

Regulation No. 14 - Appeals Procedures

14.10 Right To Hearing A reasonable opportunity for a fair hearing before an impartial appeals referee shall be provided for all interested parties to an appealed determination. All hearings shall be conducted informally and in such manner as to preserve the substantial rights of the parties.

14.11 Powers of Appeals Referee (A) An Appeals Referee can: (1) authorize the issuance of subpoenas in the name of the Commission requiring attendance and giving of testimony by witnesses and the production of books, papers and other documentary evidence in accordance with Regulation 14.16; (2) continue cases on his/her own motion for the reasons set forth in Regulation 14.15; (3) consider and rule upon a request for continuance by an interested party or its legal representative; (4) set the time, place, and format for continued hearings in accordance with Regulation 14.15; (5) fix the time for filing memoranda of law, briefs or other legal documents; (6) schedule and conduct prehearing conferences in the discretion of the Appeals Referee; (7) conduct a hearing, regulate the course of the hearing and determine the order of proof; (8) administer oaths and affirmations; (9) request or authorize the request for an interpreter; (10) re-open, dismiss, and adjourn hearings and enter orders of withdrawal of appeals; (11) continue or adjourn a hearing as provided in Regulation 14.15 and Regulation 14.20. (B) In addition to exercising any of the powers of an Appeals Referee, the Chief Appeals Referee can: (1) apply to the Clerk of Court to issue an order requiring any person refusing to comply with a subpoena to comply with said subpoena; (2) determine the assignment or reassignment of appeals referees and the scheduling or re-scheduling of hearings; 14-2 (3) consider and rule on motions concerning disqualification of appeals referees in accordance with Regulation 14.12(c); (4) authorize subpoena or interpreter fees; (5) continue cases as provided in Regulation 14.15.

14.12 Disqualifications or Recusals of Appeals Referee (A) An appeals referee shall not conduct a hearing in which he/she may have a personal interest or conflict of interest or in which he/she may have a personal bias toward or against any of the parties. (B) If an appeals referee assigned to conduct a hearing communicates with a party or his/her/its representative or witness as to issues of fact or law without notice to and opportunity of all parties to participate, that appeals referee shall recuse himself/herself from hearing the matter. (C) Any party to a proceeding before an appeals referee seeking disqualification of that appeals referee must a written motion requesting the disqualification of the appeals referee no less than five days prior to the scheduled hearing date. Such motion is to be filed with the Chief Appeals Referee, who shall make a determination thereon, and issue a decision. The decision shall be interlocutory but may be specified as a grounds for appeal following the issuance of the decision of the Appeals Referee. (D) When the Chief Appeals Referee determines an appeals referee shall not conduct a

scheduled hearing, the Chief Appeals Referee shall assign another Appeals Referee to hear the case.

14.13 Representation (A) Any individual may appear for himself/herself in any proceeding before an appeals referee. Any partnership may be represented by any of the partners. An association may be represented by any of the members of such association. A corporation may be represented by its employee, officer, or agent. (B) The Appeals Referee, in his/her discretion, may refuse to allow any person to represent others in any proceeding before him/her, who he/she determines has engaged in unethical conduct, or who intentionally and repeatedly fails to observe the provisions of the Employment Security Law, or the Rules, Regulations, and/or instructions of either the appeals referee or the Commission. 14-3 (C) Any claimant or employer who is a party to any proceeding before the Commission may be represented by (1) an attorney who is admitted to the North Carolina State Bar; or (2) any person who is supervised by an attorney admitted to the North Carolina State Bar. The supervising attorney need not be present at any proceeding before the Commission. If an individual appears under supervision of an attorney, the name of the attorney must be included in the record of the case. (D) Any attorney regularly admitted to practice in the courts of another state, and who is in good standing therein, may appear pro hac vice, at the discretion of the appeals referee. (E) Any assignment, pledge or encumbrance of any right to benefits which are or may become due or payable under the Employment Security Law shall be void, except as otherwise provided by law. (F) Any action which may be taken by a party may be taken by his/her/its legal representative, unless otherwise stated. (G) A legal representative may: (1) Obtain information about the case to the same extent that the party is able to do so; (2) tender evidence; (3) present opening and closing arguments; and (4) make any request or give any notice about the proceedings before the Commission. (H) (1) Any documents or information required to be sent or served on any party shall be sent or served upon the party's designated legal representative only, if any. (2) The Commission shall provide to the legal representative notice and a copy of any administrative action, determination, or decision. (3) A notice or request sent to the legal representative of a party will have the same force and effect as if it had been sent directly to the party.

