National Association of Unemployment Insurance Appeals Professionals

Navigator

Winter 2016

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Hartford, Connecticut on June 19 – 23, 2016

Connect with your UI peers from around the country at **NAUIAP's 36th annual training conference!** NAUIAP has another spectacular agenda lined up for this year's conference. It will feature a Higher Authority track, in addition to many great workshops and plenaries for all levels. Visit www.nauiap.org for further details about the conference and to register to attend!

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Minnesota Promotes Reassignment Over Rescheduling Hearings

By Sasha Mackin, Supervising Unemployment Law Judge, Minnesota

On Monday morning, I arrive to the office and receive a phone call from one of the unemployment law judges (ULJs) I supervise – she is ill and not going to make it in today. There was a time that calling in sick would mean rescheduling her hearings for the day; the parties would be inconvenienced and payment of benefits would be delayed or overpayments would increase. Later that day, another ULJ's hearing is running long and he may not finish for another hour. Instead of rescheduling his next hearing or continuing a case when witnesses are already present, another ULJ is available to conduct the next hearing. Minnesota's approach is a system that promotes reassignment over rescheduling.

In 2007, Minnesota implemented its new online computer benefit and tax system, which included an automated scheduling system for hearings. Each judge's calendar is set in the system. This works, in part, because we have standardized hearing times. Hearing slots currently are set at 8:15 am, 9:30 am, 10:45 am, 1:00 pm, 2:15 pm, and 3:30 pm (allowing an hour and 15 minutes between hearings). Depending upon our business needs and the judge's availability, we may choose to block any one of those slots. For instance, we have set the computer system to always block 3:30 hearings; and, of late, we have blocked 9:30 hearing times for all judges too. This also allows us to set department-wide trainings for judges, knowing there are no hearings scheduled to conflict with the training time. In specific, limited instances, we have agreed to set a hearing outside of one of these slots. In those cases parties must be notified separately because the system reflects the hearing as if it were scheduled in a traditional slot.

Appellants may appeal determinations online (employer agents are required to by statute). When parties appeal, they are offered several options for the hearing date and time they wish. We have programmed our automated appeal scheduler to offer dates and times in one week, and then a date and time in the following week. Previously, we offered the next available date and time and closely-linked slots. We found appellants chose a date and time because they were forced to, but then immediately called to reschedule. We have found that by offering options in different weeks, we have reduced the need to reschedule.

The majority of our hearings are conducted by telephone using Clear2There technology. Our judges are centrally located in the same office. Because we have one office, support staff and judges can interact easily. We have set business procedures for different types of appeals issues; support staff always includes particular exhibits in every case file. Exhibits are scanned into the system, available online, and pre-marked by the system with a watermark. Although parties and ULJs may supplement the case with any additional exhibits, ULJs can expect to see the same original determination, appeal document, and agency questionnaires in any file. Our system also allows us to see any ULJ's calendar and easily reassign a case from one judge to another.

Along with set hearing times, centrally located staff and judges, an automated system, telephonic hearings and C2T technology, we have another factor that has greatly helped us maintain our timeliness: our training program and back-up judges. As detailed in the winter 2013 NAUIAP newsletter, Minnesota has developed a comprehensive training program for new judges. The training program lasts several months and includes, importantly, training on how the agency determinations (or adjudications) are made. ULJs adjudicate initial determinations as part of their training. This experience offers ULJS a more holistic view of how our program and system operates, and insight into how the initial determinations are made. This cross-training is key because it allows us to have back-up judges, or "adjudicating judges," to round out our reassignment philosophy.

