CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

VIRGINIA L FARGHER
Claimant

Precedent Benefit
Decision No. P-B-498

PAYCHEX NORTH AMERICA
Employer/Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROBERT DRESSER

ROY ASHBURN

ALBERTO TORRICO

DENNIS HOLLINGSWORTH

BONNIE GARCIA

Pursuant to section 409 of the California Unemployment Insurance Code, AO-238561 is hereby designated as Precedent Decision No. P-B-498.

Adopted as Precedent: November 8, 2011

Case No.: AO-238561
Claimant: VIRGINIA L FARGHER

REM

The employer appealed from the order of the administrative law judge that denied the employer's application to reopen a decision that dismissed the employer's appeal pursuant to section 5067(e), title 22, California Code of Regulations.

ISSUE STATEMENT

The issue before us is whether the employer had good cause for failing to appear at the hearing scheduled on the employer's appeal.

FINDINGS OF FACT

The employer appealed from a notice of determination/ruling that held the claimant not disqualified for benefits under section 1256 of the Unemployment Insurance Code and ruled the employer's reserve account was not relieved of benefit charges. A hearing on the appeal was scheduled for September 22, 2010. On September 3, 2010, a notice of that hearing was sent to the parties.

By a communication faxed to the office of appeals on September 17, 2010, the employer's agent requested a reset of the hearing on the ground that the employer's "true first hand witness," a female hereinafter referred to as "DM", would be unavailable for two weeks after September 17, 2010 due to that witness relocating from California "to the East Coast." The request was denied on September 17, 2010. The employer did not appear at the hearing.

A decision was issued on September 24, 2010, that dismissed the employer's appeal due to such nonappearance. The employer's agent timely filed an application to reopen the matter on October 1, 2010. The application repeated the reasons provided for the reset request and added that DM had been unable to appear at the hearing "via phone" and the employer had been "unable to secure a secondary witness due to personal time off that had been scheduled." A hearing on that application was scheduled for October 26, 2010. A notice of that hearing was mailed to the parties on October 7, 2010.

On October 11, 2010, the employer's agent faxed to the office of appeals a request for a reset of the October 26, 2010 hearing on the ground that a male witness, hereinafter referred to as "JH," would be "on vacation" on October 26, 2010, and therefore "unable to attend" the hearing. The request contained the following contention: "We have confirmed that we have no other first hand witness in this separation." The request was denied.

On October 22, 2010, the employer's agent faxed to the office of appeals a request that the employer's "first hand witness," DM, be allowed to participate in the October 26, 2010 hearing by telephone because DM had relocated to Pennsylvania from California. The request also contained the following contention: "There is not a local manager associated with this separation now in California." The request was granted.

DM testified by phone at the October 26, 2010 hearing as to the following. DM on September 17, 2010 began a motor vehicle trip across the country in order to relocate to New Jersey. DM completed that trip on September 24, 2010. DM was on a preapproved vacation leave during that trip. The employer knew on or about September 10, 2010 that DM would be on leave at the time of the hearing scheduled for September 22, 2010.

The administrative law judge at the October 26, 2010 hearing failed to make sufficient inquiry as to the importance of DM's testimony to an effective presentation of the employer's position on the case at the September 22, 2010 hearing, whether the employer by reasonable efforts could have arranged to have DM participate in the September 22, 2010 hearing by telephone, and whether the employer by reasonable efforts could have arranged to have some other individual adequately substitute for DM at the September 22, 2010 hearing. The administrative law judge also made no inquiry concerning the apparent inconsistencies in the employer's September 17, 2010, October 1, 2010, October 11, 2010, and October 22, 2010 communications concerning the case and the identity of its "true first hand" witness. It was not otherwise established whether DM might have been accessible to testify by telephone during the September 22, 2010 hearing and whether some other employee of the employer could have effectively substituted for DM at the September 22, 2010 hearing.

