

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division**

ASHLEY COX, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:21-cv-253-HEH
	)	
ELLEN MARIE HESS, in her official	)	
capacity as Commissioner of the Virginia	)	
Employment Commission,	)	
	)	
Defendant.	)	

**PLAINTIFFS’ STATUS REPORT**

Plaintiffs, by counsel, submit the following as their status report pursuant to Paragraph 6 of this Court’s May 25, 2021, Order (ECF No. 25) (hereinafter “Order”).<sup>1</sup>

The Virginia Employment Commission (“VEC”) reports that it has made progress on some aspects of this case. Following the Order, the VEC reports that it has accelerated the pace of deputy adjudications and made inroads on the backlog of unpaid cases needing deputy adjudication that were in existence as of May 10, 2021. The VEC also reports that it identified and resumed payments on June 15, 2021, to 4,189 claimants who had been deprived, until then, of continued claims benefits in violation of law. Plaintiffs commend the VEC for achieving these reported outcomes that the Order requires.

At the same time, much work remains to be done by the VEC in the days and weeks ahead. Although the VEC reports that it is making headway on the backlog of unpaid claims needing adjudication that existed prior to the Court’s intervention, a newer backlog of claims

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<sup>1</sup> The Order permits the parties to submit separate reports if they cannot agree on content, and the parties discussed in a June 28, 2021, meeting that they likely would file separate reports.

requiring adjudication is very likely growing. And although many in the “continued claims” group were reportedly paid when the VEC performed a search in June 2021, there remain large and growing numbers of claimants in this group, who are being deprived of benefits under circumstances that apparently violate the law. Finally, Plaintiffs’ Counsel continue to hear daily from claimants who are waiting, often for long periods of time, without benefits and often without information about their claims, due largely to claimants’ inability to speak with a VEC representative.

This report details three topics: 1) deputy adjudication backlog, 2) continued claims cutoffs, and 3) customer service issues.

### **Deputy Adjudication Backlog**

The VEC has apparently made progress adjudicating the 92,158 pending unpaid claims awaiting deputy adjudication in existence as of May 10, 2021 (the “Unpaid Claims Awaiting Adjudication,” ECF No. 25, at ¶ 5). The VEC has reported that, as of June 23, 51,757 of these claims remained unadjudicated, and as of June 30, 39,925 remained.<sup>2</sup>

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<sup>2</sup> The VEC’s most recent reports list the number of claims adjudicated each week, and separately list the reduction in the number of backlogged claims – but the two figures do not correspond. Earlier reports indicated that the number of adjudications each week exceeded the reduction in the case backlog – for example, for the week ending June 12, the VEC reported 8,438 deputy adjudications, and a reduction in the backlog of 6,422. VEC representatives explained that the difference was because some adjudications involved cases that were not included in the May 10 backlog – such as cases arising after May 10. But in the most recent reports, the weekly reduction in the backlog *exceeds* the number of adjudications for the week. For example, for the week ending June 19, the VEC reported 6,561 adjudications while the backlog decreased by 8,787 claims; and for the week ending June 26 the VEC reported 9,598 adjudications while the backlog decreased by 11,832 claims. If the VEC is resolving backlogged claims through methods other than deputy adjudications (which is what the VEC reported to Plaintiffs’ Counsel on June 30, 2021, as the reason for these numerical variations), it would be helpful for Plaintiffs and the Court to know what those different methods are, and how many resolved backlogged claims fall within each method. Moreover, Plaintiffs’ Counsel question why these claims were flagged for deputy adjudication (often with benefits held for months and months) if the cases did not actually require review by a deputy.

However, the Order also requires the VEC to increase the number of UI claims adjudicated by deputies to at least 10,000 per week by July 1, 2021, and to at least 20,000 per week by August 1, 2021. *See* ECF No. 25, at ¶ 5(a). Plaintiffs hope that the VEC will meet the 10,000 claims per week standard by July 1, 2021, as the Order requires, but we have no assurance that will happen. While the VEC reported on June 30, 2021, that it completed 9,598 adjudications for the week ending June 26, the number of claims adjudicated in prior weeks has bumped up and down: 8,675 for the week ending May 29; 5,747 for the week ending June 5; 8,438 for the week ending June 12; and 6,561 for the week ending June 19. Two of those weeks had only four workdays, but even allowing for prorating (which the Order does not), the numbers do not provide assurance that the 10,000 per week (and then 20,000 per week) standard will be achieved.

