

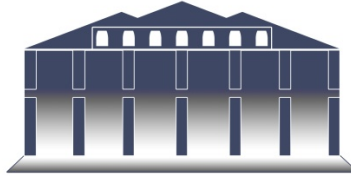
Opportunities Exist to Increase the Accountability and Independence of the Board of Review



**Final Report to the Joint Legislative
Program Evaluation Oversight Committee**

Report Number 2016-03

March 1, 2016



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March 1, 2016

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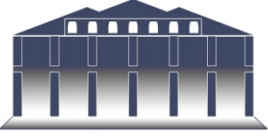
Session Law 2015-238 directed the Program Evaluation Division to study the value provided to the State by the Board of Review.

I am pleased to report that the Department of Commerce cooperated with us fully and was at all times courteous to our evaluators during the evaluation.

Sincerely,

A handwritten signature in black ink, appearing to read "John W. Turcotte".

John W. Turcotte
Director



PROGRAM EVALUATION DIVISION

NORTH CAROLINA GENERAL ASSEMBLY

March 2016

Report No. 2016-03

Opportunities Exist to Increase the Accountability and Independence of the Board of Review

Summary

Session Law 2015-238 directed the Program Evaluation Division to study the value of the Board of Review. Prior to 2011, the Employment Security Commission made initial determinations of unemployment benefits and heard first and second level appeals of those determinations, which are referred to as lower and higher authority appeals, respectively. In 2011, the General Assembly transferred the initial determination and lower authority appeals functions to the Department of Commerce's Division of Employment Security (DES) and created a three-member Board of Review to be appointed by the Governor to hear higher authority appeals. The board did not become operational until January 2014.

Elimination of the higher authority appeals function in general or the Board of Review specifically would not result in any savings to the State's General Fund, and both provide several benefits. The federal government provides funding to states to cover the administrative costs of running their unemployment benefit programs. Although the federal government does not require states to offer higher authority appeals of unemployment benefit determinations, most states offer them through a variety of structures. In North Carolina, the higher authority appeals function cost \$1.7 million to administer in Fiscal Year 2014–15. North Carolina's cost per determination of \$277 is efficient relative to seven comparison states.

However, the Program Evaluation Division found several issues with the Board of Review.

- The Board of Review's reliance on DES staff undermines its independence.
- The Board of Review lacks policies and procedures to ensure consistency and continuity of operations as appointees change.
- The Board of Review does not track the data necessary to ensure continuous improvement of operations.

If the General Assembly decides the higher authority appeals function should continue to be performed by the Board of Review, the Program Evaluation Division recommends the following actions:

- transfer two attorneys and four administrative staff from DES to the Board of Review;
- modify statute to direct the Board of Review to develop policies, procedures, and standards for higher authority appeals operations; and
- direct DES to work with the Board of Review to track and collect the data necessary to support appeals operations.

Purpose and Scope

Session Law 2015-238 directed the Program Evaluation Division to study the value provided to the State by the Board of Review. This study addresses three research questions:

1. How are Board of Review determinations being made?
2. What are the costs and benefits of the Board of Review?
3. How does North Carolina's Board of Review compare to higher authority appeals entities in other states?

The Program Evaluation Division collected data from several sources:

- interviews with and data from the Department of Commerce's Board of Review and Division of Employment Security;
- interviews with and data from the U.S. Department of Labor's Employment and Training Administration;
- a 50-state statutory review, a survey of the 47 states with higher authority appeals, and interviews with the 3 states without higher authority appeals; and
- a query of stakeholder organizations representative of employer and employee interests in North Carolina.

Background

The federal government provides funding to states to cover the administrative costs of running their unemployment benefit programs, including the costs of handling appeals. The Federal-State Unemployment Insurance Program, established by the Social Security Act of 1935, provides temporary financial assistance to workers who are unemployed through no fault of their own. The program is a federal-state partnership based on federal law but administered by state employees under state law. The Department of Commerce's Division of Employment Security (DES) administers North Carolina's program.¹

In North Carolina, the weekly benefit amount may not exceed \$350.² The duration of the benefit depends on the seasonal adjusted statewide unemployment rate. The maximum duration is 12 weeks when the unemployment rate is less than or equal to 5.5% and 20 weeks when the unemployment rate is greater than 9%.³ Therefore, individuals can receive a maximum total unemployment benefit of \$4,200 to \$7,000, depending on the unemployment rate.

The program is funded by federal and state taxes that most employers pay on wages earned;⁴ employees pay nothing towards unemployment insurance (see Exhibit 1). The federal tax rate is 6%, but employers receive a credit against tax liability of up to 5.4%—creating an effective federal tax rate of 0.6%—for timely payment of state taxes under an approved state unemployment insurance program. The standard state tax rate is 1.2%, but actual rates vary based on an employer's experience rating.

¹ N.C. Gen. Stat. Chp. 96.

² The weekly benefit amount for an individual who is totally unemployed is an amount equal to the wages paid to the individual in the last two completed quarters of the individual's base period divided by 52 and rounded to the next lower whole dollar. For the second quarter of 2015, the average weekly benefit amount was \$234.

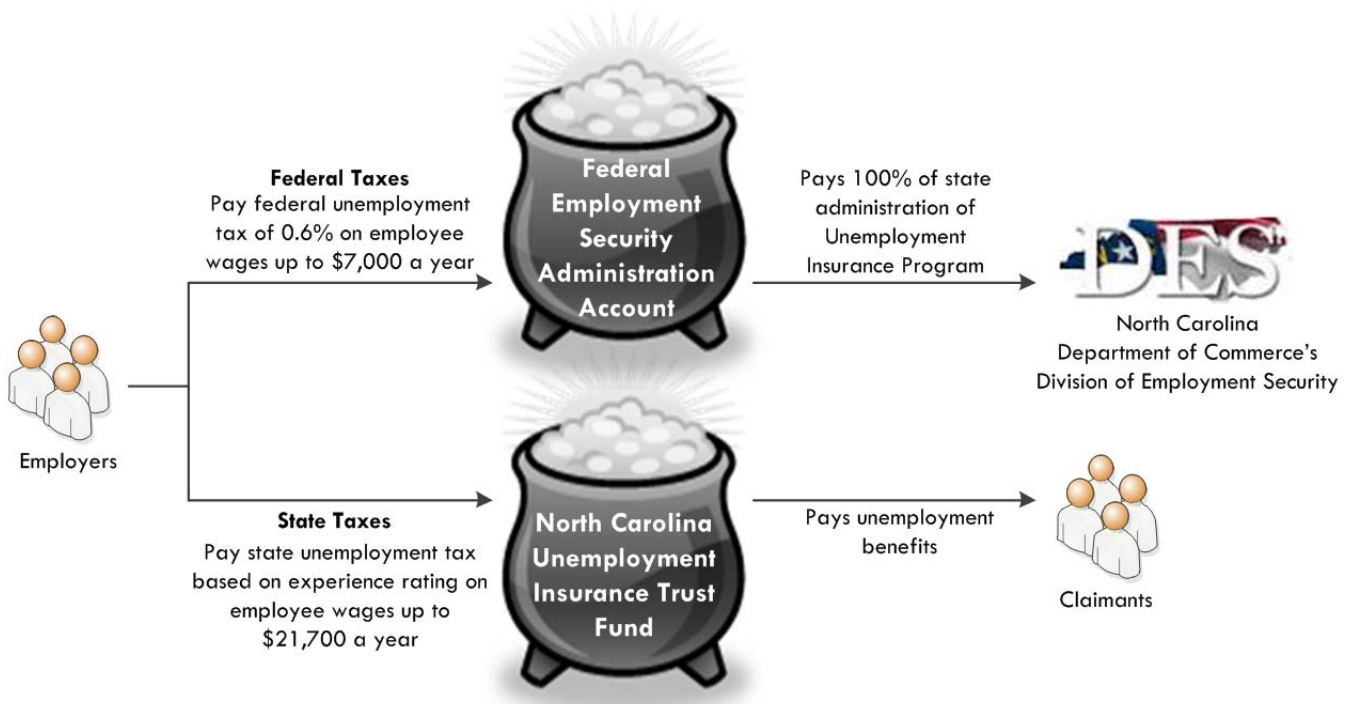
³ Between unemployment rates of 5.5% and 9%, the maximum duration of benefits goes up one week for each 0.5% increase in the unemployment rate.

⁴ In general, employers are subject to federal and state unemployment taxes if they have at least one worker in 20 different calendar weeks during a calendar year or they pay wages of \$1,500 or more in any calendar quarter.

Experience rating is affected by payroll, tax paid, timeliness of payments, and unemployment benefits charged against the employer’s account. Based on economic conditions, the state tax rate could be as low as 0.06% or as high as 5.76%.

Federal taxes fund the federal Unemployment Trust Fund, which provides grants to states to meet the necessary costs of administering their unemployment benefit programs. In federal Fiscal Year 2013–14, North Carolina received \$62 million in federal grant dollars. State taxes fund the North Carolina Unemployment Insurance Trust Fund, which pays unemployment benefits to claimants. The fund paid \$335.9 million in benefits in Fiscal Year 2014–15.

Exhibit 1: Funding for Unemployment Insurance Administration and Benefits



Note: Depending on economic conditions, the state tax rate for 2016 could be as low as 0.06% or as high as 5.76%.

Source: Program Evaluation Division based on information from the U.S. Department of Labor and N.C. Division of Employment Security.

North Carolina has an appeals process that provides several stages of review for disputed unemployment claims. After an employee files a claim for unemployment benefits, a DES adjudicator makes an initial determination of benefits. There are three criteria that individuals must meet in order to be eligible for unemployment benefits: they must be unemployed due to no fault of their own;⁵ they must be considered monetarily eligible;⁶ and they must be able, available, and actively seeking work.⁷

Claimants and employers have 30 days from the initial determination to file an appeal. Exhibit 2 shows the levels of appeal for unemployment benefit determinations.

- **Lower authority appeals.** The first level of review, referred to as lower authority appeals, is an administrative hearing conducted, usually by telephone, by a DES attorney referred to as an appeals referee. Either party has 10 days to appeal the lower authority appeals determination.
- **Higher authority appeals.** The second level of review, referred to as higher authority appeals, is an administrative hearing conducted by the Board of Review. Each board member reviews the case and votes independently. If the votes are not unanimous, the Board of Review conferences to discuss the case, and on rare occasions the board will grant oral arguments to the parties.⁸ Either party has 30 days to appeal the higher authority appeals determination to superior court.

