Bill as Introduced

SB 101-FN – AS INTRODUCED

2003 SESSION

03-1065
08/09

SENATE BILL ***101-FN***

AN ACT relative to unemployment compensation.

SPONSORS: Sen. Flanders, Dist 7; Rep. Bishop, Rock 74

COMMITTEE: Executive Departments and Administration

ANALYSIS

This bill adds Indian tribes to the definition of employer for the purposes of unemployment compensation and makes various other changes.

This bill also changes the pay grade of the deputy commissioner of the department of employment security.

This bill is a request from the department of employment security.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

03-1065
08/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT relative to unemployment compensation.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Paragraph; Unemployment Compensation; Employer Defined. Amend RSA 282-A:8 by inserting after paragraph VII the following new paragraph:

VIII. An Indian tribe as defined by 26 U.S.C. section 3306(u) of the Federal Unemployment Tax Act for which services in employment are performed within this state unless such services are otherwise excluded from employment under 26 U.S.C. section 3306 (c) of the Federal Unemployment Tax Act or under RSA 282-A:9.

2 Unemployment Compensation. Amend RSA 282-A:9, IV(s)(1)(B) to read as follows:

(B) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products in the home or otherwise than in a permanent retail establishment; ***or***

3 New Subparagraph; Unemployment Compensation. Amend RSA 282-A:9, IV(s)(1) by inserting after subparagraph (B) the following new paragraph:

(C) Is engaged in the trade or business of the delivering or distribution of newspapers or shopping news, including any services directly related to such trade or business;

4 Unemployment Compensation. Amend RSA 282-A:31, III to read as follows:

III. Subparagraph I(c) shall be waived for any week with respect to any individual who is otherwise entitled to unemployment compensation benefits and is selected by the department of employment security and enrolled in a vocational training program [~~under the auspices of the New Hampshire department of education~~] ***approved by the commissioner of the department of employment security*** and is as to such week in good standing in the training program, and has not failed without good cause to attend all scheduled sessions. Remuneration for services in connection with the training program paid to any such individual shall be wages for the purposes of RSA 282-A:14.

5 New Paragraph; Unemployment Compensation. Amend RSA 282-A:32 by inserting after paragraph III the following new paragraph:

IV. For any week during which the individual resides other than in New Hampshire, another state, the District of Columbia, Puerto Rico, the Virgin Islands or Canada.

6 Unemployment Compensation. Amend RSA 282-A:36 to read as follows:

282-A:36 Labor Dispute. [~~An individual~~] ***A person*** shall be disqualified for benefits for any week with respect to which the commissioner finds that his ***or her*** total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he ***or she*** is or was last employed; provided that this section shall not apply

if it is shown to the satisfaction of the commissioner that:

I.(a) [~~He~~] ***The person*** is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(b) [~~He~~] ***The person*** does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided that, if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises; or

II. [~~He~~] ***The person*** has become unemployed and entitled to unemployment compensation before the commencement of the labor dispute and his connection with the employer has been totally severed, including the absence of recall rights, seniority rights and other fringe benefits and indicia of employment; or

II-a. The stoppage of work was due solely to a lockout or the failure of the employer to live up to the provision of any agreement or contract of employment entered into between the employer and his employees; or

III. The stoppage of work has continued for a period of 2 weeks after the termination of the labor dispute; or

IV. [~~He~~] ***The person*** has, since becoming unemployed for the reasons set forth in the introductory paragraph worked in 5 or more [~~consecutive~~] weeks in employment [~~for an employer~~] ***as defined in RSA 282-A:9, except RSA 282-A:9, IV(f), or wages earned in a like manner in another state***, earning in each week an amount at least equal to [~~his~~] ***such person's*** maximum benefit rate plus 20 percent thereof, and then becomes unemployed from said employer due to a lack of work.

7 Unemployment Compensation. Amend RSA 282-A:58 to read as follows:

282-A:58 Decision. In every appeal, except those withdrawn, the chairman shall prepare a written decision which shall be sent by certified mail, return receipt requested, ***or first class mail, whichever the commissioner determines to be most appropriate,*** to each interested party at the last address of each according to the records of the department of employment security. The decision, except one on an appeal dismissed for lack of prosecution or defaulted for failure to attend, among other necessary things as determined by the commissioner, shall: set forth all the material findings and specific provisions of law necessary to support the conclusions; identify the interested parties and the account, whether fund or employer, to which benefits will be charged, if allowed; identify the week or period during which benefits are denied; identify the first week and subsequent period with respect to which benefits will be paid, if allowed; determine all things necessary to finally dispose of the case; and identify the members of the tribunal.

8 Unemployment Compensation. Amend RSA 282-A:69, II to read as follows:

II. Notwithstanding this section, any organization or group of organizations, described in section 501(c)(3) and exempt under section 501(a) of the Internal Revenue Code ***or Indian tribe as defined in RSA 282-A:8, VIII,*** which becomes an employer under this act, may elect to change its status either to reimburse in the manner provided for the state in RSA 282-A:70 or to pay contributions as hereinabove provided. The change in status shall be irrevocable for 3 calendar years. Thereafter the employer may elect to change its status no later than January 1, for any year, but such new change in status shall be irrevocable for 3 calendar years. Any 2 or more of such employers or any 2 or more cities, towns, counties or other political subdivisions of this state may elect, for a period of not less than 3 years, to pool their separate accounts under such rules as may be adopted by the commissioner, including appropriate bonding and fiscal safeguard requirements, and each unit shall be jointly and severally liable for payments due.

9 Unemployment Compensation; Deputy Commissioner. Amend RSA 282-A:109 to read as follows:

282-A:109 Deputy Commissioner.

I. The commissioner of the department of employment security shall nominate a deputy commissioner for appointment by the governor, with the consent of the council. The deputy commissioner shall serve for a term of 5 years and until a successor has been appointed and qualified. The deputy commissioner may have successive terms.

II. [~~There shall be a~~] ***The*** deputy commissioner of the department of employment security who shall act as commissioner whenever the commissioner of the department of employment security is incapacitated, absent or unable to act for any cause. The deputy commissioner shall also act as commissioner of the department of employment security until a new commissioner is duly appointed whenever there is no commissioner. [~~During such period as the deputy commissioner acts as commissioner, his status as a classified state employee shall continue and shall in no way be altered, affected or changed.~~] ***The deputy commissioner shall be compensated in accordance with the provisions of RSA 94:1-a.***

10 Unemployment Compensation. Amend RSA 282-A:152, I to read as follows:

282-A:152 Collection of State Contributions.

I. Whenever used in this subdivision, unless the context shall otherwise require, or unless otherwise specifically provided, the word "contribution" shall include not only the principal of any contribution but also all interest, penalties, fees and other charges added thereto by law; and the term "serving officer" shall include any sheriff, deputy sheriff, constable or other officer authorized to serve any civil process. ***Delivery of written notice by an authorized representative of the commissioner shall be deemed proper service of process.***

11 Unemployment Compensation. Amend RSA 282-A:155 to read as follows:

282-A:155 Interstate Collections. The courts of this state shall[~~, in the manner provided in~~

~~RSA 282-A:143 and 153,~~] entertain actions ***in the name of the commissioner*** to collect ***benefits,*** contributions or interest thereon for which liability has accrued under the employment security law of any other state or of the federal government. ***The commissioner shall have the authority to collect any such debt by civil action in any manner provided for the collection of contributions in RSA 282-A:141-156.***

12 Agreement Authorized. Amend RSA 282-A:178, I to read as follows:

I. The department of employment security, through its commissioner, is hereby authorized to enter into an agreement, effective April 3, 1975, with the secretary of labor of the United States to become an agent of the United States in order to carry out the provisions of Chapter 2 of Title II of the Trade Act of 1974, ***as amended*** (P.L. 93-618, ***as amended***), and to perform such acts and do all those things necessary to fully carry out such agreement.

13 Agreement Authorized. Amend the introductory paragraph of RSA 282-A:178, II(a) to read as follows:

(a) Solely for the purposes of carrying out the agreement authorized in [~~paragraph~~] ***paragraphs*** I ***and I-a***, and notwithstanding other provisions of this chapter to the contrary, the provisions of this section permit:

14 New Paragraph; Agreement Authorized. Amend RSA 282-A:178 by inserting after paragraph I the following new paragraph:

I-a. The department of employment security, through its commissioner, is hereby authorized to enter into an agreement, effective November 4, 2002, with the Secretary of Labor of the United States to become an agent of the United States in order to carry out the provisions of the Trade Adjustment Assistance Reform Act of 2002, as amended, (P.L. 107-210, as amended), and to perform such acts and do all those things necessary to fully carry out such agreement.

15 Salary Established. Amend RSA 94:1-a, I(b) by inserting in Grade HH the following:

HH Department of employment security deputy commissioner

16 Effective Date.

I. Section 15 of this act shall take effect July 1, 2003.

II. The remainder of this act shall take effect 60 days after its passage.

LBAO
03-1065
1/30/03

SB 101-FN - FISCAL NOTE

AN ACT relative to unemployment compensation.

FISCAL IMPACT:

Due to time constraints, the Office of Legislative Budget Assistant is unable to provide a fiscal note for this bill at this time. When completed, the fiscal note will be forwarded to the Senate Clerk's Office.

EDIA

LBAO
03-1065
Revised 2/10/03

SB 101 FISCAL NOTE

AN ACT relative to unemployment compensation.

FISCAL IMPACT:

The Legislative Budget Assistant has determined that this legislation has a total fiscal impact of less than $10,000 in each of the fiscal years 2003 through 2007.

Amendments

Sen. Flanders, Dist. 7
March 12, 2003
2003-0664s
08/01

Amendment to SB 101-FN

Amend the bill by replacing section 1 with the following:

1 New Paragraph; Unemployment Compensation; Employer Defined. Amend RSA 282-A:8 by inserting after paragraph VII the following new paragraph:

VIII. An Indian tribe as defined by 26 U.S.C. section 3306(u) of the Federal Unemployment Tax Act for which services in employment are performed within this state unless such services are otherwise excluded from employment under 26 U.S.C. section 3306 (c) of the Federal Unemployment Tax Act or under RSA 282-A:9. Indian tribes shall also include wholly owned subdivisions, subsidiaries, or business enterprises of Indian tribes.

Amend the bill by replacing section 5 with the following:

5 New Paragraph; Unemployment Compensation. Amend RSA 282-A:32 by inserting after paragraph III the following new paragraph:

IV. For any week during which the individual resides other than in New Hampshire, another state, the District of Columbia, Puerto Rico, the Virgin Islands or a contiguous country with which the United States has an agreement with respect to unemployment compensation.

Amend the bill by inserting after section 15 the following and renumbering the original section 16 to read as 20, respectively:

16 New Paragraph; Exclusions. Amend RSA 282-A:9 by inserting after paragraph VI the following new paragraph:

VII. For the purposes of paragraph I, the exclusions under paragraphs IV (o)(2), IV (o)(5), and IV (p)(4) shall apply to Indian tribes.

17 New Paragraph; Payments in Lieu of Contributions. Amend RSA 282-A:69 by inserting after paragraph IV the following new paragraph:

V. The following provisions shall apply to Indian tribes electing to make payments in lieu of contributions:

(a) At the discretion of the commissioner, any Indian tribe that elects to become liable for payments in lieu of contributions shall be required within 30 days after the effective date of its election, to:

(1) execute and file with the commissioner a surety bond approved by the commissioner; or

(2) deposit with the commissioner money or securities on the same basis as other employers with the same election option.

(b) Failure of the Indian tribe to make required payments, including assessments of interest and penalty, within 90 days of receipt of the bill will cause the Indian tribe to lose the option to make payments in lieu of contributions for the following tax year unless payment in full is received before the contribution rate for the next tax year is computed.

(c) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment shall have such option reinstated if, after a period of one year, all contributions have been made timely, provided no contributions, payments in lieu of contributions for benefits paid, penalties, or interest remain outstanding.

(d) Failure of the Indian tribe to make required payments, including assessments of interest and penalty, after all collection activities deemed necessary by the commissioner have been exhausted, will cause services performed for such tribe to not be treated as employment for purposes of this section.

(e) The commissioner may determine that any Indian tribe that loses coverage under subparagraph (d) may have services performed for such tribe again included as employment for purposes of RSA 282-A:9 if all contributions, payments in lieu of contributions, penalties and interest have been paid.

(f) The commissioner shall notify the United States Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage made under subparagraphs (d) and (e).

(g) Notices of payment and reporting delinquency to Indian tribes shall include information that failure to make full payment within the prescribed time frame:

(1) shall cause the Indian tribe to be liable for federal unemployment tax;

(2) shall cause the Indian tribe to lose the option to make payments in lieu of contributions; and

(3) could cause the Indian tribe to be excepted from the definition of employer, as provided in RSA 282-A:8, and services in the employ of the Indian tribe to be excepted from employment.

(h) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the federal government shall be financed in their entirety by such Indian tribe.

18 Waiver of Costs. Amend RSA 282-A:29 to read as follows:

282-A:29 Adjustment of Overpaid Benefit Account by Compromise.

I. The commissioner may, with the approval of the attorney general, effect by written

stipulation such settlement of any overpaid benefit account due under the provisions of this chapter as he ***or she*** may deem to be for the best interests of the state; and the payment of the sum so agreed upon shall be a full satisfaction of such overpaid benefit account.

II. Payment by a debtor of interest, penalties, fees and legal costs due under the provisions of this chapter totaling $50 or less may be waived by the commissioner of the department of employment security as he or she may deem to be for the best interests of the state.

19 Waiver of Costs. Amend RSA 282-A:148 to read as follows:

282-A:148 Adjustment of Contribution by Compromise.

I. The commissioner of the department of employment security may, with the approval of the attorney general, effect by written stipulation such settlement of the contribution or interest due under the provisions of this chapter as he ***or she*** may deem to be for the best interests of the state, and the payment of the sum so agreed upon shall be a full satisfaction of such contribution and interest.

II. Payment by a debtor of interest, penalties, fees and legal costs due under the provisions of this chapter totaling $50 or less may be waived by the commissioner of the department of employment security as he or she may deem to be for the best interests of the state.

