

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE.

The meeting was called to order by Chairman Donald Dahl at 9:00 a.m. on January 31, 2003 in Room 521-S of the Capitol.

All members were present except: Representative Mike Burgess, Unexcused  
Representative Don Hill, Unexcused  
Representative Todd Novascone, Unexcused  
Representative Rick Rehorn, Unexcused  
Representative Dale Swenson, Excused

Committee staff present: Renae Jefferies, Revisor of Statutes  
June Evans, Secretary

Conferees appearing before the committee: James Garner, Acting Secretary, Kansas Department of Human Resources  
Claude Lee, Deputy Secretary, Kansas Department of Human Resources

Others attending: See attached sheet

The Chairman opened the meeting at 9:00 a.m. and stated that Minutes for January 15, 21 and 24 had been distributed. If there are any changes or corrections, please contact either the Chairman or the secretary by Wednesday, February 6. If there aren't any changes, the Minutes will stand as written.

The Chairman asked if there was anyone wishing to introduce bills.

The Chairman announced next week's schedule. The Chairman welcomed Secretary Garner back to the committee.

James Garner, Acting Secretary, Kansas Department of Human Resources (KDHR), stated when he attended a committee briefing earlier the Chairman asked if any legislation would be forthcoming. Two proposals might be coming: (1) making sure that limited liability companies fall under the unemployment insurance laws and (2) a parity issue relating to unemployment insurance.

Secretary Garner introduced Claude Lee, Deputy Secretary, KDHR. Mr. Lee said appearing with him were the Chief of Appeals, Steve Markley, and Chief Unemployment Insurance Judge, Tom Henderson. Backing them up is Chief of Benefits, Marge Baker.

Mr. Lee said he served as the department's Chief of Appeals and before that as an administrative judge for a number of years. Mr. Lee recently returned as a temporary unemployment insurance judge to help with the backlog.

The "Due Process" federal law requires adjudication of unemployment insurance (UI) benefits under the standard of "pay when due." The Unemployment Insurance Call Center examiners find facts and decide whether to pay each claimant UI benefits under K.S.A. 44-706. They also decide whether to charge base period employer's experience rating account under K.S.A. 44-710C). Each of those decisions is called a "determination." The Call Centers are located in Topeka, Kansas City and Wichita. Aggrieved claimants and employers may file an appeal with the Office of Appeals if they do so within 16 days from the mailing date of the examiner's determination.

The Appeals unit docketed 10,200 appeals in 1999; 10,500 appeals in 2000; and 11,637 appeals in 2001. The count rose sharply to 15,500 appeals in 2002 and was second only to the all-time high count in 1992 of 17,200 appeals. At the close of 2002, we had received, but not docketed, a number of new appeal files that, if counted, would have caused 2002 to be a record year. Whether projected on a fiscal or calendar basis, 2003

## CONTINUATION SHEET

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would undoubtedly be the all-time record high year of approximately 18,500 appeals.

The federal standard is that 60% of all decisions on appeals be in the mail within 30 days after the appeal's first postmark. It is a tough but necessary standard.

As the caseload soared, the budget was cut causing staff shrinkage by 18%. A normal docket for each judge was 25 new cases each week. Most judges accepted 35 cases per week. In October budget constraints required layoff of three temporary judges that had been brought in to help. A part-time judge retired. The higher caseload brought greater pressures and two full-time judges were off most of the quarter for medical reasons. On the administration side, the department had to reduce a full-time contract administrative staff person by half. In October, a full-time administrative employee retired. Requests were denied to fill these positions due to the budget.

In two weeks, using the overtime and extra staff, the backlog dropped to 1,900. Today the backlog is down to a level thought impossible just one week ago – 1,680 appeals have not yet been heard.

The department is exploring options to find approximately \$180,000 to help with Appeals' inevitable record numbers. Permanent administrative and law clerk positions are being requested to support judges at a much lower cost. It is estimated that by mid-June the normal workload will be back to 300 cases per week with each set for hearing within two weeks. A decision should be mailed to the parties on the 28<sup>th</sup> day after the new appeal is dropped into the U.S. mailbox (Attachment 1).

Secretary Garner stated the department is funded through federal funds and their normal fiscal year begins October 1. The federal budget has not been enacted but it is hopeful when Congress reconvenes it will be passed. It is unknown how much money the department will receive, perhaps around \$15.4M. The number of cases are so high the department will get contingency funding. After that is received some additional personnel may be hired. We are trying to get \$180,000 from the Advisory Fund .

The Chairman stated next week would be busy with hearings. The meeting adjourned at 9:30 a.m. The next meeting will be February 3, 2003.



**Testimony Before the House Committee on Commerce and Labor**  
**by Claude Lee, Deputy Secretary**  
**Kansas Department of Human Resources - Office of Appeals**  
**January 31, 2003**

Mr. Chairman, and members of the Committee, thank you for the privilege of appearing before you today. My name is Claude Lee. Appearing with me are Chief of Appeals Steve Markley and Chief UI Judge Tom Henderson. Also, backing us up is Chief of Benefits Marge Baker.

