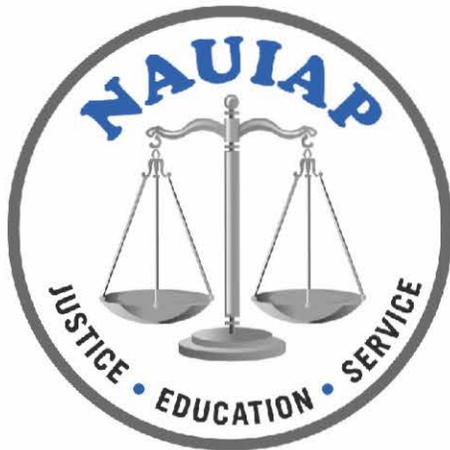


Navigator

NAUIAP
Charting a Course in UI Appeals



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SAVE THE DATE
2012 NAUIAP Conference
June 17-June 21
Nashville, Tennessee!!

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Spring 2012

NAUIAP
2012



Follow Me to Tennessee!

By Lynda McDaniel

Hey, Ya'll! Remember me? I was the one in Oklahoma City with the "Follow Me to Tennessee" buttons. If you weren't there, you missed an extraordinary training conference that provided a year's worth of Continuing Legal Education and lots of networking opportunities. Karl and his gang did a great job. But I'm here to tell you, Tennessee is going to outdo them. That's right. The June 2012 training symposium is in Music City, USA—Nashville, Tennessee. The agenda promises the distinctive CLE that you can't get anywhere but at NAUIAP. In addition, the contact with your peers is totally unique because we all talk the same talk and walk the same walk. No interpreters needed here. So go to the website--and sign up now!! See ya'll there!



Nashville has so much to offer. We'll begin with a Sunday night reception overlooking the entire city as the sun sets. Monday, we put on our work boots and hit the training hard. By Tuesday night we'll be ready to cut loose and visit the Country Music Hall of Fame. Folks, if you haven't been there, you are in for a treat from Bill Monroe, Hank Williams, Patsy Cline, and Loretta Lynn to Miranda Lambert, Blake Shelton, Sugarland and Taylor Swift. The rest of the week offers time to explore all that Nashville has to offer.... from B.B. King, the Bourbon Street Blues & Boogie Bar in Printers Alley, the Wild Horse Saloon with line dancing instruction, Tootsie's Orchid Lounge, Margaritaville, to the Nashville Symphony and the Tennessee

Performing Arts Center. There's just too many to name them all and most are in walking distance of our hotel, the Sheraton-Downtown.

Bringing the family or friends?? There's something for everyone. Take the children to the Adventure Science Museum, the Nashville Zoo or the Nashville Shore. And history buffs, young and old, will love the Hermitage and Belle Meade Mansion.

We'll work you hard all day but then it's time to put on the boots and scoot. My staff and the hotel staff will gladly help you arrange visits to the Ryman Auditorium, home of the original Opry or perhaps an evening at the Grand Ol' Opry. And remember, the hotel is offering the per diem rates for three days before and three days after the training; so, ya'll come on down and set a spell with us. 🎵 Music Calls Us Home 🎵

WEBSITES, PANCAKES, and GREEK TEMPLES

By John W. Garrett Jr.

The President's Column

First, I hope everyone had a wonderful holiday season. I was asked to write an article for the NAUIAP newsletter. I thought about various topics before finally deciding to mix business with pleasure. So, the first part of this article will provide an update on a few business items. The next section will be a mini food and travel review of the great city of Nashville, Tennessee. Nashville, as you know will host the 2012 national conference. It is an exciting and interesting city, filled with great tourist attractions and restaurants. The places that I will talk about and recommend are places that I have actually visited. It is my hope to give you a little sampling of some things to see and places to eat that will entice you to join us in Nashville this June.

