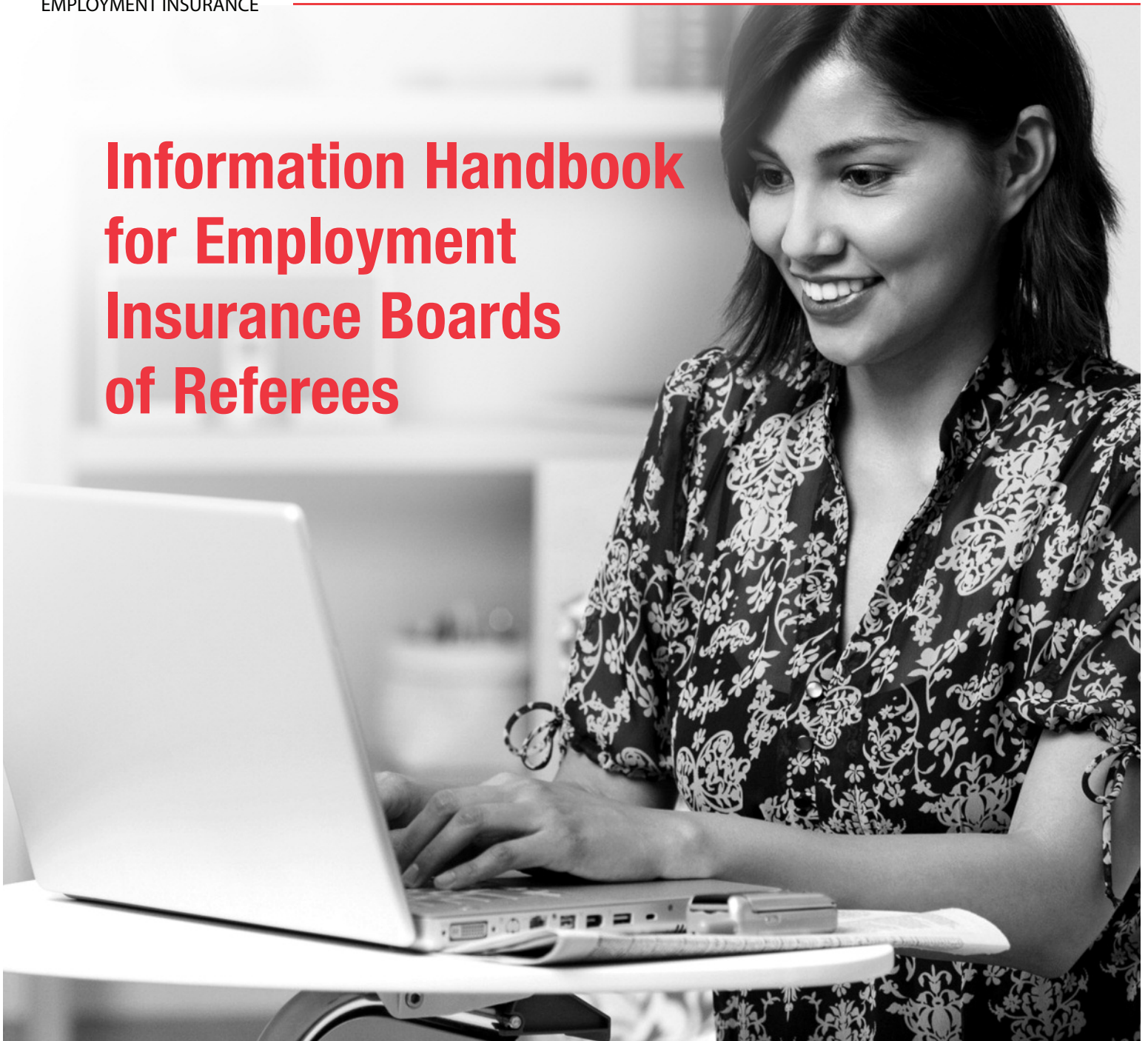


Information Handbook for Employment Insurance Boards of Referees



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Purpose of this handbook

This handbook provides an overview of the Employment Insurance (EI) appeal system and structure as well as the roles and responsibilities of the Employment Insurance Boards of Referees, as prescribed under the *Employment Insurance Act*, *Employment Insurance Regulations* and related jurisprudence.

NEW

Employment Insurance is now being delivered by Service Canada – the Government of Canada’s new service delivery network that brings a range of federal services and benefits together to meet Canadians’ needs. Service Canada offers easy-to-access, one stop, personalized service. For more information about Service Canada or to find a Service Canada Centre, the public may visit us on-line at servicecanada.gc.ca or call 1 800 0-Canada (1 800-622-6232).

1

Canada Employment Insurance Commission

The Canada Employment Insurance Commission finds its basis for existence under the *Department of Human Resources and Skills Development Act*. It is composed of four members: the Chairperson and the Vice-Chairperson, who are the Deputy Minister and Associate Deputy Minister, respectively; the Commissioner for Workers; and the Commissioner for Employers.

The Commission is responsible for Employment Insurance, employment services, and the development and use of labour market resources. It administers the *Employment Insurance Act* and its Regulations.