I served as the department's Chief of Appeals and before that as an administrative judge for a number of years. Recently, I returned as one of those temporary UI (Unemployment Insurance) Judges to help with the backlog. For that reason, Secretary Garner's first assignment for me was to help our people get through this crisis, and then to testify today so you can know the past, present and future of the problems with Appeals.

First, you should know that from Secretary Garner's first directive every person has worked above and beyond the call of duty in their effort to serve the workers and employers who rely on this law. That is particularly true of the UI Judges who for months have worked countless hours beyond their normal schedules with no additional compensation except for the satisfaction of performing their duty as professionals.

**The "Due Process":** Federal Law requires adjudication of UI benefits under the standard of "pay when due." First, the Unemployment Insurance Call Center examiners find facts and decide whether to pay each claimant UI benefits under K.S.A. 44-705 and K.S.A. 44-706. They also decide whether to charge base period employer's experience rating account under K.S.A. 44-710(c). Each of those decisions is called a "determination." The Call Centers are located in Topeka, Kansas City and Wichita. Aggrieved claimants and employers may file an appeal with the Office of Appeals, if they do so within 16 days from the mailing date of the examiner's determination.

Implicit within the "pay when due" standard is that the department provide the parties adjudicatory "due process," including a hearing from any adverse determination with a decision by an impartial judge resulting from a hearing that includes: the right to receive reasonable notice of the adverse action in writing; the right to a hearing with reasonable notice that includes a permanent verbatim transcript; the

right to be represented by council; the right to testify and examine witnesses under oath; and the right to receive a written decision with findings of fact and conclusions of law; and the right to seek judicial review of any adverse action. Either party can appeal the Judge's decision to the Employment Security Board of Review and then on to the courts.

**The Numbers:** Regulation requires all hearings to be by telephone conference unless one party exercises their right to appear in person before the judge. Thirteen permanent, full-time Unemployment Insurance Judges adjudicate all appeals. These Judges are stationed in Topeka, Kansas City, Overland Park, Pittsburg, Wichita, Hutchinson, Salina and Dodge City. A staff of nine full-time, permanent administrative staff support the adjudicatory staff. All are stationed in Topeka, except for one full-time and one temporary person in Wichita.

Our Appeals unit docketed 10,200 appeals in 1999; 10,500 appeals in 2000; and 11,637 appeals in 2001. That count rose sharply to 15,500 appeals in 2002 and was second only to our all-time high count in 1992 of 17,200 appeals. At the close of 2002, we had received, but not docketed, a number of new appeal files that, if counted, would have caused 2002 to be a record year. Whether projected on a fiscal or calendar basis, this year will undoubtedly be our all-time record high year of approximately 18,500 appeals.

The federal standard is that 60% of all decisions on appeals be in the mail within 30 days after the appeal's first postmark. It is a tough but necessary standard. Historically we have been in compliance, with very few exceptions. For many years, we have taken pride in the self-imposed maxim: "assign every case every week." However, the combined effect of staff reductions and lay-offs compounded by record numbers of appeals in the normally heavy season, was a backlog that reached over 2,400 appeals unassigned last fall. That was many times greater than at any time in our history. In human terms, it was a tragedy.

**The Problem:** As the caseload soared, our budget was cut causing staff shrinkage by 18%. A normal docket for each judge was 25 new cases each week. Most judges accepted 35 cases per week. In October, budget constraints required layoff of three temporary judges that had been brought in to help. Then, a part-time judge retired. The higher caseload brought greater pressures and two full-time judges were off most of the quarter for medical reasons. On the administrative side, we had to reduce a full-

time contract administrative staff person by half and, in October, a full-time administrative employee retired. We attempted to fill all of these vacancies with at least temporary employees and use overtime for administrative staff. However, all our requests were denied for the single stated reason: "budget."

**The Solution:** The moment he learned of the situation, Secretary Garner declared an emergency. He set priorities and directed us to look everywhere for a few hours unused funding to pay for desperately needed overtime and temporary staff. In another way, we reduced a 3½ week wait for 900 newly filed appeals to one afternoon's cooperative effort. Secretary Garner asked every supervisor and each of their staff at every level to contribute an hour or more of time they would otherwise spend on work of less high priority to help out in the file room. (all time properly coded, of course.) The response amazed everyone. On the second day, Secretary Garner and I headed for the file room to help but we were too late. The first day, dozens of department employees showed up! After a few hours, all 900 files were in the office mail to Appeals the same afternoon.

In two weeks, using the overtime and extra staff, the backlog dropped to 1,900. With no complaints and no extra pay, every judge accepted "a few more cases" each week because they had administrative support. Today, the backlog is down to a level thought impossible just one week ago – 1,680 appeals not yet heard. That's because our word processors have whittled 1,000 dictated decisions down to zero. Of course 1,600 is still unacceptably high. And there is the federal time lapse. Instead of 60%, we actually dropped to 0% in December. Our only consolation is that we are not alone. Some other states are worse, and the feds have been sympathetically silent.