After the parties have exhausted their remedies before DES and the Board of Review, they are permitted to seek judicial review. Parties can file a petition for review in the superior court of the county in which they reside or in which their principal place of business is located. Further appeals are handled by the North Carolina Court of Appeals and Supreme Court.

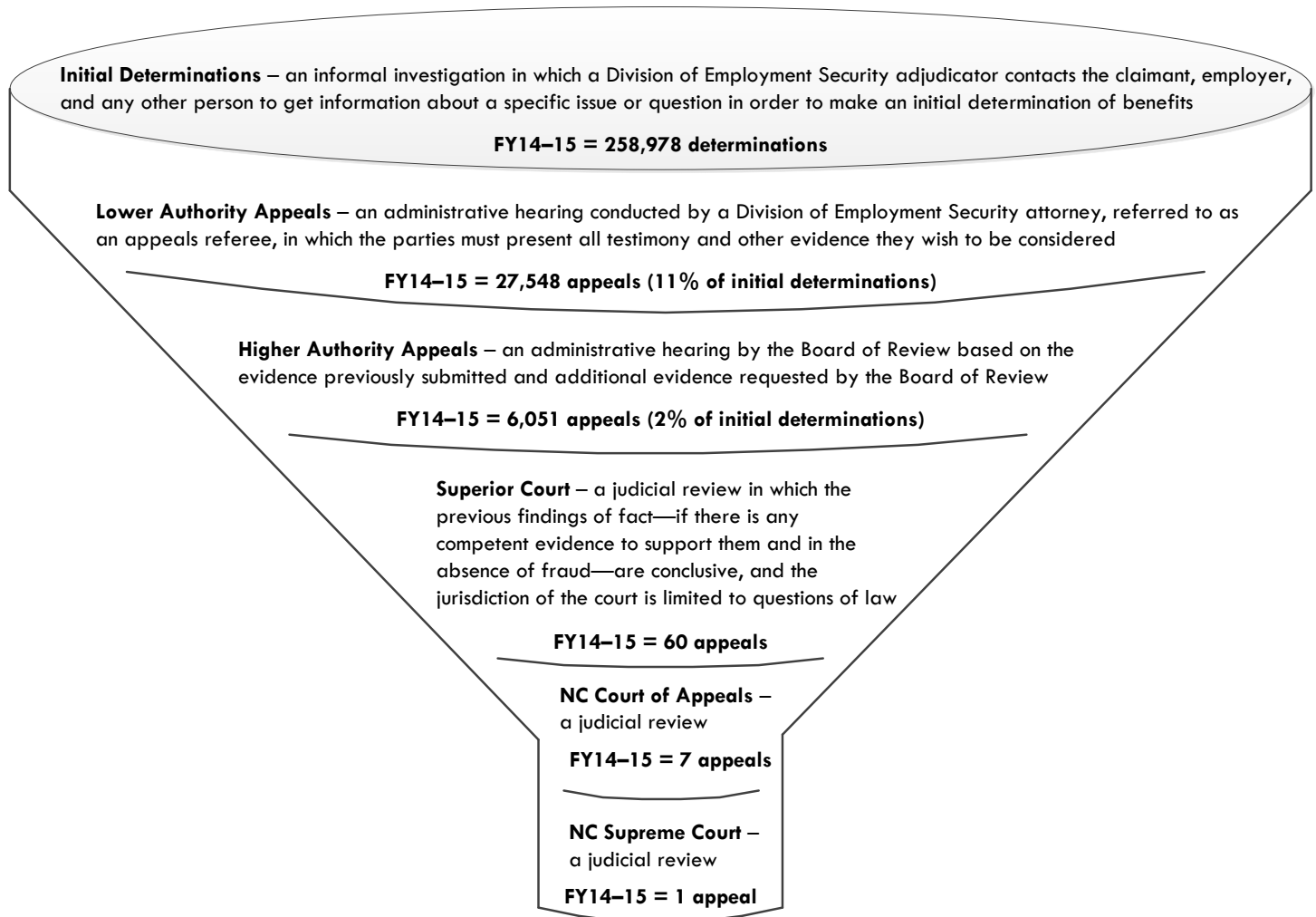
⁵ An individual does not qualify for benefits if the division determines the individual left work for a reason other than good cause attributable to the employer. When an individual leaves work due to a permanent reduction in hours of more than 50%, the leaving is presumed to be good cause attributable to the employer. When an individual leaves work due to a permanent reduction in the individual's rate of pay of more than 15%, the leaving is presumed to be good cause attributable to the employer.

⁶ There are two requirements that will qualify the claim monetarily: the claimant must have earned wages in at least two quarters of either the base or the alternate base year period, and the claimant must have earned at least \$780 in one of the last two quarters to establish a weekly benefit amount.

⁷ To be considered able, claimants must not be receiving disability benefits. To be considered available, claimants must not test positive for controlled substances, be incarcerated, fail to have satisfactory immigration status, or be on disciplinary suspension. To be considered to be actively seeking work, claimants must make at least five job contacts with potential employers each week.

⁸ The Board of Review heard three oral arguments in Fiscal Year 2014–15.

Exhibit 2: Levels of Review for Unemployment Benefit Determinations



Source: Program Evaluation Division based on general statute and information from the N.C. Division of Employment Security.

In addition to providing the second level of review for unemployment benefit determinations, North Carolina's Board of Review provides initial hearings for other types of cases.

- **Tax cases.** According to statute, the Board of Review has the power to conduct hearings for the purpose of determining employer tax liability.⁹ When DES's Tax Section discovers a potential issue with an employer's liability, it refers the case to DES's Legal Section. The assigned attorney may file a motion with the Board of Review to hear the case. In Fiscal Year 2014–15, the board processed 33 tax cases.¹⁰ Any party affected by the board's determination may appeal to superior court.
- **D-100 cases.** When a DES employee files for unemployment benefits, the case is referred to as a D-100 case. In this situation,

⁹ N.C. Gen. Stat. § 96-4(q).

¹⁰ The most common tax cases are misclassification cases, which involve questions of whether one or more workers are employees or independent contractors. Tax rate and penalty protest cases involve employers challenging changes in the unemployment insurance tax rates they are being charged or penalties they have been assessed. Successorship cases involve questions of whether new companies have succeeded to the liabilities of previous companies.

the Board of Review, rather than a DES appeals referee, hears any initial appeal. The Board of Review did not hear any D-100 cases in Fiscal Year 2014–15 but has heard three cases since its inception.

- **Labor disputes.** According to administrative law, if there is a question of whether unemployment arose from a labor dispute, the case must be heard by the Board of Review.¹¹ To date, the Board of Review has not heard a labor dispute case.

Although North Carolina has been offering higher authority appeals since 1936, the Board of Review was not created until 2011 and was not operational until 2014. North Carolina has had a higher authority appeals function since the General Assembly passed the Unemployment Compensation Act in 1936. Higher authority appeals were originally heard by the Unemployment Compensation Commission, which became the Employment Security Commission in 1941.¹² Until 2011, the Employment Security Commission handled initial determinations, lower authority appeals, and higher authority appeals. Higher authority appeals went to the chairman of the commission for review. Staff attorneys would draft proposed decisions for the chairman's approval and signature on behalf of the commission. On rare occasions the chairman or his legal advisors would deem a particular appeal noteworthy and refer it to the full commission for a ruling at one of the commission's regularly scheduled meetings.

As shown in Exhibit 3, when the General Assembly transferred the functions of the Employment Security Commission to DES in 2011, it created the Board of Review to hear appeals arising from DES determinations and thereby perform the higher authority appeals function previously performed by the Employment Security Commission.

¹¹ 04 N.C. Admin. Code 24B .0503. "Labor dispute" means a dispute between an employer and its employees about wages, hours, working conditions, or issues concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. According to N.C. Gen. Stat. § 96-14.7(b), if it is determined unemployment was caused by a labor dispute, an individual is disqualified for unemployment benefits for the period of time that is reasonably necessary for the employer to resume operations.

¹² The Unemployment Compensation Commission consisted of two members appointed by the Governor and the Commissioner of Labor. The Employment Security Commission consisted of seven members appointed by the Governor.

Exhibit 3: Timeline of Events Since the Board of Review's Creation in 2011

Division of Employment Security		Board of Review
<p>2011: Session Law 2011-401 transfers the functions of the Employment Security Commission to the new Division of Employment Security (DES) within the Department of Commerce (DOC).</p>	<p>2011</p>	<p>2011: Session Law 2011-401 creates a three-member Board of Review to hear appeals arising from DES determinations, directing the Governor to appoint the board by November 15, 2011 with confirmation by the General Assembly and directing the General Assembly to set board member salaries in the current Appropriations Act. The Governor does not appoint the board, and the General Assembly does not set board member salaries.</p>
<p>2011: In the absence of appointees to the Board of Review, the Assistant Secretary of DES hears appeals arising from DES determinations.</p>		
<p>2013: Session Law 2013-2 makes several changes to the state unemployment insurance program, including reducing the maximum amount and duration of benefits and increasing the tax employers pay, to accelerate the repayment of the \$2.5 billion advance the State borrowed from the federal government to pay unemployment benefits.</p>	<p>2012</p>	<p>2012: Session Law 2012-142 sets the board chairman's annual salary at \$122,255 and board members' annual salaries at \$120,737.</p>
<p>2013: On May 9, the Superior Court in Rowan County rules the Assistant Secretary of DES does not have the statutory authority to hear appeals arising from DES determinations.</p>	<p>2013</p>	<p>2013: Session Law 2013-224 directs the Governor to appoint the Board of Review by September 1, 2013 and states the initial appointments do not require confirmation by the General Assembly.</p> <p>2013: On December 6, the Governor appoints the initial Board of Review members.</p>
<p>2015: Session Law 2015-238 retroactively validates appeal determinations issued on or after November 1, 2011 by the Assistant Secretary of DES.</p>	<p>2014</p>	<p>2014: The Board of Review issues its first determination on January 27.</p> <p>2014: House Bill 1069 stipulates that because the Board of Review was not appointed by September 1, 2013, the names of the individuals appointed by the Governor in December 2013 were subject to confirmation by the General Assembly. The bill does not confirm the appointments. The bill also stipulates the Board of Review must exercise its decision-making processes independent of the Governor, the General Assembly, DOC, and DES and that members will serve staggered four-year terms. The Governor vetoes the bill, and the Legislature takes no further action.</p>
	<p>2015</p>	<p>2015: Session Law 2015-238 confirms the Governor's appointments. The bill also stipulates the Board of Review must perform its job responsibilities independent of the Governor, the General Assembly, DOC, and DES and that members will serve staggered four-year terms. The bill directs the Program Evaluation Division to study the value to the State of the Board of Review.</p>

Notes: Session Law 2011-401 also created a 15-member State Advisory Council representing employers, employees, and the general public to aid DES in formulating policies and discussing problems related to administration. As of January 2016, the Speaker of the House of Representatives had made his appointments to the council, but the Governor and President Pro Tempore of the Senate had not.

