



Navigator

Fall 2015

Connections Made in Washington, D.C!

By Julie McMurtry, Michigan

As a first time attendee at a NAUIAP conference, I am sure my experience was like most of yours – impressed by the expansive knowledge of the state and federal representatives; inspired by the genuine heartfelt comments of the outgoing president; and grateful for the outreach of strangers who became friends. I pause to mention, however, like all conference trips, not all of my experiences fall into the category of memorable conference moments belonging in a scrapbook. Upon arrival, the air conditioning in my room did not work. (Remember how hot it was??) I was unable to call the front desk and alert them of my problem, because my phone did not work either. And, like many of you, I headed up to the rooftop for the cocktail reception – only to be sent scurrying downstairs for cover when the winds kicked up and the skies opened. But that location change turned out to be a wonderful turn of events – as we watched the rain from the porch of the hotel bar with New Friends from New Mexico.

I am sure that all of us walked away with a memory unique to DC. I know that I made many – eating at an amazing restaurant on the Potomac with friends, standing among visitors from around the world and reading the words on the Lincoln Memorial (“with malice for none, with charity for all”), admiring the large headed Presidential mascots at the Nationals game with a fellow baseball aficionado. And while one of my traveling companions lost weight from all of the walking and touring, I definitely enjoyed the foods of DC such that the only thing lighter on my return to Michigan was my wallet.



I am very much looking forward to Hartford next year – and not just because of the lovely conference center promotional video we were shown.

I am looking forward to a week that will let me see the faces of so many hard working professionals – professionals who generously shared ideas, tips, tools, and resources – simply for the betterment of the communities served by the work we all do. As a first time attendee, I left feeling like that was a week very well spent, armed with so many more resources than when I arrived – and I look forward to seeing you all again soon!



President's column By Kathryn Todd, Ohio

EXPAND YOUR MIND, CHANGE YOUR WORLD

Each summer when I attend the annual NAUIAP conference I return to the office with a renewed sense of purpose; a mind filled with new ideas and optimism that has somehow waned in the cold winter months...It is a few days of the year dedicated solely to interacting

with other states who do what we do, who experience the same difficulties we experience and who may have found a solution to the same problems we are facing. It is training that pays dividends for the rest of the year. So as the incoming President of NAUIAP, my mission is clear. To assist the Board of Governors in increasing the membership of the organization, reaching out to as many states as we can and enhancing the annual conference so that each UI appeals professional finds **new and meaningful** training content to make the expense **worthwhile**.

This year in Washington DC I spoke to as many first time conference attendees as I could find...and I asked each to give me candid feedback on what they thought of the NAUIAP organization, the conference and their experience. They gave thoughtful, helpful and some critical input (this is not a shy constituency)!! All agreed that they learned things they did not know about the UI program, the UI laws and regulations, interaction with USDOL and/or other state's practices. And unanimously, they felt the most important aspect---was inter-

acting with other states (the more the better). They related that the personal interaction with other UI professionals provided thought provoking information about the work we do...including best practices, new technology and how to serve the unemployed more efficiently. What more could I say about the benefits of NAUIAP membership and the training conference? With their comments in mind, what will be the focus for the Board of Governors for the next year? What can we do to best serve all NAUIAP members?

First, it would be helpful to have more higher authority training topics and workshops at the conference. We currently have a committee working on this for next year's conference. Please send us any input!!!

Second, it is important to continue to reach out to states that do not currently participate in NAUIAP. If we can get all states and as many individuals as possible to participate in the organization, then everyone will benefit. Our goal... to have participation from EVERY entity adjudicating UI appeals. The benefit is the wealth of information that can be gathered and shared. MORE is better!!!

And of course, by providing personal support, research and information to all members. Whether you need data fast, a salary comparison, someone to listen to an idea or comment on an "out of the box" solution, or a recommendation for a service provider; you can touch base with an experienced UI professional. Priceless! Let NAUIAP be your resource!

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DRUG ABUSE MISCONDUCT

By Truman Sayre, West Virginia

The recent legalization of marijuana for medical and recreation use presents interesting situations and discussions. I am much more “in the weeds” than a “big picture” person. I do not see the difference between the characterization of legalized marijuana and alcohol, or medical marijuana and prescribed drugs, they should receive similar treatment/analysis. There may be some interesting interface as regards the legal use of marijuana in one state, and then the employee travels to another state where it is not legal and the employee tests positive for marijuana. Or, an employee works for a national or multi-state employer which has a “no drug use” policy, and the employee lives and works in a “legal to use recreational marijuana” state. Some national organizations, such as the National Football League and US Military have decided that drug use, drug abuse or use of performance enhancing drugs is going to be misconduct due to federal law. Still, there may be discussion about that.

