



**STATE OF CALIFORNIA - GOVERNOR EDMOND G. BROWN JR.
LABOR AND WORKFORCE DEVELOPMENT AGENCY**
**CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
EXECUTIVE DIRECTOR/CHIEF ADMINISTRATIVE LAW JUDGE**

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February 11, 2013

To: Board Members

**February 2013 Summary Report of Executive Director and
Chief Administrative Law Judge Alberto Roldan**

1. Office of the Chief

- I am very sad to report the unexpected passing of Administrative Law Judge II Michael Campbell on February 8, 2013. Judge Campbell has served in the Chief's Office as a member of the Tax Unit for a number of years after having originally been appointed at CUIAB as an ALJ in the Sacramento Office of Appeals. He was an excellent judge and a warm and friendly colleague. This is a huge and unexpected loss to our office. We will pass on more information regarding the memorial service as it becomes available.

2. Snapshot of Field Operations performance through January 2012

January 2012 Workload and Performance: New cases departed significantly upward compared to the prior two months. January's intake [35,188] was 2% higher than the average for the fiscal year. Dispositions [34, 777] were also greater than the previous two months, but trailed verifications for the first time since September 2012. Although this resulted in a slight rise in the open caseload [40,368], the inventory is has still been reduced overall by 12% as compared to where we were at the beginning of the fiscal year.

Case Aging and Time Lapse: Average case age at the end of January was reduced to 24 days. This is the best it has been since August and is well within DOL standards. 30-day time lapse [54%] jumped by six percentage points and is the second best month end result in ten years. 45-day [86%] and 90-day time lapse [97%] continue to be in great shape and continue a durable trend of compliance with DOL expectations. Time frames for non-time lapse UI cases continue to be substantially longer and actually increased from December. The balance of time lapse and non-time lapse cases as priorities in the workload continue to be a concern. 8% of the non-time lapse UI decisions were issued within 30 days, 24% went out within 45 days and only 84% within 90 days.

Cycle Time: The UI cycle time in January was 45 days from date of appeal to issuance of the decision. This was identical to the result in December and each step was basically unchanged. Of some interest is that offices flattened out and all except Pasadena were within 3 percentage points of the average. Though Pasadena is an outlier in terms of performance it again reduced its cycle time and hopefully soon will be back in the pack. They have filled the critical vacancy at the Legal Support Supervisor II position and this should stabilize matters on the support staff side. Despite the reduction in caseload, the cycle time for DI appeals rose one day to 76 days.

Unemployment Insurance (UI) for January: New UI cases [33,641 cases; 19,238 appellants] were 2% above the average for the fiscal year and the largest intake since October 2012. The number of closed cases [33,153 cases; 18,930 appellants] was 1% below average but just slightly trailed new cases. There was some change in the mix of cases in that the percentage of non time-lapse UI cases [mostly extensions] fell to 40% of the open caseload as opposed to 43% in December.

Disability Insurance (DI) for January: In disability, the number of new cases [982] was also higher than the previous two months, but remains quite low in historic terms. Prior to last November, the agency had verified at least 1,000 new cases every month since CATS was instituted. Intake now has been below that threshold for three consecutive months. The number of DI decisions [1,083] reflects that lack of new cases. The open balance [1,277] hit an all-time low for the second straight month.

Tax and Rulings for January: After two very slow months for rulings, intake [223] was up. Dispositions were also up but not as much, and the inventory [4,147] had a very slight bump upwards. In tax, the number of new petitions has been relatively consistent every month this fiscal year. For December it was 2% below the average. January had the greatest number of dispositions [299] since October. The open balance of tax cases [3,606] is the smallest it has been since February 2009.

UI TRENDS - FO
 Program Codes 1, 2, 3, 4, 5, 6, 8, 23, 24, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 41, 42

NEW OPENED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	37,307	34,125	38,172	42,249	37,447	36,321	39,238	40,219	31,780	35,604	30,181	35,509	438,152	36,513		
2011	38,676	34,399	39,494	35,519	36,159	35,785	32,527	38,079	39,828	36,161	30,799	31,448	428,874	35,740	98%	-773
2012	33,339	30,233	36,391	33,590	34,531	31,871	32,132	37,791	33,363	36,746	31,266	26,393	397,646	33,137	93%	-2,602
2013	33,691												33,691	33,691	102%	554
Multi	7												2012	102%	101%	
	UI registrations Jan to date are up 1% from 2012, down 13% from 2011, and down 10% from 2010												2011	94%	87%	
	UI registration monthly average is up 2% from 2012, down 6% from 2011, and down 8% from 2010												2010	92%	90%	
													chg to '13 avg		chg to '13 YTD	

CLOSED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	32,738	37,951	44,067	39,481	35,731	36,680	35,798	39,000	38,748	37,386	34,848	36,237	448,665	37,389		
2011	34,029	37,998	50,124	35,054	32,103	38,117	33,797	36,979	41,802	33,663	33,076	34,301	441,043	36,754	98%	-635
2012	33,604	37,167	44,615	28,383	34,802	31,915	30,672	35,346	30,299	38,963	32,844	32,269	410,879	34,240	93%	-2,514
2013	33,153												33,153	33,153	97%	-1,087
Multi	7												2012	97%	99%	
	UI dispositions Jan to date are down 1% from 2012, down 3% from 2011, and up 1% from 2010												2011	90%	97%	
	UI disposition monthly average is down 3% from 2012, down 10% from 2011, and down 11% from 2010												2010	89%	101%	
													chg to '13 avg		chg to '13 YTD	

BALANCE OPEN CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Avg.	% Chg of Avg	Yr-Yr AvgChg	
2010	76,301	72,323	66,136	68,715	70,234	69,664	72,557	73,410	66,243	64,624	59,811	59,075	68,258			
2011	63,632	59,909	49,088	49,435	53,389	50,926	49,805	50,755	48,650	51,057	48,653	45,715	51,751	76%	-16,507	
2012	45,315	38,225	29,603	34,674	34,327	34,188	35,578	37,843	40,820	38,495	36,792	30,853	36,393	70%	-15,358	
2013	31,303												31,303	86%	-5,090	
Multi	9												2012	86%	69%	
	UI balance of open cases Jan to date is down 31% from 2012, down 51% from 2011, and down 59% from 2010												2011	60%	49%	
	UI balance monthly average down 14% from 2012, down 40% from 2011, and down 54% from 2010												2010	46%	41%	
													chg to '13 avg		chg to '13 YTD	

DI TRENDS - FO
Program Codes 7, 10, 11, 12, 16 & 20

NEW OPENED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	1,446	1,437	1,775	1,957	1,371	1,232	1,763	1,609	1,366	1,372	1,159	1,414	17,901	1,492		
2011	1,537	1,651	1,411	1,691	1,360	1,428	1,405	1,575	1,489	1,392	1,094	1,268	17,301	1,442	97%	-50
2012	1,395	1,490	1,611	1,256	1,362	1,382	1,206	1,122	1,233	1,069	845	754	14,725	1,227	85%	-215
2013	982												982	982	80%	-245
													2012	80%	70%	
													2011	68%	64%	
													2010	66%	68%	
														chg to '13 avg	chg to '13 YTD	

DI registrations Jan to date are down 30% from 2012, down 36% from 2011, and down 32% from 2010
DI registration monthly average is down 20% from 2012, down 32% from 2011, and down 34% from 2010

CLOSED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	1,283	1,557	1,967	1,852	1,276	1,581	1,494	1,511	1,581	1,552	1,372	1,565	18,591	1,549		
2011	1,295	1,576	1,925	1,512	1,441	1,567	1,365	1,462	1,426	1,579	1,266	1,270	17,684	1,474	95%	-76
2012	1,334	1,547	1,456	1,424	1,460	1,140	1,079	1,220	999	1,452	938	1,039	15,088	1,257	85%	-216
2013	1,083												1,083	1,083	86%	-174
													2012	86%	81%	
													2011	73%	84%	
													2010	70%	84%	
														chg to '13 avg	chg to '13 YTD	

DI dispositions Jan to date are down 19% from 2012, down 16% from 2011, and down 16% from 2010
DI disposition monthly average is down 14% from 2012, down 27% from 2011, and down 30% from 2010

BALANCE OPEN CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Avg.	% Chg of Avg	Yr-Yr AvgChg	
2010	2,997	2,876	2,682	2,789	2,891	2,541	2,808	2,908	2,691	2,513	2,299	2,148	2,679			
2011	2,390	2,465	1,951	2,126	2,046	1,905	1,943	2,054	2,117	1,930	1,757	1,755	2,037	76%	-642	
2012	1,815	1,757	1,905	1,734	1,636	1,877	2,005	1,906	2,139	1,755	1,663	1,379	1,798	88%	-239	
2013	1,277												1,277	71%	-521	
													2012	71%	70%	
													2011	63%	53%	
													2010	48%	43%	
														chg to '13 avg	chg to '13 YTD	

DI open balance Jan to date is down 30% from 2012, down 47% from 2011, and down 57% from 2010
DI open balance monthly average down 29% from 2012, down 37% from 2011, and down 52% from 2010

TAX TRENDS - FO
Program Codes 15, 17, 18, 32, 45, 46, 47, 48.

NEW OPENED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	142	139	164	233	140	163	94	137	146	181	188	232	1,959	163		
2011	134	168	144	261	140	180	112	266	364	147	248	402	2,566	214	131%	51
2012	346	141	196	117	78	335	253	229	254	200	215	214	2,578	215	100%	1
2013	223												223	223	104%	8
													2012	104%	64%	
													2011	104%	166%	
													2010	137%	157%	
														chg to '13 avg	chg to '13 YTD	

Tax registrations Jan to date are down 36% from 2012, up 66% from 2011, and up 57% from 2010
Tax registration monthly average is up 4 % from 2012, up 4% from 2011, and up 37% from 2010

CLOSED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	48	109	107	91	117	124	135	101	174	130	99	235	1,470	123		
2011	139	173	193	252	176	277	168	278	325	293	323	247	2,844	237	193%	115
2012	227	352	322	492	267	217	236	290	284	357	234	195	3,473	289	122%	52
2013	299												299	299	103%	10
													2012	103%	132%	
													2011	126%	215%	
													2010	244%	623%	
														chg to '13 avg	chg to '13 YTD	

Tax dispositions Jan to date are up 32% from 2012, up 115% from 2011, and up 523% from 2010
Tax disposition monthly average is up 3% from 2012, up 26% from 2011, and up 144% from 2010

BALANCE OPEN CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	4,509	4,539	4,596	4,738	4,759	4,796	4,754	4,790	4,758	4,801	4,890	4,885	4,735		
2011	4,880	4,874	4,824	4,833	4,797	4,700	4,643	4,630	4,666	4,520	4,445	4,593	4,700	99%	-34
2012	4,711	4,498	4,371	3,995	3,803	3,918	3,931	3,871	3,841	3,683	3,664	3,683	3,997	85%	-703
2013	3,606												3,606	90%	-391
													2012	90%	77%
													2011	77%	74%
													2010	76%	80%
														chg to '13 avg	chg to '13 YTD

Tax balance of open cases Jan to date is down 23% from 2012, down 26% from 2011, and down 20% from 2010
Tax balance monthly average is down 10% from 2012, down 23% from 2011, and down 24% from 2010

RULING - OTHER TRENDS - FO
 Program Codes 9, 13, 14, 19, 21, 22, 40, 44

NEW OPENED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	486	609	709	598	441	424	468	1,359	201	239	229	214	5,977	498		
2011	64	97	92	739	526	510	426	454	207	982	247	251	4,595	383	77%	-115
2012	182	245	746	576	605	424	229	418	209	315	51	108	4,108	342	89%	-41
2013	292												292	292	85%	-50

Ruling/Other registrations Jan to date are up 60% from 2012, up 356% from 2011, and down 40% from 2010

Ruling/Other registration monthly average is down 15% from 2012, down 24% from 2011, and down 41% from 2010

CLOSED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	335	392	500	682	465	716	421	631	484	804	303	415	6,148	512		
2011	442	399	728	390	424	631	384	397	530	593	389	351	5,658	472	92%	-41
2012	500	455	299	255	214	165	239	323	170	334	434	171	3,559	297	63%	-175
2013	242												242	242	82%	-55

Ruling/Other dispositions Jan to date are down 52% from 2012, down 45% from 2011, and down 28% from 2010

Ruling/Other disposition monthly average is down 18% from 2012, down 49% from 2011, and down 53% from 2010

BALANCE OPEN CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	4,965	5,182	5,394	5,312	5,287	4,996	5,048	5,781	5,494	4,931	4,857	4,658	5,159		
2011	4,281	3,977	3,340	3,692	3,792	3,672	3,716	3,772	3,453	3,842	3,698	3,590	3,735	72%	-1,423
2012	3,272	3,060	3,509	3,825	4,216	4,475	4,466	4,563	4,602	4,582	4,199	4,133	4,075	109%	340
2013	4,182												4,182	103%	107

Ruling/Other balance of open cases Jan to date is up 28% from 2012, down 2% from 2011, and down 16% from 2010

Ruling/Other balance monthly average is up 3% from 2012, up 12% from 2011, and down 19% from 2010

2012	103%	128%
2011	112%	98%
2010	81%	84%
	chg to '13 avg	chg to '13 YTD

ALL PROGRAM TRENDS - FO

NEW OPENED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	TOTAL	Avg.	% Change	Yr-Yr AvgChg		
2010	39,381	36,310	40,820	45,037	39,399	38,140	41,563	43,324	33,493	37,396	31,757	37,369	463,989	38,666				
2011	40,411	36,315	41,141	38,210	38,185	37,903	34,470	40,374	41,888	38,682	32,388	33,369	453,336	37,778	98%	-888		
2012	35,262	32,109	38,944	35,539	36,576	34,012	33,820	39,560	35,059	38,330	32,377	27,469	419,057	34,921	92%	-2,857		
2013	35,188												35,188	35,188	101%	267		
Multi	7												2012	101%	100%			
	All program registrations Jan to date are even with 2012, down 13% from 2011, and down 11% from 2010												2011	93%	87%			
	All program registration monthly average is up 1% from 2012, down 7% from 2011, and down 9% from 2010												2010	91%	89%			
																chg to '13 avg		chg to '13 YTD

CLOSED CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	TOTAL	Avg.	% Change	Yr-Yr AvgChg		
2010	34,404	40,009	46,641	42,106	37,589	39,101	37,848	41,243	40,987	39,872	36,622	38,452	474,874	39,573				
2011	35,905	40,146	52,970	37,208	34,144	40,592	35,714	39,116	44,083	36,128	35,054	36,169	467,229	38,936	98%	-637		
2012	35,665	39,521	46,692	30,554	36,743	33,437	32,226	37,179	31,752	41,106	34,450	33,674	432,999	36,083	93%	-2,853		
2013	34,777												34,777	34,777	96%	-1,306		
Multi	7												2012	96%	98%			
	All program dispositions Jan to date are down 2% from 2012, down 3% from 2011, and up 1% from 2010												2011	89%	97%			
	All program disposition monthly average is down 4% from 2012, down 11% from 2011, and down 12% from 2010												2010	88%	101%			
																chg to '13 avg		chg to '13 YTD

BALANCE OPEN CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Avg.	% Change	Yr-Yr AvgChg			
2010	88,772	84,920	78,808	81,554	83,171	81,997	85,167	86,889	79,186	76,869	71,857	70,783	80,831					
2011	75,183	71,225	59,203	60,086	64,024	61,203	60,107	61,211	58,886	61,349	58,553	55,653	62,224	77%	-18,608			
2012	55,113	47,540	39,388	44,228	43,982	44,458	45,980	48,183	51,402	48,515	46,318	40,048	46,263	74%	-15,961			
2013	40,368												40,368	87%	-5,895			
Multi	9												2012	87%	73%			
	All program open balance Jan to date is down 27% from 2012, down 46% from 2011, and down 55% from 2010												2011	65%	54%			
	All program open balance monthly average is down 13% from 2012, down 35% from 2011, and down 50% from 2010												2010	50%	45%			
																chg to '13 avg		chg to '13 YTD