Sen. Prescott, Dist. 23
March 19, 2003
2003-0869s
08/04

Amendment to SB 101-FN

Amend the bill by replacing all after the enacting clause with the following:

1 New Paragraph; Unemployment Compensation; Employer Defined. Amend RSA 282-A:8 by inserting after paragraph VII the following new paragraph:

VIII. An Indian tribe as defined by 26 U.S.C. section 3306(u) of the Federal Unemployment Tax Act for which services in employment are performed within this state unless such services are otherwise excluded from employment under 26 U.S.C. section 3306 (c) of the Federal Unemployment Tax Act or under RSA 282-A:9. Indian tribes shall also include wholly owned subdivisions, subsidiaries, or business enterprises of Indian tribes.

2 Unemployment Compensation. Amend RSA 282-A:9, IV(s)(1)(B) to read as follows:

(B) Is engaged in the trade or business of selling, or soliciting the sale of, consumer products in the home or otherwise than in a permanent retail establishment; ***or***

3 New Subparagraph; Unemployment Compensation. Amend RSA 282-A:9, IV(s)(1) by inserting after subparagraph (B) the following new paragraph:

(C) Is engaged in the trade or business of the delivering or distribution of newspapers or shopping news, including any services directly related to such trade or business;

4 Unemployment Compensation. Amend RSA 282-A:31, III to read as follows:

III. Subparagraph I(c) shall be waived for any week with respect to any individual who is otherwise entitled to unemployment compensation benefits and is selected by the department of employment security and enrolled in a vocational training program [~~under the auspices of the New Hampshire department of education~~] ***approved by the commissioner of the department of employment security*** and is as to such week in good standing in the training program, and has not failed without good cause to attend all scheduled sessions. Remuneration for services in connection with the training program paid to any such individual shall be wages for the purposes of RSA 282-A:14.

5 New Paragraph; Benefit Eligibility Conditions. Amend RSA 282-A:31 by inserting after paragraph III the following new paragraph:

IV. Subparagraphs II(b) and II(c) shall apply only to services in the employ of the state or any political subdivision thereof, to Indian tribes, and to organizations defined in section 501(c)(3) and exempt under section 501(a) of the Internal Revenue Code.

6 New Paragraph; Unemployment Compensation. Amend RSA 282-A:32 by inserting after paragraph III the following new paragraph:

IV. For any week during which the individual resides other than in New Hampshire, another state, the District of Columbia, Puerto Rico, the Virgin Islands or a contiguous country with which the United States has an agreement with respect to unemployment compensation.

7 Unemployment Compensation. Amend RSA 282-A:36 to read as follows:

282-A:36 Labor Dispute. [~~An individual~~] ***A person*** shall be disqualified for benefits for any week with respect to which the commissioner finds that his ***or her*** total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he ***or she*** is or was last employed; provided that this section shall not apply if it is shown to the satisfaction of the commissioner that:

I.(a) [~~He~~] ***The person*** is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(b) [~~He~~] ***The person*** does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided that, if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises; or

II. [~~He~~] ***The person*** has become unemployed and entitled to unemployment compensation before the commencement of the labor dispute and his connection with the employer has been totally severed, including the absence of recall rights, seniority rights and other fringe benefits and indicia of employment; or

II-a. The stoppage of work was due solely to a lockout or the failure of the employer to live up to the provision of any agreement or contract of employment entered into between the employer and his employees; or

III. The stoppage of work has continued for a period of 2 weeks after the termination of the labor dispute; or

IV. [~~He~~] ***The person*** has, since becoming unemployed for the reasons set forth in the introductory paragraph worked in 5 or more [~~consecutive~~] weeks in employment [~~for an employer~~] ***as defined in RSA 282-A:9, except RSA 282-A:9, IV(f), or wages earned in a like manner in another state***, earning in each week an amount at least equal to [~~his~~] ***such person's*** maximum benefit rate plus 20 percent thereof, and then becomes unemployed from said employer due to a lack of work.

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282-A:58 Decision. In every appeal, except those withdrawn, the chairman shall prepare a written decision which shall be sent by certified mail, return receipt requested, ***or first class mail, whichever the commissioner determines to be most appropriate,*** to each interested party at

the last address of each according to the records of the department of employment security. The decision, except one on an appeal dismissed for lack of prosecution or defaulted for failure to attend, among other necessary things as determined by the commissioner, shall: set forth all the material findings and specific provisions of law necessary to support the conclusions; identify the interested parties and the account, whether fund or employer, to which benefits will be charged, if allowed; identify the week or period during which benefits are denied; identify the first week and subsequent period with respect to which benefits will be paid, if allowed; determine all things necessary to finally dispose of the case; and identify the members of the tribunal.

9 Unemployment Compensation. Amend RSA 282-A:69, II to read as follows:

II. Notwithstanding this section, any organization or group of organizations, described in section 501(c)(3) and exempt under section 501(a) of the Internal Revenue Code ***or Indian tribe as defined in RSA 282-A:8, VIII***, which becomes an employer under this act, may elect to change its status either to reimburse in the manner provided for the state in RSA 282-A:70 or to pay contributions as hereinabove provided. The change in status shall be irrevocable for 3 calendar years. Thereafter the employer may elect to change its status no later than January 1, for any year, but such new change in status shall be irrevocable for 3 calendar years. Any 2 or more of such employers or any 2 or more cities, towns, counties or other political subdivisions of this state may elect, for a period of not less than 3 years, to pool their separate accounts under such rules as may be adopted by the commissioner, including appropriate bonding and fiscal safeguard requirements, and each unit shall be jointly and severally liable for payments due.

10 Unemployment Compensation. Amend RSA 282-A:152, I to read as follows:

282-A:152 Collection of State Contributions.

I. Whenever used in this subdivision, unless the context shall otherwise require, or unless otherwise specifically provided, the word "contribution" shall include not only the principal of any contribution but also all interest, penalties, fees and other charges added thereto by law; and the term "serving officer" shall include any sheriff, deputy sheriff, constable or other officer authorized to serve any civil process. ***Delivery of written notice by an authorized representative of the commissioner shall be deemed proper service of process.***

11 Unemployment Compensation. Amend RSA 282-A:155 to read as follows:

282-A:155 Interstate Collections. The courts of this state shall[~~, in the manner provided in RSA 282-A:143 and 153,~~] entertain actions ***in the name of the commissioner*** to collect ***benefits,*** contributions or interest thereon for which liability has accrued under the employment security law of any other state or of the federal government. ***The commissioner shall have the authority to collect any such debt by civil action in any manner provided for the collection of contributions in RSA 282-A:141-156.***

12 Agreement Authorized. Amend RSA 282-A:178, I to read as follows:

I. The department of employment security, through its commissioner, is hereby authorized

to enter into an agreement, effective April 3, 1975, with the secretary of labor of the United States to become an agent of the United States in order to carry out the provisions of Chapter 2 of Title II of the Trade Act of 1974, ***as amended*** (P.L. 93-618, ***as amended***), and to perform such acts and do all those things necessary to fully carry out such agreement.

13 Agreement Authorized. Amend the introductory paragraph of RSA 282-A:178, II(a) to read as follows:

(a) Solely for the purposes of carrying out the agreement authorized in [~~paragraph~~] ***paragraphs*** I ***and I-a***, and notwithstanding other provisions of this chapter to the contrary, the provisions of this section permit:

14 New Paragraph; Agreement Authorized. Amend RSA 282-A:178 by inserting after paragraph I the following new paragraph:

I-a. The department of employment security, through its commissioner, is hereby authorized to enter into an agreement, effective November 4, 2002, with the Secretary of Labor of the United States to become an agent of the United States in order to carry out the provisions of the Trade Adjustment Assistance Reform Act of 2002, as amended, (P.L. 107-210, as amended), and to perform such acts and do all those things necessary to fully carry out such agreement.

15 Salary Established. Amend RSA 94:1-a, I(b) by inserting in Grade HH the following:

HH Department of employment security deputy commissioner

16 New Paragraph; Exclusions. Amend RSA 282-A:9 by inserting after paragraph VI the following new paragraph:

VII. For the purposes of paragraph I, the exclusions under paragraphs IV (o)(2), IV (o)(5), and IV (p)(4) shall apply to Indian tribes.

17 New Paragraph; Payments in Lieu of Contributions. Amend RSA 282-A:69 by inserting after paragraph IV the following new paragraph:

V. The following provisions shall apply to Indian tribes electing to make payments in lieu of contributions:

(a) At the discretion of the commissioner, any Indian tribe that elects to become liable for payments in lieu of contributions shall be required within 30 days after the effective date of its election, to:

(1) execute and file with the commissioner a surety bond approved by the commissioner; or

(2) deposit with the commissioner money or securities on the same basis as other employers with the same election option.

(b) Failure of the Indian tribe to make required payments, including assessments of interest and penalty, within 90 days of receipt of the bill will cause the Indian tribe to lose the option to make payments in lieu of contributions for the following tax year unless payment in full is received before the contribution rate for the next tax year is computed.

(c) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment shall have such option reinstated if, after a period of one year, all contributions have been made timely, provided no contributions, payments in lieu of contributions for benefits paid, penalties, or interest remain outstanding.

(d) Failure of the Indian tribe to make required payments, including assessments of interest and penalty, after all collection activities deemed necessary by the commissioner have been exhausted, will cause services performed for such tribe to not be treated as employment for purposes of this section.

(e) The commissioner may determine that any Indian tribe that loses coverage under subparagraph (d) may have services performed for such tribe again included as employment for purposes of RSA 282-A:9 if all contributions, payments in lieu of contributions, penalties and interest have been paid.

(f) The commissioner shall notify the United States Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage made under subparagraphs (d) and (e).

(g) Notices of payment and reporting delinquency to Indian tribes shall include information that failure to make full payment within the prescribed time frame:

(1) shall cause the Indian tribe to be liable for federal unemployment tax;

(2) shall cause the Indian tribe to lose the option to make payments in lieu of contributions; and

(3) could cause the Indian tribe to be excepted from the definition of employer, as provided in RSA 282-A:8, and services in the employ of the Indian tribe to be excepted from employment.

(h) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the federal government shall be financed in their entirety by such Indian tribe.

18 Waiver of Costs. Amend RSA 282-A:29 to read as follows:

282-A:29 Adjustment of Overpaid Benefit Account by Compromise.

I. The commissioner may, with the approval of the attorney general, effect by written stipulation such settlement of any overpaid benefit account due under the provisions of this chapter as he ***or she*** may deem to be for the best interests of the state; and the payment of the sum so agreed upon shall be a full satisfaction of such overpaid benefit account.

II. Payment by a debtor of interest, penalties, fees, and legal costs due under the provisions of this chapter totaling $50 or less may be waived by the commissioner of the department of employment security as he or she may deem to be for the best interests of the state.

19 Waiver of Costs. Amend RSA 282-A:148 to read as follows:

282-A:148 Adjustment of Contribution by Compromise.

I. The commissioner of the department of employment security may, with the approval of the attorney general, effect by written stipulation such settlement of the contribution or interest due under the provisions of this chapter as he ***or she*** may deem to be for the best interests of the state, and the payment of the sum so agreed upon shall be a full satisfaction of such contribution and interest.

II. Payment by a debtor of interest, penalties, fees, and legal costs due under the provisions of this chapter totaling $50 or less may be waived by the commissioner of the department of employment security as he or she may deem to be for the best interests of the state.

20 Effective Date.

I. Section 5 of this act shall take effect upon its passage.

II. Section 15 of this act shall take effect July 1, 2003.

III. The remainder of this act shall take effect 60 days after its passage.

2003-0869s

AMENDED ANALYSIS

This bill adds Indian tribes to the definition of employer for the purposes of unemployment compensation and makes various other changes.

This bill also changes the pay grade of the deputy commissioner of the department of employment security.

This bill is a request from the department of employment security.

Committee Minutes

Date: March 12, 2003
Time: 2:55 p.m.
Room: LOB Room 102

The Senate Committee on Executive Departments and Administration held a hearing on the following:

SB 101-FN relative to unemployment compensation

Members of Committee present: Senator Prescott
Senator Estabrook
Senator Peterson

The Chair, Senator Russell Prescott, opened the recessed hearing on SB 101-FN.

Commissioner John Ratoff: Senator Flanders called me and said that he would not be here and Representative Bishop signed saying that he was in favor of it and he had to go to a hearing. So, neither one of the sponsors are here.

Senator Russell E. Prescott, D. 23: So, we can go start with the top of the list then, can't we?

Commissioner Ratoff: I am Commissioner Ratoff and, if you wish, I'll start.

Senator Russell E. Prescott, D. 23: That sounds great. Thank you, Commissioner.

Commissioner Ratoff: My name is Commissioner John Ratoff, Commissioner of the Department of Employment Security. The prime sponsors of this bill, Senator Flanders and Representative Frank Bishop, are not available, but the two of them sit in as the legislative representatives on the UI Advisory Council.

The UI Advisory Council is made up three members of labor, three members of management, a Senator and a Representative. Annually, when the

Department sponsors legislation, initiates legislation, it is initiated through the UI Advisory Council. So, all of our work is approved by this Council.

So, the product we bring to you today is the result of discussions, sending in the original bill and then, just this last Monday, we received the LSR that came back to us and we found some... Since then, the federal government has made some minor changes so we have to make some amendments to the final LSR and then I have an amendment to correct a section that was not introduced properly into the bill.

So, having said all that, I would like to defer to the chairman of the UI Advisory Bureau of my Department, Lyn Angle. She is responsible for the administration of all UI law and the management for the taxes and benefit. So, I will defer to Lyn Angle and then I would like to come back and speak about an amendment. With that, I will turn it over to Lyn.

Senator Russell E. Prescott, D. 23: That's fine.

Carolyn Angle: Good afternoon, Mr. Chairman and members of the Committee. My name is Carolyn Angle. I am Director of the Unemployment Compensation Bureau for the Department of Employment Security. I am here today to testify in support of this bill.

As the Commissioner mentioned, we have an amendment that apparently hasn't been delivered yet, and then we have a secondary amendment to that. My testimony tries to incorporate all the pieces so that when you step back to consider them, you will have that in written testimony.