Part I of the *Employment Insurance Act* provides for passive income support (EI benefits) for persons temporarily out of work. Part II provides for active employment benefits and support measures to enable unemployed persons to return to work. Part VI provides for the appeal system and the establishment of Boards of Referees.

Employees of the Department who process and make decisions on claims for Employment Insurance benefits have been delegated the authority to act on behalf of the Commission.

2

The Commission's legislative and administrative powers under the *Employment Insurance Act* and Employment Insurance Regulations

Parliament enacted the *Employment Insurance Act*, but the Commission has the power to make regulations. Following approval by the Governor in Council, the regulations become part of the Act. The Commission is responsible for administering the EI Act and its Regulations, except those parts dealing with the insurability of employment, premium collection and the repayment of benefits under Parts IV and VII of the Act, which fall under the mandate of the Minister of National Revenue. The Minister of National Revenue makes decisions on insurability of employment and on the amount of both insurable earnings and premiums payable with respect to insurable employment. All disputes in this area are referred to the Tax Court of Canada.

Under Part III of the EI Act, the Commission annually reviews, and may adjust, the premium rates of insured workers and employers. The Canada Revenue Agency (CRA) is responsible for collecting these premiums. One of the Commission's main administrative duties is to determine claimants' entitlement to EI benefits. Employment Insurance agents who work at local offices decide individual claims based on EI legislation and jurisprudence established by higher courts, specifically the Supreme Court of Canada and the Federal Court of Appeal, and by Umpires, who are federal and provincial court judges.

3 Overview of the EI system

Canadians who contribute to the EI system are eligible for benefits under the circumstances noted below. People who are denied EI benefits have the right to appeal the decision of the Commission.

3.1 Applying for Employment Insurance benefits

Claimants file for benefits by completing the appropriate forms online or in person and by providing a record of employment (ROE). When insured workers become unemployed, they should receive an ROE from their employer. The ROE is the single most important document with regard to Employment Insurance because it shows the employee's insurable earnings and the number of insured hours worked. Employers are legally required, within five days of the end of employment, to issue an ROE to all employees who cease working in insurable employment.

The ROE provides the information required to determine whether the EI eligibility requirements are met and to calculate a claimant's weekly benefit rate. In addition to the paper ROE, the ROE Web application is now available to employers who meet the technical requirements. Web ROEs can be received and maintained in a database and can then be retrieved electronically.

3.2 The Commission's determination of eligibility for EI benefits

After the EI Commission agents examine the application for EI benefits and obtain any additional information required, they decide on the claimant's eligibility. Payment of benefits depends entirely on meeting the eligibility requirements of the EI legislation and the jurisprudence, i.e., legal precedents established by the superior courts and the Umpire.

Ineligible claimants are notified in writing and advised of their right to appeal the decision. In some situations, claimants are also notified verbally when they are not eligible for benefits.

If the agent allows the claim for benefits in circumstances where a claimant quit for work-related reasons, was fired for misconduct or lost employment by reason of a labour dispute, the employer will be informed of the decision and the corresponding right to appeal.

Where claimants meet the eligibility and entitlement criteria, they normally have to make a bi-weekly declaration. They usually complete the EI report on-line or use the telephone reporting service. Alternatively, some claimants may complete paper reports by mail.

4 The EI appeal system

The EI appeal system consists of two levels of appeal: the Board of Referees and the Umpire. While the decisions of the Umpire are final, there are some situations that can be reviewed by the Federal Court of Appeal and, ultimately, the Supreme Court of Canada. There are certain fees involved in appeals beyond the Umpire level.

Section 111 of the EI Act provides for the establishment of Boards of Referees and gives the Commission the power to make regulations with respect to the appointment of panel members, the constitution of a quorum, and the practices and procedures of the Board of Referees.

Section 112 of the EI Act provides for the appointment of Umpires.

Section 114 of the EI Act provides that claimants (or others subject to a Commission

decision) and employers may appeal the Commission's decisions to the Board of Referees.

Section 115 of the EI Act provides that a decision by a Board of Referees may be appealed to the Umpire by claimants, other persons who are the subject of a decision of the Commission, employers, organizations to which claimants or employers belong, or the Commission, on the following grounds:

- the Board of Referees failed to exercise or exceeded its jurisdiction, or failed to observe a principle of natural justice;
- the Board of Referees erred in law; or
- the Board of Referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

5 Appeals to the EI Board of Referees

General information

When the Commission renders a decision on a claim that results in a denial of benefits, the Commission is required to communicate its decision to the claimant or any other person who is subject to a Commission decision. Under certain circumstances, the Commission informs employers of its decision as well, for instance when the Commission decides to pay benefits to claimants who lost their employment because of a labour dispute, who were dismissed or who left their employment voluntarily for work-related reasons.

Employers and EI claimants (or others subject to a Commission decision) have the right to appeal these Commission decisions to the

Board of Referees. These appeals must be submitted in writing within 30 days of receiving the decision. The Commission has the discretion to extend this 30-day period when there are special reasons for delay (subsection 114(1) of the Act). The notice of appeal may provide information not known to the Commission at the time of the initial decision. In this case, the decision may stand or be removed.