FIELD OPERATIONS ~ REPORT SUMMARY

STATEWIDE	2012-2013												STATEWIDE		Appellants			
	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Average	Current Mo. % of Avg.	Total	Current Mo. Average	Total	
WORKLOAD																		
New Opened Cases																		
UI TL	32,132	37,791	33,363	36,746	31,266	26,393	33,691						33,055	102%	231,382	19,238	18,874	132,119
Ruling & T-R	1,206	1,122	1,233	1,069	845	754	982						1,030	95%	7,211			
Tax	207	399	185	295	37	93	270						212	127%	1,486			
Other	253	229	254	200	215	214	223						227	98%	1,588			
Total	22	19	24	20	14	15	22						19	113%	136			
Multi Cases	33,820	39,560	35,059	38,330	32,377	27,469	35,188						34,543	102%	241,803			
UI TL	15	54	5	5	2		7											
Closed Cases																		
UI TL	30,672	35,346	30,299	38,963	32,844	32,269	33,153						33,364	99%	233,546	18,930	19,051	133,355
Ruling & T-R	1,079	1,220	999	1,452	938	1,039	1,083						1,116	97%	7,810			
Tax	215	294	157	305	425	146	226						253	89%	1,768			
Other	236	290	284	357	234	195	299						271	110%	1,895			
Total	24	29	13	29	9	25	16						21	77%	145			
Multi Cases	32,226	37,179	31,752	41,106	34,450	33,674	34,777						35,023	99%	245,164			
UI TL	1/4	3/8	2/5	7/52		2/6												
Balance - Open Cases																		
UI TL	35,578	37,843	40,820	38,495	36,792	30,853	31,303						35,955	87%		17,874	20,530	
Ruling & T-R	2,005	1,906	2,139	1,755	1,663	1,379	1,277						1,732	74%				
Tax	4,424	4,530	4,558	4,547	4,159	4,104	4,147						4,353	95%				
Other	3,931	3,871	3,841	3,683	3,664	3,683	3,606						3,754	96%				
Total	42	33	44	35	40	29	35						37	95%				
Multi Cases	45,980	48,183	51,402	48,515	46,318	40,048	40,368						45,831	88%				
UI TL	17	56	51	6	8		9											
Time Lapse																		
30 TL % (60)	42	50	50	53	58	48	54						51	106%				
45 TL % (80)	83	83	85	81	85	83	86						84	103%				
90 TL % (95)	98	98	98	98	97	97	97						98	99%				
CASE AGE																		
Average Days	26	23	27	26	27	27	24						26	93%				
Average Days UI (median)	22	21	24	22	23	24	21						22	94%				
>90 Days Old	0%	1%	1%	1%	1%	1%	1%						1%	117%				
>90 Days Old w/out holds	0%	1%	1%	1%	1%	1%	1%						1%	117%				
NET PYS USED	164,222	180,022	176,37	190,53	168,33	163,71							173,9	94%				
Field Offices	180,08	190,86	186,68	195,64	167,80	173,65							182,5	95%				
Net Pys	344,30	370,88	363,05	386,17	336,13	337,36							356,3	95%				
Ratio 1 /	1.10	1.06	1.06	1.03	1.00	1.06							1.05	101%				
w/OHQ&RSU	169,52	184,78	180,11	196,95	172,77	168,36							178,7	94%				
SS w/EDD	218,65	234,75	228,30	236,61	202,94	209,82							221,8	95%				
EDD 0	388,17	419,53	408,41	433,56	375,71	378,18							400,6	94%				
Ratio 1 /	1.29	1.27	1.27	1.20	1.17	1.25							1.24	100%				
PRODUCTIVITY																		
Weekly Dispos per ALJ (U&kd)	44.6	43.0	45.7	44.6	51.5	49.5							46.5	106%				
Weekly Dispos per ALJ	45.3	43.7	46.4	45.4	52.5	50.0							47.2	106%				
Weekly Dispos (Non-ALJ)	35.1	34.4	36.6	37.8	44.7	40.1							38.1	105%				

AO REPORT TO BOARD -- MONTH OF JANUARY 2013

	# Cases	# Appellants	Calendar Yr Avg
REGISTRATIONS	2789	1733	2545
DISPOSITIONS	2921	1764	2664
OPEN BALANCE	2078	1187	2627
PENDING REG.			
APPEAL RATE			8.30%

CASE AGING 41 Days

TIME LAPSE

45 Days (50%)	13.00%
75 Days (80%)	83.00%
150 Days (95%)	100.00%

ADDITIONAL INFORMATION

FO to AO Monthly Report 3.75 Days Statewide Avg.

FO ALJs working in AO 5.5

California Unemployment Insurance Appeals Board
Board Appeal Summary Report
Average Days in Transfer from FO Received Date to Date Received at AO

	January, 2013	December, 2012	November, 2012	October, 2012
	Average Days in Transfer			
	Case Count	Case Count	Case Count	Case Count
Fr	2.16	2.25	2.99	2.48
	77	165	150	166
Ing	3.33	6.65	4.23	2.47
	152	211	272	342
Inl	4.95	5.34	3.47	3.23
	204	274	302	302
LA	2.54	3.81	4.92	2.52
	119	212	240	280
Oak	5.79	4.29	5.51	6.34
	89	174	206	215
OC	0.81	2.30	1.74	1.45
	186	362	197	258
Ox	1.22	1.36	1.13	3.57
	59	140	211	231
Pas	12.22	16.78	19.76	13.87
	36	160	188	157
Sac	4.52	3.72	3.18	4.65
	186	318	316	320
SD	6.74	11.10	4.01	4.68
	112	215	202	252
SF	3.08	4.04	5.04	2.41
	52	142	119	123
SJ	2.19	1.76	2.89	4.91
	90	113	123	88
Tax	1.75	3.06	12.86	2.44
	4	16	7	16
Total	3.75	5.15	4.78	4.04
	1366	2502	2533	2750

ALL PROGRAM TRENDS-AO

REGISTRATIONS

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	2,470	2,136	3,081	2,779	2,362	2,691	2,518	2,957	3,089	2,658	2,796	2,721	32,258	2,688		
2011	2,506	2,625	3,779	3,046	3,318	2,971	3,021	3,267	3,259	3,298	2,341	2,561	35,992	2,999	112%	311
2012	2,789	2,316	3,555	2,608	2,418	1,958	2,407	2,932	2,430	2,728	2,376	2,156	30,673	2,556	85%	-443
2013	2,789												2,789	2,789	109%	233
														2012	109%	100%
														2011	93%	111%
														2010	104%	113%

Registrations Jan to date same from 2012, up 11% from 2011, and up 13% from 2010.

Registration monthly average up 9% from 2012, down 7% from 2011, and up 4% from 2010.

chg to 13 avg

chg to 13 YTD

DISPOSITIONS

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	2,210	2,634	2,764	2,707	2,534	2,949	2,352	2,657	2,647	2,853	2,565	2,360	31,232	2,603		
2011	2,601	2,626	2,583	2,546	2,994	3,447	2,361	2,860	4,116	3,804	3,130	3,022	36,090	3,008	116%	405
2012	2,917	3,106	3,407	2,747	2,310	1,816	2,653	3,087	2,709	2,341	2,327	2,608	32,028	2,669	89%	-339
2013	2,921												2,921	2,921	109%	252
														2012	109%	100%
														2011	97%	112%
														2010	112%	132%

Dispositions Jan to date same from 2012, up 12% from 2011, and up 32% from 2010.

Disposition monthly average up 9% from 2012, down 3% from 2011, and up 12% from 2010.

chg to 13 avg

chg to 13 YTD

BALANCE OPEN CASES

	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec	End of yr Total	Avg.	% Chg of Avg	Yr-Yr AvgChg
2010	3,177	2,668	3,000	3,058	2,886	2,635	2,837	3,135	3,591	3,387	3,626	3,973	3,973	3,164		
2011	3,872	3,870	4,984	5,543	5,814	5,356	6,020	6,423	5,566	5,057	4,265	3,792	3,792	5,047	159%	1,882
2012	3,663	2,902	3,018	2,906	3,014	3,141	2,948	2,758	2,509	2,863	2,894	2,340	2,340	2,913	58%	-2,134
2013	2,057													2,057	71%	-856
														2012	71%	56%
														2011	41%	53%
														2010	65%	65%

Open Balance Jan to date down 44% from 2012, down 47% from 2011, and down 35% from 2010.

Open Balance monthly average down 29% from 2012, down 59% from 2011, and down 35% from 2010.

chg to 13 avg

chg to 13 YTD

WEEKLY AO WORKLOAD REPORT

January 2013

Week						
Ending	<u>Unreg total</u>	<u>Appeals Rec'd</u>	<u>Registrations</u>	<u>Dispositions</u>	<u>Open Balance</u>	<u>Change</u>
1/1-1/4/13	2590	221	467	179	2619	279
1/11/2013	2385	530	745	512	2712	93
1/18/2013	1967	404	504	664	2581	-131
1/25/2013	2220	500	673	846	2435	-146
1/31/2013	2321	570	400	720	2057	-378
1/1-1/31/2013						
Running Total		<u>2225</u>	<u>2789</u>	<u>2921</u>		

Week				
Ending	<u>Average</u>	<u>45-Day (50%)</u>	<u>75-Day (80%)</u>	<u>150-Day (95%)</u>
	<u>Case age</u>	<u>Time Lapse</u>	<u>Time Lapse</u>	<u>Time Lapse</u>
1/1-1/4/13	42	13.64%	70.91%	100.00%
1/11/2013	44	7.96%	79.31%	99.47%
1/18/2013	44	11.57%	80.59%	99.61%
1/25/2013	43	16.95%	84.28%	99.69%
1/31/2013	40	13.58%	87.71%	99.82%
1/1-1/31/2013	40	13.11%	82.73%	99.68%

APPELLATE OPERATIONS ~ REPORT SUMMARY

APPELLATE		2012-2013												AO		Appellants	
WORKLOAD	July	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Average	Current Mo. % of Avg.	TOTAL	Current Mo.	Appellants
Registrations																	
UI TL	2,319	2,624	2,338	2,632	2,260	2,091	2,708						2,453	110%	17,172		
DI	85	92	78	85	65	57	52						73	71%	514		
Ruling & T-R	1	1	3	1	5	1	2						2	100%	14		
Tax	2	13	11	9	44	6	27						16	169%	112		
Other	0	2	0	1	2	1	0						1	0%	6		
Total	2,407	2,932	2,430	2,728	2,376	2,156	2,789						2,545	110%	17,818	1,733	
Multi Cases			283	9		8	4										
Dispositions																	
UI TL	2,538	2,958	2,582	2,235	2,247	2,512	2,823						2,556	110%	17,895		
DI	79	95	79	87	77	71	69						80	87%	557		
Ruling & T-R	1	0	3	3	0	5	3						2	140%	15		
Tax	35	34	43	16	2	18	25						25	101%	173		
Other	0	0	2	0	1	2	1						1	117%	6		
Total	2,653	3,087	2,709	2,341	2,327	2,608	2,921						2,664	110%	18,646	1,764	
Multi Cases/Ct				1/5		4/237											
Balance - Open Cases																	
UI TL	2,744	2,578	2,363	2,727	2,722	2,199	1,933						2,467	78%			
DI	102	97	97	95	82	68	51						85	60%			
Ruling & T-R	2	3	3	1	6	2	1						3	39%			
Tax	100	78	46	39	82	70	72						70	103%			
Other	0	2	0	1	2	1	0						1	0%			
Total	2,948	2,758	2,509	2,863	2,894	2,340	2,057						2,624	78%		1,175	Estimate
Multi Cases	0		283	287	287	57	61										
FO to AO Appeal Rate																	
UI TL	7.3%	9.2%	6.6%	8.7%	5.8%	6.4%	8.4%						7.5%	112.2%			
DI	7.5%	8.5%	6.4%	8.5%	4.5%	6.1%	5.0%						6.6%	75.4%			
Ruling & T-R	0.7%	0.5%	1.0%	0.6%	1.6%	0.2%	1.4%						0.9%	158.2%			
Tax	0.9%	5.5%	3.8%	3.2%	12.3%	2.6%	13.8%						6.0%	230.1%			
Other	0.0%	8.3%	0.0%	7.7%	6.9%	11.1%	0.0%						4.9%	0.0%			
Overall Rate	7.2%	9.1%	6.5%	8.6%	5.8%	6.3%	8.3%						7.4%	112.0%			

Board Member	1st	2nd	3rd	UI	DI	Ruling	Tax	1 Party	2 Party	Total
Kathleen Howard										
Sum	557	595	31	1124	43	2	14	434	749	1183
Percent	30%	32%	26%	31%	37%	50%	36%	33%	30%	
Michael Allen										
Sum	383	399	0	770	11	0	1	230	552	782
Percent	21%	22%	0%	21%	10%	0%	3%	18%	22%	
Robert Dresser										
Sum	153	168	86	387	11	0	9	116	291	407*
Percent	8%	9%	74%	11%	10%	0%	23%	9%	12%	
Roy Ashburn										
Sum	752	686	0	1371	50	2	15	526	912	1438
Percent	41%	37%	0%	38%	43%	50%	38%	40%	36%	
Total Cases Reviewed:	1845	1848	117	3652	115	4	39	1306	2504	

*Off Calendar

Monthly Board Meeting Litigation Report - January 2013

AGENDA ITEM 9

<u>LITIGATION CASES PENDING</u>	TOTAL = 328
SUPERIOR COURT: Claimant Petitions.....	269
Employer Petitions.....	35
EDD Petitions.....	3
Non-benefit Court Cases	6
APPELLATE COURT: Claimant Appeals.....	10
Employer Appeals.....	2
EDD Appeals.....	0
Non-benefit Court Cases	1
ISSUES: UI.....	284
DI.....	22
Tax.....	13
Non-benefit Court Cases	9

2013 CALENDAR YEAR ACTIVITY - Benefit & Tax Cases

<u>LITIGATION CASES FILED</u>	<u>YTD</u>	<u>January</u>
SUPERIOR COURT: Claimant Petitions.....	6	6
Employer Petitions.....	3	3
EDD Petitions.....	0	0
APPELLATE COURT: Claimant Appeals.....	0	0
Employer Appeals.....	0	0
EDD Appeals.....	0	0

<u>LITIGATION CASES CLOSED</u>	<u>YTD</u>	<u>January</u>
SUPERIOR COURT: Claimant Petitions.....	5	5
Employer Petitions.....	0	0
EDD Petitions.....	0	0
APPELLATE COURT: Claimant Appeals.....	0	0
Employer Appeals.....	0	0
EDD Appeals.....	0	0

2013 Decision Summary

<u>Claimant Appeals</u>		<u>Employer Appeals</u>		<u>CUIAB Decisions</u>		
Win: 3	Loss: 2	Win: 0	Loss: 0	Affirmed: 2	Reversed: 2	Remanded: 1

California Unemployment Insurance Appeals Board
FO Cycle Time Summary Report
For Cases Closed in January 2013

UI CASES	Average Days to Process an Appeal	Case Creation Date to Verified Date	Verified Date to Scheduled Date	Scheduled Date to Hearing Date	Hearing Date to Decision Mailed Date
Jurisdiction	Average	Average	Average	Average	Average
Fresno	44	5	17	13	2
Inglewood	44	5	12	17	4
Inland	47	5	16	16	4
Los Angeles	44	5	15	15	4
Oakland	44	5	17	12	3
Orange County	43	5	13	14	4
Oxnard	44	5	18	13	1
Pasadena	52	5	18	15	7
Sacramento	44	5	16	14	4
San Diego	43	5	9	16	6
San Francisco	46	5	19	14	3
San Jose	48	5	24	13	2
Statewide	45	5	16	14	4

ALL CASES	Average Days to Process an Appeal	Case Creation Date to Verified Date	Verified Date to Scheduled Date	Scheduled Date to Hearing Date	Hearing Date to Decision Mailed Date
Jurisdiction	Average	Average	Average	Average	Average
Fresno	45	5	18	13	2
Inglewood	54	5	18	18	4
Inland	49	5	17	16	5
Los Angeles	46	5	16	15	4
Oakland	45	5	18	12	3
Orange County	45	5	14	14	5
Oxnard	45	5	19	13	1
Pasadena	53	5	18	15	7
Sacramento	46	5	17	14	4
San Diego	43	5	9	16	6
San Francisco	46	5	19	14	3
San Jose	50	5	25	13	2
Statewide	47	5	17	15	4

CUIAB 12/13 Fiscal Year Overtime/Lump Sum Payout - SCO Report
July 2012 through December 2012

12/13 Fiscal Year-to-Date Overtime Expenditure

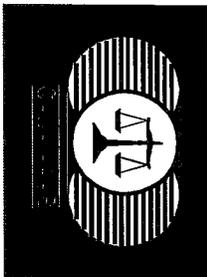
Branch	FY Y-T-D Decision Typing		FY Y-T-D CTU Typing		FY Y-T-D Registration		FY Y-T-D Other	
	Hours	Pay	Hours	Pay	Hours	Pay	Hours	Pay
Appellate	384.55	\$10,346.69	1,132.25	\$32,674.41	1,242.80	\$33,567.56	2,474.70	\$65,733.38
Admin	54.50	\$1,982.64	0.00	\$0.00	46.00	\$926.16	107.50	\$3,265.26
IT	0.00	\$0.00	0.00	\$0.00	0.00	\$0.00	1,128.25	\$45,100.40
Exec	0.00	\$0.00	0.00	\$0.00	0.00	\$0.00	0.00	\$0.00
Project	18.00	\$832.86	0.00	\$0.00	10.00	\$462.70	144.00	\$5,120.81
Field	1,309.21	\$36,317.96	236.50	\$6,393.37	1,387.25	\$39,696.86	4,478.09	\$128,780.93
Total	1,766.26	\$49,480.15	1,368.75	\$39,067.78	2,686.05	\$74,653.28	8,332.54	\$248,000.78

12/13 Fiscal Year-to-Date Total Overtime Expenditures

Branch	12/13 FY Allocation	Year-to-Date Hours	Year-to-Date Position Equivalent	Year-to-Date Pay	Year-to-Date Allocation Balance	FY 12/13 FY Projections		
						Estimated Expenditures Over-/Under		
Appellate	\$71,338.00	5,234.30	2.52	\$142,322.04	-\$70,984.04	-\$213,306.08		
Admin	\$3,818.00	208.00	0.10	\$6,174.06	-\$2,356.06	-\$8,530.12		
IT	\$35,711.00	1,128.25	0.54	\$45,100.40	-\$9,389.40	-\$54,489.80		
Exec	\$2,266.00	0.00	0.00	\$0.00	\$2,266.00	\$2,266.00		
Project	\$10,165.00	172.00	0.08	\$6,416.37	\$3,748.63	-\$2,667.74		
Field Operations	\$233,873.00	7,411.05	3.56	\$211,189.12	\$22,683.88	-\$188,505.24		
Total	\$357,171.00	14,153.60	6.81	\$411,201.99	-\$54,030.99	-\$465,232.98		
Actual Monthly Average Personnel Year						13.61		

12/13 Fiscal Year-to-Date Lump Sum Payout
July 2012 through December 2012

Branch	Year-to-Date Hours	Year-to-Date Position Equivalent	Year-to-Date Pay
Appellate	360.50	0.17	\$8,745.41
Admin	202.50	0.10	\$3,537.34
IT	0.00	0.00	\$0.00
Exec	873.00	0.42	\$53,439.41
Project	0.00	0.00	\$0.00
Field Operations	3,774.30	1.81	\$107,402.16
Total	5,210.30	2.51	\$173,124.32



CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
SPECIAL PROJECTS MATRIX
February 2013

California's economy is globally ranked with approximately 1.0 million business owners and 18.3 million workers. Currently, California, along with the nation, is experiencing an immense economic downturn with 1.8 million California workers out of work. These are unprecedented numbers for California and the nation. Given this current economic situation, we strive to better serve California's workers and business owners during a time when more than ever, they are in need of our services. Since January 2009, the Board has been focused on the appeal backlog and identifying work solutions that will help address the workload.

