



**Joint Testimony of
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Program**

**Before the Committee on Government Operations & Facilities
Council of the District of Columbia**

Performance Oversight Hearing on the Office of Administrative Hearings

February 25, 2021

The Legal Aid Society of the District of Columbia¹ and the Claimant Advocacy Program² submit the following testimony regarding the performance of the Office of Administrative Hearings (OAH).

2020 was an unexpected and unprecedented year for us all. Due to the COVID-19 Public Health Emergency (PHE), there was a massive increase in the number of requests for hearings in areas most affected by the PHE, especially cases involving unemployment benefits. At the same time, there was a sudden shift in the way that OAH administrative law judges and staff could interact with the public in order to minimize the spread of the virus.

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.” Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 89 years, Legal Aid staff and volunteers have been making justice real – in individual and systemic ways – for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, www.LegalAidDC.org, and our blog, www.MakingJusticeReal.org.

² The Claimant Advocacy Program (CAP) is a free legal counseling service available to individuals who file unemployment compensation appeals in the District of Columbia. CAP is a program of the Metropolitan Washington Council AFL-CIO, which works with over 200 affiliated union locals and religious, student, and political allies to improve the lives of workers and families throughout the greater metro Washington area. For more information, visit <http://www.dclabor.org/unemployment-help.html> or <http://www.dclabor.org/>.

We commend OAH for the steps it quickly took to ensure that its most important operations were functional during these challenging times. This includes acting swiftly to toll filing deadlines for cases involving the Department of Employment Services (DOES), the Department of Human Services (DHS), and other critical agencies; setting up remote workspaces for most, if not all, staff; and switching all hearings to be held telephonically. We especially appreciate OAH's consideration of how the PHE would affect the ability of litigants to access OAH and the agencies from whom OAH hears appeals, and their swift action to ensure that these litigants would not be denied access to justice.

Several of the agencies over which OAH has jurisdiction also enacted emergency policies and procedures to protect District workers and residents negatively affected by the PHE. For example, DHS suspended recertification requirements for the Supplemental Nutrition Assistance program (SNAP), Temporary Assistance for Needy Families (TANF), and public medical assistance programs, like Medicaid. Because of these protections, there has not been a surge in cases at OAH arising from DHS actions.

At the same time, many DC workers and residents lost their jobs or income due to the PHE and DOES has been crushed under the resulting increase in the number of people seeking unemployment benefits. As a result, the number of unemployment hearings at OAH has skyrocketed, as have the requests for assistance from Legal Aid and CAP. We therefore will be focusing our testimony on unemployment issues.³ These include (1) accessing OAH hearings and office staff; (2) delays in scheduling hearings; and (3) refusal to issue final orders in UI monetary determination cases.

Accessing OAH Hearings and Office Staff

Due to the safety precautions necessitated by the COVID-19 Public Health Emergency, OAH has closed for in-person business, so that all litigants currently access OAH via email, phone, U.S. mail, or fax. However, OAH needs to update its system to ensure *pro se* litigants receive notice regarding their cases and are able to access OAH.

One Legal Aid client illustrates the need for improved OAH communications. She received a letter in the mail from OAH telling her that she had a hearing scheduled just one week later. The next day she reached out to Legal Aid, and on the following day, she filed a request for a new hearing date with OAH so she could have time to get a lawyer. The next day, Legal Aid called OAH on her behalf to see if the hearing had been moved, but we were not able to get through. The following business day, which was the day the hearing was originally scheduled, our client called the number on her notice to try to get through to her hearing. She couldn't get through. When she called the clerk's office, they told her that her hearing had been rescheduled for a

³ Legal Aid practices in other areas of public benefits, including SNAP, TANF, and medical assistance. For these other topics, please see the testimony submitted by the Office of Administrative Hearings Legal Assistance Network, of which Legal Aid is a member.

month later. She did not get any notice by email, including in her spam folder, and OAH did not affirmatively reach out to her. She called the clerk's office again three days later, and they confirmed that her hearing had been rescheduled, but she still has not received any written notice of the new date, either via mail or email.

Email: In its modified operating schedule, OAH has leaned heavily on email communications, asking that litigants take “all efforts to communicate with the OAH electronically through oah.filing@dc.gov,” or by phone, and “[w]here possible, please include an email address and a phone number at which you can be reached, so OAH staff can reach you quickly and most effectively as the need arises.”⁴ OAH has also issued an emergency rule stating that “the Clerk may serve orders and notices by e-mail, without a party’s advance consent, in addition to any other authorized method of service.”⁵ In cases in which Legal Aid is representing a litigant, we have received service exclusively via email during the public health emergency. The ability to communicate with OAH via email has been extremely helpful for us, as email can be more reliable than mail or fax, and easier to track than mail or phone. We encourage OAH to continue to allow the broad use of email after the end of the public health emergency.

However, OAH should not rely exclusively on email for communicating with *pro se* litigants, who often do not have the necessary technological skills and access to resources to rely on email for communication. Many *pro se* litigants are low-income and have limited access to email, as they often do not have computers and may not have reliable internet access. Others, especially those who are older, are not technologically savvy and may have trouble navigating email accounts. Our clients, for example, may not have the ability to check their email often; may not know how to use basic email functions like forwarding or replying all; may have trouble figuring out how to view or download attachments; or may not know that they should be checking their spam filters regularly for OAH communications.

Because communicating via email only can be ineffective with *pro se* litigants, we ask that OAH update their emergency rule to require *pro se* litigants to receive scheduling orders and other important documents via U.S. mail. OAH can also email these documents, but email should not be the only method by which OAH sends any important documents to *pro se* litigants.

