Approved March 20, 1984
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:00 a.m./~~p.m.~~ on February 29, 1984 in room 526-S of the Capitol.

All members were present except:

All members were present.

Committee staff present:

All present.

Conferees appearing before the committee:
Mr. Ross Byington, Instructor, Haskell Indian Junior College in Lawrence
Mr. Bill Clausen, Chief of Benefits, Dept. of Human Resources
Mr. Lee Kinch, Lawyer, Wichita

H.B. 3019 An act concerning the employment security law; relating to benefit eligibility for employees of certain federal postsecondary educational institutions.

The first speaker was Mr. Ross Byington. Mr. Byington spoke as a proponent on H.B. 3019. See attachments 1, and 2.

Chairman Douville then asked Mr. Bill Clausen to take the speakers stand and answer some questions of the committee members regarding H.B. 3019, in particular, who is paying for the unemployment.

Chairman Douville then asked if there was anyone from out of town who wanted to speak on any bills previously heard. Mr. Lee Kinch took the speakers stand. He spoke as an opponent to H.B. 2936, H.B. 2938 and H.B. 2980. He said these bills are a departure from the efforts to make workers' compensation laws more decent or more reasonable. He then pointed out particular places in the bills and remarked on these.

Because of the illness of Representative Betty Jo Charlton's husband she could not appear before the committee to testify on H.B. 3019. Written testimony of hers was passed out to the committee members. See attachments # 3, 4, 5, 6 and 7.

The meeting was adjourned at 10:00 a.m.

Labor & Industry

2-29-84

Visitors	Representing
Paul Bicknell	DHR
Bill Clawson	DHR
Bill Layes	DHR
Joe FURJANIC	KASB
Stu Entz	IBP
Morris Taylor	DHR/Workers Comp
Richard Smelser	"
Bill Morrissey	"
Bryce Moore	"
	"
George Welch	Self Insurance Fund
Pat Russell	"
[signature]	Ks AFL-CIO
Lee Kinch	Attorney from Wichita Kans.
Harry A Nelson	Ks AFL-CIO
Wayne Maichel	

2-29-84 Att. 1

TESTIMONY BEFORE THE HOUSE COMMITTEE ON LABOR AND INDUSTRY REGARDING HB ~~3090~~ 3019

Mr. Chairman and members of the Committee, my name is Ross Byington, I am an instructor of American History and Political Science at Haskell Indian Junior College in Lawrence. I also serve as the president of Local 45 of the National Federation of Federal Employees which represents all permanent non-supervisory Haskell personnel. This includes facilities management, kitchen, dormatory, clerical, as well as the instructional staff. I appreciate having the opportunity to come before you on behalf of the employees of Haskell.

Haskell Indian Junior College is a federal government installation which is funded through the Bureau of Indian Affairs, the Department of Interior. Our 800-1000 students are members of federally recognized American Indian tribes who individually pay no tuition, book fees, or room or board. All of these expenses are paid from the annual Haskell allocation of funds. Haskell is a comprehensive junior college from the standpoint that we offer both college transfer and several vocational programs.

In recent years due to budget cutbacks throughout the federal government which have impacted Haskell, all non-supervisory Haskell employees now occupy furlough positions. This means that we can be placed in a non-pay, non-duty status for a period of from two weeks to twelve weeks during a fiscal year. This period for most employees has been during the summer months. The past three summers there has been no summer program at Haskell due to the budget limitations. Prior to two summers ago most Haskell employees who were furloughed were able to receive unemployment compensation, except for those who were considered to be "professionals" who were disqualified by the Kansas Department of Human Resources under authorization as interpreted from KSA 44-703. This interpretation by the Department of Human Resources was challenged by three Haskell "professional" employees after they were disqualified during the summer of 1982. Their challenge was eventually upheld in the Seventh District Court, Lawrence, case CV 82-791, decided by Judge Ralph M. King, Jr. in February, 1983. (Attachment 1)

Att. 1

This decision was not appealed further by the Department of Human Resources. As result of this action, all Haskell employees were optimistic about their being eligible to receive unemployment compensation during the anticipated 1983 furlough period. However, in late May, 1983, just prior to the start of the summer furloughs, the Department of Human Resources informed Haskell employees that they would be disqualified from unemployment compensation despite the court ruling. This included "non-professional" employees because they had been included into Kansas legislation, HB 2511, in last session. Subsequently, all Haskell employees were denied unemployment compensation in the summer of 1983, so this prompted new appeals which are currently on the April court docket in Lawrence. Because the Department of Human Resources has dragged its feet in this matter, this litigation will not be decided by the time of the next anticipated furlough period this summer. It would appear that our employees will have to initiate a new round of appeals which is a quite cumbersome task and, I would estimate, a quite costly endeavor for the state as I can illustrate by showing my personal unemployment correspondence. The alternative to this process is before you in HB 3098 which would clarify Kansas statutes regarding Haskell employees. This issue has been further complicated by directives from the U.S. Department of Labor urging state unemployment agencies to not give any special consideration to federal employees in awarding unemployment compensation, but to treat us the same as employees in the private sector. So far, the Department of Human Resources has categorized Haskell employees with Kansas public school teachers which, we contend, is not a valid comparison, and, also, not exactly the private sector. Haskell employees are distinct from public school teachers in the following ways:

(1) We do not operate on a yearly contract as public school teachers. (Attachment 2) We do not have a definite start and stop employment date. We can be furloughed at anytime during the fiscal year and may be called back early or during the furlough period. This makes alternative work possibilities extremely difficult;

(2) We have been unable to have our salaries paid over a twelve-month period because of the uncertainty of our furlough period. Public school teachers may elect to receive their salary over either a nine or a twelve-month period;

(3) Public schools or colleges may have summer programs which employees may elect to use for employment, but we do not have this opportunity. In our situation a summer session is not an income producing activity.

(4) While we are on furlough status we have to continue to pay our share of our federal government health program despite the fact that we are in non-pay status. This non-duty period also lengthens the time that we have to spend before receiving step increases in pay;

(5) When classes are not in session, we are not automatically on vacation as in the public schools. We are expected to be at our jobs during our normal working hours forty hours per week unless we elect to use annual leave.