If the original decision stands, the agent prepares the appeal docket to the Board of Referees. All evidence relevant to the issue under appeal is identified (that is, given exhibit numbers), and written representations citing the relevant jurisprudence are prepared. Copies

of the prepared docket are then sent to the claimants, their representatives and, under certain circumstances, to employers and their representatives, as well as to the Board of Referees hearing the appeal.

Sometimes, several appeals may involve identical issues. In these cases, a representative appeal may be sent to the Board, following agreement among the parties. The Board of Referees' decision will apply to those individuals who have agreed to this procedure and who are identified on an accompanying list.

The Commission's objective is to provide a speedy and efficient appeal service to appellants. The goal is to schedule 90 percent of appeals to be heard by the Board of Referees within 30 days of their initial receipt.

5.1 Delayed appeals to the EI Boards of Referees

Under paragraph 114(1)(b) of the EI Act, the Commission, at its discretion, may allow further time in any particular case for special reasons. This discretion must be exercised in a judicial manner. This means taking into account only those factors that are relevant. An appeal on the refusal to extend the 30-day appeal period is different from other types of appeals. The appeal is limited to reviewing the Commission's exercise of its discretionary power. The Board of Referees does not have the authority to determine whether special reasons exist to justify a delayed appeal.

If the Board decides that the Commission has not exercised its discretion in a judicial manner in refusing to accept a delayed appeal, the Board itself can exercise the discretion granted to the Commission. The Board may also return the matter to the Commission, enabling it to exercise its discretionary power and advise the claimant accordingly.

6 Role of the EI Boards of Referees

The Board of Referees' main function is to make decisions on all issues arising from an appeal lodged under subsection 114(1) of the *Employment Insurance Act*.

Once constituted, the Board of Referees does not act on behalf of the claimant, the employer or the Commission, and neither do its individual members, regardless of whether they are drawn from a background affiliated with labour or employers. The Board is there to referee and to render justice based on the *Employment Insurance Act*, its *Regulations* and jurisprudence. The Board acts as an administrative tribunal, hearing each side and rendering a decision based on the facts of

the particular case and the law, in accordance with the principles of natural justice.

The principles of natural justice require that the parties:

- receive formal notice of the hearing;
- are entitled to be heard;
- are entitled to know the case against them; and
- are entitled to a fair and impartial hearing.

It is to the advantage of all parties and Board members to prepare themselves for the hearing on receipt of copies of the appeal docket.

The Board of Referees is empowered to:

- dismiss the appeal, terminate a disentitlement or allow the appeal in its entirety, with or without new facts;
- referee the arguments for and against the decision;
- assess the credibility of witnesses' statements, both written and oral; and
- give the benefit of the doubt in favour of the claimant in cases of loss of employment by reason of misconduct or voluntary leaving, when faced with contradictions and equally credible versions. In all other cases, the benefit of the doubt must be given to the party that does not have the burden of proof.

The Board does not have the authority to:

- investigate, other than to ask that further information related to the issue under appeal be placed before it by whomever the Board specifies;
- review a claimant's past history of entitlement which is unrelated to the issue under appeal;
- subpoena witnesses;

- require evidence under oath;
- charge anyone with contempt of court;
- determine if employment is insurable - who constitutes the employer – the length of insurable employment - the amount of insurable earnings – and what premiums were, or ought to have been, paid;
- write off an overpayment; or
- refer claimants to courses of instruction under section 25 of the EI Act.

Unlike a decision of an Umpire, a decision by a Board of Referees does not constitute a precedent and is not binding on any other Board of Referees.

Before arriving at the hearing, the Board of Referees members should have reviewed the facts of each case, the applicable jurisprudence, and the relevant sections of the EI Act and Regulations. The Board should note not only the jurisprudence cited by the Commission and the interested parties to the appeal, but also other relevant jurisprudence that was not cited. The Board of Referees Quick Reference Tool, the Jurisprudence Library and the EI Appeal Decisions Favourable to Workers databases may be valuable in conducting such research.

7

Code of Values and Conduct for Employment Insurance Board of Referees

Board of Referees members adopted a “Code of Values and Conduct for Employment Insurance Board of Referees” to establish the responsibilities and conduct expected of all members to maintain the integrity, competence and effectiveness of the tribunal. The Code, developed by a working group of Board

members, is a product of extensive consultation with their peers.

Board of Referees members commit to upholding these values and conduct by signing a copy of the Code on appointment or, in the case of existing members, on reappointment.

Code of Values and Conduct for Employment Insurance Board of Referees

Boards of Referees conduct hearings and make decisions in compliance with the Employment Insurance Act and Regulations, consistent with the principles of natural justice.

The principles of natural justice as established by the Supreme Court of Canada are that the parties will:

- Know the case;
- Have the opportunity to be heard/hear the case;
- Provide/receive an impartial hearing;
- Know that the persons who hear the case will make the decision; and
- Provide/receive a written decision.

Members will do this with:

- Professionalism;
- Integrity;
- Impartiality;
- Respect;
- Objectivity; and
- Collegiality.