Currently, we schedule two judges per week to be back-up, or adjudicating judges, on a rotating basis. Having two is especially helpful in the winter months in Minnesota, where storms and road conditions can delay judges getting into the office. These adjudicating ULJs are taken off of the schedule so that they may be fill-in judges if a ULJ calls in sick or is delayed, or if a hearing runs long, or to allow us to redistribute cases to help a backlogged colleague. Usually adjudicating judges hear some cases, but their hearing schedule is often lighter this week. Therefore, they may also catch up on writing decisions, schedule a continued hearing of their own, address their Requests for Reconsideration (Minnesota does not have a higher authority) and adjudicate determinations to help out the customer service center when their workload is high. In addition, this affords more flexibility for the back-up ULJ to help with other special projects in the appeals division. Judges volunteer for this assignment; some have opted out because they don't like the uncertainty of being assigned a last-minute hearing (although, this can happen to any judge with an open slot) or feel more productive with a full, set hearing schedule.

By using back-up or adjudicating judges, we have minimized the frequency of continued hearings or reschedules. This works best with our uniformity of schedule and case file; any judge called upon to take another hearing, even at the last minute, will be familiar with the types of exhibits in the case file, will have support staff and supervisors close by to assist, and will have a set time to start the hearing. These strategies have allowed us to consistently get about 90 percent of our decisions mailed within 30 days of the appeal date.

President's column

By Kathryn Todd, Ohio

To Telecommute Or Not To Telecommute.... That Is The Question!

If your agency is struggling over whether to jump on the "telecommuting" bandwagon... where do you go for information to evaluate whether this is a sound business practice? The difficulty lies in the lack of empirical data. While there are many anecdotal claims, the issue is the lack of hard data demonstrating whether it is a viable business model or just a "feel good" perk.

Telecommuting is an alternative work arrangement in which employees perform tasks elsewhere that are normally done in a primary or central workplace for at least some portion of their work schedule using electronic media to interact with others inside and outside the organization. Home is the primary location for telecommuting although not the only alternative. Fewer than 10% of telecommuting employees are involved in a full time telecommuting arrangement, which makes it difficult to evaluate the effectiveness of the option.

There are a few interesting facts found by various studies. The claims of increased performance were not demonstrated by the data. While in cases there was increased performance, it was a result of an increase in working time. Studies demonstrated that telecommuting employees worked MORE time during the day than non-telecommuting employees. The increase in time spent on task may be due to fewer breaks and distractions, or it may have been due to increased workloads assigned to telecommuting employees. One study interviewed the teleworking employees and reported that the individuals worked more in order to retain the option to work from home.

In addition, there was no data in the limited studies which found overall increased efficiencies that could be linked to the teleworking options. It was not demonstrated that office space decreased or savings associated with decreases in office rental were noted, however again most of the telecommuting options found were not full time arrangements.

On the other hand, many of the negative consequences predicted also were not found. However, one was noted in several studies. Professional isolation and damaged coworker relationships did result. The traditional thinking that informal learning contributes to professional development and learning on the job is very important to career success was reinforced by the data and may be a negative consequence of the telecommuting option. The adage of "out of sight, out of mind" was a factor. Interestingly enough, this was a larger factor in the private sector studies than the public sector studies. Certainly, this came to light in the (most public) teleworking reversals of Yahoo and Best Buy. These large companies both discontinued the teleworking option and forced employees to return to a central office setting, emphasizing their desire to reinstitute creative teamwork and shared innovation concepts. But, surprisingly one of the most interesting findings was that employee-supervisor relationships were not negatively impacted by the teleworking arrangements.

Turning to the information related by states utilizing the telecommuting in the UI arena, the results are very similar. Again, very little empirical data, but some good information.
In the Maine Bureau of Unemployment Compensation, the hearing officers conduct hearings in the office and write the decisions from home (approximately 2 ½ days a week). They are required to be available by phone or email during all working hours. The arrangement works well for all parties, however there are no productivity or efficiency statistics to report.

The Connecticut Appeals Division created a "Work At Home" policy that allows its hearing officers to write their decisions at home up to two days per week. Although Appeals management decided in the beginning of 2014 to reduce the writing days to one per week based on performance issues that may have been related to working at home, this decision was contested by the unionized hearing officers. After meeting with union officials for six months in 2015, Appeals management reinstated the second writing day at home when the parties agreed to make changes to the policy that created performance measurements tied to the privilege of working at home.