(6) Federal employees cannot negotiate their salary/pay schedule or fringe benefits as public school employees do. These working conditions are established through federal legislation.

In conclusion, Haskell employees believe that we should be entitled to unemployment compensation as other laid-off employees because we are in a non-pay status. We further believe that it should be up to our elected officials at the state level to determine what the Kansas state policies should be.

Thank you for allowing me to address this committee, the Haskell employees do appreciate your time and efforts regarding this matter. I would be glad to answer any questions which you might have for me at this time.

Ross Byington

ATTACHMENT 1

LAWRENCE JOURNAL-WORLD Tuesday, February 8, 1983 Page 8

Ruling grants unemployment benefits for Haskell workers laid off for summer

By MARY HOENK
J-W Staff Writer

A Douglas County District Court judge has reversed a ruling by a state employment review board that now makes three Haskell Indian Junior College employees eligible for state unemployment compensation for the time they were laid off last summer.

The Haskell employees filed a lawsuit in October after a Kansas Department of Human Resources referee and the state's Employment Security Board of Review in Topeka rejected the employees' claims for unemployment compensation.

The employees are Bobby D. Ratliff, a technical drafting instructor; Garry R. Martin, a dormitory supervisor; and John L. Thomas, a welding instructor.

THE HASKELL adminstration laid off instructional employees this summer in an effort to save money in the face of federal fund cutbacks. The employees union has challenged Haskell's authority to do so and a federal mediator is expected to make a decision in that case sometime this month.

Haskell President Gerald Gipp said he hadn't learned any specifics of the employment compensation lawsuit.

"I doubt it will have an effect on my decision (for future layoffs). My decision will be based on the budget and programatic needs here," he said.

He said Haskell doesn't keep track of how many people file, receive or are denied unemployment compensation.

Marlin White, the attorney for the state Employment Security Board of Review, said the decision would only apply to those Haskell employees who challenged the review board's decision in the lawsuit.

White said the case "was a close question" but he didn't know if the review board would appeal the decision. As a general rule, the board seldom appeals a district court ruling, he said.

White said Kansas law says that in the educational field, unemployment compensation can't be granted during a period of time between semesters if there is a reasonable assurance that the employee will be rehired.

In their brief, the Haskell employees claimed the junior college did not fit under the statute's definition of "educational institution" because Haskell doesn't recognize semesters or terms, and the federal employees work on a 12-month basis without a summer recess.

JUDGE RALPH M. King's opinion, issued last Thursday, reversed the review board's decision partly because Haskell doesn't meet the state law's definition of an "institution of higher education."

Ratliff, who has worked at Haskell since 1965, said of the judge's decision, "We were deserving of this. We had nothing to lose and something to gain from it."

Ratliff was laid off for three weeks last summer. "Had I realized that when I worked for the federal government there was a possibility that I would get laid off every summer, I wouldn't have taken the job. It's downgraded this job. Some people have already left and a number of people are looking for jobs, including myself."

Thomas, who was laid off for 10 weeks this summer, said, "It was a traumatic experience for a lot of people. This will soften them up a bit."

Martin, who works as a dormitory counselor, would not comment on the judge's decision and said he preferred not to respond to a question on the length of his layoff.

ATTACHMENT 2

Sen. Jesse Helms, R-N.Car., has made such a charge and the Senate last year adopted his amendment to have the Office of Personnel Management oversee a study of the comparability of Foreign Service pay with civil service pay. However, the amendment was dropped in conference with the House. The Senate committee, however, will review the Foreign Service pay issue early this year.

POSTMASTERS—Walter J. Shanley, retired postmaster of Queens, N.Y., has been appointed legislative chairman of New York State for the National Association of Postmasters (NAPUS).

SENATE PAY VOTE DOESN'T AFFECT U.S. WORKERS—Although the House will probably go along with the Senate in voting to repeal the 3.5 percent congressional pay raise, such repeal will not affect federal workers and presidential and other political appointees whose 3.5 percent increase went into effect last month.

FEDERAL JOB IS NO CONTRACT—The U.S. Court of Claims says that federal jobs cannot be considered "contracts" between employees and the government and thus fired employees cannot bypass regular administrative appeals by going directly to the federal courts. It held that only persons with contracts with a private firm or a special contract with the government can bring their cases directly to the court. It said firings must be challenged first through arbitration or through appeals to the Merit Systems Protection Board. *(Orona v. U.S. 663-82C).*

NEW FSIP CHIEF—The White House has named Roy M. Brewer, a longtime friend and ally of President Reagan dating from the days when they both headed film industry unions, to be chairman of the Federal Services Impasses Panel. The FSIP has the final word on negotiation stalemates between federal unions and management. Brewer in later years was a labor relations consultant to Walt Disney Studios, an official with Allied Artists Corporation and president of the Motion Picture Industry Council. FSIP is a unit of the Federal Labor Relations Authority.

FIRING HANDBOOK BEST SELLER, DECLARES DEVINE—Sold out are the first two printings totaling 150,000 copies of "Taking Action on the Problem Employee," an Office of Personnel Management handbook on cracking down on unsatisfactory employees. OPM Director Donald J. Devine says "one of OPM's most sought-after publications" is entering "an unprecedented third printing."

In a recent press release, he poses the rhetorical question—"Virtually impossible for a federal agency manager or supervisor to take action against a problem employee?"—then answers it with a resounding—"Not so." Devine contends that both supervisory and nonsupervisory employees can improve their performance by studying the publication (OPM Document No. 139-35-1). (Address inquiries to Cynthia Field, (202) 254-5517.)

A White House task force recently reported that during the period April through September 1983, 471 employees were given written reprimands, 608 were demoted, 174 suspended and 389 fired, which was a significant increase in all these disciplinary categories over the previous six-month period.

Considering those relatively low numbers, either the 2.1 million federal employees don't misbehave all that much, or disciplining them must not be quite as easy as the OPM director seems to believe.