These values must be reflected in the conduct of the Board members in the following manner:

- 1. Prior to the hearing:** members must thoroughly review the appellant's file; identify the issues as well as the applicable law and the relevant jurisprudence.
- 2. During the Hearing:** members shall always display the essential elements of integrity by being courteous, attentive, patient, open-minded and respectful of the diversity of all participants, while ensuring that the proceedings are orderly, efficient, non confrontational, and as informal as possible. Members shall, in a respectful manner, seek, probe and clarify relevant and additional facts.
- 3. Confidentiality:** members must treat all information contained in the appeal docket and disclosed at the hearing as strictly confidential.
- 4. Conflict of Interest:** members must be free of any bias or perception of bias towards any of the parties to the dispute and should the perception of conflict of interest arise, the member must immediately withdraw from the hearing.
- 5. Impartiality:** members must be and be seen to be impartial and objective.

8 Service pledge

Board members have developed a service pledge that reflects their commitment to the parties to the appeal. They pledge to:

- come to the hearing with an open mind;
- have read a copy of the appeal docket that was sent to the appellant;
- give all parties an opportunity to provide additional information and explain their case;
- treat the appellants and interested parties fairly and with courtesy;
- make the hearing as informal as possible; and

- make an impartial, well-reasoned decision and communicate it to the appellants and interested parties in writing within a few days of the hearing.

All appellants receive this service pledge entitled “Important Message from the Board of Referees” with the appeal docket. A copy is also displayed in every boardroom.

9 The hearing room

Boards of Referees hear appeals in Board Centres across the country. The Board of Referees Assistant ensures that the room is ready for the hearing in compliance with established boardroom standards. The Board

of Referees Assistant also ensures that any supplies and reference materials are available and any equipment is in working order.

10 Adjourning the hearing

All efforts and attempts are made to prevent or minimize adjournments. In order to observe the principles of natural justice, adjournments may be necessary when the interested parties allege they have not been given a reasonable opportunity to prepare their case, or they or their representative cannot be present on the scheduled date of the hearing. Chairpersons are responsible for deciding whether to grant an adjournment. It is a discretionary power that must be exercised in accordance with the rules of natural justice.

It may also happen that, during the course of a hearing, the Board becomes aware that there is an important witness who ought to have been directed to attend, or that one of the parties possesses further pertinent evidence which perhaps he or she has not brought to the hearing. In the interest of justice and ascertaining the facts, it might be advisable to adjourn the case. The chairperson may also decide to adjourn a case under section 82 of

the Regulations when further investigation is required. For example, if the claimant does not have enough insured hours to qualify for benefits, but it is possible that some insured hours were not recorded, the chairperson could refer the case back to the Commission for clarification.

Since an adjournment delays the final disposition of the case and may cause hardship to the claimant, the information requested should be essential to the decision to be rendered by the Board.

In order to provide timely service, adjourned cases are normally rescheduled within 45 days.

11 Attending the hearing

General information

The following persons have the right to attend the hearing:

- the claimant;
- the employer;
- other persons who are appealing a Commission decision;
- any representative of the claimant, employer or other person;
- any officer designated by the Commission;
- any legal representative of the Commission;
- any other person likely to be affected by the decision (in representative appeals where one decision applies to many appeals); and
- any other person who assists the appellant (i.e., a friend, a family member or an interpreter).

At the discretion of the chairperson, a witness may be called to be heard by the Board.

Before admitting any persons to the hearing room and introducing them to the Board, the Board Assistant greets individuals appearing before the hearing and asks for two pieces of identification. The Board Assistant then ascertains the names and addresses of the persons and in what capacity they are appearing before the Board (claimant, claimant's representative, witness, employer). This practice prevents any cases of mistaken identity and confirms who attended the hearing, their roles and addresses.

11.1 Attendance of the claimant or employer

When claimants, employers or their representatives appear at the hearing, the Board must hear any representations and any evidence submitted. If the notice of hearing did not provide enough time to submit written representations or otherwise to prepare a case, the Board may, under subsection 83(1) of the Regulations, grant an adjournment to allow more time to prepare and submit such representations before the case is decided.

The chairperson should request that the appellant or other witnesses attend if their presence would help to determine the facts. For example, the presence of the claimant, employer or other witnesses might help to clarify a difference of opinion about alleged misconduct or voluntary leaving, or situations in which contradictory statements are not satisfactorily explained. The hearing could then be adjourned and the notices of request issued for a rescheduled hearing at a later date.

When the chairperson issues a notice of request to attend a hearing, the Commission is authorized to pay the allowances and traveling expenses of the person appearing before the Board, in accordance with Treasury Board guidelines. The request to attend the hearing is not binding, i.e., there are no penalties for not attending or complying with the chairperson's request.

11.2 Attendance of the Commission

The Commission is a party to all appeals and has equal but no greater rights than any other interested party. The Commission does not normally exercise its right to attend, preferring to make its arguments in writing to the Board. In cases involving complex issues and labour disputes, the Commission may attend the hearing and make representations.

If the chairperson believes that the attendance of a Commission employee might be beneficial, the Board Assistant will make arrangements to issue a request to attend the hearing.

Except during the appeal hearing, Commission officers cannot discuss cases with the Board or any of its members. Under no circumstances does any Commission officer or the Board Assistant remain in the room while the Board is deciding a case, nor is the officer or Board Assistant contacted for further clarification after the other parties have left.

