

6/10/13 FAXed to  
FAB  
JACKSONVILLE  
Ombudsman

**Subject:** phone memos  
**From:** Donna Hand <ctdhkk@aol.com>  
**Date:** 5/13/2013 3:05 PM  
**To:** leiton@dol.gov

I have faxed a request to you on April 27, 2013 regarding phone memos used to deny a case, (Verschueren #5979).


I have not received a response. Please respond

1. Was the Verschueren case the basis for the decision and interpretation of the memo issued?
2. Did the National Office physically review the file that pertains to the memo or the evidence that forms the basis of the telephone conference memo?
3. If the memo pertains to this case, why was the claimant not provided with a copy of this memo before the Recommended Decision was issued?
4. Are there any memo notes addressing BeLPT under Part E?
5. Is this memo note applicable to all claimants?                      What is the effective date of the memo?
6. What specific part of the statute and/or federal regulations give the authority to issue memos with the effect of law?
7. Please send a copy of all memos with the date of effect that pertains to BeLPT under Part E and preexisting respiratory illnesses under Part E.

--  
Donna Hand  
[ctdhkk@aol.com](mailto:ctdhkk@aol.com)

*enclosed is leiton's response*

*All DEEDIC CANNOT use phone  
memos to decide claims!!*

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Rec 6/10/13  
  
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U.S. Department of Labor

Employment Standards Administration  
Office of Workers' Compensation Programs  
Division of Energy Employees Occupational  
Illness Compensation  
Washington, D.C. 20210

JUN - 4 2013

Ms. Donna Hand  
[REDACTED]  
[REDACTED]

Dear Ms. Hand:

Thank you for your April 27, 2013 facsimile sent to Acting Secretary of Labor Seth Harris, Solicitor of Labor M. Patricia Smith, and me. You wrote as the authorized representative for Ms. [REDACTED], who filed a claim for benefits under Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). Your inquiry contained seven specific questions, and was forwarded to me for response.

Our records show that subsequent to my letter to you dated April 1, 2013, on April 23, 2013, the Final Adjudication Branch issued a final decision to deny Ms. [REDACTED]'s claim for chronic beryllium disease (CBD) and bronchitis under Part B and Part E of the EEOICPA. A copy of the final decision is attached.

Preliminarily, your facsimile indicates that your inquiry is in regard to a "phone memo on [REDACTED] case file [REDACTED]." It is my understanding that you are referring to a November 14, 2012 policy call note regarding the pre-employment diagnosis of a chronic respiratory disorder.

Below please find responses to your questions 1 through 6. Enumerated question 7 in your inquiry will be responded to in a separate correspondence as a Freedom of Information Act (FOIA) request.

Your initial question asks whether the [REDACTED] case was the basis for the November 14, 2012 policy call note. Ms. [REDACTED]'s case was the impetus for the policy call. The Jacksonville district office had sought out some clarification on the criteria necessary for establishing a diagnosis of CBD, and the November 14, 2012 policy call note provided the requested clarification. *the dri pare*

Regarding your question 2, the National Office does not, as a matter of policy, review the actual case file prior to taking part in a policy call and issuing the note from each policy call. These policy call notes provide informal policy guidance to our field staff regarding the adjudication of individual claims for benefits under the EEOICPA, and a full case file review is generally not necessary.

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Your third question asks why Ms. ██████████ was not provided with a copy of the policy call note. As indicated above, the policy call notes provide informal policy guidance to our field staff. DEEOIC Policy teleconference notes, which are developed through DEEOIC's deliberative process, are pre-decisional in nature and are not intended to be final opinions or final statements of agency policy. In addition, attorneys in the Office of the Solicitor of Labor (SOL) provide legal advice and guidance concerning policy discussions during Policy teleconferences. These communications between SOL attorneys and DEEOIC staff are protected under the "attorney-client privilege" and are also exempted in accordance with Exemption 5 under FOIA.

In your fourth question, you inquire as to whether there are any policy call notes "addressing BeLPT under Part E?" There are certain policy call notes that include mention of both BeLPT and Part E. We would be glad to respond to a request for information such as this under a FOIA request. Please provide detailed information as to what information you are seeking, and we will respond accordingly.