Source: Program Evaluation Division based on legislation.

The Board of Review's enabling legislation stipulated the board was to be appointed by the Governor by November 2011. However, Governor Perdue, who announced in January 2012 that she was not running for re-election, did not make any board appointments. Governor McCrory, who was elected in November 2012, did not initially make any board appointments.

During this time, the Assistant Secretary of DES performed North Carolina's higher authority appeals function. In May 2013, the Superior Court in Rowan County ruled the Assistant Secretary of DES did not have the statutory authority to hear appeals arising from DES determinations. Session Law 2013-224, passed in June 2013, directed the Governor to appoint the Board of Review. In December 2013, Governor McCrory appointed the first Board of Review. The board issued its first determination in January 2014.

In 2014, House Bill 1069 stipulated the Board of Review must exercise its decision-making processes independent of the Governor, General Assembly, and DES. The bill also specified members would serve staggered four-year terms. The General Assembly ratified the bill, but the Governor vetoed it because there were "unacceptable provisions which stagger and shorten terms of current lawfully seated members." The Legislature took no further action at that time. In 2015, Session Law 2015-238

- retroactively validated appeal determinations issued on or after November 1, 2011 by the Assistant Secretary of DES;
- stipulated the Board of Review must perform its job responsibilities independent of the Governor, the General Assembly, and DES;
- specified board members would serve staggered four-year terms to preserve the continuity of knowledge on the board; and
- directed the Program Evaluation Division to study the value of the Board of Review to the State.

Findings

Finding 1. Although the federal government does not require states to offer higher authority appeals of unemployment benefit determinations, 47 states offer them through a variety of structures.

To receive federal grant funding to cover the cost of administering unemployment insurance programs, states must offer fair, impartial hearings to individuals whose claims for unemployment benefits have been denied.¹³ Therefore, states must offer at least one level of appeal, referred to as lower authority appeals. The federal government does not require states to offer a second level of appeal, referred to as higher authority appeals.¹⁴ Nevertheless, 47 states offer higher authority appeals of unemployment benefit determinations (see Exhibit 4). Only Hawaii, Minnesota, and Nebraska do not offer higher authority appeals.

¹³ The federal government also requires that the employees making initial and lower authority appeals determinations be merit-based. N.C. Gen. Stat. Chp. 126, the State Human Resources Act, satisfies this requirement. The Program Evaluation Division verified that no employees making initial or lower authority appeals determinations are exempt from the State Human Resources Act.

¹⁴ Accordingly, there is no federal requirement that the employees making higher authority appeals determinations be merit-based.

Exhibit 4: 47 States, Including North Carolina, Offer Higher Authority Appeals

State	Board	Number of Members	At Least One Member				Means of Selection
			Represents Employees	Represents Employers	Represents the Public	Must Be An Attorney	
AL	✓	3	✓	✓	✓		Appointed by Governor
AK			Higher authority appeals performed by agency head				
AZ	✓	4					Appointed by agency head
AR	✓	3	✓	✓	✓	✓	Appointed by Governor
CA	✓	5				✓	Appointed by Governor, Speaker of the Assembly, and Senate Committee on Rules
CO	✓	5					Appointed by agency head
CT	✓	3	✓	✓			Appointed by Governor
DE	✓	5					Appointed by Governor
FL	✓	3	✓	✓			Appointed by Governor
GA	✓	3					Appointed by Governor
HI			No higher authority appeals				
ID	✓	3	✓	✓		✓	Appointed by Governor
IL	✓	5	✓	✓	✓		Appointed by Governor
IN	✓	3				✓	Appointed by Governor
IA	✓	3	✓	✓	✓		Appointed by Governor
KS	✓	3					Appointed by Governor
KY	✓	3	✓	✓	✓		Two members appointed by Governor, other member is agency head
LA	✓	5	✓	✓	✓		Appointed by Governor
ME	✓	3	✓	✓	✓	✓	Appointed by Governor
MD	✓	3					Appointed by agency head
MA	✓	3					Appointed by Governor
MI	✓	9				✓	Appointed by Governor
MN			No higher authority appeals				
MS	✓	3					Appointed by agency head
MO	✓	3	✓	✓	✓	✓	Appointed by Governor
MT	✓	3					Appointed by Governor
NE			No higher authority appeals				
NV	✓	3	✓	✓	✓		Appointed by Governor
NH	✓	8	✓	✓	✓	✓	Appointed by Governor
NJ	✓	3					Appointed by Governor
NM	✓	3	✓	✓			Two members appointed by Governor, one member appointed by agency head
NY	✓	5					Appointed by Governor
NC	✓	3	✓	✓	✓	✓	Appointed by Governor
ND			Higher authority appeals performed by agency head				
OH	✓	3	✓	✓			Appointed by Governor
OK	✓	3					Appointed by Governor
OR	✓	3					Appointed by Governor
PA	✓	3					Appointed by Governor
RI	✓	3	✓	✓	✓		Appointed by Governor
SC	✓	3					Elected by Legislature
SD			Higher authority appeals performed by agency head				
TN			Higher authority appeals performed by attorneys designated by agency head				
TX	✓	3	✓	✓	✓		Appointed by Governor
UT	✓	3	✓	✓	✓		Appointed by Governor
VT	✓	3					Appointed by Governor
VA			Higher authority appeals performed by agency head				
WA			Higher authority appeals performed by agency head				
WV	✓	3					Appointed by Governor
WI	✓	3					Appointed by Governor
WY	✓	3					Appointed by Governor

Source: Program Evaluation Division based on other states' general statutes and program websites.

In the absence of federal guidance, states structure their higher authority appeals in a variety of ways. The only guidance the U.S. Department of Labor provides on how states may structure their higher authority appeals entities appears in model legislation dating back to the 1950s.¹⁵ As a result, states vary in

- whether they have boards or a sole individual making determinations,
- the number of individuals on boards,
- who board members represent, and
- who appoints board members.

Of the 47 states with higher authority appeals entities, the majority have three-member boards or commissions appointed by the Governor (see Exhibit 5). Several states stipulate those members represent employees, employers, and the public. Fewer states require a member to be an attorney; California and Michigan require that all their members be attorneys.

Exhibit 5

States Structure Their Higher Authority Appeals Entities in a Variety of Ways

	Number of states (including NC)
Board provides higher authority appeals	41
Board has three members	32
At least one member	
represents employees	19
represents employers	19
represents the public	14
must be an attorney	9
Members appointed solely by Governor	33

Source: Program Evaluation Division based on other states' general statutes and program websites.

The General Assembly structured North Carolina's higher authority appeals entity as a three-member board appointed by the Governor.

The appointments are subject to confirmation by the General Assembly.

- One member, who serves as the chair, is appointed to represent the general public and must be a licensed attorney in North Carolina.
- One member is appointed to represent employees.
- One member is appointed to represent employers.

Arkansas, Maine, and Missouri have the same configuration as North Carolina, with one member representing the public and being an attorney, one member representing employees, and one member representing employers.

¹⁵ Model legislation that appears in the U.S. Department of Labor's Manual of State Employment Security Legislation (1950) states the Governor shall appoint a three-member board of review with one member representing employees and one member representing employers. States are not required to follow this guidance.

Finding 2. North Carolina's higher authority appeals function is efficient compared to others states despite Board of Review members earning higher salaries.

In Fiscal Year 2014–15, North Carolina's higher authority appeals function cost \$1.7 million to administer. Administration of the higher authority appeals function is divided among the Appeals Section and Legal Section in the Division of Employment Security (DES) and the Board of Review. Using staff time estimates provided by DES and the Board of Review, the Program Evaluation Division calculated the cost of higher authority appeals to be \$1.7 million in Fiscal Year 2014–15 (see Exhibit 6). The largest cost of the higher authority appeals function is incurred by the Legal Section, which reviews each appeal and prepares a recommendation for the Board of Review's consideration.

Exhibit 6: Higher Authority Appeals Function Cost \$1.7 Million, Fiscal Year 2014–15

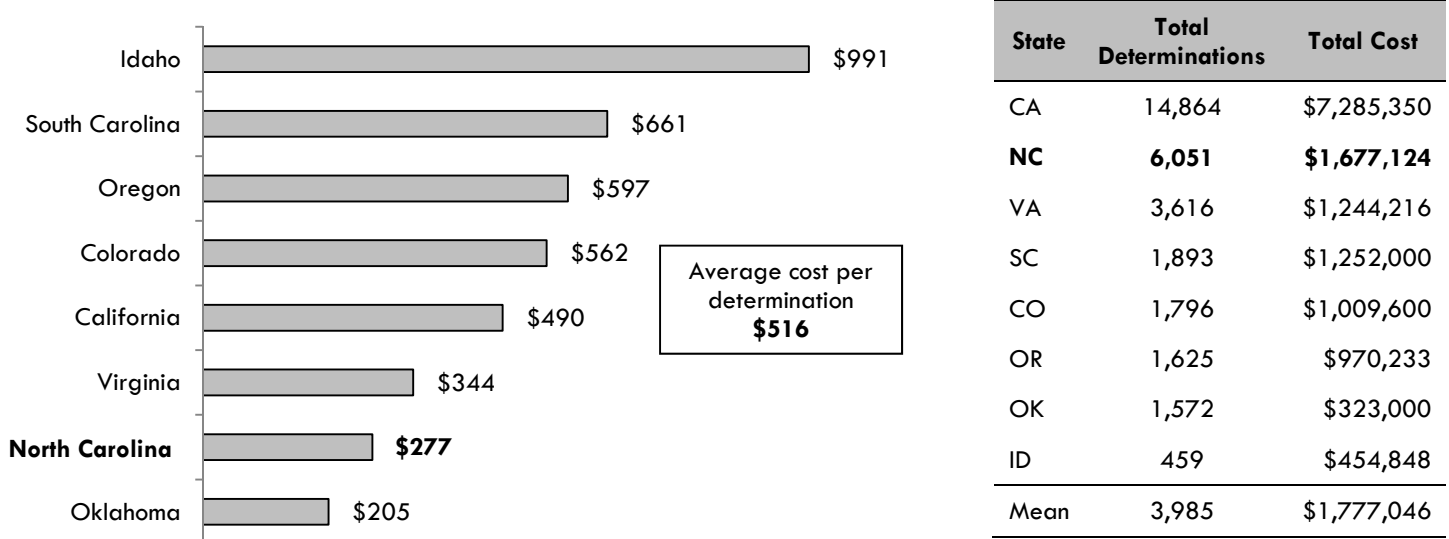
Role in Higher Authority Appeals		Allocated Expense
DES, Appeals Section	Prepare files of higher authority appeals for the Legal Section	\$210,390
DES, Legal Section	Review higher authority appeals and prepare recommendations for the Board of Review	\$855,297
Board of Review	Review recommendations and make higher authority appeals determinations	\$611,437
Total		\$1,677,124

Notes: DES stands for the Division of Employment Security. Staffing section costs include direct and indirect costs associated with these functions including personnel benefits, supplies, communication, postage, travel, equipment, maintenance, allocated building expenses, contractual services, and other indirect costs.