**The Plan:** We are exploring options to find approximately \$180,000 to help with Appeals' inevitable record numbers. Hardship has taught efficiency. Rather than ask for new permanent UI judge positions, we first want permanent administrative and law clerk positions to support the judges at a much lower cost. Although the budget is far from settled, we brought back one retired employee as a part-time temp, one full-time temp, and we are using overtime for the docketing and word processing units. And we are requesting the return to full staff by filling the four full-time positions (lost first to retirement and then to budget cuts) that will bring us up to pre-backlog staff levels.

**Back to Normal When?** The exact date depends on factors beyond our control, such as economic trends. But we estimate that by mid-June, if not before, we will see our normal workload back to 300

cases per week, each set for hearing within two weeks, a decision mailed to the parties on the 28<sup>th</sup> day after the new appeal dropped into a U.S. mailbox. .

Thank you again, Mr. Chairman, for this opportunity to speak. I will try to answer your questions.



BEFORE THE UNEMPLOYMENT INSURANCE JUDGE:

In The Matter Of:

Docket Number:

Claimant:

Social Security #:

Employer:

ATTN PERSONNEL

Hearing: January 14, 2003  
via telephone

\*Decision Mailed: January 29, 2003

DECISION

**APPEARANCES:** \_\_\_\_\_ appeared for the claimant. \_\_\_\_\_, service manager, appeared for the employer.

**ISSUE(S):** The claimant filed a timely appeal from an examiner's determination which found the claimant disqualified for benefits until the claimant returns to work and earns \$1,035 after October 19, 2002, because the claimant was discharged for misconduct connected with the work. In support of that decision, the examiner made the following determination of fact: "Claimant was discharged for failure to comply with instructions provided by the employer. Misconduct is a violation of a duty or obligation reasonably owed the employer. Claimant was discharged for misconduct connected with the work."

An additional issue set for hearing was whether or not the employer's experience rating account would be charged.

**FINDINGS OF FACT:** The claimant was last employed from December 10, 2001 to October 18, 2002 with the above employer. Claimant was a service technician and was paid \$15.00 per flat rate hour. Claimant was scheduled to work from 8 a.m. to 5 p.m., Monday through Friday and every other Saturday from 8 a.m. to 5 p.m.

On October 17, 2002 claimant was given a job where the oil and filter were to be changed on a customer's vehicle. The customer requested the oil he provided be put in the vehicle.

Claimant did not use the customer's oil in changing the oil in the vehicle. Claimant took the customer's oil and put it in one of the employer's containers.

1-5



Another employee reported to the service manager what the claimant had done.

The service manager waited to see how the claimant would handle not using the customer's oil with the customer.

Claimant put empty oil containers into the customer's vehicle and parked the customer's vehicle like the work was completed.

When the service manager questioned the claimant about the oil claimant admitted he had not used the customer's oil as requested. He then did not give the oil back to the customer. Claimant admitted he had poured the customer's oil in the employer's containers and then put empty oil containers back into the customer's vehicle. Claimant's actions would make it appear he had used the customer's oil as the customer had requested.

The employer discharged the claimant for deceiving a customer. The service manager cannot watch every employee all the time and thus he must be able to trust his employees.

**OPINION:** The department must pay unemployment benefits to a claimant who was discharged unless the employer proves that the reason for discharge was misconduct connected with the work. The employment security law defines misconduct as "a violation of a duty or obligation reasonably owed the employer as a condition of employment." [K.S.A. 44-706(b)(1)] The employer has the burden of proving misconduct by a preponderance of the evidence. *Farmland Foods, Inc. v. Board of Review*, 225 Kan. 742, 594 P.2d 194 (1979).

Kansas law also provides that a contributing base period employer's account shall be charged when a claimant is discharged, unless there is a ruling that the claimant was discharged for misconduct connected with the work. [K.S.A. 44-710(c)]

An employee has an obligation to be honest and truthful in the performance of his job duties. Claimant was in a service job where dealing honestly with customers is an important function of the job. Claimant's actions constituted a total disregard of that obligation. The judge finds and concludes that the claimant was discharged for misconduct as defined herein. Therefore the claimant is disqualified for unemployment insurance benefits and the employer's experience rating account is not charged.

**DECISION:** The examiner's determination is affirmed. The claimant is disqualified for benefits beginning October 19, 2002, and continuing until the claimant returns to work and earns three times the determined weekly benefit amount or \$1,035 from insured work, because the claimant was discharged for misconduct connected with the work. The employer's experience rating account is not charged.

IT IS SO ORDERED.

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Judge

**\*NOTICE:** Appeal rights if you disagree with this decision: You have 16 days after the "Decision Mailed" date to file an appeal to the Employment Security Board of Review. You may file by letter and mail your appeal to the Employment Security Board of Review, 1430 SW Topeka Blvd, Topeka KS 66612, postmarked on or before the final date. (If the 16th day falls on a Sunday or a Holiday, the next working date is the final date.) The Board will affirm or reverse this decision after reviewing the evidence presented at the referee's hearing.