

# Navigator

Fall 2017

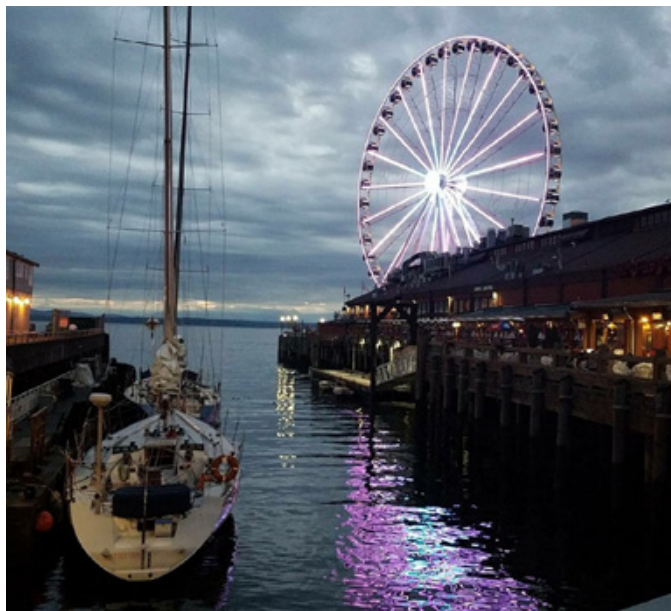
## Enjoying A First NAUIAP Convention in Beautiful Seattle, Washington

Laurel Klein Searles, Chief of Appeals, Kansas Department of Labor

I was fortunate enough to be able to attend the NAUIAP conference for the first time in Seattle from June 19-22, 2017. Going into the conference, I was excited to attend the event, because it focused exclusively on appeals. I have been to a few other national conferences, but appeals always seemed to be an afterthought. It was refreshing to find a conference that was solely focused on the world of unemployment insurance appeals.

**Day one** of the conference exceeded my expectations. The introductory session with Lieutenant Governor Habib energized me as I thought of the importance of inclusiveness in our work and ways that I could work to make the appeals process more inclusive for all participants. I thoroughly enjoyed Judge Lee's session in which we learned a little about Seattle and Washington. I also won a prize, which is always a great way to kick off a conference. Throughout the day, I was inundated with new ideas for myself, my department, my agency and my state in each session. As the conference concluded for the day, I was happy to join a group of attendees from Region 5 in the underground Seattle tour. On that outing, we were able to get to know each other, share take-aways from day one, and relax.

I started **day two** with an early morning walk with other conference attendees and a trip to the original Starbucks—a must stop in Seattle, especially if you suffer from a caffeine addiction. During the second day, we learned about trending issues, the impact of state laws concerning marijuana, ETA Handbook 382, and evidence. The most helpful session for me was the regional breakout session. As a first time attendee and relatively new chief, I was happy to discover that many others share the same challenges that I do. I appreciated the opportunity to discuss those issues with a group and talk about what has worked well and what has not. It was a very productive day that was capped off with a spectacular group event at the Space Needle. We enjoyed a delicious meal, networked with others, and it was there that I was recruited for the newsletter committee for NAUIAP.



**Day three** was also packed full of informative presentations and helpful discussions. Information was shared in sessions on legislative initiatives, developments and potential trends in the gig economy, credibility, central panels, voluntary quits due related to harassment, interactions with the court, interpreters, and the importance of the Lower Authority/Higher Authority relationship. During the evening, many



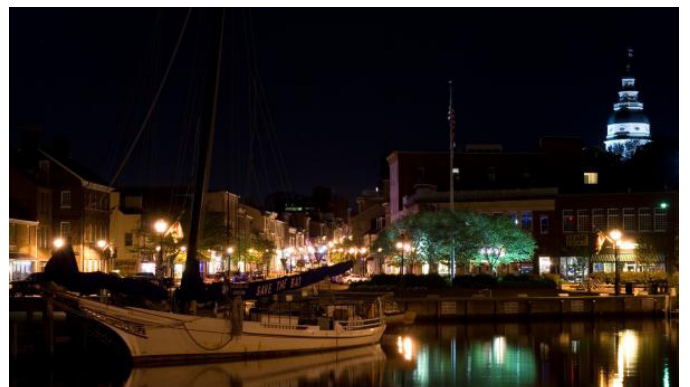
were excited to attend the Mariners/Tigers game at Safeco Field where the Mariners defeated the Tigers 7-5. As a Royals fan, I had little interest in the game despite being in the same division as the Tigers. I chose to go on a smaller group outing with other attendees. We enjoyed two of my favorite things: wine and chocolate at The Chocolate Box. We then went on to see spectacular views of Seattle from the Seattle Great Wheel. After an exceptionally long wait, we were also able to devour a crab leg dinner at The Crab Pot.