WORK PROCESS IMPROVEMENTS

Project & Description	Lead	Priority	Milestones	Goals	Status
<p>EDD/CUIAB Appeal Co-Location Pilot Exploring the co-location of four CUIAB staff at EDD's LA PAC to streamline appeals registration processing.</p>		High	<ul style="list-style-type: none"> Developed scope with EDD 07/2010 Connectivity established 08/2010 Train staff 09/20/2010 Launch Pilot 09/27/2010 Suspended due to freeze 10/04/2010 Relaunch 06/13/2011 	<ul style="list-style-type: none"> - Reduce claimants' & employers' wait time for hearing decisions. - Resolve appeal registration issues in a timely manner. 	<p>On 07/09/12, one Pasadena staff member was added and Inglewood FO appeals was added on 9/10/12. Co-Location is registering for Inglewood, Los Angeles, Pasadena, Sacramento, and San Diego. Recruitment completed, awaiting start date for new staff person.</p>
<p>US Department of Labor Taskforce For nine years, CUIAB has failed to meet US DOL timeliness standards for UI appeals. California is ranked 51st among 53 states and US territories on time lapse and case aging standards. In late 2008, US DOL placed CUIAB under a corrective action plan with oversight by a taskforce of US DOL, EDD & CUIAB representatives.</p>		High	<ul style="list-style-type: none"> Appeal program review 07/27-31/2009 DOL report 02/05/2010 LWDA response 03/10/2010 Two yr At Risk CAP 07/15/2010 Last site visit 12/12/2012 	<ul style="list-style-type: none"> - Meet DOL time lapse measures. - Meet DOL case age measures. 	<p>CA removed from corrective action on average case age for first level appeals. For December 2012, CA ranked 33 in the nation compared to rank 51 in December 2008.</p> <p>January 2013 Performance – First Level 30-day – 54% (60%) 45 day – 86% (80%) Avg Age – 24 days (30 days)</p> <p>Second level Avg age – 40 days (40 days)</p>

TECHNOLOGY

Project & Description	Lead	Priority	Milestones	Goals	Status
Collate Decision Print Jobs Reduce a manually collated appeal decision print jobs to one print job to save staff time.	Hugh Harrison Julie Krebs Lori Kurosaka Faye Saunders	High		<ul style="list-style-type: none"> - Reduce claimants' & employers' wait times for benefits and adjustments. - Reduce cycle time for appeals process. 	Programming completed and testing is in progress. Solution will be implemented with new E-CATS release (Spring 2013).
CUIAB Network Upgrade This upgrade will double the bandwidth for faster processing of appeal data and information for ALJs and staff.	Rafael Placencia	High		<ul style="list-style-type: none"> - Reduce cycle time for appeals data flow and document saving. 	Meeting with EDD IT to explore options & alignment with Agency network consolidation efforts. Design plans are completed.
Dictaphone Integration Consolidating data & audio files on CATS for appeal cases for improved access.	Faye Saunders	High			Will be released with E-CATS.
Digital Imaging EDD mails hard copy documents to CUIAB when an appeal is filed. CUIAB will collaborate with EDD to image documents and records relating to all appeals and design an electronic exchange.	Lori Kurosaka	High	Kick off 11/2010 FSR completion 02/2011 Potential BCP 02/2011 Procurement 04/2011 FSR in review 03/14/2011 FSR in review 11/30/2011	<ul style="list-style-type: none"> - Reduce paper files prepared & sent by EDD. - Increase information security. - Reduce paper file storage space needs & costs at CUIAB. - Reduce postage costs. - Increase federal performance. 	Agency, EDD, CUIAB meeting on 01/16/2013. Moving UI appeal scope back to UI Forms Project. CUIAB & EDD will explore scope that can be completed before UI Forms Project is relaunched. Decisions will be made at a follow up meeting.
E-CATS Enhanced CA Appeal Tracking System is the modernization of CUIAB's legacy appeals tracking system. In-house IT staff are developing the system on a Microsoft web application framework	Faye Saunders	High			Users will see new and improved screen search, efficiency in decision printing, and IT ability to roll-out updates via the internet. Testing is in progress. Stress-test simulation is under development and target completion is 02/13/2013. Implementation scheduled for Spring 2013.
Electronic Case Management CUIAB's case tracking database is 10 years old and cumbersome to manage the current workload volume. CUIAB is collaborating with LWDA & EDD to develop an integrated case management system.	Lori Kurosaka Janet Maglante	On Hold	LWDA, EDD & CUIAB approved FSR & project strategy in 10/2010. Kick off 05/2011.	<ul style="list-style-type: none"> - Receive appeals case documents electronically from EDD. - Eliminate internal mailing of case documents 	Project Team is revisiting the FSR to update and complete by end of fiscal year. Will begin product research and demos.
E-Decision Review for ALJs In-house development for electronic appeal decision review process.	Faye Saunders	High			Performing business analysis for requirements gathering.

TECHNOLOGY cont.

Project & Description	Lead	Priority	Milestones	Goals	Status
<p>EDD CCR Interface As a part of EDD's UI Modernization Project, CUIAB is building an interface with the Continued Claims Redesign Project under development. Primary data exchange will include address change updates.</p>	Faye Saunders	High		<ul style="list-style-type: none"> - Eliminate paper exchange process with EDD. - Increase worker information security. 	Completed testing solution with EDD. EDD's CCR implementation is delayed to July 2013.
<p>Expand Auto Dialer Hearing Reminder Adding email and cell phone text features for supplemental hearing notifications.</p>	Rafael Placencia	On Hold	<p>Updated software. Final testing 08/2010. Implemented 09/2010. Implemented email reminders 04/2011. Revised 10/2011.</p>	<ul style="list-style-type: none"> - Increase hearing attendance rate & productivity. 	
<p>Explore Feasibility to Use EDD Mail Center Within three months, Field Operations wants to explore feasibility of mailing decisions and notices via the EDD Mail Center to take advantage of bulk postal discounts and save staff resources.</p>	Hugh Harrison Lori Kurosaka Faye Saunders	High			<p>Held planning meeting with EDD on 04/12/2012 for requirements gathering and costing. Identifying existing model costs and estimating project cost estimates. Held requirements gathering session with FO & AO on 05/02/2012. AppDev is procuring software to expedite coding for this process. Held CUIAB requirements session.</p>
<p>Field Office Technology Enhancements Investing and testing use of larger sized monitors for hearing rooms. Provide second monitors for support staff to toggle into SCDB without interrupting their CATS.</p>	Rafael Placencia	Medium	Complete procurement	<ul style="list-style-type: none"> - Improve readability of documents on screen. 	Hardware deployment
<p>Field Office Telephone Tree Field Operations will test the use of phone menu options to answer routine constituent calls. This will allow support staff to spend more time on the non-routine calls.</p>	Rafael Placencia	Medium	Develop standard automated phone tree to be used for all FO's Pilot new phone tree in the Inland FO	<ul style="list-style-type: none"> - Reduce claimants' & employers' time on phones. - Standardize hearing information provided by phone. 	Standard phone tree design completed. Pilot began in the Inland FO.
<p>EDD Flat File Expansion The nightly data file of UI, DI, and PFL appeal transmittals will be expanded to include data for the entire UI macro print jobs. This expanded data will allow CUIAB to calendar hearings before paper transmittal arrives.</p>	Lori Kurosaka Faye Saunders	High		<ul style="list-style-type: none"> - Reduce claimants' & employers' wait times for benefits and adjustments. - Reduce cycle time for appeals process. - Reduce hard copy SCDB screen prints mailing from EDD. 	<p>Gathered business requirements with Judicial Advisory Council 10/16/2012. Trying to schedule project launch meeting with EDD. EDD IT Branch has lead. UI Branch is now on "lock-down" due to CCR Project testing.</p>

TECHNOLOGY cont.

Project & Description	Lead	Priority	Milestones	Goals	Status
<p>Hearing Scheduling System Currently, FO & AO support staff schedule or assign appeal hearings or cases using a hybrid manual process. Appellate, Field & IT staff observed an EDD demon on their UI Scheduling System.</p>	Lori Kurosaka Faye Saunders	Medium	Charter & scope completed. Kick off 10/14/2010. Requirements 2/2011 Testing began 01/2012 AO Implementation 04/26/2012	<ul style="list-style-type: none"> - Reduce claimants & employers wait time for hearing decisions. - Provide easier electronic process for staff to calendar hearings or schedule cases. 	IT team completed visits to 12 FOs to observe calendaring processes. Business requirements & design document were vetted with FO Steering Council in September 2012. Application coding is 35% completed.
<p>LWDA Network Consolidation To comply with OCIO Policy Letter 10-14, the LWDA Departments & Boards are developing a network consolidation plan that must be completed by June 2013.</p>	Rafael Placencia	Medium	LWDA Workgroup develops migration plan. Consensus on migration plan. Implementation	<ul style="list-style-type: none"> - Improve IT efficiency & effectiveness. - Improve security. - Reduce IT costs by using shared service models. - Reduce greenhouse gas emissions. 	The migration plan is completed and a cost model has been developed.
<p>Personal Productivity & Mobility Pilot for Board Members, Appellate & Senior Staff Testing use of new mobile, paperless technology with Board Members, six Appellate ALJs, and Senior Staff.</p>	Rafael Placencia	On Hold due to air card limitations	OCIO approval for procurement. Testing equipment with Board.	<ul style="list-style-type: none"> - Reduce the use of paper for board appeal processing and board meetings. 	Scoped down due to GO directive on cell phone (air card) reductions.
<p>Printer Standardization Standardizes the use of printers throughout the organization as they are replaced. This will reduce maintenance and toner costs through the printers lives.</p>	Rafael Placencia	Medium		<ul style="list-style-type: none"> - Reduce maintenance & support costs. - Reduce toner costs. 	Researching feasible equipment. Standards are in place for light, heavy, color, and multi-function printers.
<p>Refresh Bench & Conversion CUJAB's intranet site is under refresh and conversion to SharePoint 2010 software. This software will provide easier updates and content.</p>	Faye Saunders	Medium	Secured consultant to build SharePoint server 09/2012. Migration of current content completed 08/2012.	<ul style="list-style-type: none"> - Improve internal communication tool for CUJAB employees. 	IT is working with different programs to update the content of their pages. Forms & documents are migrated to new site. Page design & links are postponed due to IT resource shortage.
<p>VOIP Telephony CUJAB is exploring use of Voice Over Internet technology to provide lower cost telecommunications.</p>	Rafael Placencia Janet Maglente	On Hold	09/17/2011 Completed 23out station hearing facilities.	<ul style="list-style-type: none"> - Elimination of long distance toll calls - Consolidation of telecommunications support areas. 	On hold 07/2011. IT staff are preparing business analysis for feasibility of further implementation.

STAFFING, FACILITIES, EQUIPMENT & OTHER

Project & Description	Lead	Priority	Milestones	Goals	Status
<p>Archive File Document Conversion Each FO is retaining three years of completed paper appeal case files that are sitting in considerable real estate space. The file room space may be easily converted to ALJ offices or hearing rooms.</p>	Lori Kurosaka Pat Houston	High	MSA vendor contract executed 01/2010. OC, Inland, LA, Oxnard, San Jose, San Diego, LA, Sacto, SF. Appellate complete Vendor quality checks 04/05, 05/06, 08/19. Vendor quality check 05/09	<ul style="list-style-type: none"> - Recapture real estate space for ALJ offices and hearing rooms. - Priority conversion for OC, Inland, LA, San Jose & Oxnard. 	Extended vendor contract to 12/31/2012. CUIAB IT working on solution to scan files in FO.
<p>Judicial Advisory Council Established an advisory council of two Presiding Judges & three ALJs to seek input on major technology development.</p>	Lori Kurosaka Janet Maglante	On-Going	07/2011-Completed business requirements for case management system.	<ul style="list-style-type: none"> - Design comprehensive technology systems with input from judicial users. 	Updating business requirements for imaging & workflow system. Testing ergonomic furniture to help judges to adopt new technology.
<p>Performance Management Tools for Board & Leadership Develop additional reporting tools that the Board & Leadership will use to monitor overall appellate performance and appeal process cycle times. These tools will also help to measure success with the large scale technology projects.</p>	Janet Maglante	High	Business case metrics for imaging Business case metrics for case management Tested report template designs with IT.	<ul style="list-style-type: none"> - Design comprehensive technology systems with input from staff users. 	Field Operations performance indicator reports are complete. In design & test for Appellate Operations cycle time and case aging reports.
<p>Staff Advisory Council Established an advisory council of six Field Operations staff and two Appellate staff to seek input on major technology development.</p>	Lori Kurosaka Janet Maglante	On-Going		<ul style="list-style-type: none"> - Develop and implement training plan for judges & staff. - Develop and implement a communications plan targeting all CUIAB stakeholder groups on new technology status. 	First assignment is to redesign appeal forms as smart forms. Scheduling mini-design sessions from September - December 2012.
<p>Transforming CUIAB Completed engagement with vendor. Establish new change management program at CUIAB to train staff for skills needed for new technology implementations and communicate on tech project initiatives.</p>	Pam Boston	High		<ul style="list-style-type: none"> - Develop and implement training plan for judges & staff. - Develop and implement a communications plan targeting all CUIAB stakeholder groups on new technology status. 	Draft communications and training plans are approved by Steering Council. Plans are being vetted with Presiding Judges through 02/08/2012.

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NINA FENDEL, Of Counsel
ANA M. GALLEGOS, Of Counsel

• Also admitted in Arizona
** Admitted in Hawaii
*** Also admitted in Nevada
**** Also admitted in Illinois
***** Also admitted in New York

January 14, 2013

California Unemployment Insurance Appeals Board
c/o Ralph W. Hilton, Chief Counsel
2400 Venture Oaks Way, Suite 300
Sacramento, CA 95833

**Re: San Francisco Unified School District
Unemployment Insurance Appeals Board January 15, 2013 Meeting
Consideration of Board Decision AO-278558 (Arthur A. Calandrelli) for
Designation as Precedent Benefit Decision**

To the Honorable Members of the Unemployment Insurance Appeals Board:

Our client, the United Educators of San Francisco, has received notification from you that you will be considering Board Decision AO-178558 (Arthur Calandrelli) for designation as a precedent benefit decision. The San Francisco Unified School District has indicated its support for that action. The United Educators of San Francisco, which represented Mr. Calandrelli and other similarly situated individuals respectfully disagrees.

The issue in question is whether or not an individual who receives a "reasonable assurance" letter in the spring of a school year advising him or her that he or she has a reasonable assurance of employment in the next academic term has, in fact, received reasonable assurance of employment in the next academic term, when a summer session intervenes between the spring term of an academic and the fall term of the following academic year. That matter is currently before the San Francisco Superior Court in Case No. CPF-12-512437. However, this current action is not the first time this question has been before the San Francisco Superior Court. It was the issue before the Court in the case of *San Francisco Unified School District v. California Unemployment Insurance Appeals Board*, CPF05-504939. On that occasion the Honorable James L. Warren issued his decision denying the San Francisco School District's request for a petition for writ of mandate overturning the California Unemployment Insurance Appeals Board decision. Attached hereto as Exhibit A you will find the judgment Judge Warren entered on November 16, 2005. Attached hereto as Exhibit B is Judge Warren's order denying the petition for writ of mandate filed on October 11, 2005. Finally, attached as Exhibit C you will find the Statement of Decision of Judge Warren. Judge Warren held conclusively that the California Unemployment Insurance Appeals Board was correct when it held that school employees were eligible for benefits during a summer term. Judge Warren held that a summer session was indeed a "term" as that word is used in Unemployment Insurance Code Section 1253.3.

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January 14, 2013

Page 2

Judge Warren, in his Statement of Decision on page 5 wrote the following:

Real Parties' period of unemployment also did not begin 'between two successive academic terms.' The CUIAB held that Real Parties potentially were eligible for benefits during the summer term, which ran from June 19, 2003 through July 25, 2003. Consistent with the express language of Section 1253.3, CUIAB appropriately limited Real Parties' potential liability to the summer term, and excluded the true summer recess on either side of it. At oral argument, SFUSD contended that summer school is not a 'term' because it is different in length from a regular term and attendance is not mandatory. However, no such limitation appears in the text of the statute, which uses the phrase 'academic term' without qualification. To conclude that SFUSD's 6-week summer school was an academic term for purposes of Section 1253.3, it suffices that during that period educational instruction was provided to students, and that at least some teachers were employed to provide that instruction (which is not in dispute).

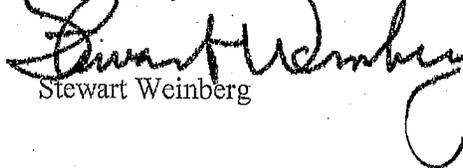
It does not appear that that decision was ever appealed. Therefore it is final as to the parties, the San Francisco Unified School District, and the California Unemployment Insurance Appeals Board. Consequently, the principle of issue preclusion and collateral estoppel applies to any subsequent litigation between the San Francisco Unified School District and California Unemployment Insurance Appeals Board. The issue is precluded from further litigation in any subsequent action between the same parties on a different claim. This is not merely collateral estoppel, we believe that it is direct estoppel.