Business items first I suppose, and the first item concerns our new website. Recently, the Board of Governors voted to update the NAUIAP website. We felt that with the name change from NAUIAB to NAUIAP, came a need for a new website identity as well. Also, it had been several years since we had updated the website so we felt the time was right to undertake this project. The name change also required a new logo for the association. I am happy to announce that you can see the new logo for NAUIAP within this very newsletter. It will also adorn the new website. Moreover, the new website is almost finished, and will be launched shortly. I have seen the end product, and I am amazed and proud of the end results. I think you will be too.

Now on to the fun items. Anyone who knows me knows that I love to travel and I have been described by more than one person as a "foodie". I enjoy researching an area before I visit it. I make a list of things to see, and more importantly, places to eat, and I usually stay an extra day or two and try to mark off as many items on the list as I can. My belief is that you never know when you are going to be able to visit a particular area again so you might as well try to visit as many places as possible while you are there. I also count how many states I have visited. So far, I have visited 31 states (and three countries if you are curious).

Because Nashville is only 6 hours away from Madison, Mississippi, I have traveled there a number of times. For a foodie, Nashville is outstanding because it offers a wide variety of food choices. Whether you have a craving for southern comfort food, seafood, or barbeque, you won't be disappointed in Nashville.

There are so many great places to visit and to eat in Nashville, but for purposes of this mini review, I am going to talk about the Parthenon, as a recommended place to visit; and the Loveless Café and the Pancake Pantry for places to dine. I will start with the Loveless Café. The Loveless Café is world famous for its southern comfort cuisine, and especially their biscuits. I highly recommend visiting this restaurant. It is the place where both the famous and the locals frequent. The site itself used to be a travel motel, and they have kept the hotel rooms and converted them into various shops. They have a gift shop, a candy store, a pottery shop, an antique store, and a country market (where you can buy their famous biscuit mix). The menu is extensive. They serve breakfast, lunch, and dinner. Check out their website to see the complete menu. I recommend the caramel sweet potatoes, and the fried chicken.

The President's Column continued on page 8



A Brief Note on the ACCARDI Doctrine

By Clayton A. Mitchell, Sr. / Associate Member, Board of Appeals / Maryland

An often overlooked doctrine of administrative law is important to insure that procedural due process is afforded to the parties in a case. This doctrine is the *Accardi Doctrine*.

The Accardi Doctrine provides that an agency must abide by its own regulations. This doctrine is named after the Supreme Court decision from which the doctrine was developed, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). The Accardi doctrine provides that when an agency fails to follow its own procedures or regulations, that agency's actions are invalid. Therefore, an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination.

On appellate review of unemployment insurance cases, problems arise when the lower authority does not strictly follow its established rules of procedure. If the error is due to mere "housekeeping" matters that do not affect the substantive rights of the parties, harmless error occurs. However, it is reversible error when a hearing examiner or administrative law judge does not follow an administrative procedure that affects the substantive rights of the parties.

In Maryland, a modified Accardi doctrine applies to substantive procedures only where a demonstration of prejudice to a party is shown. The Court of Appeals set forth the modified doctrine in *Pollock v. Patuxent Inst. Bd. Of Review*, 374 Md. 463 (2003):

Consistent with our own APA in respect to the agencies to which it applies, we adopt for other administrative agencies, the Accardi doctrine as we modify it and hold that an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This adoption is consistent with Maryland's body of administrative law, which generally holds that an agency should not violate its own rules and regulations.

In so holding we nonetheless note that not every violation of internal procedural policy adopted by an agency will invoke the Accardi doctrine. Whether the Accardi doctrine applies in a given case is a question of law that, as the Court of Special Appeals has opined, requires the courts to scrutinize the agency rule or regulation at issue to determine if it implicates Accardi because it "affects individual rights and obligations" or whether it confers "important procedural benefits" or, conversely, whether Accardi is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict

agency compliance with internal "procedural rules adopted for the orderly transaction of agency business," i.e., not triggering the Accardi doctrine.

Additionally, we adopt the exception to the Accardi doctrine which provides that the doctrine does not apply to an agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business.