I am briefly going to go over the points of the bill and I leave out any points, you have testimony to refer to. **Please see "Testimony before Senate ED&A Provided by Carolyn Angle, Director, Unemployment Compensation Bureau", attached hereto and referred to as Attachment #1.**

Section 1 and Section 8 basically allow us to expand the definition of the word employer. In December, 2002 the Federal Unemployment Tax Act was amended to require that American Indian tribes be treated in the same manner that we treat state and local governments for the purposes of paying unemployment compensation.

This means that services performed in the employ of tribes are no longer subject to FUTA, but in order to conform to the federal law, state laws are required to cover the services performed in the employ of tribes and tribes have to be offered a reimbursement option within the State hierarchy.

This means that, in our Department, we have taxable employers and reimbursing employers. Taxable employers pay contributions on a quarterly basis on the first $8,000 earned by each of their employees. A reimbursable employer reimburses the Department for the cost of benefits paid to their workers who become unemployed based on the benefit rate and the amount of wages that are incorporated to apply to that benefit.

The amendment basically expands a little bit further on the primary bill to discuss what happens to a tribal employer who fails to meet their commitment as a reimburser. The penalties that accrue to them and how we can then help them prepare to reach the reimbursement status again. **Please see "Department of Employment Security's Proposed Amendment to Senate Bill 101", dated 3/6/03, attached hereto and referred to as Attachment #2.**

Section 2 and 3 of the bill allow us to redefine the word employment so that it does no longer include service of direct sellers engaged in the trade or business of distribution or delivery of newspapers. This brings us in line with federal law, which also excludes these services. The result of this is that the services provided by the workers would not be covered by RSA 282-A. Taxes would not be paid on their wages and the monies earned in the services of trade or business of distribution or delivery of newspapers would not be usable for the purposes of claiming unemployment compensation.

Section 4 allows an expansion of the Commissioner's authority to approve vocational training programs. Currently under the law, vocational training has to be provided under the auspices of the New Hampshire Department of Education. We have found, since administering the law, that there are several apprentice boards, licensing boards and vendors who are certified to train that we are not able to approve and waive availability requirements. So, we are looking to have the Commissioner be responsible for approving those training programs so that we can expand our ability to pay one of the benefits to people who are in training.

Section 5 is a proposal that we are making because currently there are no provisions in our statute to prevent us from paying benefits to eligible people who claim them. Because we expanded claims taking activities to the telephone and to the internet, there is an increased opportunity for fraud and it becomes much easier to file outside the borders of the United States. FUTA requires that the states pay benefits to eligible individuals in the United States, its possession and to individuals in contiguous countries such as Canada and Mexico. The amendment that is being presented uses the language of contiguous country so that we can incorporate Mexico into the

statute. We don't have an agreement with Mexico, so we wouldn't at this point pay benefits to people in Mexico, but it allows it to happen should an agreement be developed. **Please see Senator Flanders' Amendment #2002-0236s, attached hereto and referred to as Attachment #3.**

Section 6 allows us to standardize our disqualification provisions. Currently under the statute, if an individual is disqualified because he left a job voluntarily or was discharged for misconduct, failed to accept an offer of suitable work, or became unemployed as a result of a labor dispute, they are disqualified. Up until 1998, the provision for disqualification was that they had to earn five consecutive weeks of wages at twenty percent more than their benefit rate and then be laid off from the employer from whom they earned that money. In 1998, we changed a portion of the statute that individuals only had to earn five weeks of wages. They were no longer consecutive, which lessens the burden, and we failed to change the statute that applies to labor disputes. This is an opportunity for us to equalize the playing field for these disqualification provisions.

Section 7 is something that has been proposed to us by the U.S. Department of Labor. Currently, we mail all appealed decisions by certified mail. When the Department of Labor came to do a review of our appeal activities, they noted that we were spending a large amount of our time processing mail to be mailed and certified and also the cost of certifying mail is much higher. So, they suggested that we make this change. We also would put procedures in place so that any party who indicated they failed to receive their appeal decision by regular mail we would send them a copy by certified mail and allow them to preserve their appeal rights under the newly dated copy.

Section 9 and 15 have the original SB 101 and Section 18, which is the Department's amendment, I am going to insist that Commissioner Ratoff speak to.

Section 10 clarifies that Department tax agents may be designated by the Commissioner as serving officers for the purposes of serving liens and tax warrants. We currently do this, but if anyone ever asked what authority we do it under, there wouldn't be any. This provides the authority.

Section 11 provides for the Commissioner to collect debts on behalf of other states and the federal government. Very often we collect the payment of benefits from Vermont claimants or vice versa and when the statute was recodified in 1981, this ability was vague in the statutes. So, we are hoping to repair it with this new language.

Sections 12, 13 and 14 relate to our ability to provide services under the Trade Act of 1974. That Trade Act has been amended a couple times and also this year there was a new Trade Adjustment Reform Act passed. We are the agency who has the agreement with the Department of Labor to provide services under this Act and so we wanted to update our statute to continue to allow us to do so.

Sections 16 and 17, which are included in the amendment that we are currently waiting for, allows the Commissioner to waive penalties, fees, interest and legal costs of up to $50 when requested by a party who is aggrieved. Currently, when we have a request to waive payment, we have to institute the Administrative Hearing Committee to conduct a hearing. If the Hearing Committee agrees to a waiver, we have to have a written agreement between the debtor and the Department, which then has to be approved by the Attorney General's Office. This seems an excessive use of our administrative resources. So, with this we can, on a case by case basis, evaluate the ability of the employer to meet its obligations or claimant to meet his payment plan obligations and either agree to a waiver or not without having to use the resources that are currently in place.

Section 19 replaces Section 16 of the original bill and Section 18 of the amendment that we are waiting for to discuss when these changes can be put in, the effective dates of the legislation.

I can answer any questions or I can certainly try.

Commissioner Ratoff: Senator, the amendments we're waiting for are being drafted by Senator Flanders' secretary. That's the amendments we keep referring to.

Ms. Angle: We have a couple copies here.

Senator Andrew R. Peterson, D. 11: Is that Senator Flanders' amendment?

Ms. Angle: No, this is our amendment.

Senator Andrew R. Peterson, D. 11: Or, is that the one that... Well, this is a Flanders amendment we have here anyway, 2003-0236s, but that's not the one.

Ms. Angle: No.

Senator Andrew R. Peterson, D. 11: Do you have another one that has to do with dates? Is that correct?

Ms. Angle: Yes.

Senator Andrew R. Peterson, D. 11: Effective date?

Ms. Angle: Uh-huh. We had a draft of ours, which is Senator Flanders' amendment, which is four pages long.

Senator Andrew R. Peterson, D. 11: Why don't you just address what you want to do in the amendment and we will get the amendment in due course, if that would be satisfactory.

Ms. Angle: I included that in my testimony.

Senator Andrew R. Peterson, D. 11: Pardon me.

Ms. Angle: I included that in my testimony.

Senator Andrew R. Peterson, D. 11: What you did is that you read testimony. Do you want to speak to it?

Ms. Angle: Senator Flanders' amendment basically allows us to expand what originally was in the bill in regard to tribes and handling them in a much more equitable fashion

Senator Andrew R. Peterson, D. 11: Okay. So, it expands that. Right?

Ms. Angle: Right. It expands it.

Senator Andrew R. Peterson, D. 11: My question to you is, what do you wish to do with dates, effective dates? Do you know? If you don't, that's alright. We can wait and get the amendment.

Ms. Angle: It was supposed to be effective upon passage, I believe.

Senator Andrew R. Peterson, D. 11: Is that where it is? Okay.

Ms. Angle: Looking at all these things, it makes you crazy. The section was supposed to take effect July 1, 2003 and the remainder of the bill was to take effect sixty days after its passage. That's what the original bill proposed. We had no change to that.

Senator Andrew R. Peterson, D. 11: We were just...

Ms. Angle: It was just to renumber it because of the sections and put the sections... the effective date...

Senator Andrew R. Peterson, D. 11: That's okay. Alright. I know we are going to see amendments here, other amendments proposed.

Ms. Angle: This that I was handed by Senator Flanders is not correct.

Senator Andrew R. Peterson, D. 11: Well, I'm rarely correct myself, so feel quite at home. The bill, however, is an FN bill, so we are going to need to sort this out fairly expeditiously.

Ms. Angle: This is section 9 that you are expanding and section 15.

Senator Andrew R. Peterson, D. 11: Have you finished your testimony or is there more?

Commissioner Ratoff: There was the original bill that was modified by the UI Advisory Council Monday and Senator Flanders was supposed to send a finished copy to us. He said he would have it here.

Attorney Lon Siel: Well, I have what we presented to the Advisory Council Monday, which is what was our understanding that Senator Flanders' amendment was going to look like today and I can give that to you. I have one copy with me. In addition to that, the Department has its own additional amendment that it would like to present today.

Senator Andrew R. Peterson, D. 11: Do you want to testify? Are you all together here?

Attorney Siel: I'm sorry. We're all together here.

Senator Andrew R. Peterson, D. 11: I'm sorry. I didn't get your name.

Attorney Siel: I'm sorry. I'm Lon Siel.

Commissioner Ratoff: He's the attorney.

Ms. Angle: General counsel for the Department.

Commissioner Ratoff: General counsel for the Department. Senator, you are going to get the final draft with the amendments on it Monday that Senator Flanders was supposed to give to you. We have a copy here. Hopefully,

Senator Flanders will give you exactly what's on here. So, why don't I give you that copy to have.

Senator Andrew R. Peterson, D. 11: I will put it in the file.

Commissioner Ratoff: This is what Senator Flanders' amendment should be when you get it and this is what Lyn was talking about. Are we on board now as to what happened? That's the bill with all the amendments by the Advisory Council that Senator Flanders was supposed to present to us or to you.

Now, since then, since Monday, I went back to the original bill and this was on Section 9. We had asked to have the Deputy Commissioner, his position changed from classified to an unclassified position. During the last session, if you will recall, sir, they took all the unclassified positions of state service and gave them different gradings.

Senator Andrew R. Peterson, D. 11: I do recall.

Commissioner Ratoff: So, what happened is that I have three attorneys in my agency who now earn more than my deputy because he is still unclassified. Over the years, as you know, the Legislature has always been trying to finalize that upgrading for everybody and in the process all the deputy commissioners that were classified have become unclassified. The last one was the Department of Labor. The Deputy Commissioner of Employment Security is the only deputy commissioner in state government now that is not unclassified. So, our request was to put it in an unclassified position similar to all the other commissioners in my category.

Senator Andrew R. Peterson, D. 11: Do you understand why? I know there was a commission that went over all of these changes. It was trying to look at it on a piece rather than have committees, ED&A committees receive specific requests based upon specific crises, which we get about eight bills a year, at least in the time I've been here. Why was this one deputy left out? Was it just to leave a stitch out of place so the gods would not be offended?

Commissioner Ratoff: No, no. This position was... The Department of Labor, that deputy position was always classified. Then it became unclassified. In the Department of Employment Security and, believe me, the deputy commissioner there now would prefer it to stay this way, but because he is subject to appointment, re-appointment, etc., he says he has three people who are working for him who are getting paid more than he does. Your personnel law says that a supervisor has to earn at least a

thousand dollars more than the person he supervises. That's your top honcho.

This is to bring my deputy in line with... I've got a sheet here of all the agencies equivalent to mine and I will gladly give that to you. **Please see "Compensation of Certain State Officers", attached hereto and referred to as Attachment #4.**

Senator Andrew R. Peterson, D. 11: I think we should have it in the file, if you don't mind.

Commissioner Ratoff: This shows all the agencies with my category.

Senator Andrew R. Peterson, D. 11: So, it is your testimony that we should change this position to unclassified, which would have the affect of raising the salary. I assume you would lower the salaries of the others.

Commissioner Ratoff: No, we wouldn't. I just want to bring him in line with other commissioners, with my department and with other departments. Herein lies the...

Senator Andrew R. Peterson, D. 11: What are the fiscal implications for that change?

Commissioner Ratoff: Pardon me.

Senator Andrew R. Peterson, D. 11: What are the fiscal implications of the change?

Commissioner Ratoff: Probably they are about $4,000 I would think.

Senator Andrew R. Peterson, D. 11: What is the approximate?

Commissioner Ratoff: It's in there now, in the sheet I gave you. Right now, he gets $71,000 and my attorney gets $75,000. So, I would raise him up to the H level and he would get $75,500. He would get $500 more than the general counsel is getting right now. But, you have that on the chart I gave the secretary.

Senator Andrew R. Peterson, D. 11: Thank you.

Commissioner Ratoff: Now, the reason for my amendment is that it seems that this bill has had all kinds of changes and amendments. When we first got this to the LSR, to have the bill drafted, I had this language. This is the

material that was sent to Legislative Services for drafting the bill and, in the original material I sent to them, I had stated that the Commissioner of the Department of Employment Security shall be appointed by the... shall appoint a deputy commissioner and the commissioner will be removed under RSA 41. This was a permanent position similar to my legal counsel. But, when the bill came out as written, it made it a five-year appointment, subject to approval of Governor and Council.

Now, by making it subject to approval of Governor and Council, that puts the position in jeopardy in this respect. This is one position that should be under RSA 41. In fact, this morning I got a call from Chris Randolph. She is the Deputy Director for the Regional Department of Labor in Boston, and she said, "I see that there's legislation up there to put the deputy on a five-year term". She said, "Why are they doing that? That's terrible." I said I didn't intend for it to come out this way and I said, what's your concern, and she said every place that we have a deputy commissioner with a term, it becomes subject to usually quick turnover and the department loses its efficiency.

For instance, in this position, this gentleman that has it now has been in state service for twenty years. And, you just heard in our bill in the testimony and changes, you heard us talking about Indians, Canadians and Mexicans. All of our jurisdiction comes to us from the federal government and our staff has to be very knowledgeable in government affairs and changes in, for instance, our budget changes every year. Federal regulations change every year. We have alien certification, etc., etc. So, it behooves our professional staff to be just that – professional employees, as opposed to political appointees. That was the reason that Chris Randolph called me from Boston today and said, "Gee, I hope that doesn't happen" and I said I didn't intend for it to be that way and I was going in with an amendment to correct it.

