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INTRODUCTION

This bench book is designed to advise judges as to proper conduct of a state hearing and how to address a variety of situations that arise in the hearing process. It is to be used as a training tool for all judges.

The policies set out in this bench book represent the official policies of the State Hearing Division (SHD) of the California Department of Social Services (CDSS). If a judge encounters a situation but believes the policy set out in the bench book should not be applied under the circumstances, that judge should consult the appropriate Presiding Judge.

Because it is awkward to identify persons as he/she, a judge or party will alternatively be referred to as either "he" or "she" throughout a section.

The SHD intends to update this bench book as necessary. The date of any additions or modifications will be listed on the bottom of the appropriate page.

Judges are encouraged to make suggestions for corrections or additions to current bench book subjects or ideas for new subjects by submitting written suggestions to the Quality Development and Training Bureau (QDTB).

ABANDONMENTS

Reference: MPP §22-054.22

A state hearing is considered abandoned if the claimant fails to appear within 20 minutes of the scheduled time. But, if the judge and county representative are still available when the claimant appears late for a hearing, the hearing should be held if possible, to avoid the inconvenience of having to reschedule the hearing. If witnesses were present and have left or if the interpreter has departed, then the matter must be considered abandoned or postponed.

Abandonments Due to Non-Appearance

The notice informing claimants of the time and place of the hearing also informs claimants that failure to appear will result in a written dismissal of the claim. If the claimant contacts the SHD before the decision is issued, and requests a reopening, the request may be granted by SHD if the claimant establishes good cause for failure to appear at the hearing.

Once a claimant receives a written decision dismissing the claim, the claimant has 15 days to request a new hearing asserting he had good cause for failing to attend the initial hearing. This is explained on the cover page of the hearing decision.

The request for new hearing will be reviewed by the Chief Administrative Law Judge or his designee. If the SHD determines that the claimant had good cause for failing to attend the hearing, a new hearing will be scheduled.

When good cause is found for a non-appearance **before** a decision is issued, the case will be rescheduled. This is referred to as a "reopening" of the hearing. When good cause is found for a non-appearance **after** a decision is issued, and the case is rescheduled, this is referred to as a "new hearing". The new hearing will retain the **same** case number as the original hearing request under either circumstance.

SHD will schedule a new hearing once it determines the claimant had good cause for not attending the original hearing. If the claimant again fails to appear at the rescheduled "new" hearing, another non-appearance decision will be issued. If the claimant again requests a new hearing alleging he had good cause for not attending the rescheduled hearing, this request and any subsequent requests will be referred to the Presiding Judge in the claimant's region to determine whether good cause should again be granted.

When the Chief Administrative Law Judge (or his designee) has granted a new hearing, he has determined that the claimant had good cause for not appearing at the initial hearing. Therefore, if the claimant appears at the new hearing, the judge should not evaluate whether the claimant had good cause for failing to appear at the initial hearing. The judge should proceed as in any other case.

On occasion, instead of requesting a "new" hearing following a non-appearance as explained on the cover page of the hearing decision, the claimant will file a separate hearing request on the same issue that was the subject of the non-appearance decision. Because SHD is unaware that this hearing request is on the same issue as the decision dismissing the claim due to the claimant's non-appearance, SHD will schedule the hearing with a **different** hearing number.

At this hearing, the county in all likelihood will request the hearing be dismissed as the subject of a previous state hearing. The Administrative Law Judge should determine if the claimant received the initial hearing decision, and if so, whether he filed this hearing request within 15 days of receiving the decision.

For more information on how a judge should evaluate hearing requests scheduled with a different hearing number following a non-appearance decision, see *Notes from the Training Bureau*, 07-11-2 Q&A # 6.

Abandonments Due to Non-cooperation at Hearing

A hearing request is also considered abandoned if a claimant, at the hearing, is unwilling to proceed with the hearing. This includes behavior of the claimant or of the authorized representative (with the claimant's concurrence) that is so disruptive, abusive or offensive that the judge is unable to conduct a fair and impartial hearing. Before dismissing a claim, the judge must warn the claimant and/or AR that continued offensive behavior will result in a written dismissal. If the AR is the disruptive individual, the judge shall give the claimant the opportunity to proceed without the AR being present.

The same AR should not be permitted to resume participation in the hearing if the matter is continued to a later date.

Refer to *Disruptive Participants*.

AID PENDING

Reference: MPP §§22-072, 63-804.1, 10-117
Title 22, CCR §50953

I Applicability of aid pending

Aid pending is only applicable when:

A. There has been a decrease, reduction, discontinuance, suspension or cancellation of aid.

B. There is a change in the manner or form of payment to a protective or vendor payment.

Aid pending is never relevant when:

C. The grant is unchanged or increased.

D. An application is denied.

Aid pending shall initially be issued if there is a timely filing. Normally, a timely filing is a hearing request filed prior to the effective date of the county action. Therefore, if an action is to take effect December 1, the filing must generally be made by November 30.

Note that the counties will often propose to reduce or discontinue CalWORKs or Food Stamp (FS) benefits "effective November 30." This is a technical error, since the discontinuance really does not take effect until the first of the following month, as the AFDC Assistance Unit (AU) or FS Household (HH) is eligible on the last day of the payment month.

EXCEPTIONS:

There are many exceptions to the general rule. The most common are:

A. When timely notice is not required (see §22-072.2), the claimant must file a hearing request within 10 days of the required adequate Notice of Action (NOA), per §22-072.3, to receive aid pending.

B. When timely notice is required but is not issued, a hearing request is timely for aid pending purposes when it is filed before the date the untimely notice could have taken effect.

Example:

Assume that the general rule applies and that 10 day prior notice is required. The county issues a NOA on April 25, to decrease the CalWORKs /FS benefits effective May 1. This NOA could have permitted the county to decrease benefits effective June 1. A hearing request submitted by May 31 is timely for aid pending purposes. (MPP §22-072.5)

II Timeliness of NOA/hearing request

A. For an NOA to be timely, there must generally be 10-day advance notice. The first and last days are excluded. A NOA sent on April 20 is timely to take effect May 1 because there are 10 days (April 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30) between the date of mailing and the effective date of the action. (MPP §22-072.4)

B. If an NOA is not adequate or language-compliant (for CDSS notices only), a filing is considered timely whenever it is filed. (MPP §§22-001a, MPP §63-504.21), Title 22, CCR §51014.1 (Medi-Cal benefits). (Note: MPP§ 22-049.52 states that **if the claimant contends** that he is not adequately prepared to discuss the issues because he did not receive adequate or language compliant notice, this issue shall be resolved by the administrative law judge at the hearing. MPP §22-049.523 adds that if adequate and or "language compliant notice was required but not provided, aid pending shall be reinstated retroactively. It is not necessary that the claimant use the specific terms "adequate" or "language compliant."

C. If an NOA is timely and adequate, the claimant must file before the effective date. A filing is timely if it would have been timely except for a "holiday" (Saturday, Sunday, and certain other holidays, per MPP §§22-002 and 22-001h.(1)). Thus if the NOA was to be effective June 1, and a person ordinarily must file by May 31, when May 31 is a Saturday, and June 1 is a Sunday, a filing on June 2 would be timely for receipt of aid pending.

D. "Good cause"--In food stamps, a judge may order aid pending even if the claimant filed a hearing request after the last day for timely filing if the claimant can establish good cause for the untimely filing.

There are no good cause exceptions for an untimely filing in CalWORKs, Medi-Cal or Social Services.

III Cessation of Aid Pending

Aid pending shall generally cease when:

A. The judge decides the issue involves a matter of law or policy and not one of incorrect application of law. (MPP §22-072.62) Aid pending shall not be terminated if the issue is a question of fact, even if the factual contention appears ridiculous on its face. However, the factual question must affect the eligibility determination.

Example:

1. CalWORKs is being discontinued because the claimant's certified bank records show he has $100,000. He claims that the actual value is $1,000 because the bank simply put in two too many zeros. Aid pending continues.

   On the other hand, if the same claimant contends the bank has added one zero too many, and the real value of the bank account is $10,000, aid pending stops. The factual challenge does not affect the law/policy question of eligibility, because the claimant's undisputed property still exceeds the maximum allowable CalWORKs property limit.

2. The county proposes to discontinue a 70-year-old claimant's FS benefits because it is undisputed his countable personal property of $2,500 exceeds the $2000 limit.

   Even though there is no factual dispute, continue aid pending as the issue involves an incorrect application of law**.** The county has applied the incorrect property limit of $2000. The claimant is entitled to have property with a value up to $3000 as he is over 60 years of age.

B. The claimant voluntarily, knowingly and in writing waives continued aid. (MPP §22-072.63)

C. The claimant has received a no good cause postponement. (MPP §22-072.64)

D. The FS certification period expires. (MPP §22-072.65)

E. The claimant withdraws or abandons the hearing request. (MPP §22-072.61) Note that after a conditional withdrawal, aid pending may be retroactively reinstated if the claimant requests a hearing and has complied with the conditions of the withdrawal.

EXCEPTIONS:

In overpayment adjustments, Welfare to Work and Food Stamp Employment and Training (FSET) sanction cases, the sanction shall not take effect if the initial filing was timely. (Note: Overpayment adjustments, Welfare to Work and FSET sanctions are not technically aid pending.)

In Administrative Disqualification Hearings (ADHCS), aid pending is never appropriate.

For Medi-Cal scope cases, see Pararegulation 539-1 (*Frank v. Kizer*).

In drug restriction cases, aid pending shall continue (if the hearing request was timely filed).

IV. Miscellaneous:

Multiple issues: In cases involving multiple issues (e.g., CalWORKs, FS, and Medi-Cal) or when there are multiple parts to one issue (e.g., CalWORKs grant computation) the judge may need to make multiple aid pending rulings.

Example:

1. There is a discontinuance of CalWORKs and Food Stamps. The CalWORKs NOA was sent on May 15 to be effective June 1; and the FS NOA was sent May 22 to be effective June 1.

   The claimant filed a hearing request on June 5. At the hearing on August 3, the judge learns that the claimant's FS certification ends August 31.

   The county has not issued any aid pending.

   The judge shall:

   (1) Determine that aid pending is not appropriate for CalWORKs (untimely filing).

   (2) Order retroactive benefits for FS (untimely NOA) to be issued from June through August but to cease at the end of August due to the end of the certification period.

2. The county proposes to decrease IHSS due to decreased need for laundry, and no further need for medical transportation. If the claimant contests both matters, issue aid pending at the prior level. If the claimant does not contest the medical transportation deletion, and says that the laundry need should be unchanged and

does not indicate any other dissatisfaction with the re-evaluation, allow the county to reduce the IHSS level by the amount of medical transportation as there is no factual or judgmental dispute in regard to that issue.

If there are multiple IHSS reductions, and the claimant contends that total need has stayed the same or increased, aid pending shall be issued at the prior level, even if the claimant agrees that certain reductions are not in dispute.

V. Amount of Aid Pending

In FS, if aid pending is appropriate at all, it shall be issued at the prior level. (MPP §22-072.5) In other programs, "aid shall be continued in the amount that the claimant would have been paid if the action were not to be taken". In some cases, this may result in an actual grant increase.

Example:

1. The county proposes to decrease the claimant's CalWORKs benefits due to alleged receipt of Unemployment Insurance Benefits (UIB). The claimant denies receipt of UIB. The claimant also has a cost of living adjustment (COLA) in the month of the proposed county action. Aid pending should be issued in the amount to which claimant received without regard to the UIB income but must include the COLA.