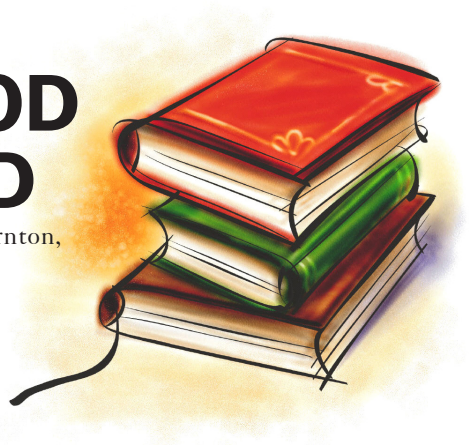
The Indiana Lower Authority also allows Hearing Officers to work from home up to two days a week. It was stated that this is a flex schedule arrangement and does not include additional work assigned. It is not considered a way to increase productivity or add efficiency but is considered a morale incentive.

Kansas and Iowa both discontinued a telecommuting option for quality and accountability reasons and neither state would be interested in implementing a telecommuting option in the near future. There are additional states that allow various forms of telecommuting; however, information was not available for those states.

Evaluating the UI telecommuting information collected, the appeals experience seems to fall directly in line with the reported data. The most effective experiences were the agencies where it is a part time option. Also, seemingly the key to the perceived success was where it was not intended to increase performance or quality, lower costs or contribute to efficiency, as those elements were not noted. Where it was implemented as another flex time option, management was not disappointed in the outcome of the program. The states hoping to gain more benefits were not as happy with the option results and several moved to restrict the telecommuting option. With limited data and fewer statistics, time will tell whether telecommuting will gain additional acceptance or remain static. If your state has a telecommuting option you would like to share with others, please contact the NAUIAP newsletter editor!!!

A GOOD READ

By Cynthia Thornton, California



Not in God's Name: Confronting Religious Violence by Rabbi Jonathan Sacks. I LOVED this book. This is not to say I agreed with everything in the book, but Rabbi Sacks is truly an original thinker. Rabbi Sacks reviews the current state of relations between the world's largest religions and reviews the historical record as well. He provides fresh insights to biblical stories as well as perspective on how to think about current events. One friend I recommended the book to thought it sounded overwhelming, but Rabbi Sacks breaks it down into small easily digestible and fascinating pieces so that the book is easy to read and really interesting.

Triumph of the Heart: Forgiveness in an Unforgiving World by Megan Feldman Bettencourt. I read this before I read "Not In God's Name" and it was interesting to compare the two books. This book was written by a reporter who was assigned to cover the story of the Muslim father of the victim of a gang shooting who teamed up with the Christian grandfather of the killer to found an institute on forgiveness. The reporter (author) describes herself as extremely unforgiving and became interested in the topic of why and how people forgive. The book contains stories of people who forgive the unforgiveable and details the biology of forgiveness (spoiler alert: forgiveness is good for you!) It was a fascinating book.

Fates and Furies: A Novel by Lauren Groff. This is an interesting approach to a novel, telling the story of a relationship. The first half of the book is written from the man's perspective (Fates) and the second half is from the woman's perspective (Furies). It is well written and engrossing. It suffers from the pox on modern day literature: the blind belief that the only interesting novels take place in New York, but other than that, it is a great read.

Primates of Park Avenue: A Memoir by Wednesday Martin also takes place in New York City. The twist on this is that it is the memoir of a woman who is an anthropologist by trade and moves to Manhattan. She notices that there is a decided Upper East Side culture and decides to study it as an anthropologist would complete with field notes. It has enough personal information to keep it interesting and it is occasionally very funny.

A Little Life: A Novel by Hanya Yanahihara. This is the story of four friends who live (surprise!) in New York City. It is well written. My tip is to take notes on who is who at the beginning. It is well worth it by the end. It is slow at the beginning, but by the end it hooks you. It's one of those novels that does not tell a pretty story, but you feel like you've lived it and the book stays with you.

