



# Navigator

Winter 2020

## Get Ready For Denver!



Save the date! NAUIAP's Denver 2020 conference is just around the corner, June 15, 2020 to June 19, 2020, and we can't wait. Check out this preview of the conference agenda and tourism guide to Denver, and you'll see why we're so excited!

This year's agenda is packed. We're emphasizing DOL criteria 6 (opportunity to question own witnesses), 23 (obtain reasonably available evidence), and 25 (findings supported by substantial evidence), all of which are critical elements. Additionally, our agenda will include the following:



- UI Program Updates by USDOL
- UI Appeals Update by USDOL
- Best Practices for Developing the Hearing Record
- Best Practices for the Higher Authority to Obtain and Review Evidence
- Decision Writing and the Use of Plain Language
- Unconscious Bias (ethics credit available)
- Subpoenas and Proffers of Evidence
- Improving Office Practices to Maximize Efficiency
- Benefit Integrity – Recent Developments and Resources
- Demonstration of NASWA's Online Training Resources

**When the conference day is done, Denver has something for everyone! If you have a couple of hours, try:**

### DOWNTOWN DENVER

The Brookings Institution ranks Denver as the fourth most walkable downtown in the nation. You can save on shoe-leather by riding the free shuttle bus on the 16th Street Mall – it makes everything downtown easy to reach.

### COLORADO STATE CAPITOL

Stand exactly 5,280 feet above sea level (one mile high!) on the west steps of the Colorado State Capitol, then climb to the rotunda for a panorama of snow-capped peaks. It is against state law to block the view of the 200 named mountains visible from the dome. Free tours are available on weekdays.

### DENVER ART MUSEUM

The Denver Art Museum is made up of two architecturally stunning buildings – one a fortress-like structure from Italian architect Gio Ponti, the other, a structure that resembles a titanium crystal with peaks and shards designed by Daniel Libeskind. Inside, find the world's greatest collection of Native American art and 68,000 other art objects, including works from European masters, Old West classics and phenomenal traveling exhibits.

### BUFFALO BILL MUSEUM & GRAVE

Welcome to the Wild West! Buffalo Bill Cody's exciting story as Pony Express rider, army scout, buffalo hunter and showman comes to life at the Buffalo Bill Museum & Grave, high atop Lookout Mountain. Enjoy views of the snowcapped Rockies in one direction, the Great Plains in the other. For those with strong nerves, drive to the museum on the hairpin Lariat Loop Drive ... then continue to I-70, exit 250, to see a live herd of buffalo.



### COLORADO RAILROAD MUSEUM

Surrounded by towering Western buttes, the Colorado Railroad Museum combines a spectacular location with more than 100 narrow and standard gauge locomotives, cabooses and cars. Exhibits include a working Roundhouse, model railroads, photographs and artifacts, much of it housed in a replica of an 1880s-style depot. Train rides every Saturday on the Galloping Goose take guests on a third of mile loop of track, while "Steam ups" and special events including "A Day Out With Thomas" occur throughout the year.

### THE CLYFFORD STILL MUSEUM

Clyfford Still, considered one of the most important painters of the 20th century, was among the first generation of Abstract Expressionist artists. The Clyfford Still Museum, which opened at the end of 2011, was founded to promote the late artist's work and legacy. Still's estate - 2,400 artworks - has been sealed off from the public since 1980.

### U.S. MINT

Learn how to make money! The U.S. Mint can produce more than 50 million coins a day, each one stamped with a little "D" for Denver. Free guided tours show every step in the process of turning a dull, blank, metal slug into shiny pocket change. Same-day tickets available starting at 7 a.m.; no advance reservations.

### HISTORY COLORADO CENTER

The History Colorado Center, one of Denver's newest cultural attractions, is designed to ignite imaginations of all ages about Colorado history through high-tech and hands-on exhibits, programs for children and adults, and special events.

### THE BLUE BEAR AT THE COLORADO CONVENTION CENTER

The Colorado Convention Center is home to "I See What You Mean," AKA the giant Blue Bear that peers into the Center's interior. Created by Colorado-based artist Lawrence Argent, the curious blue bear stands 40 feet tall – you can walk under it.







### 16TH STREET MALL - PEDESTRIAN MALL

Lined with 200 trees and 50,000 flowers, this festive, mile-long 16th Street Mall has 28 outdoor cafes and offers Denver's best people-watching. Renowned architect I.M. Pei designed the gray and pink granite pathway to resemble the pattern of a diamondback rattlesnake. Hop on the bus – they're free and stop on every corner. After dark, horse-drawn carriages clatter up and down the Mall.

### LARIMER SQUARE

Larimer Square is a trendy block of Victorian buildings is home to chic shopping, dance clubs, a comedy club, outdoor cafes and a dozen of Denver's best restaurants. For 40 years in downtown Denver, it's hip to be at the "Square."

### LODO HISTORIC DISTRICT

Denver's happening historic district is filled with turn-of-the-century warehouses, now home to 90 brewpubs, sports bars, restaurants and rooftop cafes. While you're in LoDo, stop by Rockmount Ranchwear for a snap-button Western shirt at the store where they were invented; browse from 6:30 a.m. to 9 p.m. at the Tattered Cover Bookstore; listen to jazz at El Chapultepec, one of Esquire Magazine's 50 best bars; or sip a handcrafted beer at the Wynkoop Brewing Company, Denver's first brewpub opened by former Denver Mayor and Colorado Gov. John Hickenlooper.

### UNION STATION

Denver's Union Station has undergone a massive restoration that transformed the landmark into a transportation, dining, shopping and entertainment hub and hotel. The historic, Beaux-Arts 1914 train terminal is now a foodie destination, with a dozen restaurants and bars, from farm-to-table favorite Mercantile to the Terminal Bar, situated in the station's old ticket windows. A handful of local retailers includes a branch of the popular Tattered Cover Bookstore. Union Station is also fulfilling its original role as a major ground transportation hub, serving as an AMTRAK, light rail and shuttle bus station with direct rail service to Denver International Airport.

### CONFLUENCE PARK

Denver was founded at Confluence Park as a gold mining camp in 1858. Today, the river park is the heart of Denver's 85-mile bike trail network, and is surrounded by attractions. Ride the Platte River Trolley to the Downtown Aquarium to see stingrays and sharks and The Children's Museum of Denver, with dozens of interactive "playscapes" for younger kids; eat and drink in the nearby neighborhoods of Riverfront, LoHi and Highlands.

### ELITCH GARDENS THEME & WATER PARK

The only downtown theme park in America is really two parks in one: on one side of Elitch Gardens Theme & Water Park, experience 53 thrill rides, including looping roller coasters; on the other side, cool off in a wet 'n' wild water park with tubes waterslides and wave pools. The park is open from early May to early November.



### CITY PARK

City Park, Denver's largest park, has several lakes, spectacular mountain views, a public golf course, flower gardens and a hiking/jogging trail that is exactly one mile high.

### DENVER MUSEUM OF NATURE & SCIENCE

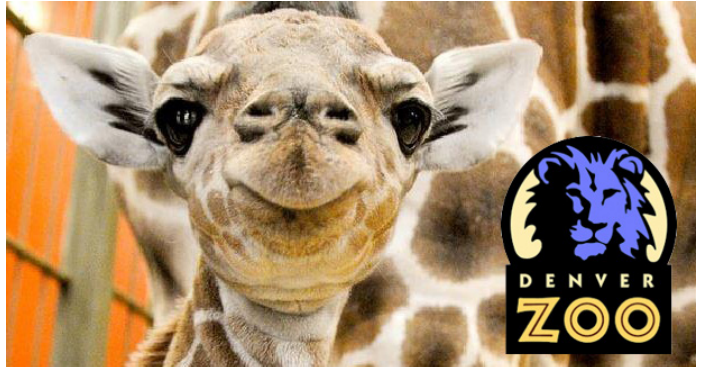
From stunning prehistoric fossils to an exploration of outer space, The Denver Museum of Nature & Science never fails to astound and amaze with realistic visions of the past, present and future. The Gates Planetarium is one of the most sophisticated planetariums in the country, giving visitors unparalleled insight into the workings of the cosmos, and the Phipps IMAX Theater features brilliantly filmed IMAX entertainment.





### DENVER ZOO

Lions and tigers and bears – and so much more, on lovely grounds make the Denver Zoo one of the most popular zoos in America. Go eyeball-to-eyeball with a gorilla in Primate Panorama or an Amur tiger at The Edge. Predator Ridge recreates the plains of Africa with a pride of lions, while Tropical Discovery is rainforest teeming with crocodiles and Gila monsters.



### CHERRY CREEK

The tree-shaded Cherry Creek neighborhood is just two miles from downtown and easily accessible by bike on the Cherry Creek Bike Path.

### CHERRY CREEK SHOPPING DISTRICT

More than 500 department stores, boutiques, galleries, spas, and one-of-a-kind shops grace this browsing paradise – the largest concentration of stores between St. Louis and San Francisco. Cherry Creek Shopping Center is an ultra-upscale mall with Neiman Marcus, Nordstrom and Tiffany's, while across 1st Ave., Cherry Creek North offers tree-lined streets with cafes, spas and galleries amidst fountains and public art.