*(The Comptroller General has ruled that federal departments and agencies may purchase subscriptions to the *Federal Employees' News Digest* with government funds. The decision is No. B-185591, issued May 5, 1976.)

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DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
JUDICIAL CENTER
LAWRENCE, KANSAS 66044

RALPH M. KING, JR., Judge
First Division

WM. J. HALLERAN, C.S.R.
Reporter

EARL J. WILSON
Bailiff

CV 82-791 Bobby D. Ratliff, et al vs. Employment Security Board of Review, et al

MEMORANDUM DECISION

This is a combined appeal by three employees of Haskell Indian Junior College from a finding of the Employment Security Board of Review of the State of Kansas that they are ineligible for unemployment benefits because of the application of KSA 44-706. Haskell is operated by the Bureau of Indian Affairs under the Department of the Interior of the United States of America. Two of the employees are instructors, and one (Martin) is a counselor. They were briefly terminated in one form or another due to a cutback in federal funds and then were rehired. These facts are not in dispute.

The sole issue is the application of KSA 44-706(i) and whether it disqualifies them from benefits under the Kansas Employment Security Law, KSA 44-701, et seq.

Under KSA 44-706 an individual is disqualified for benefits:

> "(i) For any week of unemployment on the basis of of service and instructional, research or principal administrative capacity for an educational institution as defined in subsection (v) of KSA 44-703 and amendments thereto, if such week begins..."

The precise question of law is whether Haskell is an "educational institution."

KSA 44-703(v) defines an educational institution as follows:

> "(v) 'Educational institution' means any institution of higher education, as defined in subsection (u) of this section, or any institution in which participants, trainees or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of

Atch. 2

> an instructor or teacher and which is approved, licensed or issued a permit to operate as a school by the state department of education or other government agency that is authorized within the state to approve, license or issue a permit for the operation of a school. The courses of study or training which an educational institution offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation."

There are two ways to bring Haskell within this definition. The first is if it is an "institution of higher education" under KSA 44-703(u), suffice it to say the record is void of any testimony applicable to section (u)(1)-(u)(3). Only the appellation "junior college" suggests (u)(5) might be applicable, but the precise language of the statute does not say junior colleges. It has long been the law in Kansas that when the statute is plain and unambiguous, there is no room left for judicial construction so as to change the language employed therein. Avers vs. Commissioners of Trego, 37 Kan. 240. In the absence of any finding of fact by the administrative tribunal demonstrating the applicability of KSA 44-703(u) one must conclude Haskell does not meet the statutory definition.

The second way to bring Haskell within the definition of KSA 44-703(v) is if it is "approved, licensed, or issued a permit to operate as a school by the state department of education or other government agency that is authorized within the state to approve license or issue a permit for the operation of a school." Again, the record is void of any testimony upon which to predicate such a factual finding. Although the Board does not make the argument, conceivably it might be argued that "other govenment agency" might refer to the Department of the Interior of the federal government, and thus there would be some record to support the Board's finding. It would seem, however, that if there were some uncertainty in this regard the application of the statutory rule of construction known as the doctrine of the ejusdem generis would make it abundantly clear that a state agency was what the legislature had in mind. Parman vs. Lemmon, 119 Kan. 323, 327.

The finding of the Board that the plaintiffs are disqualified under KSA 44-706 is not supported by the evidence and its order is hereby set aside pursuant to KSA 44-709.

This Memorandum Decision will serve as a Journal Entry. Costs are assessed to the defendants.

District Judge

cc: Robert W. Fairchild
Marlin A. White
Court Reporter

#3

TESTIMONY OF BETTY JO CHARLTON BEFORE THE

HOUSE LABOR AND INDUSTRY COMMITTEE ON HOUSE BILL 3019

HB 3019 ON PAGE 16 UNDER (u)(4) SPECIFICALLY EXEMPTS FEDERAL SCHOOLS FROM THE DEFINITION OF INSTITUTIONS OF HIGHER LEARNING FOR THE PURPOSES OF UNEMPLOYMENT BENEFITS. HASKELL JUNIOR COLLEGE IS THE ONLY SCHOOL IN THE STATE THAT FALLS UNDER THE DEFINITION IN THE NEW LANGUAGE.

HASKELL EMPLOYEES, FACULTY AND NON-FACULTY, ARE HIRED AND PAID ON A FULL-YEAR BASIS. IN THE PAST, SUMMER SCHOOL HAS BEEN USUALLY HELD. EVEN WHEN SUMMER SCHOOL WAS NOT HELD, THE EMPLOYEES WORKED THROUGHOUT THE YEAR EXCEPT FOR VACATIONS. WHEN SUMMER SCHOOL WAS HELD THE INSTRUCTORS TAUGHT; WHEN SUMMER SCHOOL WAS NOT HELD THEY PERFORMED OTHER DUTIES. BUT THEY ALWAYS WORKED 12 MONTHS AND WERE PAID 12 MONTHS.

IN 1982, THE FEDERAL GOVERNMENT CUT THE BUDGET OF THE BUREAU OF INDIAN AFFAIRS. THE REDUCTION OF FUNDS APPLIED TO HASKELL RESULTED IN NO SUMMER SCHOOL SESSION AND THE "FURLOUGHING" OF NEARLY ALL EMPLOYEES, BOTH TEACHING AND NON-TEACHING.

AT THAT TIME, ALL EMPLOYEES EXCEPT TEACHERS AND ADMINISTRATORS AT INSTITUTIONS OF HIGHER EDUCATION IN KANSAS WERE ELIGIBLE FOR UNEMPLOYMENT COMPENSATION DURING THE SUMMER. NEVERTHELESS, ALL HASKELL EMPLOYEES WERE DENIED COMPENSATION. THREE EMPLOYEES APPEALED THE DETERMINATION, EXHAUSTED THEIR ADMINISTRATIVE REMEDIES, AND WOUND UP IN DOUGLAS COUNTY DISTRICT COURT. THE COURT DECIDED FOR THE EMPLOYEES, ON THE GROUND THAT HASKELL DID NOT FALL WITHIN THE DEFINITION IN THE STATUTE.