14.14 Scheduling and Notice of Hearing (A) As soon as possible after receipt of the appeal and file from the adjudicator, a hearing shall be promptly scheduled and held at a local office where claimant is registered for 14-4 work and has filed a claim except that if the local office is forty (40) or more miles from the employer's business, a telephone hearing may be scheduled, or a telephone hearing may be scheduled upon agreement or request of the parties, or a telephone hearing may be scheduled to meet standards for appeals promptness or efficient administration of the Employment Security Law. (B) Due notice of a hearing shall be made to the parties, or legal representatives, if any, by mailing the notice to the last known address at least 10 days prior to the

date of the hearing, or the parties may accept service thereof. (C) The parties shall be given reasonable notice of the hearing, which notice shall include: (1) the date, hour, place and nature of the hearing, the local office number, the appeals docket number, the name and address of the employer and the claimant and other persons to whom notice of the hearing is being given, the social security number of the claimant, and the name, address and telephone number of the Appeals Referee; (2) a reference to the particular substantive statutory issues and/or regulations to be considered; (3) a statement of the nature and purpose of the hearing and of the manner and time within which evidence may be submitted to the Commission for consideration, and other information on the hearing, including the effect of failure of appellant to appear at the hearing, subpoenaing witnesses, right of representation, and continuances. (D) Any party to whom a notice of any appeals hearing is required by these Regulations to be given may, at or prior to such hearing, waive the service of such notice and enter his/her appearance at such hearing for all purposes.

14.15 Continuances (A) An Appeals Referee assigned to hear a case may grant a continuance only if: (1) a party, necessary witness, legal representative, or Appeals Referee cannot appear for the hearing because of personal illness or illness of immediate family member, jury duty, or death in the immediate family; or, (2) an attorney representing a party must appear in a court of superior jurisdiction; or, 3) a properly issued subpoena has not been served on a necessary witness; or, 4) a party, necessary witness, or legal representative has a prior commitment that conflicts with the hearing date or time and which cannot reasonably be rescheduled; or, (5) a party has not received proper notice of the hearing or the issues to be determined at the hearing; or, (6) the Appeals Referee has a scheduling conflict; or, (7) a party requires an interpreter; or, (8) the Appeals Referee has a conflict of interest which requires his/her recusal; or, (9) a party has requested and been granted a change in the type of hearing scheduled; or, (10) a party needs additional time to obtain legal representation and has demonstrated good cause for failing to obtain legal representation prior to the commencement of the hearing. (B) Any request for continuance for any reason other than in (A), above, may be granted only by the Chief or designee of the Chief Appeals Referee. Notice of the continuance and the specific reason therefor shall be given to all as soon as possible. A written continuance order shall be a part of the official record of the case.

14.16 Subpoenas (A) Upon request of any party to the proceeding, including the Commission, the Appeals Referee shall authorize the issuance of a subpoena requiring the attendance of witnesses and/or the production of documents or other items material to the proceeding unless the Appeals Referee determines that: (1) the request on its face is clearly objectionable or unreasonable; (2) the evidence requested is not relevant to a matter in issue; or (3) the request does not describe the evidence requested with sufficient particularity. (B) The

requesting party must include in any request for subpoena: (1) name of the party requesting the subpoena; (2) claimant's name and the appeals docket number of the case; 3) the name and address at which the person may be served and telephone number of the person whose appearance is sought; 14-6 (4) specific identification of anything sought, including a detailed description and specific designation of present location, including the name and address of the person in possession; and (5) a statement of the relevance or significance of the testimony or evidence subpoenaed. (C) The Commission shall include in each subpoena: (1) the name, address, and telephone number (if available) of the person being subpoenaed; (2) claimant's name and the appeals docket number of the case; (3) the date, hour, and location of the hearing in which the witness is commanded to appear; (4) a particularized description of the books, papers, records, or other items the witness is directed to bring with him to the hearing, if any; (5) the identity of the party requesting the subpoena; (6) the date of issue of the subpoena; and (7) the signature, official title, address and telephone number of the Appeals Referee issuing the subpoena. (D) Subpoenas shall be served in such a manner as the Appeals Referee shall direct and as appropriate to the circumstances of the case. (E) Any person receiving a subpoena or any party may object thereto by notifying the Appeals Referee prior to the hearing. The Appeals Referee shall promptly rule on the objection and so notify the parties prior to the commencement of the hearing. The Appeals Referee may continue the hearing if necessary to hear and rule on the objection. (F) Witnesses subpoenaed to appear at Commission hearings may request witness fees and mileage reimbursement as provided by G.S. 7A-314. (G) Any documentation showing service of the subpoena shall become part of the official record of the case.