2. CalWORKs was $400, based on receipt of $100 UIB. The county sends an NOA to decrease CalWORKs to $200, based on current receipt of $300 UIB. The claimant denies receipt of any UIB. Aid pending should be granted as if no UIB were received, i.e., at the $500 level.

VI. Intervening NOA:

In some cases, the county sends a second NOA after the claimant has filed a timely hearing request on the first NOA. If the second NOA involved a different factual basis, the claimant must file timely on the second NOA to receive the benefits reduced in the second NOA.

Example:

The claimant files timely on an NOA discontinuing CalWORKs and FS effective August 1. On August 4, the county sends a timely, adequate and language-compliant NOA proposing to stop CalWORKs benefits September 1 because the only eligible child has turned 19. The claimant does not file on that NOA. The hearing is held on September 10. The judge should order aid pending from August 1 only until September 1 for CalWORKs, and from August 1 forward (assuming the matter is fact/judgment) for FS.

CLAIMANTS AND AUTHORIZED REPRESENTATIVES

Reference: MPP §§22-001 (c)(2) and 22-085
Notes from the Training Bureau 95-6-2 and 96-6-2

Claimants

A claimant is a person who has requested a state hearing and is or has been either:

A) An applicant or recipient of aid.

B) A foster parent or foster care provider on behalf of a foster child whose foster care benefits are affected by a county action.

C) The representative of the estate of a deceased applicant or recipient.

D) The caretaker relative of a child with regard to that child's application for or receipt of aid.

E) The guardian or conservator of the applicant or recipient.

F) The sponsor of an alien.

A deceased person can never be a claimant. If the applicant or recipient of aid is deceased, the legal representative of the estate can be the claimant. If there is no estate to be probated, the claimant may be a relative of the deceased.

In some instances an individual or organization will have obtained a Superior Court order declaring the individual or organization to be a "special administrator" and authorizing the individual/organization to act on behalf of the decedent in a state hearing. In such case, the individual/organization can be the claimant. The authorized representative would be any person who was authorized to act in that capacity by the special administrator.

An employee who was displaced by a Welfare to Work participant on a Welfare to Work assignment also may be a claimant in a state hearing to dispute his/her displacement. (MPP §42-720.4)

Persons who cannot be claimants in a state hearing include parents or relatives of living adult applicants or recipients (unless they are the guardian or conservator), IHSS providers, representatives of nursing homes or hospitals, or persons who have filed applications on behalf of applicants or recipients (who are either physically or mentally unable to act for themselves).

Authorized Representatives (AR)

A claimant may choose to have another person represent him at the hearing. It is preferable for a judge to obtain a DPA 19 or other authorized representative form from the claimant at the hearing, although the judge may proceed without such a form if the claimant is present.

If there is an AR in the case, all correspondence should be directed to the AR, with a copy to the claimant.

When the claimant is not present at the hearing, the judge needs to determine why the claimant is not present, e.g., is the claimant incompetent, or is the mentally competent claimant simply not present.

If the claimant is incompetent, comatose, suffering from amnesia or other mental impairment, then a relative of the claimant, an individual with knowledge of the claimant's circumstances who completed and signed the Statement of Facts for the claimant, or an attorney may be recognized as AR without an AR form. The judge has discretion not to recognize an individual as AR for an incompetent claimant but should have good evidence that the person is not acting in the best interests of the claimant before declining to recognize the person as AR. Refer to *Notes from the Training Bureau* 95-6-2, question 10, for persons other than those stated above who may act as AR for an incompetent claimant.

The judge may accept the sworn testimony at the hearing of the "AR" that the claimant is incompetent unless the judge has some evidence to the contrary.

If the claimant is competent but not present at the hearing, the general rule is that the AR must provide the judge with a DPA 19 or other authorized representative form to be recognized as an AR. The DPA 19 or authorized representative form must have been signed and dated by the claimant on or after the date of action or inaction with which the claimant is dissatisfied.

If the claimant signs a DPA 19 or other authorized representative form designating an organization to act as AR, any individual employed by that organization may be recognized as AR. The judge may also recognize an attorney or someone acting under the **direct** supervision of an attorney as the AR without a signed a DPA 19 or other authorized representative form **IF** the attorney or person acting under the **direct** supervision of the attorney states on the record that he has had contact with the claimant since the disputed action or inaction **and** that the claimant authorized him to act on the claimant's behalf.

If a prospective AR who is not an attorney or is not a person acting under the supervision of an attorney appears at a hearing without the mentally competent claimant, and without a signed a DPA 19 or other authorized representative form, the judge may proceed with the hearing if the person swears or affirms that the claimant has authorized him to act as AR and the judge further determines that the person was authorized to act as AR. The judge is encouraged to make a

collateral contact such as a phone call to the claimant to establish that the prospective AR was authorized to act as AR before proceeding with the hearing. If the judge conducts the hearing, the prospective AR will still have to provide an AR form after the hearing is closed. If the judge does not receive a DPA 19 or other authorized representative form in the time allowed, the judge shall dismiss the claim under MPP §22-054.36.

If the attorney or non-attorney comes to the hearing without an authorized representative form and does not state on the hearing record that the mentally competent claimant has authorized her to act as authorized representative, the judge should dismiss the claim. The Judge should always be alert to the confidentiality issues this situation raises.

The county has a duty to notify the authorized representative of all actions regarding the hearing including sending notice concerning conditional withdrawals or compliance with state hearing decisions.

CONTINUANCES

Reference: MPP §§22-053.2 and .3

If the judge conducting the hearing determines that evidence not obtained at the hearing is necessary for the proper resolution of the case, the judge shall have the authority to continue the hearing to a later date. This determination may be made at the hearing or during the decision preparation process.

Continued Hearing Determined at Hearing

When a Judge orders a continuance during a hearing, she shall give oral notice of the time and place of the continued hearing to each party present at the hearing if possible. The judge should have the claimant sign a record open and time waiver form (DPA 421) and provide a copy of that form to all parties that notifies the parties of the date, time and place of the continued hearing. The judge should send a follow up letter to the parties, confirming the date, time and place of the continued hearing, and informing the parties that the continued hearing will take place even if one party does not appear.

If the judge is unable to set the date and time of the continuance at the initial hearing, the judge shall send written notice to all parties at least 10 days prior to the date of the continued hearing. This notice should inform the parties that the continued hearing will take place even if one party does not appear.

Continued Hearing Determined after Hearing

Sometimes after the initial hearing date, the Judge determines that a continued hearing is necessary. The Judge shall notify all parties of the reason for the continued hearing and attempt to obtain a time waiver. The Judge should schedule the date, time and place of the hearing and notify the parties that she should be contacted within five days if they are unable to attend on that date. The Judge should also advise that the hearing will proceed even if one party does not attend.

Judges should insure that the hearing room will be available for the date of the hearing. The Judge should also insure that any required interpreter has been ordered.

When a judge continues a hearing on her own motion, the judge should obtain a time waiver from the claimant. If the claimant refuses to sign a time waiver, the judge shall in her discretion advise the claimant that the judge will decide the case based on evidence that was submitted at the hearing and that no continued hearing will be scheduled. A judge may also continue a hearing without a time waiver, but will still be responsible for having a decision issued by the adopt due date.

If both parties to a hearing have been properly notified of the time, date and place of a continued hearing and either party fails to appear at the scheduled time and place without notifying the judge, the judge shall do the following:

1. Wait 30 minutes after the scheduled hearing time.

2. If either party still does not appear after 30 minutes have elapsed, the judge should open the record and conduct the continued hearing in the absence of the missing party. **The judge should wait five (5) days before preparing a decision.**

3. If the absent party later contacts the judge prior to submission of the decision and gives a good cause reason for her nonappearance **and for not contacting the judge or county representative prior to the continued hearing**, an additional continued hearing should be scheduled. Appropriate time waivers should be obtained. The judge shall not consider the evidence taken at the initial continued hearing if both parties attend the rescheduled continued hearing.

Judges should schedule continued hearings either:

1. On a day that the judge is not scheduled for hearings, or

2. Prior to the first hearing time slot of the judge's hearing day or after the last time slot of the hearing day so long as it will not interfere with the judge's duty to hear other cases.

County of Responsibility

Reference: MPP§22-077; 22-049.9

In most cases, the state hearing is held in the county responsible for the action under review (county of responsibility) as this is the county where the claimant resides. However, situations occur where either the claimant resides in a different county or a second county must be included as a party to the hearing.

Out-of-County Hearings

SHD is responsible for notifying the county of responsibility of the hearing request and the scheduling of the hearing. The county of responsibility is responsible for either resolving the case or preparing a position statement. The county of responsibility is responsible for requesting the county of residence representative to represent the county of responsibility at the hearing.

The county of responsibility may advise the representative from the county of residence that the county of responsibility wishes to participate by telephone. This participation is encouraged. If the county of responsibility has not indicated it will participate, but the ALJ determines that this participation would be helpful in conducting the hearing, the ALJ should contact the county of responsibility and request the county of responsibility participate in the hearing.

Two-County Hearings

There are times when participation of two counties is required in order for the issue to be resolved. For example, if the issue is an overpayment calculated by County A that will be collected by County B, both counties need to be parties to the hearing if the claimant disputes both the overpayment and the current collection. This is different from a 60-month time-on-aid case, where the action is being taken by County B although information is needed from County A in order to correctly decide the months on aid.

MPP Section 22-049.9 provides that whenever it is necessary that another county be joined as a party, the Administrative Law Judge shall so order and shall, subject to Section 22-053.3, postpone the hearing, hold the record of the hearing open, or continue the hearing as necessary.

If SHD is aware of the need for a second county to be included in a hearing prior to scheduling the hearing, SHD will notify that county of the request for hearing and scheduling. The hearing would then proceed as with an out-of-county case, with one or two county representatives.

If SHD is not aware of the need to add a second county to the scheduled hearing, and only the first county has been identified as a party to the hearing, the ALJ should advise the parties of the need to add the second county as a party. If the claimant is willing to postpone the hearing, the ALJ should postpone the case. She should insure that the returned calendar indicates the need to notify the second county.

Alternatively, the ALJ can hold the hearing and leave the record open to add the second county as a party to the hearing. The judge must retain jurisdiction of the case and not postpone the hearing if she determines she needs to add a second county during the course of the hearing after she has taken testimony. The judge should notify the second county in writing that it has been added as a party to the hearing. The judge should have the inclusion of the second county added to the HWDC database information on the case. The judge should send copies of all relevant documents to the second county, and request a position statement for herself and for the claimant. The ALJ should schedule a continued hearing if necessary to insure the due process of all parties.

If the claimant did not correctly identify the need for a second county to be involved, or did not correctly identify the county of responsibility, the claimant is required to waive time for either the postponement or the open record. If the claimant specifically requested a hearing against two counties as parties, but a hearing was scheduled with only one party, the claimant is not required to waive time.

DISQUALIFICATIONS/RECUSALS

Reference: MPP §22-055
California Government Code §11425.40

At **a** hearing, a party may request the judge to disqualify herself. **The judge shall go on record and rule on such request.** The judge shall then disqualify herself at the hearing if the judge determines that she cannot conduct a fair and impartial hearing. If the judge disqualifies herself, she shall postpone the case; or, if another judge is available to hear the case at the hearing site, the judge shall ask the case to be reassigned to another judge. The judge shall document the postponement as a good cause postponement on the DPA 99.