IN 1983, THE LEGISLATURE CHANGED THE STATUTE TO INCLUDE TEACHERS AND ADMINISTRATORS IN THE DISQUALIFICATION. HASKELL TEACHERS AND OTHER EMPLOYEES WERE AGAIN ON "FURLOUGH" WITHOUT PAY. SOME OF THE EMPLOYEES AGAIN APPEALED. THE 1983 APPEAL IS NOW IN THE DISTRICT COURT, BUT THE CASE HAS NOT YET BEEN CALLED.

I INQUIRED LAST FALL, AT THE DEPARTMENT OF HUMAN RESOURCES, WHY THE DECISION OF THE DISTRICT COURT HAD NOT BEEN FOLLOWED FOR THE 1983 SUMMER FURLOUGHS. THE DEPARTMENT'S ANSWER TO MY QUESTION IS ATTACHED.

YOU WILL NOTE THAT THE DEPARTMENT DENIED BENEFITS ON TWO GROUNDS: 1) ADMINISTRATORS DO NOT HAVE TO FOLLOW COURT DECISIONS AND 2) THE DEPARTMENT IS BOUND TO FEDERAL CONFORMITY.

Atch. 3

I HAVE ASKED THE COMMITTEE TO INTRODUCE AND ACT ON HB 3019 BECAUSE I BELIEVE IT WAS THE INTENT OF THE LEGISLATURE IN KSA 44-70 TO DENY UNEMPLOYMENT BENEFITS TO SCHOOL EMPLOYEES WHO HAVE 12 MONTHS CONTRACTS AND WHO ARE PAID 12 MONTHS OF THE YEAR BUT WORK AT THEIR SCHOOL JOBS ONLY 9 MONTHS OF THE YEAR. I DO NOT BELIEVE IT WAS LEGISLATIVE INTENT TO INCLUDE HASKELL PERSONNEL, WHO DO NOT HAVE CONTRACTS, WHO ARE PAID ON A 12 MONTHS BASIS TO WORK 12 MONTHS A YEAR, AND WHO THEREFORE WHEN LAID OFF FOR 3 MONTHS HAVE NO INCOME.

AS TO THE DEPARTMENT'S POSITION, PERHAPS THE DEPARTMENT DOES NOT HAVE TO FOLLOW COURT DECISIONS BUT THERE IS NO REASON WHY THEY MAY NOT.

FEDERAL LAW AND FEDERAL RULES AND REGULATIONS SEEM TO PROVIDE THAT UNEMPLOYMENT BENEFITS FOR FEDERAL EMPLOYEES ARE SUBJECT TO STATE LAW. THE DETERMINATIONS MADE BY THE DEPARTMENT IN REGARD TO BENEFITS FOR FEDERAL EMPLOYEES ARE SUBJECT TO STATE LAW AND TO FEDERAL REGULATIONS. THE FEDERAL REGULATIONS ARE PROCEDURAL - THEY SET OUT THE PROCEDURES THE KANSAS DEPARTMENT OF HUMAN RESOURCES SHALL FOLLOW IN REPORTING ITS DETERMINATIONS TO THE FEDERAL GOVERNMENT.

IT SEEMS TO ME THERE IS NO REASON HASKELL EMPLOYEES SHOULD HAVE TO GO THROUGH THE APPEAL PROCESS EVERY YEAR. THEIR 1982 CASE WAS DECIDED IN APRIL 1983. THEIR 1983 CASE MAY NOT BE DECIDED UNTIL THE LEGISLATURE ADJOURNS THIS YEAR. I BELIEVE WE CAN GIVE THESE EMPLOYEES RELIEF WITH THIS BILL, CLARIFYING THE DEFINITION AND CODIFYING THE COURT DECISION IN THE STATUTES.

KANSAS DEPARTMENT OF
Human Resources
OFFICE OF THE SECRETARY

401 TOPEKA AVENUE TOPEKA, KANSAS 66603
913-296-7474

October 11, 1983

Honorable Betty Jo Charlton
Representative, Forty-sixth District
State of Kansas
1624 Indiana Street
Lawrence, KS 66044

RE: Your letter dated
13 September 1983

Dear Representative Charlton:

The court apparently made a decision based upon the contents of the administrative records in those particular cases. It is entirely possible that the facts developed in subsequent cases would require a contrary finding.

It should be noted that the doctrine of "stare decisis" does not apply in administrative matters.

In addition, federal conformity legislation, specifically 5 U.S.C. 8501, 8502, and 20 C.F.R. 609.9(6), 609.3(d), requires the agency to act within a prescribed manner. Should the agency be out of conformity, it stands to lose federal funding.

I trust this answers your question.

Sincerely yours,

Jerry R. Shelor
Secretary of Human Resources

JRS:sk

KANSAS DEPARTMENT OF
Human Resources
OFFICE OF THE SECRETARY

401 TOPEKA AVENUE TOPEKA, KANSAS 66603
913-296-7474

54

September 2, 1983

Honorable Betty Jo Charlton
Representative, Forty-sixth District
State of Kansas
1624 Indiana Street
Lawrence, KS 66044

RE: Your letter dated:
23 August 1983

Dear Representative Charlton:

In answer to paragraphs one and two of your letter, please be advised that H.B. 2511, which amended K.S.A. 44-706 (j), was enacted into law on 28 April 1983. This amendment required denial of benefits to all educational institution employees who performed services in any capacity other than service in an instructional, research or administrative capacity. Therefore, the nonprofessional employees could have received benefits if they were employees of an institution of higher education for services performed prior to 28 April 1983, but not for services performed thereafter. This would explain why the "dormitory house mother among others", as mentioned within your letter, received benefits last year but not this year.

In respect to the "three teachers", agency records reveal that they were originally denied benefits and thereafter appealed that denial of benefits to the District Court of Douglas County, after exhausting all administrative remedies under K.S.A. 44-709. The District Court ruled that a junior college was not an institution of higher education within the meaning of K.S.A. 44-703(u) and ordered payment of benefits.