Phone: Access to OAH via phone has become vital for litigants since the OAH office is closed for the duration of the public health emergency. This is especially true for litigants without access to email, or who have technological challenges. At times, this access has been challenging, with litigants having trouble reaching a live person at OAH, being directed to voicemail repeatedly, and sometimes not being able to leave a voicemail. We have found that,

⁴ <https://oah.dc.gov/release/oah-modified-operating-schedule>.

⁵ D.C. Mun. Regs. tit. 28, § 2841.16 (2020); available at https://oah.dc.gov/sites/default/files/dc/sites/oah/publication/attachments/OAH%20NERM%20final_1.pdf.

even when they leave voicemails, they are at times not returned. We encourage the Council to help OAH ensure it has the resources necessary to respond to all phone inquiries within 48 hours.

Delays in Scheduling Hearings

Legal Aid and the Claimant Advocacy Program are concerned about the lengthy delays claimants experience between requesting a hearing at OAH and having a scheduled hearing. For unemployment hearings requested over the last few months, the claimants we represent have largely had to wait at least two months after filing a hearing request to receive a scheduling order, and then an additional two weeks for the hearing to be held. Oftentimes these claimants are not receiving any unemployment benefits and are thus depending on a decision from OAH in order to receive money to pay for basic needs, like rent and utilities. Several claimants have waited significantly longer for their hearing to be scheduled.

The surge in unemployment appeals also revealed several record-keeping issues that led to delays in scheduling hearings. First, there were several instances where attorneys filed Notices of Appearance, but they were not entered into OAH's database. Second, and at times related to the first issue, attorneys of record were not served OAH orders. And third, we have at times received repeated requests for paperwork that had been filed with a claimant's initial appeal – namely, requests for Determinations by Claims Examiners for Unemployment Insurance cases.

For example, one Legal Aid client filed an OAH hearing request at the beginning of July 2020 and supplemented this filing by providing OAH with a copy of the claims examiner determination she was appealing at the end of August. OAH nevertheless dismissed her hearing request at the end of December on the erroneous grounds that the client had never filed a claims examiner determination.

We urge the Committee to ensure OAH has the resources it needs to maintain a system that is robust enough to keep track of and expeditiously schedule this surge of cases. In particular, we encourage OAH to enact policies and procedures to expedite unemployment cases for litigants who are experiencing significant hardship or delays. As we can see from the surge this year due to COVID-19, and a recent past surge due to a policy change for home health aide cases, although we cannot predict when or why a surge may happen, we can assume that a surge will happen, and OAH must have a plan in place for organizing and prioritizing the flow.

Refusal to Issue Final Orders in UI Monetary Determination Cases

Legal Aid and the Claimant Advocacy Program are concerned that OAH has wrongfully denied unemployment claimants the right to OAH review of their "monetary determinations" from DOES. These determinations are one of several types of determinations that DOES sends claimants with a decision about their eligibility and/or qualification for unemployment benefits. Specifically, monetary determinations tell claimants whether they have sufficient earnings reported to DOES to qualify for benefits -- and can either prevent claimants from receiving any

benefits or from receiving a higher amount of benefits each week. There are three possible outcomes: (1) if found **monetarily ineligible**, the claimant receives no further determinations from DOES, and the claim is denied; (2) if found **monetarily eligible with no further eligibility or qualification concerns**, the claimant receives no further determinations from DOES, and the claim is approved; and, (3) if found **monetarily eligible, but there is another possible eligibility or qualification concern on the claim**, the claimant should receive a DOES Determination by Claims Examiner resolving the other possible issue.⁶

OAH regularly reviews and issues final orders regarding Determinations by Claims Examiner, Notices of Determination of Overpayments, and other initial determinations. However, OAH representatives have shared with advocates that OAH will not issue Final Orders because OAH does not have authority to order DOES to revise a Monetary Determination. This policy is confusing to claimants, as even DOES directs claimants to appeal unfavorable Monetary Determinations to OAH. DOES's PUA Monetary Determination directs claimants to file an appeal at OAH within 15 days or else the Monetary Determination will become final. Additionally, DOES recently tweeted on 12/22/2020: "Have you been deemed monetarily ineligible for UI benefits? You can file an appeal with the Office of Administrative Hearings (OAH) by calling 202-442-9094. For more information on Administrative appeals, visit <http://does.dc.gov>."

Instead, OAH will request (but not order) DOES to resolve any errors in the monetary eligibility assessment. According to performance answers by DOES, OAH remanded 158 monetary determinations to DOES in 2020 and 40 thus far in 2021. However, since there is no order, claimants cannot enforce the order if DOES fails to correct their mistake.

Thus, OAH's policy leaves claimants with no recourse at OAH, including those who wish to appeal a finding that they are not monetarily eligible and those found eligible for benefits but who wish to appeal the amount of weekly benefits DOES found them eligible for. This OAH policy is contrary to the DC Code, which provides in Section 51-111 that OAH has authority over "initial determinations." Monetary determinations are one kind of "initial determinations," and, in the first two scenarios described, are usually the final determination received by the claimants. OAH must issue final orders reviewing monetary determinations and redetermination in DOES cases because monetary determinations are reviewable determinations under Section 51-111.

⁶ This is an issue that may surge in the near future, as claimants receiving temporary pandemic-related unemployment benefits can request that their weekly benefits amount be revised upward based upon their earnings histories, and they may receive monetary determinations denying these requests.

Conclusion

We appreciate the opportunity to testify today regarding OAH's performance. We would be happy to answer any questions and to work with the Committee and the agency following today's hearing to identify further concrete steps OAH can take to address these pressing challenges.