If the judge determines that she can conduct a fair and impartial hearing and prepare an unbiased decision, she shall rule on the record that she will conduct the hearing and prepare a decision.

Judges should also advise the party requesting the disqualification that either party has the right to request a rehearing and all arguments for a rehearing, including whether the judge has conducted a fair and impartial hearing, will be considered.

If after the hearing has begun but before a decision has been written, the judge determines that a disqualification is proper, the case will be assigned to another judge. The claimant would be given the option of having the new judge prepare a decision based on the record established at the hearing or to have a new oral hearing with the newly assigned judge.

Judges should be aware that the appearance of impropriety may cause a problem. Thus if a judge has made a statement that a reasonable person would consider to be prejudicial to either party, the judge should consider disqualifying herself even if she believes she can decide the case in a fair manner. Similarly, if the judge has had a personal or working relationship with a party or witness, the judge should disclose this fact even if she believes she can conduct a fair and impartial hearing. If upon such disclosure, either party asks the judge to disqualify herself, she should rule on such request on tape.

A judge should only disqualify herself if she has a very good reason for doing so. For example, if a judge is a personal friend of a county witness who will testify as to disputed facts, it would be proper for the judge to recuse herself. Similarly, if the judge personally knows a claimant or has a bias either for or against a particular claimant and such bias precludes the judge from making impartial findings of fact, it would be proper for the judge to recuse herself.

However, it is not proper for a judge to recuse herself simply because she has already conducted a hearing with a claimant or because a claimant has a reputation for filing many hearing requests.

DISRUPTIVE PARTICIPANTS

Reference: MPP §22-049.2 and §22-054.33

The judge has wide discretion in dealing with disruptive participants. The judge shall warn any disruptive individual that such behavior will not be tolerated. If the disruptive individual is not a party or a representative and does not respond to the warning, the judge should exclude the individual. The judge may take a recess to reduce the tension.

- If the disruptive individual is the representative of the claimant, the judge should inform the claimant that if the behavior does not cease, the AR will be excluded. The judge should give the claimant the option to continue the hearing without the representative or to continue the hearing to a later date *with a different representative*.

- If the disruptive individual is the claimant and the judge concludes that the hearing cannot continue, the judge should inform him that the hearing will be terminated and that the claimant will receive a written decision in the mail. The judge shall take no further evidence. If the judge has taken sufficient evidence to prepare a decision on the merits, he should prepare the decision. If the judge had not taken sufficient evidence before terminating the hearing to prepare a decision, the judge should dismiss the claimant's hearing request on the basis the claimant is unwilling to proceed (MPP §22-054.33).

- If the disruptive individual is the county representative, the judge should also terminate the hearing. The judge should then decide the case based on the evidence presented prior to the termination of the hearing.

Exclusion from the hearing is an extreme measure and should be undertaken only when reasoning, recesses, and other less drastic measures are unsuccessful.

When the safety of the judge or other persons present at the hearing is at issue, the judge should obtain security by contacting the Presiding Judge and/or through the county welfare department before proceeding with the hearing. If safety becomes a concern at the hearing, the judge should terminate the hearing and make efforts to obtain security.

EXCLUSION OF WITNESSES AND OBSERVERS

Reference: MPP §22-049.12 and .13

An observer may be present at a hearing. Usually, an observer is a student, or a county or state employee in training for a position related to state hearings. At the hearing, the judge should identify the observers for the record and should obtain the agreement of the claimant to permit the presence of any observer who is not a state employee. It is not necessary for the judge to obtain the claimant's permission for a state employee observer.

The judge may, on her own motion or upon the reasonable request of either party, exclude a witness from the hearing room during the testimony of another witness. The judge, generally, may not exclude the county representative, or the claimant, except the claimant may be excluded upon the request of her authorized representative, and with the claimant's consent. Unless excluded as disruptive to the hearing process, both the claimant's representative and the county's representative should not be excluded. Refer to *Disruptive Participants*.

Either party's representative is permitted to have an advisor present throughout the hearing. (MPP §22-049.13) If that advisor is also going to testify as a witness, the advisor may not be present as an advisor until after she has testified. A fraud investigator may be such an advisor.

The judge should exercise her discretion to exclude a witness. In determining whether to exclude a witness the judge should consider the possibility that the testimony of anticipated witnesses will be affected if there is no witness exclusion. If more than one witness is excluded, they should be admonished not to discuss the case with each other. The judge may request that a witness remain at the hearing site after she has testified so that a party can recall the witness for further questioning. If more than one witness is asked to remain after offering evidence, each should be admonished not to discuss the case with other witnesses.

Once a person has testified and then has become an advisor, the advisor may not again testify, except for providing rebuttal testimony; or subject to the judge's ruling to exclude or admit the advisor's testimony after considering the arguments of the parties

EX PARTE DISCUSSIONS

Reference: MPP §22-049.82
California Government Code §§11430.10 through .80

MPP §22-049.82 states "merits of a pending state hearing shall not be discussed between the Administrative Law Judge (judge) and a party outside the presence of the other party."

This regulation prohibits a judge from contacting a party, outside the presence of other parties, to discuss the merits of a case. This regulation, however, does not prohibit a judge from contacting a party, outside the presence of other parties, to discuss nonsubstantive matters about the case, or from contacting a non-party to discuss substantive issues. Program contacts are not *ex parte* communications because program staff are not parties.

For example, a judge may not contact a claimant to ask if the claimant was orally advised of Medi-Cal property spenddown. However, a judge may contact a claimant to reopen the record, ask for an oral time waiver, or schedule a continued hearing.

California Department of Health Care Services (CDHCS) Medi-Cal Field Office and Denti-Cal Office are parties in scope of benefit cases, CDHCS eligibility program staff is not a party in Medi-Cal eligibility cases. A judge may not contact the Field or Denti-Cal office regarding the merits of the case. However, a judge may contact these offices to request a position statement.

Judges may properly contact program staff to determine CDHCS policy on a particular issue. Judges may also properly contact program staff to ask about CDSS or CDHCS policy, federal waivers, litigation, federal Action Transmittals, proposed regulations, etc.

Government Code §11430 applies to CDSS judges. That section is set out verbatim, in pertinent part below:

§11430.10 Pending proceedings

(a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

(c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

§11430.20 Permissible communications

A communication otherwise prohibited by §11430.10 is permissible in any of the following circumstances:

(a) The communication is required for disposition of an ex parte matter specifically authorized by statute.

(b) The communication concerns a matter of procedure or practice, including a request for a continuance that is not in controversy.

§11430.30 Permissible communications from employees or representatives of agencies

A communication otherwise prohibited by §11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of the advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character.

(1) The advice involves a technical issue in the proceeding and the advice is not otherwise reasonably available to the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in §11430.50.

§11430.40 Communications received prior to serving as presiding officer, disclosure

If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in §11430.50.

§11430.50 Violations; duty of presiding officer

(a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the presiding officer to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that was concluded.

§11430.60 Disqualification of presiding officer

Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the *ex parte* communication may be sealed by protective order of the disqualified presiding officer.

§11430.80 Communications between presiding officer and agency head regarding the merits of any issue

(a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.

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Where the agency conducting the hearing is not a party to the proceeding, the judge may consult with other agency personnel. The *ex parte* communications prohibition only applies between the

judge and parties and other interested persons, not between the judge and disinterested personnel of a nonparty agency.

Thus judges may usually contact CDSS or CDHCS program staff about the merits of the case where a county is the hearing party. Where the county is a party, judges should not contact a CDSS or CDHCS analyst if such analyst could be considered an interested nonparty in the case at hand. For example, it would not be proper to contact a CDHCS analyst after the hearing where the county representative cited that analyst in the county's position statement unless the judge allows the parties to participate in such post-hearing discussion.

Similarly, if a judge contacts a CDSS or CDHCS analyst and such analyst advises the judge of particular knowledge or interest in the specific case, the judge must stop any discussion on the matter unless the parties are also allowed to participate in the communication. Parties may communicate to the judge about matters that are not issues in the hearing (§11430.20 and §11430.30) without having to notify the other party about such communication.

When CDHCS is a hearing party, the judge may contact CDHCS program staff for assistance or advice as long as the CDHCS program staff contact was not an advocate at the hearing or involved in the case prior to the hearing. Thus, it would be proper for a judge to call the CDHCS Benefits branch about a denial of a Treatment Authorization Request (TAR) for a wheelchair because a Medi-Cal field office was the advocate at the hearing, not the Benefits branch. If the Benefits branch employee had an interest in the specific case at issue, the judge must stop discussion on the matter unless the parties are also allowed to participate in the communication.

It would not be proper to contact the Medi-Cal Dental Program on a dental scope case however, because there is no separation of function between the advocate and the program contact. That is, the Medi-Cal Dental Program is both the advocate and the program contact.

While it would be proper for a judge to contact CDSS or CDHCS staff for advice or assistance on a case, the judge must not simply set out the facts and ask the staff person to decide the case for her.

Note that §11430.10 DOES NOT prohibit the judge from communicating to a party about an issue in the hearing, but only prohibits a party from communicating to a judge. It is nonetheless strongly recommended that judges NOT communicate to either party outside the presence of the other party.

If, after the hearing has been conducted, the judge decides she needs to communicate with a party or needs additional evidence, the judge should reopen the record by writing a letter to the parties and explaining what additional information is needed. If the judge requests one party to submit additional evidence, the judge must ensure that if such evidence is received, it is forwarded to the other party and that the other party is given an opportunity to respond.

It is still proper for the judge to contact the county (or the claimant) to schedule a continued hearing (§11430.20) as long as the judge and the party do not discuss the merits of the case outside the presence of the other party.

Section 11430.80 states that there shall be no communication, direct or indirect, while a proceeding is pending about the merits of any issue in the proceeding between the presiding officer and the agency head or other person to which the power to hear or decide in the proceeding is delegated. This new prohibition means that effective July 1, 1997, if a judge discusses the merits of a case with her Presiding Judge and then writes a proposed decision on the case, that Presiding Judge will not have the authority to act on the proposed decision. The Presiding Judge must send the proposed decision to another Presiding Judge or a Specialist to adopt or alternate.

Neither the judge nor the Presiding Judge may discuss the merits of the case with the Presiding Judge or Specialist who will be reviewing the proposed decision. The Presiding Judge in each region has the discretion to either discuss a case with a judge which is likely to require a proposed decision or to refer the judge to another Presiding Judge or Specialist.

Judges may discuss the merits of any case with their Presiding Judge where the Presiding Judge does not have the authority to act on the proposed decision such as in orthodontic cases or EPSDT cases.

Government Code §11430.80 only concerns ex parte discussions about the merits of the case. Presiding Judges will still have delegated authority to adopt or alternate decisions where the judge discusses matters with him not related to the merits of the case. For example, a judge may ask her Presiding Judge whether a case should be postponed, whether a Special Needs Trust case should be written as a proposed decision or a final decision, or whether the Presiding Judge has seen any cases on the Assistance Dog Special Allowance program.

Any judge may discuss the merits of a case with another judge. The judge may also discuss the merits of a case with another Presiding Judge or a Specialist as long as such Presiding Judge or Specialist will not be reviewing the case.