Turning to paragraph three of your letter, any legislation which would exempt certain educational institution employees from disqualification because they were paid on a nine or twelve month schedule when they were not performing services for the entire period would be contrary to federal conformity requirements.

In reference to K.S.A. 44-706(i) and (j), these sections have no relationship to a schedule or method of payment for periods when individuals actually perform services, but specifically relate to a week of unemployment if such week begins during two successive academic years or terms.

Atch. 4

In reply to paragraph four concerning the pending appeals, I have been informed that they have been scheduled for hearing during the week of September 12, 1983. The hearings are being held in abeyance at the request of the attorney who apparently is representing all claimants from this institution.

I have attached, for your pursual, a sample copy of the determinations that were issued to the Haskell College employees which denied benefits under K.S.A. 44-706 (i) and (j). Please note the federal statutory requirements that are mandated upon the agency.

If you have further questions, please feel free to contact me.

Sincerely,

Jerry R. Shelor
Secretary

JRS:sk

Encl.

KANSAS DEPARTMENT OF
Human Resources
OFFICE OF THE SECRETARY

401 TOPEKA AVENUE TOPEKA, KANSAS 66603
913-296-7474

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Representative, Forty-sixth District
State of Kansas
1624 Indiana Street
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13 September 1983

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I trust this answers your question.

Sincerely yours,

Jerry R. Shelor
Secretary of Human Resources

JRS:sk

STATE OF KANSAS

BETTY JO CHARLTON
REPRESENTATIVE, FORTY-SIXTH DISTRICT
DOUGLAS COUNTY
1624 INDIANA STREET
LAWRENCE, KANSAS 66044
913-843-5024

TOPEKA

HOUSE OF
REPRESENTATIVES

ROOM 272-W
STATE CAPITOL BUILDING
TOPEKA, KANSAS 66612

August 23, 1983

Secretary, Department of Human Resources
401 Topeka
Topeka, Kansas

Dear Mr. Secretary:

Haskell Institute, the federal school for native Americans at Lawrence, lies in my district and many Haskell staff families live in the district. Last year, because of federal budget cuts, Haskell employees were "furloughed" for the summer. Several applied for and received unemployment compensation. This year there were furloughs again but no compensation. They were told at the local employment office it was because of a change in state law.

Since Haskell is a Junior College, employees other than instructional, research and administrative are affected by HB 2511, Sec. 2(j), p. 987 of the 1983 Session Laws. Faculty members are disqualified by Sec. 2(i), and there has been no change affecting them. Nevertheless, three teachers and one dormitory housemother, among others, received benefits last year but not this year.

Unlike public school employees who are hired to work nine months a year but are paid twelve months, these employees are hired to work twelve months a year and to be paid twelve months. They have no income at all when they are laid off for the summer through no fault of theirs. If this was taken into consideration last year in granting some faculty members benefits, why not again this year? And why not for employees who are disqualified under new Sec. 2(j)? As you are interpreting the statute, would legislation be necessary to exempt employees who are hired for twelve months from the definition of employees of educational institutions?

The Haskell employees who were laid off for the summer are now returning to work. They appealed within sixteen days of the mailing date of denial of benefits in June. They have continued sending cards for their claims weekly as they were instructed to do by the local employment office. Nearly two months time has elapsed and they have had no word about their appeals. I would very much appreciate answers to my questions and an explanation of the time required for consideration of appeals from you or someone in the appropriate division of the department.

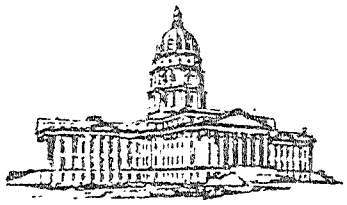
Very truly yours,

Betty Jo Charlton

copies: Mr. & Mrs. Dempsey Micco
Sharon Atkinson
Rep. Arthur Douville

STATE OF KANSAS

BETTY JO CHARLTON
REPRESENTATIVE FORTY-FOURTH DISTRICT
DOUGLAS COUNTY
1424 INDIANA STREET
LAWRENCE, KANSAS 66044
913-843-5024



TOPEKA

HOUSE OF
REPRESENTATIVES

ROOM 291-W
STATE CAPITOL BUILDING
TOPEKA, KANSAS 66612
913-296-7639

September 13, 1983

Jerry R. Shelor, Secretary
Department of Human Resources
401 Topeka Avenue
Topeka, Kansas 66603

Re: Denial of Benefits to Furloughed Employees
Haskell Indian Junior College, Lawrence, Kansas

Dear Mr. Shelor:

Thank you for your letter of September 2nd. I have one more question. Why did not the decision of the Douglas County District Court on the 1982 denial of benefits govern the department's decision on the 1983 applications for compensation?

The court decided for the claimants, not only on the ground that "junior college" is not mentioned in the statute on definitions but also on the ground that this particular school is not "approved, licensed, or issued a permit. . ." by the state.

I am enclosing a copy of the court's decision.

Yours very truly,

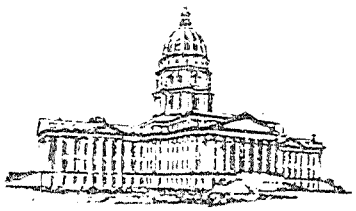
B. J. Charlton

Betty Jo Charlton

Copy to Priscilla

STATE OF KANSAS

BETTY JO CHARLTON
REPRESENTATIVE, FORTY-SIXTH DISTRICT
DOUGLAS COUNTY
1624 INDIANA STREET
LAWRENCE, KANSAS 66044
913-843-5024



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STATE CAPITOL BUILDING
TOPEKA, KANSAS 66612

HOUSE OF
REPRESENTATIVES

August 23, 1983

Secretary, Department of Human Resources
401 Topeka
Topeka, Kansas

Dear Mr. Secretary:

Haskell Institute, the federal school for native Americans at Lawrence, lies in my district and many Haskell staff families live in the district. Last year, because of federal budget cuts, Haskell employees were "furloughed" for the summer. Several applied for and received unemployment compensation. This year there were furloughs again but no compensation. They were told at the local employment office it was because of a change in state law.