However, as regards the random drug test, there is another, more fundamental issue to consider for drugs or marijuana. Let us (A) assume that a positive drug test does not measure impairment, and (B) assume that a positive drug test indicates past drug use. As Unemployment Compensation (UC) judges, are we to find misconduct evidenced by a random drug test?

In West Virginia, the code defines gross misconduct to include “reporting to work in an intoxicated condition or being intoxicated at work; reporting to work under the influence of any controlled substance without a valid prescription, or being under the influence of any controlled substance without a valid prescription while at work; adulterating or otherwise manipulating a sample or specimen of order to thwart a drug or alcohol test lawfully required of an employee; refusal to submit to random testing for alcohol or illegal controlled substances for employees in safety sensitive positions”, but the code does not address the significance of a positive random drug test. Is it gross misconduct? Is it misconduct? In WV, we have three categories (1) no misconduct, no disqualification, (2) simple misconduct, six week disqualification and (3) gross misconduct, indefinite disqualification. In some “positive drug test” cases, there may be evidence of impairment at work. A claimant may have fallen down and cannot get back up at work. A drug test after an injury or accident at work, the idea is that the impairment resulted in the injury or accident. A probable cause or reasonable suspicion drug test involves evidence of impairment at work. However, unless there is some evidence of impairment at work, then the random positive drug test is not evidence of intoxication/impairment at work, since a positive drug test is evidence of past drug use and a positive drug test is not evidence

of present impairment at work due to drugs. Moreover, a random drug test by definition does not involve suspicion of impairment at work.

After a positive random drug test, a claimant may receive a prior written warning that another positive drug test would result in a discharge. After the second positive drug test, it is a discharge for gross misconduct after prior written warning. Another thought is to consider that a positive random drug test is simple misconduct (ie violation of the employer policy), then the claimant is disqualified for six weeks and that specific employer’s UC account is not charged. The UC benefits are paid from the general trust fund for benefits for claimants. But that is not fair to the employers (such as Department of Transportation regulated truckers) who are required to randomly drug test employees and required by regulation to discharge after a positive drug test. It is a windfall to claimants who get high on the weekend, get a positive drug test on Monday at work, get discharged and then get UC benefits for 20 weeks (not 26 weeks due to the 6 week disqualification, since the discharge was for simple misconduct). If you are going to rely on the violation of employer policy for simple misconduct finding, then what about the employer policies which are silent about the drug abuse issue. Some employer policies speak to a drug free workplace and a safe work environment, but the policy does not specifically express that a positive drug test violates the employer policy or is misconduct.

There have been other resolutions to this issue of using a positive drug test to determine a finding of misconduct in UC appeals. Some states’ UC statute express that a positive drug test is gross misconduct. Such a political solution is neat, simple, easy to apply and does not reward a claimant with UC benefits after being discharged for engaging in a criminal activity (drug abuse), which violates employer policy. It is consistent with the contention that UC benefits are intended to provide basic living expenses to individuals who are unemployed through no fault of their own.

Seventeen states have legislatively enacted “per se” laws which make it illegal for drivers to have objectively measured levels of THC in their body while driving a vehicle on the public highway. Some of the states set the threshold standard at 1 to 5 nana grams / milliliter, while other states consider any amount of THC to be proof of impairment. Under “per se” laws, no additional evidence is needed to show that a driver is impaired due to THC. (cite Charleston Gazette-Mail newspaper article “States watch for drugged driving as legal pot spreads”, page 5E, 8/30/2015) Extrapolating the “per se” laws to UC appeals would result in misconduct findings for

DRUG ABUSE MISCONDUCT CONTINUED

a random positive drug test, since many employment random urinalysis tests have a threshold of 20 ng/ml.

What about the states without UC statutory guidance, state supreme court precedent or “per se” motor vehicle laws? As UC judges, are we to find misconduct evidenced by a random positive drug test?

We can agree that there are safety concerns. But what we are talking about involves the characterization of what is immoral conduct which occurs off duty. There are (at least) two competing factions in this country, liberal/conservative, right/left, you name it. One of the factions wants to drug test claimants who are receiving UC benefits and the other faction wants to legalize the drugs. One faction gains the upper hand in one state or issue, and the other faction undermines it in an asymmetrical manner at the federal level.