EXPLANATORY REMARKS

Reference: MPP §§22-003.1, 22-049.7, and 22-065

The tape recorder should be turned on as soon as the parties enter the room; or if the judge is more comfortable introducing herself first, the tape should be turned on immediately after this introduction and a statement that the tape recorder is being turned on.

The following points shall be covered during the opening remarks at every hearing although not necessarily in this order. The judge should make the remarks in a conversational tone, to put the claimant at ease.

1. The judge shall state her name and identify for the record the claimant, the claimant's address, the date of the hearing, the hearing site, and the following information:

   Introductions:

   Each participant and observer shall be identified on the record. This will facilitate the making of a transcript in the event of further litigation.

   The interpreter, if present, shall be qualified and sworn in. (Refer to *Interpreters*.)

2. The judge shall indicate that she has been appointed by the Director of the California Department of Social/Health Care Services to conduct a fair, independent, and impartial hearing, and that he/she is not employed by nor associated with the county or CDHCS.

3. The claimant shall be informed that:

   A. The hearing will be tape recorded as required by state law.

   B. All testimony is to be given under oath or affirmation. Witnesses shall be sworn or affirmed or state that they will testify under penalty of perjury.

   C. All relevant documents submitted will be marked as exhibits.

4. Prior to taking testimony, the judge shall ask if the claimant has read the position statement, or if the case involves an interpreter, ask if the interpreter has interpreted the position statement to the claimant.

5. The judge shall inform the parties that the decision will not be issued the day of the hearing (except in cases of bench or stipulated decisions); that it will be based on the information introduced during the hearing, and the period after the hearing if the record is left open; that the decision will be in writing and will be received in the mail; and in the case of

proposed decisions that the decision may be reviewed by others within the Department and if the Director disagrees with the judge's proposed decision, the Director may overrule the judge.

6. Appeal rights including time limits shall be mentioned and the claimant referred to the decision cover page for an explanation of these rights. (This may be done at the end of the hearing at the judge's discretion.)

7. The order of testifying shall be explained; as well as the party's rights to testify, to ask questions, and to present any additional documents.

8. In those cases in which there is a possibility of criminal prosecution, the claimant shall be advised that testimony, documents and the hearing file can be used by the prosecutor and the tape recording may be subpoenaed. If the claimant requests a postponement to obtain legal representation after this explanation, it should generally be granted. (Refer to *Postponements*.)

9. **The issues shall be defined before the testimony begins to ensure that all the parties know what issues will be resolved in the hearing.** The issues should be defined again at the close of the hearing so that the issues decided in the written decision will not be a surprise, particularly if issues are added during the hearing, or the issues change. (Refer to *Scope of Issues*.)

FORMS

The following forms should be available at every hearing:

1. Aid Pending Decision (DPA 284)

   The original should be given to the county (or CDHCS where appropriate), the first copy to the claimant or AR, and the next copy placed in the hearing file.

2. Authorized Representative (DPA 19)

   The claimant should sign a completed DPA 19. The original should be placed in the hearing file and copies given to the county/CDHCS and the claimant/AR.

3. Discrimination Complaint Referral (GEN 1076)

   The judge needs to complete this form at the hearing and provide copies to the parties as explained on the GEN 1076. The judge must send the original GEN 1076 to the Civil Rights Bureau at the address listed on the GEN 1076. Place a copy in the hearing file.

4. Interpreter/Translator Billing (DPA 302)

   Before signing a DPA 302, the judge should review it to ensure the interpreter completed it correctly. By signing the form, the judge is simply certifying that the interpreter was present at the hearing site; the judge is not approving payment.

   After signing, the judge may return the DPA 302 to the interpreter (it is the interpreter's responsibility to submit it to SHD). If the interpreter leaves the DPA 302, the judge may give it to support staff.

5. Notification of Open Record and Waiver of Time (DPA 421)

   After completing a DPA 421, give the top copy to the party who is required to submit evidence during the record open period and the next copy to the other hearing party. If the copies are not clear, the judge should ask the county representative to make necessary copies. Place the original DPA 421 in the hearing file,

6. Withdrawal/Conditional Withdrawal of Request for Hearing (DPA 315)

   Give copies to the hearing parties and place the original in the hearing file.

7. Subpoena and Subpoena Duces Tecum Forms

   If needed at the hearing site, a judge should complete these forms and give the forms to the party requesting the subpoena. (Refer to *Subpoenas/Subpoenas Duces Tecum*.)

   If time allows, judges may ask support staff to prepare and mail subpoena documents.

8. Self-addressed, stamped envelopes

   If the record is left open for a claimant to submit additional evidence, give the claimant a self addressed, stamped envelope. It is not necessary to provide such envelopes to county staff or professional authorized representatives.

In addition to the forms listed above, Disability Hearings Bureau (DHB) judges are encouraged to ensure the following forms are available at the hearing site:

9. Release of Information (MC 220)

   The original should be retained by the judge after it is signed by the claimant, and a copy may be given to the claimant. The form should not be dated by the claimant.

10. Disability Determination and Transmittal (MC 221)

    This form can be filled out at the hearing to ensure all relevant information is obtained. No copies need to be given.

11. Applicant's Supplemental Statement of Facts (MC 223)

    The judge may give this form to the claimant to complete when there is no such form in the file; when the form is in the file but was completed more than six months in the past; or when the condition(s) has changed.

12. Pain Questionnaire (DEP 2079)

    The judge may give this form to the claimant to complete, using the same criteria as in (10), above.

13. RFC Assessment (DEP SP 2004)

    The judge may give this form to the claimant/AR to give to the claimant's physician to complete and return.

14. Evaluation Form for Mental Disorders (DEP 1002s)

The judge may give this form to the claimant/AR to give to the claimant's psychiatrist/psychologist/physician to complete and return.

15. Psychiatric Review Technique (SSA-2506-BK)

The judge may use this form to make sure that she asks all relevant questions. Do not give this form to the claimant to have her physician/psychologist complete.

16. Daily Activities Questionnaire (DEP 2059)

The judge may have the individual complete the form, particularly in the case where the claimant has nonexertional (especially if psychological or psychiatric) impairments. The form may also serve as an aid in ensuring that all relevant questions are asked.

HANDLING THE MEDIA AT A HEARING

Reference: MPP §22-049

A claimant will occasionally request that a reporter or news team be permitted to attend and/or film the hearing. The media may be admitted to the hearing only in those cases in which the claimant has made a specific waiver of his right to confidentiality on tape and in writing *and* the judge has determined that the presence of the media would not be disruptive to the hearing process.

The judge shall determine if any access will be granted to the media. The judge should consider: maintenance of proper hearing decorum; county objections; potential disruption to the proceedings; adverse effect on witnesses; physical space and conditions of the hearing room; potential distractions for the judge, including impediments to the judge's ability to discharge responsibilities; any other factors which, in the discretion of the judge are necessary to ensure the orderly and proper conduct of the hearing.

The judge shall notify the Presiding Judge immediately if a party requests that the media be allowed to attend the hearing. This notification should take place before the hearing if possible.

The ALJ should be aware of any potential sensitivity arising from the presence of the media and use her discretion in determining whether the decision should be proposed decision. A copy of any final decision should be sent to the Presiding Judge for his information,

IDENTIFYING THE ISSUE

References: MPP §22-049.5

Immediately after the opening remarks, and before there is any testimony, the judge shall state for the record exactly what issues will be discussed at the hearing. The judge shall state the specific month(s) which are to be reviewed. These will be the only issues decided in the written decision. This will allow the parties to clarify whether these are the real issues, to add issues if appropriate, and to indicate that certain issues have been resolved.

The judge shall limit the issues to county or CDHCS actions or inactions. The judge does not have authority to make declaratory judgments even if both parties request such judgments.

The matters discussed at the hearing must be reasonably related to the hearing request or matters that have been agreed upon by the county and the claimant. If additional issues arise during the course of the hearing, the judge shall determine whether they are reasonably related to issues raised in the hearing request. If so, the county will be expected to address them, but at the county's request, the record should be left open to present evidence and/or argument if its rights would otherwise be prejudiced. When the county has failed to *attempt* to make its required prehearing contact and the claimant raises an issue that the judge determines is reasonably related to an issue raised in the hearing request, the record should not be left open in most cases unless the claimant knowingly waives time.

Related and Non-related Issues

There is no specific definition of a reasonably related issue. However, a judge should address issues in a hearing that are connected to issues raised in the claimant's hearing request if it would not prejudice the county to hear such issues.

The following examples contrast related and nonrelated issues. In each case, the judge must balance judicial economy with the due process rights of each party.

Example 1:

Related The hearing request is filed on the back of a CalWORKS discontinuance Notice of Action (NOA). The county has discontinued Medi-Cal and FS at the same time for the same reason. Medi-Cal and FS are reasonably related.

Non-related The hearing request is filed on the back of an CalWORKS NOA, and the county has discontinued Medi-Cal and FS for a different reason. Medi-Cal and FS are not reasonably related.

Example 2:

Related The claimant requests a hearing to dispute a CalWORKS overpayment. There is an FS overissuance for the exact same period of time, based on the exact same reason, e.g., unreported UIB. FS is reasonably related.

Non-related The claimant requests a hearing to dispute a CalWORKS overpayment. There is an FS overissuance which overlaps the CalWORKS overpayment, but the reason is different. The FS issue is not reasonably related.

Example 3:

Related The claimant requests a hearing on a demand for repayment of an CalWORKS overpayment. There is no prehearing contact attempted by the county. At the hearing, the claimant wants to discuss the amount and cause of the overpayment. As the county did not clarify the issue(s), the amount and cause are reasonably related. (Note: The judge may find it appropriate to leave the record open for the county to submit evidence.)

Non-related The claimant requests a hearing on a demand for repayment of an CalWORKS overpayment. During prehearing contact, the claimant clarifies that the demand for repayment is the *only* issue. At the hearing, the claimant wants to discuss the amount and cause of the overpayment. These are not reasonably related.

Note: If the claimant had initially requested a hearing on the amount and cause of the overpayment, The remaining balance and any subsequent recoupment action taken by the county would be reasonably related issues whether there was prehearing contact between the parties or not.

Agreements by the Parties

Even if the matter is not reasonably related to the hearing request, the judge should hear the issue if the parties have agreed, during the prehearing contact, to discuss that issue. (Note: Remember that even with the parties' agreement, the judge cannot make declaratory judgments or rule on matters outside the jurisdiction of the state hearing.)

If a claimant raises an issue which is not related to the hearing request, but the county agrees to add it as an issue, the judge shall address the issue. When the county needs additional time to prepare on such an additional, nonrelated issue, that issue should be added if, and only if, the claimant waives sufficient time for the county preparation of a position statement, the claimant's response, and the county's rebuttal.

Change in County Position

If the action the county proposes to take at the hearing is different from what the county asserted in its notice, the judge shall inform the claimant of the county's changed position.

If the basis for the action has changed (e.g., the original denial was due to excess property and now the county denial is based on a transfer of property, or the amount of overpayment was *increased*), the claimant must specifically waive adequate notice requirements before the judge may include these matters as issues. If the county worker states at the hearing that the amount of overpayment was decreased, the judge shall consider this to be in issue even without a waiver of additional notice, as the original notice included the matter at issue and the claimant's rights have not been prejudiced.

