

DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 25

IN RE PELOQUIN
(Adopted February 19, 1992)

This cause has come on before the undersigned chairman of the Employment Security Commission, pursuant to N.C. Gen. Stat. §96-15(e), to consider the EMPLOYER'S APPEAL from the decision of Appeals Referee Sam Taylor, under APPEALS DOCKET No. VI-UI- 03127T. Having reviewed the record in its entirety, the undersigned is of the opinion that the aforesaid decision must be vacated, and the cause remanded for de novo hearing and a new decision.

Pursuant to the Employment Security Law, appeals referees have the responsibility to conduct hearings. It is the law and policy of the Commission that all interested parties are given a reasonable opportunity to have a fair hearing -in connection with the payment and denial of unemployment compensation benefits. ESC Regulation No. 14.10. Such requires appeals referees to conduct hearings complete enough to provide sufficient information upon which the Commission can act with reasonable assurance that its decision to pay or deny unemployment compensation benefits is consistent with the Employment Security Law of North Carolina and the Federal Unemployment Tax Act.

In this case, it appears that one of the parties requested a continuance in order to change the format from a telephone hearing to that of an in-person hearing. The motion to have the case heard as an in-person hearing rather than as a telephone hearing was denied. The requesting party was the employer. The employer represents, and the Commission accepts for the purpose of this order that the format change request was denied both for being untimely and for being without notice to the other party. The appeals referee apparently followed the appeals department's informal policy or rule of "five days," that is, that such requests for continuances must be made at least five days prior to the hearing.

However, it appears that the request was timely and sufficient. The Commission construes the reasonable opportunity to have a fair hearing requirement to mean that any party can have the hearing changed from a telephone format to an

in-person format at any time prior to the actual commencement of the appeals hearing. This practice almost always requires that the hearing be rescheduled and delayed in order to reset the case on the docket and give the other parties proper notice of the changes in the hearing.

There are some practical limitations to the Commission's ability to change cases from telephone hearings to in-person hearings. This right is limited by the requirement that the party requesting the change to an in-person hearing must be willing to travel to the Employment Security Commission office most convenient to the other parties, ESC Regulation No. 15.11 (the objecting party is to travel). Further, the distances that witnesses must travel to the hearing must be considered. The appeals referee must also consider allowing the taking of testimony by telephone from witnesses whose in-person appearance might be unduly burdensome, such as expert witnesses testimony on behalf of a party in support of or opposition to a drug test.

Except as limited above, an appeals referee may not deny a party's prehearing request to change a telephone hearing to an in-person hearing unless the referee makes findings showing that the change to an in-person hearing will deny the opportunity to have a fair hearing to either party.

In this case, it also appears that the employer sought a continuance in order to secure the testimony of a witness necessary to ascertain the employer's substantial rights. The witness in question was a supervisor of the employer. This witness was represented as being the supervisor with the most knowledge concerning the claimant's separation. At the time of the scheduled hearing, this supervisor was unavailable.

It is part of the responsibility of the appeals referee as the primary fact finder to regulate the course of appeals hearings. That responsibility includes enabling each party to exercise its right to call and examine all witnesses believed necessary to ascertain the substantial rights of the parties, ESC Regulation Nos. 14.10 (opportunity for fair hearing), 14.11 (A) (3) (referee to regulate course of hearing and set continued hearings), and 14.15 (A) (every party has right to call all witnesses).

Effective July 16th, 1991, Senate Bill 429 gives appeals referees the specific statutory authority to grant continuances for good cause. The law reads in pertinent part:

G.S. 96-15 is amended by adding a new subsection to read: (dl) A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include but not be limited to those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State, such as service as a member of the North Carolina General Assembly, or an obligation to participate in a court of greater jurisdiction.

The passage of Senate Bill 429 demonstrates the General Assembly's intention that all parties to an appeals hearing be given a fair opportunity to present their witnesses and evidence to the appeals referee. To accomplish that end, the appeals referee can use the existing specific regulatory authority to grant continuances for good cause when any party's necessary witness is not available due to a prior commitment which cannot be rescheduled, ESC Regulation No. 14.11(A)(5)(d) (referee can continue cases because of a party's prior commitment that cannot be rescheduled). The recent passage of Senate Bill 429 reinforces the conclusion that under Regulation 14.11(A)(5)(d), the term "party" includes the party's necessary witnesses.

The referee further has an obligation of assisting the parties in the discovery of facts and, if necessary, to take the initiative in the discovery of information, ESC Regulation No. 14.28 (rules on how the referee is to conduct and control the hearing). See Hoke v. Brinlaw Mfg. Co., 73 N.C. App 553 at 559, 327 S.E.2d 254 (1985). The fair hearing requirement makes it evident that the parties must have the means requesting the production of evidence which effects eligibility and qualification for benefits. It is therefore also required that the appeals referee must have the means to compel the production of such evidence.

To secure the attendance of necessary witnesses and the production of related documentary evidence, the appeals referee has the power to issue subpoenas and to continue hearings in support of subpoenas whether issued by the appeals referee or one of the parties. See G.S. 96-15 (dl) (referee can grant continuance for good cause); ESC Regulation Nos. 14.11(A)(2) (referee can issue subpoenas), 14.11(A)(3) (referee can regulate and continue hearings), 14.15(A) (party has right to call-and examine witnesses), and 14.15(D) (referee may issue subpoenas for witnesses and documents).

In this case, the request for a continuance was made only one working day before the hearing. However, the Commission has no specific time limitation on

granting such continuances. While a general three- or five-day limitation on granting continuances before the hearing might be practical and give some threshold of greater notice to opposing parties about scheduling changes, such a fixed rule would also limit the opportunities for parties to effectively present witnesses necessary to ascertain their rights.

In balancing the needs of all parties, the Commission cannot restrict the efforts of parties to secure all necessary testimony. ESC Regulation No. 14.15(A) reads in pertinent part:

... [E]very party, representative or attorney of record shall, upon request, have the right to call and examine all witnesses believed necessary to establish the rights and to make an oral cross-examination of any person present and testifying.

In fact, an appeals referee on his or her own motion or by request of a party may conduct an in-person hearing at which the attendance and testimony of witnesses is taken by telephone.

Nor can the Commission permit three- or five-day guidelines to limit its decisions on whether or not to issue subpoenas to secure all necessary testimony. Appeals referees can even issue subpoenas during the course of hearings. Here, the Commission's practice requires an in- person hearing. Further, a subpoena, if necessary, to secure testimony of a necessary witness should be issued. In other words, the appeals referee may use format changes, split formats, continuances, subpoenas, and adjournments in order to secure necessary testimony.

Here, the record shows there is no evidence that the claimant would have been denied an opportunity to have a fair hearing if the employer's request for a continuance or an in-person hearing had been granted. Indeed, the record suggests that the claimant did not object to a continuance.

IT IS NOW THEREFORE, ORDERED, ADJUDGED, AND DECREED that the decision entered by the Appeals Referee is **VACATED**, and the cause is **REMANDED** for further proceedings consistent with this decision.