### DENVER BOTANIC GARDENS

Denver Botanic Gardens, a 23-acre oasis in the middle of the city, has 45 different gardens (some 33,000 plants), as well as one of the nation's top 10 conservatories. Relax in the Japanese Garden, climb through the Rock Alpine Garden and explore the new Mordecai Children's Garden. The Boettcher Memorial Tropical Conservatory is the largest single structure tropical conservatory in the U.S., including banyan tree roots and cloud forest orchids.

### GOLDEN

Golden, Colorado's first capital, celebrates its Old West history and mountain location with a trendy downtown filled with galleries and recreation shops. Sip a beer at an outdoor café, while kayakers float by on fast rushing Clear Creek.

### RED ROCKS PARK & AMPHITHEATRE

Carved from towering red rock monuments, Red Rocks Park & Amphitheatre is one of the world's most renowned concert venues and has hosted everyone from the Beatles to Bruce Springsteen. Listening to a concert here is on the "bucket list" of every true music fan. When there's no concert, the Visitor Center has a free museum and Performers' Hall of Fame, while the surrounding park has hiking trails that weave in, around and over the colorful red rocks.

### COORS BREWERY TOUR

"Taste the Rockies!" Coors Brewery, the world's largest brewing site still uses the same Rocky Mountain spring water that Adolph Coors discovered in 1873. Free, self-guided tours show every step in the brewing process, and end with free samples for those over 21.

*If you have a few hours to tour beyond Denver's city limits, consider:*

### CENTRAL CITY & BLACK HAWK

34 miles west of Denver

These two old gold mining towns (once known as the "Richest Square Mile on Earth") have come alive with casino gambling. Central City and Black Hawk offer two dozen casinos rock 24-7 with 10,000 slot machines, poker, blackjack, roulette and craps. The surrounding hills are covered with abandoned gold mines, Victorian buildings and Old West history. Every summer, the Central City Opera Association hosts a season of world-class opera.

## GEORGETOWN

42 miles west of Denver on I-70

Nestled in a steep mountain valley, Georgetown is one of Colorado's most elegant mining towns with 200 Victorian buildings. Ride the Georgetown Loop Railroad over a 100-foot high trestle to neighboring Silver Plume, tour historic homes and shop on the quaint Main Street that has been used in films featuring Clint Eastwood and John Denver

## ECHO LAKE AND MOUNT EVANS

From I-70 take Exit 240 and then Colorado Hwy. 103 to Echo Lake

Mount Evans Scenic Byway, the highest paved road in North America, climbs 9,000 feet from Denver, passing through five life zones en route to the 14,264-foot high summit. This is one of Colorado's 54 fourteeners (peaks that climb to 14,000 feet and above), and one of only two in the nation that you can drive up. Stop at Echo Lake along the way for hiking trails, fishing, picnic tables and an unusual eight-sided log cabin restaurant. At timberline, Denver Botanic Gardens maintains a trail that winds through wildflowers. Due to snow, the Mount Evans Highway is generally open to the top only between Memorial Day and Labor Day.

## BOULDER

30 miles west of Denver on Hwy. 36

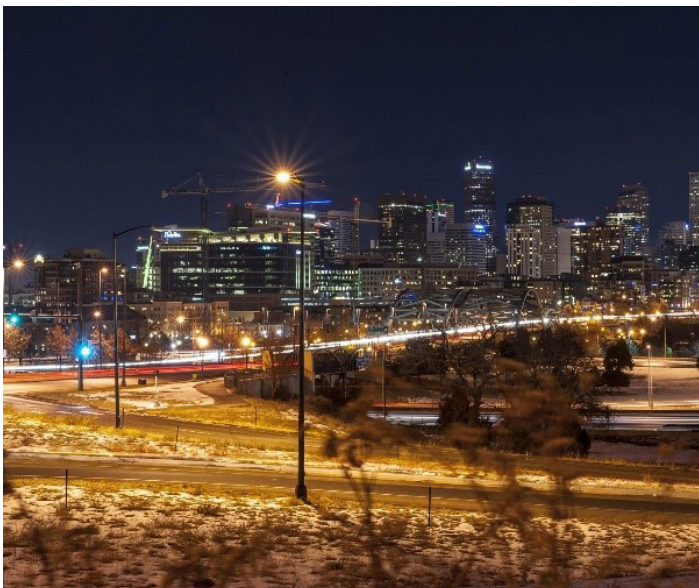
Home to the University of Colorado, Boulder has been described as the "the city nestled between the mountains and reality." A recent study pegged it as the "happiest" city in America. You'll find out why when you stroll past the shops, cafes and street performers on the Pearl Street Mall, or take a hike on the city's 200 miles of trails. Nearby attractions include the National Center for Atmospheric Research with a museum on weather and global warming,

and towering Eldorado Canyon State Park, one of the most famous technical climbing centers in America.

Or, if you can add a day to your trip, experience ROCKY MOUNTAIN NATIONAL PARK! Located only 71 miles west of Denver on Hwy. 36, this is Colorado's No. 1 attraction. Rocky Mountain National Park offers an unforgettable trip into the heart of the Rocky Mountains. More than 350 miles of trails meander to valleys of wildflowers, thundering waterfalls, high alpine lakes and craggy, snow-capped peaks. Trail Ridge Road is the highest continuous highway in the world with panoramic views in all directions. See elk, moose and big horn sheep, while hawks and eagles circle overhead. National Geographic named Rocky Mountain National Park one of the top trips in the world in 2014. At the entrance to the park, the historic resort village of Estes Park offers shopping and dining.

**We hope to see you in Denver, June 2020!**

**[WWW.VISITDENVER.COM](http://WWW.VISITDENVER.COM)**



## NAUIAP STATE MEMBERSHIP

National Association of Unemployment Insurance  
Appeals Professionals

**\$300**  
to enroll 1 to 10 members

**\$500**  
to enroll 11 to 25 members

**\$1000**  
to enroll 26 to 75 members

**\$1500**  
to enroll 76 plus

*Members enjoy access to training webinars, the Navigator, and more!*





## FROM THE PRESIDENT'S DESK

Edward S. Steinmetz, Assistant Chief Administrative Law Judge  
Washington State Office of Administrative Hearings

### Why UI?

What is it about the adjudication of Unemployment Insurance (UI) claims that keeps you passionate about your work? For most people, working to support our families and ourselves is a necessity. However, there is no requirement that we spend our work lives adjudicating UI claims. So then, why do we do it? I am sure that the answers to this question vary widely, and are unique to each of us. I believe it is good for us to stop on occasion and think about what it is that keeps us engaged and committed to our chosen line of work in the UI arena.

I can tell you that when I asked the Chief Judge of Washington State's central panel office to transfer me to the UI caseload, I would never have guessed that 25 years later I would still be so engaged and enthused about working in this area of the law. So I have thought about it, and here are a few of my answers to the question "Why UI?"

I grew up on our family farm in Montana where work was not just an expectation, it was a necessity. Over the years, my family's work gave me a deep sense of pride and accomplishment in the good years, but also brought fear and sometimes desperation in those years where hail or other natural disasters destroyed a year's worth of work and income in minutes. For me, understanding the inherent value of work is something that goes to my very core. I have a deep appreciation for what it means to a working person to lose their job and have no income. Or to a business that is in danger of going under financially because of its increasing tax burden. Working in the adjudication of UI claims allows me to exercise one of my essential core values, and is therefore very meaningful to me. I knew I was in the right place the first time I logged into the NAUIAP website and saw the Abraham Lincoln quote "I am always for the (person) who wishes to work." Me too.

Another reason that I am drawn to the UI caseload is because of the emphasis on fairness. As a proverbial "middle child", I was often asking my parents for "fairness" with regard to how I was treated. My older brother was always allowed to do way more fun stuff than I was, and my younger brother and sister always got away with a lot more bad stuff than I ever did. As I grew older, I began to understand that knowing something about the law could sometimes bring fairness to an otherwise difficult and stressful situation. When I started holding UI hearings and learning about the US DOL 31-point case review criteria,

I discovered a hearing process that works very hard to ensure that UI hearings are fair and accessible to ordinary people. Under the DOL criteria, we are responsible for creating a fair hearing environment. As a UI adjudicator, I like that every hearing I conduct gives me the opportunity to bring some degree of fairness to the lives of other people, regardless of whether I am ultimately required to rule for or against them.

My third reason for moving to the UI caseload, and staying with the UI caseload for over 25 years, is that this area of practice is broad and diverse and has provided me with regular and continued opportunities to grow professionally and to continue learning. Like many of us, I learned the UI caseload by first holding hearings in quits and discharges, as well as availability and work search matters. My colleagues working in other caseloads told me that the UI hearings were "simple" or "easy". Nevertheless, having worked in other caseloads before beginning UI, I knew that the UI cases were just as challenging and difficult as many of the other types of hearings I had held. As I learned about what constitutes good cause to quit, misconduct and gross misconduct under my state's laws, I then had to learn how to identify the "moving party" in the face of often-contradictory facts and unclear perceptions. When I ruled against the claimant, I then had to learn to properly discuss and decide the issues of fault and repayment of regular and conditional overpayments. Once I had developed the necessary competency in quits, discharges and availability/work search, I then started hearing fraud cases, unemployment due to labor strike or lockout, and Unemployment Compensation for Ex-service members (UCX) cases. It took me awhile to learn the nuances of these case types before moving on to learn tax cases and training benefits cases. Due to the same natural disasters that we encountered on the farm, I also had to gain a competent understanding of Disaster Unemployment Assistance (DUA) cases.