The administrative law judge's order denied the employer's application to reopen upon the stated rationale that by failing to either arrange for DM to participate in the September 22, 2010 hearing by telephone or submit for that hearing a written declaration from DM in lieu of DM's testimony, the

employer essentially deprived itself of good cause for its failure to appear at the September 22, 2010 hearing.

REASONS FOR DECISION

A party appears in the hearing by: (a) being present on the record at the hearing; (b) participating by electronic means on the record in an electronic hearing; (c) filing a statement that the party intends to constitute its appearance that the administrative law judge receives by the time of a hearing and does not exclude under rule 5062(j); or (d) interrogatories or deposition if so ordered by an administrative law judge pursuant to rule 5062(k). (California Code of Regulations, title 22, section 5061.)

In practice, this agency typically refers to statements submitted pursuant to regulation section 5061 as "written declarations" or "written statements." A written declaration includes a signed attestation under penalty of perjury that it is true, whereas a written statement does not include such an attestation. For purposes of this decision, each such document is hereinafter referred to as "statement."

A party shall arrange for its witnesses to participate in the hearing. (California Code of Regulations, title 22, section 5058(a).)

An administrative law judge may issue a notice to attend, a notice to attend and produce, a subpoena, or a subpoena duces tecum on his or her own motion, and shall do so upon the proper application of a party.(California Code of Regulations, title 22, section 5058(b).)

An application for a notice to attend or a subpoena shall include the name of the witness and a showing of the need therefor. An application for a notice to attend shall also include the address of the witness. (California Code of Regulations, title 22, section 5058(c).)

An appeal dismissed for nonappearance may be reopened if the appellant shows good cause for failing to appear at the hearing. (California Code of Regulations, title 22, section 5067(e).)

If a party to an appeal fails to appear in any day of a hearing and a decision is issued which is adverse to the party's interest, the decision may be vacated if the party shows good cause for failing to appear. (California Code of Regulations, title 22, section 5068(d).)

"Good cause" means a substantial reason under the circumstances, considering the diligence of the proponent and any burden or prejudice to any person involved. Good cause includes, but is not limited to, mistake, surprise, inadvertence, or excusable neglect. (California Code of Regulations, title 22, section 5000(hh).)

"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evidence Code, section 1200.)

Testimony given at the hearing under oath and subject to cross-examination is generally entitled to greater weight than hearsay statements, whether or not such statements are signed under penalty of perjury. (Precedent Decisions P-B-218, P-B-293, and P-B-378.)

The taking of evidence in a hearing shall be controlled by the administrative law judge in a manner best suited to ascertain the facts and safeguard the rights of the parties. (California Code of Regulations, title 22, section 5062(m).)

Precedent Decision P-B-365 involves circumstances generally similar to the instant case and offers some guidance on the issue at hand. In P-B-365, the claimant's appeal was dismissed because the claimant failed to appear at a hearing scheduled for 1 p.m. on the claimant's appeal. At or about noon on the day of the hearing it became necessary for the claimant to transport his girlfriend's eight-year old daughter to the hospital for treatment of an injury. At approximately 12:40 p.m. the claimant telephoned the office where the hearing was to be held in an unsuccessful attempt to speak to the administrative law judge assigned to the case. At that time the claimant explained to the office staff the reasons for the claimant's imminent nonappearance at the hearing. The claimant's appeal was dismissed due to the claimant's nonappearance at the hearing. Although the claimant's application to reopen the appeal was denied by an administrative law judge, the Appeals Board reversed that order and held that good cause existed to reopen the appeal. In doing so, the Appeals Board recognized "the desirability of having disputes under the Unemployment Insurance Code decided on their merits," the claimant's diligence in making a reasonable effort to notify the administrative law judge as to the reasons for his nonappearance "as soon as the facts of his situation could be communicated," and the exigent circumstances that rendered such nonappearance "excusable." P-B-365 also specifically referenced, with approval, a prior Appeals Board decision in which an employer was held to have shown good cause for failing to appear at a

hearing “where a continuance had been sought by telegram shortly before the hearing because an important witness could not be present.”