11.3 Board of Referees quorum

Subsection 111(1) of the EI Act provides that a Board of Referees consists of three persons: a chairperson and two members. Subsection 78(3) of the Regulations provides that a Board can sit even though it is constituted of only two persons. To have a quorum, the chairperson and one member must be present, and the appellant must consent in writing.

When one member is absent, it is the responsibility of the Board of Referees Assistant to endeavour to find a replacement immediately. If no replacement can be found, the parties interested in the appeal must give their consent in writing that the case be heard with a two-person Board (subsection 78(3) of the Regulations). Should one of the parties object, the hearing cannot proceed and must be adjourned, as any decision reached by a two-person Board would be deemed not to be rendered by a properly constituted EI Board of Referees.

12 Telephone and video conference hearings

A hearing gives the parties an opportunity to present their case and to answer any questions the Board may have. When an appellant or an interested party cannot attend, a telephone hearing may be requested. Video conferences are available in a few locations. The Board of Referees Assistant will make the necessary arrangements.

Where it is not possible to arrange for either a telephone or video conference hearing, and in the chairperson's assessment one or more of the parties to the appeal should be heard, the chairperson may, in exceptional circumstances, request that the party or parties attend the hearing at the expense of the Commission.

13 Conducting the hearing

Hearings before the Board of Referees are meant to be simple and informal. The chairperson and members of the Board are

expected to create and maintain an atmosphere conducive to the free flow of information throughout the hearing.

The chairperson should ensure that all parties attending the hearing are aware that Board members are independent of the Commission. It should be made clear that the Board's function is to referee, to be an impartial body applying the EI legislation and relevant court judgments. Those attending should be informed that the Board's function is to apply the law, not change it, and to ensure that all the facts of the case are known and applied to the case. None of the Board members represents the interests of the government, employers or labour; together they constitute an impartial tribunal called on to provide objective analysis and unbiased decisions.

The interested parties may be accompanied by an interpreter if they are not sufficiently familiar with either of the two official languages. A hearing may be adjourned to enable the claimant to be accompanied by an interpreter at a rescheduled hearing. In the case of persons with hearing impairments, the *Canadian Charter of Rights and Freedoms* requires that any proceedings of a tribunal be conducted with the aid of a sign language interpreter. Section 14 of the Charter provides that everyone at the hearing must understand the language in which it is being conducted, including people who are deaf or hearing impaired.

Any information having a bearing on the decision cannot be considered confidential. Natural justice requires that all parties to an appeal be aware of pertinent evidence so that they may provide a rebuttal. Evidence submitted and considered at the hearing cannot be considered confidential.

The Board is not in a position to know whether a claimant will be eligible to receive benefits following its decision. Therefore, the Board of Referees cannot assure claimants that benefits will be paid if their appeal is successful.

After the hearing, the chairperson informs the participants that the Board's written decision will be communicated to them shortly by mail.

The Board Assistant is not present during the actual hearing. Should there be a request from one of the parties present to include in the appeal docket a specific document that he or she knows ought to be on file, the Board Assistant can retrieve the document. The Board Assistant may also be called on to assist with recording, video conferencing or telephone equipment, or to enter new exhibits as directed by the chairperson.

14 Recording the hearing

The purpose of recording a hearing is to have a reviewable record of the proceedings in the event of a subsequent appeal to another level.

The chairperson has the discretion to record the proceedings at a Board of Referees hearing at the request of the appellant or the interested parties, including the Commission. While such requests would normally be respected, in cases involving labour disputes or sexual or other harassment, recording is required.

While the chairperson has the sole authority to determine how the hearing will proceed, the recording of more complex or sensitive cases is recommended. From time to time, the judiciary wishes to know whether or not a particular hearing was recorded, and if so, who made the request. The Board of Referees' written decision must specify whether or not the hearing was recorded and identify which party requested the recording.

15

Deliberations of the Board of Referees and decision writing

Once the hearing ends, all parties leave the room and the Board of Referees takes the matter under consideration, deliberates and renders a decision based on the docket and the facts presented during the hearing.

Parties - *NEW*

- the name of all persons attending and their role in the hearing, e.g., claimant, witness, employer's representative, interpreter. This information is recorded in the header portion of the decision.

For purposes of consistency and uniformity, members and the chairperson are given a template for a Board of Referees' decision to assist them in writing the decision once their deliberations are completed. The template contains five sections:

Issues

- the issue under appeal as found in exhibit 1, the Presentation of the Appeal to the Board of Referees.

Information from the docket

- all the evidence put forward by the Commission and the claimant that is in the appeal docket.

Evidence at the hearing

- oral or written evidence provided at the hearing.

Finding of facts, application of law

- how the evidence was analyzed, what evidence was found to be fact, which sections of the *Employment Insurance Act*, *Regulations* and jurisprudence apply and the

conclusion, i.e., the Board finds that the claimant did or did not lose his or her employment by reason of his or her own misconduct.

Decision

- a statement in respect of the appeal – dismissed, allowed or allowed in part.