**On our final day**, we ended the conference with the business meeting and a closing plenary panel on the pros and cons of administering justice from home and other inducements designed to retain talent. During the business meeting, we voted to hold next year's conference in Annapolis, Maryland. I look forward to the opportunity to reconnect with colleagues met in Seattle and meet more unemployment insurance professionals as well as explore Annapolis. I know it will be another exciting time as we all focus our time and energy on improving unemployment insurance appeals throughout the country.



## And... announcing the Annual NAUIAP *Convention in Annapolis, Maryland* June 17- 21, 2018

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# PRESIDENT'S COLUMN

Jayson Myers, Chief Administrative Law Judge  
U.I. Appeals Board, New York

Greetings to all our members. It's my high honor to serve as President of NAUIAP for this year. This is my first issue of *The Navigator* as President.

My charge as President is to solidify NAUIAP's place as your prime resource for unemployment insurance training and best practices. We want to know in a more specific sense what you want from NAUIAP so we can deliver for you. Please reach out to me and the other Board members with your thoughts on how NAUIAP can best help you in your states. I will also reach out to those states who are not currently members or have not attended our conferences in recent years to ask them what they want most out of this organization. I look forward to those conversations.

It is truly a treasure to be able to work with this year's Board of Governors: our newest additions, Sasha Mackin of Minnesota and Melissa Butler of Texas; past Presidents Kay Todd of Ohio and Tim Dangerfield of South Carolina, President-Elect Amanda Hunter of Florida, First Vice President Ed Steinmetz of Washington, Second Vice President Sabrina Rahn of Indiana, Secretary Brad Collins of Arkansas, Treasurer Dan Doherty of Maryland, and At-Large Members Reba Blackwell of New Mexico and Paul Fitzgerald of Massachusetts.

Here is where I make my earnest pitch to all our members to volunteer to work on one of our committees. Volunteer to write an article for the next edition of *The Navigator*. (See more about *The Navigator* in the new feature, Committee Spotlight.) Volunteer for a different committee (Membership, Technology, Agenda). But most important, volunteer. We need you, we want you, and I promise that you will feel good by benefiting your fellow UI professionals across the country.

From all accounts, we had one of our most successful annual conferences ever this past June in Seattle. No one event stands out. Most of all, it was great seeing all of you there and getting the highly positive feedback that you had about the agenda.

The Seattle conference was the product of very hard work by all our Board members but especially our present First Vice President Ed Steinmetz of Washington. When the Board decided to take the 2017 conference to the Pacific Northwest, Ed was the driving force and inspiration. I will always value the partnership we had in planning the agenda. The conference could not have happened without his vision and extraordinary level of commitment.

I will recount my highlights, and hopefully bring back some great memories to you:

- The Keynote Address by Washington Lt. Governor Cyrus Habib was as inspirational an address

as we have ever had at a NAUIAP conference. Lt. Governor Habib's story is special, and it will likely continue to be written as he moves along in public life.

- The USDOL presentations delivered by Jim Garner and Corey Pitts, always essential to our work in UI, were illustrative of the enduring relationship between USDOL and NAUIAP for which we are so grateful.
- NAUIAP's commitment to training at our conference was evident in the multiple workshops on both the Lower Authority track and the Higher Authority track.
- The enriching plenary sessions on Evidence and Ethics delivered by the talented judicial staff of the Washington Office of Administrative Hearings, who are led by the accomplished and inspiring Chief Administrative Law Judge, Lorraine Lee.
- The special events: the wonderful dinner we had at the Skyline at the Space Needle capped by honoring my predecessor as President, Tim Dangerfield, and then going up to the top of the Needle for that one-of-a-kind view; the Mariners game at which Justin Verlander melted down when his perfect game was broken up by a drag bunt, and the sights and culinary delights of Seattle in general.

That great conference propels us into this year—and Annapolis! The Naval Academy and other charms make it another tremendous site for a conference. The USDOL will be a strong presence on our agenda, an agenda that will be fashioned by our Agenda Chair, Paul Fitzgerald of Massachusetts with care and consideration for the needs and ideas of our members. You will learn more about the 2018 conference through our website and *The Navigator* in coming weeks and months.