Conclusion of Hearing

The issues should generally be summarized at the close of the hearing so that all parties will know exactly what issues the judge will decide. In all cases where the issues have changed during the course of the hearing, the issues shall be restated.

INTERPRETERS

Reference: MPP §22-049.6
California Government Code §§11435.45 through .65

A successful interpreter-assisted hearing requires a joint effort and close cooperation between the interpreter and the judge. The judge has the primary responsibility for the control and the conduct of the hearing. The judge also shares responsibility with the interpreter for making the hearing as intelligible as possible to all hearing participants. **The judge shall not proceed when the parties are unable to understand the interpretation. The hearing shall not be conducted in any language other than English.**

Determining the Necessity of an Interpreter

In most cases requiring the assistance of an interpreter, SHD will be aware of the need for an interpreter before the hearing and an interpreter will have been scheduled. However, if no interpreter was scheduled and at the hearing, either the judge, the county or the claimant requests assistance of an interpreter, every effort should be made to obtain one immediately. SHD's Interpreter Coordinator currently may be reached at (916) 229-4159. A tele-interpreter can be reached at (800) 822-5552. If the judge determines an interpreter is necessary and cannot be obtained, the hearing should be postponed. The need for an interpreter should be prominently marked on the hearing file and/or returned calendar stating that an interpreter is needed and the claimant's language, including any particular dialect.

Qualifying an Interpreter

SHD makes every effort to schedule an interpreter when an interpreter is needed for a hearing. An interpreter may have been certified by the courts or by the federal or state government.

It is the judge’s responsibility to insure that the interpreter provided by the state is able to successfully carry out her duties. If the interpreter is not certified, the judge may ask questions of the interpreter at the beginning of the hearing to insure that the proceedings will be properly translated. The questions should address whether the interpreter is fluent in both English and the target language/dialect. The judge may ask how much and what type of experience the interpreter has previously had with hearings or court proceedings. The judge should insure that the interpreter understands her duty to interpret the proceedings accurately and completely. If the interpreter is unacceptable, the judge should then postpone the hearing so that another interpreter can be scheduled.

The judge should also insure that the interpreter has no personal knowledge of the parties and no financial interest in the outcome of the hearing.

Tele-Interpreter Service

SHD has contracted with a private agency to provide telephone interpretive services. These interpreters can be used in situation where SHD has not been able to obtain an interpreter, where an interpreter fails to appear, or when the need for an interpreter has not previously been identified. There will be situations when the use of a telephone interpreter is not appropriate, such as when there are many documents or a long position statement that needs translation as the telephone interpreter will not have access to these documents. The hearing should then be postponed and the need for an in-person interpreter noted. The parties should be advised that it may not be possible to obtain an in-person interpreter. The judge should make use of the tele-interpreter to provide this explanation.

The judge should insure that the interpreter is qualified to provide services at the hearing in the target language. If the judge is not satisfied, the judge can place another call to the service and request a new interpreter.

Tele-interpreter services can be accessed by calling (800) 822-5552. The judge identifies herself as an ALJ with DSS. The service will ask the judge for the language and then will ask the judge to wait on the line while they contact an interpreter.

Conducting a Hearing with an Interpreter

Before the hearing, the interpreter should be given the position statement to read and to interpret for the claimant. When using a tele-interpreter, it will not be possible to interpret the position statement prior to the hearing.

At the beginning of the hearing, the judge shall administer an oath to the interpreter. This oath should be similar to the following:

> "John Smith, do you swear or affirm to interpret from _____ to English and from English to _____ as literally, and as accurately as possible during the entire hearing and further swear to respect the confidentiality of matters presented in these proceedings?"

After swearing in the interpreter, the judge shall insure that the parties understand the role of the interpreter at the hearing. The participants shall be advised that it is the interpreter's job to interpret testimony and documents. The interpreter does not provide any direct testimony or argument himself. The parties must be advised that they should ask to have interpretations repeated if they do not understand what has been said.

The judge shall ask the claimant and/or the claimant's AR if she wishes to have everything interpreted or if she wishes to have the interpreter available on an as-needed basis. The choice rests with the claimant; however, the ALJ can ask to have the whole process interpreted at his option even if the claimant has indicated that this is not necessary.

There may be situations where an interpreter is needed for a witness only; the use of a tele-interpreter can usually satisfy this need if no interpreter has been ordered.

The judge shall conduct the hearing in the same manner as a hearing without an interpreter, except the judge must ensure the hearing participants pause frequently to allow the interpreter to provide an interpretation of what was said.

There are three types of interpretation which are commonly employed: "simultaneous", "consecutive" and "summary". Simultaneous interpretation occurs instantaneously while the speaker is talking. Consecutive interpretation is the interpreting of a phrase immediately after it was said. Summary interpretation summarizes or condenses the essence of the dialogue and is given at frequent intervals during the proceeding.

It is within the discretion of the judge as to which type of interpretation will be used during which portion of the proceedings. Consecutive interpretation is the preferred type of testimonial interpretation in order to preserve the integrity of the record.

However, simultaneous interpretation can provide for a more smoothly flowing hearing, with less interruption. It requires a highly skilled interpreter and the judge should ensure that the interpreter is sufficiently competent to use this technique. In addition it is essential that the interpreter use a soft voice when using this technique so that the hearing tape can be transcribed if necessary.

Summary interpretation can be used effectively at the following times: During technical discussions between the county representative and the AR where the parties have agreed the claimant's rights are protected; and when the individual or his AR specifically waive consecutive interpretation. Summary interpretation is not appropriate when testimony is being given.

Judge's Duties at the Completion of an Interpreter Hearing

At the end of a hearing involving an interpreter, review the Interpreter/Translator Billing form (DPA 302) to ensure it was accurately completed by the interpreter. If not, complete and/or revise the DPA 302 or direct the interpreter to do so. When the DPA 302 is completed, sign and date it. Return the DPA 302 to the interpreter (the interpreter is responsible for submitting the DPA 302 to SHD). If a DPA 302 is left by an interpreter, give it to support staff upon returning to the office. (Refer to *Forms*.)

To commend a particularly competent interpreter or to complain about an inadequate interpreter, contact SHD’s Interpreter Coordinator.

OATHS

Reference: MPP §22-049.3

Testimony is a statement at a hearing given under oath, affirmation or under penalty of perjury.

The judge shall administer an oath to an interpreter before administering an oath to parties and witnesses. (Refer to *Interpreters*.)

Prior to taking testimony, the oath should **be** given in the following or similar words:

> Do you swear or affirm the testimony you are about to give is the truth, the whole truth, and nothing but the trust?

If a party or witness declines to take an oath or affirmation or to declare he is telling the truth under penalty of perjury, the judge shall advise the person that his statements will be given little weight because they are hearsay evidence, and not testimony.

Sometimes an authorized representative (AR) or observer who has not taken the oath will make substantive statements or declarations. The judge should point out that the statements are hearsay declarations, and suggest that the AR or observer (who is now a witness) may want to take the oath and give testimony.

If the judge forgets to administer the oath or affirmation but remembers before the hearing record is closed that the oath or affirmation was not administered, the judge shall ask each hearing participant to take an oath or affirmation in the following or similar words:

> "All statements I made at the hearing were the truth,
> the whole truth, and nothing but the truth."

If a judge discovers after a hearing has concluded and the participants have left, that an oath was not administered, the judge shall send an affidavit and a cover letter to each hearing participant who testified. The cover letter shall request that the affidavit be signed and returned in the enclosed self-addressed stamped envelope. The affidavit shall state, in these or similar words:

> **"**All statements I made at the hearing were the truth, the whole truth, and nothing but the truth under the laws of the State of California."

The affidavit should be signed under penalty of perjury.

POSTPONEMENTS

Reference: MPP §22-053

1. Good cause must normally be established before a hearing is postponed.

2. A claimant is entitled to a first time postponement if Food Stamps is identified as an issue in the hearing request even if good cause is not established.

3. The judge shall advise the queue clerk or note on the returned calendar that the case was postponed and the reason for the postponement.

4. Good cause reasons for postponements are stated in MPP §22-053.113. The good cause reasons include but are not limited to the following:

   - death in the family
   - personal illness or injury
   - sudden and unexpected emergencies which prevent the claimant or the authorized representative from appearing
   - a conflicting court appearance which cannot be postponed
   - the county, when required, does not make a position statement available to the claimant not less than two working days prior to the date of the scheduled hearing, or the county has modified the position statement after providing the statement to the claimant, AND the claimant has waived decision deadlines contained in MPP §22-060.

5 The CDHCS is not required to make a position statement available two days in advance of the hearing. A claimant is thus not entitled to a good cause postponement if she does not receive the position statement prior to the hearing day in a CDHCS case..

6. Good cause for a postponement should **not** include:

   - The issues are too difficult.
   - The AR is on vacation.
   - The AR's child has a medical appointment.
   - The claimant requests a second postponement to obtain legal assistance and there are no extenuating circumstances.

7. The judge may postpone a case for reasons other than those stated in MPP §22-053.113 at her discretion. The judge should not abuse her discretion in granting postponements, but should grant the postponement if it would violate due process to deny the postponement request.

Examples of discretionary postponements include:

- A claimant needs assistance in understanding issues and communicating at the hearing.
- Either party's crucial witness is unavailable due to illness.
- The claimant requests a **first** postponement because he was unable to obtain legal assistance.
- The claimant requests a second postponement to obtain legal assistance in a case involving potential criminal prosecution if the claimant was unable to obtain legal assistance after the first postponement despite a diligent effort to obtain such assistance.
- A claimant arrived on time for a scheduled hearing which was significantly delayed due to other hearings, and she cannot wait any longer.
- **The parties mutually agree to postpone the case and there are no prior postponements.**

8. In cases where the judge grants a postponement at the claimant's request, the time frame for rendering a decision will be automatically extended. Judges must give the claimant a written notice that explains the time for rendering a decision is extended for a period not to exceed 30 days **or orally advise the claimant that the time for releasing a decision will be extended for a period not to exceed 30 days**.

9. If the county has failed to furnish adequate and/or language compliant notice under MPP §§22-001a.(1) the judge must grant a postponement if the claimant requests a postponement. The claimant shall be advised of the right to waive adequate notice requirements for purposes of proceeding with the hearing. This includes situations where the county representative has increased the amount of the CalWORKSs overpayment or Food Stamp overissuance from the amount stated on the NOA. (Refer to *Aid Pending.*) **If a postponement is granted because adequate or language compliant notice was not provided, the county position statement shall substitute for adequate notice for purposes of rescheduling the hearing if the position statement plus the original NOA meet adequate notice requirements.**

10. Once the record is opened, the claimant and county representative sworn in, and evidence has been taken, the matter shall not be postponed. The judge has taken jurisdiction of the case and should conduct the hearing, even if it means continuing the case. Any exceptions should be approved by the appropriate Presiding Judge.

RECORDING THE HEARING

Reference: MPP §22-049.4

Prior to each hearing the judge should test the tape recorder to assure that it is working properly. Judges should also advise the claimant and county appeals specialist to sit near the microphone so that their voices can be heard in case the judge or someone else wants to listen to the tape after the hearing.

There may be times when a defect in the tape recorder or other factor results in unrecorded proceedings. If this is discovered during the hearing, and the mechanism is repaired, the judge should summarize the evidence for the record and ask the parties to stipulate as to the sufficiency and accuracy of the summary. If one party requests that the hearing start over again, the judge shall do so.