14.17 Prehearing Procedures Prehearing conferences, discovery, stipulation and other related matters may be used at the discretion of the Appeals Referee. However, Appeals Referees shall take into consideration the intent of adjudication pursuant to G.S. 96-15 as to informality and the time compliance requirements mandated by the United States Secretary of Labor. 14-7

14.18 Hearing Procedures (A) The hearing shall be conducted by and before an Appeals Referee, who: (1) Shall call the proceeding for hearing, give the docket number, the name of the appellant, the names of the parties and the social security number of the claimant and the issues appealed; (2) Shall take appearances for the record and administer the required oath. (B) All hearings shall be conducted informally and in such manner as to preserve the substantial rights of the parties. (C) The party appealing must produce some evidence in support of his/her/its case. The appellant may have his/her/its case dismissed by the Appeals Referee for failure to appear at the scheduled hearing time or to present any evidence at the hearing. (D) The parties to the proceeding may file an agreed stipulation of facts. The Appeals Referee may require additional evidence or stipulation of facts. (E) Unless limited by stipulation of the parties or unless otherwise limited by the Commission or an

Appeals Referee under this section, every party or legal representative shall have the right to call and examine or cross-examine all witnesses. (F) The Appeals Referee shall control the order of proof and rule upon admission of evidence, and may examine and cross-examine witnesses. (G) The Appeals Referee shall admit all relevant and noncumulative evidence and consider all relevant issues. The Appeals Referee shall have the discretion to determine the relevance of any evidence. (H) The Appeals Referee shall not be bound by the common law or statutory rules of evidence and procedure. (I) The rules of evidence as applied in the general courts of justice shall not govern the admissibility of evidence in an appeals hearing. However, in determining the admissibility of evidence in a hearing in which the rules of evidence do not apply, the Appeals Referee shall consider such factors as: (1) relevance of the evidence to the issues, (2) undue repetitiousness, (3) the right of the party against whom the evidence is offered to confront the witness against him/her/it. 14-8 (J) Hearsay evidence is generally admissible. However: (1) Hearsay evidence will be accepted as competent evidence only if it falls within the statutory or common law exceptions to the hearsay rules, or has equivalent circumstantial guarantees of trustworthiness and is more probative on the point for which it is offered than any other evidence which the proponent could reasonably be expected to procure under the circumstances of the case. (2) The hearsay proponent carries the burden of making a prima facie showing of competence before the evidence can be used to support a finding of fact. (K) In any hearing, the Appeals Referee may examine the parties and their witnesses. Where a party is not represented by counsel, the Appeals Referee before whom the hearing is being held should advise him/her as to his/her rights, and aid him/her in examining and cross-examining witnesses, and give him/her every assistance compatible with the impartial discharge of the Appeals Referee's official duties. (L) Business records as defined in Regulation No. 2.13 are admissible as an exception to the hearsay rule and may be used as the basis for a finding of fact if the records are reflections of an act, occurrence or event and not an opinion and if they are properly identified by the person who made them or by someone who has knowledge of their preparation and custody. (M) When a party desires to offer into evidence numerous documents, a list of the documents in the order of their presentation shall be prepared and offered as an exhibit. (N) The Appeals Referee shall provide all parties with reasonable opportunity to examine all documents offered into evidence. (O) When a party desires to introduce documents, affidavits or statements at a hearing, that party must provide an authenticated copy plus one copy of each exhibit for the use of the Appeals Referee and a copy for each party to the proceeding. (P) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the Employment Security Commission. The noticed fact and its source shall be stated and made known to affected parties at the earliest practical time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. The Appeals Referee may use his/her experience, technical competence, and

specialized knowledge of Commission procedures in the evaluation of evidence presented at hearings. 14-9 Notwithstanding the foregoing, at the hearing the Appeals Referee must secure the presence of an employee of the Employment Security Commission who is competent to present labor market evidence when the issue to be resolved is a claimant's ability to work and/or availability for suitable work, and the Appeals Referee must ensure that the labor market is described in terms of the specific claimant. (Q) The Appeals Referee may permit a party to file an affidavit at the hearing under the same rules applicable to other forms of hearsay evidence. (R) All testimony at any hearing before an Appeals Referee upon a disputed claim shall be recorded. (S) In lieu of live testimony from a laboratory representative at a contested claims hearing, an affidavit from the authorized representative of the laboratory may be presented to prove controlled substance examination results, chain of custody and/or compliance with all testing and retesting required by federal or state law. When a party desires to introduce such affidavit at the hearing, a copy of the affidavit must be received by the party against whom the affidavit will be offered at least two (2) days prior to the commencement of the hearing. If the party who desires to introduce the affidavit is unable, despite reasonable efforts, to accomplish the required service within the time specified, the Appeals Referee shall adjourn/continue the hearing to allow such service to be accomplished. At the hearing, the party must offer an authenticated copy of the affidavit as an exhibit. If the party against whom the affidavit is offered objects to the entry of affidavit into the official record, said party shall have the right to request an adjournment or continuance of the hearing for the purpose of subpoenaing the author of the affidavit, who shall be permitted to testify by telephone at the reconvened hearing. Once the affidavit is made a part of the official record of evidence compiled by the Appeals Referee, findings of fact may be premised thereon. Notwithstanding the foregoing, the results of the controlled substance examination and compliance with any applicable statutory or regulatory procedural requirements may be deemed proved if the claimant admits or stipulates to such during the hearing before the Appeals Referee or by affidavit.