Our UI work always keeps us busy, and this year is no different than most others. But we also need to have time for each other. I urge you to join this happy and dedicated band that we have at NAUIAP. You will enrich us and we believe you will be enriched, too.

## NAUIAP STATE MEMBERSHIP

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to enroll 76 plus



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# Peculiar Predecessors and Successors: Unusual Ways to Transfer and Acquire a Business

Scott E. Michael, Legal Appeals Manager,  
Washington Employment Security Department<sup>1</sup>

Stereotypically, selling off a business is a neat and orderly affair. The owners of the businesses negotiate the terms of the deal, write a contract, and sign it. After the sale closes, the state unemployment agency gives the seller the title of “predecessor” and the buyer is given the title of “successor.” The successor then inherits the unemployment experience of the predecessor, and the successor becomes responsible for paying any taxes the predecessor left unpaid.

But business transactions do not always follow the typical script, and it is not always clear when a business “acquires” another business’ assets. State courts faced with these odd situations have long taken a flexible approach, choosing to look at the “substance of the transaction” rather than requiring strict privity of contract between the buyer and seller. *Warehouse Indem. Corp. v. Ariz. Dep’t of Econ. Sec.*, 627 P2d 235, 237 (Ariz. Ct. App. 1981). This article is written to celebrate these unusual cases and highlight three uncommon transactions where state appellate courts followed this flexible approach and found a predecessor-successor relationship.

## Escambia Mid-County Development - The Landlord Knows Best

Escambia Mid-County Development Corp. (Escambia) established a nursing home. Then, it leased the operation and management of the nursing home to Rosemont Nursing and Convalescent Home Inc. (Rosemont). “The management of Rosemont left a great deal to be desired.” So, after “numerous breaches and defaults,” Escambia, the landlord, ordered its tenant, Rosemont, to get out. Not wanting to leave the nursing home patients out in the cold, Escambia retained most of Rosemont’s employees and used most of the fixed assets of the nursing home so the patients could continue to be cared for with no break in service. After seeing this, the state unemployment agency assigned Rosemont’s high tax rate to Escambia. And even though Rosemont did not sell its business so much as got kicked out of its business by Escambia, Escambia was still found by the Florida District Court of Appeal to be Rosemont’s “successor.”

*Escambia Mid-Cnty. Dev. Corp. v. State, Dep’t of Commerce, Div. of Emp’t Sec.*, 356 So.2d 855 (Fla. Dist. Ct. App. 1979)

## K & K Woodworking – Buying Someone Else’s Assets from the Bank

Timmer & Brummel Inc. (Timmer) borrowed money from its local bank. In exchange, Timmer gave the bank a first-priority security interest in all of Timmer’s corporate assets. Timmer was not able to keep up with its loan payment to the bank, and, not surprisingly, was also unable to keep up with its unemployment tax payments. So, Timmer surrendered all of its corporate assets to the bank – assets that were later purchased from the bank by K & K Woodworking (K & K). Not surprisingly, the state unemployment agency gave K & K the title of “successor” and assessed K & K for all of Timmer’s unpaid unemployment taxes. Although K & K never bought anything from Timmer, and instead simply bought everything from the bank, the Michigan Court of Appeals affirmed that K & K was the successor to Timmer.

*K & K Woodworking Inc. v. Mich. Emp’t Sec. Comm’n*, 522 N.W.2d 694 (Mich. App. 1994)

## Mason – When the Predecessor Just Walks Away

City Cartage Co. (City Cartage) was a freight delivery company with nine employees and unassignable contracts with four customers to deliver their freight. On January 29, City Cartage gave its customers 30 days’ notice that it was terminating the contracts. On Saturday, February 28, City Cartage walked away from its customers and the nine employees who worked on those contracts. The following Monday, March 2, Mason started business as a de facto clone of City Cartage: it performed the same freight delivery service, for the same four customers, with the same nine employees, and even used the same labor union contract with those employees. Even in the absence of any sale of assets, assignment of customer contracts, or anything resembling a formal transfer of business, the Indiana Appellate Court still found Mason was a “successor” to City Cartage.

*Mason v. City Cartage Co.*, 117 N.E.2d 387 (Ind. App. 1954)

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<sup>1</sup> The views expressed in this article are those of the author alone and do not necessarily reflect the views of the Washington Employment Security Department.