If it is discovered after the hearing that the proceedings were not recorded, the judge shall notify the parties, prepare a summary of the proceedings from his notes, and mail it to the parties with the request that they submit any additional information they desire to be included in the summary. The judge shall mail any response from one party to the other party for comments. Once the party agrees with the judge's summary he should be requested to sign a statement that the summary accurately reflects the evidence presented. If either party objects to this procedure, or if the parties do not agree as to what evidence was presented, the judge shall conduct another hearing. The judge may also schedule a continued hearing on his own motion in lieu of contacting the parties by mail.

If a party or authorized representative wishes to record the hearing, the judge should permit the recording unless he finds that it will disrupt the hearing. If the judge does not allow the recording, the judge shall specify his reasons on the record. The judge shall advise the parties that his recording is the only official record of the hearing.

REHEARINGS

Reference: MPP §22-065
Welfare and Institutions Code (W&IC) §10960

After receiving an adopted final or proposed decision or a Director's alternate decision in the mail, a hearing party or authorized representative may request a rehearing within 30 days after receiving the decision. The Director may grant a request for rehearing filed more than 30 days but less than 180 days after receipt of the decision if good cause for a late filing is established.

Administrative Disqualification Hearings (ADH)

There is no right to a rehearing on a decision which adjudicated an ADH, for FS (MPP §22-230.151) or AFDC (now CalWORKs)(45 Code of Federal Regulations (CFR) §235.112(c)(2)). If an ADH was combined with a regular hearing, a rehearing is only permissible on the portion of the decision which adjudicated the overpayment/overissuance issue, not the Intentional Program Violation (IPV) issue.

Non-Appearance Cases

If a claimant fails to appear for his hearing and receives a written decision dismissing the claim, the claimant has 15 days to request a new hearing asserting he had good cause for failing to attend the initial hearing. **This request is considered a request for a new hearing and is not a request for a rehearing.** (Refer to Abandonments section.)

Claimant Requests New Hearing on Merits Instead Of Rehearing on Merits

If a judge determines that a request for hearing was actually intended to be a request for rehearing on a case that was decided on the merits, the judge should write a decision dismissing the claim under Section 22-054.34 (i.e. identical issue was subject to prior hearing).

The judge should determine whether the claimant has also requested a rehearing on the same issue. If the claimant has not requested a rehearing on the same issue, the judge should note in the Summary and the Conclusion sections of the decision that the matter will be referred to the State Hearings Division (SHD) Rehearing Unit.

The judge will prepare a memo addressed to the SHD Rehearing Unit briefly explaining that the request was intended to be a rehearing request including an explanation of why the claimant is seeking a rehearing. It is important to include enough information for the Director to determine whether to grant the rehearing. The judge should also identify the case number of the initial hearing decision. The judge will follow the normal procedure and submit the dismissal decision for adoption. The decision and case file must be sent directly to the SHD Rehearing Unit Mail Station 19-37. (See Notes 98-08-01B)

Reviewing Rehearing Requests

When granting a rehearing, a Director may order a rehearing on the record or an oral rehearing on one, several, or all the issues presented at the initial hearing. (MPP §22-065.4) When the Director orders a rehearing on the record either party may request and obtain an oral rehearing if such request is received within 15 days of the date of the notice advising of the rehearing on the record. (MPP §22-065.5)

Once the Director has granted a rehearing, the judge has no authority to determine that it was granted in error for any reason including timeliness. Once a request for rehearing is received, the Director has 35 days to act after the request is received. (AB 921 amending W&IC 10950, October 11, 2007.)

Once the rehearing request has been granted, only the party who requested the rehearing may withdraw the rehearing request. It is up to the Chief ALJ or the Chief's designee (e.g., the judge at the hearing) whether to allow the moving party to withdraw.

Judge's Role in Rehearings

When assigned a rehearing on the record, a judge should review the record to determine if the case should be scheduled as an oral hearing. If the judge determines an oral rehearing must be scheduled or a party requests an oral rehearing, the Presiding Judge will schedule an oral rehearing.

If a rehearing is ordered but limited to certain issues, the judge must generally limit the rehearing decision to those identified issues. However, there may be rare instances when a limited rehearing is ordered and the judge will expand the issues. For example, this will arise when the rehearing is ordered limited to "jurisdiction", when the judge determines that jurisdiction exists and expands the issues to decide the merits of the case. This may also occur with respect to a substantive issue in limited circumstances as in the following example: A rehearing is ordered in an IHSS case "to determine if the recipient is severely impaired." Once the judge makes that determination, he also needs to determine the hours to which the recipient is entitled.

Similarly there may be a circumstance when a full scale rehearing is ordered, but the judge limits the issues. Basically, this will arise when neither the original hearing and decision, nor the rehearing letter, address a jurisdictional issue. For example, if the judge on rehearing determines that the original filing of the hearing request was untimely, or that he lacks subject matter jurisdiction, the judge shall dismiss the original claim without reaching the merits of the claim.

At the scheduled rehearing, the judge is required to record the rehearing, even if neither party, or only one party, is present. The judge will accept testimony and relevant evidence from the party or parties, or simply state for the record that no one is present and no documents have been submitted.

If either party fails to appear at the rehearing, and no explanation is provided, the judge shall wait five days from the date of the hearing before adopting a decision. This allows the party who did not appear an opportunity to present a good cause reason for the failure to appear.

If either party establishes a good cause reason for the nonappearance during the five-day period following the rehearing, the judge shall reschedule the rehearing. In that instance, the record of the previously conducted rehearing shall not be considered by the judge, and he shall again conduct a rehearing to ensure due process for all parties. The judge shall inform the parties that the evidence obtained at the previously scheduled rehearing or continued rehearing will not be considered in any manner.

Once the record is closed, the judge is responsible for preparing the rehearing decision. That decision shall be prepared using the appropriate rehearing format, and shall include a History Section. The Judge shall write an order that includes a sentence which specifically sets aside or upholds the order in the initial decision. (Refer to Orders in the *Decision Preparation section (6) of the Administrative Law Judge Manual*).

REQUESTS FOR HEARING TAPE

If a hearing party or authorized representative requests a copy of the hearing tape or transcript, advise the individual to call SHD's State Records Desk at (916) 229-4100 or to submit a written request to SHD, State Records Desk, 744 P Street, MS 19-37, Sacramento, CA 95814.

There is no charge for a copy of the hearing tape.

The SHD does not transcribe hearing tapes, except in exceptional circumstances.

RESCINDING AGENCY ACTIONS

If a county has issued a NOA proposing an adverse action against the claimant, the county only rescinds that adverse action by taking affirmative steps to rescind the action. When the county agrees to rescind the action, such an agreement is not a rescission, but only an agreement to rescind. If the claimant accepts the county proposal to rescind the action, the judge shall prepare an order binding the county by its stipulation to rescind its action.

The judge should not prepare a decision dismissing the claim just because the county has agreed to rescind an action. A decision dismissing the claim is appropriate only when the county has issued a new NOA that states that the initial adverse action was rescinded AND when the county has taken action to rescind the initial adverse action as noted below.

The NOA advising the claimant that the initial action was rescinded is itself the necessary and sufficient action to allow the judge to dismiss the claim if the initial action was a demand for repayment of an overpayment, a denial of an application, or if the county never took the action proposed in the NOA (e.g., a NOA proposing a decrease in the CalWORKs grant which was never implemented).

The NOA advising the claimant that the initial action was rescinded **is not** a sufficient basis to dismiss the claim if the county has not in fact taken action to implement the rescission. For example, if the county has advised the claimant that it would reduce the CalWORKs grant by $40, in October 2008, to recoup a $673 CalWORKs overpayment, the county has not rescinded that action by merely issuing another NOA advising the claimant that it will rescind that action. It must also reissue that $40.

Conversely, the county has not rescinded its action merely by reissuing the $40. The county must also issue a new NOA rescinding the initial NOA.

If the CDHCS submits a position statement for hearing asserting that the Medi-Cal service has been authorized, the Judge should not dismiss the claim unless there is evidence that the service has in fact been approved. Such evidence can include a copy of the electronic TAR approval. Where the CDHCS has failed to establish that the TAR has been approved, the Judge should issue a stipulated decision.

The same rules apply if the CDHCS has changed its position in response to additional evidence provided at or after hearing.

SUBPOENA/SUBPOENA DUCES TECUM

Reference: MPP §22-051.4,.5,.6, §22-052
California Code of Civil Procedure (CCP) §1986(c) and 1991
California Government Code (Gov. C) §§11180 through 11191
Welfare & Institutions Code (W&IC) §10954

A hearing party or AR may request a subpoena (for a person) or a *subpoena duces tecum* (for documents) before or at a scheduled hearing. Subpoena requests submitted before a scheduled hearing may be made by telephone, fax, or mail to the appropriate SHD unit and are reviewed by a Presiding Judge or designee. Subpoena requests made at a hearing are reviewed by the assigned judge. In determining whether to issue a requested subpoena, judges (including a Presiding Judge) consider several factors, including the following:

(1) Is the witness/document relevant?

(2) Is it unduly cumulative or repetitious?

(3) Is there sufficient time to allow the document to be produced, and submitted, or for the person to attend the hearing?

Is the witness/document relevant?

Witnesses or documents are only relevant if they can provide some evidence in regard to the issue(s) in the case. Thus, subpoenas for persons or documents involved in the particular documenting process generally should not be issued (e.g., for political officeholders, agency heads; documents as to how counties acted in relation to persons not involved in the case to be heard). Subpoenas should be issued when the person(s) or document(s) will help the judge arrive at a correct legal decision.

Is it unduly cumulative or repetitious?

Generally, a Presiding Judge or designee does not deny a subpoena requested before a scheduled hearing on the ground the person and/or documents to be subpoenaed may be unduly cumulative or repetitious. Such denials are uncommon because it is not clear, until the hearing commences, who will appear to testify and/or which documents will be presented.

At a hearing, however, a judge is able to determine if sufficient credible evidence was presented to resolve relevant disputed facts and may appropriately deny a requested subpoena on the basis the person the person and/or documents to be subpoenaed will add little or nothing to the evidence already presented.

Is there sufficient time to allow the document to be produced, and submitted, or for the person to attend the hearing?

Service is limited to times and places which are reasonable (MPP §22-051.6).

Statutory provisions:

W&IC §10954 conveys upon the Director or judge conducting the hearing all the powers and authority conferred upon the head of a department in Article 2, commencing with §11180 of Chapter 2 of Part 1 of Division 3 of Title 22 of the Government Code.

Under Gov. C. §11181(e), subpoenas and subpoenas duces tecums may be issued. The process issued extends to all parts of the state (Gov. C. §11184) but a person is not obliged to attend as a witness at a place out of the county in which he resides, unless the distance is less than 50 miles from his place of residence (Gov. C. §11185).

Witness fees and mileage shall be paid at the same mileage allowed to a witness in civil cases. (Gov. C. §11191) Witness fees and mileage in civil cases is $35.00 per day, and $0.20 per mile (Gov. C. §68093).

A county and CDHCS is responsible for serving a subpoena issued at its request and for paying witness fees to each subpoenaed person who attends hearing. A claimant or AR is responsible for serving a subpoena issued at his/her request, but witness fees are paid by the State. To claim witness fees from the State, a witness subpoenaed by a claimant or an AR must complete and sign the claim on the back of the subpoena document and give it to the judge at the hearing or mail it to SHD. (MPP §22-051.6)

If a judge receives a claim for witness fees at a hearing, she should review it for accuracy, ensure the witness signed the claim, and sign it (if approving payment of witness fees). The judge may route all witness fee claims to support staff.