We should share information about the different aspects of the drug / marijuana issue. I read a newspaper article about a Washington state resident/employee who waited in line to be one of the first to legally buy marijuana. The employee was interviewed by a TV reporter as he was entering the store to buy the marijuana on Saturday morning. The employer supervisor saw his subordinate employee in the TV interview on TV. On Monday morning the employee was tested for drugs when he arrived at work. The employee tested positive for marijuana and was discharged.

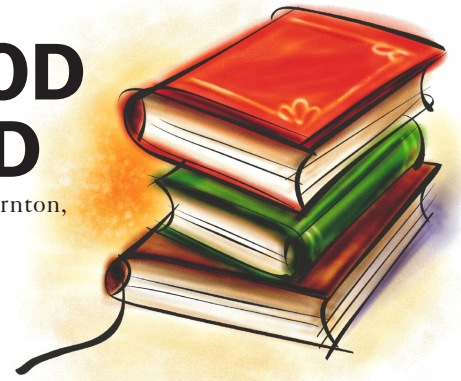
Also, there is a drug test for impairment, but it is not practical presently. I hope that someday the technology will improve to give us a test for impairment due to drugs that we can use. It turns out that you can measure impairment due to drugs from a combination of salvia and blood tests. You take a swab of salvia at the time of the incident or test. Then the employee goes to the hospital and takes a blood test. The blood specimen may be tested to measure for impairment due to drugs, that impairment is measured at the time the blood specimen was taken at the hospital. Then the salvia is tested to extrapolate the drug impairment measurement to the time the salvia was taken, the salvia test is used to calculate the impairment back in time to when the salvia was taken. But, the test process is too cumbersome and expensive, so it will not be useful for UC purposes. For WV Department of Motor Vehicles, the testimony of the DUI arresting officer and other circumstances are crucial to determine the issue of impairment due to drugs at the time of the motor vehicle incident or DUI drug arrest. The arresting officers can do eye tests and personal observations, which the employers are not trained to perform.

So, as UC judges, are we to find misconduct evidenced by a random positive drug test?



A GOOD READ

By Cynthia Thornton,
California



Beautiful Ruins by Jess Walter. This is a sweet novel taking place in both Italy and the United States from the fifties to the present and is populated by artists. It is romantic in the sense that it presents a wide panorama of life and the characters are philosophical about their small place in that great world. The character development is intricate, full and whimsical. If you have even a small romantic bone in your body, this is the sort of book that puts words in an order you will want to memorize. The descriptions of the Italian coast alone are worth the price of admission. This story tells what happens to people after the story ends.

All the Light We Cannot See by Anthony Doerr. This is a story of survival in World War II. The protagonists are a blind French girl and a German boy. The suspense is great, the descriptions vivid and the ending bittersweet. The book is beautifully written and won the Pulitzer prize.

Angle of Repose by Wallace Stegner. This is a beautifully written fictionalized biography of Susan Ward, a pioneer in the West with east coast roots and connections. Like *All the Light We Cannot See*, the book won the Pulitzer prize and the writing is pure pleasure. The book was controversial because the family of Susan Ward allowed Stegner access to her letters and were unhappy with the results. A lawsuit ensued. The book has an interesting forward describing how Stegner struggled over how to tell the story and finally settled on telling it through a wheel chair bound fifty something grandson who is a retired professor. Sounds contrived, but it works. Stegner's treatment of women is also interesting. This was written in the seventies, but it's fascinating how all the blame for the failed relationship falls on Susan Ward. The miscommunications are her fault for failing to intuit the emotional state of her brilliant and caring but highly uncommunicative husband. Likewise, the narrator's wife left him for another man after he became wheel chair bound. The men's failings are cast in a warm glow of human understanding and kindness while the women's failings are subject to a harsh spotlight.

Far From the Madding Crowd by Thomas Hardy. This is another beautifully written book. I picked it up because the movie came out. Like the two books above, the writing is outstanding. Also like *Angle of Repose*, the treatment of women is maddening. The book was released over a hundred years ago, so I tried to cut the author some slack in that not many authors were developing female characters like Hardy did at the time. But the treatment of Bathsheba Everdene (the main female character) left something to be desired. The male protagonist, Gabriel Oake was fabulously developed (if a little more than moon-eyed over Bathsheba). It was interesting reading *Angle of Repose* and *Far From the Madding Crowd* back-to-back. The male protagonists in both books are famously stingy with words and the females in both books are meant to divine the inner-workings of the males solely from observation in their natural habitats. The beginning is a little slow (unless you're fascinated by bucolic descriptions and snail paced character development) but the story picks up considerably. What struck me most about this book is that the story although over 100 years old is timeless.