Now, the UI Advisory Board, the board I was talking about, they are aware of this and they couldn't understand why the LSR came out the way it is. Kathy Eneguess called me from Arizona and said, "Why are you allowing it to go through that way?" So, I'm here trying to make a correction.

Senator Andrew R. Peterson, D. 11: You want this appointment to be made by you and be contemporaneous with your ...?

Commissioner Ratoff: No. The way it is under RSA 41, the commissioner makes the appointment and then whoever gets the job has a career job and they can only be removed by the Governor and Council.

Senator Andrew R. Peterson, D. 11: For cause?

Commissioner Ratoff: For cause or whatever. But, the point is, you just can't arbitrarily dismiss a person. A commissioner can't just arbitrarily dismiss a person. If you dismiss a person, you have to explain to the Governor and Council why you were doing it.

Ms. Angle: We have a copy of that proposed draft.

Senator Andrew R. Peterson, D. 11: Oh, that's good. Are you asking for a policy that's in line with what is done in other departments relative to...? It seems to be that you are talking about a fairly hybrid animal and it could be mistaken.

Commissioner Ratoff: No. The Department of Labor is this way. If you will look at the Department of Labor, you will see that the Deputy Director of the Department of Labor is in the same position.

Senator Andrew R. Peterson, D. 11: Doesn't the Commissioner serve a five-year term and then...?

Commissioner Ratoff: I do.

Senator Andrew R. Peterson, D. 11: And then reappointment?

Commissioner Ratoff: The Commissioner does, but in a department like the Department of Employment Security, the Commissioner may serve as a policy maker and a liaison to the Legislature, but believe me, to be an actual administrator of federal law, you have got to have many years of experience the way Lyn does and the way my deputy does. All of my staff...

Tape change.

Commissioner Ratoff: All of my staff are long-term professional employees who really have to know the system. As I say, it's an altogether different system than the state government and it's a very unique system.

Senator Andrew R. Peterson, D. 11: It strikes me that what you are really describing is more of a classified employee in that case.

Commissioner Ratoff: It would be fine if it was classified at the proper grade. That's what I'm saying. He is classified. He is underclassified.

Senator Andrew R. Peterson, D. 11: Why don't we...?

Commissioner Ratoff: He is at labor grade 35. You can't go any higher than that according to the classified system.

Senator Andrew R. Peterson, D. 11: So, we are trying to make, to carve out a category for, in essence, a classified employee at a higher salary. Is that incorrect?

Commissioner Ratoff: You can't do that. You can't...

Senator Andrew R. Peterson, D. 11: But, wouldn't that be the effect?

Commissioner Ratoff: No. You are making this person unclassified. You're putting him into the unclassified system. Now, this puts him at a risk. This puts him in a risk 'cause he is liable, every five years, for scrutiny. A Governor or Commissioner could dismiss him. You take a person with twenty years of experience subjecting himself to possible arbitrary dismissal is just not right, Senator. As a matter of fact, the gentleman himself was torn when I submitted this. He said, rather than being subject to the will of politicians, he would just as soon leave it the way it is and take less money, and I don't think that's right either.

Senator Andrew R. Peterson, D. 11: I'm acting as a devil's advocate in some ways, in order to clarify the points.

Commissioner Ratoff: I know you are.

Senator Andrew R. Peterson, D. 11: Don't misunderstand the penchant on my part to dismiss lightly the performance that people in state government offer in their jobs. I see the people that I work with in state government as truly being public servants and I say that quite often here because I mean it. I also understand that the political appointee who heads an agency is very much in need of people who have greater experience and working directly beneath them. So, don't misunderstand my comments in that way.

I think we have two problems here. One is to understand the effect of the changes in this legislation that are proposed and the second is to have those changes before us in a timely manner so we can act on this bill. I think that the second part is something... What's our schedule as far as FN bills go, Senator Prescott? Can we do it next week?

Senator Russell E. Prescott, D. 23: Yes.

Senator Andrew R. Peterson, D. 11: But, we have a relatively tight time frame to get these put in proper form. Perhaps with Senator Flanders' help

that will be able to be done. As I said, I know that you are first to testify and we have a few more and we have some other amendments that may be proposed as we go that you all may have a point of view on as well. So, there is a little bit of work to be done between now and next Wednesday and that's the reason for my questions. I apologize for a long explanation, but that's just so that you will understand what I am trying to do.

These issues are important and a lot of this is to have your state law conform to federal strictures and we are contributing a lot, an Indian tribe situation where we don't even have one, and so forth. So, I'm sure you agree on that point.

Anyway, I do have one specific question, Mr. Chairman and I will turn it back over to you and that is relative to the paper carriers. You've got the newspaper carriers in here as being an exempted class for getting unemployment benefits, people who deliver newspapers. Is that correct?

Ms. Angle: It is the people who transport the newspapers for distribution.

Senator Andrew R. Peterson, D. 11: Right. Is that a problem?

Ms. Angle: It's not a problem necessarily, but we wanted to be in conformity with the law, the federal law.

Senator Andrew R. Peterson, D. 11: So this is another federal...

Commissioner Ratoff: That's right.

Senator Andrew R. Peterson, D. 11: As is most of the bill.

Commissioner Ratoff: As I said, Senator, about everything we do, you have to know your federal law and then come back and change state law to comply with federal law. So, my people have a different orientation, a different mindset. That's why I say I would hate to lose my professionals.

Senator Andrew R. Peterson, D. 11: Well, I can certainly understand that. My only question about the change you are suggesting is that you have an unclassified employee, a commissioner, who is appointed for a five-year term and appoints a deputy. That deputy stays there for thirty years and you might have another four or five different commissioners that would have limited opportunity to make a change if they wanted to have a different direction and so forth. Perhaps that's why, but apparently, it is what you are asking for, unless I'm not hearing you correctly.

Commissioner Ratoff: Yes, that's what I'm asking for. The same situation, as I say, I keep going back to the Department of Labor and that situation. It exists there now, so I'm not asking for anything new.

Senator Andrew R. Peterson, D. 11: And, Safety, do you know what we do?

Commissioner Ratoff: No.

Senator Andrew R. Peterson, D. 11: For example, Commissioner Stephen?

Commissioner Ratoff: No, I just happen to know. The only reason I am so aware of the Department of Labor is because Dave Wihby, who has been their Deputy Director for years, has always been on the lowest pay scale there is and finally they brought him up to this position I'm talking about and he is on a permanent basis.

Senator Andrew R. Peterson, D. 11: Thank you. Thank you, Mr. Chairman.

Senator Russell E. Prescott, D. 23: Thank you very much. Are there questions? Senator Estabrook?

Senator Iris Estabrook, D. 21: Thank you. I am the prime sponsor of the bill. I have a question about the pension board and I understand from your explanation. By the way, thank you. This is one of the best walk throughs of a bill that I've gotten.

When you are changing the training program for the approved...under the auspices of the DOE. I understand from your explanation why you have that. Why didn't you just go with an or and allow them to continue to qualify for the programs? They are under the auspices of the Department of Education or approved by the Commissioner.

Ms. Angle: I suppose we could do that as well.

Commissioner Ratoff: We could do that.

Senator Iris Estabrook, D. 21: Thank you.

Ms. Angle: It would accomplish the same thing.

Senator Russell E. Prescott, D. 23: Any further questions? Seeing none, thank you very much for your testimony. For the record, Erin McTaggart

from the New Hampshire Women's Lobby signed up in favor of the bill, not wishing to speak. The next person on the list is Doug Patch.

Attorney Doug Patch: Thank you, Mr. Chairman and members of the Committee. I have a copy of an amendment that I wanted to propose this afternoon, which I will discuss briefly. I won't take up too much of your time.

Please see "Amendment to SB 101", attached hereto and referred to as Attachment #5.

My name is Doug Patch and I am an attorney with the Concord law firm of Orr & Reno and I am testifying here this afternoon on behalf of Laidlaw Transit, Inc., a company which contracts with a number of school districts in New Hampshire to provide transportation services.

We are here to ask your support for an amendment to SB 101 that would address what is really a fairly narrow, but very important unemployment compensation issue that relates to school bus drivers.

For years, school bus drivers who provide transportation services to an educational institution, but who are employees of entities other than the educational institution, were able to collect unemployment compensation benefits during vacation and holiday periods such as school vacation weeks during the school year, as long as they otherwise qualify for those benefits. That all changed as a result of a New Hampshire Supreme Court decision in 2001 and that opinion, Appeal of Manchester Transit Authority, overturned an earlier opinion of the court and interpreted the law in such a way that school bus drivers who were employed by a private contractor are no longer entitled to collect benefits for school vacation week.

In light of this decision, the Department of Employment Security has had to deny requests for unemployment compensation by school bus drivers who are unemployed during a school vacation or holiday week.

The Department also asked the Attorney General for an opinion on whether, in light of the MTA decision, it must interpret the law in a similar fashion for summer vacation periods. The Department just recently received an answer to that opinion request and the answer indicates that, in light of the MTA decision, the Department is required to interpret the law in such a way as to deny unemployment compensation benefits to school bus drivers during the summer vacation periods as well.

While the decision on vacation weeks in and of itself was a negative development for school bus drivers and for transportation companies, the

recent decision by the AG's Office that the law should be interpreted to deny school bus drivers who would otherwise be eligible for unemployment compensation benefits during the summer vacation will have a devastating effect on the ability to retain and attract qualified school bus drivers.

We are therefore here this afternoon to ask your support for an amendment that would restore unemployment compensation benefits to those school bus drivers for holiday and vacation periods and summer vacation periods as well.

If the decision to eliminate these unemployment benefits is allowed to stand, it will have a significant negative impact on school bus safety. Not only will it make it more difficult to retain qualified experienced school bus drivers, it will also make it more difficult to hire qualified individuals to be school bus drivers. This will, of course, lead to greater turn over in school bus drivers and a need for more training. Less experienced drivers means a reduction in safety for school children. Ultimately, in order to retain the drivers, the private contractors will have to raise wages and thus, between increased wages and increased training costs, they will have no choice but to pass additional costs on to school districts.

We are asking for your support for an amendment to the law that will restore the situation to the way it was before the New Hampshire Supreme Court issued the MTA decision. It worked well then. Everyone, including the drivers and employers in the school districts and, as far as I know, the Department as well, seemed to be content with the situation. We are not asking you to provide any additional or new benefit that the school bus drivers didn't already have. We are only asking you to correct an unfortunate situation that has arisen. We urge your support for this important amendment.

Thank you for the opportunity to speak in favor of this amendment and I would be happy to answer any questions.

There are a couple of other people here who are very much involved in the industry, who I know would like to testify and probably have more familiar knowledge with the details of it than I do.

I also have what I would like to leave with the Committee - a copy of my testimony, a copy of the amendment, a copy of the MTA decision from the Supreme Court, which I think would be good for you to have in your records, and a copy of the recent opinion from the AG's Office that I made reference to in my testimony.

Please see "Testimony on Amendment to SB 101", Supreme Court decision in Appeal of Manchester Transit Authority, and letter from Mary E. Schwarzer, Assistant Attorney General, to Commissioner John J. Ratoff, attached hereto and referred to respectively as Attachments #6, #7, and #8.

Senator Russell E. Prescott, D. 23: Thank you for your testimony. Does anyone else wish to ask a question? Thank you very much. For the record, Representative Bishop signed up in favor, but was not here to speak or introduce the bill. Same with Senator Flanders.

Commissioner Ratoff: In response to information from counsel, I'd like to make the statement.

Senator Russell E. Prescott, D. 23: Who are you for the record?

Commissioner Ratoff: Commissioner of Employment Security. We have been aware of this problem since last April. This has been an ongoing controversy and we have been waiting all summer and all fall for a decision from the Attorney General's Office. We couldn't commit as an agency to anything until we at least saw the Attorney General's opinion and we did get it on Monday. So, even though we were aware that Mr. Patch was preparing legislation, it was premature of us to even consider legislation until we saw the AG's opinion, which came up Monday.

Now, I can understand your hearing the testimony from that side, but we're not prepared at this moment, naturally, but we do have the testimony that Doug is going to present, Mr. Patch, and he is going to meet with the Department, with myself, my Deputy Commissioner, the Director, and my general counsel to go over the amendment he is proposing and then we will have to contact by phone our UI Advisory Council members to get their input on it and we will give this Committee, hopefully by Friday, our point of view on it.

Senator Russell E. Prescott, D. 23: Very good.

Commissioner Ratoff: We are aware that everything he says, it is not such a complicated issue, but is always one of those touchy issues because one year the feds say pay them and the next year they say don't pay them. Again, we are always at the mercy of someone else telling state government how to run their business. So, we welcome their testimony, but we can't respond to it. We will be in touch with you by letter. Okay?

Senator Russell E. Prescott, D. 23: Very good.

Commissioner Ratoff: Thank you.

Senator Russell E. Prescott, D. 23: Thank you. Senator Flanders, did you wish to speak?

Senator Robert B. Flanders, D. 7: Yes, if I may. I apologize. My name is Bob Flanders. I represent Senate District 7. I was not here to introduce the bill. I sent Susan Duncan over and she was not recognized. The reason I was not here is because I attended the service for the young soldier who was killed in Kuwait. I went to the veterans' cemetery to attend that funeral. That's why I was not here.

I'm sure you have heard a lot more about the bill than I know. This is a bill that I sponsored because I am on the Advisory Board for Unemployment Security and this is something that came before the Board and voted by the Board with 100% approval. There's a lot of amendments floating around. I guess you got two or three amendments. But, I apologize for not being here. I apologize to the Commissioner for not being here. But, that was rather important.

Senator Russell E. Prescott, D. 23: Very good.

Senator Robert B. Flanders, D. 7: Thank you.

Senator Russell E. Prescott, D. 23: Thank you very much, Senator. For the record, Shari Ridlon is in favor of the bill, not wishing to speak, from The Provider Enterprises. The same with Amy Lockwood from Concord Area. The same for Deb McCallum. So, the next person wishing to speak on the list is John J....

Unidentified speaker: I think Deb McCallum wanted to speak actually.

Senator Russell E. Prescott, D. 23: Deb McCallum. Please come forward to speak.