We are unwilling to decide this matter on the basis of the limited record thus far created. The administrative law judge did not conduct a sufficient inquiry into the circumstances surrounding the employer’s failure to appear at the September 22, 2010 hearing. Pursuant to the considerations set forth in P-B-365, the employer has the burden of showing that DM was an important witness at the September 22, 2010 hearing and that the employer could not by reasonable efforts have arranged for DM to testify by phone during that hearing. The record is unclear on these two questions. The apparent inconsistencies in the employer’s communications as to the identity of its “true first hand” witness are also unexplained. These questions will need to be fully addressed at a further hearing before the employer’s application to reopen can be fairly and properly decided.

While this case will therefore be remanded for further proceedings, we would be remiss if we did not take this opportunity to address certain faulty suppositions underlying the administrative law judge’s offered rationale for denying the employer’s application to reopen.

First, the administrative law judge implicitly assumes that because DM was an employee of the employer, it was necessarily within the employer’s power to require that DM participate in the September 22, 2010 hearing by telephone notwithstanding the fact that DM was on leave and involved in a cross-country relocation. However, no factual foundation for this hypothesis was ever established. While it was the employer’s obligation under regulation 5058 to arrange for DM’s participation in the hearing and the employer on or after September 17, 2010 might have requested a subpoena from the office of appeals to compel DM’s participation in the hearing by telephone once the employer knew that its reset request was denied, the administrative law judge failed to make any inquiry on this subject and the record is otherwise devoid of an explanation for the employer’s failure to pursue a subpoena. A party is generally expected to seek a subpoena for the purpose of securing at the hearing the testimony of an important witness who is unwilling or unable to voluntarily appear, but the extent to which a failure to make such a request might affect the decision on an application to reopen must depend upon an examination of the pertinent circumstances. It might not be reasonable to require an employer to seek a subpoena concerning an employee who is on leave due to a serious medical condition, jury duty, a death in the immediate family or other pressing reasons.

We recognize that employers on occasion succeed in obtaining telephone testimony from an employee who is on leave from work, but those instances cannot reasonably justify a policy of general application that would compel every employer to make any employee on leave available for testimony by telephone at a time and date specified by this agency. Whether or not an employer can reasonably be expected to make an employee on leave available to testify by telephone must depend upon an analysis of all the relevant facts involved. Those facts might well include, but are not limited to, when the employee's leave request was submitted, when such request was granted, the reason for the leave, the reasonable accessibility of the employee by telephone at the time and date of the hearing, whether under the existing circumstances the employer could be reasonably expected to request a subpoena that would compel the employee's testimony by telephone, whether such a request was promptly made by the employer, whether good cause existed for any failure to make such a request, and whether arranging for such testimony would otherwise unduly burden either the employer or the employee. No such analysis took place in this case.

Second, we note that the denial of the application to reopen was also founded, at least in part, upon the rationale that the employer's failure to submit a statement from DM in lieu of an appearance by DM in person or by phone deprived the employer of good cause for not appearing at the hearing. That rationale, however, is without a legitimate basis and contravenes both the regulation governing appearances at hearings and our agency's published instructions to the public on this subject. Regulation section 5061 permits a party to appear in a hearing by filing a statement if the party intends the statement to constitute its appearance, the statement is received by the administrative law judge by the time of the hearing, and the statement is not excluded by the administrative law judge as being otherwise untimely. However, the election to appear at the hearing by means of such a statement is clearly set forth in the regulation merely as an option rather than as a default requirement. Furthermore, the hearing information pamphlet that is provided by this agency to parties with their notice of hearing advises the parties of their options with regard to appearing at the hearing in the event that their request to change the date or time for the hearing is denied. That pamphlet describes the risks associated with each option. The pamphlet does not advise that declining to appear by a statement will in any way affect the decision on any subsequent application to reopen filed by the party. While we recognize that statements are frequently submitted at hearings from various individuals who are unwilling or unable to testify in person or by phone, we do not believe that a party can be fairly required to submit a statement in

lieu of an appearance in person or by phone by the party or an important witness. An appearance by a statement is neither in principle nor practicality the equivalent of an appearance in person or by phone.