Source: Program Evaluation Division based on information from the N.C. Division of Employment Security.

North Carolina's administration of higher authority appeals is efficient relative to other states. The Program Evaluation Division surveyed the 47 states that offer higher authority appeals to determine their costs for administering the function. Although 22 states responded to the survey, 7 provided complete cost data. One important measure of the efficiency of administering higher authority appeals is the total amount of dollars a state expends per determination. Exhibit 7 shows that North Carolina's cost per determination of \$277 is lower than all but one of the seven comparison states; this cost is almost half of the mean cost per determination of \$516. The reason North Carolina's cost per determination is low compared to other states is because of the high volume of determinations it processes. North Carolina's cost for administering higher authority appeals is close to average, but it processes 1.5 times the average amount of determinations.

Exhibit 7: North Carolina’s Cost per Higher Authority Appeals Determination is Low, FY 2014–15



Source: Program Evaluation Division based on survey of states with higher authority appeals.

North Carolina Board of Review members are paid higher salaries than members in other states. The General Assembly sets Board of Review members’ annual salaries in the appropriations bill. For the 2015–17 fiscal biennium, the chair’s salary is \$123,255 and the other two members’ salaries are \$121,737.¹⁶ Of the states responding to the Program Evaluation Division’s survey, eight having three-member boards provided salary data. All of these states pay their members less than North Carolina. The mean salary for the eight other states is \$65,518, and the median salary is \$79,802.¹⁷ The average salary in Idaho—the only one of the eight states that, like North Carolina, requires one member be an attorney—is \$92,420, which is approximately \$30,000 less than North Carolina’s salaries.

Finding 3. Eliminating the higher authority appeals function or the Board of Review would not result in General Fund savings to the State.

Because higher authority appeals are a discretionary activity, the Program Evaluation Division examined the financial implications of two potential changes:

- eliminating the higher authority appeals function altogether or
- preserving the higher authority appeals function but eliminating the Board of Review.

Because the cost of administrating higher authority appeals is covered by federal grant dollars, there would be no General Fund savings to the State in either scenario. However, either action would make federal grant dollars available for the Division of Employment Security (DES) to reallocate to other administrative activities within the Unemployment Insurance Program.

¹⁶ The Board of Review salaries were set at a level similar to the salary of the Chairman of the Employment Security Commission, which was \$120,363.

¹⁷ Kentucky has the lowest average salary at \$12,000, and Maryland has the highest average salary at \$110,815.

Eliminating higher authority appeals would result in North Carolina receiving fewer federal grant dollars but realizing administrative cost avoidance, allowing DES to reallocate approximately \$1 million to other administrative functions. Recall that the higher authority appeals function cost \$1.7 million to administer in Fiscal Year 2014–15. Therefore, eliminating higher authority appeals would result in \$1.7 million in cost avoidance. However, part of the federal grant allocation formula is based on the workload volume and staffing costs of lower and higher authority appeals combined. If North Carolina eliminated its higher authority appeals function, the Program Evaluation Division estimates North Carolina would have received approximately \$666,000 (or 1.16%) less grant revenue in Fiscal Year 2014–15.¹⁸ Eliminating higher authority appeals would not result in any savings to North Carolina’s General Fund because the savings would go to the federal government. However, the net result would provide DES with the ability to reallocate approximately \$1 million in grant dollars after the \$666,000 reduction in grant funds is taken into account (see Exhibit 8).

Eliminating the Board of Review would not result in North Carolina receiving fewer federal grant dollars and would allow DES to reallocate approximately \$611,000 to other administrative functions. Currently, attorneys in DES’s Legal Section review higher authority appeals cases and make recommendations to be considered by the Board of Review. North Carolina’s higher authority appeals function could be administered without an independent Board of Review. Instead, higher authority appeals determinations could be made by attorneys within the Legal Section of DES, much like how lower authority appeals determinations are made by attorneys within the Appeals Section of DES. Under this scenario, North Carolina would not receive fewer grant dollars because it would still have the higher authority appeals function.

Recall that the Board of Review cost about \$611,000 in Fiscal Year 2014–15. Preserving the higher authority appeals function but eliminating the Board of Review would provide DES with approximately \$611,000 to reallocate to other administrative activities (see Exhibit 8).

Similarly, any reduction in Board of Review member salaries would provide DES with that amount to reallocate to other administrative activities.

¹⁸ Of the \$57.3 million in total base grant funding North Carolina received in Federal Fiscal Year 2014–15, \$3.7 million was based on the workload volume and staffing costs of lower and higher authority appeals combined. In State Fiscal Year 2014–15, 18% of all appeals occurred at the higher authority appeals level. The Program Evaluation Division multiplied \$3.7 million by 18% to reach the figure of \$666,000. This methodology is limited because North Carolina’s federal grant funding varies from year to year based upon a number of factors such as total unemployment claims and because it does not consider above-base funding, which is determined based on all claims activity combined. The U.S. Department of Labor confirmed that the Program Evaluation Division’s methodology was reasonable.

Exhibit 8: Elimination of the Higher Authority Appeals Function or the Board of Review Makes Federal Grant Dollars Available for Reallocation to Other Administrative Functions

Eliminating higher authority appeals		Eliminating Board of Review	
Description: Eliminating the higher authority appeals function creates opportunity for cost avoidance but also results in revenue loss		Description: Eliminating the Board of Review as the entity determining higher authority appeals creates cost avoidance	
Cost avoidance (+)		Cost avoidance (+)	
Cost of administering higher authority appeals	\$1.7 million	Cost of Board of Review	\$611,000
Revenue Loss (-)		Revenue Loss (-)	
Portion of Fiscal Year 2014–15 federal grant attributable to higher authority appeals	\$(666,000)	No revenue would be lost because North Carolina would still perform higher authority appeals	\$(0)
Result		Result	
Grant dollars available for reallocation to other unemployment insurance administrative functions	\$1 million	Grant dollars available for reallocation to other unemployment insurance administrative functions	\$611,000

Source: Program Evaluation Division based on information from the U.S. Department of Labor and N.C. Division of Employment Security.

DES administrators believe the State benefits from having a higher authority appeals function but question the value added by the Board of Review. DES officials support maintaining higher authority appeals despite the potential to reallocate grant dollars to other administrative activities. DES stated the lower authority appeals function in North Carolina is designed and staffed to make determinations with the knowledge that there will be at least one additional expert review at the higher authority appeals level if an appeal is filed. If lower authority appeals determinations could be appealed directly to the court system, DES believes the lower authority appeals process would need to be substantially enhanced and that any savings projected in eliminating higher authority appeals would be exceeded by the cost of providing more formal hearings at the lower authority appeals level.

However, DES also believes the Legal Section's review of higher authority appeals is sufficient and that having the Board of Review make a determination based upon an attorney's recommendations is an additional layer that is redundant and provides little value. DES stated that any dollars available if there were no Board of Review could be allocated toward improving processes at the initial determinations level, the level of adjudication before any appeals may be filed. In Fiscal Year 2014–15, appeals referees determining lower authority appeals reversed 40% of the initial determinations that were appealed (10,980 of the 27,548).¹⁹ Only five states had higher reversal rates, and the national average was 31%.

¹⁹ In Fiscal Year 2014–15, 82% of lower authority appeals were brought by employees, and they won 37% of the appeals they brought; 18% of appeals were brought by employers, and they won 52% of the appeals they brought.

Likewise, stakeholders generally support having the higher authority appeals function but have mixed views on the utility of the Board of Review. The Program Evaluation Division queried 12 stakeholder organizations representative of employer or employee interests and received responses from 8 organizations.²⁰ All entities responding indicated support for having a higher authority appeals function. For example, one response stated, “Because there are sometimes significant differences in the way the [lower authority] appeals referees apply the law to the facts, there can be significant differences in outcomes based upon the appeals referee assigned. The availability of a higher [authority] appeal eliminates these inconsistencies in policy within the agency.”

With respect to the Board of Review, however, respondents were mixed in their support for keeping the board. One response noted, “In addition to the fact that [unemployment insurance] tax matters can be very complicated, having an independent authority available to hear these matters helps ensure that tax disputes are determined based upon the law rather than the policy goals of the agency.” However, another response did not support the Board of Review approach and, instead, favored having a committee of DES management hear higher authority appeals. The organization stated, “It may be more efficient, cost effective, and have no loss in correct decision making if a higher level of appeals of top management at [DES] was established in lieu of the board.”

Finding 4. Despite a lack of evidence to support the idea that offering higher authority appeals lessens the burden on the court system, the higher authority appeals function and the Board of Review structure offer several other benefits.

A major argument in favor of having the higher authority appeals function is that it lessens the burden on the court system, but there is limited evidence to support this idea. If North Carolina did not offer higher authority appeals, lower authority appeals determinations that are appealed would go directly to superior court. Whereas the administrative costs of offering higher authority appeals are paid for by federal grant funds, North Carolina bears the cost of administering its court system. The Division of Employment Security (DES) estimates its cost in processing and staff time for all superior court appeals in Fiscal Year 2014–15 was roughly \$125,000, or \$2,000 per case. In addition, the Administrative Office of the Courts estimates the average superior court case costs the State \$1,200. DES and some stakeholders suggested a monetary benefit of having a second level of administrative hearing is that states will have fewer cases proceeding to their court systems as a result.