Deb McCallum: I will be very brief. I just want to back up everything that Doug Patch has stated in regards to the amendment to the bill. For the record, my name is Deb McCallum and I work for First Student.

Our company, like Laidlaw, contracts out to districts for transporting children within the State of New Hampshire. Currently, we have 750 employees that we feel will be greatly affected by the decline of unemployment benefits. One of the things that Doug stated that we see as a

problem is retaining and recruiting drivers for our industry. In order for us to keep these drivers, we are gonna have to increase wages and in turn that will trickle down to our school districts.

Student safety, as he stated, will be a major concern. If we can't retain the drivers, we can't keep up the consistency of people on our routes. We are gonna be short drivers. We're gonna have routes that will probably go uncovered and we are gonna have students waiting at bus stops, waiting for a bus to arrive at some point in time.

Another affect, our employees, most of us in the industry, live pay check to pay check. It's gonna be a heavy financial impact on them if they go into a summer vacation period where they are going to have to rely on their pay checks. They are gonna be out there looking for more permanent jobs and, again, here comes the effect of retaining, training, and getting more drivers on board.

That's pretty much it in a nutshell. I hope you consider looking at this amendment because I think you are gonna see a big impact clear across the State of New Hampshire.

Senator Russell E. Prescott, D. 23: Thank you very much. Senator Peterson?

Ms. McCallum: I'm sorry. Let me sit back down.

Senator Andrew R. Peterson, D. 11: Your company does the bus routes for Conval High School, don't you, over in Peterborough or don't you?

Ms. McCallum: No. That would be Laidlaw. We are First Student. I am in Nashua, New Hampshire. We have several locations throughout the State.

Senator Andrew R. Peterson, D. 11: Alright. I thought you were with Laidlaw. I'm sorry.

Ms. McCallum: No. First Student.

Senator Andrew R. Peterson, D. 11: Thank you.

Senator Russell E. Prescott, D. 23: Rich Leute, did you wish to speak?

Rich Leute: Yes, I did. Good afternoon, Mr. Chairman and members of the Committee. My name is Rich Leute. I am the Director of Operations for Transportation Rentals, Inc., which is a company that contracts with many

school districts, private organizations, day camps, fraternal organizations and individuals to provide transportation services for the most part in school buses.

I am here to echo my support for the amendment to SB 101 that would address the aforementioned issue that Doug Patch raised relating to school bus drivers' eligibility for unemployment benefits. I stand together with the spokes person for Laidlaw Transit and Deb McCallum from First Student and all other school bus contractors, some of whom are here today, and others that may not have been afforded the ability to speak to this Committee and what a devastating impact this ruling will have on Transportation Rentals, Inc.

There's no doubt in my mind about the increased costs of constant training, advertising, processing of criminal backgrounds that would ultimately have to be considered when figuring costs to customers. These would be the most outstanding and obvious impacts of this ruling.

I would like to pose one of many other situations to consider. Our company, in an effort to support single parents and the ability to support their families and at the same time not have to worry about child care, allow our drivers, with permission from our respective customers, the ability to bring their pre-school age children on the bus with them while they are in the performance of their duties. This is one very distinct way that school bus driving can be a valuable asset to the taxpayers of this State in that it helps single parents earn a living, a meager living, but nonetheless a living.

A discontinuance of eligibility would create a hardship of great magnitude for taxpayers and government agencies for these same people being out of work and thereby needing public assistance. It is just one of the creative ways that the school bus industry works to employ people that have certain circumstances and, at the same time, tap into that resource.

Of course, the eligibility of benefits certainly plays a big role in the nature of the business.

I would respectfully submit to this Committee that the hardships created by the Manchester Transit Authority appeal and the subsequent decision to deny unemployment benefits to school bus drivers that are employees of private contractors is a decision too costly to the children of this State that rely on this transportation.

The drivers that operate these buses are a dedicated breed of people that take their responsibilities very seriously and are quality employees. They have

been rigorously trained, qualified stringent standards. They submit themselves to constant training required by the State. They get up before dawn and drive the safest form of ground transportation on the planet and they enjoy doing it. I am very pleased with the job they do every day and make no mistake, most, if not all, have been trained at the sole expense of the contractors that employ them. It's a very big expense, too, to train one person.

My company, as well as other school bus contractors, is affected by the inability to retain these dedicated professionals are very worried about the future, not only the safety, but also the future of our companies. Beset with a serious driver shortage with our applications for employment at a staggeringly slow pace, my records show one out of every ten applications turn into a licensed driver. This makes for a very difficult situation.

Taking into account the top thirty percent of the driving pool is eligible for the charter services that I do pick up and supply, that leaves seventy percent of the work staff in danger of being laid off without benefit of unemployment insurance should the amendment not be passed.

I would respectfully submit to this esteemed committee that this factor alone is one of the biggest concerns to all of the contractors and it is our belief, Transportation Rentals, is that the dividing line on eligibility should be solely dictated on whether or not an employer pays these taxes on behalf of an employee. If they are paid, then the employee should reap the benefits of that tax paid on their behalf.

I am grateful to this Committee for their time and I want to thank everybody for their patience and the opportunity to speak before this Committee. If there are any questions, I would be happy to answer then.

Senator Russell E. Prescott, D. 23: Seeing none, thank you very much.

Mr. Leute: Thank you very much.

Peter Chamberlain: Good afternoon Mr. Chairman and members of the Committee. My name is Pete Chamberlain. I am the business administrator for the Bow School District. I am also President of the New Hampshire School Transportation Association, an organization that represents both school districts and private carriers and is dedicated to the continuing improvement of school bus safety in this state. When I say private carriers, I refer to First Student, Laidlaw and the like.

I am testifying here this afternoon on behalf of that organization to support the proposed amendment to SB 101 to allow the payment of unemployment compensation benefits to school bus drivers during school vacation periods.

As a business administrator who is responsible for the running of the transportation department in my school district, I am continually facing the problem of replacing drivers. The cost of replacing these individuals is certainly expensive and is a drain on the limited time of my staff. More importantly, it increases the number of less experienced drivers in my organization and therefore has a potential negative impact on transportation safety in the district. This reasoning is equally true for districts that retain private transportation companies. Any action that can be taken to reasonably retain qualified drivers should be seriously considered.

Thank you for the opportunity of testifying before you today and, if you have any questions, I would be more than happy to answer them.

Senator Russell E. Prescott, D. 23: Thank you very much for your testimony. Any questions of the Committee? Seeing none, thank you. Does anyone else wish to testify on behalf of SB 101? I will close the hearing on SB 101 and thank very much all of you for coming to testify.

Hearing concluded at 3:45 p.m.

Respectfully submitted,

L. Gail Brown

Recorded by Pamela Mannochi
Transcribed by L. Gail Brown
3/17/03

8 Attachments

ATTACHMENT #1

Senate Bill 101-FN
March 12, 2003
Testimony before Senate ED&A
Provided by Carolyn Angle
Director, Unemployment Compensation Bureau

The NH Department of Employment Security Supports SB 101-FN and the amendment for the following reasons. The Bill and the amendment have the unanimous support of the Advisory Council.

Section 1 and 8

In December 2000, the Federal Unemployment Tax Act (FUTA) was amended to require that American Indian Tribes be treated similarly to state and local governments. This means that services performed in the employ of tribes are no longer subject to FUTA tax. In order to conform to Federal law, state laws are required to cover the services performed in the employ of tribes, with some exceptions, and tribes must be offered a reimbursement option, meaning that instead of paying quarterly contributions on the first $8000 of wages paid to each employee, the tribes would be permitted to reimburse the department on a dollar for dollar basis for unemployment benefits paid to their former employees, if the unemployed individual's benefit rate is based on wages paid by the tribe. Although NH does not at present have any "Indian Tribes" within our state boundaries, the US Department of Labor has recommended that our law be amended so that it conforms in the event that there is a petition to the federal

government to recognize a tribe within our borders or an out of state tribe has one or more employees in New Hampshire in the future.

Senator Flander's amendment provides considerable additional language, which is optional under federal law and deals with what the state needs to do if an Indian Tribe fails to fulfill its obligations as a reimbursable employer and the subsequent actions the state may take to make the organization taxable.

Section 2 and 3

These sections amend RSA 282-A: 9 so that the term employment will not include service by a direct seller engaged in the trade or business of distribution or delivery of newspapers, etc. This change brings RSA 282-A in line with federal law, which also excludes these services. The result of this is that the services provided by these workers would not be covered under RSA 282-A and therefore monies earned providing these services could not be used to establish a claim for unemployment benefits.

Section 4

This section updates the statute to allow the Commissioner to approve vocational training programs. Currently, an individual must be enrolled in a training program under the auspices of the NH Department of Education in order for NH Employment Security to waive certain availability requirements while the individual is in training. It has come to the Department's attention that many vocational programs are provided through apprenticeship councils, licensing

boards and vendors who are certified to train individuals. Allowing these programs to be approved by the Commissioner of the Department of Employment Security will broaden the Department's authority to allow benefits to those individuals while in training.

Section 5

Currently, there are no provisions in NH Unemployment Compensation Law to prevent claims being filed and benefits paid to claimants who live outside the United States and are not in countries which have an agreement with the United States with respect to unemployment compensation. With the advent of telephone and Internet claims, the potential for fraud is enormous, as filing from outside the country becomes easier. FUTA requires that states pay benefits to eligible individuals in the United States, its possessions and to individuals in contiguous countries such as Canada which has executed an agreement and Mexico if it should enter into such an agreement. Senator Flander's amendment changes the language of the original bill to " contiguous" to include both Canada and Mexico.

Section 6

An individual is disqualified from receiving benefits If the individual leaves their job voluntarily without good cause attributable to the employer, is discharged for misconduct connected with the work, refuses an offer of suitable work or is unemployed due to a work stoppage that exists because of a labor dispute until

the individual meets the re-qualification provisions in RSA 282-A. Prior to 1998 both RSA 282-A 32, I and RSA 282-A 36, IV provided that an individual must work in 5 or more consecutive weeks in employment earning in each week an amount at least equal to his maximum benefits rate plus 20% and then become unemployed from said employer due to lack of work. In 1998 RSA 282-A: 32, I was changed to require that an individual would be disqualified until the individual earned in each of 5 weeks wages in employment ... of at least 20% more than such individuals weekly benefit amount subsequent to the date... Section 6 provides for consistency in re-qualification provisions for both statues. It also inserts gender neutral language into RSA 282 A: 36.

Section 7

This section allows appeal determinations to be mailed via first class mail rather than certified mail. This was a recommendation made by the U.S. Department of Labor following a review of this department's appeal unit activities in August 2002. This would significantly reduce the staff time and the cost of processing mail. The department will put procedures in place to assure that any party, who does not receive their appeal decision via regular mail, will have a second copy sent by certified mail so their appeal rights are preserved.

Section 9, 15 (Original SB 101-FN) **and 18,** (Department's amendment)
These sections will be addressed by Commissioner John R. Ratoff.

Section 10

This section clarifies that department tax agents may be designated by the commissioner as "serving officers" for the purpose of serving liens and tax warrants.

Section 11

This section clarifies the authority of the commissioner to collect debts via civil action on behalf of other states and the federal government. The re-codification of the statute in 1981 made the previously existing authority less clear.

Section 12, 13 and 14

These sections update the RSA 282-A with regard to changes made over time to Chapter 2 of Title II of the Trade Act of 1974, as amended and include and authorize the department to carry out the provisions of the Trade Adjustment Reform Act of 2002 as amended.

Section 16 and 17 (Senator Flander's amendment)

These sections increase the capacity of the commissioner to waive debts of employers and benefit recipients of interest, penalties, fees or legal costs of up to fifty dollars if it is in the best interests of the state. Currently a benefit recipient or

an employer who owes the department money must request a compromise of the debt. This requires that the Administrative Hearing Committee be convened, the debtor and the department execute a settlement agreement, and approval be obtained from the attorney general's office. For example, an elderly person employs a domestic. The quarterly report is filed late due to a snowstorm. The employer is assessed a late fee of $25 and charged $.08 in interest. The employer's record is otherwise issue free and this is the first time a report has been filed late. To go through the above process to set aside this indebtedness is a waste of limited administrative resources.

Section 19 (Department's amendment)

This section which replaces Section 16 of the original SB 101-FN and Section 18 of Senator Flander's amendment, provides for the effective dates of the legislation.

ATTACHMENT #2

DEPARTMENT OF EMPLOYMENT SECURITY'S PROPOSED AMENDMENT

TO SENATE BILL 101

3/6/03

Amend Section 1 of the bill to read as follows:

1 New Paragraph; Unemployment Compensation; Employer Defined. Amend RSA 282-A:8 by inserting after paragraph VII the following new paragraph:

VIII. An Indian tribe as defined by 26 U.S.C. section 3306(u) of the Federal Unemployment Tax Act for which services in employment are performed within this state unless such services are otherwise excluded from employment under 26 U.S.C. section 3306 (c) of the Federal Unemployment Tax Act or under RSA 282-A:9. **Indian tribes or tribal units (subdivisions, subsidiaries or business enterprises wholly owned by such Indian tribes) subject to this Act shall pay contributions under the same terms and conditions as all other subject employers, unless they elect to pay into the State unemployment fund amounts equal to the amount of benefits attributable to service in the employ of the Indian tribe. For the purposes of RSA 282-A:9, I, the exclusions under RSA 282-A:9, IV, (o) (2), (o) (5), and (p) (4) shall apply to Indian tribes.**

Amend Section 5 of the bill to read as follows:

5 New Paragraph; Unemployment Compensation. Amend RSA 282-A:32 by inserting after paragraph III the following new paragraph:

IV. For any week during which the individual resides other than in New Hampshire, another state, the District of Columbia, Puerto Rico, the Virgin Islands or ~~Canada~~ **a contiguous country with which the United States has an agreement with respect to unemployment compensation**.