If the Unemployment Insurance Appeals Board were to adopt the Calandrelli decision as a precedent decision, it would do so in the face of a Court decision in which ironically the Unemployment Insurance Appeals Board obtained a favorable decision to the contrary of the principle which it now seeks to adopt as a precedent.

This also appears to be an effort by the San Francisco Unified School District to rewrite history and the influence the very same court which found contrary to this principle in 2005.

We respectfully urge the Court to reject the proposition that the Calandrelli decision be made a precedent decision, and that it await the outcome of litigation currently pending and which may be filed in connection with the Calandrelli decision as well.

Respectfully submitted,


Stewart Weinberg

KLH:ld

opeiu 3 afl-cio(1)

132063/699904

cc: John R. Yeh

EXHIBIT A

ORIGINAL

1 BILL LOCKYER
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6 Attorneys for Respondent

FILED
San Francisco County Superior Court

NOV 16 2005

GORDON PARK-LI, Clerk
BY: *Judith C. Rogness*
Deputy Clerk

7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF SAN FRANCISCO

9
10 **SAN FRANCISCO UNIFIED SCHOOL DISTRICT,**

11 Petitioner,

12 v.

13 **CALIFORNIA UNEMPLOYMENT INSURANCE**
14 **APPEALS BOARD,**

15 Respondent,

16 **DOUGLAS D. CROTER, JULIA A. BALTRIP,**
17 **STEPHEN M. DOLGIN, DEBRA A. HENDRICKS,**
18 **JOHN M. HATTORI, MARK E. PODHRECKI,**
19 **CHARLES FORVE, JOHANNA M. VON**
20 **GOTTFRIED, REBECCA WEBB and HENRY J.**
PYTEL III,

Real Parties in Interest.

CASE NO. CPF 05-504939

^(a)
~~PROPOSED~~ JUDGMENT
FOR RESPONDENT

Hearing Date: August 30, 2005

Time: 9:30 a.m.

Dept: 301

Judge: The Honorable

James L. Warren

Action Filed: January 13, 2005

21 On October 11, 2005, the court entered an Order Denying Petitioner's Petition for Writ
22 of Mandate, and that directed respondent, California Unemployment Insurance Appeals Board
23 (CUIAB), to prepare a form of judgment. It is therefore ORDERED, ADJUDGED AND
24 DECREED that judgment is entered for respondent CUIAB.

25 Dated: ^{Nov. 14, 2005} ~~October~~ 2005

26
27 ^(a)
Judge James L. Warren

Judge of the Superior Court

28 20030863.wpd

EXHIBIT B

COPY

1 BILL LOCKYER
Attorney General of the State of California
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6 Attorneys for Respondent

Original
**ENDORSED
FILED**
San Francisco County Superior Court

OCT 11 2005

GORDON PARK-LI, Clerk

BY: ~~MARJORIE SCHWARTZ SCOTT~~
[Signature] Deputy Clerk

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

11 SAN FRANCISCO UNIFIED SCHOOL DISTRICT,

12 Petitioner,

13 v.

14 CALIFORNIA UNEMPLOYMENT INSURANCE
15 APPEALS BOARD,

16 Respondent.

CASE NO. CPF 05-504939

~~PROPOSED~~ ORDER
DENYING PETITIONER'S
PETITION FOR WRIT OF
MANDATE

17 DOUGLAS D. CROTER, JULIA A. BALTRIP,
STEPHEN M. DOLGIN, DEBRA A. HENDRICKS,
18 JOHN M. HATTORI, MARK E. PODHRECKI,
CHARLES FORVE, JOHANNA M. VON
19 GOTTFRIED, REBECCA WEBB and HENRY J.
PYTEL III,

20 Real Parties in Interest.

Date: August 30, 2005
Time: 9:30 a.m.
Dept: 301
Judge: The Honorable
James L. Warren
Action Filed: January 13, 2005

22
23 The Petition for Writ of Mandate came for hearing on August 30, 2005 before
24 Department 301 of this court. Jo Anne SawyerKnoll and John Yeh, of Miller Brown & Dannis,
25 appeared on behalf of petitioner. Deputy Attorney General Karin S. Schwartz appeared on behalf
26 of respondent. Having fully considered all the briefs, exhibits and supporting documents, and the
27 argument of counsel, the Court HEREBY ORDERS THAT:

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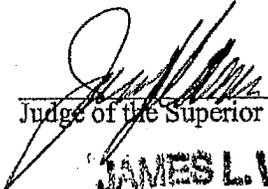
1. Petitioner's first request for judicial notice (filed on June 9, 2005) is DENIED.

2. Respondent's request for judicial notice (filed on July 29, 2005), and petitioner's second request for judicial notice (filed on August 4, 2005), are GRANTED.

3. The Petition for a Writ of Mandate is denied. Respondent's interpretation of Unemployment Insurance code section 1253.3 is correct.

4. Judgment shall be entered for respondent. Respondent shall prepare a proposed form of judgment.

Dated: October 6, 2005



Judge of the Superior Court
JAMES L. WARREN

Case # 504-939

San Francisco Unified
School District

VS

California Unemployment
Ins. Appeals Board

EXHIBIT C

1 BILL LOCKYER
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6 Attorneys for Respondent

Original
**ENDORSED
FILED**
San Francisco County Superior Court

OCT 11 2005

GORDON PARK-LI, Clerk

BY: ~~MARJORIE SCHWARTZ SCOTT~~
[Signature] Deputy Clerk

7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10
11 **SAN FRANCISCO UNIFIED SCHOOL DISTRICT,**

12 Petitioner,

13 v.

14 **CALIFORNIA UNEMPLOYMENT INSURANCE
15 APPEALS BOARD,**

16 Respondent.

17 **DOUGLAS D. CROTER, JULIA A. BALTRIP,
18 STEPHEN M. DOLGIN, DEBRA A. HENDRICKS,
19 JOHN M. HATTORI, MARK E. PODHRECKI,
20 CHARLES FORVE, JOHANNA M. VON
21 GOTTFRIED, REBECCA WEBB and HENRY J.
PYTEL III,**

Real Parties in Interest.

CASE NO. CPF 05-504939

STATEMENT OF DECISION

Date: August 30, 2005
Time: 9:30 a.m.
Dept: 301
Judge: The Honorable
James L. Warren
Action Filed: January 13, 2005

22 The Petition for a Writ of Mandate under California Code of Civil Procedure 1094.5
23 came on before the Honorable James L. Warren in Department 301 for hearing on August 30,
24 2005. Jo Anne SawyerKnoll and John Yeh, of Miller Brown & Dannis, appeared on behalf of
25 petitioner. Deputy Attorney General Karin S. Schwartz appeared on behalf of respondent.
26 Following the hearing, the court took this matter under submission.

27 The court, having read and considered all documents submitted in support of the
28 Petition, having heard oral argument, having considered the evidentiary objections of respondent,

1 and having carefully reviewed the record, now orders that petitioner's Motion for Writ of
2 Mandate is DENIED and that judgment be entered in respondent's favor. In ruling on this
3 motion, the court considered only relevant and admissible evidence.

4 **A. Factual and Procedural Background**

5 Petitioner, SFUSD, operates primary and secondary schools in the County of San
6 Francisco. Real parties in interest (real parties) are ten substitute teachers who have been
7 employed by SFUSD. SFUSD brought this lawsuit to challenge a decision by the California
8 Unemployment Insurance Appeals Board (CUIAB) that section 1253.3, subdivision (b), of the
9 Unemployment Insurance Code (hereinafter, § 1253.3(b)) did not render real parties "ineligible"
10 for unemployment insurance benefits after they were unable to obtain work during a six-week
11 summer school term in 2003. There is no dispute that, from June 19, 2003 through July 25,
12 2003, SFUSD operated a summer school. (Petition for Writ of Mandate, ¶ 14)

13 Section 1253.3, subdivision (b), prohibits an award of unemployment insurance
14 benefits to certain employees of educational institutions "with respect to any week which begins
15 during the period between two successive academic years or terms" if the employees received a
16 "reasonable assurance" of employment in the institution in the "second of the academic years or
17 terms." Petitioner contends that this provision operates as a blanket prohibition on payment of
18 unemployment benefits to unemployed substitute teachers during the summer, regardless of
19 whether a school district operates a summer school. CUIAB held that the exemption only applies
20 to periods in which a school district is in recess: that is, when it is not providing any instruction
21 to students. Thus, under the CUIAB's interpretation, a substitute teacher who was able and
22 available for work during the weeks in which a summer school was offered, but who was totally
23 or partially unemployed during that period, could potentially be eligible for benefits
24 notwithstanding §1253.3(b).

25 **B. The Petition for a Writ of Mandate.**

26 The Petition for a Writ of Mandate is denied. CUIAB's interpretation of § 1253.3(b) is
27 correct as a matter of law.

28 ////

1 **1. Standard of Review.**

2 At issue is a question of law: the proper interpretation of a statute, § 1253.3(b). The
3 court exercises de novo review on questions of law that are raised in writ petitions under section
4 1094.5 of the Code of Civil Procedure. (*Weinberg v. Cedars Sinai Med. Ctr.* (2004) 119
5 Cal.App.4th 1098, 1107.) In exercising its independent review, however, the court gives “great
6 weight” to the CUIAB’s interpretation. (*American Federation of Labor v. Unemployment Ins.*
7 *Appeals Bd.* (1994) 23 Cal.App.4th 51, 58; see also *MHC Operating Ltd. Partnership v. City of*
8 *San Jose* (2003) 106 Cal.App.4th 204, 219 [court must give “appropriate deference” to agency’s
9 interpretation of law].) The court will reject the CUIAB’s interpretation if it is contrary to
10 statutory intent. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.*, *supra*, 23
11 Cal.App.4th at p. 58.)

12 **2. Legislative Intent.**

13 The court’s task, in construing a statute, “is to ascertain the intent of the Legislature
14 so as to effectuate the purpose of the enactment.” (*Cummins, Inc. v. Superior Court* (2005) 36
15 Cal.4th 478, 487.) The Legislature’s intent, in enacting the Unemployment Code, was to provide
16 benefits to persons “unemployed through no fault of their own, and to reduce involuntary
17 unemployment and the suffering caused thereby to a minimum.” (Unemp. Ins. Code, § 100.)
18 Consistent with this express intent, the Supreme Court has explained that the unemployment
19 insurance code was “designed to cushion the impact of . . . seasonal [and] cyclical . . . idleness.”
20 (*Chrysler Corp. v. California Employ. Stabilization Commn.* (1953) 116 Cal.App.2d 8, 16.)

21 The court must construe the Unemployment Insurance Code “liberally . . . to further
22 the legislative objective of reducing the hardship of unemployment.” (*Prescod v. Unemployment*
23 *Ins. Appeals Bd.* (1976) 57 Cal.App.3d 29, 40, emphasis omitted.) Further, because § 1253.3(b)
24 creates an exception to the general statutory scheme, it should be construed narrowly. (*In re*
25 *Estate of Thomas* (2005) 124 Cal.App.4th 711, 720.)

26 Finally, because the California Legislature modeled § 1253.3(b) on a federal statute,
27 Congressional intent also is relevant. The language of section 1253.3(b) largely and purposefully
28 tracks a provision in the Federal Unemployment Tax Act (FUTA) of 1976. (Stats. 1978, ch. 2, §

1 '106; 90 Stat. 2667, 2670-2671 (amending 26 U.S.C. § (a)(6)(A)).) Congress' intent, with respect
2 to the provision at issue in FUTA, was to prevent overcompensation of teachers who are paid a
3 reasonable annual salary based on work performed only over nine months of the year. (See, e.g.,
4 Remarks of Sen. Long, 122 Cong. Rec. 33285 (1976); Remarks of Sen. Javitz, 122 Cong. Rec.
5 33284-33285 (1976); Remarks of Rep. Ullman, 122 Cong. Rec. 35132 (1976).) The debate on
6 the measure confirms Congress's intention to prohibit payment of unemployment benefits during
7 "vacation" or "recess" periods. (See, e.g., p. Remarks of Rep. Steiger, 122 Cong. Rec. 35136
8 (1976); Remarks of Rep. Corman, 122 Cong. Rec. 22899 (1976).)

9 **3. CUIAB's Interpretation Advances Legislative Intent.**

10 The CUIAB's interpretation advances the intent of the Unemployment Insurance
11 statutes: to provide benefits to those unemployed through no fault of their own, and to ameliorate
12 the harshness of cyclical unemployment. In addition, the CUIAB's interpretation is consistent
13 with the intent behind enactment of 1253.3: to deny benefits to those teachers whose
14 compensation already takes into account a three-month (paid) summer vacation. Because
15 substitute teachers are not paid for the summer unless they actually work in a school during that
16 period, the CUIAB's interpretation will not result in the type of double-compensation that
17 Congress sought to avoid. (See Educ. Code, § 45030; Administrative Record, pp. 1547, 1551,
18 1582.) The court must construe this exemption narrowly to avoid undermining the ultimate goals
19 of the Unemployment Insurance Code.

20 **4. CUIAB's Interpretation is Consistent with the Terms of the Statute.**

21 The CUIAB's interpretation is consistent with the language of § 1253.3(b). The
22 CUIAB correctly held that real parties' period of unemployment did not begin "between two
23 successive academic years or terms."

24 Real parties' period of unemployment did not begin "between two successive academic
25 years" because, in California, there is no gap between successive academic years. The
26 Legislature did not define the term "academic year" as it is used in § 1253.3(b). "Year," of
27 course, has a common sense meaning of 365 days. Consistent with this common sense meaning,
28 the Legislature has defined a "school year" as running from July 1 to June 30, as petitioner

1 acknowledges. (Educ. Code, § 37200; Petition for Writ of Mandate, ¶ 16.) The Legislature has
2 stated that “academic year” and “school year are synonymous in at least some contexts. (See
3 Educ. Code, § 22169, 25926.) By contrast, petitioner has not identified any potentially
4 applicable California legislation that defines “academic year” as something less than a “year.” In
5 light of these authorities, considering the underlying purposes of the unemployment insurance
6 code as a whole and § 1253.3(b) in particular, and giving appropriate deference to the CUIAB’s
7 interpretation, the court holds that the CUIAB’s interpretation of “academic year” is correct.

8 Real parties’ period of unemployment also did not begin “between two successive
9 academic terms.” The CUIAB held that real parties potentially were eligible for benefits during
10 the summer term, which ran from June 19, 2003 through July 25, 2003. Consistent with the
11 express language of § 1253.3, CUIAB appropriately limited real parties’ potential eligibility to
12 the summer term, and excluded the true summer recess periods on either side of it. At oral
13 argument, SFUSD contended that summer school is not a “term” because it is different in length
14 from a regular term and attendance is not mandatory. However, no such limitation appears in the
15 text of the statute, which uses the phrase “academic term” without qualification. To conclude
16 that SFUSD’s six-week summer school was an academic term for purposes of § 1253.3, it
17 suffices that during that period educational instruction was provided to students, and that at least
18 some teachers were employed to provide that instruction (which is not in dispute).

19 **C. Requests for Judicial Notice.**

20 CUIAB opposes petitioner’s first request for judicial notice, which SFUSD filed on
21 June 9, 2005. The request seeks improperly to supplement the administrative record. Petitioner
22 has not made the showing required for admission of extra-record evidence. (Code Civ. Proc., §
23 1094.5, subd. (e).) Accordingly, that request is denied. The court grants the parties’ other
24 requests for judicial notice, which were unopposed.

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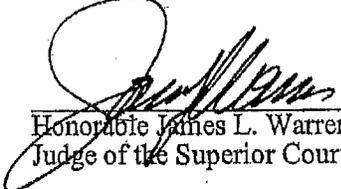
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1 D. Conclusion.

2 The CUIAB's interpretation of § 1253.3 is correct as a matter of law. The Petition for
3 a Writ of Mandate is denied. Judgment shall be entered for respondent.

4
5 Dated: ~~September~~ ^{October 6}, 2005


Honorable James L. Warren
Judge of the Superior Court

8 Case #: 504 939

11 SF Unified School District

13 VS

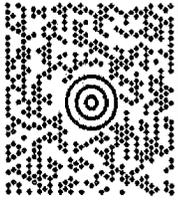
15 Calif Unemployment
17 INS - Appeals Board

UPS CampusShip: View/Print Label

1. Ensure there are no other shipping or tracking labels attached to your package. Select the Print button on the print dialog box that appears. Note: If your browser does not support this function select Print from the File menu to print the label.
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 voice 650.327.2672 - fax 650.688.8333
 www.bwslaw.com

FACSIMILE MESSAGE

DATE: January 11, 2013

FILE No.: 05863-0002

To:

FAX No.:

PHONE No.:

California Unemployment
 Insurance Appeals Board
 San Francisco Office of Appeals

916.263.6842

FROM: John R. Yeh

PHONE No.: 650.327.2672

RE: SFUSD -- Decision A0-278558 (Calandrelli)

NUMBER OF PAGES WITH COVER PAGE: 17 **ORIGINAL WILL NOT FOLLOW**

MESSAGE:

DATE SENT: _____ **TIME SENT:** _____ **INITIALS:** _____

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JAN. 11. 2013 - 2:39PM

BURKE, WILLIAMS & SORESENSEN

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BURKE, WILLIAMS & SORESENSEN, LLP

Direct No.: 650.327.2672
Our File No.: 05863-0002
jyeh@bwslaw.com

January 11, 2013

VIA FACSIMILE -- (916) 263-6842

California Unemployment Insurance Appeals Board
c/o Ralph W. Hilton, Chief Counsel
2400 Venture Oaks Way, Suite 300
Sacramento, CA 95833

Re: San Francisco Unified School District
Unemployment Insurance Appeals Board January 15, 2013 Meeting
Consideration of Board Decision A0-278558 (Arthur A. Calandrelli) for
Designation as Precedent Benefit Decision

To the California Unemployment Insurance Appeals Board:

This law firm represents the San Francisco Unified School District ("District") in the above-named matter. The District appreciates receiving advance notice of the CUAIB's intent to consider the decision in the above case as a precedent benefit decision. While scheduling conflicts prevent the District from attending the CUAIB's January 15, 2013 meeting, this issue has a significant impact on the District, and the District supports designation of the decision as a precedent on the grounds stated below.