The Board's written decision must be clear, complete and written in plain language. Once the facts are established and summarized, all parties to the appeal are entitled to know:

1. the implications of these facts;
2. why some evidence was given more weight;
3. what the link was between the particular facts of the case and the legislation; and
4. what principles in the jurisprudence apply, and what Canadian Umpire Benefit (CUBs) decisions and Federal Court of Appeal and Supreme Court of Canada decisions were relied on given the particular facts.

The Board of Referees, the Umpire and the Courts are bound by the law and cannot refuse to apply it, even in the name of equity and fairness.

Recording the reasoning process allows parties to understand why the Board decided as it did and determine whether they agree with the decision.

The chairperson and Board members sign their decision. If one of them dissents, a separate decision must be written and signed. The Board Assistant sends all parties the signed decision and the leaflet "How to appeal a Board of Referees' Decision" to the Umpire.

16 Implementing the Board's decision

When the Board allows an appeal, benefits are paid in accordance with the decision, provided that the claimant meets all other entitlement conditions not under appeal.

The only exception to this is when the Commission appeals the decision of the Board

of Referees to the Umpire within 21 days of the Board's decision. The Commission may appeal on the grounds that the Board erred in law or on the grounds that the claimant ought to be disentitled because of a loss of employment due to a labour dispute.

17 Request for reconsideration and *de novo* hearings

17.1 Request for reconsideration

In accordance with section 120 of the EI Act, a Board of Referees may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or based on a mistake as to, some material fact.

A request for reconsideration by the Board may be necessary in the following instances:

- when an interested party submits new facts, or purported new facts, which in his or her opinion could influence the decision of the Board, and the interested party requests reconsideration;
- on the request of a party when there were multiple decisions appealed and the Board failed to deal with one (or more) of them at the first hearing;
- when the Umpire orders that a case be reheard by the same Board.

If a party decides to proceed with the reconsideration request to the Board of Referees, the appeal is to be rescheduled with the same Board that previously heard and decided the case. The Board will first have to decide whether the information constitutes new facts.

All parties to the appeal are advised of the date on which the Board of Referees will conduct their review of the information submitted, to comply with subsection 83(1) of the EI Regulations, which reads:

“A board of referees shall give each of the parties interested in an appeal a reasonable opportunity to make representations concerning any matter before the board.”

If the Board considers that there are no new facts, the request for reconsideration will be denied. If the Board is satisfied that new facts have been presented, it may rescind, maintain or amend its previous decision.

17.2 *De novo* hearings

In accordance with subsection 117(c) of the EI Act, an Umpire may refer the matter back to the Board of Referees for rehearing and redetermination.

Where the Umpire has directed that the case be heard anew (*de novo*), the Umpire will have:

- rescinded the original decision of the Board;
- ordered that the case be heard anew (*de novo*) by a differently constituted Board; and
- ordered the removal of the original decision from the appeal docket.

This process is intended to ensure that the appellant receives a fair and unbiased hearing by the newly constituted Board of Referees. Moreover, the Umpire may direct what issues should be examined by the Board.

A hearing de novo is not a rehearing as the case is to be heard anew, as though it had not been heard by any Board before.

18 Media access

The hearings of a quasi-judicial tribunal are public in nature. In practice, the public very rarely attends a Board of Referees hearing. In very exceptional cases, members of the media may wish to attend. Normally, one of the parties to the appeal has advised them of the time, date and place of the hearing and invited them to attend.

According to the *Canadian Charter of Rights and Freedoms*, and the Federal Court's decision in T-1588-87, the media have the right to attend any hearing of an administrative tribunal and, therefore, any hearing of a Board of Referees. However, a ban on publication might be justified given the "competing or counter-balancing rights or interests" raised by

the claimant, employer or other person subject to a Commission decision.

Whenever the right of the media to cover a particular hearing is challenged, it is incumbent on the chairperson (in accordance with the provisions of subsection 80(7) of the Regulations) to determine whether the proceedings will be held in the presence of the media. The chairperson advises the parties that they have a reasonable period to present their arguments and then decides to allow or deny access. Once the chairperson's decision is communicated to the parties, they are at liberty to challenge that decision before the Federal Court.

19 Impact of the Canadian *Charter of Rights and Freedoms*

On all hearings

The *Canadian Charter of Rights and Freedoms* has had a significant impact on the obligations and jurisdiction of the Board of Referees. Firstly, the Board carries an important responsibility as a representative of justice in the eyes of the public. It must adhere to the Charter in its demeanour at the hearing and in its written decisions. Simply put, there can be no breach of the Charter's prohibition of discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (section 15 of the Charter).

On hearings invoking the Charter

In some instances, an appellant may include a Charter ground or argument as one of the issues under appeal to the Board of Referees. For example, an appellant may argue that the provision of the *Employment Insurance Act* or *Regulations* leading to the denial of benefits is discriminatory and violates rights under the Charter. The Supreme Court of Canada ruled in the case of Tétreault-Gadoury (SC No. 21222) that the Board of Referees does not have the jurisdiction to consider arguments invoking the *Canadian Charter of Rights and Freedoms*, and it vested the Umpire and federal and provincial court judges with this authority.