14.19 Official Record (A) The Appeals Referee shall prepare an official record of a hearing which shall include: (1) Documents designated as part of the official record in accordance with Regulation No. 13.17; (2) All statements of parties or witnesses, including reports from telephone conversations, reports, forms and documents submitted by the parties prior to the hearing; 14-10 (3) Offers of proof; (4) Evidence presented; (5) Matters officially noticed, except matters so obvious that a statement of them would serve no official purpose; (6) Any other decisions or orders previously entered in the case; (7) Any other document necessary to the disposition of a case. (8) The taped recording of the proceedings. (B) Contents of the official record shall be identified for the record, marked as exhibits, and entered into the official record by the Appeals Referee. (C) Copies of all records from Appeals Referee hearings shall be kept on file for a minimum of 90 days after the expiration of any appeals period; thereafter,

only copies of final decisions will be retained in the Commission files, and the Commission may destroy any records which it determines no longer serve any legal, administrative, or other useful purposes.

14.20 Adjudgments An adjournment may be directed or granted by an Appeals Referee at his/her discretion and only for good cause. Good cause for an adjournment includes, but is not limited to: 1. the hearing cannot be completed in the time allotted; or, 2. a party needs additional time to obtain legal representation and the party made a reasonable effort to obtain legal representation prior to the commencement of the hearing; or, 3. a party wishes to present additional evidence or witness and the party made a reasonable effort to have the evidence or witness at the hearing, but was unable to do so; or, 4. a party, necessary witness, legal representative or Appeals Referee is unable to continue with the hearing because of personal illness; or, 5. a properly issued subpoena has not been served on a necessary witness; or, 6. new material matters develop in the course of a hearing which a party is unprepared to meet and the element of surprise is present so a party needs an opportunity to prepare. If the hearing is adjourned prior to the close of testimony, the Appeals Referee shall explain to the parties present the reason for such adjournment. However, no case shall be delayed unreasonably. 14-11

14.21 Dismissals If an appealing party fails to pursue an appeal or fails to appear at a hearing within fifteen (15) minutes of the time set for the hearing, after having been duly notified of the hearing, the appeal may be dismissed.

14.22 Reopening of Cases An Appeals Referee may reopen hearings within ten (10) days of entry of an appeal dismissal upon written notice to the parties.

14.23 Withdrawals An appellant may withdraw an appeal upon approval of the Appeals Referee.

14.24 Nonappearance of Appeals Referee With respect to in-person hearings, in the event that an Appeals Referee fails to appear for a scheduled hearing at a local office within fifteen (15) minutes of the time set for the hearing, and has not contacted the local office concerning such delay, the local office manager shall permit the parties to leave and said hearing shall automatically be continued and rescheduled.

14.25 Decisions (A) Following the conclusion of the hearing, the Appeals Referee shall render a decision within five (5) working days from the date of the hearing, and such decision shall be issued without undue delay. The decision shall be in writing and shall be signed by the Appeals Referee or his/her designee. (B) The written decision of the Appeals Referee shall include findings of fact, conclusions of law, and the decision of the Appeals Referee. (C) Findings of fact shall be made on all issues or questions presented at the hearing. Said findings shall be based on the competent evidence of record and on matters officially noticed. (D) Copies of the decision shall be mailed to

parties, legal representatives of record, and such local offices and departments of the Commission as necessary to put the decision into effect. The decision shall include an explanation of the rights of appeal. 14-12 (E) The decision of the Appeals Referee shall be deemed the final decision of the Commission unless an appeal from said decision is filed within ten (10) days from the date the decision was mailed. (1) In computing any period of time prescribed by these Regulations, including rules respecting notice, the day of the act or notice is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a state legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a state legal holiday. A half-holiday shall be considered as other days and not as a holiday.

14.26 Interpreters Whenever any deaf person is a party or necessary witness to a hearing conducted before an Appeals Referee, the Appeals Referee shall, upon request or upon the Appeals Referee's own motion, appoint a qualified interpreter of the deaf to assist such deaf person in the hearing. The Commission shall determine a reasonable fee for such interpreter services, the cost of which shall constitute expenses under Chapter 96 of the North Carolina General Statutes.

14.27 Foreign Language Interpreters In the event a party or necessary witness experiences difficulty in speaking or understanding the English language, the Appeals Referee shall, upon request or upon the Appeal Referee's own motion, attempt to secure an interpreter to assist that party or necessary witness in the hearing.