Since 2003, the undersigned has represented the District in annual group hearings brought by 40-50 school district employees seeking benefits for the summer period between the regular school years. At issue is whether these employees, consisting largely of substitute teachers, paraprofessionals, security guards, food service workers and secretary/clerks, are eligible to receive unemployment benefits for the summer if they receive reasonable assurance of returning to work during the following school year under Unemployment Insurance Code section 1253.3. During that time, Administrative Law Judges with the San Francisco Unemployment Appeals Board ("SFUAB") have issued numerous variable rulings on the issue of whether such employees are eligible for benefits if they seek work during the District's summer school term.

The need for a precedent benefit decision on this matter is compelling, for the following reasons:

- The group hearings that will take place later in 2013 will be the District's tenth consecutive year of litigating this issue before the SFUAB, and, ultimately, the CUIAB.
- This issue has generated two superior court lawsuits. The first, *San Francisco Unified School District v. California Unemployment Insurance Appeals Board*, San Francisco Superior Court Case No. CPF05-504939 (2005), resulted in a court order finding the real party in interest claimants eligible for benefits

California Unemployment Insurance Appeals Board
January 11, 2013
Page 2

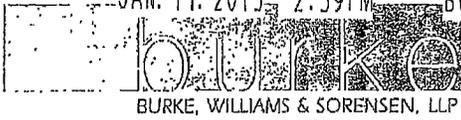
during the summer months. However, that matter did not definitively resolve this issue as it did not address the impact of the work history of the claimants. A second matter, *United Educators of San Francisco v. California Unemployment Insurance Appeals Board*, San Francisco Superior Court Case No. CPF-12-512437, is pending before the court.

- The United Educators of San Francisco, the union representing many of the claimants in these matters, has sent letters to its members encouraging them to apply for benefits, and citing the decisions of the SFUAB Administrative Law Judges as a reason to pursue benefits. Representative letters sent by UESF are attached as Exhibit A (See, May 24, 2011 and June 1, 2010 letters. Only page 1 of the June 1, 2010 was available to the District).
- The decisions of the SFUAB Administrative Law Judges have been variable, with the effect of further incentivizing claimants to seek benefits. For example, in the 2011 group claims, Administrative Law Judge Eric Wildgrube found all 40 claimants eligible for benefits. The CUAIB reversed the rulings in approximately 40% of the cases, and further modified the findings of eligibility in many of the others.
- The District has incurred considerable expense and staff resources defending against approximately 40-50 claims a year, and appealing them to the CUAIB.

The CUAIB's decision in the *Calandrelli* matter applies the correct legal analysis in concluding that:

- 1) Summer school is not an "academic term" for the purposes of Unemployment Insurance Code section 1253.3 since it "was not a part of the school's traditional academic year" (*Calandrelli*, p. 9);
- 2) Precedent Benefit Decisions P-B 412 and 417 do not support a finding of eligibility for summer benefits if a claimant cannot find summer school work; and
- 3) P-B 431 establishes that a claimant is only eligible for benefits in the first year after incurring a reduction in work schedule from 12 to 10 months.

We appreciate that CUIAB has received extensive briefing on this issue from the District over the past years. Rather than repeat that analysis here, we are attaching two recent briefings on the issue that were submitted to the SFUAB/CUAIB. (Exhibit B) In short, the District believes that the intent of Unemployment Insurance Code section 1253.3 is that school-term employees who have reasonable assurance of returning to work for the following school year are not eligible for summer benefits since the summer is a recess period, and that the inability to find a



California Unemployment Insurance Appeals Board
January 11, 2013
Page 3

summer school position does not by itself make a claimant eligible for benefits because Precedent Benefit Decisions P-B 412 and 417 require a "loss in customary work" to support a finding of eligibility.

We appreciate the CUAIB's willingness to consider the District's position on this issue.

Very truly yours,

BURKE, WILLIAMS & SORENSEN, LLP

JOHN R. YEH

JRY:mks

cc: (Via U.S. Mail)
Eric Hall
United Educators of San Francisco
2310 Mason Street
San Francisco, CA 94133

Donald L. Davis, General Counsel
San Francisco Unified School District
555 Franklin St., 3rd Floor
San Francisco, CA 94102

Stewart Weinberg, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
Counsel for United Educators of
San Francisco

EXHIBIT A



UESF

United Educators of San Francisco
 AFUWET, AFEUD • NEA/CIA

2310 Mason Street • San Francisco, CA 94133 • 415 956-8373 • Fax 415 956-8374 • www.uesf.org

June 1, 2010

James MacArthur Calloway
 P. O. Box 24589
 San Francisco, CA 94124

RE: Summer Unemployment Benefits for Substitute Teachers

This letter is to help explain to substitute teachers what they can do to improve their chances of getting unemployment benefits during the summer. The advice here is specific to this group. Although some of this information is applicable to other SFUSD employees, not all of it is. (I am sending out separate letters to laid-off teachers, laid-off paraprofessionals and to continuing paraprofessionals.) Some teachers have multiple classifications, as both a regular teacher and a substitute teacher, so it is possible that you may get more than one of these unemployment advice letters from me. If you get both this letter and the letter to laid off teachers or paras, the advice in the other letter should prevail if the two letters differ. This is practical advice resulting from the work I have done in representing UESF members at unemployment appeals hearings. Needless to say, this is not legal advice and for that you should consult an attorney.

You have likely just received a "reasonable assurance letter" from the SFUSD. That letter is designed to block school employees from unemployment benefits during the summer. Whether it is effective or not depends on a number of factors that I will discuss below. In order to get unemployment benefits, you have to file for them, so do that first.

Below is the normal situation and how one can overcome the being blocked from summer unemployment benefits.

1. If you worked last summer for SFUSD, and you applied to work this summer, and were not barred from working due to some alleged misconduct, but do not have a summer assignment, you will be able to establish that you have a reasonable expectation of working this summer and you will get benefits at least for the duration of the summer session.
2. If you have worked this school year, 2009-2010, in a SFUSD site that is a year-round site, such as Log Cabin, Woodside or Argonne Elementary, you have a reasonable expectation of working during the summer and should win an appeal for summer unemployment benefits for the whole summer.
3. If you have worked this school year, 2009-2010, in a SFUSD Child Development Center, you are eligible for unemployment benefits for the whole summer.

In my opinion, the current situation, because of the teacher layoffs, makes the reasonable assurance letter for substitute teachers invalid. I argue that because of the layoffs, this is what is called a 'sham offer' of employment. As a matter of law, the laid off teachers have the right to the first available open position for which they qualify in seniority order. This recall right applies to both regular and temporary work and it is the temporary work that substitute teachers do. The law requires that temporary teachers, therefore including substitute teachers, be laid off when they are laying off

S.S. # 465-96-6903

Need 1 copy for LA office

Page 1 of 2



UESF

United Educators of San Francisco
AFL/CEU, AFL-CIO • NEA/CTA

2310 Mason Street • San Francisco, CA 94133 • 415 156-8373 • Fax 415 956-8374 • www.uesf.org

May 24, 2011

Monte Whatley

~~██████████~~ 3783 28th ST. APT. 17
San Francisco, CA ~~██████████~~

Unemployment Benefits for Paraprofessionals

This letter is to help explain to Paraprofessionals what they can do to improve their chances of getting unemployment benefits during the summer. The advice here is specific to this group. Although some of this information is applicable to other SFUSD employees, not all of it is. (This is practical advice resulting from the work I have done in representing UESF members at unemployment appeals hearings. Needless to say, this is not legal advice and for that you should consult an attorney.

You have likely received a "reasonable assurance letter" from the SFUSD. That letter is designed to block school employees from unemployment benefits during the summer. Whether it is effective or not depends on a number of factors that I will discuss below. In order to get unemployment benefits, you have to file for them; so do that first.

~~██████████~~ If the conditions they apply to you, can help us win summer time unemployment ben-

~~██████████~~ If you worked the summer for SFUSD, 2010, and you applied to work this summer, 2011, and were laid off from working due to some alleged misconduct, but do not have a reasonable expectation of working this summer, you will likely be able to establish that you have a reasonable expectation of working this summer and you will get benefits at least for the duration of the summer session.

~~██████████~~ If you have worked this school year, 2010-2011, in a SFUSD site that is a year-round site, such as Log Cabin, Woodside or Argonne Elementary, you have a reasonable expectation of working during the summer and should win an appeal for summer unemployment benefits for the whole summer.

3. If you have worked this school year, 2010-2011, in a SFUSD Child Development Center, you are eligible for unemployment benefits for the whole summer.
4. If your situation is that you have been laid off or your hours for the next school year 2011-2012 have been cut compared to the hours that you have this year, you will likely be eligible for unemployment benefits for the summer.
5. If the situation is that you work for SFUSD in some capacity, we will probably be able to prove that you have a reasonable expectation of working this summer. If SFUSD calls you to work, do not turn down the work, go to work.

If none of these above conditions apply to you, your chances of winning an unemployment case are reduced, but you never know.

S.S.# 1465-96-6907

Page 2 of 2

Monte Whatley
March 24, 2011
Page 2 of 2

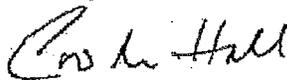
Union Members should list me as their representative, with the UBSF's address -2310 Mason Street, San Francisco, Ca. 94133. We have done well in representing our members at the Unemployment Insurance Appeals Board Hearings. The cases are generally heard in November or December and the rulings come out in February or April.

I am not authorized to represent non-members and, as this representation is not part of the collective bargaining process, we have no obligation to represent non-members. If you are listed as a non-member Agency Fee payer, I am not authorized to represent you in unemployment appeals hearings. You certainly have a right to be a non-member. However, should you wish to become a member, you need to fill out and return a union membership application. The form is available on the Union's website, www.uesf.org.

If you have questions, email me at ehall@uesf.org or send me a facsimile to 415-956-8374 or send me a letter. There are more than a thousand people getting this letter and it is thus not possible for me to respond to phone calls on this matter.

Remember that, in order to get unemployment insurance benefits, you have to file for them. If SFUSD objects, and they likely will, you will have to appeal that ruling on time. The forms you get from the State Employment Development Department explain what to do. Those who can should consider filing for benefits on line. That URL (Internet web address) is http://www.edd.ca.gov/Unemployment/Filing_a_Claim.htm.

Sincerely,



Eric M. Hall
Senior Field Representative

EMH/ms
uso/cso/uso

EXHIBIT B

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Direct No.: 660.327.2672
Our File No.: 05883-0002
ljeh@bwslaw.com

October 15, 2012

VIA FACSIMILE – (415) 357-3830 AND U.S. MAIL
California Unemployment Insurance Appeals Board
San Francisco Office of Appeals
185 Berry Street, Lobby 2, Suite 200
San Francisco, CA 94107

Re: San Francisco Unified School District
Multiple Employee Hearings, Hearing Dates: October 3, 4, 9, 10 and 11, 2012

To the Honorable Jeffrey P. Holl, Administrative Law Judge:

This office represents the San Francisco Unified School District with respect to the group hearings occurring on the above-listed days.

Summer School as "Academic Term":

School districts are not required to offer summer school, and students are not required to attend. In *California Teachers Association v. Board of Education of Glendale* (1980) 109 Cal.App.3d 738, the court of appeal, in affirming the lower court's rejection of a teacher union's challenge to the District's contract with a university to provide summer school services, stated:

...[T]he governing body of a district may establish and maintain such summer schools. *No mandatory requirement of summer school is found in any of these sections, and it must therefore be concluded that the establishment and maintenance of summer school classes and programs is only permissive rather than mandatory.*" (Id. at 744-45.) (Emphasis added.)

The California Ed. Code demonstrates a strong statutory intent to distinguish the mandatory regular school year from the permissive summer school term. Ed. Code §§ 37618 - 37620 provide as follows:

§ 37618. School Calendar. Rotating Shifts

The governing board of any school district operating pursuant to the provisions of this chapter shall establish a school calendar whereby the teaching sessions and vacation period during the school year are on a rotating basis.

§ 37619. Holidays

Each selected school shall be closed for all students and employees on regular school holidays specified in Article 3 (commencing with Section 37220) of Chapter 2.

§ 37620. Sessions and Vacations

The teaching sessions and vacation periods established pursuant to Section 37618 shall be established without reference to the school year as defined in Section 37200. *The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year.* (Emphasis Provided)

Ed. Code § 37620 clearly identifies the "academic year" as that occurring during the regular school year of no less than 175 days, when students are required to attend.

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Our File No.: 05883-0002
jyah@bwslaw.com

October 15, 2012

VIA FACSIMILE – (415) 357-3830 AND U.S. MAIL
California Unemployment Insurance Appeals Board
San Francisco Office of Appeals
185 Berry Street, Lobby 2, Suite 200
San Francisco, CA 94107

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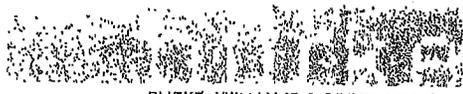
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Ed. Code § 37620 clearly identifies the "academic year" as that occurring during the regular school year of no less than 175 days, when students are required to attend.



BURKE, WILLIAMS & SORENSEN, LLP

Hon. Jeffrey Holl
October 15, 2012
Page 2

Likewise, in the context of employee rights, the Ed. Code recognizes that it would be unfair to treat employment during the summer school term in accordance with the same rights as employment during the regular school year. Ed. Code § 44913 provides as follows:

§ 44913. Summer School Employment in Computation for Classification as Permanent Employee

Nothing in Sections 44882 to 44887, inclusive, Sections 44890 to 44891, Sections 44893 to 44906, inclusive, and Sections 44908 to 44919, inclusive, shall be construed as permitting a certificated employee to acquire permanent classification with respect to employment in a summer school maintained by a school district, and service in connection with any such employment shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of the district. The provisions of this section do not constitute a change in, but are declaratory of, the preexisting law.

Likewise, there is no statutory right to summer school employment that flows from employment during the regular school year. While school-term employees generally have the right to return the following school year unless released under a temporary or short-term contract (Ed. Code § 44954, § 45103(d)(2)); laid off (§ 44949, § 45117); or dismissed for cause (§44932 *et seq.*, §45113), there is no guarantee of summer employment from year to year. Therefore, it would violate the basic purpose of U.I. Code § 1253.3 to treat the summer school term as being an equivalent term as the regular school year. Since employees have vested legal rights in their regular school year job, and no legal entitlement to summer work, as UESF witness Elizabeth Conley admitted on cross-examination, it would be a fallacy to treat the summer as an "academic term" for the purposes of U.I. Code § 1253.3. Since not all employees work, and not all students take, summer school, it would not be fair to treat it as commensurate with the regular school year. The CUIAB consistently reached that position in its 2011 appeals. (See, e.g., CUIAB decision in *Jimmy Lui* case, No. AO278588.) It would be arbitrary and capricious for the SFUAB to reach a different decision than the CUIAB.

Precedent Benefit Decisions P-B 412 and 417 Require a "Loss of Customary Work" for Eligibility:

The CUIAB, in Precedent Benefit Decision P-B-412, ruled that a claimant had a reasonable expectation of summer work when he was reduced from a 12-month to a 10-month schedule, since it was "clear that the cause of his unemployment was not a normal summer recess or vacation period but *the loss of customary summer work.*" (Emphasis Provided.) In Precedent Benefit Decision P-B-417, the CUIAB again based eligibility on "the loss of customary summer work," *but only for the first year in which the employee served under the reduced schedule.* Precedent Benefit Decisions P-B-412 and P-B-417 do not stand for the proposition that a history of work in the previous summer, or availability for work in the current summer, make the summer school term an "academic term." Rather, there has to be an actual loss of summer work (such as a claimant receiving a summer school assignment in 2011, and having it cancelled due to low enrollment.) (See, e.g., Decision in case of *Barbara v. Velarde Stienes*, SFUAB Case No. 3879729.) It is an abuse of discretion to equate the inability to find a summer school assignment -- to which there is no guarantee of employment -- with a "loss of customary summer work."

No Laid-Off Teachers Were Placed in the Substitute Teacher Pool:

UESF offered testimony of Susan Solomon and Elizabeth Conley attempting to show that substitutes' job prospects were diminished. This argument turns out to be nothing but smoke and mirrors. As Solomon admitted on cross-examination, school districts must meet statutory deadlines for the layoff process, including serving preliminary

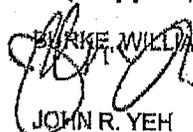
Hon. Jeffrey Holl
October 15, 2012.
Page 3

layoff notices by March 15 and final layoff notices by May 15, before they have complete budget information for the following school year, including the Governor's May budget revise. Although the District issued approximately 200 layoff notices to teachers, all of those notices were rescinded, and the teachers rehired, by August. Both Solomon and Conley admitted on cross-examination that they were unable to name one teacher who was laid off and then entered into the substitute pool. UESF's theory, therefore, never came to fruition. Furthermore, almost all of the substitute teachers testifying at hearing testified that they resumed receiving their customary rate of substitute assignments upon returning to work for the 2012-2013 school year. UESF's theory is simply unsupported by the facts.