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# SPOTLIGHT ON KANSAS

Laurel Klein Searles, Chief of Appeals, Kansas Department of Labor

In the State of Kansas, the Office of Appeals handles all lower authority appeals. The Office of Appeals is comprised of a Chief of Appeals, Laurel Klein Searles, eight Appeals Referees, a Chief Administrative Officer, and nine administrative staff members. From January 1, 2017, to August 31, 2017, approximately 6400 lower authority appeals hearings have been scheduled with approximately 6100 decisions being issued. The vast majority of all lower authority appeals hearings are held over the telephone. Parties do have the right to request an in-person hearing and that request is automatically granted. All in-person hearings are held in Topeka, Kansas, unless extenuating circumstances warrant otherwise.

If a party wishes to appeal to the higher authority, the party has 16 days to file an appeal with the Employment Security Board of Review (the Board). The Board is comprised of three members with one member serving as chairperson. The Secretary of Labor appoints an

Executive Secretary, who attends all meetings of the Board. The Board is also advised by an attorney employed by the Kansas Department of Labor. Additionally, the Board has three administrative staff members, who primarily transcribe the lower authority appeals hearings. From January 1, 2017 to August 31, 2017, approximately 1500 cases have been appealed to the Board.

To decide appeals, the Board reviews the record of the hearing held before the referee. The Board may affirm a referee's decision, reverse the decision, or remand for a new hearing. Any action of the Board is subject to review in accordance with the Kansas Judicial Review Act. If no action for review is taken, the Board's decision shall become final 16 calendar days after the date the decision was mailed. If a party wishes to appeal the Board's decision, the party must file an appeal in state district court within the 16-day time period.

## COMMITTEE SPOTLIGHT: THE NEWSLETTER COMMITTEE

Working to produce and publish *The Navigator*

Sasha Mackin, Supervising Unemployment Law Judge,  
Minnesota Department of Employment and Economic Development

For most of us, our primary connection with NAUIAP as an organization is attending the annual conference where we can get together in person to share best practices and learn more about the important work each of us do in our respective state programs. But important work happens with NAUIAP throughout the year on our committees. While members are encouraged to join committees at the annual conference, anyone can request to join at any time. If you missed an opportunity to sign up for a committee at the conference itself, please contact any of the officers or at-large members of the board for more information about joining a committee.

To de-mystify committee work, *The Navigator* will feature a committee spotlight to highlight a different NAUIAP committee over the next several issues. The featured committee this edition is the newsletter committee.

NAUIAP publishes three newsletters each year, in fall, winter, and spring, called *The Navigator*. The newsletter committee usually convenes shortly after the conference each summer, with a slate of new and returning members who have signed up to work on the committee. The newsletter chair contacts committee members to discuss the plan for the upcoming edition. Some

articles are customarily assigned for certain issues, such as a recap of the most recent conference. Committee members are encouraged to offer ideas for articles and tasked with either writing articles themselves or working with colleagues to do so. Each issue features a word from the NAUIAP president in the "President's Column." Also, traditionally, *The Navigator* has highlighted states in each issue to offer insight into a state or territory's unique program. Most issues feature other articles of legal interest within the world of unemployment insurance, and can report information on the upcoming summer conference. Members spend time in email conference in the planning stages, and then whatever time it takes to write an article. Members need not write articles for every issue in the year they serve on the committee.

Joining the newsletter committee gives members an opportunity to exercise their journalistic muscles and spend a little time on exploring topics of legal interest to share with colleagues around the country. It is a great opportunity to work on a project with a national reach and share information with NAUIAP members. Past editions of the newsletter *The Navigator* are available on [www.NAUIAP.org](http://www.NAUIAP.org). We would love to have your help and good ideas at *The Navigator*!

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# SCHOOL for JUDGES

Keri Phillips, Unemployment Law Judge at the Minnesota Department of Employment and Economic Development.

Since the Great Recession, Minnesota has continually endeavored to find the best and most efficient way to train new hearing officers/unemployment law judges ("ULJs"). This challenge is increased in current times of limited budgets and low staffing numbers, combined with the difficulties of attracting and retaining good talent in a better economy.

In 2008, Minnesota implemented the cohort-based training, with the goal of providing consistent, comprehensive training on UI law and hearing procedures, facilitating active learning, and building community. Before 2008, ULJs were thrown more directly into the mix; observing only a few hearings before starting off their own, learning to navigate the challenges of holding a hearing and interpreting the law primarily by trial and error. The last cohort, hired in 2014, participated in three months of training prior to conducting their first hearing. This included training in adjudication of initial determinations, and they adjudicated during training.

