Best Practices for Conducting Telephonic Hearings

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1. Review of the Requirements for Telephonic Hearings
    - Notice requirements
2. The pros for telephonic hearings:
    - Easier for aged, disabled, or parents to participate;
    - Helpful to those working abroad;
    - Less reschedule requests;
    - Increase productivity for Hearing Officials (less travel time);
    - Hearings Official can take better notes, read computer screen, and follow a script;
    - Security- personal safety for the Hearings Official;
    - Simple technology and cost-effective for all parties;
    - Decreases anxiety and less disruptive;
    - Witnesses can participate without traveling.
3. The cons for telephonic hearings:
    - Credibility- how can it be determined without "seeing" the participants?
    - Poor weather conditions can impact power, Wi-Fi, and phone lines;
    - Greater difficulty maintaining the control of the hearing.
    - Poor sound quality- including loud backgrounds or poor-quality phones.
    - Participants have difficulty with phone technology- i.e., volume, mute, speaker, etc.

Controlling the Hearing

The hearing officer must control the hearing. The hearings officer has functions and responsibilities similar to a trial judge. For example, the hearings officer may place reasonable time limits on the presentation of evidence.

The hearings officer must emphasize the need for only one person at a time to speak, for the record to be clear, and for all parties to hear what is said.

The hearings officer sets the tone of the hearing through the use of calm authority.

The hearing officer should not engage in arguments with the parties or witnesses, but should listen to objections made, decide, and then move on. This is particularly difficult in telephone hearings as it is impossible to speak over the animated party. The hearings officer must listen carefully for an opportunity to get the attention of the animated person, to explain the acceptable tone and demeanor to use in the hearing and to warn of the consequences of future outburst.

Note – the hearings officer should be careful not to take over the hearing. The hearings officer should ensure the orderly flow of the proceeding by setting forth clear expectations for the conduct of the hearing and then insist the conduct is adhered too, without taking over the questioning of witnesses and presentation of evidence.

Parties, representatives, and other participants should conduct themselves with dignity, and show courtesy and respect for one another and the hearing officer.

To maintain and enforce proper conduct and decorum, the hearing officer may take appropriate action, including but not limited to:

- expressing disapproval and issuing warning;
- excluding a person or persons from the hearing; and
- recessing the hearing.

If a hearings officer fails to maintain control of a hearing and ensure the proper decorum is observed, there is a possibility that the right of the parties to a fair and impartial hearing may have been denied. The issue of a whether parties to a hearing have been denied the right to a fair and impartial hearing based upon the failure of the hearings officer to control the hearing has been decided by appellate courts, throughout the nation. In one such appeal, Heeter Construction inc. v. West Virginia Human Rights Commission 618 S.E.2d 592 (W.Va. S.Ct. 2005), the appellate court held that the behavior of the attorneys for both sides was so egregious, that the right to a fair and impartial hearing had been denied, by the hearings officer's failure to control the behavior. For more information, see the Heeter decision at, Heeter Construction v. WV Human Rights Commission, No. 32512 (courtswv.gov).

Evaluating Credibility by Telephone

By Judge Toni Boone

A. Listen for inconsistencies or contradictions in testimony: Within the present testimony, between the present account of even and past accounts, and between the testimony and facts clearly established by other witnesses or by documentary evidence.

B. Coaching: Are there long pauses between the time the question is asked and the time the answer is given? Do you hear whispering? Do you hear a pen or pencil scratching against paper as if notes are being exchanged? If the witness is testifying using simple words and phrases but reaches a point in his/her testimony where he/she begins using multisyllabic words and/or legal terminology, it is likely that the testimony was coached and/or rehearsed.

C. **Obvious fabrication**: Occasionally, the testimony is so inherently improbable that it could not be truthful.

D. **Detail in Answers to Questions** (of the Lack Thereof)

E. **Length of Answers to Questions**

F. **Testimony Seems Rehearsed, Artificial or Prerecorded**

G. **Can't Recall the Order in Which Pertinent Events Occurred**

> If someone lived through and observed an event, he or she can usually recall when it occurred in contrast to other events, even if the person cannot call the exact date of the event. If the testimony of a witness regarding the chronology of events is in question, you may want to make inquiries for clarification of the record: "I'm unclear on the order in which the events happened. What did you say was the last event of importance prior to today's hearing?" Your next question might be: "And what happened just before that?" If the events actually occurred and if the witness actually recalls them, he/she will be able to do this. If the witness can't do it, either the events didn't happen that way or they don't remember what happened at all.

H. Listen for **Changes in Behavioral Baseline**.

When actions and behaviors of witnesses are in accordance with their typical behavior, their credibility is enhanced. Witnesses who react in keeping with their usual behavior are more believable. The key is to determine their "Behavioral Baseline." Deviations from it indicate a lack of credibility. Deviations from

behavioral baseline which may indicate a lack of truthfulness include, but are not limited to:

1. Sudden **evasiveness** to certain questions begins when witness had testified candidly earlier.

2. **Long pauses** prior to answering certain questions when witness had answered readily before (also, "hemming and hawing"—uh, er um— before answering when it had not been necessary to "hem and haw" before).