There are contempt powers available, through CCP §1991 made applicable through CCP §1986(c) to compel compliance with a subpoena.

Subpoenas and subpoena duces tecum are discussed in California Administrative Hearing Practice, California CEB, §2.91 et seq. Additionally, the CDSS has the option to adopt the procedures set forth in Gov. C. §§11450.05 through .40.

TELEPHONE AND VIDEOCONFERENCE HEARINGS

Reference: MPP §§22-045.13 and 22-056

1) A hearing scheduled to be conducted by telephone or videoconference can only be conducted in this manner if the claimant agrees.

2) Telephone hearings may be conducted in many ways, including but not limited to:

   a) With the judge and the county representative in the hearing room and the claimant contacted at home.

   b) With the judge and claimant in the hearing room and the county representative at another location (e.g., in an out of county case).

   c) With the county representative and claimant in one location (e.g., the county office) and the judge at another location.

   d) With the judge and county representative in one location and the claimant contacted at home.

   e) With the judge in one location, the claimant in another location (e.g., at home) and the county available in a third location (e.g., at the county office).

   f) With the judge in one location and the claimant at home (e.g., a Dental Scope issue).

   g) A witness may be contacted by telephone in any of the above instances.

3) If the county representative is not in the hearing room, but in another location, the judge must arrange or have support staff arrange for a conference call.

4) At the beginning of the hearing**,** the judge shall verify that the claimant has a copy of the position statement.

5) The judge shall call the parties at the scheduled hearing time.

6) If the judge calls the claimant at home and there is no answer or a busy signal, the judge shall place another call in five minutes. If on the second try there is no answer or a busy signal, the judge shall consider the hearing abandoned and mark the returned calendar accordingly.

7) If the claimant is scheduled for a hearing at the county office and the judge is at another location, the county shall call the judge when the claimant arrives at the county office. If the claimant does not arrive within 20 minutes of the scheduled hearing time, and does not contact the county, the case

shall be treated as an abandonment and any witnesses shall be dismissed. However, if the claimant appears at the county location more than 20 minutes after the scheduled hearing time and the county contacts the judge, the judge should proceed with the hearing if it would not disrupt the judge from conducting other hearings and if all witnesses (if any) are still available.

8) The judge will introduce herself and give her location for the record. The judge will state the claimant's name, the case name if applicable, and the hearing number. Each person present will be asked her name, role in the hearing and location. The judge will observe any problems in voice transmission and arrange for a change in positioning of the parties, if needed.

9) The hearing will be tape recorded. The judge will identify the issues and explain the procedures at this point, the right to speak, cross-examine and order of proceedings. The judge will introduce exhibits into evidence. The persons present will be advised to speak slowly and clearly. They will also be advised not to interrupt anyone else who is speaking. Each person will be told to identify herself before speaking.

10) The oath should be given with each person individually acknowledging it by voice. The record will then prove that the oath was taken.

11) Testimony should be taken just as in an in-person hearing. The judge will control the direct testimony and cross-examination in the same manner as if present in person. In all respects the hearing will be conducted in the same manner as in an in-person hearing.

12) For some hearings, the judge may need to review documents that are not part of the position statement. For example, the claimant who is at home, may testify at the telephone hearing that she has a rent receipt that is relevant to the issue at hearing. Or the county representative who is at the same location as the judge may submit into evidence the eligibility worker's case contacts sheet that was not part of the position statement. In any circumstance where new documents are submitted into evidence at the hearing, the judge or some other person must read the pertinent part of the document(s) into evidence.

The judge must then keep the record open and have the document(s) sent to the other party and give that party an opportunity to respond. The judge shall obtain an oral time waiver from the claimant for purposes of keeping the record open. The judge shall send written confirmation to the parties as to the length of time the record is open and the reason that the record is open.

If both parties are at a location where a FAX machine is available, documents should be faxed either during a recess in the hearing or while the hearing is conducted so that documents can be exchanged and/or the judge can observe documents during the hearing. This will avoid requiring the judge to leave the record open.

13) Close the hearing as usual. If aid pending is in question, notify the parties of the decision orally, and give the written aid pending decision to the parties at the judge's location, and mail or fax the written copies to the parties not present.

TIMELINESS ISSUES IN STATE HEARINGS

References: MPP Section 22-009; Welfare and Institutions Code 10951

When a judge hears a case involving a hearing request filed more than 90 days after the date on the notice of action, the judge must consider MPP Section 22-009 and W&IC Section 10951. Because MPP Section 22-009 refers to adequate and language-compliant notice, the judge must also consider these terms when deciding whether or not to dismiss a hearing request made more than 90 days after the date on the NOA.

MPP Section 22-009.1 states:

> The request for a state hearing shall be filed within 90 days after the date of the action or inaction with which the claimant is dissatisfied.
>
> .11 If the claimant received an adequate and language-compliant notice of the county action, the request for hearing shall be filed within 90 days after the notice was mailed or given to the claimant. If adequate notice was required but a notice was not provided, or if the notice is not adequate and/or language-compliant, any hearing request (including an otherwise untimely hearing request) shall be deemed to be a timely hearing request.

Effective January 1, 2008, Welfare and Institutions Code Section (W&IC) Section 10951 has been amended to state:

a) No person shall be entitled to a hearing pursuant to this chapter unless he or she files his or her request for the same within 90 days after the order or action complained of.

(b) (1) Notwithstanding subdivision (a), a person shall be entitled to a hearing pursuant to this chapter if he or she files the request more than 90 days after the order or action complained of and there is good cause for filing the request beyond the 90-day period. The director may determine whether good cause exists.

(2) For purposes of this subdivision "good cause" means a substantial and compelling reason beyond the party's control, considering the length of the delay, the diligence of the party making the request, and the potential prejudice to the other party. The inability of a person to understand an adequate and language compliant notice, in and of itself, shall not constitute good cause. In no event shall the department grant a request for a hearing where the request is filed more than 180 days after the order or action complained of.

(3) Nothing in this section shall preclude the application of the principles of equity jurisdiction as otherwise provided by law.

Late Hearing Requests

When the claimant files a hearing request more than 90 days after the date of an adequate and language compliant NOA, in certain circumstances the judge must raise the issue of whether the hearing request is timely even if the county or CDHCS does not raise the issue. This duty to raise the timeliness issue only applies if there is a NOA that indicates that the hearing request was or may have been filed untimely.

Assume the claimant files a hearing request eight months after an alleged county action.

- If the county or CDHCS does not request a dismissal but includes evidence of an adequate and language-compliant NOA, then the judge must decide whether the hearing request was a timely hearing request.

- Similarly, if the county or CDHCS does not raise the issue of an untimely filing, but the claimant files the hearing request on a NOA that is adequate and language-compliant, the judge must decide whether the hearing request was timely.

- If the county or CDHCS does not raise the issue of an untimely filing, but the claimant files the hearing request on a NOA that is NOT adequate and language-compliant, the judge may proceed on the merits without deciding the timeliness issue. The judge should include a sentence in the decision stating what about the notice was not adequate or language compliant.

- If the county or CDHCS does not request a dismissal and does not include evidence of an adequate and language-compliant NOA, then the judge may proceed on the merits without deciding the timeliness issue. The judge should include a sentence in the decision stating that no evidence of an adequate or language compliant notice was provided.

Factors to Consider

1. Is the NOA Adequate?

MPP Section 22-001(a)(1) defines adequate notice as follows:

A written notice informing the claimant of the action the county intends to take, the reasons for the intended action, the specific regulations supporting such action, an explanation of the claimant's right to request a state hearing, and if appropriate, the circumstances under which aid will be continued if a hearing is requested, and for the California Work Opportunity and Responsibility to Kids (CalWORKs) Program, if the county action is upheld, that the aid paid pending must be repaid. In the Food Stamp Program, see Section 63-504.2.

If the NOA does not meet the definition of adequate notice in MPP Section 22-001(a)(1), the hearing request will be deemed to be a timely request even if it was made more than 90 days after the NOA was mailed. Note that the 180-day limit for a late filing when there is good cause does

not apply to inadequate NOAs. If the NOA is not adequate, ANY hearing request is a timely hearing request.

Note: For CalWORKs overpayments and Food Stamps overissuances, to be considered adequate, a notice must include specific language advising that this is the last chance to request a hearing. (See Paraphrased Regulation 004-13.)

2. Is the NOA Language-Compliant?

MPP Section 22-001(l)(1) defines language-compliant notice as follows:

A notice of action that meets the applicable requirement in (a) or (b) below:

(a) For notices of action provided by the California Department of Social Services (CDSS) in the claimant's primary language:

A written notice of action that complies with the requirements of Section 21-115.2 for a claimant who chose to receive written communications offered in his/her primary language pursuant to Section 21-116.21. There shall be a rebuttable presumption that a claimant chose to receive written communications offered in the claimant's primary language if the claimant identified a primary language other than English to the county pursuant to Section 21-201.211.

(b) For CDSS notices of action that CDSS does not provide in the claimant's primary language:

The county must offer and provide interpretive services for the notice of action if either of the following applies:

(1) The claimant contacts the county about that notice of action prior to the deadline for a timely request for hearing on an adequate notice of action and indicates a need for interpretive services; or

(2) The claimant previously identified a primary language other than English to the county and contacts the county about that notice of action prior to the deadline for a timely request for hearing on an adequate notice of action.

HANDBOOK BEGINS HERE

Section 21-115.2 provides as follows:

> "Forms and other written material required for the provision of aid or services shall be available and offered to the applicant/recipient in the individual's primary language when such forms and other written material are provided by CDSS. When such forms and other written material contain spaces (other than "for agency use only") in which the CWD is to insert information, this inserted information shall also be in the individual's primary language."

HANDBOOK ENDS HERE

If the NOA does not meet the definition of language-compliant notice in MPP Section 22-001(l)(1), the hearing request will be deemed to be a timely request even if it was made more than 90 days after the NOA was mailed. The concept of language-compliant notices applies to CDSS NOAs only. It does not apply to CDHCS NOAs. Note that the 180-day limit for a late filing when there is good cause does not apply to NOAs that are not language-compliant. If the NOA is not language-compliant, ANY hearing request is a timely hearing request.

3. Did the Claimant Receive the NOA?

There is no need for the judge to make a finding whether or not the claimant received a NOA that is not adequate or not language-compliant since the hearing request will already be deemed to be a timely request. If the judge determines that the NOA was both adequate and language-compliant, the judge must make a finding of fact whether the claimant received the NOA. If the judge finds that the claimant did not receive the NOA, then the hearing request is timely regardless of when it was filed.

Note that a claimant has a right to a hearing regarding a county INACTION. When there is an inaction there will not be a NOA. For example, the claimant seeks to add a newborn child to the assistance unit. The county never issues a NOA regarding the application for the newborn.

If the claimant requests a hearing regarding that application, any hearing request would be a timely request because the county has not acted on the application. This would be true even if the county has evidence an eligibility worker verbally advised the claimant that the application for the newborn had been denied.