This past August, the Minnesota Unemployment Insurance Program hired a cohort of five new ULJs. Given that this class of hires were more experienced than previous classes, as well as the program's staffing needs, Minnesota sought to provide a more streamlined training program than with past cohorts, aiming to move the new judges to hearings more quickly, while still providing a solid foundation on which to be successful.

I was tasked to lead the training, which included hammering out the content, leading or attending the sessions, and being the point person for any questions or issues that arose for the group at the beginning of their employment. The structured training covered substantive UI law; the process of applying for and requesting benefits for the applicant, as well as the employer's role and responsibilities in the program; hearing procedures and due process requirements; tips on how to hold a good hearing, handle interruptions, and convey neutrality; and navigating the automated UI computer system to access information and process decisions. Throughout the discussions, trainers sought to elucidate the balance between holding quality hearings that adhere to all due process requirements, and achieving the efficiency necessary to keep up with a demanding workload and meet federal standards.

The new judges participated in one month of training before conducting their first hearing. The training during that month consisted of the following:

- **Community building and on-boarding.** Research shows that successfully on-boarding new staff results in longer retention. Our on-boarding activities included introductions to the appeals department staff and program leadership, morning refreshments the first day, and several scheduled

lunches with experienced judges to provide an early social opportunity to connect. ULJs rely on each other for advice, opinions, feedback, and venting, and report that this collaborative environment is a valuable part of their employment. The trainers sought to foster this sense of community among the new judges, and welcomed them to the larger fold.

- **Roundtable presentations.** The new ULJs were assigned topics of substantive UI law to research and present to the cohort. The new ULJs were assigned an experienced ULJ for each topic. The experienced ULJ was available to field questions, make suggestions, review PowerPoint slides, and identify examples and resources for the new ULJs to use in their presentations. The idea behind roundtables is that one learns best by teaching others.
- **Listening to hearings.** The cohort listened to recorded hearings as a group, identified the relevant law, and discussed the analysis and possible outcomes. The ULJs then drafted findings of fact and decisions, met with one another to compare and review their drafts, and compared their versions with the decision issued by the ULJ in that matter. If the case was reviewed by the Minnesota Court of Appeals, the cohort reviewed the opinion as a group. This exercise allowed the cohort to apply the concepts they had been learning to actual sets of fact, while becoming familiar with the procedural, technological, and interpersonal hiccups that commonly occur during appeal hearings. This exercise provided the opportunity to literally hit "pause" during a hearing, and discuss different approaches to the issue at hand. It also allowed the new judges to observe the lifespan of a case, from fact finding at the initial determination phase, to the hearing and decision on appeal, through any and all subsequent appeals.
- **Listening to live hearings.** The cohort sat in on live hearings, from their desks on their own phone extensions. Then they met with the experienced ULJ who held the hearing to discuss the analysis and outcome. They drafted the findings of fact and decision for the ULJ to critique, revise as desired, and issue.
- **Mock hearings.** The cohort moved from listening to hearings to conducting mock hearings, first in a room together, and then over the phone. The ULJs got used to hearing their own judicial voices, practiced the opening statement and procedures, and became familiar with the Clear 2 There conference system. Supervisors listened in and provided feedback.
- **Hearings.** Within one month of starting their employment, the new judges started with simple one-party hearings on the issue of whether an applicant had good cause for missing

a reemployment services session (an eligibility requirement under Minnesota UI law), and gradually increased their repertoire to include other types of cases. The cohort met regularly to debrief and pose challenging or interesting cases to the group for discussion. The number and complexity of the hearings increased.

Although our case load demanded it, we also deliberately put this group on hearings earlier than past cohorts. Because of advice we got at the Seattle NAUIAP conference, we scheduled them for back-to-back hearings, rather than spacing them out for more comfortable first weeks. In the past, some of our new judges have struggled with issuing timely decisions after enjoying more time with an easier hearing schedule at the beginning of their employment. To avoid the development

of bad habits and to try to engender efficiency earlier, this schedule has the new ULJs doing hearings faster and more like their experienced colleagues.

Holding a thorough and efficient hearing is an art that is learned through experience. The new judges report that the learning curve spiked when they began to put into practice concepts and law by doing mock hearings and writing decisions for experienced ULJs. And as always, training provided the trainers with the opportunity to look at well-worn practices and procedures with fresh eyes, and envision better, more efficient ways of doing things. The new judges are nearly up to a full hearing schedule within six weeks of hire and already tackling complex cases.

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