Lila: A Novel by Marilynne Robinson. This is a slice of life story set in the Great Depression in the Midwest. Do not read this book if you must nail down every detail! Unlike "A Little Life" which tells you every background detail of the main characters, this novel leaves several big questions unanswered. It is well written and will keep you interested.

A GOOD LISTEN, TOO

By Karl Jahnke, Oklahoma

The Defibulators sing *Working Class*. Just a fun song about the working class. Enjoy the song and be proud if you relate.

https://m.youtube.com/watch?v=z3kkHVRllTg

Since retirement this past year I too have been thinking about the people I have met. Many of the best and finest folks I have met these past 38 years, from Maine to Hawaii and about 30 states in between, I've met through NAUIAP. I wish you all the best and wish you all good Fishin' and Whistlin' days to come.

https://m.youtube.com/watch?v=G487EDeXadA

Evidentiary Issues In Separation or Settlement Agreements In UI Law

By Chairman Frank E. Brown, Florida

Many states' UI law provides that individuals who voluntarily give up employment as a result of a separation agreement of some kind are usually ineligible for benefits. Whether by statute, court decision, or agency decision or rule, absent some action attributable to the employer beyond the offer of the agreement, these states disqualify an individual who chooses to accept a benefit from the employer he or she would not otherwise be entitled to in exchange for resignation when ongoing work is available. These agreements commonly include early retirement or other staff reduction incentive packages[1], negotiated separations where an employee is facing job discipline or performance issues[2], and workers' compensation settlements where an employee resigns in exchange for settlement of a contested benefit.[3]

These cases may raise particular evidentiary issues depending on how the parties reach their agreement, and how it is memorialized. In particular, the parol evidence rule and mediation privilege may limit what evidence the hearing officer should consider.

Parol Evidence Rule

The "parol evidence rule" is not actually a rule of evidence, but a substantive doctrine from the law of contracts. It provides that when two or more parties have entered into a written contract that is "integrated" – that is, which is intended to contain the complete agreement between the parties – "extrinsic" or outside evidence of the terms of the contract cannot be offered except in specific limited circumstances.[4] Stated more simply, a contract says what it says, and a party cannot introduce evidence of oral promises allegedly made at or before the time the written contract was formed, or prior written communications, that would alter the obligations of the final written contract. Thus, if a claimant testified that her resignation was just a layoff and the employer promised to hire her back in four weeks, but the agreement makes no mention of such an obligation, the testimony cannot be relied upon to show that the employer breached the agreement by not hiring her back.

However, the parol evidence rule does not apply to proof of performance of contracts as written, so if the agreement did contain a promise to rehire in four weeks, the rule would not prevent the claimant from providing evidence that she was not rehired as promised in the agreement.

One important exception to the parol evidence rule is that testimony as to the meaning of the contractual provision may be offered when the relevant term is ambiguous. A contract must be interpreted in its entirety, but if a term in the agreement can reasonably be interpreted multiple ways, oral testimony may be offered as to the intent of the parties. However, neither a party's own subjective intent nor its testimony as to the discussions between the parties controls over clear, unambiguous contrary language in the agreement.

The parol evidence rule also does not preclude evidence contradicting recitals, that is, the non-promissory factual portions of the agreement that characterize the status of the parties or basic understandings that led to entry into the agreement.[5] For example, an agreement containing a statement that the claimant has resigned does not preclude the claimant from establishing that he was separated prior to entering into the agreement, or that his "voluntary" resignation was in fact given in lieu of immediate termination.

The Mediation Privilege

An even more restrictive doctrine is the mediation privilege. Many states, by statute, case law, or rule of court, make statements at a formal mediation confidential, except in limited circumstances.[6] Instead, any settlement agreement reached at the mediation is intended to be the exclusive representation of the agreement. Testimony about what was discussed in the mediation conference may be admitted only under specific exceptions under these laws. This means that it is typically not appropriate during a UI hearing for a party to testify about what he was told by the other party in a mediation.

Exceptions to these laws vary from state to state. However, common exceptions involve situations where all parties affirmatively and intentionally waive the privilege, or where the meaning of a provision of the mediation settlement document(s) is ambiguous and the provision is material to the resolution of the issues in the appeal hearing.