A Blast from the Past...

Did your Baby Boomers retire or did they stick around through the recession? Read what the Navigator had to say on this topic in 2003!

Succession Planning Bon Voyage Baby Boomers!

Marcella Townsend / West Virginia

We are having fun here in West Virginia planning a retirement party. One of our Administrative Law Judges, Bill Smith, whom many of you met at the NAUIAB 2003 conference here in Charleston, is retiring later this month. We hate to see him leave, but it is a happy time celebrating a long and successful career in unemployment appeals.

We are joking that we may want to store some of these party supplies for the celebrations yet to come. You see, nearly ALL of our Judges will be eligible to retire within the next five years. By the year 2012, we anticipate enormous change within our office.

As State agencies set out plans to improve services, we all face challenges in recruiting and retaining staff to make it happen. Our workforce is aging and retirements will increase over the next few years. The nation's estimated 78 million baby boomers turned 60 this year. There are projections of mass exodus of public and private employment sectors which call for the need for succession planning.

I've seen statistics that a majority of the people working with unemployment appeals all across the country - our Board members, Judges, and support staff, will be eligible for retirement within the next five years. It is time to raise up and mentor our new folks. The problem is that there are fewer candidates in the "pipeline" due to downsizing over the last decade. Thus, we may have fewer candidates to choose from and many of them may be eligible to retire.

Succession planning in most private sector businesses is focused on identifying and preparing suitable employees through mentoring and training to replace key players, such as the chief executive officer (CEO). However, succession planning in a government agency is different. We must develop a strategy that fits within the existing human resource administration.

We can't develop people in secret. It is counterproductive to put someone forward for a job who will turn it down when the time comes. A better succession plan focuses on career development for all employees that will engage them by investing in their career goals within the agency. We create a powerful tool for encouraging long-term service commitments by providing more opportunities for career development. Continuous development is a strategy that can be emphasized for all workers to strengthen agency leadership and operational continuity.

There is no single, right way for agencies to develop and implement succession planning. We can begin with a simple exercise of "what if" scenario planning. For instance: "What if we had to replace half of our Administrative Law Judges within a year? Could we maintain our current timeliness performance?" This exercise might suggest the need for a contingent plan of contracting those services until permanent placements can be made. A careful and considered plan of action ensures the least possible disruption to the organization's effectiveness.

Planning to meet staffing needs in challenging times presents both difficulties and opportunities. I know many of you are currently working overtime to eliminate a large backlog of appeals. You may be focusing your attention on the next 6 months and do not have the time to look 5 years ahead right now.

Succession planning is an important topic for all of us. We plan to organize a workshop to cover this subject at the upcoming NAUIAB conference. If you have developed a plan please contact me at mtownsen@workforcewv.org or give me a call at 1(800) 635-0189. We would like to assemble a handful of professionals to share their agency's design. If you haven't had time to give succession planning much attention, you will want to attend the Oxford, Mississippi, conference to get an enormous head start.

COME ROCK THE LAND OF STEADY HABITS

By Amy Stillman Kulig, Counsel, CT ES Board of Review

Connecticut is excited to host the 2016 NAUIAP conference this coming June in its state capitol, Hartford. Although Connecticut is known as the “land of steady habits,” and there are LOTS of places you history buffs can explore (from an Ancient Burying Ground to the Harriet Beecher Stowe Center), your conference hosts plan to shake things up a bit at next year’s conference. Agenda planning is well under way, with an ALL NEW track for higher authority, and a wide variety of new presenters from inside and outside the organization. Tentative workshops for the higher authority folks include workshops on Ethical Considerations for Board Members, including Hatch Act concerns; the Future of the Higher Authority; Higher Authority Best Practices; and Better Communication between Higher and Lower Authority. But don’t worry, there are plenty of workshops and plenaries for EVERYONE! We are trying to focus on the most timely and cutting edge topics: Medical Marijuana; Meaningful Access (ESL and ADA considerations – with a related video game demo!); Worker Misclassification in the World of Uber; HIPPA; Electronic Evidence; Social Media-Related Discharges; Self-Assessment by States; Separations Stemming from Medical Conditions; UI Revitalization Consortium Updates; the new FQA and more! How about a point-counter point discussion between NELP and an employer advocate on labor and employment issues in the news? That should be lively!