Since Haskell is a Junior College, employees other than instructional, research and administrative are affected by HB 2511, Sec. 2(j), p. 987 of the 1983 Session Laws. Faculty members are disqualified by Sec. 2(i), and there has been no change affecting them. Nevertheless, three teachers and one dormitory housemother, among others, received benefits last year but not this year.

Unlike public school employees who are hired to work nine months a year but are paid twelve months, these employees are hired to work twelve months a year and to be paid twelve months. They have no income at all when they are laid off for the summer through no fault of theirs. If this was taken into consideration last year in granting some faculty members benefits, why not again this year? And why not for employees who are disqualified under new Sec. 2(j)? As you are interpreting the statute, would legislation be necessary to exempt employees who are hired for twelve months from the definition of employees of educational institutions?

The Haskell employees who were laid off for the summer are now returning to work. They appealed within sixteen days of the mailing date of denial of benefits in June. They have continued sending cards for their claims weekly as they were instructed to do by the local employment office. Nearly two months time has elapsed and they have had no word about their appeals. I would very much appreciate answers to my questions and an explanation of the time required for consideration of appeals from you or someone in the appropriate division of the department.

Very truly yours,

Betty Jo Charlton

copies: Mr. & Mrs. Dempsey Micco
Sharon Atkinson
Rep. Arthur Douville

Summer 1982 #5

KANSAS DIVISION OF EMPLOYMENT

NOTICE OF DETERMINATION

Social Security No.

Address Correspondence To:

District Job Ins. Office #3
1430 S.W. Topeka Ave.
Topeka, Kansas 66603

Code: 28400 BYB:

Determination
Mailing Date:

ISSUE: K.S.A. 44-706. An individual shall be disqualified for benefits: (i) "For any week of unemployment on the basis of service in an instructional, research or principal administrative capacity for an educational institution as defined in subsection (v) of K.S.A. 44-703 and amendments thereto, if such week begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms during such period or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs such services in the first of such academic years or terms and there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms."

FINDINGS: The claimant is an employee of Haskell Indian Junior College. This institution of higher education, as defined in K.S.A. 44-703(u), is a Federally-operated educational institution under the direction of the Department of Interior, Bureau of Indian Affairs. Either all or a majority of the claimants' wages in the base period are from Federal employment, and has therefore filed a claim for Unemployment Compensation for Federal Employees, (UCFE). The claimant has been temporarily separated from employment in the period of time between successive academic years or terms and has been given a specific return to work date.

Employees of schools operated by Federal government agencies such as the Department of Interior and the Departments of the Army, Navy, and Air Force (Dependents schools) are Federal employees and are covered for UCFE purposes under 5 U.S.C. 8501. The provision in 5 U.S.C. 8502 specifically requires State Employment Security Agencies to take claims and pay benefits to Federal civilian personnel "....in the same amount, on the same terms, and subject to the same conditions...." of the state law which applies to unemployed claimants who worked in the private sector. These specific conditions were further stated in 20 CFR 609.9(6) and 20 CFR 609.3(d), including "the terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCFE and claims for waiting period credit. The provisions of the applicable State laws which shall apply include, but are not limited to:....(6) Disqualifications.; and "An individual shall be eligible to receive a payment of UCFE or to waiting period credit with respect to a week of unemployment if:....(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this Part or the applicable State law, with respect to that week of unemployment.", respectively. (emphasis added)

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DETERMINATION: The claimant worked for an educational institution in the last semester or term, in an instructional, research, or principal administrative position. The claimant has a contract or reasonable assurance for work in a similar capacity for the next academic year or term.

The claimant is disqualified for the period between successive academic years or terms in accordance with K.S.A. 44-706(i) as stated fully above. The disqualification period begins_____.

APPEAL RIGHTS:

This determination becomes final sixteen (16) days after the determination mailing date above, unless appealed in writing to the referee on or before the final date.

If you disagree with this determination, you may write a letter giving the date of this notice, the claimant's social security number, and your specific reasons for appealing, or you may complete appeal forms. The prescribed appeal forms may be obtained from any office of the Division of Employment, where advice in filing the appeal is also available, or from our administrative office, 401 Topeka Avenue, Topeka, Kansas 66603.

IMPORTANT TO THE CLAIMANT: If you appeal, continue to file claims as long as you remain unemployed.

By:_____
Deputy Examiner

Last Employer:

Haskell Indian Junior College
Lawrence, Kansas 66044

Department of Interior
Bureau of Indian Affairs
P.O. Box 2026
Albuquerque, New Mexico 87103

Summer 1983

KANSAS DIVISION OF EMPLOYMENT

NOTICE OF DETERMINATION

Social Security No.

Code: 28400 BYB:

Address Correspondence to:

District Job Ins. Office #3
1430 S.W. Topeka Ave.
Topeka, Kansas 66603

Determination
Mailing Date:

ISSUE: K.S.A. 44-706. An individual shall be disqualified for benefits: (j) For any week of unemployment on the basis of service in any capacity other than service in an instructional, research, or administrative capacity in an educational institution, as defined in subsection (v) of K.S.A. 44-703 and amendments thereto, if such week begins during the period between two successive academic years or terms if the individual performs such services in the first of such academic years or terms and there is a reasonable assurance that the individual will perform such services in the second of such academic years or terms, except that if benefits are denied to the individual under this subsection and the individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this subsection.

FINDINGS: The claimant is an employee of Haskell Indian Junior College. This institution of higher education, as defined in K.S.A. 44-703(u), is a Federally-operated educational institution under the direction of the Department of Interior, Bureau of Indian Affairs. Either all or a majority of the claimants' wages in the base period are from Federal employment, and has therefore filed a claim for Unemployment Compensation for Federal Employees, (UCFE). The claimant has been temporarily separated from employment in the period of time between successive academic years or terms and has been given a specific return to work date.