Applying the Doctrines to Cases

Applying these two doctrines properly requires the hearing officer to accomplish several things. First, because state laws vary, the hearing officer must be aware of the general standard contained in the law of his or her state, any exceptions to that standard, and to what that standard applies. For example, if the mediation privilege is a court rule rather than a statutory standard, does it even apply in a UI hearing?

Second, the hearing officer must develop the record enough to understand how the agreement came about. Was it negotiated between the claimant and employer directly in the workplace? Did it come about at a mediation to resolve a workers' compensation, wage and hour, or discrimination claim or lawsuit?

Third, the hearing officer must determine if the agreement was intended to be full agreement between the parties. This is initially determined by looking at it – if it contains a statement that it is, or the agreement is facially comprehensive, then the parol evidence rule will typically apply. In the case of a mediation agreement, however, it is not unusual for the parties to sign a mediation stipulation that may be further fleshed out in a subsequently signed full settlement agreement. In such a case, the mediation stipulation will generally be binding, unless and until superseded by the subsequent agreement.

Finally, keep in mind that the ultimate evidence is usually to be found in the agreement, not in the parties' own testimony or interpretation. While background questions about how the agreement came about and why are often necessary, the final answers are usually to be found in the written agreement. Indeed, written agreements exist precisely for this reason.

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1 Examples of cases so holding, under either statutory, court, or agency authority include *Calle v. Unemployment Appeals Commission*, 692 So. 2d 961 (Fla. Ct. App. 1997); *York v. Review Board of the Indiana Employment Security Division*, 425 N.E. 2d 707 (Ind. Ct. App. 1981); *Connolly v. Director of the Division of Unemployment Insurance*, 948 N.E. 2d 1218 *(Mass. Sup. Jud. Ct. 2011); Shield v. Proctor & Gamble Paper Products Company*, 164 S.W. 3d 540 (Mo. Ct. App. E.D. 2005); *Black-Melone v. Board of Review, 2009 N.J. Super. Unpub.* LEXIS 1373 (N.J. Sup. Ct. App. Div. 2009); *In re Carcaterra, 90 A.D.3d 1389 (N.Y. Sup. Ct. App. Div. 2011); Broschart v. Employment Security Department*, 95 P.3d 356 (Wash. Ct. App. 2004).

2 *Terry v. Illinois Department of Employment Security*, 2012 Ill. App. Unpub. LEXIS 266 (Ill. App. Ct. 2012); *Andrist v. Wanamingo*, 2004 Minn. App. LEXIS 301 (Minn. Ct. App. 2004); *Goffi v. Unemployment Compensation*, 427 A.2d 1273 (Pa. Commw. Ct. 1981); *In re Medical University of South Carolina*, 504 S.E.2d 345 (S.C. Ct. App. 1998);

3 *Lake v. Unemployment Appeals Commission*, 931 So. 2d 1065 (Fla. Ct. App. 2006).

4 Restatement (2d) of Contracts, § 215.

5 Restatement (2d) of Contracts, § 218.

6 See, e.g., Ariz. Rev. Stat. § 12-2238; Cal. Evid. Code § 1119; Conn. Gen. Stat. § 52-235d; § 44.405, Fla. Stat.; Annot. Laws. Mass. GL ch. 233, § 23C; N.J. Court Rules, R. 1:40-4; Ohio. Rev. C. Ann. 2710.03; Ore. Rev. Stat. § 36.220; 42 Pa.Con. Stat. § 5949; Tex. Civ. Prac. & Rem. Code § 154.073; Wis. Stat. § 904.085.

State Spotlight

Clarification to Wisconsin State Spotlight from Fall 2015 Navigator: LIRC is "attached" to DOA for administrative support purposes, but is not a part of DOA. Additionally, LIRC averages approximately 2,500 benefits cases and 300 tax cases, for a total of 2,800.