To this extent we adopt the application and rationale of the Court of Special Appeals in its previous applications of the Accardi. We reject, however, the Court of Special Appeals' holdings where that court has indicated that there can be a per se violation of the doctrine in situations where it may be applicable, regardless of whether the complainant involved was prejudiced by the failure of the agency to follow its procedures or regulations.

Where the Accardi doctrine is applicable, we are in accord with the line of cases arising from the

The ACCARDI Doctrine continued on page 8

Ohio Owns Integrity

By Emily Briscoe, Hearing Officer , Ohio Unemployment Compensation Review Commission

On November 20, 2009, President Obama signed Executive Order 13520. The purpose of this Order is “to reduce improper payments by intensifying efforts to eliminate payment error, waste, fraud, and abuse in the major programs administered by the Federal Government, while continuing to ensure that Federal programs serve and provide access to their intended beneficiaries.” The Order implements a comprehensive set of policies, including “coordinated Federal, State, and local government action in identifying and eliminating improper payments.”

The Improper Payments Elimination and Recovery Act of 2010 (IPERA) amended the Improper Payments Information Act of 2002 (IPIA). IPERA established several criteria that federal agencies must meet in order to be in compliance with the law, including the requirement that the agency has reported an improper payment rate of less than 10 percent for each program and activity for which an estimate was published under section 2(b) of the Improper Payments Information Act of 2002. For the 2010 IPIA reporting period the Department of Labor reported an improper payment rate of 11.2 percent (10.6 percent overpayment rate and 0.6 percent underpayment rate) in its FY 2010 Agency Financial Report.

Because the UI program was not in compliance with IPERA, the Department of Labor was required to develop a plan that describes the actions the agency will take to bring the program into compliance. To meet this requirement, the Department of Labor has developed a Strategic Plan, which includes several initiatives to comprehensively address UI improper payments. One element of the Strategic Plan is the development of a new performance measure under the UI Performs performance management system to address the leading cause of UI improper payments: claimants who return to work and who continue to claim and collect UI benefits. In fiscal year 2010, these benefit year earnings overpayments totaled \$2.1 billion, which represented 3.4 percent of total UI benefits paid and nearly 30 percent of all overpayments.

Reducing improper payments in the UI program is a top priority at the Department of Labor. As such, it is receiving a high level of focus and oversight in close coordination with the Office of Management and Budget. The Department of Labor is aggressively working to identify new strategies and tools to support states in addressing the rising UI improper payment rate. To this end, the Department of Labor issued Unemployment Insurance Program Letter

(“UIPL”) 19-11 “National Effort to Reduce Improper Payments” on June 10, 2011, as an immediate call to action to all state administrators to ensure that UI integrity is a top priority and to develop state specific strategies to bring down the UI improper payment rate. This UIPL provided information to state workforce agencies about a national strategic plan to aggressively target UI overpayment prevention and to request that all states participate in federal-state collaboration. The Department of Labor also established the UI Integrity Institute, a joint federal-state task force charged with reducing improper payments of UI benefits.

The Department of Labor identified Ohio as one of eleven “High Impact” states, as defined by the dollar amount of overpayments. The Ohio Department of Job and Family Services became involved in the integrity effort by forming the UI Improper Payments team and by developing the UI Integrity Strategic Plan to address reducing improper UI payments. The UI Improper Payments team worked to determine the estimated amount and root causes of Ohio’s improper payments, and developed a plan to reduce these improper payments. Ohio’s UI Integrity Strategic Plan, submitted May 20, 2011, identified the root causes of the majority of Ohio’s improper payments as benefit year earnings errors, separations issue errors, work search issue errors, and job service registration errors. Ohio’s UI Improper Payments team also participated in the UI Integrity Institute meeting in June of 2011.