4. Did the Claimant Have Good Cause for the Late Filing?

Effective January 1, 2008, W&IC Section 10951 permits a late filing of a hearing request (i.e., one filed more than 90 days after the date a NOA was mailed or given to the claimant when the claimant received an adequate and language-compliant NOA) as long as the request was made

within 180 days of the date the NOA was mailed or given to the claimant. (See All County Information Notice I-66-08 for further discussion of good cause in late filings)

Because the good cause provisions only apply effective January 1, 2008, the State Hearings Division has determined that judges should consider good cause only for notices mailed or given on or after **October 3, 2007 which is 90 days before January 1, 2008.** If the claimant had received an adequate and language compliant NOA that was mailed or given on or before October 2, 2007, the 90-day time period for filing the hearing request would have expired before January 1, 2008 when the good cause provisions went into effect.

5. Timely Filing Measured By Date the NOA was Mailed or Given, Not Date it Was Received

Note that MPP Section 22-009.11 provides that "If the claimant received an adequate and language-compliant notice of the county action, the request for hearing shall be filed within 90 days after the notice was mailed or given to the claimant."

Judges should be aware that the date on the NOA is not necessarily the date the NOA was mailed or given to the claimant. Thus particularly in cases where the hearing request was filed 91 or 92 days after the date on the NOA, the judge must determine when the NOA was mailed or given to the claimant.

6. Is the Current Amount of Aid at Issue?

MPP Section 22-009.2 provides:

A recipient shall have the right to request a state hearing to review the current amount of aid. At the claimant's request, such review shall extend back as many as 90 days from the date the request for hearing is filed and shall include review of any benefits issued during the entire first month in the 90-day period. This review shall only apply to facts that occurred during the review period.

If the claimant is disputing the current amount of aid, the claimant has the right to a hearing even if he received an adequate and language-compliant NOA but failed to file his hearing request within 90 days of the date the NOA was mailed or given to him. However, the time frame for the review may be limited as shown in the following handbook example from MPP Section 22-009.

The county issues the claimant adequate and language-compliant notice on January 20, 2005 advising him/her that the Medi-Cal share of cost is increased from $100 to $200 effective February 1, 2005. The claimant receives this notice but does not request a hearing until July 6, 2005. Although the claimant's hearing request is filed more than 90 days after the January 20, 2005 notice was issued, the claimant has the right to a state hearing to review the share of cost for the current month (i.e., July 2005) and the review will extend back 90 days to include all of April, May and June 2005. There can be no review of the February or March 2005 share of cost because the hearing request is untimely as to those months. The review will be based only on the relevant

facts that occurred during April, May, June, and July, 2005, including the claimant's income and deductions for those months as relevant to the share of cost.

7. Does the NOA Involve a Food Stamp Issue?

MPP Section 22-009.12 provides that "In the Food Stamp Program, the time limits for state hearing requests are set forth in Sections 63-802.4 and 63-804.5".

MPP Section 63-802.4 provides:

.41 If the CWD determines that a household is entitled to restoration of lost benefits, but the household does not agree with the amount to be restored as calculated by the CWD or any other action taken by the CWD to restore lost benefits, the household may request a state hearing within 90 days of the date the household is notified of its restoration of lost benefits. If a state hearing is requested prior to or during the time lost benefits are being restored, the household shall receive the lost benefits as determined by the CWD pending the results of the state hearing. If the state hearing decision is favorable to the household, the CWD shall restore the lost benefits in accordance with that decision.

.42 If a household believes it is entitled to restoration of lost benefits but the CWD, after reviewing the case file does not agree, the household has 90 days from the date of the CWD determination to request a state hearing. The CWD shall restore lost benefits to the household only if the state hearing decision is favorable to the household. Benefits lost more than 12 months prior to the date the CWD was initially informed of the household's possible entitlement to lost benefits shall not be restored.

MPP Section 63-804.5 provides:

Time period for requesting hearing. A household shall be allowed to request a hearing on any action by the CWD or loss of benefits which occurred within the prior 90 days. In addition, at any time within a certification period a household may request a state hearing to dispute its current level of benefits.

When addressing a timeliness issue in the food stamp program, judges should be aware of these regulations. In particular, judges must consider the last sentence of MPP Section 63-804.5. That provision permits a claimant to request a hearing regarding benefits for any month in the current certification period.

For example, if the certification period was from January 2008 through December 2008, and the claimant requested a hearing on December 3, 2008, he could have his food stamp allotments reviewed back to January 2008 because January 2008 was within the certification period when he made his hearing request in December 2008.

If the certification period was from January 2008 through December 2008, and the claimant requested a hearing on February 9, 2008, under MPP Section 63-804.5 the review could only extend back to January 2008 since that is when the current certification period began. Under MPP Section 22-009.2 his request for review could go back to November 1, 2007.

8. Are There Any Equitable Considerations for the Late Filing?

In addition to the issues addressed above, W&IC Section 10951(a)(3) provides that nothing in this section shall preclude the application of the principles of equity jurisdiction as otherwise provided by law. Thus even if the hearing request was not timely filed and the notice was adequate and language compliant, and good cause does not apply, judges may consider equity principles such as equitable estoppel when determining whether to hear or dismiss an untimely hearing request

TIME WAIVERS

References: MPP §§22-053.3; 22-060

MPP §22-060 provides in pertinent part:

All state hearings shall be decided or dismissed within 90 days from the date of the request for state hearing except in those cases where the claimant waives such requirement or the claimant withdraws or abandons the request for hearing.

In the Food Stamp Program, all state hearings shall be decided or dismissed and the claimant and CWD notified of the decision within 60 days from the date of the request for a state hearing.

It is important for judges to remember to obtain time waivers when they are necessary and appropriate. It is also important that judges not solicit time waivers when they are not appropriate.

A judge should obtain a time waiver when he keeps a record open or reopens the record for the claimant to provide additional information, in some instances when the judge keeps the record open or reopens the record for the county to provide information, or when the judge schedules a continued hearing. The time period for issuing a decision is automatically extended by 30 working days if the claimant requests a postponement.

It is not appropriate for a judge to obtain a time waiver solely because a judge needs additional time to issue a hearing decision before the adoption due date. This is true even if the case is being heard near or after the adopt due date.

Record Open and Reopening Situations

There are many instances where the judge will need to leave the record open to obtain additional information. If the judge leaves the record open to allow the claimant to provide additional information such as a bank statement or a sworn affidavit, the judge should obtain a time waiver. Generally, the judge should explain to the claimant that the claimant is entitled to a decision within 60 or 90 days of the date he requested a state hearing. . The judge should then explain that he is asking for additional time to write the decision because he is giving the claimant time to provide additional information.

Normally the judge should ask for a 30-day time waiver. The time waiver should allow sufficient time for the claimant to provide the additional evidence and for the county to respond to the new evidence. If the claimant needs more time to obtain additional evidence, then the judge may ask the claimant to sign a time waiver of more than 30 days. For example, if the claimant needs to obtain property records from out of state, the judge could ask for a 45 or 60-day waiver.

If the record is left open for the county to provide additional evidence, the judge should ask for a waiver only if the county is asked to provide information that the county should not have been prepared to present at the hearing. For example, if the claimant testifies for the first time as to the facts regarding a statement from his eligibility worker, the judge may choose the keep the record open for the appeals specialist to obtain a notarized affidavit from the eligibility worker in response to the claimant's contention. In this circumstance, it would be appropriate for the judge to obtain a time waiver from the claimant.

Normally the judge should not leave the record open for the county to provide information it should have been prepared to present into evidence at the hearing. For example, if the county demanded repayment of a five year old food stamp overissuance, and alleges that a Notice of Action demanding repayment was issued four years ago, the appeals specialist should have that Notice of Action as part of the county record (MPP §22-073.35 requires the county to bring the county case file to the hearing.) If the appeals specialist asks for the record to be left open to provide the Notice of Action, it would be proper for the judge to deny the request. If the judge does decide to keep the record open for the county to provide a copy of the Notice of Action, the judge should not ask the claimant to sign a time waiver.

The same standards that apply to leaving the record open should also apply to reopening the record.

Continued Hearing

The same principles that apply to record open cases also apply to continued hearings. If a claimant declines to sign a time waiver for the purpose of a continued hearing so that the claimant may present additional evidence, or for the appeals specialist to present evidence on an issue that the appeals specialist could not have anticipated, then the judge has the choice of conducting the continued hearing without obtaining the time waiver, or not holding a continued hearing.

Postponements

MPP §22-053.3 provides: When a hearing is postponed, continued, or reopened at the claimant's request, the 60-day or 90-day period provided in Section 22-060 shall be extended. Any such requests for postponement, continuance, or reopening of a hearing may not exceed 30 days each

If the judge grants a **county** request for postponement, the 60 or 90-day time periods are **not** automatically extended.

Withdrawals

Conditional Withdrawals

In some cases the county appeals specialist will indicate that the claimant has conditionally withdrawn her hearing request but the claimant attends the hearing on the scheduled hearing date. Judges should deal with a claimant who attends a hearing following a conditional withdrawal as follows:

Signed Conditional Withdrawal

If a claimant and the county appeals specialist signed a conditional withdrawal prior to the hearing, the judge should ask the appeals specialist if she is willing to proceed with the hearing. If the appeals specialist is not willing to proceed, the judge should advise the claimant that she is entitled to change her mind and have a hearing, but the hearing will be postponed because the county appeals specialist is not prepared to proceed with the case.

If the appeals specialist is willing to proceed, the judge may conduct a hearing if:

1. There is a position statement, or
2. The claimant waives a position statement and;
3. The judge believes the issues are not so complex that a position statement is required. If the issues are too complex for the judge to proceed without a position statement, then the judge should postpone the hearing even if the appeals specialist is willing to proceed.

No Signed Conditional Withdrawal

The situation is different if there is no signed conditional withdrawal.

If the parties agree that the claimant and county verbally agreed to a conditional withdrawal, but the claimant chose to attend the hearing anyway, the hearing should be postponed unless the appeals specialist is willing to proceed with the case. The judge should proceed in the same manner as in the case of a signed conditional withdrawal.

If the appeals specialist contends the case was resolved with a verbal conditional withdrawal but the claimant attends the scheduled hearing and contends she did not verbally conditionally withdraw, the judge must decide if the claimant did in fact verbally conditionally withdraw.

If the judge determines that the claimant did verbally conditionally withdraw or led the appeals specialist to believe she verbally conditionally withdrew, but the claimant now indicates she wants a hearing, then the judge should postpone the case unless the appeals specialist is willing to proceed with the case. The judge should advise the parties that there is no conditional withdrawal, but the hearing will be rescheduled.

Hearing Requests Following a Conditional Withdrawal

If the claimant requests a hearing before the county has issued a new Notice of Action (NOA) after the parties entered into a conditional withdrawal, then the hearing request is treated as a reopening of the initial hearing request. The case number would remain the same as the initial hearing number.

If the claimant requests a hearing after the county has issued a new NOA following a conditional withdrawal, then the hearing request is treated as a new hearing and given a new hearing number.

If the SHD erroneously assigns a new case number when the claimant requests a hearing before the county issues a new NOA, a judge should hear the case, but have the case number revised to the initial case number. Similarly, if the SHD erroneously assigns the initial case number to a hearing request made after the county has issued a new NOA following a conditional withdrawal, a judge should hear the case and have a new case number assigned to the case.

Under no circumstance should a case be postponed or dismissed because the hearing request was assigned an incorrect number.