This diversity of relevant facts and law has helped to keep my mind active, and achieving an acceptable level of competency in each UI case type has given me the same sense of accomplishment that I felt growing up on the farm. Looking back, I know that moving to the UI caseload was the right choice for me.

These are a few of my answers to the question of "Why UI?", what are some of your answers?



# In Memoriam

Our colleague, mentor and friend, Tim McArdle of California, unexpectedly passed away in October of 2019. NAUIAP has lost our unofficial historian and long-time supporter. He leaves a tremendous legacy with our organization and many fond memories. Here are some of the tributes paid to him by former NAUIAP officers and Board of Governors members:

*Tim was the epitome of our organization's professionalism and he set the standard for what appeals professionals should aspire to be. Whenever I was putting together a presentation for a conference, I always thought, "What Tim Would Do?". He is one of the NAUIAP treasures whose absence will be felt.* — Clayton Mitchell, MD

*Tim was the epitome of Class, with a capital "C". I cannot think of anyone who was more knowledgeable, dedicated, and sincere in the field of UI Law.* — Bob Lorenzo, NY

*If you had met Tim McArdle at your first NAUIAP meeting, you probably thought, "Wow, this is a pretty classy organization. I'm coming back!" Kind and personable, helpful and friendly. Tim was an expert in UI tax, Board of Review governance and politics, administrative law and hearings, and judicial ethics. Accomplished, professional, an obvious leader, Tim was nearly always on the program for NAUIAP Conferences. And Tim never disappointed: well-prepared, on time, reliable Tim.* — James Pflasterer, WI

*In my years of membership in our organization, I learned that a few giants among us carried NAUIAP to ever higher levels of professionalism and camaraderie. Tim McArdle's winning and charming personality and his capacity to produce mountains of excellent work made him a titan. Tim could generate the brilliant ideas AND "make it so!"* — Maureen Bucek, TX

*I first met Tim when he and Allan Toubman were presenting an Administrative Law course for what was then called NAUIAB. I was immediately struck by Tim's innate ability to synthesize questions from the audience and provide compelling legal responses with great aplomb. His enthusiasm was contagious, and he will be sorely missed. Rest In Peace my friend.* — Alice Mitchell, GA

*He was always such a good guy. Always positive and always willing to contribute/share his knowledge with others and especially very supportive to new folks coming into the UI appeals system.* — Karl Jahnke, OK

*Tim McArdle was one of the brightest, kindest, most caring and compassionate people I ever have known. He made friends everywhere; he was respected without ever requiring it. He knew the law and knew how to teach it in an engaging manner.* — Marilyn White, AZ

*As I sat down to write something about my dear friend Tim, one word constantly came to mind: GENTLEMAN. Gentleman is defined as a man that is chivalrous, courteous, or honorable.* — Donna Watts-Lamont, MD

*I will remember Tim most for his boundless generosity—he gladly shared his knowledge, his time, his self. Tim was the embodiment of "build a bigger table"—whether that was a work conference table or his dinner table. He never seemed rushed. He consistently made everyone he encountered feel the same way.* — Angela Bullard, CA

*Tim brought the lessons that he learned from training the California judges to NAUIAP, the National Judicial College and many states. He offered sage advice to myself and other former Presidents. He was a principal author of the NAUIAP Code of Conduct. He co-authored a law journal article on fairness of telephone hearings that has been cited by a number of federal and state appellate courts. After Hurricane Katrina, the Mississippi agency wanted to instill best appeal practices. As the ethics expert, Tim provided important direction to the hearing officers. He taught ethics in a compelling manner that emphasized his own limitations and real life experience. He asked a class whether a Catholic judge could fairly evaluate the discharge of a Catholic schoolteacher who believed in abortion rights. To demonstrate the relationship between perception and truth, he explained how after he was involved in a multi-vehicle accident on an LA freeway, the different drivers had different perceptions of what occurred. Tim's legacy is that ethics is the foundation of judging. Despite heavy workloads, our first obligation is to be fair and to be perceived as fair.* — Allan Toubman, ME

*When we first met, he told me he was an open book. I learned it was true. Some chapters were difficult, some were joyous. Some were short and some were long. But from end to end, throughout his entire life, Tim was genuinely honest; selfless to a fault; a loving and giving person. He was a good and decent person who made the world a better place.*

*Tim was strong of faith. His faith was his guiding light throughout all of the chapters of his life.*

*Tim was an excellent attorney. But all of his colleagues at NAUIAP, CUIAB, and NJC will remember him as a top notch judicial trainer. He was an expert at substance, procedure, ethics, and professional manners. Tim was a patient listener, who learned from those he was training.*

*Tim worked with NAUIAP for many years. He thoroughly enjoyed the wonderful members from each state. He loved working with the Board of Governors, looking for ways to improve the quality of our work. I was with him for many of these chapters and can attest they were the best of times!*

*Tim was a family man. Close to his sister and brothers. Close to his children and grandchildren. Closest to Pat, his partner and soul mate.*

*I will always remember the chapters of his open book.* — Jay Arcellana, CA

# Thoughts on Selecting – and Retaining – Good Candidates as ALJs and Higher Authority Counsel

By J. S. Cromwell, Chair, Oregon Employment Appeals Board  
With Don Westfall, Chief Review Judge, Washington Employment Security Department,  
John Lohuis, Presiding ALJ, Oregon Office of Administrative Hearings, and  
Marilyn White, Administrator, Arizona DES/OIG Appellate Services

Let's face it, hiring candidates for jobs as ALJs and higher authority counsel can seem like a bit of a crap shoot. You post a job announcement and cross your fingers that you can find someone who is qualified to do the work – all within the confines of your state's hiring policies and procedures. It's hard work, it's time-consuming, and there's no guarantee that you'll get it right the first time. And because our work is so specialized and requires such extensive training before our new employees are up to speed, figuring out whether or not your recruitment was successful can take months. Here are some thoughts about things we can do to select – and retain – good candidates.

## Before Posting a Job Announcement

Review the position description for the job you're posting. Make sure it is accurate and clearly outlines what your candidate will be hired to do. Talk to your HR office and find out if they pre-screen candidates before referring them to you. If they do, adjust the PD to prevent pre-screening from inadvertently weeding out qualified candidates.

Think hard about what types of attributes you're looking for in a candidate, figure out which of them can be trained versus which cannot, and focus your recruitment on people who possess qualities that cannot be trained. For example, if you're looking for self-directed individuals who show attention to detail, you might want to develop a recruitment plan that assigns value to the completeness and precision of the individuals' application materials, and demerits to any that are incomplete or riddled with errors.

Consider including management experience in the position description. A candidate with even a minimal amount of supervisory experience usually knows what makes a good employee, and will likely model those attributes at work.

Offer as decent a salary as your state allows. Try to hire candidates who know their worth, and be prepared to negotiate terms at the end of the hiring process.

Consider assembling an interview panel, consisting of people whose judgment you trust. Incorporating different perspectives into the recruitment process can only enhance it. For example, if two of the panel rank the same person as #1 candidate, and a third ranks the same person as dead last, that could spark a valuable conversation about why the candidate was so highly ranked by some, and threw up "red flags" for others.

Work with HR and your interview panel to develop meaningful interview questions to ensure that whomever you hire shares your organization's values.

Don't forget your Vets! Remember that military work experience might not readily translate to a civilian job recruitment or position description, and take steps to ensure that your pre-screening processes do not inadvertently exclude qualified Veterans from your recruitment.

## While Recruiting

Consider requiring candidates to submit a resume and cover letter rather than just filling out an application form, and design a grading rubric for assessing the application materials, for example, grading them for consistent formatting, typos, and grammar errors.

If the job involves writing, consider including a real-world writing test as part of your recruitment process. A real-world writing test can give you a better idea of the candidates' aptitudes for the specific type of work you do than a generic writing sample. This will also expose the candidate to what their work will truly be like if they were offered and accepted a position with your office.

Consider incorporating questions about the writing test into your interview process. Ask candidates how long they spent drafting their writing test, what approach they took to reviewing the

record, what their experience was like drafting the decision, how much time they spent drafting and editing. Maybe even ask what they thought of the case, the record, and the process.

Remember, the recruitment process isn't just to give you the chance to select a new employee, it should also be the candidates' chance to select a new employer. To that end, consider asking candidates if they liked the writing test, or if they found the work boring or unsatisfying. If the job can be repetitive with respect to numerous tasks, ask the candidate how they feel about such repetition – whether they are more apt to seek out new challenges or embrace the routine and make it their friend. Such questions might spark a conversation that will help both you and your candidates determine whether or not the job is a good fit.



Try to “be yourself” at the interview, and invite the other panelists to also be themselves. Try to have a friendly conversation with your candidates rather than a formal Q&A session. This can help give the candidates an idea of your office’s culture and what it might be like to work with you. It might also help the candidate relax during the interview, allowing you to get a better sense of who they are.