To achieve the goals set forth in Ohio’s UI Integrity Strategic Plan, multiple educational tools for staff members and claimants were implemented. Integrity webinars were created for all staff members on three key issues which were identified as the main root causes of overpayments. Global e-mails were sent to staff members setting the vision and direction for Ohio’s unemployment integrity efforts, sharing the proposals developed by Ohio’s integrity team and announcing the upcoming integrity

Ohio Owns Integrity continued on page 8

NAUIAP's New Website

David Scrimm, Website Administrator

Please take a moment and NAVIGATE to the new and improved website <http://nauiap.org>! The website administrator; David Scrimm, Board of Governor's (BOG) member from Montana, welcomes your input! When David was elected to the BOG he requested the assignment of Website Administrator in order to make improvements to the current website. He certainly made those improvements and more....

David worked with Charlotte Robertson at Most Wanted Advertising to design a website to serve current NAUIAP members better and entice others to join. David presented the new concept to the Board in October of 2011. The Board unanimously agreed to move forward with the new website design and coordinate that improvement with the roll out of the new organization name. As noted previously the name was changed to NAUIAP to recognize that the organization serves All appeals professionals not just Boards and Board members .



The site, which went live January 16, allows anyone to view the latest newsletter, information about NAUIAP, Board and Committee information, events, and other resources. The public is also able to see the latest member and legal news topics posted on the site. There is also a forum to ask questions and discuss issues to help keep everyone up to date on the latest happenings.

And that isn't all.....along with our new name and our new website, we also have a new logo. Now as a member, you are able to log on and read the complete member and legal news articles, archived newsletters, participate in member polls, and find job postings. You are able to network with other members and have access to many resources through the member library. We hope that members will send us the latest news from their state or region.

Looking back through the newsletter archive Scrimm noticed that the former site didn't have much information on member news or legal updates. The new

site has a place for both and is easier to use so the information can be posted almost immediately. We also hope to post articles and documents from the conferences. The information can be printed directly from the website eliminating the need to make additional handouts, eliminating the cost, time and inconvenience of thumb drives—with the benefit of having the information you want at your worksite!!!

The most important thing to take away is that this is your website. We want you to tell us what you like, what you don't like and how we can improve it. We also want you to be contributing editors. We want to keep the website fresh, up to date and user friendly. It is an important resource for our members and we're hoping you use it to assist you in your career.

COMING SOON.....we are soon moving to an electronic newsletter!!! The electronic version will be available on the NAUIAP website! Stay tuned!!!

A Good Read

By Cynthia Thorton, California

All The Pretty Horses by Cormac McCarthy (he also wrote "The Road") Great descriptions and character development. It's also fun trying out my sixth grade Spanish! This book takes place in the 1940's around the border of Texas and Mexico. The book has a terrific story and will give you a real appreciation for horses. My college aged son loved this book.

Empire of the Summer Moon by S.C. Gwynne
This is the story of the relationship between the white settlers and the Comanche in the late 1800's early 1900's. The great Comanche leader Quanah is showcased. I've read other books about how Indian tribes tended to kidnap and assimilate whoever came in their path and this is a scholarly look at some of those stories. It also tells the story of the Comanches who were on the lower end of the social scale in terms of tribes until the Europeans brought horses to this continent. They were such great horse handlers that they were suddenly catapulted into great warrior status. The book was fascinating with many stories that were absolute gems in and of themselves (like the story of Cynthia Parker's life.)

The Marriage Plot: A Novel by Jeffrey Eugenides (he also wrote "MiddleSex") This was a fun book to read beginning by following a few undergraduates at Brown University with a nice literary twist at the end. The protagonist was just a couple of years younger than I was in 1982 so I remembered things slightly differently than Mr. Eugenides characterizes them, but it was a fun read nonetheless.

Colleges that Change Lives by Loren Pope
This is a great book if you are considering college for a child. A new edition is written each year and colleges fall off the list and are added to the list with each new edition. The book's real value is in reinforcing the criteria that SHOULD be used in deciding which college to attend.

Dreaming in Chinese by Deborah Fallows. The author is a linguist who spoke six languages when her husband was transferred to China. She thought she would simply pick up another language. The book is the story of how a professional fared in trying to learn Chinese. For anyone who has tried to learn another language or is interested in China, this book is a must. It's funny and informative all at the same time.