Only one state has eliminated its higher authority appeals function, allowing for a before-and-after comparison of the impact of doing so. In 2005, Minnesota decided to eliminate its higher authority appeals function in order to focus more resources and effort on lower authority appeals.

²⁰ The Program Evaluation Division sent queries to the following entities: CAI, Carolina Asphalt Pavement Association, Carolinas Association of General Contractors, Legal Aid of North Carolina, North Carolina Advocates for Justice, North Carolina Association of Defense Attorneys, North Carolina Bar Association, North Carolina Chamber of Commerce, North Carolina Home Builders Association, North Carolina Justice Center, North Carolina Retail Merchants Association, and North Carolina State AFL-CIO.

Since eliminating higher authority appeals, Minnesota has not experienced an increase in the number of cases going to court. In fact, Minnesota has seen a slight decline in the percentage of lower authority appeals going to court. Minnesota officials suggested this result may be due to a decline in overpayments, which they believe are a significant cause of appeals going to court because claimants have more at stake when they have to repay unemployment benefits.

Currently, less than 1% of lower authority appeals determinations in Minnesota are appealed to court. Similarly, in Hawaii and Nebraska—the other two states without higher authority appeals—less than 1% of lower authority appeals determinations are appealed to court. The differences in each state's appeals processes, maximum amount of unemployment benefit, amount that claimants and employers pay in court costs, and other variables make it challenging to infer the effect an absence of higher authority appeals has on the number of cases appealed to court. Nevertheless, the limited evidence from these states suggests there is a deterrent effect to parties appealing to the courts—perhaps due to the cost, complexity, or time involved—that is unrelated to whether higher authority appeals are offered. Thus, in attempting to monetize the suggested benefit of fewer appeals going to the court system, the Program Evaluation Division encountered a lack of empirical evidence to support the idea that offering higher authority appeals prevents cases from proceeding to court.

However, higher authority appeals provide benefits to parties of unemployment insurance cases and to DES.

- **The higher authority appeals process is less formal than superior court and easier for parties to navigate without legal representation.** DES does not require specific forms for a party to file an appeal; a higher authority appeal may be written as a simple letter. Filing an appeal in superior court is more challenging; an appellant must file a petition for judicial review in the Office of the Clerk of Court of the proper county and within 10 days of filing an appeal also must provide copies to all necessary parties. Unlike superior court, which requires appellants to pay filing fees,²¹ higher authority appeals have no associated fees and DES provides digital recordings of appeals hearings to parties at no cost. In addition, whereas courts apply formal rules of evidence during hearings, administrative hearings of higher authority appeals are simply required to be conducted in such a manner as to ascertain the substantial rights of the parties.
- **Higher authority appeals generally proceed more quickly than appeals in superior court.** In Fiscal Year 2014–15, 76% of all higher authority appeals cases were decided within 40 or fewer days, whereas DES estimates an average case in superior court took 120 days. There are several reasons why it is advantageous for parties to receive determinations quickly. In cases where a previous determination is reversed in favor of a claimant, the

²¹ Parties filing appeals to superior court in North Carolina have to pay fees of \$200 unless the clerk of court determines the petitioner is unable to pay.

unemployed individual can receive benefits more quickly. Conversely, when an individual receives a benefit initially that is reversed upon appeal, the individual still may be better off with a quick decision because fewer paid-out benefits will be required to be repaid.²² It is also easier for DES to collect these repayments when less time has elapsed.

- **Higher authority appeals serve as a mechanism for internal feedback and quality control.** When lower authority appeals determinations are reversed, an opportunity exists for lower authority appeals referees to receive feedback on why determinations were reversed. In addition, reversals can help management spot problematic patterns in determinations. As discussed previously, in the absence of higher authority appeals, few lower authority appeals determinations would likely be appealed to superior court, thereby providing less data to inform quality control efforts.

In addition, the Board of Review structure provides benefits to parties of unemployment insurance and tax cases.

- **The Board of Review's structure provides the perception that parties are receiving an independent review of their lower authority appeals.** The Board of Review does not report to the DES Assistant Secretary or any higher authority. According to the Board of Review, claimants and employers perceive the board as an outside entity, which has increased their confidence in the process and their sense that they are getting their day in court.
- **The Board of Review provides an impartial venue for hearing tax cases.** As discussed in the Background, the Board of Review has the power to conduct hearings for the purpose of determining employer tax liability. In the absence of the Board of Review, tax cases would have to either be decided initially in superior court or decisions would be rendered initially by someone within DES who works for the same agency that is bringing the case against a given party.

Finding 5. The Board of Review's reliance on Division of Employment Security staff undermines its independence.

N.C. Gen. Stat. § 96-15.3 stipulates the Department of Commerce must assign staff to the Board of Review, and the board and its staff must perform their job responsibilities independent of the Governor, the General Assembly, the department, and the Division of Employment Security (DES).²³

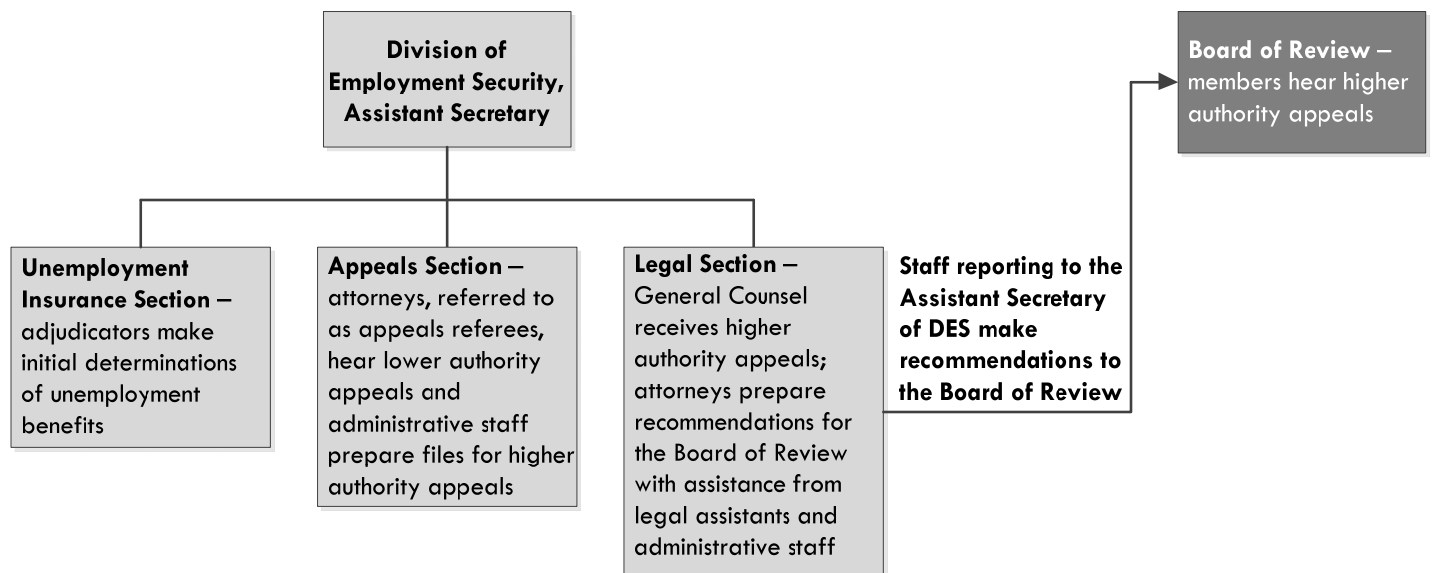
²² The Supreme Court ruled in *California Department of Human Resources Development v. Java* (1971) that once benefits have been allowed a claimant, if the claimant claims a week of benefits, the claimant must not be denied until there is a subsequent decision reversing the decision of eligibility. Benefits are stopped only when the decision on an employer's appeal is issued holding the claimant ineligible.

²³ Session Law 2015-238 added N.C. Gen. Stat. § 96-15.3. In 2014, similar language appeared in House Bill 1069, which was ratified by the General Assembly but vetoed by the Governor.

The Board of Review is dependent upon staff that report to the Assistant Secretary of DES, who oversees the initial determination and lower authority appeals functions. According to the Program Evaluation Division's survey, in 86% of responding states (n = 18), staff working on higher authority appeals do not report to the individual overseeing initial determinations of unemployment benefits. In North Carolina, however, DES adjudicators make initial determinations, DES appeals referees hear lower authority appeals, and DES attorneys make recommendations to the Board of Review for higher authority appeals (see Exhibit 9). All of these individuals ultimately report to the DES Assistant Secretary.

Having the attorneys that provide recommendations to the Board of Review, which is charged with hearing appeals arising from DES determinations, report to the DES Assistant Secretary hinders the independence of the Board of Review. According to the Board of Review, "Although the Board of Review is required by statute to exercise its decision-making authority independently of DES, the lack of resources including staff makes the execution of that mandate difficult. The Board of Review has no authority over or ability to supervise the attorneys who are providing support. They work for DES, and they are aware of that. Tasks for DES take priority over tasks for the Board of Review. When the Board of Review does not accept the proposed decision from a staff attorney, the revisions may come back weeks later, even if the revision is the addition of a few sentences written by the board. The Board of Review cannot process the volume of cases it does without support. Accordingly, we have no choice but to accept the support resources provided."