Meeting the weekly deputy adjudication standards set out in the Order (10,000 adjudications per week by July 1, 2021, and then 20,000 adjudications per week by August 1, 2021) is critical because the number of claims awaiting adjudication is not static; new claims are filed by unemployed Virginians daily, and many will have issues requiring deputy adjudication. Accordingly, while the VEC reports that it has reduced the backlog of unpaid claims that existed as of May 10, 2021, by roughly 50,000 claims (from roughly 90,000 to roughly 40,000), Plaintiffs' Counsel estimates, based on publicly-available data, that *at least* 30,000 new claims have been added to the deputy adjudication backlog since May 10, 2021 – leaving a net reduction of less than 20,000 claims after nearly two months of work.<sup>3</sup> Therefore, until the VEC

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<sup>3</sup> The actual net reduction, if there is one, is probably less than 10,000 cases. Plaintiffs' Counsel have repeatedly asked VEC representatives for information regarding the current deputy adjudication backlog, but thus far they have been unwilling to share that information. VEC representatives are aware that the backlog can be roughly calculated from public data, so we can

can ramp up its adjudication capacity to the 10,000 per week and 20,000 per week standards in the Order, it will make little headway towards meeting the U.S. Department of Labor standard of resolving at least 80% of claims flagged for deputy adjudication within 21 days after an issue is detected. See Unemployment Insurance, State Quality Service Plan, Planning and Reporting Guidelines, ETA Handbook 336, 18th Ed. (March 2019) at Appendix I, p.2, available at [https://wdr.doleta.gov/directives/attach/ETAHandbook/ET\\_Handbook\\_No.336\\_18th\\_Edition\\_Change\\_4\\_acc.pdf](https://wdr.doleta.gov/directives/attach/ETAHandbook/ET_Handbook_No.336_18th_Edition_Change_4_acc.pdf) (last accessed June 30, 2021). Indeed, the most recent public data (for May 2021) shows that the VEC is still resolving only 1.3% of nonmonetary claims, and only 4.7% of monetary claims, within the 21-day standard set by the U.S. Department of Labor. Those numbers have changed very little from the February 2021 data reported in the Complaint. ECF

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only assume that they would provide the precise number if that number were favorable. In any event, Plaintiffs' Counsel believe that Paragraph 4 of the Order requires the VEC to provide that data: "The Parties shall also work collaboratively to exchange regular updates regarding the progress of the VEC's efforts to expedite resolution of UI claims that have been flagged" for issues requiring deputy adjudication, and "shall meet regularly to discuss the status of pending UI claim adjudications."

Plaintiffs' Counsel's estimate of the size of the increased backlog of claims awaiting deputy adjudication was calculated as follows. For May and June 2021 (roughly the period after the VEC calculated its backlog of unpaid claims awaiting deputy adjudication), the VEC has reported an average of 8,400 "initial" (*i.e.*, new) claims each week. <https://oui.doleta.gov/unemploy/claims.asp> (last visited July 1, 2021; reports can be generated from this site). VEC representatives reported to Plaintiffs' Counsel that approximately one-third of all initial claims present "separation" issues that require deputy adjudication, and data for 2020 and 2021 indicate that another ten percent of initial claims present "non-separation" issues requiring deputy adjudication. <https://oui.doleta.gov/unemploy/btq.asp> (last visited July 1, 2021; reports can be generated from this site). Accordingly, at least 3,600 initial claims requiring deputy adjudication have accrued each week, on average (8,400 x (.33 + .10)) – for a total of nearly 30,000 initial claims requiring deputy adjudication in the eight weeks since the May 10 backlog was calculated. In addition, claims are added to the backlog when the VEC identifies issues in claims requiring review by a deputy that are already in a paid status (the May 10 backlog included only "unpaid" claims). As a result, the precise number of cases requiring deputy adjudication – in addition to the backlog of 92,000 unpaid claims identified as of May 10 – is likely to be much higher than 30,000.