Amend Section 8 of the bill to read as follows:

8. Unemployment Compensation. Amend RSA 282-A:69, II to read as follows:

II. Notwithstanding this section, any organization or group of organizations, described in section 501(c)(3) and exempt under section 501(a) of the Internal Revenue Code ***or Indian tribe as defined in RSA 282-A:8, VIII***, which becomes an employer under this act, may elect to change its status either to reimburse in the manner provided for the state in RSA 282-A:70 or to pay contributions as hereinabove provided. The change in status shall be irrevocable for 3 calendar years. Thereafter the employer may

elect to change its status no later than January 1, for any year, but such new change in status shall be irrevocable for 3 calendar years. Any 2 or more of such employers or any 2 or more cities, towns, counties or other political subdivisions of this state may elect, for a period of not less than 3 years, to pool their separate accounts under such rules as may be adopted by the commissioner, including appropriate bonding and fiscal safeguard requirements, and each unit shall be jointly and severally liable for payments due.

Amend RSA 282-A:69 by adding, as Section V, the following:

V. The following provisions shall apply to Indian tribes electing to make payments in lieu of contributions:

(a) At the discretion of the commissioner, any Indian tribe or tribal unit that elects to become liable for payments in lieu of contributions shall be required within thirty days after the effective date of its election, to:

(1) execute and file with the commissioner a surety bond approved by the commissioner; or

(2) deposit with the commissioner money or securities on the same basis as other employers with the same election option.

(b) Failure of the Indian tribe or tribal unit to make required payments, including assessments of interest and penalty, within 90 days of receipt of the bill will cause the Indian tribe to lose the option to make payments in lieu of contributions, as described in section II above, for the following tax year unless payment in full is received before contribution rate for next tax year are computed.

(c) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment, as described in subparagraph (A), shall have such option reinstated if, after a period of one year, all contributions have been made timely, provided no contributions, payments in lieu of contributions for benefits paid, penalties or interest remain outstanding.

(d) Failure of the Indian tribe or any tribal unit thereof of make required payments, including assessments of interest and penalty, after all collection activities deemed necessary by the commissioner have been exhausted, will cause services performed for such tribe to not be treated as "employment" for purposes of subsection (b).

(e) The commissioner may determine that any Indian tribe that loses coverage under subparagraph (d) may have services performed for such tribe again included as "employment" for purposes of RSA 282-A:8, VIII if all

contributions, payments in lieu of contributions, penalties and interest have been paid.

(f) The commissioner will notify the United States Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage made under subparagraphs (d) and (e).

(g) Notices of payment and reporting delinquency to Indian tribes or their tribal units shall include information that failure to make full payment within the prescribed time frame:

(1) will cause the Indian tribe to be liable for taxes under FUTA;

(2) will cause the Indian tribe to lose the option to make payments in lieu of contributions;

(3) could cause the Indian tribe to be excepted from the definition of "employer," as provided in paragraph (a), and services in the employ of the Indian tribe, as provided in paragraph (b), to be excepted from "employment."

(h) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the Federal government shall be financed in their entirety by such Indian tribe.

Renumber section 16 to be section 18 and insert new sections 16 and 17 to read as follows:

16. Amend RSA 282-A:148 to read as follows:

282-A:148 Adjustment of Contribution by Compromise **or Waiver**

I. The commissioner of the department of employment security may, with the approval of the attorney general, effect by written stipulation such settlement of the contribution or interest due under the provisions of this chapter as he **or she** may deem to be for the best interests of the state, and the payment of the sum so agreed upon shall be a full satisfaction of such contribution and interest.

II. Payment by a debtor of interest, penalties, fees and legal costs due under the provisions of this chapter totaling $50.00 or less may be waived by the commissioner of the department of employment security as he or she may deem to be for the best interests of the state.

17. Amend RSA 282-A:29 to read as follows:

282-A:29 Adjustment of Overpaid Benefit Account by Compromise **Or Waiver**

I. The commissioner may, with the approval of the attorney general, effect by written stipulation such settlement of any overpaid benefit account due under the provisions of this chapter as he **or she** may deem to be for the best interests of the state; and the payment of the sum so agreed upon shall be a full satisfaction of such overpaid benefit account.

II. Payment by a debtor of interest, penalties, fees and legal costs due under the provisions of this chapter totaling $50.00 or less may be waived by the commissioner of the department of employment security as he or she may deem to be for the best interests of the state.

ATTACHMENT #3

Sen. Flanders, Dist. 7
February 10, 2003
2003-0236s
08/10

Amendment to SB 101-FN

Amend the bill by replacing section 5 with the following:

5 New Paragraph; Unemployment Compensation. Amend RSA 282-A:32 by inserting after paragraph III the following new paragraph:

IV. For any week during which the individual resides other than in New Hampshire, another state, the District of Columbia, Puerto Rico, the Virgin Islands or a contiguous country with which the United States has an agreement with respect to unemployment compensation.

Amend the bill by replacing RSA 282-A:109, II as inserted by section 9 with the following:

II. [~~There shall be a~~] ***The*** deputy commissioner of the department of employment security [~~who~~] shall act as commissioner whenever the commissioner of the department of employment security is incapacitated, absent or unable to act for any cause. The deputy commissioner shall also act as commissioner of the department of employment security until a new commissioner is duly appointed whenever there is no commissioner. [~~During such period as the deputy commissioner acts as commissioner, his status as a classified state employee shall continue and shall in no way be altered, affected or changed.~~] ***The deputy commissioner shall be compensated in accordance with the provisions of RSA 94:1-a.***

ATTACHMENT #4

Grade	Agency	Position
FF	Department of health and human services	transitional assistance, business and industry coordinator
FF	Department of corrections	warden, lakes region facility
FF	Department of health and human services	director of MMIS
GG	Liquor commission	commissioner
GG	New Hampshire veterans home	commandant
GG	Adjutant general	deputy adjutant general
GG	Department of education	director, career technology and adult learning
GG	Department of education	director, standards and certification
GG	Department of education	director of instruction
GG	Department of health and human services	director, alcohol and drug abuse
GG	Department of health and human services	director of child support services
GG	Department of health and human services, division of developmental services	director of developmental services
GG	Department of health and human services, division of behavioral health	assistant director, community supports and long-term care
GG	Department of justice	director
GG	New Hampshire hospital	superintendent
GG	Department of health and human services, office of health management	senior physician and director of medicaid
GG	Department of resources and economic development	director, division of parks
GG	Sweepstakes commission	executive director
GG	Department of health and human services	office of program support
GG	Department of administrative services	director of plant and property management
GG	Department of corrections	director, division of administration
GG	Department of corrections	psychiatrist
GG	Department of corrections	senior physician
GG	Department of health and human services	chief legal counsel
GG	Department of health and human services	medicaid director
GG	Department of employment security	general counsel
GG	Department of cultural resources	state librarian

71,000
75,000

Grade	Agency	Position
GG	New Hampshire hospital	senior physician/psychiatrist
GG	Department of health and human services, office of health management	state senior physician
GG	Department of resources and economic development	director of economic development
GG	State treasurer	deputy treasurer
GG	Banking department	deputy bank commissioner
GG	Department of corrections	director, division of field services
GG	Department of safety	director, division of fire standards and training
GG	Department of safety	state fire marshal
GG	New Hampshire hospital	assistant superintendent professional SE
GG	Department of regional community technical colleges, police standards and training council	director
GG	Department of resources and economic development	director of travel and tourism
GG	Department of resources and economic development	director, forests and lands
GG	Department of health and human services, division of children, youth and families	assistant director
GG	Department of transportation	director of administration
GG	Insurance department	director
GG	Department of health and human services, office of health management	director of program support
GG	Department of state	deputy secretary of state
HH	Department of corrections	warden
HH	Department of safety	director of motor vehicles
HH	Department of transportation	director of operations
HH	Department of transportation	director of public works
HH	Fish and game department	executive director
HH	Labor department	deputy commissioner
HH	Liquor commission	chairman
HH	Department of regional community technical colleges	president, Manchester and Stratham
HH	Department of regional community technical colleges	president, Concord
HH	Department of agriculture, markets and food	commissioner

Grade	Agency	Position
HH	Department of health and human services	chief information officer
HH	Department of environmental services	director
HH	Department of cultural resources	commissioner
HH	Department of health and human services division of elderly and adult services	director of elderly services
HH	New Hampshire retirement system	director of finance
HH	Department of revenue administration	assistant commissioner
HH	Department of revenue administration	director of audit division
HH	Department of youth development services	commissioner
HH	Department of administrative services	director (comptroller)
HH	Department of administrative services	director of information technology management
HH	Department of administrative services	director, division of personnel
HH	Department of administrative services	financial data manager
HH	Department of corrections	unit director non-medical
HH	Department health and human services	division director
HH	Department of environmental services	assistant commissioner
HH	Insurance department	actuary
HH	Department of health and human services, office of health management	physician in charge
HH	Department of regional community technical college	deputy commissioner
HH	Public utilities commission	counsel
HH	Department of health and human services	transitional assistance, section administrator
HH	Department of health and human services, office of health management	state epidemiologist, administrator health data unit
HH	Insurance department	deputy commissioner
HH	Department of health and human services	director of application management
HH	New Hampshire hospital	associate commissioner and director

Grade	Agency	Position
II	New Hampshire retirement system	executive director
II	Department of health and human services, division of behavioral health	director, community supports and long term care
II	State treasurer	treasurer
II	Adjutant general	adjutant general
II	Department of corrections	director adult services-warden
II	Department of safety	director of state police
II	Department of employment security	commissioner
II	Department of regional community technical colleges	president, Laconia and Berlin
II	Department of regional community technical colleges	president, Nashua and Claremont
II	Banking department	commissioner
II	Department of health and human services, division of children, youth and families	director
II	Department of education	deputy commissioner
II	Department of transportation	director of project development
II	Labor department	commissioner
II	Insurance department	insurance commissioner
II	Department of justice	chief medical examiner
II	Department of health and human services, office of health management	director
II	Department of state	secretary of state
II	Department of administrative services	assistant commissioner
II	Department of health and human services	controller
JJ	Department of health and human services	senior division director
JJ	Public utilities commission	chairman
JJ	Public utilities commission	commissioner
JJ	Department of safety	assistant commissioner
JJ	Department of justice	deputy attorney general
KK	Department of education	commissioner
KK	Department of health and human services	deputy commissioner
KK	Department of transportation	assistant commissioner
KK	Department of regional community technical colleges	commissioner
KK	Department of resources and economic development	commissioner

Grade	Agency	Position
KK	Department of environmental services	commissioner
LL	Department of safety	commissioner
LL	Department of transportation	commissioner
LL	Department of justice	attorney general
LL	Department of administrative services	commissioner
LL	Department of corrections	commissioner
LL	Department of revenue administration	commissioner
MM	Department of health and human services	commissioner

(c)(1) For attorney positions in the department of justice, except for the attorney general and deputy attorney general, the following shall apply commencing on December 28, 2001:

	Minimum	Market anchor	Maximum
	$38,000		$92,000
Attorney		$46,000	
Assistant attorney general		$63,000	
Senior assistant attorney general		$78,000	
Associate attorney general		$86,000	

(2) The attorney general shall have the authority to place all attorneys of the department of justice in the appropriate position within the overall range, above, at, or below the market anchor salary. A market anchor designation for a position is the reference point within the overall range to aid in salary management and recruitment when done at a level other than entry level. The attorney general shall consider the following criteria in considering compensation for department attorneys:

(A) Tenure and progressive experience.

(B) The nature of the work performed.

(C) Increased independence of work performed and judgment exercised.

(D) Achievement of pre-determined performance standards.

(E) The acquisition and application of further education and training.

(F) Demonstration of an increased frequency of undertaking the type and complexity of work normally associated with the next position level.

(G) Fulfilling a leadership or management role.

(3) Designation of position, salary levels, and salary increases for attorneys in the department of justice shall be determined by the attorney general, subject to approval of the governor and council, within appropriations made to the department of justice. The provisions of RSA 94:3 shall not apply to attorney positions governed by this subparagraph.

ATTACHMENT #5

Amendment to SB 101

Amend the bill by striking out section 16 and replacing it with the following:

16 Unemployment Benefits for Certain Employees Providing Transportation Services. Amend RSA 282-A:31 by inserting after paragraph III the following new paragraph:

IV. Subparagraphs II (b) and (c) shall not apply to any individual who is otherwise entitled to unemployment compensation benefits and who is in the employ of a private employer which is under contract to provide transportation services to an educational institution. Any such individual shall be entitled to unemployment compensation benefits for any week which commences during a period between 2 successive academic years or terms even if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms. Any such individual shall also be entitled to unemployment compensation benefits for any week which commences during an established and customary vacation period or holiday recess even if such individual performs services in the period immediately before such vacation period or holiday recess and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess.

17 Effective Date.

I. Section 15 of this act shall take effect July 1, 2003.

II. Section 16 of this act shall take effect upon its passage.

III. The remainder of this act shall take effect 60 days after its passage.

ATTACHMENT #6

Testimony on Amendment to SB 101

Good afternoon Mr. Chairman and members of the Committee. My name is Doug Patch; I am an attorney with the Concord law firm of Orr & Reno. I am testifying here this afternoon on behalf of Laidlaw Transit, Inc., a company which contracts with a number of school districts in NH to provide transportation services. We are here to ask your support for an amendment to SB 101 that would address a fairly narrow, but very important, unemployment compensation issue that relates to school bus drivers.

For years school bus drivers who provide transportation services to an educational institution but who are employees of entities other than the educational institution were able to collect unemployment compensation benefits during vacation/holiday periods, such as school vacation weeks during the school year, as long as they otherwise qualified for those benefits. That all changed as a result of a NH Supreme Court decision in 2001. That opinion, Appeal of Manchester Transit Authority, 146 N.H 454 (2001), overturned an earlier opinion of the Court and interpreted the law in such a way that school bus drivers who were employed by a private contractor are no longer entitled to collect benefits for a school vacation week. In light of this decision the Department of Employment Security has had to deny requests for unemployment compensation by school bus drivers who are unemployed during a school vacation or holiday week.

The Department also asked the Attorney General for an opinion on whether, in light of the MTA decision, it must interpret the law in a similar fashion for summer vacation periods. The Department just recently received an answer to that opinion request and the answer indicates that in light of the MTA decision the Department is required to interpret the law in such a way as to deny unemployment compensation benefits to school bus drivers during the summer vacation periods as well. While the decision on vacation weeks in and of itself was a negative development for school bus drivers and transportation companies, the recent decision by the AG's Office that the law should be interpreted to deny school bus drivers who would otherwise be eligible for unemployment compensation benefits during the summer vacation will have a devastating effect on the ability to retain and attract qualified school bus drivers.