Exhibit 9: DES Legal Staff Provide Recommendations to the Board of Review for Appeal Hearings

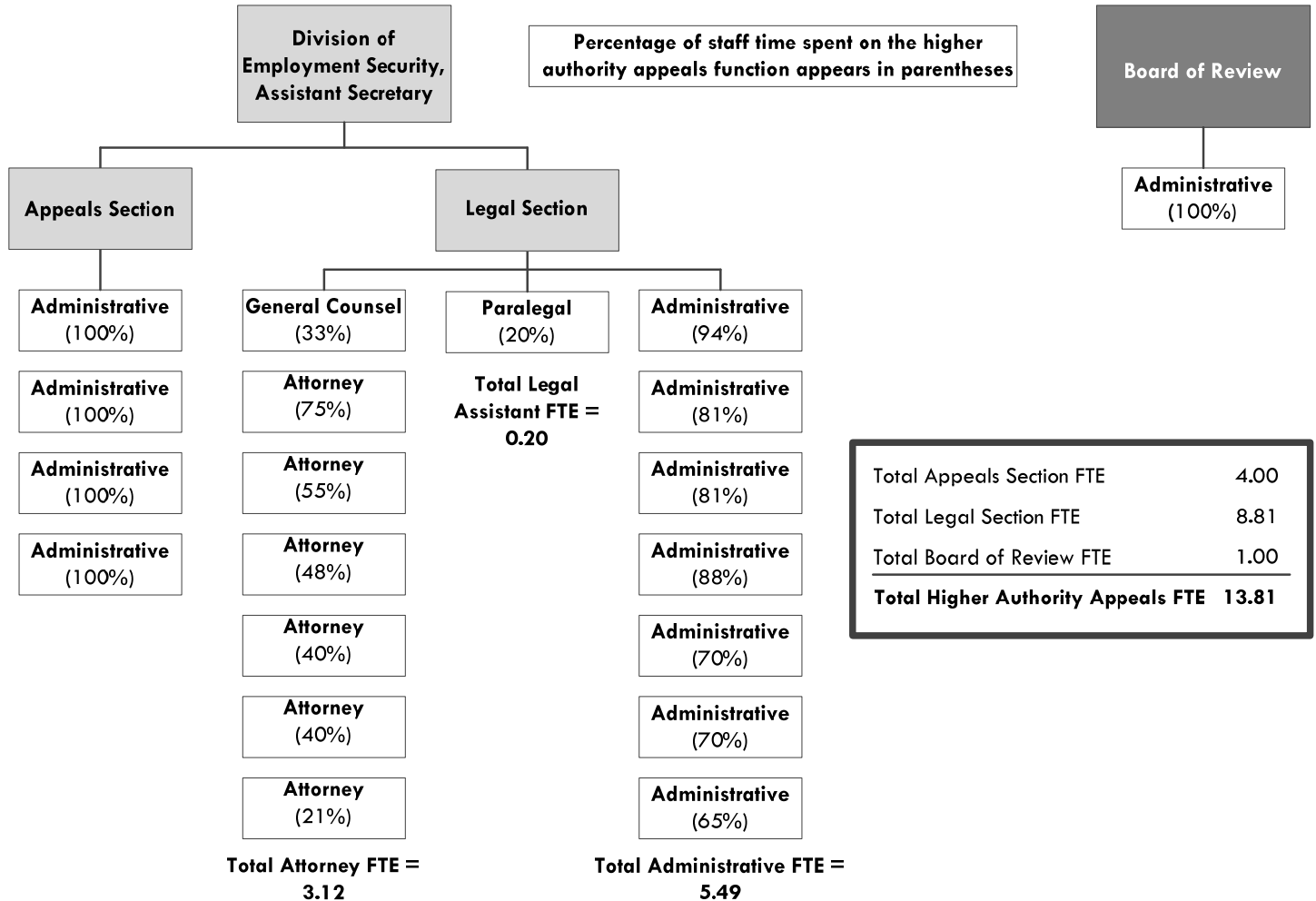


Source: Program Evaluation Division based on data from the N.C. Division of Employment Security.

In addition to independence, efficiencies could be gained by having staff dedicated exclusively to the Board of Review. Currently, the staff assigned to provide support to the Board of Review are not dedicated exclusively to the higher authority appeals function. As shown in Exhibit 10, in Fiscal Year 2014–15, the Board of Review relied on seven DES attorneys, one DES paralegal, and seven DES administrative staff in the

Legal Section. All of these individuals spent a portion of their time on higher authority appeals.

Exhibit 10: Percentage of DES Staff Time Spent on Higher Authority Appeals, FY 2014–15



Note: Percentage of time spent on higher authority appeals was self-reported by DES employees. During a time of transition in Fiscal Year 2014–15, the Legal Section had two individuals effectively serve as General Counsel during an overlapping period; only one General Counsel position is shown in this exhibit or used for FTE totals presented. In addition, a legal liaison spent 25% of his time doing attorney work on higher authority appeals for 2.5 months in Fiscal Year 2014–15; this position is not represented in the exhibit or FTE totals.

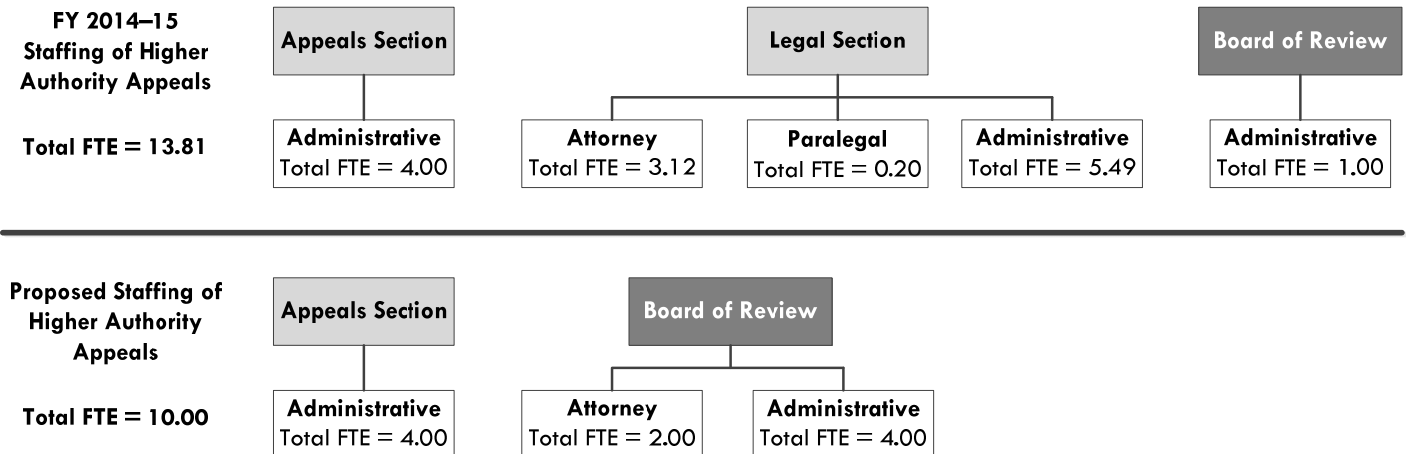
Source: Program Evaluation Division based on data from the N.C. Division of Employment Security and Board of Review.

The Board of Review reports it could function with two attorneys and four administrative staff dedicated exclusively to Board of Review activities. The Joint Legislative Oversight Committee on Unemployment Insurance recommended a similar approach in its 2015 report to the General Assembly, proposing legislation that would transfer attorney and paralegal positions from DES to the Board of Review to ensure the board handles higher authority appeals independently.

As shown in Exhibit 11, transfer of positions from the Legal Section to the Board of Review would decrease the number of full-time equivalent (FTE) positions dedicated to higher authority appeals from 13.81 to 10. DES could reallocate the remaining 3.81 FTE to other administrative activities or continue to use those FTE within the Legal Section. The Program Evaluation

Division estimates North Carolina's cost per higher authority appeals determination would have decreased from \$277 to \$246 in Fiscal Year 2014–15 had the proposed staffing of higher authority appeals shown in Exhibit 11 been in place.²⁴

Exhibit 11: Fewer Staff Are Required for Higher Authority Appeals if Staff Work Exclusively on Board of Review Activities



Source: Program Evaluation Division based on information from the Board of Review.

For tax cases, a DES attorney serves as the Board of Review's hearing officer in one case and represents DES in another case. As discussed in the Background, the Board of Review has the power to conduct hearings for the purpose of determining employer tax liability. When a DES attorney in the Legal Section is assigned a tax case, the attorney represents DES in any hearing brought before the Board of Review. Another DES attorney is assigned to act as the hearing officer for that case. Unlike in unemployment benefit cases where the Board of Review itself conducts oral arguments, in tax cases a DES attorney serves as the hearing officer with the Board of Review in attendance to ask for any additional evidence it wants to consider in rendering its decision. According to the Board of Review, "the system wherein attorneys represent DES in tax cases and may simultaneously be assigned to support the Board of Review as hearing officer in a different case smacks of a conflict of interest." Having attorneys dedicated exclusively to the Board of Review who always preside over tax hearings and never represent DES in tax hearings would eliminate this potential conflict of interest.

²⁴ In Fiscal Year 2014–15, Legal Section staff costs allocated to higher authority appeals totaled \$495,021. To determine what costs would have been with two attorneys and four administrative staff dedicated exclusively to Board of Review activities, the Program Evaluation Division used the average salary of the Legal Section attorneys and administrative staff who worked on higher authority appeals activities, generating a cost of \$307,500. All other direct and indirect costs were kept constant.

Finding 6. The Board of Review lacks policies and procedures to ensure consistency and continuity of operations.

State law charges the Board of Review with the responsibility of determining policies and procedures for higher authority appeals. Policies and procedures are important administrative controls that help ensure a standard of operation and mitigate risk. The Program Evaluation Division's review of the Board of Review's administrative documentation found templates for determinations but no documented policies and procedures for how cases are to be received, processed, and determined. The Program Evaluation Division attributes the absence of policies and procedures by the Board of Review to the fact that cases currently are received and processed by Division of Employment Security staff and to a lack of staff dedicated exclusively to the Board of Review.

Documented and up-to-date policies and procedures for higher authority appeals are important because they would establish common definitions of administrative processes and what steps the Board of Review must take to process higher authority appeals and other types of cases. For example, Board of Review members identified timeliness as an issue, stating it often takes as long as two weeks to receive cases from the Appeals Section that prepares lower authority appeals for higher authority appeals. In establishing policies and procedures, the Board of Review could consult with the Appeals Section to determine a reasonable timeframe for receiving cases and set a target.

Without policies and procedures, the Board of Review puts the validity of its determinations at risk. One of the perceived benefits of having higher authority appeals is that parties feel their appeals are receiving consistent, impartial review. Without policies and procedures, appellants cannot be assured that review of their appeal was handled consistently. A lack of policies and procedures also is concerning because of the time-limited nature of board appointments. Without documented policies and procedures, future higher authority appeals operations will have to rely on the institutional knowledge of prior board members.