When scoring candidates, weigh their soft skills heavily. Candidates who passed the initial screening probably already met the minimum qualifications. The task for recruiters after that point is to give the candidates the opportunity to demonstrate that they have the good people skills, social skills, and communication skills, as well. Finding a candidate who can be coached, will listen and receive feedback, will treat parties and colleagues with respect, and be a good team player might be more valuable than finding someone with a “top tier” law degree or big firm experience.

Be thoughtful when developing reference check questions, and check references carefully. Reference and background checks, while helpful, are not necessarily a predictor of success. Every office has a different culture, and people

change over time, so someone who might once have been a great fit in a different office might not be who your office needs right now.

If possible, don’t pressure your successful candidate to start immediately, especially if they have to give notice to their last employer. Although you might want or need your new employee to start immediately, allowing space for the employee to leave their last job with integrity will form a lasting impression, and clearly communicate that you respect and value their integrity.

Consider using the recruitment process to model the behavior you wish to see from your future employee. Keep in mind that your office is an authority on unemployment insurance benefits cases in your state, and that it is likely that either the candidates applying for work with your office or their friends and families might one day come before your office for a hearing or review. The way you treat unsuccessful candidates during the recruitment process might very well affect their opinions of your office and how it will handle their cases, and will help inform their belief about whether your office is unprofessional and biased, or fair and impartial.

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## Retaining Your Good Candidate

Try to make a good first impression. After you have selected your new employee, it is important to communicate with them prior to their first day and let them know what to expect before they arrive. This will, hopefully, ease some of the first day nerves that can get in the way of a good impression. Things to communicate might include the following:

- Let the new employee know the office’s dress code so they are not embarrassed to have over- or under-dressed for their first day.
- Is parking around your office scarce? Or will they need a permit? Let them know in advance so they can plan their arrival the first day.
- What about food? Does your office have a fridge or break-room for food storage? Is there a communal coffee pot or coffee club, or do employees bring their own coffee from home? Is your office in a remote area without quick access to restaurants or stores? Let your new employee know so they can plan what to bring to the office so they can be comfortable their first day.
- Introduce your new employee around to their new coworkers, and plan an informal stand-up or get-to-know-you staff meeting for your new employee’s first week.
- Make sure your new employee has a complete and clean work station – there is little so off-putting as arriving to work only to find that you haven’t been assigned a computer, or don’t have a chair. And it’s not at all welcoming to look in your desk drawer only to find well-worn supplies and the previous occupant’s lunch crumbs all over the place. Start your new employee out right by providing them with a clean workstation with all the basics in place and ready for them.

Model the behavior you want to see in your new hire. If you

expect prompt responses to emails, then promptly respond to their emails. If you expect kindness, be kind to them.

Have a training program in place before your new employee’s first day of work so each person involved in the employee’s training – including the new employee – has some structure, knows what to do, and knows what’s coming next.

Designate some time for the new employee to participate in activities and meetings with coworkers so they can come to know each other. This could include a resources list so the person knows who their go-to expert is in each area – for example, so they know who is the tech person, who is the secretary, who is the “expert” on quits, who their peer trainer is, etc. In my office, we schedule some “walk-n-talk” time for the new employee to take a walk (or grab some coffee) with existing staff one-on-one, so they can get to know each person as an individual and find out each of their roles in the office without the pressure or formality of a sit-down meeting across a desk.

Consider one-on-one peer mentoring for the first six months or year, and, as the supervisory manager, try to meet with your new hire frequently during their first weeks and months. This will ensure that you are informed about the new employee’s progress, aware of any deficiencies, and can promptly identify any equipment, resources, or training they need to be successful. It will also ensure that your new hire knows how they’re doing and what they need to work on at every step of their training. This is particularly important if your state has a “trial service” period. If yours does, make sure you are very attentive to the trial service timelines – in the event that your new hire is not successful, this will ensure that you are both on the same page and that neither of you are surprised to learn that it’s not working out and the relationship needs to be terminated.

Happy employees stay put, so consider what perks you might be able to offer beyond your state's basic hiring package:

- Offer office work, telecommuting or teleworking, or a hybrid arrangement – this allows you to hire and retain people who live throughout your state, not just from within commuting distance of the office. It has the added bonus of bringing some geographic diversity to your office, which might improve the quality of your office's work.
- Offer flex schedules or non-standard work shifts – allowing staff to work when it's most convenient for them allows staff to have a meaningful work-life balance, minimizes their use of accrued leave, and allows them be less distracted, and more "present," when at work.
- Encourage outside activities – staff who have the time and encouragement to pursue a variety of interests and activities will likely enjoy a better quality of life than those who are required to work certain hours or are discouraged from pursuing interests that might take them away from the office sometimes.
- Offer employees meaningful training opportunities – encourage job rotations so your staff can gain experience in different program areas or learn other aspects of the work your office does. Send employees with an aptitude for administration to management or leadership training. Consider rewarding hard-working staff with specialized training and networking opportunities. Send your top performer(s) to NAUIAP Denver!

Finally, encourage career mobility – urge your staff to pursue opportunities for advancement, and support their efforts to reach their goals. If your staff knows you will help them get where they want to go, you can attract highly motivated and competent people that just might end up sticking around.

Good luck with your next recruitment!

# Spotlight

## SPOTLIGHT ON MISSISSIPPI

By Gary Holmes, Appeals Department, Mississippi Department Of Employment Security

Mississippi, land of the Delta Blues, magnolias, soybeans and Kermit the Frog. Music, the arts and agriculture are historical industries for this state but more recently, Mississippi has made strides in all aspects of the technology market. The Mississippi Department of Employment Security (MDES) has taken full advantage of these technological developments with its own job match app and now a cloud-hosted unemployment insurance (UI) system. The push towards embracing technology has its roots in a shove from a gal named Katrina.

The Appeals Department of MDES by necessity, thanks to the ravages of Hurricane Katrina in 2005, moved its handling of adjudications to telephonic hearings over 13 years ago. The Appeals Department handles appeals for all types of unemployment insurance appeals as well as the Reemployment Services and Eligibility Assessment (RESEA) and Trade Adjustment Assistance (TAA) and Alternative or Reemployment Trade Adjustment Assistance (ATAA/RTAA) programs. However, UI accounts for the majority of hearings held.

We have 14 full-time administrative law judges (ALJs) and one chief ALJ. These ALJs are located all over the state with some in local WIN Job Centers and some working remotely. We have 7 support staff and a support-staff supervisor. The higher authority currently has 2 members with 1 support staff.

In 2018, lower authority resolved 13,655 UI appeal requests. Hearings are conducted by, and recorded through, telephone using a conferencing software package. A party may request an in-person hearing but this rarely occurs. Hearings are scheduled by the Appeals Department. Re-scheduling requirements are fairly liberal to accommodate the parties. The Appeals Department can transfer or re-assign hearings as needed.

To initiate a hearing, a party may contact the Appeals Department by phone, mail or email. The only requirements to

request a hearing are that the requesting party provide enough information to identify the parties and a statement that the party disagrees with the decision issued by MDES.

Parties may submit any of the following for use in the hearing via United State mail, overnight courier, and email: documents, photographs, videos and recordings. The regulations of MDES also require that parties provide copies of what is submitted to MDES for the hearing to the opposing party as well. Documents and photos are numbered electronically using Adobe. Videos and recordings are identified by file name. All documents are maintained in an electronic format, if possible. The electronic "stamping" of documents using Adobe has saved the Appeals Department a significant amount in both time and postage. The stamps are open-source and can be adapted for use by other appeals departments. Please let us know if you would like to use this low tech exhibit stamping system.

Higher authority appeals are handled by our Board of Review, consisting of individuals appointed by the governor. If a party is dissatisfied with the Board of Review's decision, the matter can be appealed to the appropriate Circuit Court. Of the approximately 13,660 UI appeals in 2018, nearly 13% were appealed to the agency's Board of Review. That year, our Higher Authority issued 1,806 decisions.

Our long-range goal is to establish an online portal to allow parties to directly upload exhibits for hearings (documents, videos, recordings and photos). Such a system would streamline the process of receiving exhibits from parties and ensure that all parties timely receive copies of exhibits for the hearing.

I have enjoyed sharing this brief glimpse of Mississippi's Appeals Department with you. If you have any questions about MDES Appeals, please contact me at Gary Holmes, gholmes@mdes.ms.gov.



# Am I right, or am I right? Confirmation bias and other systematic errors in judgment

By Munazza Humayun, Unemployment Law Judge  
and Katie Conlin, Unemployment Law Judge  
Minnesota Department of Employment & Economic Development

Imagine listening to a claimant's testimony explaining her poor attendance: health problems, a sexual assault, an ailing parent living in another state. The claimant is emotional and her testimony seems heartfelt. She mentions that her mother passed away after a long period of sickness, her mother just passed away two weeks ago. When you return to the employer witness for rebuttal testimony, he hesitantly says, "Judge, we gave her bereavement leave for her mother's death four months ago."