No. 1, at ¶¶ 32-36; <https://oui.doleta.gov/unemploy/btq.asp> (last visited July 1, 2021; reports can be generated from this site).

### **Continued Claims Cutoffs**

Paragraph 12 of the Order requires the VEC to run a query of individuals who filed for benefits after February 1, 2020, received some benefits, and then were cut off for more than 21 days in the absence of a deputy adjudication. The VEC reports that it ran a query on June 14, 2021, and identified 4,189 individuals who, as of that time, remained cut off from continued benefits without due process.<sup>4</sup> The VEC reports that it resumed paying benefits to these individuals on June 15, 2021. Based on VEC's description of the June 14, 2021, query, it appears that the benefit cutoffs most of those individuals suffered lasted for more than a year.

Also, the VEC has confirmed that its continued claims computer programming (initiated in December 2020) remains running, such that certain issues needing deputy adjudication—separation issues, and three discrete types of nonseparation issues—will no longer hold up continued claims benefits if they are not adjudicated within 21 days of detection. The VEC reports this means that, every business day, claimants with certain issues (such as job separations) that caused the VEC to stop their benefits without due process will see their benefits resume after a 21-day stoppage (if, as in most cases, no deputy adjudication of the issue has already occurred within that time period).

Still, Plaintiffs have significant concerns about the continued claims cutoffs that remain, which hurt Virginians who have relied on the continued receipt of benefit payments to pay for necessary household expenses such as housing, food, and the like.

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<sup>4</sup> VEC's June 14, 2021, query covered only the period beginning March 14, 2020, rather than February 1, 2020, as required by the Order. ECF No. 25, at ¶ 12.

First, federal guidance does not require the VEC to cut off benefits when it identifies an issue with respect to a person's unemployment claim. Instead, the applicable U.S. Department of Labor guidance, UIPL 04-01, merely *permits* a pause in benefit payments for a brief period (up to 14 days, and not the 21 days implemented by the VEC) when an issue is identified.

<https://wdr.doleta.gov/directives/attach/UIPL4-01.cfm> (last visited July 1, 2021). Given the adverse financial impacts to claimants caused by the loss of emergency financial assistance that unemployment benefits provide, the VEC should revisit its policy of cutting off benefits without due process. Fortunately, a Virginia state law that goes into effect July 1, 2021, will require the VEC to resume continued claims benefits across the board, "regardless of the type of issue," in the absence of prompt deputy adjudications on the issues causing such stoppages.<sup>5</sup>

In addition, Plaintiffs have identified two circumstances involving large numbers of Pandemic Unemployment Assistance (PUA) claimants where the VEC still appears to be violating federal law by cutting off benefits for more than 14 days without affording claimants due process (notice and opportunity to be heard). These are circumstances involving proof of employment, and circumstances involving proof of identity.

As to proof of employment issues, a third-party contractor (Gov2Go) informs the VEC when documents submitted by claimants are either not submitted by a deadline or are deemed insufficient. The VEC then cuts off benefits, without first notifying the claimant, while the claimant waits on deputy adjudication of that potential eligibility issue.<sup>6</sup> As to the VEC's proof

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<sup>5</sup> 2021 Va. Acts ch. 539 (amending VA. CODE ANN. § 60.2-619(B)).

<sup>6</sup> Federal guidance indicates that a failure to submit such documents by the applicable deadline is subject to an extension for good cause. See UIPL 16-20, Change 4. Plaintiffs' Counsel have heard from claimants who reported getting confirmation numbers from the Gov2Go system within applicable deadlines, suggesting that they had complied with requirements, but then were

of identity process (which is handled through another third-party contractor, ID.me), the VEC cuts off benefits as soon as the claimant is directed to complete the ID.me process, without prior notification to the claimant. In other words, even when the claimant works as quickly as possible to complete the identity verification process, benefits are cut off contemporaneously to the VEC's notification to the claimant of the requirement to complete the process. Consequently, claimants are left wondering why their benefits were suddenly stopped and have no idea when, if ever, those sorely needed payments will resume.