Finding 7. North Carolina's performance of higher authority appeals has improved and is efficient compared to other states, but the Board of Review does not track the data necessary to ensure continuous improvement of operations.

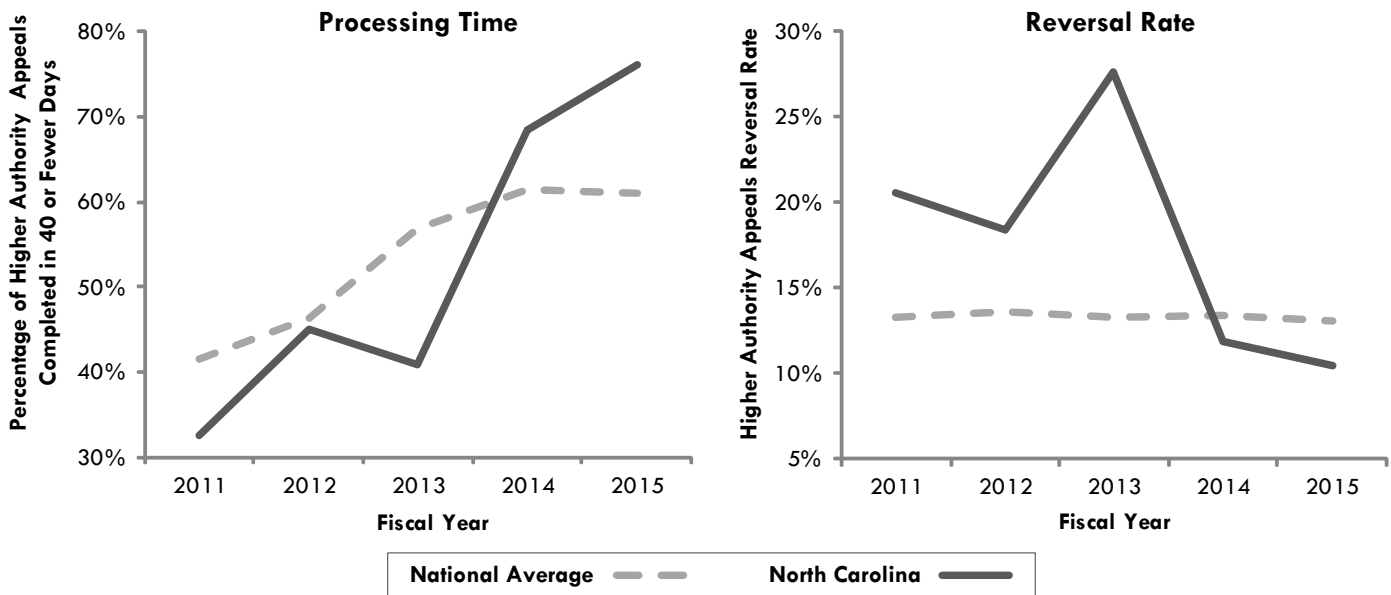
The U.S. Department of Labor requires that states report on two higher authority appeals performance measures: timeliness of processing higher authority appeals and reversals of lower authority appeals determinations.

Timeliness of processing higher authority appeals has improved.

Timeliness is measured in terms of the age of the appeal. The federal performance standard is to have higher authority appeals completed within 40 days of filing. Exhibit 12 shows North Carolina's performance improvement compared to the national average. Since Fiscal Year 2010–11, North Carolina's percentage of higher authority appeals completed within 40 days has more than doubled; this performance improvement has outstripped the national average.

The rate at which higher authority appeals determinations reverse lower authority appeals determinations has improved. Higher authority appeals determinations that reverse lower authority appeals determinations indicate a potential problem with the lower authority appeals process or ruling. Reversals can occur as a result of problems with due process, legal and technical accuracy, or the conduct of lower authority appeals referees. Exhibit 12 shows reversal rates have fallen since Fiscal Year 2010–11, and in Fiscal Year 2013–14 the reversal rate fell below the national average. In Fiscal Year 2014–15, the Board of Review reversed 10% of lower authority appeals,²⁵ whereas the national average was 13%.

Exhibit 12: North Carolina’s Higher Authority Appeals Performance Has Improved Relative to the National Average



Source: Program Evaluation Division based on data from the U.S. Department of Labor.

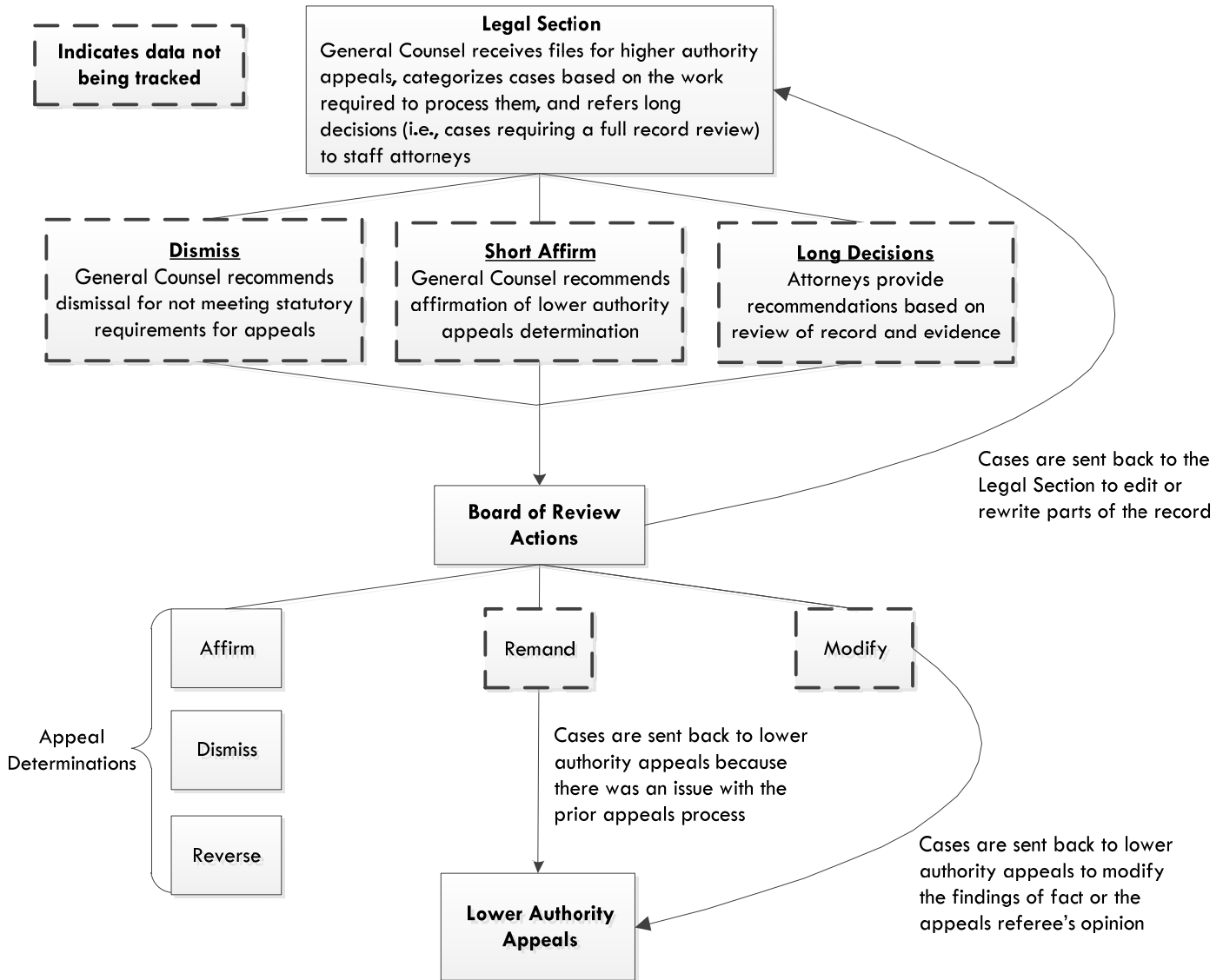
Although North Carolina’s performance on both federal measures has improved and is better than the national average, additional information is required to better understand the performance of the Board of Review. The data reported to the U.S. Department of Labor on higher authority appeals are limited to timeliness and reversals. Higher authority appeals reversal rates are a better indicator of performance of the lower authority appeals process than a measure of the performance of the Board of Review. Unfortunately, this performance measure is the only one the U.S. Department of Labor tracks related to the quality of appeals. A better indicator of the Board of Review’s performance would be the rate at which superior courts reverse Board of Review determinations. Of the 60 Board of Review determinations appealed to superior court in Fiscal Year 2014–15, 6 were reversed. DES attorneys estimate about 10% of cases appealed to superior court are reversed each year. Systematically tracking these data would inform assessments of the Board of Review’s performance.

²⁵ In Fiscal Year 2014–15, 80% of higher authority appeals were brought by employees, and they won 7% of the appeals they brought; 20% of appeals were brought by employers, and they won 26% of the appeals they brought.

The Program Evaluation Division attributes the absence of data collection beyond the measures required by the federal government to a lack of staff dedicated exclusively to the Board of Review.

Tracking aspects of the board’s performance requires additional workload process data. Prior to the Board of Review taking action on an appeals case, the Legal Section’s General Counsel triages higher authority appeals cases for the Board of Review based on the work required to process the case. Exhibit 13 shows how cases are recommended to the Board of Review and the possible actions the board may take.

Exhibit 13: Board of Review is Not Tracking Aspects of Its Workload or Determinations



Source: Program Evaluation Division based upon information from the N.C. Division of Employment Security and Board of Review.

The Board of Review is not tracking data that would be useful for improving timeliness. Cases referred as dismissals and short affirms require the least amount of time to process and render determinations. Long decisions are cases the General Counsel assigns to an attorney to review the record and evidence of findings of fact before making a recommendation to the Board of Review. These cases take longer to

process and affect timeliness of determinations, a key federal performance indicator. Currently, the Board of Review is not tracking which cases are referred as dismissals, short affirms, or long decisions. The Board of Review estimates 35% of cases are referred as long decisions. In contrast, the Division of Employment Security (DES) estimates 10% to 20% of cases are referred as long decisions. The Program Evaluation Division could not verify these estimates because these data are not tracked systematically. Tracking these data would inform assessments of the Board of Review's workload and timeliness.

The Board of Review is not tracking data that would be useful for quality assurance. If the board does not have the necessary information to either dismiss, affirm, or reverse a case, it will on occasion require cases to be remanded or modified.