Employees of schools operated by Federal government agencies such as the Department of Interior and the Departments of the Army, Navy, and Air Force (Dependents schools) are Federal employees and are covered for UCFE purposes under 5 U.S.C. 8501. The provision in 5 U.S.C. 8502 specifically requires State Employment Security Agencies to take claims and pay benefits to Federal civilian personnel "....in the same amount, on the same terms, and subject to the same conditions...." of the state law which applies to unemployed claimants who worked in the private sector. These specific conditions were further stated in 20 CFR 609.9(6) and 20 CFR 609.3(d), including "the terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCFE and claims for waiting period credit. The provisions of the applicable State laws which shall apply include,

(continued)

FINDINGS: (Continued)

but are not limited to: ....(6) Disqualifications.; and "An individual shall be eligible to receive a payment of UCFE or to waiting period credit with respect to a week of unemployment if:....(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this Part or the applicable State law, with respect to that week of unemployment.", respectively. (emphasis added)

DETERMINATION: The claimant worked for an educational institution in the last semester or term, in a capacity other than service in an instructional, research, or principal administrative position. The claimant has a contract or reasonable assurance for work in a similar capacity for the next academic year or term.

The claimant is disqualified for the period between successive academic years or terms in accordance with K.S.A. 44-706(j) as stated fully above. The disqualification period begins_____.

IMPORTANT: The claimant is encouraged to file timely weekly claims for the period of unemployment in the event the claimant is not offered an opportunity for reemployment at the start of the next academic year, term or scheduled work period.

APPEAL RIGHTS:

This determination becomes final sixteen (16) days after the determination mailing date above, unless appealed in writing to the referee on or before the final date.

If you disagree with this determination, you may write a letter giving the date of this notice, the claimant's social security number, and your specific reasons for appealing, or you may complete appeal forms. The prescribed appeal forms may be obtained from any office of the Division of Employment, where advice in filing the appeal is also available, or from our administrative office, 401 Topeka Avenue, Topeka, Kansas 66603.

IMPORTANT TO THE CLAIMANT: If you appeal, continue to file claims as long as you remain unemployed.

By:_____
Deputy Examiner

Last Employer:

Haskell Indian Junior College
Lawrence, Kansas 66044

Department of Interior
Bureau of Indian Affairs
P.O. Box 2026
Albuquerque, New Mexico 87103

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

BOBBY D. RATLIFF, GARRY R. MARTIN, and JOHN L. THOMAS, Plaintiffs,	)	
vs.	)	Case No. CV 82-791
	)	Division No. 1
EMPLOYMENT SECURITY BOARD OF REVIEW OF THE STATE OF KANSAS, and UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	)	

PLAINTIFFS' MEMORANDUM

FACTS

Plaintiffs are all regular, full-time employees of Haskell Indian Junior College. Plaintiff, Martin, is not an instructor, but is employed as a dormitory supervisor. Unlike normal school instructors plaintiffs had previously been employed for a full year basis and with the exception of vacation periods were expected to report for work every day throughout the year. No yearly contract was signed. In all past years plaintiffs and other employees in like positions worked throughout the full year. The plaintiffs are paid on a full-year basis, not nine-month basis as are public or private school employees. A furlough, such as was used here, reduces the salary they normally expect to receive for the year, rather than summer school serving as a supplement to their nine-month salary.

In the past summer school has not been held at Haskell every summer, yet the employees were employed throughout the full year. When summer school was held the instructors taught, when summer school was not held they performed other functions, but they were always employed on a full-year basis.

ARGUMENT

A. HASKELL INDIAN JUNIOR COLLEGE IS NOT WITHIN THE DEFINITION OF "EDUCATIONAL INSTITUTION" CONTAINED IN K.S.A. 44-703(v). Under K.S.A. 44-703(v) an "educational institution" must be "an institution of higher education licensed or issued a permit to

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operate as a school by the state department of education or other government agency that is authorized within the state to approve, license or issue a permit for the operation of a school." Haskell Indian Junior College is operated by the Bureau of Indian Affairs and is not licensed by the State of Kansas. Therefore, it is not within the statute.

B. ARE PLAINTIFFS DISQUALIFIED TO RECEIVE UNEMPLOYMENT BENEFITS BY THE PROVISIONS OF K.S.A. 44-706(i)?

K.S.A. 44-706(i) provides:

> An individual shall be disqualified for benefits: . . . (i) For any week of unemployment on the basis of service in an instructional, research, or principal administrative capacity for an educational institution as defined in subsection (v) of K.S.A. 44-703 and amendments thereto, if such week begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms during such period or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs such services in the first of such academic years or terms and there is a contract or a reasonable assurance that such individual will perform services in any such capacity for an educational institution in the second of such academic years or terms.

1. The plaintiffs never had a contract with Haskell prior to the lay-off in question. Immediately prior to the lay-off the administration asked the employees to come in and announced that they were no longer full-time employees but were now "furlough employees". While it may be argued in the future that there is a contract that the individuals will perform services in such capacity after a lay-off, at the time the decision was made to lay off the claimants no such contract existed. Thus, the situation at hand does not fall within the statute.

2. The statute requires that for disqualification the weeks must begin during the period between two successive terms. Haskell has never recognized a difference between different parts of the school year. Public school teachers and college professors are normally employed for the "academic year" and expect to obtain other employment during the summer or to budget their nine-month salary for a twelve-month period. Haskell employees were not able to do so. Plaintiff Ratliff has been employed by Haskell for

seventeen (17) years. He has been employed and paid for a full year every year, regardless of whether summer school was conducted. Haskell did not recognize "terms" or "academic years". The contract upon which the parties were employed was for a full calendar year and no distinction was made between terms or academic years. When Haskell laid plaintiffs off it breached this contract. This is a situation intended to be covered by the employment security law, unlike the situation of a normal school teacher who plans to seek outside employment in the summer or budgets for the period of no income. In the past there have not been "academic years" or "terms" for employees of Haskell. Thus, the statute does not apply.

3. Plaintiff Martin does not fall within the statute because he is neither an instructor nor a principal administrator. He is a dormitory supervisor. This position is not included in Section 44-706(i).

CONCLUSION

The plaintiffs respectfully request that the Court set aside the findings of the Employment Security Board of Review on the ground that the decision is not supported by the law and the facts in this case.