Federal guidance says that continued claims cutoffs (*i.e.* deprivation of benefits without due process) beyond 14 days are allowable **only** where there are “facts *clearly establishing* current ineligibility.” UIPL 04-01 (emphasis added), <https://wdr.doleta.gov/directives/attach/UIPL4-01.cfm> (last visited July 1, 2021). While proof of earnings or proof of identity processes can raise eligibility issues that will require deputy adjudication, few claims with these eligibility issues involve “facts clearly establishing current ineligibility.” Continued claims without “facts which clearly establish current ineligibility” therefore, cannot legally remain cut off beyond 14 days, if not reviewed by a deputy within that time. Other categories of issues needing deputy adjudication and that are not subject to continued claims relief under the VEC's December 2020 programming are also suspect (as bases for triggering continued claims cutoffs), for falling short of having “facts clearly establishing current ineligibility.”<sup>7</sup>

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cut off without explanation. Nonetheless, to the knowledge of Plaintiffs' Counsel, the VEC does not make this good cause inquiry or present to claimants the possibility of such extensions.

<sup>7</sup> The VEC reports that it began paying a subset of continued claims in December 2020. The subset involves claims presenting certain specific issues: separation issues, and three discrete types of nonseparation issues. But VEC conceded in January 2021 (in a letter from the VEC's FOIA office), that it has not restarted payments to claimants presenting other issues, including

The result of the VEC's current practices (particularly regarding proof of earnings and proof of identity) is that many – probably thousands – of Virginians are deprived of continued claims benefits, without due process and in apparent violation of law. This is not only an apparent violation of law, but also a practice causing real-world hurt to Virginians who have suffered joblessness during the worst economic downturn in a century. This needs to change, and VEC representatives advised Plaintiffs' Counsel on June 28, 2021, that they will review these practices.

### **Customer Service Issues**

VEC representatives report that VEC personnel have been assigned to work on the obligations stated in Paragraph 15 of the Order (automatically providing information to each unemployment insurance claimant regarding other programs such as rent or mortgage relief), and Plaintiffs' Counsel look forward to progress on those obligations soon.

However, Plaintiffs' Counsel remain very concerned with the VEC's progress on obligations stated in Paragraph 14: to improve customer service support for claimants. Plaintiffs' Counsel continue to hear from many claimants who cannot reach anyone at the VEC who can help with their issues (and, most commonly, cannot reach anyone at all). As a result, many Virginians seeking emergency aid via the unemployment insurance system have little or no information about the status of their claims. Plaintiffs' Counsel did not expect significant,

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questions about immigration status, potential receipt of benefits from other states, questions as to whether a liable employer exists, and mismatch with Social Security Administration records. As of that time, the VEC reported that there were 7,453 claimants whose benefits had not been restarted, because the cases allegedly presented one of those types of issues. In some of those cases, a deputy may find that the facts render the claimant ineligible. But that certainly will not be true in all such cases: for example, a mismatched Social Security number can easily arise because of a typographical error. More to the point, most of those cases do not present “facts clearly establishing current ineligibility,” and therefore—in the absence of deputy adjudications—weekly benefits must continue pursuant to UIPL 04-01.

entrenched customer-service problems to be resolved within a few weeks, but we have observed only one, modest improvement: the VEC is allowing claimants to schedule appointments in advance. Sadly, it appears that the appointments fill up within minutes of being opened, and therefore do not help most claimants. Plaintiffs' Counsel have also heard from claimants about scheduled appointments passing without any contact from VEC personnel.

### **Conclusion**

The VEC reports it has made progress on certain aspects of the core issues involved in this case, and for that they should be commended. The VEC appears to be increasing the rate of deputy adjudications, for example, and the VEC reports that it recently restarted benefits to 4,189 individuals who were improperly cut off from continued claims benefits. Still, much more work remains to be done: a significant backlog of cases requiring deputy adjudication remains (with thousands of new cases added to the backlog each week), and it appears that there are thousands more claimants who have been improperly cut off from continued claims benefits.

Plaintiffs' Counsel remain hopeful that progress can be made on these and other issues through good-faith work under the direction of this Court, and in accordance with the Order. Virginians are counting upon this progress to protect their rights, and to provide them with emergency financial assistance necessary for their day-to-day survival.

[signature on following pages]

Respectfully submitted,

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