Appointments to EI Boards of Referees

Appointments to EI Boards of Referees are governed by section 111 of the EI Act. Boards of Referees are tripartite, quasi-judicial administrative tribunals composed of chairpersons and panel members. Chairpersons are appointed by the Governor in Council, on the recommendation of the Minister of Human Resources and Social Development, for a three-year term and may be removed for cause. Other Board members are appointed by the Commissioner for Workers and the Commissioner for Employers, respectively, following consultation with labour groups or employer organizations. They are appointed for a three-year term which can be terminated under certain circumstances. There are some 1,000 Board members in Canada sitting in approximately 80 towns and cities.

Chairpersons and panel members are expected to:

- live or work in the area serviced by the Board Centre for approximately one year and have a reasonable knowledge of the local labour market;
- be aware of the diversity of the Canadian work force;
- be able to communicate effectively orally and in writing in either of the two official languages, and in certain cases in both official languages;
- be able to use a computer effectively in order to research jurisprudence over the Internet;
- be available for at least two sessions a month;
- not be in a situation that may create or be perceived to create a conflict of interest with respect to their functions. Conflict of interest

situations must be judged individually. However, as a guideline, here are some examples of conflict of interest situations; these are intended as examples and are not all-inclusive:

- the candidate is, or has in the last year, been an employee of Service Canada or HRSDC or
- the candidate for a chairperson position holds, or has held in the last year, an elected public office, or acts, or has acted in the last year, on behalf of any government body;
- if any potential conflict of interests occurs during the term of appointment of a Board member, then the respective appointing authority should be notified.
- advise the Board of Referees Assistant of any intended absence (normally absences should not exceed 3 months and at no time should impede the efficient functioning of the Board Centre);
- obtain a security clearance; and
- comply with the privacy requirements inherent in their position.

21 Continuing eligibility as a Board member

All requirements regarding initial appointment must be met throughout the three-year tenure of office. Failure to maintain public trust, a breach of privacy or continued absence which affects the efficient administration of the Board Centre could lead to termination of the appointment.

Members' or chairpersons' appointments will be jeopardized if they are charged with a criminal offence while in office, including an offence under the EI Act. After a verdict is reached, the members will continue on the Board if they are vindicated but will be

terminated if they are found to have committed the offence.

Chairpersons and panel members are responsible to inform their respective appointing authority should they resign.

In the case of chairpersons, the Minister may recommend to the Governor in Council that the appointment be terminated for cause.

The respective Commissioner may, on behalf of the Commission, terminate the appointment of a panel member.

22 Renewal

Although Board members may be appointed for successive terms, other suitable candidates may also be considered for appointment when a mandate expires. Renewal is considered in accordance with the eligibility criteria and is decided by the appropriate appointing authority.

There is no automatic renewal of terms of office under the legislation: chairpersons and members submit to the same process for reappointment as they did for the original appointment.

Incumbents interested in being considered for reappointment are expected to advise their respective appointing authority and follow the same process as for original appointments.

Renewal of an appointment also depends on whether the appeal volume at the Board Centre continues to justify the appointment of the same number of chairpersons or Board members.

23 Conflict of interest

Judges often emphasize that "Justice must not only be done, but must be seen to be done." Board members are in a position of public trust. They must always be aware of possible conflict of interest and remove themselves from any hearing where there is, or appears to be, a conflict of interest.

Chairpersons and Board members should not sit on a case in which they are or were a representative of the claimant or the employer.

Members should not sit on a case that may affect them, or one in which they have taken part on behalf of an association, a claimant, an employer or a witness. Also, if chairpersons or members consider themselves biased or if there could be a perception of bias due to a personal or business relationship, it is their responsibility to withdraw from the case and notify the Board Assistant, who will endeavour to find a replacement. The decision remains at

the discretion of the individual Board member, although principles of natural justice must be borne in mind. **Any member in a conflict of interest should withdraw from the hearing of the particular case.**

Interested parties to the appeal can object to the sitting of a particular Board member on the grounds specified in subsection 78(2) of the Regulations. For example, if a chairperson or member has taken part in events leading to the Commission's decision, the appellant may allege that the chairperson or member is ineligible. It is then the decision of the chairperson or the Board member to withdraw or to remain to hear the case.

It is possible that during their term on the Board of Referees, chairpersons or panel members could themselves become unemployed and begin to claim employment insurance benefits. This situation does not, by itself, constitute a conflict of interest.

Board members should note, however, that remuneration received from sitting on the Board of Referees constitutes earnings for employment insurance benefit purposes. Remuneration from sitting on the Board should therefore be declared on the bi-weekly reporting cards which the chairperson or member would have to complete in relation to their claim for EI benefit.

Permissible Political Activities

The overriding principle is that "a public office holder should not participate in a political activity where it may reasonably be seen to be incompatible with the public office holder's duty, or reasonably seen to impair his or her ability to discharge his or her duties in a politically impartial fashion, or would cast doubt on the integrity or impartiality of the office."

Members of a quasi-judicial body, such as EI Boards of Referees, should generally not participate in political activities. However, the following activities are permissible and do not automatically require resignation:

- contributing funds to a political party;
- membership in a political party;
- attending partisan events, displaying campaign material, or expressing partisan views in a public setting (subject to the general principle below).

You must notify the appointing EI Commissioner (members) or the Director of EI Appeals (Chairs) if you intend to pursue any of the following activities:

- seek nomination;
- run for office;
- fundraise; or
- manage a campaign.