CALIFORNIA

In California, the five members of the California Unemployment Insurance Appeals Board (CUIAB) handle the higher authority Unemployment Insurance (UI) and Disability Insurance benefit appeals, as well as higher authority employer payroll tax petitions. The members are appointed to overlapping four year terms, with three appointed by the Governor and one each appointed by the California Senate and the California Assembly. The Governor selects the Board Chair. The Executive Director reports to the Board and manages the organization.

In Appellate Operations, which is overseen by a Chief Administrative Law Judge, Administrative Law Judges prepare the higher authority cases for the Board members to decide. In 2015, the Board decided an average of 1,420 appeal cases per month, totaling 17,044 appeals for the calendar year. Most of the appeals are UI benefit appeals. The Board members' decisions may be appealed to the California Superior Courts. For the 184 court cases closed in 2015, CUIAB's decisions were affirmed in 172 cases (93.5%), were reversed in 10 cases (5.4%), and were remanded in two cases (1.1%).

California's lower authority appeals are handled by the Field Operations division, which is led by a Chief Administrative Law Judge. Currently, the same person serves as both the Executive Director and the Chief Administrative Law Judge over Field Operations. Lower authority appeals include UI and DI benefit appeals and employer payroll tax petitions. Lower authority appeal cases are heard by Administrative Law Judges in 12 Offices of Appeal and over 30 satellite hearing facilities around the state. In 2015, Field Operations closed an average of 20,179 appeal cases per month, totaling 242,143 appeals for the calendar year, with most being UI appeals. About 75% of appeal hearings are conducted in-person, and about 25% are conducted by telephone. Generally, 7% of the lower authority appeal decisions are appealed to the Board.

CUIAB has over 130 Administrative Law Judges statewide. The judges must be members of a State Bar, and must have practiced law for at least five years before coming to CUIAB. CUIAB is part of the California Employment Development Department, although it operates autonomously, under the authority of the Board. In addition to deciding higher authority appeals, the Board also oversees administration of the CUIAB organization, including Appellate Operations and Field Operations.

NEW YORK

All UI Appeals are handled by the Unemployment Insurance Appeal Board (UIAB) which is composed of a Higher and Lower Authority. UIAB is administered by the New York State Department of Labor with respect to funding, hiring and human resources. However, UIAB is totally independent when it comes to rendering its decisions on any appeal. In this context, the New York State Department of Labor is a party to UIAB's proceedings as are claimants and employers. UIAB's administrative offices are located in Brooklyn and in Troy, which is outside of Albany.

Unemployment Insurance Referees, also known as Administrative Law Judges (ALJs), by statute are charged with responsibility for conducting hearings and rendering Lower Authority decisions. Approximately 50 ALJs hear the Lower Authority cases. Additionally, there are supervising (Senior) ALJs who carry partial hearing calendars in addition to supervisory duties. All ALJs are licensed attorneys. Hearings are held in eight offices around the state. Most hearings are held in person though an increasing percentage are held by telephone. About 35,000 decisions per year are issued. Lower Authority ALJs have access to Higher Authority decisions and are expected to follow precedent, but the Higher Authority does not impose on the independence of Lower Authority ALJs in their decision making process.

"The Board", which is how the Higher Authority, is commonly referred to, is comprised of five members appointed by the Governor serving overlapping six year terms. No more than three Board Members can be affiliated with the same political party. The Board Chair is also the administrative head of the UIAB. The Executive Director serves under the Chair and oversees all operations, both Lower and Higher Authority. The Chief ALJ also serves under the Chair and is responsible for training and professional development of all ALJs, Lower and Higher Authority, as well as acting as chief counsel to the Board. The Board issues about 5500 decisions per year. Decisions from the Board are appealed to one particular court--New York Supreme Court, Appellate Division, Third Department in Albany. The Board is not represented in those proceedings to which claimants, employers and the Department of Labor are parties. The same Unemployment Insurance Referee title also applies to attorneys who work at the Higher Authority as counsel to Board Members. There are presently about 15 of those ALJs including some supervisors. Depending on workload, ALJs may be shifted between Lower and Higher Authority.