Conclusion: Benefits should be denied for the following reasons:

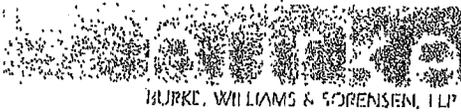
- The District's summer school session is not an "academic term" for the purposes of U.I. § 1253.3. Although instruction takes place (as one would naturally expect from a District program), this fact, by itself, does not make it an "academic term." Ed. Code § 37620 establishes that only the regular school year is an "academic term."
- Treating the summer school program as an "academic term," on par with the regular school year, makes no sense. Employment during the regular school year does not vest school-term employees with the right to summer employment, and vice-versa. Therefore, it makes no sense to treat summer school as an "academic term" in the same manner as the regular school year.
- Precedent Benefit decisions P-B-412 and P-B-417 do not allow for eligibility during the summer school term if an employee has even minimal summer school experience in the past. Those decisions require a "loss in customary summer work," which is not equivalent to the "inability to find summer work." Likewise, minimal or sporadic work at a year-long program, EED, or Argonne does not constitute a "loss of customary summer work." Moreover, witness Conley testified that substitutes needed a pre-school certification to serve children younger than school age. None of the claimants testified that they possessed such certification.
- Reasonable assurance already takes into account the tenuous nature of substitute teaching. (*Board of Education v. Unemployment Ins. Appeals Board* (1984) 160 Cal.App.3d 674, 682.) The CUIAB has also extended the finding of reasonable assurance to Prop A substitutes. (See, *Schilling*, Case No. AO-239905; *Vignaux*, Case No. AO-239904, Remand.)
- UESF's citation to *Cervisi v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal.App.3d 635 is unavailing. The court in *Cervisi* recognized an exception to the application of the reasonable assurance rule where the return to work was expressly conditioned on a community college instructor achieving a certain level of enrollment for his/her fall classes. The return of the substitute teachers here was not subject to any condition based on enrollment, funding, or program changes. Nearly all of the substitute teachers here returned to their customary pattern of work during the 2012-2013 school year. (See, P-B-431, quoting *Russ v. Unemployment Insurance Appeals Board* (1982) 125 Cal.App.3d 834) ("[t]he mere remote possibility that the school district's future plans, programs, or finances might change does not negate the reasonable assurance between the parties that the claimants would return to work in the fall.")

Very truly yours,

BURKE, WILLIAMS & SORESENEN, LLP

JOHN R. YEH

JRY:mks

cc: Eric Hall, United Educators of San Francisco.
2310 Mason Street
San Francisco, CA 94133 (Via U.S. Mail)



BURKE, WILLIAMS & SORENSEN, LLP

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Direct No.: 650.327.2672
 Our File No.: 06863-0002
 jyeh@bwslaw.com

November 13, 2012

VIA FACSIMILE – (415) 357-3830

California Unemployment Insurance Appeals Board
 San Francisco Office of Appeals
 185 Berry Street, Lobby 2, Suite 200
 San Francisco, CA 94107

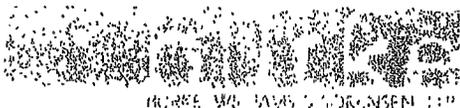
Re: San Francisco Unified School District
 Unemployment Insurance Appeals Board

Claimant	Case No.	Hearing Date
Adam Heaton	4489133	10.03.12
Elizabeth Lara Dobieman	4536112	10.03.12
Hope S. Williams	4508783	10.03.12
Maricela Medina	4509267	10.03.12
Jimmy Lui	4537196	10.03.12
Leanna Folauoo	4548411	10.03.12
Dwayne M. Guttormsen	4500862	10.03.12
Aleshea E. Moore	4523109	10.03.12
Lester L. Rubin	4529739	10.03.12
Narda Harrigan	4548302	10.11.12
Latonya E. Carpenter	4566932	10.11.12
Mercedes F. Binns	4517786	10.09.12
Yudaisy Montes de Oca	4509534	10.09.12

James McAndrew	4532590	10.04.12
Stephen S. Kaslikowski	4560206	10.04.12
Charles Denefeld	4521822	10.04.12
Alan Lovaasen	4500715	10.04.12
Richard A. Best	4518769	10.04.12
Natalya Yuzbasheva	4507430	10.04.12
Kathleen A. Murphy	4519816	10.04.12
Ralph E Gough	4548801	10.10.12

To The California Unemployment Insurance Appeals Board:

This law office represents the San Francisco Unified School District ("District") with respect to the above-listed claimants. This letter constitutes the District's appeal of Administrative Law Judge Jeffrey P. Holl's decisions in the above-listed matters, which were all served on October 24, 2012.



California Unemployment Insurance Appeals Board
San Francisco Office of Appeals
November 13, 2012
Page 2

The District does not appeal the ALJ's determination that the claimants were ineligible for benefits during the summer recess periods between the regular school term and the summer school term. The District appeals the above-named decisions on the grounds that the ALJ erred in finding that the claimants were eligible for benefits during the District's summer school term by virtue of having worked in previous summer school terms or for year-round programs.

I

FACTUAL BACKGROUND

The spring semester of the 2011-2012 school year ended on May 25, 2012. The District conducted a summer school session from June 11, 2012 through July 16, 2012. (ALJ Decision, p. 2) Employment during the regular school year as a school-term employee did not guarantee employment during the summer school term. The District operated other programs, including Child Development Centers (CDC) that did not follow the traditional school term but that operated throughout the calendar year. (ALJ Decision, p. 2)

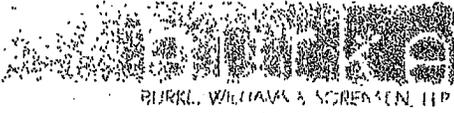
II

INTRODUCTION

A. LEGAL ARGUMENT

Unemployment Insurance Code § 1253.3, subsection (b), states that:

[B]enefits ... are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms, during that period, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs services in the first of the academic years or terms and if there is a contract or a reasonable assurance that the individual will perform services for any educational institution in the second of the academic years or terms...



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Unemployment Insurance Code § 1253.3, subsection (c), applies to those employees not serving in a "instructional, research, or principal administrative capacity":

Benefits specified by subdivision (a) based on service performed in the employ of a nonprofit organization, or of any entity as defined by Section 605, with respect to service in any other capacity than specified in subdivision (b) for an educational institution shall not be payable to any individual with respect to any week which commences during a period between two successive academic years or terms if the individual performs the service in the first of the academic years or terms and there is a reasonable assurance that the individual will perform the service in the second of the academic years or terms.

1. **The ALJ Arbitrarily and Capriciously Based Eligibility for Summer Benefits on Past Summer School Work.**

In 2008, the CUIAB affirmed a decision of the ALJ denying benefits for the summer period to a substitute teacher who received reasonable assurance of returning to work in a similar capacity.¹ The CUIAB interpreted Precedent Benefit decisions P-B-412 and P-B-417 to require a "loss in customary summer work":

[T]o be eligible for benefits during what would otherwise be a 'normal' work period between terms, recess or vacation, a claimant must meet the requirement imposed by P-B-412 and P-B-417: A reasonable expectation of work during the period for which benefits are sought, a loss of that customary work; and, under P-B-431 for contract employees whose contracts are changed, work history within the same period in the previous year.... [n. 3] The requirement imposed by the Board in P-B-412 and P-B-417 is consistent with legislative intent. It would be an absurd interpretation of the statute to find full-time teachers, for instance, eligible for benefits over the summer months when they are paid on a yearly basis, have never worked in summer classes, and have no intention of seeking or taking work between June and September. (December 16, 2008 ALJ decision, para. 19, n. 3, p. 6) (Exhibit A)

¹ Claimant Linda Well, Case No. AO-179906; ALJ Case No. 2466024.

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The District does not appeal the ALJ's determination that the claimants were ineligible for benefits during the summer recess periods between the regular school term and the summer school term. Rather, the District appeals the ALJ's erroneous conclusion that the claimants were eligible for benefits during the summer school term by virtue of having worked the summer school in the past.

The ALJ confuses past summer school work with an individual claimant's loss of customary summer work. The CUIAB, in Precedent Benefit Decision P-B-412, ruled that a claimant had a reasonable expectation of summer work when he was reduced from a 12-month to a 10-month schedule, since it was "clear that the cause of his unemployment was not a normal summer recess or vacation period but *the loss of customary summer work.*" (Emphasis Provided) In Precedent Benefit Decision P-B-417, the CUIAB again based eligibility on "the loss of customary summer work." The ALJ in this case misapplies CUIAB's Precedent Benefit decisions, and the requirement that a reasonable expectation of summer work be based upon a loss of previous summer work.

Precedent Benefit Decisions P-B-412 and P-B-417 do not stand for the proposition that a history of work in the previous summer, or availability for work in the current summer, make the summer school term an "academic term." Rather, there has to be an actual loss of summer work (such as a claimant receiving a summer school assignment in 2012, and having it cancelled due to low enrollment). In Precedent Benefit Decision P-B-417, the CUIAB again based eligibility on "the loss of customary summer work," *but only for the first year in which the employee served under the reduced schedule.*

As the ALJ acknowledged (Decision, p. 7), Precedent Benefit Decision P-B-431 affirms that the employee is exempt from Unemployment Insurance Code § 1253.3 for only the *first year* under which they are working under a reduced schedule:

"Beginning September 1980 the claimants were on a 10-month contract. At that point there was no cancellation of agreed-upon summer work as no such commitment was ever made. Certainly code section 1253.3 is applicable to their claims for benefits for the summer of 1981. We do not believe that once a school employee has been employed on a 12-month basis and the contract is thereafter changed that the employee will always remain entitled to benefits during the recess period. Thus, we distinguish and limit Appeals Board Decision No. P-B-417 to those cases involving the year in which the change in employment conditions takes place."

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Page 5

In the cases cited above, the ALJ found eligibility based on some showing of past summer work, or substitute work at a year-round program. However, the claimants have not demonstrated a "loss in customary summer work," as is required in Precedent Benefit Decisions P-B-412 and P-B-417.

III.

CONCLUSION

The claimants' history of summer work, or the expectation of summer work in 2012, is irrelevant toward the application of Unemployment Insurance Code § 1253.3. The ALJ misinterprets Precedent Benefit decisions P-B-412 and P-B-417 to allow eligibility during the summer recess period based on past summer work, or availability for summer work, as opposed to a "loss in customary summer work." Precedent Benefit decisions P-B-412 and P-B-417 are distinguishable, and do not support eligibility in these cases.

Very truly yours,

BURKE, WILLIAMS & SORESENEN, LLP


JOHN R. YEH

JRY:mks

cc: (Via U.S. Mail)
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FACSIMILE COVER LETTER

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PLEASE DELIVER TO: Ralph Hilton, Esq.
Chief Counsel, CUIAB

DATE: 1/14/2013

FAX No.: (916) 263-6764; (916) 263-6842

FROM: Mini Leano, Paralegal

RE: *SuperShuttle, International, Inc. et al.*
Appellate Board Case No. AO-279534-537

REMARKS: Please see the following written comments from Appellants in the above referenced matter. Thank you.

TOTAL NUMBER OF PAGES INCLUDING THIS COVER PAGE: 9

Received by
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JAN 14 2013

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Attorneys for: Appellants SuperShuttle International, Inc.;
 SuperShuttle Los Angeles, Inc.; SuperShuttle of
 San Francisco, Inc.; Sacramento Transportation
 Services, Inc.

BEFORE THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the matter of:

SuperShuttle International, Inc.;
 SuperShuttle Los Angeles, Inc.;
 SuperShuttle of San Francisco, Inc; and
 Sacramento Transportation Services,
 Inc.,

Claimants/Appellants.

APPELLATE BOARD CASE #AO-279534-537

Appeal from Decision of Administrative Law
 Judge David Johnson [3214568 (T), 3214569
 (T), 3214570 (T) and 3214571 (T)]

**APPELLANTS' BRIEF IN OPPOSITION TO
 DESIGNIATION OF ASSESSMENT DECISION
 AS A "PRECEDENT DECISION"**

Assessments Issued: February 26, 2010

Hearing Location: Sacramento, CA
 Hearing Date: Jan. 15, 2012
 Time: 10:30 a.m.

TO THE BOARD:

This written argument is filed by SuperShuttle International, Inc., SuperShuttle Los Angeles, Inc., SuperShuttle of San Francisco, Inc., and Sacramento Transportation Services, Inc. (collectively, "SuperShuttle") in opposition to the designation of the Board's tax assessment decision in this matter (#AO-279534-537) ("Decision") as a "precedent decision."

I. INTRODUCTION

The Decision should not be made precedent. It should *not* be used as a guide for future rulings, future assessments and future audit determinations. First, the Decision erroneously fails to apply the correct legal tests designed for evaluating worker status in franchisor-franchisee situations, instead applying tests designed for situations in which independent contractors are hired to provide services for compensation by a hiring entity. Second, the decision fails to follow time-honored legal principals excluding

compliance with the law and regulations, rules and requirements of regulators and third-parties from the *de facto* employee "control" analysis. Third, designating the decision as precedent would have extremely negative consequences for the business climate in California. It would place thousands of small businessmen operating as franchisees in jeopardy of being reclassified as "merely employees," and losing control over their work environment and their business models (and therefore, their profits), thus relegating their status to nothing more than mere hourly employees with devastating financial consequences to these businessmen.¹ Each of these issues is discussed more fully, below.

II. ARGUMENT

A. The Decision Fails To Apply The Proper Test For Evaluation Of Franchisor-Franchisee Relationships.

1. The special legal status of franchisees is ignored in the decision.

In order to create a franchise: (1) the franchisor must grant to the franchisee the right to engage in the business of offering, selling or distributing goods or services; (2) the franchisor must prescribe, in substantial part, a marketing plan; (3) the franchisee's business must be substantially associated with an advertising or other commercial symbol of the franchisor; and (4) the franchisee must pay a franchise fee. *Bus. & Prof. Code* § 20001; *Corp. Code* § 31005; Exhibit B-520, [California Department of Corporations, Commissioner's Release 3-F, "When Does An Agreement Constitute A 'Franchise'?", June 22, 1994] at p. 1. Once developed, a franchise offering system must be approved by the California Department of Corporations before it can be offered to the public. *Corp. Code* §§ 31110-31111.

The creation of a mere independent contractor relationship is not similarly regulated. There are no mandatory filing requirements that a company must fulfill in order to create and independent contractor relationship. There is no legislation that even clearly defines what an independent contractor is. For this reason, the label "independent contractor" can be used in any relationship without restriction. Because this label can be bandied about without restriction, the courts have decided that it is not dispositive — if it was, then all employers wanting to create an independent contractor relationship would only have to use the label and do nothing else. This is noted by the Decision at p. 18. However, the Decision ignores the next obvious step to analysis of the franchisor-franchisee relationship: determining whether a true franchise system was established.

¹ Although other major errors are present in the Decision (such as misstatements of fact), due to the limitations of time and the Board's consideration, this Brief will focus on the issues relating to its designation as precedent, rather than all reasons which justify its reversal.

Unlike a typical independent contractor relationship, franchise formation is heavily regulated by federal and state governments. Franchisors are required make specific disclosures to prospective franchisees and have those disclosures approved by the California Department of Corporations. The franchise offerings also must be uniform – all franchisees must be offered the same “deal.” The Decision completely fails to analyze whether a franchise relationship was created by determining whether the various statutory requirements were fulfilled. This is a significant failure. While “employee” and “independent contractor” are mere labels that can be indiscriminately assigned, statutory requirements must be fulfilled in order to identify a person as a franchisee. The cases cited in the Decision regarding the rule that “the label is not dispositive” notably involve the employee / independent contractor distinction, and do not address franchisees, where the federal and state governments have enacted significant legislative schemes governing the creation of this special status.

Even when the Decision cites a case that involved franchises, the law of the case was distorted – and apparently deliberately so – to favor a finding of control. At page 20, the Decision cites *Cislav v. Southland Corp.* (1992) 4 Cal.App.4th at 1295-6, for the principle that where a “franchisor retains to itself control exceeding that necessary to protect its legitimate interests” an agency employment may exist, and quoting *Cislav* as stating “[t]he above franchise agreements gave the franchisor control beyond that necessary to protect and maintain its interest in its trademark, trade name and goodwill.” However, significantly, *Cislav* held that the 7-Eleven franchise agreement at issue in that case did *not* give rise to an agency relationship, despite the fact that it is

16-page, single-spaced, fine print franchise agreement [providing that] the franchisees are given the right to use the 7-Eleven system, trade name and service mark and are required to comply with certain standards. Boiled down to its essence, the agreement obligates the 7-Eleven store owners/franchisees to complete an operations training program, keep the store and its surroundings clean and maintain the equipment in good repair, carry an inventory of a “type, quality, quantity and variety” consistent with the 7-Eleven image, operate the store from 7 a.m. to 11 p.m., 364 days a year, make daily deposits of all receipts into a designated account, provide Southland with copies of purchase and sales records, make the books available for inspection during normal business hours and pay a percentage fee based on receipts from sales less cost of goods sold. *Cislav, supra*, 4 Cal.App.4th, at 1294.

The *Cislav* court held that this did not meet the applicable standard requiring proof of “complete or substantial control.” And the court distinguished it from the *Kuchta* and Arthur Murray cases which it found did give the franchisor control “beyond that necessary to protect and maintain its interest in its trademark, trade name and goodwill.” The key factor in distinguishing the Arthur Murray cases was that those

agreements gave the franchisor the right to control day-to-day operational decisions and to terminate the agreement virtually at will.² (While the Decision at p. 23 characterizes the SuperShuttle franchise agreement as allowing SuperShuttle "the right to terminate the franchise agreement 'virtually at will,'" this also ignores franchise law which sets forth specific requirements for a finding of good cause sufficient to justify termination. See *Bus. & Prof. Code* § 20020 ["Except as otherwise provided by this chapter, no franchisor may terminate a franchise prior to the expiration of its term, except for **good cause.**" Emphasis added.]