*Cue the Law & Order DUN DUN sound effect.*

One unemployment law judge in Minnesota has had a similar hearing. The claimant's story started to fall apart. The judge continued the hearing, and issued a subpoena to the claimant to produce an obituary or death certificate, medical records, and police reports if available. The claimant neither produced the requested documents nor appeared at the next hearing. The judge was astonished at how certain she'd been that the claimant was testifying truthfully until the employer presented clearly conflicting information.

The judge in this case realized she had a bias that perhaps made her prone to believe sympathetic-sounding parties, and that she needed to ask sympathetic-sounding parties hard questions, questions that feel unkind, if there are unexplained inconsistencies.

Biases can sneak up on an unemployment appeals judge. The U.S. Constitution guarantees a fundamental right to due process of law before being deprived of life, liberty or property by a state. An impartial decision-maker is an "essential" element of due process in administrative hearings regarding eligibility for benefits.<sup>1</sup> But impartial decision-making does not simply mean faithfully applying an unambiguous law to a set of facts even when the result seems harsh or unpleasant. Figuring out what events took place; discerning intention, motivation, and causality; deciding whom to believe; and judging whether a person acted reasonably in a given set of circumstances, are all part of our job, and it is here that we might succumb to cognitive biases and rely on mental shortcuts that can lead us astray and seriously disadvantage parties. Assessments of credibility, especially, can make or break a case, and are one of the hardest hurdles for a losing party to overcome on appeal to a higher authority.<sup>2</sup> To make sound decisions, we must understand the operation and influence of cognitive biases and take steps to counter their effects.

## Types of cognitive biases

First, the bad news: we are not as objective as we like to think we are. Research on judgment and decision-making has repeatedly shown that a number of systematic errors plague our judgment every day. The good news, however, is that there are ways to limit the effects of these biases. We begin by summarizing some of the more common sources of error, and then discuss what we can do to avoid or correct for those errors.

### Confirmation bias

We believe what we want to believe. Confirmation bias makes us too critical of evidence that does not support our preferred

conclusion, and not careful enough in scrutinizing evidence that contradicts that conclusion. When presented with evidence that contradicts our beliefs, our impulse is to defend those beliefs rather than to thoughtfully engage with the contrary evidence.<sup>3</sup>

Hearing officers in unemployment insurance hearings are not immune. We might lean toward or against a party even before the hearing, based on our review of exhibits. We may then unconsciously look for ways to confirm that gut feeling during the hearing, overlooking or discounting contrary evidence.

### Bias for coherence

This is the tendency to quickly make a story out of limited evidence without considering what evidence might be missing. We jump to conclusions based on limited evidence, without questioning the quality or quantity of the information presented. Daniel Kahneman, a psychologist who won for the Nobel Prize for his work in behavioral economics, illustrates this phenomenon:

*Consider the following: "Will Mindik be a good leader? She is intelligent and strong ..."*

*An answer quickly came to your mind, and it was yes. You picked the best answer based on the very limited information available, but you jumped the gun. What if the next two adjectives were **corrupt** and **cruel**?*

Take note of what you did not do as you briefly thought of Mindik as a leader. You did not start by asking, "What would I need to know before I formed an opinion about the quality of someone's leadership?"<sup>4</sup>

The answer supplied by our intuition is often endorsed by the more careful and systematic part of our mind, because it is cognitively easy. The bias for coherence may especially distort our judgment when one party in a hearing is represented by counsel or is adept at packaging or framing information so as to tell a persuasive story, and the other is not.

### Halo effect

The "halo effect" is the name psychologists give to the tendency to like or dislike everything about a person. If we believe a person has some positive traits (and we like them), we are likely to believe, without evidence, that the person has other positive traits also, and vice versa.<sup>5</sup> Think of it as a sub-type of the coherence-seeking bias.

In unemployment benefit hearings, a business will often cite multiple, separate infractions as the reason it fired an employee:

Michelle was always argumentative when we told her to do something. Other employees found her to be bossy and abrupt. And she upset a customer by giving the customer the wrong information and then refusing to fix the problem she had created. Be especially careful about fully developing the record with evidence about each separate category of reasons, and be vigilant against the tendency to accept, without much independent evidence, that because a person was curt with coworkers, she must also be more likely to be the kind of person who would give wrong information to customers and refuse to fix a problem she had created.

### **Low blood-glucose levels**

The nervous system consumes more glucose than most other parts of the body, and effortful mental activity depletes glucose levels especially fast. Depleted blood-glucose levels can make us more prone to errors of logic. A study of 1,100 decisions made by eight parole judges in Israel showed that they granted 65% of parole requests that they reviewed immediately after each of their meal breaks. Over the next two hours or so, until their next meal break, the approval rate dropped steadily, to about zero just before the next meal. The cases themselves were presented in random order, and the researchers concluded that fatigue and hunger affected the judges' decision-making.<sup>6</sup> (The effects of depleted glucose levels have been studied in other contexts with similar findings.<sup>7</sup>)

### **Mitigating biases**

Some strategies for reducing the influence of biases on our decision-making are relatively simple. We can try to manage our time and schedule so as to avoid holding hearings or issuing decisions when we are famished or exhausted. Others require more effort. We offer the following suggestions:

#### **1. Ask what critical evidence is missing.**

Are you being told that since the claimant took over as sales manager for the Midwest territory at his former company, sales in that territory plunged, and that it was because he didn't try his best to generate sales? Ask yourself (and the parties) what factors affect sales, whether sales had started declining before he took over that territory, whether sales declined in other territories at the same time they were declining in the Midwest territory, whether the same resources were available to the claimant relative to the size of his territory as those available to other sales managers, etc. The idea is not that you must rule out every imaginable cause

for the decline in sales other than the claimant's lack of effort, but that you should get a reasonably complete picture rather than the tiny (or gerrymandered) slice of it presented by a motivated party.

#### **2. Don't skip steps in syllogistic reasoning (or, as we learned in primary school, show your work).**

When explaining your reasoning, be explicit about why you reached your conclusion. If you can't explain with specificity why a policy violation amounted to a serious violation of a reasonable expectation, or why a claimant's reasons for quitting don't amount to good cause, it's time to pause and consider whether you've jumped to a conclusion without fully considering (or perhaps fully developing) the facts.

For example, it's easy to write this decision: Employer had A policy. Claimant received handbook that contained A policy. Claimant violated A policy by doing B conduct. Claimant's B conduct therefore was C, a serious violation of employer's reasonable expectations.

Not all policies are reasonable. Not all policy violations are serious. And no one can be expected to act perfectly in every situation. So, a stronger decision would also tell us why A policy exists, what the potential consequences of an A policy violation could be, and what alternative conduct claimant should have known to do and could have done instead of B conduct.

#### **3. Make your reasoning about the relative credibility of opposing witnesses explicit in your decision.**

The process of explaining in writing exactly why you believe or don't believe a witness's testimony should help you notice any gaps in your reasoning. It will force you to confront the evidence that does not neatly fit with the coherent story that one part of your brain is telling you to embrace. Spell out how you resolved the major points of conflict in the evidence to arrive at your factual findings.

Resisting and overcoming intuitive impressions is challenging work. But it is also what should set the judge apart from the layperson. Intuition can be an asset at times, but it shouldn't be the only source of a case's outcome.

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<sup>1</sup> *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

<sup>2</sup> In Minnesota, hearing officers' decisions are appealable to the Minnesota Court of Appeals. That court has repeatedly stated its standard of review for unemployment-benefit cases: "We view the [unemployment law judge's] factual findings in the light most favorable to the decision, giving deference to the credibility determination of the ULJ. In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn.App.2006) (citations omitted). Where an unemployment law judge's credibility assessment is explained in the decision, even if briefly, the judge's decision is very likely to be affirmed, absent an error of law.

<sup>3</sup> Carol Tavris & Elliot Aronson, *Mistakes Were Made, But Not By Me: Why We Justify Foolish Beliefs, Bad Decisions, And Hurtful Acts* 26 (2nd Ed. 2015).

<sup>4</sup> Daniel Kahneman, *Thinking, Fast and Slow* 85 (2011).

<sup>5</sup> Kahneman, *supra*, at 81.

<sup>6</sup> For more on this study, see John Tierney, *Do You Suffer from Decision Fatigue?*, N.Y. Times, Aug. 17, 2011, available at <https://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html>.

<sup>7</sup> Kahneman, *supra*, at 45.



# The Benefits of a State Membership

By Kathryn Todd, NAUIAP Membership Committee

A state membership provides a number of great benefits. First, any member gets \$50 off the annual training conference fee. The annual training conference is the signature piece for NAUIAP. It is a three and ½ day conference with topics all geared toward the UI appellate professional, at any agency, in any position. The training covers all the new hot topics in UI, the recent court actions dealing with unemployment and DOL priority topics, budget information and state status.

NAUIAP membership gives all members access to two webinars throughout the year (CLE eligible) on topics selected by the members on which they would like more information. Last year the topics were evidence and ethics. The feedback was phenomenal from both, and this is an area we will be expanding in the future.

Members receive the NAUIAP newsletter three times a year. It contains training topics, recent information from DOL, and articles regarding recent legal topics for example...the marijuana legalization and what it means to unemployment, domestic violence statutes relating to unemployment, and lots of recent articles on the gig economy.