Respectfully submitted,

RILING, NORWOOD, BURKHEAD &
FAIRCHILD, Chartered
1027 Vermont Street
P. O. Box "B"
Lawrence, Kansas 66044
(913) 841-4700
Attorneys for Plaintiffs

By _____
Robert W. Fairchild

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Memorandum upon Marlin A. White, 1430 S.W. Topeka Avenue, 3rd Floor, Topeka, Kansas 66612, attorney for Employment Security Board of Review of the State of Kansas, by depositing the same in the United States mail, postage prepaid, addressed to said attorney, on this 22nd day of December, 1982.

_____
Robert W. Fairchild

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IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

Filed pursuant to K.S.A. Chapter 44

BOBBY D. RATLIFF GARRY R. MARTIN AND JOHN L. THOMAS	)	
Plaintiffs	)	
v.	)	Case No. 82-791
EMPLOYMENT SECURITY BOARD OF REVIEW	)	
AND	)	
UNITED STATES DEPARTMENT OF THE INTERIOR	)	
Defendants.	)	

MEMORANDUM BRIEF

STATEMENT OF FACTS

The three above plaintiffs hereinafter referred to as claimants have all filed a timely appeal from a decision of the defendant Board finding the claimants ineligible for the receipt of unemployment benefits pursuant to K.S.A. 44-706.

ARGUMENTS AND AUTHORITIES

1. FUNCTION OF THE COURT FOR JUDICIAL REVIEW

K.S.A. 44-709 (i) of the law provides that ". . . In any judicial proceeding under this section, the findings of the Board as to the fact, if supported by the evidence and in the absence of fraud, shall be conclusive, . . ."

The following cases support the proposition that the Supreme Court of Kansas will not enter the arena of admin-

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istrative review, unless it appears from the record that, (emphasis added) ". . . the findings of fact made by the administrative tribunal are not supported by the evidence, or that fraud was present or that an error of law was committed."

In Craig v. Kansas State Labor Commissioner, 154 Kan. 691, 121 p. 2d 203, the Court said:

> ". . . Under the statute the function of the District Court on appeal to it, and of this Court on subsequent appeal, is not to find facts, but only to determine whether the facts found are supported by the evidence before the administrative body." (p. 694)

See also:

Erickson V. General Motors Corporation, Buick-Oldsmobile-Pontiac Division, Kansas City, Kansas, 177 Kan. 90, 276 p. 2d 376 (1054)

Read v. Warkentin 185 Kan. 286, 341 p. 2d 980 (1959)

In Clark v. Board of Review, et al, 197 Kan. 695, 359, p. 2d 856, (1961), the Court said:

> "The findings of the Board as to the fact being supported by the evidence--are by the statute (G.S. 1959 Supp., 44-709 (h)) conclusive on judicial review."

The Court in the Clark case cites with approval the cases of Read v. Warkentin and Craig v. Kansas State Labor Commissioner.

While we feel that the statute is complete and unambiguous in outlining the jurisdiction of appellant courts, we would cite also the cases of Watkins v. Board of Review. 191 Kan 223, 380, p. 2d 329, at Syllabus on page 223 and at page 225; Pickman v. Weltmer, 191 Kan. 543, 382 p. 3d 298, Syllabus 3 at page 543, and at page 547; Chadwick v. Kansas Employment Security Board of Review, 192 Kan. 769, 390 p. 2d 1017, at Syllabus 2 on page 769, and at pages 289 and 290. In the last named case, after setting out the statute above quoted, the Kansas Supreme

Court says:

> "The provisions of the Statute are binding on the District Court and on this Court. In Pickman v. Weltmer, . . . it is stated:
>
> '. . . under G.S. 1961 Supp., 44-709 (h), where a claimant seeks judicial review, findings of fact of the Board of Review are conclusive and may not be set aside by the District Court in the absence of fraud where they are supported by the evidence, and the jurisdiction of the court is confined to questions of the law. (Citations omitted) These cases embrace the rule that judicial review must be made in the light most favorable to the findings and holding of the administrative tribunal. (citation omitted)'"

Under these cases, it would appear the Board's findings are conclusive if supported by any evidence: that whether there is a sufficiency of evidence is strictly a matter of fact and the findings of the Board thereabout are final. (In this connection, see Johnson, et al v. Pratt, et al. 200 S.C. 315, 20 S.E. 2d 865; Moen v. Director of of Division of Employment Security 324 Mass. 436, 85 N.E. 2d 779, 8 A.L.R. 2d 429, which interprets a review statute comparable to that of the law; Lavman v. State Unemployment Comp. Comm. (Or) 117 p. 2d 974, 136 A.L.R. 1468, holding that arguments going to the weight of evidence and not to existence of substantial evidence cannot be considered by the Court.)

These decisions have continued to be affirmed by the latest cases of Zimmerman v. Employment Security Board of Review, 208 Kan. 68 and further in the Boeing Company v. Employment Security Board of Review, 209 Kan. 430, Townsend v. Board of Review, 218 Kan. 320 Yunos v. Employment Security Board of Review , 813 and Farmland Foods v. Emerson I. Abendroth, et al, Employment Security Board of Review, 225 Kan. 742. The cases hereinbefore cited indicate clearly that this court had determined the defendant Board is the

proper party to serve as trier of fact.

In the instant case the evidence clearly indicates that the claimants were in fact unemployed for a short period of time during the usual summer vacation period. All claimants were aware of the fact that they would be reemployed by this employer when school commenced for the fall term. Although claimant's employment situation would be somewhat different than that of a regular type instructor in most school districts within the state, the law does not make any specific exemptions for people that might be engaged in different type of employment contracts or civil service type employment.

The defendant Board is of the opinion that the statutory provisions of K.S.A. 44-706 (i) as completely set forth in the Referee's decision must control the fact situation involved in the instant matters.

CONCLUSION

The defendant Board respectfully submits that the decision of the Board is both legally and factually correct and requests that same be affirmed by the District Court.

Martin A. White

Martin A. White, Attorney