3. **Sudden display of anger or other emotion** (crying) upon being asked certain questions after demeanor had been calm and pleasant and when the question, itself, would not normally prompt such an emotional reaction

4. Witness suddenly **starts repeating the question just asked or answering questions with a question** when he/she had not done so previously. 5. Abrupt change in tone of voice (voice had previously been pleasant and calm and suddenly becomes sarcastic or snide).

6. Abrupt change in volume of voice upon being asked a particular question or questions (volume suddenly becomes much louder or much softer).

I. Compare the witnesses in terms of their **potential interest in the outcome** of the case and judge their credibility accordingly.

J. **Look at the evidence as a whole**. Determine which version of the disputed event is more plausible in light of experience and common sense.

K. If credibility on both sides is questionable, avoid the credibility issue entirely and, if possible, **decide the case on another basis**.

Telephone Hearing Checklist

1. Start the recording and document the recording ID, if applicable.
2. Introduction for the official hearing record--open record with the following: HEARING OFFICER'S NAME, DATE, TIME, CASE NAME, DOCKET NUMBER/APPEAL ID/CASE NUMBER.
3. Introduce yourself to each party as they dial in, if needed, and explain how long you will be on standby for all parties to appear.
4. Explain this is an informal hearing with certain legal requirements, including recording the hearing.
5. Identify each participant present for the hearing, obtain/confirm addresses, phone numbers, or emails.
6. Place hearing participants under oath.
7. Clarify the point at issue.
8. Clarify right to attorney representation.
9. Explain hearing officer's responsibility --
    a) Work for the Hearings Division – separate from program areas, neutral party
    b) Review the rules and regulations presented to determine if appropriately applied. Hearings officers are required to follow the rules and do not have the authority to change regulations.
    c) Issue an administrative decision in writing by the due date (state probable date).
10. Order of presentation that will be followed--Agency has burden of proof.
11. Give basic ground rules for the hearing:
    a) Provide the order in which each party/witness will testify.
    b) No party, witness, or attorney may speak until you advise it is their turn.
    c) All participants must identify themselves each time they speak.
    d) Only 2 persons may participate at a time (one questioning, the other answering).
    e) No one may speak while anyone else is testifying except to offer an objection. Everyone will have an opportunity to speak, but not while anyone else is speaking.
    f) Optional: Each witness may signal when he/she has finished his/her statement. (This works well with interpreters.)
    g) Explain procedure regarding what to do if disconnected.
    h) Explain the Appellant's rights:
    i) opportunity to present your case
    j) opportunity to ask questions
    k) right to review documents submitted by the agency – ascertain if received
12. Provide the date for your decision and explain Administrative/Judicial Review or Procedural Review information will be provided on the decision letter.
13. *Presentation of documents (evidence).

a) If documents were submitted prior to the hearing, ensure the other party received a copy.
b) Introducing party summarizes document.
c) Address questions/objections.

14. *Mark/label the exhibit for the record.
15. Proceed with opening statements, direct testimony, cross-examination, re-direct, and re-cross.
16. If needed, ask questions to develop the record.
17. Allow closing arguments.
18. Close the hearing record- give a brief reminder of due date for decision or next steps.

**Process may differ for those hearings that require evidence be pre-filed.*

Helpful Tips:

- Have your hearing scripts ready- one for when the appellant shows, when the agency no shows, when the appellant no shows, short reversals, and one for interpreters.
- The hearings officer should begin recording as soon as practical, as the parties are being assembled, to record any conversation or ex-parte statements made. Recording of any conversation can help dispel any notion that the hearings officer engaged in inappropriate dialogue with either party and also, to verify full disclosure of any ex-parte statements, once all parties have joined the proceeding.
- Although the hearings process is described as "informal", this does not mean an absence of dignity or decorum in the hearings process. The term informality does not indicate a free-for-all; it is meant to create a proceeding that provides the flexibility needed to encourage an environment that will generate a free-flow of information among persons who are not necessarily trained in legal matters; an environment free from unnecessary and time-consuming legal technicalities. The ability to hold informal hearings is especially important when high volume hearings are being conducted.
- Prior to closing the hearing record, the hearings officer should ensure any documents submitted but not requested for admission are dealt with. The hearings officer should make note of the documents and state that they have not been admitted into the hearing record.
- Note: Any time during the hearing, the hearings officer may have a need to take a brief recess from the hearing. The hearings officer should instruct all parties to remain on the line, but not discuss the appeal or offer any testimony during the

recess, as no testimony will be taken. The hearings officer should indicate how long the recess will last. The hearings officer may find it necessary to recess for any variety of reasons:

- to allow a party to review evidence not received in advance of the hearing,
- to consult with the lead hearings officer or manager concerning the hearing or appeal, and
- to allow any party a brief break for personal or other reasons.