Your fifth question appears to ask whether the November 14, 2012 policy call note is applicable to all claimants, and inquires as to the date when the policy call note became effective. As I have explained to you on previous occasions, policy call notes attempt to address a unique case adjudication issue, and do not alter or in any way modify the actual eligibility criteria in the statute. The November 14, 2012 policy call note would not apply to all claimants, as all claims involve individual fact patterns and medical scenarios, though there may be some aspects of the policy call note that may be of assistance in a particular claim. Policy call notes do not have an effective date, as they are nothing more than informal policy guidance.

In your sixth question, you ask for the statutory authority authorizing the Division of Energy Employees Occupational Illness Compensation to "issue memos with the effective [sic] of law?" As noted above, policy calls are merely informal policy guidance. They do not have the effect of law, and they do NOT alter or in any way modify the actual eligibility criteria in the statute.

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I trust this information is helpful. Should you or Ms. [REDACTED] have any additional questions, you may call the Jacksonville district office toll-free at (877) 336-4272.

Sincerely,

*Rachel P. Leiton*

Rachel P. Leiton  
Director, Division of Energy Employees  
Occupational Illness Compensation

Enclosure: April 23, 2013 FAB Final Decision



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final statements of agency policy.<sup>1</sup> Accordingly, DEEOIC Policy teleconference notes are protected under the "pre-decisional deliberative process privilege" and are exempted in accordance with Exemption 5 under FOIA. In addition, attorneys in the Office of the Solicitor of Labor (SOL) provide legal advice and guidance concerning policy discussions during Policy teleconferences. These communications between SOL attorneys and DEEOIC staff are protected under the "attorney-client privilege" and are also exempted in accordance with Exemption 5 under FOIA.

DEEOIC Policy teleconference discussions are designed to encourage open and frank discussions between policy analysts, officials, SOL attorneys, and others on important matters of policy. DEEOIC Policy teleconference notes cover the policy questions submitted by DEEOIC district offices or the Final Adjudication Branch as well as responses from the DEEOIC National Office. Factual information presented in the questions and the National Office's policy responses are integrated in these Policy teleconference deliberative materials. Revealing the factual information in the questions would cause harm to DEEOIC's Policy teleconference deliberative process or would be tantamount to revealing DEEOIC's internal policy deliberations.

The pre-decisional deliberative process privilege protects the integrity of the DEEOIC deliberative process. Disclosure of DEEOIC policy teleconference notes would have a "chilling effect" upon DEEOIC's internal deliberative process and would lead to premature disclosure of policy discussions which may or may not ever be finalized and issued as part of official statements of policy in the EEOICPA Procedure Manual. Similarly, release of DEEOIC Policy teleconference notes would cause much public confusion resulting from various policy deliberations, reasons and rationales which were addressed during the Policy teleconferences but not ultimately adopted as final decisions or official statements of DEEOIC policy published in the EEOICPA Procedure Manual.

Therefore, after careful consideration and balancing the FOIA policy to make records available to the public to the greatest extent possible, while at the same time protecting sensitive information, we conclude that the requested disclosure of all DEEOIC Policy teleconferences notes with the date of effect that pertains to BeLPT under Part E and preexisting respiratory illnesses under Part E would cause "foreseeable harm" to the integrity of the DEEOIC deliberative process as well as causing public confusion resulting from the premature disclosures of policy deliberations, which were addressed during the Policy Teleconferences but not ultimately adopted as final decisions or official statements of DEEOIC policy issued in the EEOICPA Procedure Manual.

There are no fees associated with this response. This letter will complete our action on your FOIA request.

<sup>1</sup> DEEOIC issues final statements of policy in the EEOICPA Procedure Manual, EEOICPA Bulletins and EEOICPA Circulars.

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Under FOIA, you may appeal this response to the Solicitor of Labor. You may file an appeal with the Solicitor of Labor within 90 days from the date of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statement or arguments. The appeal should include a copy of your initial request and a copy of this letter. The appeal must be addressed to Solicitor of Labor, Division of Management and Administrative Legal Services, U.S. Department of Labor, Room N-2428, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Alternatively, you may wish to fax your appeal to (202) 693-5538. If mailed, both the envelope and the letter of appeal itself should be clearly marked: "Freedom of Information Act Appeal." You may alternatively submit an appeal by email to [foiaappeal@dol.gov](mailto:foiaappeal@dol.gov). Appeals submitted to any other email address will not be accepted.

Sincerely,

*Rachel P. Leiton*

Rachel P. Leiton  
Director, Division of Energy Employees  
Occupational Illness Compensation