2. The decision fails to apply the proper test for considering whether a franchisee is a *de facto* employee.

The principal test for determining whether a worker is an independent contractor or an employee is the "control" test. Although the control test that is used in the context of a franchisor-franchisee relationship is set forth in the Decision, it is misapplied. Instead of applying the test set forth in well-established cases analyzing worker status in a franchise context, the Decision largely applied the "control" test as set forth in *Borello* that is ordinarily used for determining the status of ordinary non-franchisee workers.

The difference between these two tests is significant. The "control" test that should be applied where the worker in question is a franchisee is whether "the [franchise] agreement gives the franchisor complete or substantial control over the franchisee..." *Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 947-48. The franchisee is *presumed* to be independent absent such a showing, and is "permitted to retain such control as is necessary to protect and maintain its trademark, trade name and goodwill." *Id.*; see also *Kaplan v. Coldwell Banker Res. Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 746.

The Decision largely disregards the distinction between these two tests.³ The Decision focuses merely on whether the controls exist, instead of focusing on whether the controls are necessary to protect and maintain SuperShuttle's trademark, trade name

² The Arthur Murray cases involved near absolute control over every aspect of the operations of the "independent" operator, even in the absence of any governmental or regulatory controls, and are in no way comparable to the situation presented by the SuperShuttle franchises. See *Porter v. Arthur Murray, Inc.* (1967) 249 Cal.App.2d 410 at 416-417, and discussion of cases in *Cislav, supra*, 4 Cal.App.4th at 1289-1290.

³ At footnote 10, the Decision dismisses important contrary law by implying that *Juarez*, cited by SuperShuttle, is on appeal. However, after certification for interlocutory appeal, the Ninth Circuit rejected the proposed appeal. *Juarez v. Jani-King of Cal., Inc.* (N.D.Cal. Feb. 16, 2012) 2012 WL 525511 (appeal denied 9th Cir. May 10, 2012 (12-80028)). *Juarez* stands as good law, and is directly contrary to the Decision of this Board. Moreover, the factors cited as grounds for distinguishing *Ruiz v. Affinity Logistics* actually establish *a fortiori* that SuperShuttle had less direct control over day-to-day operational matters than did Affinity Logistics – which was found not to have excessively controlled its independent operators.

and goodwill as is required in the context of a franchisee. For example, the Decision states: "Petitioners can use the Nextel system to track the drivers' day-to-day work details and *conduct quality control of drivers* by inviting past customers to participate in random telephone surveys of the franchisees' service quality, or to complete and submit comment cards." Decision at 22. At no point does the Decision acknowledge that this sort of spot-checking is directly related to an essential function of a franchisor: protecting the investments of all of the franchisees in SuperShuttle's trademark, trade name, and goodwill by considering the passengers' evaluation of services provided to them by the franchisees through their drivers.

Similarly, when discussing the uniform requirement, the Decision disregards the impact of a uniform on the franchisor's trademark and goodwill. Franchisors have long required their franchisees to have their employees wear uniforms, to promote the general sense of "uniformity" among the franchises and to allow the franchisees the full benefit of association with the trademarks and goodwill of the franchisor. The uniform and the blue and gold color scheme are part of SuperShuttle's trademark.⁴ If drivers were to wear significantly different colors, passengers would have less certainty when approached at the curb by a driver that the driver was actually associated with SuperShuttle. Confusion, particularly when occurring at the curbside of a large metropolitan airport, can have significant consequences for passenger flow, delays, traffic, and airport security. Having any such problems needlessly associated with SuperShuttle's trademark would be bad for all franchisees – and therefore reduce the value of the franchise in which they are heavily invested. Conversely, uniformity in the presentation of services by the franchises' drivers contributes to SuperShuttle's brand recognition, which positively impacts its goodwill, thus increasing the value of each franchise for the benefit of each franchisee.

B. The Decision Fails To Properly Disregard Rules Imposed To Comply With The Requirements Of Law, Regulations, Airport Rules, Contracts And/Or Permits.

When the "controls" are imposed by a governmental entity, they should not be imputed to the putative employer. In stark contrast to the *M & M* Decision, this Decision largely disregarded this rule. In *M & M*, the Board wisely reasoned:

⁴ This issue of franchise trademark identification extends to the appearance of the vans. It is, of course, essential that the passengers be able to identify the van that they are entering as being controlled by an authorized "SuperShuttle" franchisee, and the potential negative consequences to the public from a lack of quality control in this area is obvious. Incidents of bandit vans kidnapping passengers for robbery and assault by posing as legitimate operators would be expected to greatly increase if these standards were relaxed – and the implications to airport security are similarly obvious. Clearly identifying true franchisee operators is of significant value to the franchisees and maintains the goodwill of the entire system. Nevertheless, the Decision cites the markings, age and condition of the vans as evidence of control by SuperShuttle which indicates *de facto* employee status for the franchisees. Decision, p. 28.

The contract with the owner-operators, at first glance, looks like a recitation of control factors of the petitioner over the owner-operators such as using the petitioner's colors, complying with a dress code, maintaining ... trip sheets and keeping the vehicle in good condition. On closer examination, however, it becomes apparent that the controlling authorities are not petitioner but the Public Utilities Commission, the Airport Commission, the San Francisco Police Taxi Detail and the Airport Police. Each of the elements of the contract relates to a requirement by one of these governing entities.

M & M Luxury Shuttle, Inc., No. AO-160078(T) (issued June 17, 2008) at 3 (emphasis added). The Board's own apparent conflict regarding the proper application of law (as shown by the different result in the *M & M* decision would also weigh against precedent status for the Decision.

In the Decision, the pass-through of governmental controls as to each of these items is disregarded. Instead, the control is attributed only to SuperShuttle.⁵

Notably, with respect to the analysis of the PUC's uniform requirements, the Decision states that SuperShuttle exceeded the PUC's uniform requirement by specifying color schemes. Yet, as stated in the Decision itself, "[t]he Public Utilities Code required uniforms as a means to identify the service provider to the public as being associated with a specific charter party carrier." Decision, pp. 15, 30. The Decision then suggests that SuperShuttle excessively control by requiring more than "simply wear[ing] a plain jacket over a shirt with a valid photographic identification badge identifying them as a SuperShuttle representative." Decision, p. 15. First, this would not be a "uniform," because there would be no uniformity of color or style among the drivers. Second, a "plain jacket over a shirt" would not identify the service provider to the public as being associated with a specific charter party carrier as required by the PUC. If wearing any jacket over any shirt would meet the PUC's criteria, then the "uniform" requirement would be superfluous. Likewise, if the wearing of a name badge were sufficient to satisfy the PUC's goals, then the PUC's requirement would be limited to merely wearing a name badge. Finally, there is no legal basis for the Decision to impose the

⁵ The Decision simply brushes off its earlier decision in *M&M* simply by stating that, as a non-precedent case, it can be ignored. Decision, p. 35, fn. 10. However, the status of the case does not change the fact that this very Board came to different conclusions on the facts. No explanation is made for the Board's current assessment that matters such as petitioner's "colors, complying with a dress code, maintaining ... trip sheets and keeping the vehicle in good condition" should be considered control by SuperShuttle, despite the Board's earlier factual finding that such matters are regulated by the airport authorities. These regulations have not changed since the *M&M* decision, and were presented in evidence at the hearing. Exhibit B-502, CPUC Gen. Order 158-A, sections 6.01-6.02; Exhibit B-514, Los Angeles Airport Concession Agreement; Exhibit B-515, Sacramento On-Demand Van Service Agreement; Exhibit B-662 Airport Ground Transportation Rules and Regulations / Ontario International Airport.

requirement of a uniform against SuperShuttle, simply because of the *type* of uniform it selected to fulfill its legal obligation. To assert that the compliance with the law should have different consequences based upon the *fashion statement* being made is as absurd as it is baseless.

Uniforms are recognized in the Decision as important to the PUC and the airport regulators. Of course, this is true because they directly impact airport security and customers' recognition of which entity they are dealing with. Uniforms are also an essential part of franchise identification as discussed above. Yet the Decision holds the uniform requirement against SuperShuttle as evidence of control, despite the Board's prior recognition that such requirements are imposed by the PUC and airport authorities. *Id.*, p. 30.

Through the Decision, the Board *now* chooses to ignore that uniforms are required by regulations. The same is true regarding the regulations requiring trip-sheets (Decision, pp. 24-25), uniformity of fares amongst the franchises (*Id.*, pp. 26-27), and other extensive requirements relating to marking of the vans (*Id.*, p. 28), advertising (*Id.*, p. 28), etc.⁶

C. The Decision Needlessly Places Thousands Of Small Business Operations At Risk As To Their Investments And Their Incomes.

As noted previously to this Board, franchise systems (despite the controls inherent in the franchise system) have been recognized as important, positive cornerstones to the expansion of domestic economic opportunities and the development of small businesses. As noted by the U.S. Supreme Court:

"The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs.... If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors,

⁶ *E.g.*, as discussed above, the Decision also cites requirements that franchisees' vans meet certain requirements for "mechanical condition," coloration, trademarks and age as evidence showing that franchisees are merely *de facto* employees. However, airports have imposed these requirements, notwithstanding that such rules are clearly within the scope of permitted franchisor restrictions to preserve and promote the value of the franchised trademarks. See above; see also, Appeal from Decision of Administrative Law Judge David Johnson [3214568 (T), 3214569 (T), 3214570 (T) and 3214571 (T), Attachment "B," Examples of Control – Airport Rules and Regulations [citing these and other matters controlled through extensive airport regulations]

rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy.”

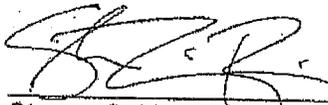
GTE Sylvania Inc. v. Continental T.V., Inc. (9th Cir. 1976) 537 F.2d 980, 999 (quoting *U.S. v. Arnold, Schwinn & Co.* (1967) 388 U.S. 365, 386-87 (Stewart, J., concurring and dissenting) (footnotes and internal citation omitted)).

The Decision, especially if made precedent, will have the effect of undermining the all franchise systems in the state by imposing improper legal standards for maintaining their non-employee status. As noted in footnote 3, above, the Decision incorrectly ignores good case law pointing to a different result. As this Board knows, hundreds of SuperShuttle franchisees will have their franchise businesses directly and adversely impacted by the Decision. Designation of the Decision as precedent will potentially expand this terrible impact to tens of thousands of other franchises throughout the state, and involving every franchisor from McDonalds to H&R Block to Supercuts. Because the Decision ignores good case law, there is a very good chance that the Decision will later be overruled (either directly or by implication through additional contrary rulings), meaning that the franchisees will have been unduly and unnecessarily placed in jeopardy.

Therefore, the Decision, and its incorrect expression of applicable franchise law, should not be made precedent.

Date: January 14, 2013

Respectfully submitted,



Steven C. Rice
Attorney for Appellants



CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

SUPERSHUTTLE INTERNATIONAL INC
c/o MARRON & ASSOCIATES LAWYERS
Account No.: 326-5719-9
Petitioner

Case No.: **AO-279534 (t)**

OA Decision No.: 3214568

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

KATHLEEN HOWARD

ALBERTO TORRICO

ROBERT DRESSER

ROY ASHBURN

This is the final decision by the Appeals Board. The Appeals Board has no authority to reconsider this decision. If you disagree with the decision, please refer to the information attachment which outlines your rights.

DEC 11 2012

Date Mailed:

Case No.: AO-279534, AO-279535, AO-279536, AO-279537
Petitioners: SUPERSHUTTLE INTERNATIONAL, INC.
SUPERSHUTTLE LOS ANGELES, INC.
SUPERSHUTTLE OF SAN FRANCISCO, INC.
SACRAMENTO TRANSPORTATION SERVICES, INC.

In Case No. AO-279534 (FO Case No. 3214568), Petitioners SuperShuttle International, Inc.¹ (hereafter "SuperShuttle") and SFO Airporter, Inc.² appealed from the decision of the administrative law judge that denied the Petitioners' petition for reassessment of an assessment issued under section 1127 of the Unemployment Insurance Code (hereafter "code") covering the period of January 1, 2007 through June 30, 2009, for a total of 10 calendar quarters. The Employment Development Department (the Department or EDD) computed and assessed the amounts of employer and worker contributions payable by Petitioners based on the estimated wages paid for employment by Petitioners' operations in Los Angeles, San Francisco and Sacramento.

In Case No. AO-279535 (FO Case No. 3214569), Petitioner SuperShuttle Los Angeles, Inc. (hereafter "SuperShuttle Los Angeles") appealed from the decision of the administrative law judge that denied the Petitioner's petition for reassessment of an assessment issued under code section 1127 covering the period of July 1, 2006 through December 31, 2006, for a total of two calendar quarters. The Department computed and assessed the amounts of employer and worker contributions payable by Petitioner based on the estimated wages paid for employment by Petitioner's operation in Los Angeles.

In Case No. AO-279536 (FO Case No. 3214570), Petitioner SuperShuttle of San Francisco, Inc. (hereafter "SuperShuttle San Francisco") appealed from the decision of the administrative law judge that denied Petitioner's petition for reassessment of an assessment issued under code section 1127 covering the period of July 1, 2006 through December 31, 2006, for a total of two calendar quarters. The Department computed and assessed the amounts of employer and worker contributions payable by Petitioner based on the estimated wages paid for employment by Petitioner's operation in San Francisco.

¹ Veolia Transportation acquired SuperShuttle in or about 2006.

² SuperShuttle Franchise Corporation, a Delaware corporation, entered into "License Agreement" with Petitioners SFO Airporter, Inc., SuperShuttle Los Angeles, Inc., SuperShuttle of San Francisco, Inc., and Sacramento Transportation Services, Inc., respectively. Each Petitioner was referred to as "City Licensee" in the "License Agreement;" and was a wholly-owned subsidiary of SuperShuttle International, Inc. City Licensee was granted the right to use a unique system of transportation services which SuperShuttle had developed, including without limitation, a demand responsive and/or scheduled airport shuttle serving under appropriate governmental authority providing transportation to passengers traveling to and from specific metropolitan airports and destinations within the general markets surrounding those airports.

In Case No. AO-279537 (FO Case No. 3214571), Petitioner Sacramento Transportation Services, Inc. (hereafter "Sacramento Transportation Services") appealed from the decision of the administrative law judge that denied Petitioner's petition for reassessment of an assessment issued under code section 1127 covering the period of July 1, 2006 through December 31, 2006, for a total of two calendar quarters. The Department computed and assessed the amounts of employer and worker contributions payable by Petitioner based on the estimated wages paid for employment by Petitioner's operation in Sacramento. No penalty of 10 percent of the amount of contributions was added to any of the assessments under code section 1127.

The Board heard oral argument on October 9, 2012. SuperShuttle Drivers; and National Employment Law Project submitted amicus curiae briefs to the Board.

Henceforth, all the above-named Petitioners are referred collectively as "Petitioners" or "City Licensees," unless indicated otherwise.

ISSUE STATEMENT

The issues in these cases are whether or not the franchisee airport shuttle drivers (hereafter "the franchisees," or "the franchisee drivers," "the shuttle drivers" or "the drivers," including their singular forms) are employees of Petitioners during the periods of the assessments. If so, whether or not the petitioners are liable for unemployment, employment training, and disability contributions, personal income tax withholdings, and interest.

FINDINGS OF FACT

Petitioners are passenger stage corporations (hereafter "PSC" or "PSCs") subject to regulation by the California Public Utilities Commission (hereafter "CPUC") pursuant to sections 211(c), 216(a), and 226(a) of the Public Utilities Code. A PSC "includes every corporation or person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over the public highway in this state between fixed termini or over a regular route." (Public Utilities Code § 226(a).) Petitioners hold certificates of public convenience and necessity ("PSC certificates" or "CPCN") from CPUC to operate as PSCs pursuant to section 1031 of the Public Utilities Code. A PSC is not authorized to engage in taxicab transportation service licensed and regulated by a city/county.

The California Public Utilities General Order 158-A governs PSC operations. Section 5.03 of this General Order pertains to "Driver Status." It states, "Every driver of a vehicle shall be the [PSC] certificate holder or under the complete supervision, direction and control of the operating carrier and shall be:

- A. An employee of the [PSC] certificate holder; or,
- B. An employee of a sub-carrier; or,

- C. An independent owner-driver who holds charter-party carrier [TCP] authority and is operating as a sub-carrier.

Under CPUC General Order 158-A, "carrier" refers to a PSC carrier unless specific reference includes charter-party carriers (TCPs). "Vehicle" refers to a motor vehicle operating passenger stage service. (CPUC Gen. Order 158-A, §§ 2.02 and 2.03.) A TCP can sign up charters or specific contracts to transport passengers from one place to another; and operate as an on demand carrier only under the authority of a PSC.

1. *SuperShuttle converted the employment status of airport shuttle van drivers from employees to franchisees to save costs.*

SuperShuttle was operating with employee drivers in all of their operations until late 1993 when SuperShuttle was suffering severe financial trouble. Subsequently, SuperShuttle engaged in effects bargaining of their decision to change the employment status of their drivers with all the labor unions concerned, and negotiated the financial terms of the unit franchise agreements that would be offered to drivers.