All members have access to the NAUIAP website. This has several benefits. The website includes an archive of newsletters issued in past years, which allows members to review past issues to find training topics or information you may have read but now need more access to, and contact information for the authors of the articles so you can contact them for more expertise or help. The website also contains all previous conference agendas, and materials from the training sessions, again an invaluable resource for future training needs. I recently pulled up an article from a previous conference where a testing expert detailed the new aspects of saliva testing for determining marijuana intoxication for my commissioners who were trying to determine if the testing was sufficient in a case we were reviewing. I would not have had this resource at my fingertips without the NAUIAP website. The website also has a feature where you can post a question and persons from other states can give you information on your topic.

Perhaps one of the most valuable aspects to being a member is the networking potential. At the annual conferences you can meet and form relationships with regional and national Department of Labor staff, and with your counterparts across the country. You have ready access to individuals who you can call or email about nearly any UI-related topic, and members who will reply to your requests for aid. Knowing a vast network of individuals dealing with the same subject area you are working in is invaluable. The Board will also send out an email question to the entire membership list, if asked, to get information on a question or topic of interest to all states.

Last, but not least, the states who are members are the backbone of the NAUIAP organization! Putting on an annual training conference is a huge endeavor and requires lots of volunteer time and effort. The state members provide a valuable resource to all other states by ensuring that the organization thrives and grows. We rely on state members to provide topic feedback, subjects on which they think training would help, and providing a ready source of speakers for the conference. So, in this aspect, I would be remiss if I didn't mention the enormous benefit to the organization and the rest of the states provided by the state members. Thank you!! If you are interested in a state membership, please let me or any member of the NAUIAP Board of Governors know and we will be happy to provide information or assist.

## NAUIAP Board of Governors

### PRESIDENT

Ed Steinmetz (WA)  
(509) 742-5728  
Edward.steinmetz@oah.wa.gov

### PRESIDENT – ELECT

Paul Fitzgerald (MA)  
(617) 626-6433  
Paul.Fitzgerald@massmail.state.MA

### FIRST VICE PRESIDENT

Dan Doherty (MD)  
(410) 570-2032  
Daniel.Doherty@maryland.gov

### SECOND VICE PRESIDENT

John Lohuis (OR)  
(503) 612-4280  
John.R.Lohuis@oregon.gov

### SECRETARY

Melissa Butler (TX)  
(512) 463-2801  
Melissa.butler@twc.state.tx.us

### TREASURER

Dan Doherty (MD)  
(410) 570-2032  
Daniel.Doherty@maryland.gov

### PAST PRESIDENT

Amanda Hunter (FL)  
(850) 487-2685 ext. 140  
Amanda.Hunter@raac.myflorida.com

### AT-LARGE MEMBERS

Kathryn Todd (OH)  
(614) 644-7207  
Kathryn.Todd@jfs.ohio.gov

Jayson Myers (NY)  
(518) 402-0191  
Jayson.myers@uiab.ny.gov

Stefanie Price (IN)  
(317) 232-7175  
saprice@dwd.in.gov

Tim Dangerfield (SC)  
803.737.2653  
tdangerfield@dew.sc.gov

Shawn Yancy (KS)  
(785)-296-5000 ext 2582  
Shawn.Yancy@KS.Gov

# SHOW AND TELL: Thoughts on the Probative Value and Admissibility of Video and Voice Recordings

**Does the surveillance video show the whole truth?**

**Can we admit voice recordings into evidence?**

**Should we, and for what purpose?**

**Here are some thoughts on the value and admissibility of video and audio recordings.**

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## RELIABILITY *of* VIDEO EVIDENCE

By J. S. Cromwell, Chair  
Oregon Employment Appeals Board

I don't know about you, but I regularly hear parties testify that "it's all on the surveillance tapes," and if we'd just review the tape we'd see what "really happened." There's a common perception that a video or digital recording of an event will be the definitive word on what happened. But is that really true?

Ask yourself, was that dress from a few years ago white and gold? Or was it blue and black? The answer could depend on biology – how the photoreceptors in our eyes register the color blue – or the ambient lighting in the photo we viewed.<sup>8</sup> Or on the fact that "[o]ur brain is really good at filling in information that's not actually there. And so the brain is basing what it sees on its own interpretation of the image."<sup>9</sup> If we can all look at the same image of a dress and disagree about what the image displays, though, how confident are we that we can look at a videotaped image to see what "really" happened?

And did you see the moonwalking bear? A popular video about image perception shows two teams, four people wearing white clothing and four wearing black. Each team has a ball, and viewers are instructed to count how many times the team in white clothing passes the ball. The screen then erupts into a frenzy of movement as eight people rapidly pass two balls around while viewers struggle to keep count of how many times the team wearing white passed the ball. The video stops, and the announcer reveals that the team wearing white passed the ball thirteen times – then asks, "But . . . Did you see the moonwalking bear?" Viewers most often did not – the video is then rewound and shown again; now that viewers are not required to focus on one team's ball, and are primed to look for a moonwalking bear instead, viewers can quite clearly see a person in a bear outfit walk to center frame, shake their arms, then moonwalk away. The screen then reads, "It's easy to miss something you're not looking for."<sup>10</sup>

It seems that parties often think if we view video footage of an event, we are in the moment, as though we are eyewitnesses to the event happening on our screens. The problem is, even under the best of circumstances, humans are not reliable eyewitnesses. We see what we're told to look for, and sometimes not all that reliably. Eyewitness testimony is notoriously unreliable and has led to many wrongful criminal convictions. For example, out of the first 130 cases Innocence Project overturned, mistaken eyewitness testimony played a part in 78 percent of the wrongful convictions.<sup>11</sup> Participants in one study were tasked with identifying suspects based upon close-up, high quality video footage of the suspect's face; one-third of the study participants identified the wrong person.<sup>12</sup> The conclusion was that "facial recognition from CCTV can be as prone to error as traditional eyewitness evidence."<sup>13</sup> Even forensic examination of video surveillance tapes can lead to different results. For example, one study compared the

relative accuracy of two methods of estimating suspects' heights based upon surveillance camera footage. The results between the two studies varied from .9 inches to over 2 inches from the individuals' actual heights.<sup>14</sup>

So the question remains, how much should we rely upon video evidence in unemployment insurance hearings to show us what "really" happened?

Video surveillance footage shows what it shows. It is not a completely neutral or unbiased eyewitness, since the human eye and human brain are involved in interpreting the footage, and how we interpret the footage can depend on biology, ambient conditions, our personal experiences, or what we're told we're going to see. That is not to say that video surveillance footage cannot be useful in unemployment hearings. It can be beneficial, for example, by allowing us to visualize the events at issue or orient us to the location at which the events occurred, helping us determine which of the parties' witnesses were actually present during the event at issue, or even helping us resolve conflicts in evidence by providing corroboration of a witness's statement in a hotly contested case.

When considering the benefits video surveillance footage might bring to our work, though, it is also important to also consider its limitations.

The bulk of unemployment insurance hearings, at least in Oregon, are conducted by teleconference. We do not know what the parties look like, and therefore cannot match individuals in video footage to the parties without relying upon the parties to help us interpret the video footage. Likewise, we have rarely ever been to the places shown in the videos, and need the parties to help orient us to the location. We therefore must invite, and even require, partisan interpretation of the video footage before we can start to make sense of what we are seeing on the video.

A variety of other factors might affect the probative value of video footage. Many surveillance systems record grainy black-and-white images with low pixel count and poor lighting. Some security systems are programmed to alternate between different cameras rather than providing viewers with a continuous view of a single location. The size of the room being surveilled and the distance of the camera from the action might affect what we are able to see in the video footage; for example, sharply angled camera placement and a slanted floor might result in a "forced perspective" that makes people seem closer together than they actually were. Time stamps on surveillance video can be tampered with, or just accidentally incorrect, for example, if the system's owner did not set the time stamp feature or forgot to adjust for daylight savings.



Another shortcoming of surveillance footage is that it can be clipped to show only a moment in time without context. Generally speaking, a party will not provide video of a claimant's entire shift just to illustrate what happened during a 30-second block of time, nor would most Administrative Law Judges or Higher Authorities want to admit an 8-hour video into evidence just to view what happened during the 30 seconds at issue. However, that means that the party with control over the unedited footage of an event, and who likely has a vested interest in the outcome of a hearing, is responsible for editing the footage for a hearing. Under those circumstances, the footage is susceptible to being

selectively edited to support that party's position and, possibly, omit important context.

In the end, as in so many things, the probative value of video evidence must be determined on a case-by-case basis. But the next time you're asked to review video surveillance footage to determine what "really" happened, consider the benefits and shortcomings of video footage as evidence, and maybe ask yourself whether or not you missed the moonwalking bear.

## *Do You Hear What I Hear?* **SECRET RECORDINGS BY EMPLOYEES**

By Ana Maria Price, Administrative Law Judge  
Mississippi Department Of Employment Security

Going hand in hand with video surveillance is the rising prevalence of audio recordings in the workplace. Many factors affect the admission of, and weight afforded to, an employee's secret recording of conversations at the workplace. With the ubiquity of smartphones, the capability to record conversations at work is now easier than ever.