We are therefore here to ask your support for an amendment that would restore unemployment compensation benefits to these school bus drivers for holiday and vacation periods and summer vacation periods as well.

If the decision to eliminate these unemployment benefits is allowed to stand, it will have a significant negative impact on school bus safety. Not only will it make it more difficult to retain qualified, experienced school bus drivers, it will also make it more difficult to hire qualified individuals to be school bus drivers. This will of course lead to greater turnover in school bus drivers and the need for more training. Less experienced drivers means a reduction in safety for school children. Ultimately, in order to retain drivers, the private contractors will have to raise wages and thus between increased wages and increased training costs, they will have no choice but to pass these additional costs on to school districts.

We are asking your support for an amendment to the law that will restore the situation to the way it was before the NH Supreme Court issued the Appeal of the Manchester Transit Authority decision. It worked well then; everyone, including the drivers, employers, and school districts, and so far as I know the Department as well, was happy with the situation. We are not asking you to provide any additional or new benefit that the school bus drivers didn't already have, we are only asking you to correct an unfortunate situation that has arisen. We urge your support for this important amendment.

Thank you for the opportunity to speak in favor of this amendment. Please let me know if you have any questions.

ATTACHMENT #7

We conclude that the plaintiffs' remaining arguments are without merit and do not warrant further discussion. *See Vogel v. Vogel*, 137 N.H. 321, 322 (1993).

Reversed and remanded.

BRODERICK, J., concurred; BATCHELDER and HORTON, JJ., retired, specially assigned under RSA 490:3, concurred.

Department of Employment Security
No. 98-730

APPEAL OF MANCHESTER TRANSIT AUTHORITY

(New Hampshire Department of Employment Security)

June 1, 2001

1. **Administrative Law—Judicial Review—Statutory Provisions**
City transit authority's appeal under RSA chapter 541 was improper because judicial review of department of employment security decisions is provided for in RSA 282-A:67, which specifies the procedure for appealing a final decision of the appeal tribunal, and such review is exclusive of other methods of judicial review of unemployment compensation decisions. RSA ch. 541; RSA 282-A:67, :68.

2. **Unemployment Compensation—Practice and Procedure—Judicial Review**
Department's decision will be upheld unless its findings or conclusions were unauthorized, affected by an error of law, or clearly erroneous in view of all the evidence presented. RSA 282-A:67.

3. **Unemployment Compensation—Employee Eligibility—Particular Cases**
Disallowance of benefits to employees of educational institutions who were hired with the understanding that they would not work between semesters applies to employees of other entities who provide services to an educational institution and who are hired with the express understanding that their expected work schedule is dictated by whether the school is open. RSA 282-A:31, II(c).

4. **Unemployment Compensation—Employee Eligibility—Particular Cases**
Part-time school bus drivers who, pursuant to a collective bargaining agreement were not expected to work when school was not in session and were not required to be "on call" during such times, were ineligible for unemployment benefits for an established and customary annual vacation period. RSA 282-A:31, II(c).

5. **Judgments—Res Judicata—Particular Cases**
Res judicata was inapplicable where claimants' claim for unemployment compensation benefits for a particular vacation period was a different cause of action than that of another claimant's similar claim for benefits for the prior year's vacation period.

6. Judgments—Collateral Estoppel— Particular Cases

Collateral estoppel did not apply where the only issue actually litigated in a prior action was whether the appeal tribunal erred in determining whether a city transit authority met the definition of a service organization for an educational institution pursuant to statute, and that question was irrelevant to the issue to be determined in the current case.

Devine, Millimet & Branch, P.A., of Manchester (*Mark T. Broth* and *Diane Murphy Quinlan* on the brief, and *Ms. Quinlan* orally), for the petitioner.

Craig, Wenners & Craig, P.A., of Manchester (*Vincent A. Wenners, Jr.* and *Stephanie Stergiou Ferro* on the brief, and *Mr. Wenners* orally), for the respondents.

Philip T. McLaughlin, attorney general (*Daniel J. Mullen*, senior assistant attorney general, on the brief, and *Andrew B. Livernois* orally), for the State, as *amicus curiae*.

HORTON, J., retired, specially assigned under RSA 490:3. The petitioner, Manchester Transit Authority (MTA), appeals a decision of the appellate board of the New Hampshire Department of Employment Security (appellate board) finding the respondent school bus drivers (claimants) eligible for unemployment benefits for the week ending February 28, 1998. We reverse.

The following facts were either found by the New Hampshire Department of Employment Security Appeal Tribunal (appeal tribunal) and are not challenged here, or appear on the record before us. MTA is a public authority incorporated by the City of Manchester, pursuant to RSA 38-A:1 (2000), for the purposes of acquiring, owning, and operating a mass transportation system in Manchester. MTA has contracted with the City of Manchester School Department (school department) to provide buses and drivers to transport Manchester students in grades one through eight over specified school routes. In accordance with a collective bargaining agreement with the Amalgamated Transit Union, Local 717, MTA employs part-time operators to transport students pursuant to its contract with the school department.

The claimants were employed by MTA as part-time school bus drivers. Each filed a claim for unemployment compensation benefits for the week ending February 28, 1998, during which Manchester schools were closed for the annual February vacation. The department of employment security initially denied the claims and the appeal tribunal ruled that each of the claimants was ineligible to receive benefits based upon the claimants' employment with MTA. On further appeal, the appellate board reversed the appeal tribu-

nal's decisions and found the claimants eligible for unemployment compensation benefits based upon their MTA employment. Following the denial of motions to reconsider, MTA appealed to this court, purportedly pursuant to RSA chapter 541 (1997).

[1] We note initially that MTA's appeal under RSA chapter 541 is improper. Judicial review of department of employment security decisions is provided for in RSA 282-A:67 (1999), which specifies the procedure for appealing "a final decision of the appeal tribunal as reversed, modified, or affirmed by the appellate board." Such review is "exclusive of all other methods of judicial review of unemployment compensation decisions." RSA 282-A:68 (1999). Nevertheless, the appeal was timely filed and complied with the substantive requirements of RSA 282-A:67. Accordingly, we will treat this appeal as having been brought pursuant to that statute.

[2] In reviewing decisions under RSA 282-A:67, we must not "substitute [our] judgment for that of the appeal tribunal as to the weight of the evidence on questions of fact." RSA 282-A:67, V. "Furthermore, we will uphold the department's decision unless its findings or conclusions were unauthorized, affected by an error of law, or clearly erroneous in view of all the evidence presented." *Appeal of Work-A-Day of Nashua*, 132 N.H. 289, 291 (1989) (quotation omitted).

At issue here is the interpretation of RSA 282-A:31, II (1999), which provides:

> An unemployed individual shall not be eligible to receive benefits:
>
> (a) Based on services in an instructional, research, or principal administrative capacity for an educational institution . . . .
>
> (b) Based on services in any other capacity for an educational institution, including services for a service organization for any educational institution for any week which commences during a period between 2 successive academic years or terms to any individual if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms;
>
> . . . .

> (c) Based on services for an educational institution for any week which commences during an established and customary vacation period or holiday recess if such individual performs services in the period immediately before such vacation period or holiday recess and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess.

The appeal tribunal framed the legal issue before it as "whether or not the claimant[s] performed services as . . . bus driver[s] for a service organization for an educational institution, and if so, did the claimant[s] have reasonable assurance to return to work following the February 1998 school vacation." The appeal tribunal ruled that MTA was such a service organization and that the claimants had reasonable assurance that they would return to work. The appellate board disagreed, finding that under *Appeal of Locke*, 127 N.H. 403 (1985), MTA was not a service organization.

Both the appeal tribunal and the appellate board erroneously imported the "service organization" language of RSA 282-A:31, II(b) into RSA 282-A:31, II(c). Subparagraph (b), however, applies to unemployment in any week between successive academic years or terms, whereas the week of February 28, 1998 was, as found by the appeal tribunal, "an established and customary vacation . . . period." Thus, RSA 282-A:31, II(c) is the applicable provision. Because subparagraph (c) does not refer to service organizations, we need not decide whether MTA is such an organization.

The claimants first argue that they were not providing services for an educational institution, but rather were providing services for MTA. They argue that the statute must be read to apply only to employees of educational institutions, or it would have the absurd effect of rendering ineligible for unemployment benefits any person who provides any service for a school, such as a police officer who gives a presentation to the schoolchildren or the manufacturer of the school's desks. The petitioner, on the other hand, argues that the statute is clear on its face and that the claimants provide services for the Manchester schools.

Similar statutes in other jurisdictions have been interpreted both ways. *Compare, e.g., Borough of Pleasant Hills v. Com., Etc.*, 440 A.2d 679, 681 (Pa. Commw. Ct. 1982) (eligibility exclusion did not apply to school crossing guards employed by the borough rather than by the school district) *with Fisher v. Bureau of Indian Affairs*,

318 S.E.2d 322, 323 (N.C. Ct. App. 1984) (claimants employed by Bureau of Indian Affairs but serving secondary school fell within eligibility exclusion). We conclude that the statute is ambiguous. We therefore "review legislative history to aid in our analysis." *Appeal of Routhier*, 143 N.H. 404, 406 (1999) (quotation omitted). "[O]ur goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Appeal of N.H. Dep't of Transportation*, 143 N.H. 358, 360 (1999) (quotation omitted).

Prior to 1983, the applicable provision denied eligibility as follows:

> (d) With respect to weeks of unemployment beginning after December 31, 1977, benefits for any week which commences during an established and customary vacation period or holiday recess if he performs services *in the employ of* a public or other non-profit educational institution described in subparagraphs (b) or (c) in the period immediately before such vacation period or holiday recess and there is a reasonable assurance that he will perform any such services *in the employ of* such an educational institution in the period immediately following such vacation period or holiday recess.

RSA 282-A:31, II(d) (Supp. 1981) (emphasis added). In 1983, section II was amended to its present form, which contains the "services for" rather than the "in the employ of" language.

"Ordinarily, any material change in the language of the original act . . . is presumed to indicate a change in legal rights." *Snyder v. N.H. Savings Bank*, 134 N.H. 32, 36 (1991) (quotation omitted). Thus, we presume that the "services for" language in the amended statute means something different from "in the employ of" and therefore reject the claimants' argument that the statute applies only to employees of educational institutions.

The legislative history reveals that the amendment was introduced at the request of the University of New Hampshire to deal with employees that it hired on a percentage basis. *See* N.H.S. JOUR. 554-59 (1983). We explained the amendment's context in *Appeal of Locke*, 127 N.H. at 405:

> Employees of educational institutions, such as the university system, were hired on a percentage basis. They worked "82% time" and accepted positions fully aware that the

> institutions did not expect them to work between academic semesters, and they were reasonably assured that jobs would be waiting at the end of the semester break. Some of these individuals began to file for unemployment benefits during the summer months. Since the employees were hired with the understanding that they would not work between semesters, and their positions were so defined, the legislature amended the statute with the purpose of disallowing unemployment benefits to this group.

[3] We conclude that application of this purpose is not limited to employees of educational institutions, for employees of other entities who provide services to an educational institution may be hired with the express understanding that their expected work schedule is dictated by whether the school is open. Thus, in determining whether a claimant is covered by the eligibility exclusion of RSA 282-A:31, II(c), we look to whether the claimant was hired to work only when school is in session.

MTA's job description for part-time school bus operators states: "Part-time operators are employed during the time that school is in session within the City of Manchester." The collective bargaining agreement provides that "[w]ork [for part-time operators] shall be on school days unless performing charter work." The claimants argue, however, that MTA school buses are used for charter work during school vacations and that "there is a penalty for the drivers for refusing to do charter work."

In its decision in the instant case, the board stated:

> Throughout the periods when the claimant[s] w[ere] not working the record reflects that they were available and "on call" during the "slack time" which existed as a result of the school vacation period. Despite the claimant[s'] availability there was no work available that week. In accordance with the holding in the *Locke* decision the claimant was required to be available during the "slack time" in order to be assured that her job would still be available to her when business returned to normal at the end of school vacation. These and other facts in the instant case outlined herein and in the record are similar to those in the *Locke* decision.

We conclude that the appellate board's characterization of the facts in this case as analogous to those in *Appeal of Locke* is clearly erroneous.

The appellate board is required to defer to the appeal tribunal's factual findings. *See* RSA 282-A:65 (1999). The appeal tribunal found that "in accordance with the [union] contract, part-time school bus drivers will be utilized to perform all school related charter work in yellow school buses." It also found that "[i]f a charter is refused there is no threat of loss of employment, however the refusing driver is placed at the bottom of the seniority list." These facts are not analogous to those in *Appeal of Locke*, where the petitioner's employer "required its employees to be on-call during [semester breaks]" and the petitioner was "fearful that if she were not available during the slow business times, her job would not be assured when business in the area returned to its normal pace during the academic year." *Appeal of Locke*, 127 N.H. at 405-06.

The collective bargaining agreement provides:

> i. A list shall be made available at the beginning of each contract pick, allowing each school bus operator the opportunity to sign yes or no to performing additional school related work.
>
> j. An operator who refuses when asked to perform additional work, shall go to the bottom of the additional work list as worked and shall not be asked again until all other school bus operators that have signed yes to the additional work list have had the opportunity to accept or refuse.

Thus, part-time operators voluntarily decide whether to take on charter work at all. There is no evidence of any penalty for signing "no" to the charter work list. Once on the list, part-time operators are offered charter work "by seniority and on a rotating basis." When an operator's name is at the top of the list and the operator is offered a charter, the operator may still refuse, but the operator's name then goes to the bottom of the charter list. We disagree with the characterization of this consequence as a penalty, however, as the operator's name also goes to bottom of the list if the operator accepts and performs the work. While the collective bargaining agreement could have implemented a different rotation system, we do not view its failure to allow an operator to remain at the top of the list until work is accepted as a penalty on par with the feared loss of employment in *Appeal of Locke*.