- Cases that are remanded are sent back to lower authority appeals because there was an issue with the prior appeals process. For example, cases are remanded when the record of the prior appeal is inaudible, files have been misplaced, or some aspect of the appeals hearing was not conducted properly by the appeals referee.
- Cases that are modified are sent back to lower authority appeals to modify the findings of fact or the appeals referee's opinion.

Remands and modifications indicate inadequacy at the lower authority appeals level. The Board of Review is not tracking which cases it remands or modifies. The Board of Review estimates between 5% and 10% of cases are remanded or modified. In contrast, DES estimates 5% or less of cases are remanded or modified. The Program Evaluation Division could not verify these estimates because these data are not tracked systematically. Tracking these data would allow the Board of Review to determine how often issues with quality arise and would provide improved feedback and oversight of the lower authority appeals function.

Lastly, the Board of Review is not tracking data to indicate its own utility. Legal Section attorneys review higher authority appeals cases first and make recommendations to the Board of Review. One measure of the board's value would be how often it disagrees with the recommendations made by Legal Section attorneys or finds errors in the work done by Legal Section attorneys. For long decisions, the Board of Review estimates 10% of its determinations differ from the attorneys' recommendations it receives and 5% to 10% of its determinations require the attorneys to edit or rewrite parts of their proposed determination language. The Program Evaluation Division could not verify this estimate because these data are not tracked systematically. Tracking these data would allow the Board of Review to demonstrate the value of its contribution to the higher authority appeals function.

Recommendations

North Carolina is not required to offer higher authority appeals or to have a Board of Review to perform that function. Limitations in the availability of data that measure effectiveness, challenges in monetizing the benefits of higher authority appeals and the Board of Review, and conflicting evidence and opinions regarding the value of the Board of Review prevented the Program Evaluation Division from drawing conclusions as to whether the costs of administering the present system outweigh the benefits.

Nevertheless, if North Carolina is to continue to have the higher authority appeals function that has been in place since 1936 and the function is to be performed by the Board of Review that became operational in 2014, the Program Evaluation Division recommends that the General Assembly increase the Board of Review's independence and its own ability to monitor the board's operations.

Recommendation 1. The General Assembly should transfer staff from the Division of Employment Security to the Board of Review.

As discussed in Finding 5, the Board of Review's reliance on Division of Employment Security (DES) staff undermines the board's independence. Currently, the Board of Review relies on DES staff for recommendations on what decision it should render on appeals of DES determinations. The Board of Review reports that having two attorneys and four administrative staff dedicated exclusively to its work would allow it to operate more independently and effectively. The General Assembly should direct DES to transfer these positions to the Board of Review, and these positions should report to the Chair of the Board of Review. The General Assembly also should direct DES to transfer each year to the Board of Review an adequate amount of federal grant funds to cover the costs of these positions.

Recommendation 2. The General Assembly should modify statute to direct the Board of Review to develop policies, procedures, and standards for higher authority appeals operations.

Statute charges the Board of Review with the responsibility for developing policies and procedures for higher authority appeals. Finding 6 shows the board has not developed policies and procedures. As a result, the General Assembly should modify statute to be more explicit in requiring the Board of Review to develop the policies, procedures, and standards necessary to ensure consistency and continuity of higher authority appeals operations. The General Assembly should direct policies, procedures, and standards be developed within 90 days of passage of the law. Having staff dedicated exclusively to the Board of Review as proposed by Recommendation 1 would make these policy development efforts feasible.

Recommendation 3. The General Assembly should direct the Division of Employment Security to work with the Board of Review to track and collect the data necessary to support appeals operations.

To ensure the Board of Review has the data and information necessary to make continuous improvements to the operation of higher authority appeals, the General Assembly should direct the Division of Employment Security to work with the board to facilitate data collection and track the following data at a minimum:

- reversals of board determinations by superior courts;
- referrals from staff attorneys for dismissals, short affirms, and long decisions;
- cases remanded back to lower authority appeals or referred to the Legal Section for modification; and
- deviations between the recommendations made by staff attorneys and the determinations of the board.

To ensure timely access to data, the Board of Review should begin collecting this data within 30 days of the completion of policies, procedures, and standards.

Having staff dedicated exclusively to the Board of Review as proposed by Recommendation 1 would make these data collection efforts feasible.

Agency Response

A draft of this report was submitted to the Board of Review and Division of Employment Security to review. Their responses are provided following the report.

Program Evaluation Division Contact and Acknowledgments

For more information on this report, please contact the lead evaluator, Kiernan McGorty, at kiernan.mcgorty@ncleg.net.

Staff members who made key contributions to this report include Jeff Grimes and Sean Hamel. John W. Turcotte is the director of the Program Evaluation Division.



North Carolina
Department of Commerce
Board of Review

Pat McCrory, *Governor*
John E. Skvarla, III, *Secretary*

Jeanette K. Doran, *Chairman*

February 22, 2016

Mr. John Turcotte, Director
Program Evaluation Division
North Carolina General Assembly
Legislative Office Building, Suite 100
300 North Salisbury Street
Raleigh, NC 27603-5925

Re: Response to Program Evaluation Division draft report No. 2016-03

Dear Mr. Turcotte:

At the outset, I want to thank the staff of the Program Evaluation Division, particularly Dr. Kiernan McGorty, for their hard work and professionalism in preparing PED's report on the Board of Review ("the Board").

In response to the report, the Board wishes to convey its earnest desire to work collaboratively with the Division of Employment Security to carry out its duties. To this end, Interim Assistant Secretary Ted Brinn and I have begun discussions regarding appropriate levels of support for the Board, including additional staff. These discussions have been constructive, and I am confident will yield positive results for the people of North Carolina.

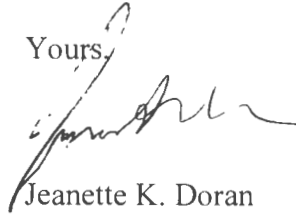
The report describes the history of higher level appeals in North Carolina. While the staff of DES, and formerly the Employment Security Commission, did an admirable job evaluating higher level appeals of unemployment insurance claims, the value of the Board in considering higher level appeals and exercising its judgment independently of DES cannot be understated. The Board provides a review of lower appeals and tax protests which is untethered from the influence—whether real or perceived—of those who made the decisions which are the subject of our review. We strive to do so in the most cost effective and efficient manner possible. Indeed, as the PED report notes, the cost per determination by the Board in North Carolina is efficient relative to other states. Further, the processing time for appeals has improved relative to the national average since the Board began its work in January 2014.

Notably, no single individual has had full authority to decide higher level appeals since such appeals began in 1936. From 2011 to 2014, the Assistant Secretary made those determinations but did not have statutory authority to do so, though those decisions have since been ratified by statute. Previously, higher authority appeals were determined by the Employment Security Commission either sitting in the full commission or by the chairman on behalf of the full commission. Eliminating the Board of Review and consolidating higher authority decision-

making in a single individual, such as the Assistant Secretary, would be a radical shift from the historical practices of higher authority appeals in North Carolina. As discussed in Finding 4 of the report, the structure of the Board provides benefits to the parties to unemployment insurance and tax cases. Specifically, the Board provides for an independent review of lower appeals of unemployment claims and provides an impartial venue for hearing tax cases. Neither benefit could be achieved if the Board was eliminated and its duties assigned to DES staff.

I am grateful for the careful attention you and your colleagues have obviously given this matter. The Board is committed to continuing to improve its performance and we look forward to continuing constructive conversations with the Division to implement the Employment Security Law of North Carolina.

Yours,

A handwritten signature in black ink, appearing to read 'Jeanette K. Doran', written over the word 'Yours,'.

Jeanette K. Doran
Chairman



Employment Security
COMMERCE

PAT McCRORY
Governor

JOHN E. SKVARLA, III
Secretary

W.T. BRINN, JR.
Interim Assistant Secretary

February 22, 2016

Mr. John W. Turcotte, Director
Program Evaluation Division
North Carolina General Assembly
Legislative Office Building, Suite 100
300 North Salisbury Street
Raleigh, NC 27603-5925

First, I want to commend the staff of the Program Evaluation Division for the time and effort in preparing the evaluation of the value provided to North Carolina by the Board of Review (the "Board").

Historically, the Higher Authority Appeals ("HAA") of the Division of Employment Security (the "Division") has efficiently and effectively ensured the laws of Chapter 96 of the General Statutes are being applied. Having this process provides confidence to claimants and employers that multiple levels of expertise have reviewed and agreed with the application of the law. We believe the HAA system has fairly and consistently applied unemployment law with equitable opportunity for all parties involved in the appeals process.

The provisions of S.L. 2011-401 created the Board of Review as an independent body to issue HAA decisions on behalf of the Division. The General Assembly appropriated salaries for the Board in the 2012-13 Appropriations budget; however, no additional funds were appropriated for support staff. In order to provide appropriate support for the Board, the Division designated a full-time staff position for assistance in providing administrative support of the Board's daily operations. Once the Board was appointed, it was determined that the most efficient way at that time to maintain work flow would be to have existing Division legal staff review HAA appeals and issue a recommended decision to the Board for their consideration. The Board has the ability to accept, reject or revise the recommendation. The Division believes it has provided the staffing and technical support to every extent requested by the Board. We do not oppose allocating staff as provided in PED's 'Recommendation 1.' The Division and the Board need to continue to work together to determine the Board's needs in order to better understand the responsibilities and separation of staff assignments.



In applying the provisions of G.S. 96-4, the Division recognizes a distinction between supporting the Board while ensuring its independence. The Division has an obligation to ensure that the costs of operations are fiscally responsible. There are some roles that must be clarified when moving staff under the Board. The Division has already begun constructive conversations with the Chair of the Board to determine what would provide an effective method of support for the Board without interfering with its independence.

In conclusion, the Division believes it has made every effort--and will continue to make every effort-- to implement the laws of North Carolina as written. We are committed to making sure the Board has every reasonable resource available to them in order to perform the function required by Statute. We suggest we all continue to analyze the overall cost of the Board but believe the higher appeals process provides the customers of the Division greater confidence in the quality of decisions rendered.

Respectfully,

A handwritten signature in black ink, appearing to read 'W. T. Brinn, Jr.', with a long horizontal flourish extending to the right.

W. T. Brinn, Jr.
Interim Assistant Secretary