The Connecticut folks are also busy making sure your accommodations are top-notch and that you and your travel companions have lots of suggestions for dining and fun. The newly renovated Hartford Hilton will host our conference and has everything you will need to feel like you are in a home away from home, from its on-site restaurant to its workout facility and pool.



Mark Twain House, Hartford, Connecticut



Connecticut State Capitol

Hartford has a fabulous variety of amazing restaurants – whether you want barbecue, paella, burgers at a brew pub or a top of the line steakhouse, you can find it in Hartford. Want to discuss the day’s workshops with a colleague over a drink? Plenty of options there, including a terrific bar right at the Hilton that won’t break your budget! Or take a cocktail cruise on the Lady Katherine from the Hartford Riverfront. Within walking distance of the hotel, you will find the CT Science Center- popular with both adults and kids, and the renowned Wadsworth Art Museum. Also nearby is a theater/restaurant, where you can enjoy a glass of wine while you catch the latest movies. If you prefer more off beat movies, take a short trip to the Real Art Ways. Or visit the Mark Twain house and see where he wrote and played pool! Hopefully the Triple A team, Hartford Yard Goats, will have home games that week in its brand new stadium for those who love baseball. If music is your interest, there are plenty of venues that host live music, from Blues to Jazz to Rock and Roll. We will be posting much more information about the area on the NAUIAP website very soon!

Don’t forget that Hartford is conveniently located two hours from Boston and New York City. Trains run frequently to both cities if you want to extend your time in the area.

If you have any additional agenda ideas, please send them to Amy.Kulig@ct.gov or Jayson.Myers@labor.ny.gov. If you would like more information about the Hartford area, please contact Diane.Moree@ct.gov.

State Spotlight

WISCONSIN

In Wisconsin, UI Appeals are handled by a Higher Authority, the Labor and Industry Review Commission (LIRC). LIRC also hears appeals for workers' compensation and the equal rights division of the Department of Workforce Development although their work is predominately in UI appeals. LIRC averages about 2,500 UI appeals per year. LIRC is comprised of three members appointed by the Governor serving overlapping six year terms. LIRC and its staff are part of the Wisconsin Department of Administration. LIRC decisions are appealable to the courts.

Wisconsin's Lower Authority Appeals is part of the Wisconsin Department of Workforce Development, Unemployment Insurance Division. Hearings are held in four offices around the state, Madison, Milwaukee, Eau Claire and Appleton. Administrative offices for the Bureau of Legal Affairs are in Madison. There are 26 Administrative Law Judges (ALJs), three Supervising Attorneys and a Deputy Bureau Director who acts as the Chief of Appeals. All ALJs are licensed Wisconsin attorneys. The Lower Authority averages 22,000 appeals per year. About 60% of the hearings are held in-person and 40% by telephone.

CONNECTICUT

Connecticut's higher authority for unemployment appeals is known as the "Board of Review," and consists of three members. The board receives approximately 250 appeals per month. The Governor appoints all three members of the Board, but the Chairperson becomes a classified service position upon appointment. Therefore, the Chairperson remains in the position when a new Governor is elected. Therefore, there is continuity in the leadership of the Appeals Division and consistency in precedent making authority. The other two Board members are designated to represent either the employer or the claimant community. Counsel to the Board serves as the Chairperson if the Chairperson is absent or there is a conflict. The Board has a staff of four attorneys, in addition to the Counsel. Since 1990, the board has posted its decisions to an on-line library, which is available to the public, and the lower authority is required to follow those cases designated as precedent.

The Board's Chairperson is the executive head of the appeals division, including the lower authority. The Chief Referee is the administrative head of the lower authority. The lower authority currently receives approximately 1,400 appeals per month. Currently, the lower authority has 24 hearing officers, or referees, but is losing 5 referees to budget-driven layoffs on October 1st. In 2016, the lower authority is consolidating its remaining offices that have not been consolidated and will have two regional offices. The majority of the lower authority hearings are conducted in person, but there is an expectation that the number of telephone hearings will increase once there are two offices. The Board's Chairperson, the Chief Referee and the Board's Counsel work collaboratively to ensure that the Referees receive training in unemployment and related employment law, evidence and writing.

Connecticut is looking forward to hosting the 2016 NAUIP conference in its state capitol, Hartford.

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