[4] We conclude that the claimants were not expected to work when school was not in session and were not required to be "on call"

during such times. We therefore hold that the claimants are ineligible for unemployment benefits for the "established and customary" 1998 February vacation. RSA 282-A:31, II(c).

The claimants nevertheless argue that MTA is precluded, under the doctrines of res judicata and collateral estoppel, from challenging their eligibility because it did not appeal a board decision granting one of the claimants, Gwyn Furtado, unemployment benefits for the 1997 February vacation. MTA argues that to give preclusive effect to the 1997 decision "would be unfair, inequitable and contrary to the interests of judicial economy." We find it unnecessary to address MTA's policy arguments, however, because we conclude that neither res judicata nor collateral estoppel applies.

[5] "Res judicata is a doctrine judicial in origin which applies to repetitious suits involving the same cause of action." *Christian Camps & Conferences v. Town of Alton*, 118 N.H. 351, 353 (1978). It is inapplicable here because the claimants' claim for benefits for the February 1998 vacation is a different cause of action than Gwyn Furtado's claim for benefits for the February 1997 vacation. *See id.* at 353-54.

[6] Collateral estoppel, on the other hand, "precludes the relitigation by a party in a later action of any matter actually litigated in a prior action in which he or someone in privity with him was a party." *In re Alfred P.*, 126 N.H. 628, 629 (1985). The only issue that appears to have been actually litigated in 1997 is whether the appeal tribunal erred in determining that MTA "[met] the definition of a service organization for an educational institution pursuant to RSA 282-A:31 II(b)." We held above, however, that whether MTA is a service organization is irrelevant to the issue to be determined in this case. Thus, we conclude that MTA is not collaterally estopped by the appellate board's 1997 decision.

Finally, the claimants argue that MTA waived the issues appealed because "the questions presented for review were not raised by the MTA in the appeal below, but rather by the State of New Hampshire itself." We conclude, however, that the claimants waived this argument by failing to make more than this passing reference to it in their brief. *See State v. Hermsdorf*, 135 N.H. 360, 365 (1992).

Reversed.

BROCK, C.J., and BRODERICK, J., concurred.

ATTACHMENT #8

March 11, 2003

Attorney-Client Privilege

BY FACSIMILE
AND FIRST CLASS MAIL
Commissioner John J. Ratoff
New Hampshire Department of Employment Security
32 South Main Street
Concord, NH 03301

Re: Request For An Opinion

Whether the application of RSA 282-A:31, II(b) should be controlled by Appeal of Edna Mae Locke, 127 NH 403 (1985) or Appeal of Manchester Transit Authority, 146 NH 454 (2001)

Dear Commissioner Ratoff:

I am writing to respond to your request for an opinion as to whether the interpretation of RSA 282-A:31, II (b) should be controlled by Appeal of Edna Mae Locke, 127 NH 403 (1985) (hereinafter "Locke") or Appeal of Manchester Transit Authority, 146 NH 454 (2001) (hereinafter "MTA"). Although I have specified that this letter is subject to the attorney-client privilege, because you are the client, and the person with ultimate authority for the Department of Employment Security, you retain the right to waive the privilege at any time.

In brief, Locke continues to control the meaning of "services for a service organization for any educational institution," as that phrase is used in RSA 282-A:31, II (b). However, the Locke Court was not called upon to interpret the phrase, "based on services . . . for an educational institution." The MTA Court did interpret that phrase, and concluded that it applied to employees hired by a private corporation to provide services to an educational institution. As explained in greater detail below, the MTA Court's interpretation applies to the meaning of the phrase "based on services . . . for an education institution," as that phrase appears in RSA 282-A:31 II (a), (b), and (c).

BACKGROUND

As your letter of October 9, 2002 explained, the Federal Unemployment Tax Act (FUTA), 26 U.S.C.A. §§ 3301-3311, permits employers to take a credit against their federal taxes for contributions required to be paid into a state unemployment compensation fund as long as the state's unemployment compensation statute conforms to certain specifications in federal law. See 26 U.S.C.A. § 3302.

Broadly speaking, Locke and MTA concern FUTA's "between and within terms denial" provisions. See 26 U.S.C.A. § 3304(a)(6)(A)(1994). Federal law requires state laws to contain the "between and within terms denial" provisions for institutional, research and principal administrative services for educational institutions. 26 U.S.C.A. §3304(a)(6)(A)(i). Federal law also authorizes, but does not require, state law to adopt provisions which deny unemployment compensation based on services in any other capacity for an educational institution or an educational service agency. 26 U.S.C.A. § 3304(a)(6)(A)(ii-iv). The purpose of the "between and within term denial" provisions is to reserve unemployment compensation for individuals who find themselves subject to unanticipated unemployment through no fault of their own.

In 1983, in order to comply with FUTA's requirement and thereby keep New Hampshire employers eligible to receive FUTA tax credits, the New Hampshire Legislature enacted RSA 282-A:31, II(a), which states in relevant part:

> An unemployed individual shall not be eligible to receive benefits [b]ased on services in an instructional, research or principal administrative capacity for an educational system for any week which commences during a period between 2 successive academic years or terms... if such individual performs such services in the first of such academic years or terms and there is a contract or 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.

This provision prevents individuals from collecting unemployment compensation who a) have been compensated by their employer with a yearly salary, notwithstanding that periods of non-activity will occur during the year and/or b) who are aware of the seasonal character of educational systems and anticipate periodic unemployment. This provision is limited in scope; it only applies to individuals who work in "an instructional, research or principal administrative capacity for an educational system." It is also limited in that it applies to "periods between successive academic years or

terms," but does not apply to holidays or vacations within academic years or terms.

In 1983, the New Hampshire Legislature also choose to exercise the discretion afforded it under FUTA and to adopt provisions which deny unemployment compensation "based on services in any other capacity for an educational institution or an educational service agency." 26 U.S.C.A. § 3304(a)(6)(A)(ii-iv). State statute RSA 282-A:31 II(b) states in relevant part:

> An unemployed individual shall not be eligible to receive benefits [b]ased on services in any other capacity for an educational institution, including services for a service organization for any educational institution for any week which commences during a period between 2 successive academic years or terms . . . if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms....

This provision prevents individuals who have provided services to an educational institution in any capacity other than the capacities set forth in RSA 282-A:31, II (a) from receiving benefits for periods of inactivity between successive academic years or terms. Its broad scope includes individuals who have "provided services . . . for an educational institution," including "services for a service organization for any educational institution." This provision does not discuss whether unemployment compensation is available for holidays or vacations within academic years or terms.

Finally, RSA 282-A:31,II (c) address whether unemployment compensation shall be made available during customary vacation periods or holiday recess. That statute states in relevant part:

> An unemployed individual shall not be eligible to receive unemployment benefits [b]ased on services for an educational institution for any week which commences during an established and customary vacation period or holiday recess if such individual performs services in the period immediately before such vacation period or holiday recess and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess.

ANALYSIS

In Locke, the New Hampshire Supreme Court interpreted the term "service organization" as used in RSA 282-a:31, II(b) to be equivalent to the federal definition of "educational service agency." The later term is defined as "a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions...." 26 U.S.C.A. § 3304(a)(6)(A)(iv). The Court also examined the legislative history of the addition of the phrase "service organization" into the state statute. The Court concluded that the phrase "including services for a service organization for any educational institution" was added to prevent employees from collecting unemployment benefits when those employees: a) were hired on a percentage basis by educational institutions, b) accepted their positions while fully aware that the institutions did not expect them to work between academic semesters; and c) were reasonably assured that jobs would be waiting at the end of the semester break. See Locke 127 N.H. at 405-06.

The Locke Court concluded that a food-service employee of a "for-profit" corporation was eligible for unemployment compensation benefits during a temporary lay-off during the summer months of 1983 even though the "for profit" corporation had hired the employee to provide food services at an educational institution because: a) the employee did not work for a "service organization;" b) the private corporation required its employees to be "on-call" during the seasonal "slack time;" and c) the employee was fearful that if she were not available "on-call" her job would not be assured when business in the area returned to its normal pace during the academic year. See id. at 406.

Nothing in MTA changes the Court's analysis of the meaning of "service organization" in RSA 282-A;31 II(b). The MTA Court did interpret a different part of RSA 282-A:31, II(b) however, in a manner that is significant because the phrase at issue appears in subsections a, b, and c of the statute.

In the MTA case, bus drivers employed by the Manchester Transit Authority to transport Manchester students in grades one through eight over specified school routes sought unemployment compensation for the period of time Manchester schools were closed for the annual February vacation, a period of approximately one week. See 146 NH at 455. The MTA Court noted that the period at issue was a vacation period, and that RSA 282-A:31 II(c) (1983) applied. The Court then noted that in 1983 that statute was amended to replace the phrase "in the employ of such an educational institution" with the phrase "based on services for an educational institution." Id. at 457-58. Based upon standard rules of statutory construction, the Court reasoned that the "services for" language meant something different from the

"in the employ of" language. The Court concluded that the meaning of the phrase was "not limited to employees of educational institutions, for employees of other entities who provide services to an educational institution may be hired with the express understanding that their expected work schedule is dictated by whether the school is open." MTA 146 N.H. at 459.

Applying both the expanded meaning of "services for" and the Locke criteria (stemming from the purpose of the "between and within terms denial" provisions, see supra), the Court concluded that the MTA bus drivers: a) provided services for an educational institution; b) understood that they were employed only while school was in session; and c) were not expected to be "on-call." Accordingly, the Court held that the MTA bus drivers were not entitled to unemployment compensation benefits for the one week February vacation.

Turning to the larger question at issue, the MTA decision as to the meaning of "services for" as used in RSA 282-A:31(a)(b) and (c) is not limited to employees of educational institutions. Accordingly, under state law, employees of private entities who hire individuals to provide services for an educational institution shall be ineligible for benefits if reasonable employees would understand that they were employed only while school was in session and if the employer does not require the employee to be "on-call."

Just as Locke is distinguishable (see above), other state cases are distinguishable. The Supreme Court of Wisconsin has held that where school crossing guards were employed by a city rather than a school, they were eligible for unemployment benefits. See City of Milwaukee v. Dept of Industry, Labor and Human Relations, 316 N.W. 2d 367, 371 (Wis. 1982). The Wisconsin statute, however, described individuals exempt from benefits as "employees." The New Hampshire statute describes them as "unemployed individuals." The Wisconsin decision also gave great weight to their state agency's interpretation of the statute as permitting payment to city crossing guards. See also Milton v. Director of the Division of Employment Security, 438 N.E. 2d 71 (1982) (equivalent Massachusetts statute speaks of "service in employment" and the Unemployment Compensation Act defines employment as "service performed for wages by an employee for his employer").

Please do not hesitate to contact me if you would like to discuss this issue further. I may be reached at 271-1216.

Sincerely,

Mary E. Schwarzer
Assistant Attorney General

cc: Lon Siel, General Counsel, NHES
Charles Bradley, Counsel NHES

doc. 206982

Speakers

SENATE Executive Departments & Administration

Date 3/12/03 Time 1:45 Public Hearing on

Bill # SB 101-FN relative to unemployment compensation.

(Please print) ***Please check box(es) at left that apply.***

SPEAKING?	FAVOR	OPPOSED	NAME	REPRESENTING
✓	☐	☑	Erin MacTaggart	NH. Women's Lobby
✓	☑	☐	DOUG PATCH	LAIDLAW TRANSIT, INC.
✓	☑	☐	Rep Franklin Bishop	N.H. House
✓	☑	☐	Senator Bob Flanders, Distr. 7 (Susan Duncan for him)	
✓	☑	☐	Shari Ridlon	The Provider Enterprises
✓	☒	☐	Amy Lockwood	Concord Area Trust for Community Housing
✓	☑	☐	Deb McCallum	First Student
✓	☑	☐	John O Mahoff	NHES
✓	☐	☐	Rich Leute	TRI
✓	☐	☐	Carolyn Angle	NHES
✓	☐	☐	Peter A Chamberlin	NH School Trans Assoc
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Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: March 19, 2003

THE COMMITTEE ON Executive Departments and Administration

to which was referred Senate Bill 101-FN

AN ACT relative to unemployment compensation.

VOTE: 5-0

2003-0922s

Having considered the same, report the same with the following amendment and recommend that the bill: **AS AMENDED OUGHT TO PASS.**

Senator Joseph D. Kenney
For the Committee

SB101 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: relative to unemployment compensation.

Date	Body	Description
1/30/2003	S	Introduced and Ref. to Executive Departments & Administration; SJ 3, Pg.35
2/14/2003	S	Hearing; March 12, 2003, Room 102, LOB, 1:45 p.m.; SC10
3/21/2003	S	Committee Report; Ought to Pass with Amendment{0922}, [03/27/03]; SC15, Pg.31-35
3/27/2003	S	Committee Amendment{0922}, [Not Voted On]; SJ 10, Pg.161-164
3/27/2003	S	Sen. Clegg Moved Laid on Table, MA, VV; SJ 10, Pg.164
4/10/2003	S	Sen. Flanders Moved Remove From Table, MA, VV; SJ 12, Pg.278
4/10/2003	S	Committee Amendment{0922}, AA, VV; SJ 12, Pg.278
4/10/2003	S	Ought to Pass with Amendment{0922}, MA, VV; OT3rdg; SJ 12, Pg.278
4/10/2003	S	Passed by 3rd Reading Resolution; SJ 12, Pg.310
4/10/2003	H	Introduced and ref to Labor; HJ 34, p1144
4/15/2003	H	Hearing Apr 23 11:00 RM306,LOB
5/7/2003	H	Maj Report OTP for May 15 (Vote 8-5;Reg)
5/15/2003	H	Passed VV; HJ 42, p1339 + 1354
5/15/2003	H	Enrolled Am{1751}, Am Adopted; HJ 45, p1436
5/22/2003	S	Enrolled Bill Amendment{1751}, Adopted; SJ 17, Pg.483
5/29/2003	H	Enrolled; HJ 45, p1447
5/29/2003	S	Enrolled;
6/9/2003	S	Became Law Without Signature on 6/9/2003 Eff- 6/9/2003* Chap- 0116
6/9/2003	S	*Multiple Effective Dates, All but Sec. 5 Eff- 8/8/2003

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Docket Abbreviations