the ALJ later overturned that determination at her hearing. However, typographical errors of this nature cause delay and confusion and are entirely preventable with proof-reading and sufficient supervision.

Legal Errors. We also see Claims Examiner Determinations that contains legal errors that could be ameliorated with more effective training and supervision of the Claims Examiners.

One of the most common legal errors we see is an over-reliance on findings of "gross misconduct," which is a complete denial of unemployment benefits, even when alleged violations were minor or mitigating circumstances exist.[6] In the past 16 months, I have reviewed more than 100 Claims Examiner Determinations – the majority of which disqualified claimants from benefits. Of those, only one (1) determination found simple misconduct. Claimants who left a security post for two to three minutes without incident or who were accused of eating discarded food at a restaurant have been found to have committed gross misconduct. Even assuming that the employer's accusations are true, these incidents should be simple misconduct – an eight week disqualification that allows claimants to receive benefits for up to 18 additional weeks.[7]

Failure to Mail Claims Examiner Determinations. Finally, we have noticed persistent problems with the mailing of Claims Examiner Determinations. Some determinations are mailed well after the date on the Certificate of Service, forcing the claimant to meet a "good cause or excusable neglect" jurisdictional standard at their OAH hearing.[8] Others determinations are not mailed at all.

Just last week I spoke with a claimant who never received his Claims Examiner Determination in the mail. Because it had been many weeks since he filed his initial claim, he went to his local DOES office. He was told that a determination was made on his claim three weeks ago – when he was given a print-out of the determination, it had an "XXX" printed above "date" on the Certificate of Service. The DOES employee told him the determination was likely not mailed to him. This individual filed a hearing right away and sought legal advice on how to explain to the Judge that even though he filed late, his late filing should be excused due to the agency's error. However, there are many more claimants who may never find out the results of their initial claim, or once finding out, may never appeal because they do not know they can present an argument for good cause or excusable neglect.

Recommendations:

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[6] 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.

[7] Other common legal errors include: (a) Failure to investigate "good cause" reasons for quitting a job, once a voluntary quit has been proven by the employer; (b) 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; and (c) Misunderstanding the "intent" requirement in misconduct determinations.

[8] The date on the Certificate of Service is used to calculate the 15 calendar day deadline for filing an appeal with OAH.

- 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 sole authority to waive overpayments, at their 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).

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, her waiver request is still pending.

Another Legal Aid client received approximately 20 months of unemployment benefits (including federal extension benefits) ending in March of 2012. Then, eight months after she stopped receiving benefits, she received a bill for nearly $9,000 (representing almost her entire payment) for overpaid benefits. She did not receive the proper notice (a Notice of Overpayment) or any explanation for how the overpayment accrued. An investigation revealed that her employer incorrectly reported her wages to DOES more than two years ago, and that their recent correction triggered an overpayment. However, the correct amount of this overpayment should have been

$6,900. Because my client was without any fault in accruing this overpayment, DOES waived the debt, which was the correct decision and a fair outcome for this client. However, even with this successful outcome, there are at least two areas for concern: 1) DOES issued an overpayment statement that was nearly $2,000 higher than it should have been; and 2) My client did not receive the proper notices explaining why and how she accrued the debt and providing explanation on how she can appeal.

These delays and errors 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 and raise due process concerns.

Recommendation:

- Publish existing guidelines for overpayment investigations, notice to claimants, and appeal rights, to ensure meaningful opportunities for claimants to review and challenge alleged overpayments.
- Develop and implement standards for acceptance of waiver requests (including hardship and "no fault" standards).
- 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).

The Language Access Act requires, for example, 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.
- 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 and we look forward to working together with DOES to continue resolving matters impacting claimants' benefits.