To illustrate the unique issues in this area let's use facts from a discharge case from Mississippi. An employee of a furniture store, Campbell, had raised concerns about his work environment to a supervisor, but had received no response. Shortly thereafter, in May of that year, the store manager, Bailey, agreed to meet with Campbell along with Sistrunk, another store employee. During the May meeting, Bailey alleged that Campbell argued with her about recording a previous meeting he had had with Bailey and Sistrunk in March of that year without their knowledge (presumably on his cell phone). The employer asserted that Campbell qualified for termination because during the May meeting, he refused to admit that he had secretly recorded the March meeting. The employer suspended Campbell after the May meeting and subsequently terminated him. Campbell then appealed the denial of his unemployment insurance benefits.<sup>15</sup>

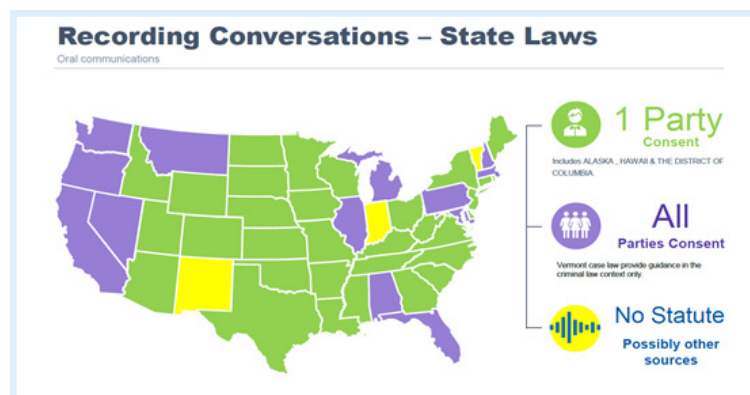
At a hearing on this matter, Campbell admitted that he secretly recorded the March meeting because "[he] had heard some pretty alarming things in that store and I said Lord, I better do something to try to protect myself now. And that's what I did."

If Mr. Campbell desired to admit the recording into evidence, the hearing officer should have ensured that most aspects of a proper foundation exist for the recording. In general, to have a recording admitted, the proponent of the recording, here Mr. Campbell, should establish:

- The chain of custody – the proponent of the recording demonstrates the recording is substantially the same as when it was made;
- The speakers on the recording are properly identified – can be accomplished with voice identification; and,
- The recording meets the consent requirements of the individual jurisdiction.<sup>16</sup>

These foundational hurdles can be difficult for parties to address simply because they are not aware of these requirements. In addition, some of the reliability issues that plague videotape evidence also affect audio recordings. The proponent of a recording needs to satisfactorily identify the parties to the recording and that the recording accurately captured the conversation. After questioning by the Hearing Officer, often the employee or proponent of the recording can present enough information to establish that the mechanical aspects of the recording were proper. Even if the proponent of the recording can establish the factors above to show reliability, though, admission of a recording must still meet state consent requirements.

State consent law directly impacts the admission of an in-person recording. Mississippi is among the 36 one-party consent states.<sup>17</sup> There are currently twelve all-party consent states<sup>18</sup> and three states<sup>19</sup> have not enacted specific statutes regarding recording in-person conversations.<sup>20</sup> The map in **Figure 4** illustrates the current law among the states; the recording will not be admissible and can constitute misconduct if recorded in violation of state law. Federal law<sup>21</sup> provides for one party consent.



**FIGURE 4:**

- The capability of the recording device – easily met if the device sufficiently records sounds;
- The capability of the person making the recording – the operator explains how he or she was able to make the recording with the device and how he or she learned to do so;
- The recording is correct and involves the parties – the recording does not need to be perfect, just reasonably likely that the parties will not be mistakenly identified, or no changes occurred to the recording;
- The recording has been properly preserved since it was made prior to the hearing with no additions, deletions or changes – to ensure no tampering with the recording;

Yet another consideration involves the prohibitions in company policy. In the Mississippi example above, the employer had no policy prohibiting employees making recordings at the workplace. If the employer has such a policy, it must not infringe upon certain employee rights. The National Labor Relations Act<sup>22</sup> (NLRA) safeguards employees making recordings even in violation of company policy. The NLRA guarantees employees the right “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection”<sup>23</sup>, any company policy restricting recordings must allow for the recording these stated purposes. In this context, the burden falls to the employee to show a protected reason encompassed the basis for the recording. The employer’s prohibition on recordings may be too restrictive if it bans all recordings.<sup>24</sup>

Don’t forget, even if the recording is not otherwise admissible, it may be used for impeachment purposes.

As with video evidence, audio recordings presented by the parties have a myriad of factors affecting reliability, admissibility, and weight that must be evaluated on a case-by-case basis. Under the relatively permissive standards in administrative proceedings in most jurisdictions, all but suspect recordings will likely be admitted unless your jurisdiction’s consent threshold is not met. The challenge then comes for you to determine if you really do hear what the proponent hears in the recording.

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<sup>8</sup> Jonathan Mahler, *The White and Gold (No, Blue and Black!) Dress That Melted the Internet*, The New York Times (February 27, 2015).

<sup>9</sup> Dr. Ellen Carpenter, Neuroscience Department Chair, UCLA, <https://www.youtube.com/watch?v=I0OPNOpU6SY>

<sup>10</sup> “Awareness Test! Moonwalking Bear Advert!” <https://www.bing.com/videos/search?q=video+of+moonwalking+gorilla&view=detail&mid=B746A382C4BAEBA5BB20B746A382C4BAEBA5BB20&FORM=VIRE>

<sup>11</sup> Charles W. Bryant, *Why are eyewitnesses unreliable?*, <https://people.howstuffworks.com/eyewitnesses-unreliable.htm>, citing Zak Stambor, *How reliable is eyewitness testimony?*, Monitor on Psychology, April 2006, Volume 37, No. 4, page 26.

<sup>12</sup> Sylvia Rowley, *Wrongful conviction throws spotlight on unreliability of eyewitness evidence*, The Guardian, 8-18-2009.

<sup>13</sup> *Id.*

<sup>14</sup> Jenny Ljungberg and Johanna Sönnnerstam, *Estimation of human height from surveillance camera footage - a reliability study*, Examensarbete i ortopedteknik, 15 hp, Jönköping, maj 2008

<sup>15</sup> *Campbell v. Miss. Employment Security Comm’n*, 782 So.2d 751 (Miss. Ct. App. 2000).

<sup>16</sup> Subject to the law of each state. See Hale, Amanda, *Objecting to Video and Audio Evidence Without Hesitation*, Oct. 7, 2013, [www.jamespublishing.com/2013/objecting-video-audio-evidence-without-hesitation/](http://www.jamespublishing.com/2013/objecting-video-audio-evidence-without-hesitation/)

<sup>17</sup> Miss. Code Ann §49-1-52 (2019); See Figure 1.

<sup>18</sup> See Figure 2.

<sup>19</sup> See Figure 3.

<sup>20</sup> Among these 3 states, a right of privacy may exist that would encompass recordings made without permission. See *infra* note 5.

<sup>21</sup> 18 U.S.C. §2511 requires the consent of only one (1) party to the conversation unless the purpose of the recording is for criminal or tortious intent.

<sup>22</sup> 29 U.S.C. § 151 et seq.

<sup>23</sup> 29 U.S.C. § 157.

<sup>24</sup> *Whole Foods Mkt. Grp. Inc. v. Nat’l Labor Relations Bd.*, (Summary Order, d Cir. June 1, 2017).

## FIGURE 1:

### Most of the states are one party consent states. These states are:

**Alabama** - (AL Code §13A-11-30 & 13A-11-31) a misdemeanor offense for failing to obtain the consent of at least one (1) party prior to recording an in-person or telephonic conversation.

**Alaska** - (Alaska Stat., 42.20.310 (a)) a person may not record a conversation without the consent of a party to the conversation.

**Arizona** - (Ariz. Rev. Stat. 13-3005 (A)(2)) makes it a felony to intercept a communication to which one is not a present, or to aid someone else in doing so without the consent of a party to such conversation.

**Arkansas** - (Ark. Code Ann. 5-60-120(a)) makes it illegal to intercept or record any conversation, whether oral, wire, or telephone, unless the person recording is part of the conversation or a party given prior permission.

**Colorado** - (Colo. Rev. Stat., 18-9-304) makes it a misdemeanor to record a conversation unless the person is either (1) physically present at the conversation or (2) has the consent of at least one (1) of the principal parties thereto.

**Connecticut** - (Conn. Gen. Stat. 53a-187(1)(2) & 53a-189(a)) provides that it is unlawful to record an in-person conversation without the consent of at least one (1) party thereto, by a party not present, by means of any instrument or device.

**Delaware** - (Del. Code Ann. tit. 11 § 1335(a)(2) & (a)(4) & 11 § 2402(c)(4)) address this issue. Title 11 § 1335(a)(2) & (a)(4) address installing a recording device in a place without the consent of the person or persons entitled to privacy there. Title 11 § 2402(c)(4), states that one (1) party present at the conversation may record it, or when permission has been given by one (1) party to the conversation unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States, this State or any other state or any political subdivision of the United States or this or any other state.