THE LIGHTER SIDE

The Brain Store

A man went to a brain store to get some brain to complete a study. He sees a sign remarking on the quality of professional brain offered at this particular brain store. He begins to question the butcher about the cost of these brains.

"How much does it cost for engineer brain?"

"Three dollars an ounce."

"How much does it cost for programmer brain?"

"Four dollars an ounce."

"How much for lawyer brain?"

"\$1,000 an ounce."

"Why is lawyer brain so much more?"

"Do you know how many lawyers we had to kill to get one ounce of brain?"

Changing A Light Bulb

How many lawyers does it take to change a light bulb?

How many can you afford?

A Trampoline

What's the difference between a lawyer and a trampoline?

You take off your shoes before you jump on a trampoline.

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www.naviap.org

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I would be remiss if I did not mention the famous Pancake Pantry. It is located near the Vanderbilt campus. Simply put, they have incredible pancakes. They have been making great pancakes since 1951. It is a very popular tourist and local destination, so to avoid long lines, get there early. I recommend the sweet potato pancakes.

After eating at the above cited restaurants, you will need to walk around. I suggest visiting the Parthenon, but you won't have to go to Greece. Nashville has the world's only full-scale replica of

the famous Athenian Parthenon. It was originally built for the 1897 Tennessee Centennial Exposition. It was not intended to be a permanent structure, but due to its immense popularity, it was rebuilt using permanent materials in 1925. I thoroughly enjoyed my visit to the Parthenon.

Well, that is a few suggestions. You will find a great deal to see and do in Nashville. I hope you can join me there in June. We are going to have a great conference.

The ACCARDI Doctrine continued from page 4

Supreme Court and other jurisdictions which have held that prejudice to the complainant is necessary before the courts vacate agency action. In the instances where an agency violates a rule or regulation subject to the Accardi doctrine, i.e., even a rule or regulation that "affects individual rights and obligations" or affords "important procedural benefits upon individuals," the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down. In other instances where an exception to Accardi applies and where an agency fails to follow its "internal administrative procedures," if the complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated pursuant to the Maryland Administrative Procedure Act. In either case, prejudice must be shown.

Pollack v. Patuxent Inst. Bd. Of Review,
374 Md. at 503-504.

A hearing examiner or an administrative law judge who does not permit cross-examination, does not permit sufficient time to conduct a hearing, permits a hearing to go forward in the absence of sufficient notice, or who goes to Herculean efforts to impermissibly give an agency deference or preferential treatment during a hearing runs afoul of the Accardi doctrine. As a result on appeal, the lower authority decision is vacated as void ab initio under Accardi.

The several States may have variations on the Accardi Doctrine so it is important to perform the requisite due diligence to ascertain Accardi's effect on your jurisdiction's administrative jurisprudence. Boards of appeal must insure that the administrative record is in accord with Accardi to avoid your agency's decision to be judicially "struck down".

Ohio Owns Integrity continued from page 5

webinars. The e-mails also notified staff of the creation of a new integrity e-mail address to which additional suggestions to further reduce improper payments could be sent. Pop-up messages to claimants were added to the weekly online claim-filing application. Finally, an auto-dialer campaign placed calls to all active claimants required to make job contacts, reminding them about the work search and documentation requirements, and that regular audits would be conducted.

The Ohio Unemployment Compensation Review Commission ("UCRC") has joined with the Ohio Department of Job and Family Services in the effort to reduce improper payments. The UI Improper

Payments team includes two employees of the UCRC, who participated in the development of Ohio's UI Integrity Strategic Plan and shared the progress and mission of the UI Improper Payments team with UCRC staff. A UCRC staff member also brainstormed with other members of the UI Improper Payments team to draft a proposal to the Department of Labor in response to a request for innovative and creative original ideas to reduce improper payments. Although the Ohio proposal was not selected as the winner of the contest, participation in the program further strengthened the teamwork between UI staff and the UCRC, and the joint commitment to reduce improper payments and improve the integrity of the Ohio UI program.