In principle, a statement does not have the same legal status as sworn testimony presented in person or by phone and subject to questioning. By its very nature, i.e. an out of hearing statement offered to prove the truth of the matter stated, such a statement represents a hearsay statement that is, pursuant to the long-standing legal principles recognized in Precedent Decisions P-B-218, P-B-293 and P-B-378, generally subject to receiving less weight than sworn testimony presented in person or by phone.

In practicality, an appearance by statement is also not the equal of an appearance in person or by phone. A party who appears in person or by phone can hear and respond to whatever is said, answer questions, provide elaboration or clarification to testimony as needed, refute allegations made by opposing parties, question any witness who participates in the hearing, and provide a closing argument that addresses the facts, issues and assertions that were brought out during the hearing. In comparison, it is often quite difficult for a party who appears solely by way of a statement to accurately anticipate and adequately address in that statement every fact, issue, allegation and question that might arise during the hearing. An appearance by a statement thus constitutes a generally far less effective means of protecting and advancing a party's interests at a hearing than an appearance in person or by phone.

Moreover, under regulation sections 5067(e) and 5068(d), a party who appears by a statement is thereafter precluded from applying to reopen or vacate the decision following the hearing. These procedural remedies are only available to a party who does not appear in any way at the hearing. Thus, any policy or practice that effectively requires a party to appear by a statement if its reset and phone hearing requests are denied presents that party with an unfair dilemma. The party is faced with the discomforting choice of either appearing by the generally inferior method of a statement and thus foregoing the right to be heard on an application to reopen or vacate, or not appearing and later filing an application to reopen or vacate that will be denied on the ground that the party should have submitted a statement instead of not appearing. We do not believe that our appeals process should be permitted to function in such an unfair fashion.

We therefore confirm that a party who was denied the opportunity to appear in person or by phone should not thereafter be denied reopening merely because that party declined to appear at the hearing by way of the

generally inferior means of a statement. Our conclusion on this procedural point should not be interpreted as a pronouncement that a statement must necessarily be discounted as credible evidence. The decision as to the value and credibility to be attached to the assertions contained in any such statement remains within the authority of the administrative law judge assigned to the case. As we recognized in Precedent Decision P-B-235, hearsay evidence, though of lesser probative value than testimony under oath, is admissible for whatever weight the administrative law judge deems it to be worth. Our decision in this matter only addresses the extent to which a party's election not to utilize such a method of appearance should affect the consideration of an application to reopen later submitted by that party.

The question of what constitutes good cause for failing to appear at a hearing similarly arises in cases wherein the party who fails to appear at the hearing is not the appellant and therefore files an application to vacate under regulation section 5068(d). Although this case involves an application to reopen rather than an application to vacate, the principles and considerations described above apply equally to decisions on applications to vacate.

For the reasons described above, we believe that a further hearing must be scheduled on the employer's application to reopen.

DECISION

The administrative law judge's order denying the employer's application to reopen is set aside and the case is remanded to an administrative law judge for a further hearing to determine whether the employer had good cause for its failure to appear at the first scheduled hearing on September 22, 2010. If good cause is found, the decision of the administrative law judge dismissing the employer's appeal for nonappearance shall be set aside and the matter reopened for a hearing and decision on the merits. If good cause is not found and the employer's application to reopen is denied, the decision dismissing the appeal for nonappearance shall stand as issued. In such case, the employer will have the right to appeal the order denying the application for reopening. In any event, the hearing transcripts, audio recordings, exhibits and other documents produced in the course of these proceedings shall remain a part of the record in this case.