You will need to take a leave of absence from the Board of Referees for the duration of your political involvement in these activities.

If you are elected to political office, either provincially or federally, you will need to resign your position on the Board of Referees. Board Chairs may be required to resign on election to other levels of office as well, so contact with the Director of EI Appeals is necessary.

24 Protection of Personal Information

The Department collects personal information to render decisions on claims for benefits under the *Employment Insurance Act* and is accountable for safeguarding this information in accordance with the Government Security Policy, the *Privacy Act* and its Regulations and the *Department of Human Resources and Skills Development Act*. Personal information, such as relationships, health issues, financial status or Social Insurance Number, that is contained in the appeal docket and divulged at the hearing must be safeguarded from disclosure.

Members and chairpersons of Boards of Referees are required to sign the “Employment Insurance Boards of Referees Undertaking” containing specific clauses dealing with the safeguarding of personal information and the rules to be followed.

Prior to appointment, chairpersons and members must agree to comply with the

privacy requirements, which are as follows:

- to act with discretion by not discussing cases outside the boardroom;
- to refrain from any disclosure to any other person or organization;
- to use the information only for the purposes of the appeal to the Board of Referees;
- to always safeguard the appeal dockets in their possession and return them to the Board Assistant for shredding at the end of the day’s session;
- to ensure any information transported to the Board Centre on a recording device contains no personal identifiers and is erased at the end of the hearing day.

The same privacy considerations apply to computer access and electronic documents under the control of a Board member.

25 Security clearance

Under the Federal Government Security Policy, departments must ensure that persons who have access to classified government information in the performance of their duties are reliable and trustworthy. Due to their access to personal information and the legal nature of the duties of a Board of Referees, in addition to the high degree of responsibility and public trust required to effectively fulfill these duties, chairpersons and members must obtain a security clearance before their appointment can be confirmed.

In order to obtain a security clearance at the reliability level, chairpersons and members are required to undergo a criminal reference check

which, in some cases, may involve fingerprinting in order to confirm one’s identity. This information is protected under the *Privacy Act* and is used solely for the purpose of providing security screening assessments.

26 Training program for EI Boards of Referees

The training program for EI Boards of Referees has four components.

The **Orientation** component is provided immediately following appointment and includes: reading material; a video presentation; the “*Information Handbook for Employment Insurance Board of Referees*”; a visit to a Service Canada Centre and a Board Centre; and a day or two observing Board of Referees’ hearings.

The **Level 1 training** is a 3.5 day classroom course which includes an introduction to the role of the Board of Referees and covers: the principles of natural justice; EI legislation and jurisprudence; hearing skills and decision writing; hands-on jurisprudence research; and the “*Getting Started – A Guide for New Chairpersons and Members of Boards of Referees*”. On completion of this training you will be called on to hear cases.

Between 4 to 6 months following your level 1 training, you will receive the **Level 2 training**. This 3.5 day classroom program expands on the Level 1 training and provides more in-depth training on hearing skills; evidence evaluation; conducting a hearing; and decision-writing.

Both Level 1 and 2 involve training by independent legal professionals.

The **Annual Information Session** is a one day event which continues your professional development and includes networking with your peers, updates on EI appeal initiatives, case reviews of recent Federal Court of Appeal decisions and discussion of local concerns. The Commissioners and/or representative from the Appeals Directorate may attend. The session uses a uniform national agenda.

27 Remuneration and allowances

What is a session?

A session means the convening of a Board of Referees for the purpose of considering several cases (usually five or six), hearing interested parties and witnesses, deliberating, and preparing and completing the written decisions. It also includes training sessions and information seminars convened by the Commission.

Remuneration of Board members

Board members are paid a rate of remuneration approved by Treasury Board. The terms and rate of payment can be changed only on the

recommendation of the Commission and with the approval of Treasury Board.

The current rates and conditions are available from the Board Assistant at the Board Centre.

Cancelled sessions

In exceptional circumstances, it may be necessary to cancel an entire session. The chairperson and Board members should be given advance notice of at least one working day. For example, if a session is scheduled for 8:30 a.m. Friday, then the Board of Referees should be notified by 8:30 a.m. Thursday. Similarly, if the session is scheduled for 8:30 a.m.

Monday, then the Board of Referees should be notified by 8:30 a.m. Friday.

Where the chairperson or Board members are not given a 24-hour notice and would suffer financial loss, remuneration will be paid in full for the cancelled session.

Traveling expenses for the Board

Chairpersons and members are not reimbursed for expenses incurred in the course of conducting hearings at the Board Centre to which they have been appointed. However, when they are called on to attend a session at a centre other than their own, they are entitled to be reimbursed for travel and other expenses in accordance with Treasury Board guidelines.

Allowances for attending hearings

Persons requested in writing by the chairperson to attend a hearing should be compensated for loss of wages, provided the claim is supported by a voucher signed by their employer. They may also be paid traveling, living and other expenses according to Treasury Board guidelines.

Claims for remuneration and allowances

Chairpersons, members of the Board and people requested by the chairperson to attend Board hearings should complete and sign the required forms at the end of the session. The Board Assistant will collect the forms.