**District of Columbia** - (D.C. Code Ann. 23-542(b)(3)) states that one (1) party in the conversation may record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States, any State, or the District of Columbia, or for the purpose of committing any other injurious act.

**Georgia** - (Ga. Code Ann. 16-11-66(a)) This section permits recording of oral conversations where such person is a party or if one (1) of the parties is gives prior consent.

**Hawaii** - (Haw. Rev. Stat. 803-42(8)(b)(3)(A)) permits one (1) party in the conversation to record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

**Idaho** - (Idaho Code 18-6702(d)) permits the interception of a communication if those involved have consented to its recording.

**Iowa** - (Iowa Code Ann.808B.2(2)(c)) states that one (1) party in the conversation may record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of this State or for the purpose of committing any other injurious act.

**Kansas** - (Kan. Stat. Ann. 21-4002(a)(1) & 21-6101, 22-2518 (civil damages)) provides an exception to the statutory right of privacy where one (1) party to the communication consents to its recording.

**Kentucky** - (Ky. Rev. Stat. Ann. 526.010 & 526.020) states that eavesdropping is illegal if a device of any type is used without the consent of at least one (1) party thereto. It is considered a Class D felony.

**Louisiana** - (La. Rev. Stat. 15:1303(b)(4) & 15:1312(civil damages)) allows a conversation to be recorded if the individual making the recording is a party to the conversation or if prior consent has been given and the purpose of the recording does not involve a criminal or tortious act in violation of the Constitution of the United States or this state or any other injurious act.

**Maine** - (Ma. Rev. Stat. Title 15 Sec. 709(4)(B)-(C), 710 (penalty), 711 (civil damages)) requires prior authorization by a sender or receiver of the communication to legally record the communication.

**Minnesota** - (Minn. Stat. Ann 626A.02 § Subd. 2(d)) makes it legal to record or intercept a communication as long as the person is a party in the conversation or one (1) party has given consent.

**Mississippi** - (Miss. Code Ann. 41-29-529, 531(e), 533) permits the interception of oral communication if the person is a party to the conversation or if one (1) party has given prior consent to the conversation and the purpose of the interception does not involve a criminal or tortious act in violation of the Constitution of the United States or of this state or for the purpose of committing any other injurious act.

**Missouri** - (Mo. Ann. Stat. 542.402.2(2) & ,2(3), .418) states that at least one (1) party to the communication may record, or if there is consent from a non-recording party to the conversation consents, then can record communication and disclose it.

**Nebraska** - (Neb. Rev. Stat. 86-290(2)(c)) provides that one (1) party in the conversation may record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United State or of any state.

**New Jersey** - (N.J. Rev. Stat. §2A:156A-3, -4(d),-24) permits recoding of conversations as long as one (1) party, either the person recording or another participant in the conversation, provides consent to the recording unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of this State or for the purpose of committing any other injurious act.

**New York** - (N.Y. Penal Law,250.00(2) & 250.05) states that in order to record a conversation, the consent of at least one (1) party to that conversation must provide prior consent.

**North Carolina** - (N.C. Gen Stat.15A-287(a)(1)) says that it is a Class H felony to intercept communications without having the consent of at least one (1) person involved in the communication. It is also illegal to hire someone else to do it.

**North Dakota** - (N.D. Cent. Code 12.1-15-02(1) & (3)) states it is a Class C felony to intercept a communication using a device without the prior consent of at least one (1) of the parties or participating in the communication.

**Ohio** - (Ohio Rev. Code Ann. 2933.52(B)(4)) provides it is not unlawful to record or intercept a conversation if one (1) person involved in the conversation gives prior consent and the purpose of the recording does not involve a criminal or tortious act in violation of the law or Constitution of the United States or this state or any other injurious act.

**Oklahoma** - (Okla. Stat. Ann. tit. 13.176.4(5)) states that it is not a crime when consent has been given by at least one (1) party, or when the one recording it is involved in the conversation unless the purpose of the recording is to commit a criminal act.

**Rhode Island** - (R.I. Gen. Laws 11-35-21(c)(3)) provides that one (1) party in the conversation may record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

**South Carolina** - (SC Code 17-30-30(C)) makes it a felony to record oral communications unless the person is a party to the communication or where one (1) of the parties to the communication has given prior consent to the recording.

**South Dakota** - (S.D. Codified Laws Ann. §23A-35A-20(1)) states that one (1) person may record a conversation if they are a party to the communication or have the prior consent of a party to the communication.

**Tennessee** - (Tenn. Code Ann. §39-13-601(b)(5)) states that a person who is a party of the conversation can record a conversation, or if they have been given consent unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of this State. A non-electronic conversation may be recorded if privacy cannot be expected.

**Texas** - (Tex. Penal Code Ann. §16.02(c)(4)(A)&(B)) states that recording may occur by anyone involved in the conversation or where consent has been granted by one person. Tex. Civ. Prac. & Rem. Code §123.004 (damages).

**Utah** - (Utah Code Ann. §§77-23a-4(7)(b)) states that one (1) party in the conversation may record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of this State or federal laws.

**Virginia** - (Va. Code Ann. § 19.2-62.(B)(2)) allows a participant in a conversation to record it, or if one member of the conversation gives consent.

West Virginia - (W. Va. Code §62-1D-3(e)) says that recording is legal or disclosing the information when they are a participant or have been given permission from one participant unless the purpose of the recording is to commit any criminal or tortious act in violation of the Constitution or laws of the United States or the constitution or laws of this state.

**Wisconsin** - (Wis. Stat Ann. §§968.31(2)(c) & 885.365(1)) states that one (1) party in the conversation may record it, or when permission has been given by one (1) party unless the communication is recorded for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of this State or for the purpose of committing any other injurious act.

**Wyoming** - (Wyo. Stat. §7-3-702(b)(iv)) says it is legal for one member of the conversation to record, or when one (1) party gives prior consent unless the communication is recorded for the purpose of committing any criminal or tortious act.



## FIGURE 2:

### There are 12 all party consent states:

**California** - (Ca. Penal Sec. 632(a)) makes it a felony for intentionally recording a confidential communication without the consent of all parties thereto. Any such recording is not admissible in any administrative proceeding; Florida - (Fla. Stat. Ch.934.03(2)((a)(3)(d)) - recording is lawful only when all parties to the conversation have given prior consent and the purpose of the recording is to obtain evidence of a criminal act;

**Illinois** - (720 Il. C. S. 5/14-2(1)(a)(1) - (2)) requires that consent of all parties to any private conversation is required to record such conversation;

**Massachusetts** - (Mass. Gen. Laws Ch. 272 Sec. 99(B)(4)) requires prior consent of all parties to a private conversation;

**Maryland** - (MD. Code Cts. & Jud. Proc. 10-402(3)) permits a party to a conversation to record it where all of the parties to the conversation have given prior consent to the recording of the communication unless the interception of the communication is for the purpose of any criminal or tortious act in violation of the Constitution or laws of the United States or of this State. Parties to the conversation must have a reasonable expectation of privacy;

**Michigan** - (Mich. Comp. Laws 750.539(c & 539(h) (civil damages)) states that whether a party is present or not, consent of all parties to a private must be obtained prior to using any device to eavesdrop upon the conversation;

**Montana** - (Mont. Code 45-8-213 (c)) requires that consent of all parties to any private conversation to record such conversation;

**Nevada** - This state, through case law, follows the right to privacy to hold that a party must consent to a recording before it can be used against that party;

**New Hampshire** - (NH Stat. 570-A-2(l)(d)) makes it a felony to willfully disclose the contents of a communication recorded in violation of this statute unless all parties to that communication consent to such recording. Disclosing the contents of a recording after obtaining the consent of some, but not all of the parties to the oral communication is only a misdemeanor;

**Oregon** - (Or. Rev. Stat. 165.543) states that it is a Class A misdemeanor if the person recording the conversation is not a party and where none of the parties to the conversation has given prior consent;

**Pennsylvania** - (18 Pa. Cons. Stat. §5703 & §5704(4)) require all parties to the communication to give prior consent to the recording. Also 18 Pa. Cons. Stat. §§5725 & 5747 address civil liability in this context;

**Washington** - (WA Rev. Code §9.73.030(definition), 9.73.080 (penalty), 9.73.060 (civil damages)) requires consent of all parties to record a telephone or in-person conversation. Making a reasonably clear announcement will secure consent.

## FIGURE 3:

### While these 3 states have no statute, some protections are afforded:

**Indiana** - (Ind. Code Ann. 35-33.5-1-5(2)) addresses only warrants to intercept electronic communications;

**New Mexico** - (N.M. Stat. Ann 30-12-11 & 30-12-11) does not address in-person conversations but states that a civil cause of action exists to a person whose oral communication is intercepted (wiretapping) in violation of sections 30-12-1 through 30-12-11;

**Vermont** - (Chapter 1, Article 11, Vermont Constitution) provides that privacy can be invaded where a person has exhibited an actual expectation of privacy and such expectation is reasonable. It appears from the case law in the criminal context, that recordings of private conversations wholly indoors without the consent of any of the parties would be an invasion of privacy under Vermont law. State v. Brooks, 601 A.2d 963, 964 (Vt. 1991).

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