2. *Petitioners had the right to operate and provide shared ride airport shuttle van transportation service; notwithstanding its claim that it was in the business of offering and granting franchises for the right to utilize SuperShuttle's trademark and trip-generating service.*

During the periods of assessments, Petitioners were authorized and licensed to transport passengers and provide other transportation services; had the right to operate shared ride shuttle services; and operated as shared ride ground transportation providers. Petitioners entered into unit franchise agreements with drivers, referred therein as "franchisees," to operate "demand responsive and/or scheduled airport shuttle services," transporting passengers to and from hotel, convention center, passenger's home or office, and the metropolitan airports with which Petitioners had entered into service agreements. Petitioners offered and granted to franchisees, through unit franchise agreements, the right to utilize the SuperShuttle System (hereafter "System") and its trademarks. The "System" provided to the franchisees "trip generating service," and access into an airport with which Petitioners had contracted to be the premiere transportation provider on a semi-exclusive basis.

3. *Petitioners used SuperShuttle's mandatory national central reservations, route design, dispatch and cashiering systems to receive reservations and non-cash payments from customers; and then dispatch the routes to franchisee drivers for bidding and transportation of the customers.*

- a. *SuperShuttle controlled the dispatch systems.*

SuperShuttle developed a "proprietary" technology to automate the Dispatch System (SDS), consisting of the dispatch and reservation systems; communications technology; and analytical and reporting tools. "Bidding" software was used to "manage" and "create" bids. A hand-held Nextel device, the so-called Nextel phone, transmitted and displayed bids from the SuperShuttle dispatch system to the franchisees.

The automated SDS used an algorithm and routing software to apply various variables - flight time, lead time for pickup, pickup time, and distance involved in picking up the different trips - to determine which trips should be grouped for the creation of "the most efficient routes." A "trip" originated from the same location and could consist of any number of passengers up to the van capacity. According to SuperShuttle policy, three should be the maximum number of trips in each route, but the dispatcher had the discretion to increase it.

The dispatch system was not totally automated. There were two groups of dispatchers, one handling the reservations in the field and the other at the airport holding lots. Dispatchers' jobs were to insure proper operation of the automated dispatch system and the bidding process. Dispatchers could use a "bid monitor" to view driver availability and pending rides, strategically group passengers into the most optimal routes, and monitor the execution of each trip. A dispatcher could combine two routes, one more lucrative than the other, to allow a driver who had placed a bid on the less lucrative route to "piggyback" on a better route.

b. *Franchisees bid for routes through SuperShuttle's dispatch system.*

Franchisees were obligated to provide Petitioners with an availability schedule in advance, and to accept assigned trips while their vans were logged into the dispatch system. There were predominantly three types of bidding: the "clear van bidding;" the "available bidding;" and the "holding lot bidding."

"Clear van bidding" was a means by which a driver would initiate the bidding process by text-messaging the centralized dispatch system to state his/her availability. The dispatch system would search any routes within a pre-determined radius within that vehicle's GPS location and a given period of time, such as a 20-mile radius within any two-hour period; and transmit a summary of multiple routes to the driver's Nextel phone screen display, consisting of information on the zone, number of passengers and stops.

Drivers could let the routes "time out" after about 60 to 75 seconds; or hit the "pass" button; or select a route and hit the "bid" button. After a driver hit the "bid" button, the server would "assign" the route to that driver if that route and the vehicle driven by the bidding driver were still available, and display more details of the route, including the address, pick up location, city, state, zip, fare, tip, payment method, and number of passengers. The driver could accept the bid or exercise an "option" to reject it; or occasionally, contact the dispatcher to request

a "piggyback." The dispatcher would "un-assign" a rejected route, i.e., remove the route from that driver and make it available for bidding by other drivers. The manager could question why a franchisee had rejected a bid, and remind the franchisee that the purpose of the unit franchise agreement was to provide customer service, rather than to merely earn higher revenue.

"Available bidding" involved routes that were not accepted during the bidding process, or were outside the radius of the "clear van" window. The dispatcher would send a message to all vehicles in the available queue stating, "Bid started. You're number [queue position] of [number of available drivers]." The vehicle that had been available for the longest period of time would have the first choice. It was not uncommon for Petitioners to use taxis, or ExecuCars that were operated by a different entity of the Petitioners, to pick up passengers whose reservations were not selected or when the shuttle vehicle was going to be late.

"Holding lot bidding" would be available only to vehicles in the airport van holding lots in the order of their holding queue positions. Before proceeding into the airport's central terminal area, all airport concessionaire drivers had to wait at the van holding lot that Petitioners managed, until an airport manager at the curbside pickup location notified the holding area that a van would be needed. A franchisee that refused to take a passenger at the curb when needed could face adverse consequences from Petitioners, that included being forced to leave the airport for two hours, or work only in the field for the rest of the day.

"Auto dispatching" involved direct communication between the dispatcher and the driver when increase of "van coverage" was necessary.

Prospective passengers had multiple reservation options. They could book reservations through the SuperShuttle centralized reservation telephone line, the SuperShuttle Web site, an airport SuperShuttle agent, or a hotel. Passengers could pay in cash or with a credit card, in advance or on-board the shuttle vans.

The Nextel system recorded information on the activities of each vehicle: the shift beginning and ending time; vehicle availability; the quantity of bids that were passed up; whether the Nextel phone was turned off or timed out; the pickup time, location and destination; the distance between the first pickup and the vehicle's then current location; the number of passengers and stops; whether the bid was accepted or acknowledged and denied; and where the passenger had boarded and disembarked. Franchisees could view a summary of the financial information related to their franchises on their Nextel phones, such as their receivables and revenue for the week, payments, fares, and prepaid credit cards.

4. *SuperShuttle unilaterally determined the franchisees' obligations in excess of what the regulating authorities imposed, and what would be necessary for the protection of the SuperShuttle brand standard.*

The unit franchise agreement of Petitioner SuperShuttle Los Angeles stated, "The System standards set forth in the unit franchise agreement and in the operations manual are, in part, imposed by regulating authorities. *Additional obligations were determined by SuperShuttle, to be necessary for the overall quality and growth of the SuperShuttle brand.* The brand is composed of the SuperShuttle companies and all the individual franchisees who operate in the SuperShuttle System, and who collectively and voluntarily accept the SuperShuttle standards[.]" The SuperShuttle Operations Manual stated, "The SuperShuttle System procedures and standards established in the Unit Franchise Agreement and this Manual are the backbone of its franchise business. When you became a franchisee, *you agreed to abide by the SuperShuttle service standards and procedures.*" [emphasis added]

The unit franchise agreement further stated that a franchisee was operating a business independent of and distinct from those of SuperShuttle and Petitioner. It was stated verbatim, "FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR CITY LICENSEE," and "SuperShuttle does not seek to control the details of how Franchisee conducts its business[, it] seeks only two compatible objectives: that customers are served promptly, courteously, and safely; and, that the SuperShuttle brand image is upheld[.]" [sic]

- a. *SuperShuttle unilaterally established the franchisees' scheduled hours and territory.*

Petitioners granted to the franchisees, through the unit franchise agreement, the right to operate a "SuperShuttle System" van during certain specified hours determined by Petitioners (called "scheduled hours"); to provide shared ride shuttle services, and certain other services within a certain geographic area (called "the territory"); and to participate in Petitioners' dispatch system.

Franchisees might elect a 24-hour franchise, beginning each day at 12 noon and continuing until 12 noon of the next day. Franchisees might also elect either the 14-hour "AM Franchise" beginning from 1:00 a.m. to 4:00 p.m. on the same day, or the "PM Franchise" beginning from 11:00 a.m. to 2:00 a.m. on the next day. Upon one week's prior written notice to Petitioner, Franchisee might elect to change from one type of "scheduled hours" to another (e.g., from a 24-Hour Franchise to a PM Franchise). Franchisee's right to make any such change was limited to four (4) times per calendar year. Under the franchise agreement, franchisees could conduct "occasional charter operations"³ originating in the "territory" without using Petitioners' dispatch system. Petitioners' evidence showed that one driver had conducted "occasional charter operations."

³ "Charter operations" meant incidental scheduled transportation between locations other than the airport.

b. *SuperShuttle unilaterally established the types and amounts of fees to be charged to franchisees.*

(i) *Franchise fee.* Franchisees had to pay Petitioners an initial franchise fee, or a portion thereof for a 14-hour franchise. Such fee would be deemed fully earned by Petitioners upon execution of the unit franchise agreements and would not be refunded, in whole or in part, at any time. The amount of the franchisee fee was initially twenty-one thousand dollars (\$21,000) in 2004, and was increased to fifty thousand dollars (\$50,000) as of January 27, 2005. Most drivers financed the entire franchise fee by making payments to SuperShuttle for the first seven years of the ten-year franchise period.

(ii) *License fees.* Franchisees had to pay to Petitioners 25% of all gross revenues received by the franchisees on account of operating the SuperShuttle System vehicles during the preceding week.

(iii) *System fee.* Franchisees had to pay Petitioners a weekly system fee in the sum of \$375 for the 24-hour Franchise and \$250 for AM Franchise or PM Franchise. The system fee accrued throughout the term of the unit franchise agreement and continued to accrue; and would be due and payable whether or not the franchisee's vehicle was operational.

(iv) *Airport and incidental expenses.* Franchisees had to reimburse Petitioners for all airport expenses, including the airport loop fees, airport concession and inspections fees assessed to Petitioners for the operation of franchisees' vehicles in the airports. Airport loop fees were charged to Petitioners based on the number of times each specific shuttle van, identified by a transponder on the van, had entered the airport.

Franchisees also had to reimburse Petitioners for any and all costs Petitioners incurred on behalf of the franchisees such as vehicle insurance costs; vehicle leasing fees if the franchisees leased their vehicles from Petitioners; alternative fuel costs; pager costs; toll fees; vehicle maintenance and/or inspection fees; Nextel phone charges or similar phone system charges; any fines assessed against Petitioners due to the franchisees' acts or failure to act; any parking tickets; costs in resolving the customer complaints about franchisees or franchisees' services; and for all other articles that Petitioners might order on the franchisees' behalf, such as uniforms.

(v) *Deposit for the communication and specialized equipment.* Franchisees had to sign the communication and specialized equipment agreement, and pay a \$1,500.00 deposit to Petitioners for the installation of the SuperShuttle specialized communication transmission equipment for Petitioners' dispatch system in their vans, and other equipment, such as a headsign and credit card

processing equipment. Petitioners "loaned" the equipment to the drivers for their use while they were franchisees.

(vi) *Decal fee.* The franchisees had to pay Petitioners a \$250 fee for the application of vehicle decals to the franchisees' vehicles, and removal at the termination of their unit franchise agreements.

(vii) *\$50 handling charge.* A \$50.00 per occurrence handling charge could be assessed the driver's account if a driver or the backup/relief driver did not log into the dispatch system within 30 minutes of the driver's scheduled availability. In addition, if a driver rejected a dispatched trip without having given an appropriate, advanced 2-hour notice that his or her vehicle would be out of service, Petitioners would find an alternate means of transportation, such as taxi service, for the passenger whom the driver had refused to serve. Petitioners, at times, assessed a \$50.00 per occurrence handling charge to the driver's account.

c. *SuperShuttle unilaterally established the formula for calculating the total gross revenue for each van.*

The "Commission's authority over shuttle carriers includes the power to fix rates. (Cal. Const. art. XII, § 4 & 5.) The rates must be just and reasonable. (Cal. Pub. Util. Code § 451.) The Commission's rate regulation of these carriers is quite flexible, permitting 'zones of rate freedom' (Cal. Pub. Util. § 454.2) as well as the ability to raise or lower rates (Cal. Pub. Util. Code § 491.1). (PUC *Amicus Br.* filed by CPUC with the Court in *Kairy v. SuperShuttle International* (9th Cir. 2011) 660 F.3d 1146, at 7, fn.1.)

The unit franchise agreement obligated the drivers to charge the fares set by Petitioners pursuant to their agreements with the various airports. A driver was not free to change a fare. At times, SuperShuttle would provide discounted rates for special groups or occasions, including discount vouchers and coupons that the drivers were obligated to accept.

Petitioners required the drivers to keep a daily "trip sheet" on which the drivers recorded a list of each fare; pick up and drop off time and location; number of fares; amount of prepaid fares; method of payment, credit card or cash, and where the payment was rendered. The driver would submit to Petitioners any vouchers and credit card slips he or she had received during the week. The credit card payments were payable to and processed by Petitioners or SuperShuttle. The driver kept all cash received from the customers.

Petitioners could track the amounts of revenue to each shuttle van, and on a weekly basis, would calculate the total gross revenue for each van based on the trip sheet submitted by the driver. Gross revenues included all fares, revenue from charter operations, amounts received on account of all vouchers and all

other revenue franchisees received on account of operation of their vans pursuant to the unit franchise agreements.

Petitioners would deduct from the gross revenue all the fees and incidental expenses, including but not limited to the franchise, license, and system fees, and airport expenses. Shuttle drivers would receive a payment from Petitioners for the net difference; or remit payment to Petitioners if the gross receipts were insufficient to cover the fees and expenses.

The franchisees' income was therefore dependent on the quantity of fares they carried. If they had sub-drivers operating their vans, they were obligated to pay the same fees to Petitioners for each van. There was no requirement that a driver be on duty on any particular day. Drivers could take vacation whenever they wished. Unless Petitioners agreed ahead of time, the franchisees continued to make their payments to Petitioners for their franchise, van lease and system fee for access to the dispatch system even when they were not working.

d. *SuperShuttle unilaterally established how nonpayment or late payment would be handled.*

The franchisees were obligated to pay all the fees on a weekly basis, to cash out every Monday or Tuesday and to maintain a zero balance on their accounts. When the franchisees fell behind in the payments, the franchise manager would attempt to diagnose the cause for the cash shortage. They would be allowed to continue working, however they would be closely monitored.

e. *SuperShuttle unilaterally established the terms of van ownership and cost of vehicle maintenance.*

Drivers could either lease their vehicles from Petitioners, or purchase them from other drivers or independent car dealers. The vans had to meet the System's specifications, including the make, model, color (blue), size (nine to 15-passenger), age and mechanical condition. Franchisees had to grant Petitioners a security interest in their vans.⁴ The drivers could use their vans for personal use during off hours. They could provide private charter service to and from locations not including airports, provided that they notified Petitioners and the CPUC, pay a license fee to SuperShuttle, and use the SuperShuttle set hourly rate of \$55.

f. *SuperShuttle unilaterally established "good causes" for terminating a unit franchise agreement.*

⁴ Sections 6.1 and 6.3 of the Communication and Specialized Equipment Agreement between Petitioners and the drivers provided that in order "to secure the due, punctual and unconditional performance by Franchisee of its obligations under this Agreement, including without limitation its obligation to return Equipment and Specialized Equipment to City Licensee upon termination of this Agreement", "Franchisee hereby grants to City Licensee a security interest in and to the 'Collateral'" which "means all of Franchisee's right, title and interest in the Vehicle."

Petitioners could "immediately terminate" a unit franchise agreement on delivery of a notice of termination to the franchisee, with no opportunity to cure. Twenty-five events, including but not limited to insolvency; failure on three or more separate occasions to make timely payment of fees; receipt of excessive number of complaints, citations, notices from airport representatives, customers, or federal, state or local regulatory agencies; were "deemed to be an incurable breach" and "good cause" for terminating the agreement.

In addition, the agreement would be terminated after the franchisee had received a notice with "opportunity to cure," but failed to cure noncompliance with any requirement in the unit franchise agreement or the Manual or prescribed by the City Licensee, within three days after notice; or failed to pay any amounts due the City Licensee within three days after receipt of a written notice of default.

"Good cause" to terminate the unit franchise agreement "shall also include City Licensee's determination[,] *in its sole discretion*, that termination of the Agreement is *in the best interest of the SuperShuttle system*." [emphasis added]

The franchisee could terminate the unit franchise agreement at anytime by negotiating with Petitioners; or selling his or her franchise to a new franchisee, with Petitioners' approval. The franchise owner-seller would determine the franchise sale price. Upon termination of the unit franchise agreement, the driver would no longer be liable for any further franchise payments if he or she had signed a waiver when the unit franchise agreement was initially executed. However, the driver would not be reimbursed for any paid franchise fee. At the end of each franchise term, the franchisee had the option to renew the right to operate a SuperShuttle vehicle for two additional terms of five years each.

5. *Drivers' perception of the nature of their work and employment status.*

The unit franchise agreements identified the drivers as independent contractors, and many of the drivers understood that to be their correct status. Petitioners strongly recommended that the driver form a business entity to act as the franchisee, and obtain an identification number from the Internal Revenue Service. The business entity may be a corporation, a limited liability company (LLC) or a general or limited partnership in the franchisee's sole discretion.

The franchise agreement allowed franchisee drivers to hire sub-drivers to drive their vans, but only upon Petitioners' approval of the drivers. All sub-drivers had to follow the same rules and regulations as the franchisees themselves. Most franchisee drivers drove their own vans. Less than half of the franchisees hired sub-drivers, and a few had multiple vans and multiple drivers.

The nature of the drivers' work remained the same. Several franchisee drivers considered themselves as performing "essentially the same type" of work,

transporting passengers to and from the airport that they did as an employee. Petitioners were the drivers' sole source of airport shuttle customers.

Franchisee-driver Zaydoff understood that he was "working for" Petitioner SuperShuttle Los Angeles under a contract wherein Petitioner would collect and give "all quotes for pickups" to the drivers who, in return, would "handle the customers" and paid Petitioner 25% of their gross revenue. If Petitioners did not have any customers, the drivers would not have any customers. Franchisee-driver Donaldson considered himself "operating under SuperShuttle" because their logo on the van made it "pretty obvious" that he was working for them. He thought that it would be "counterproductive" to obtain private charters even though he had the authority to do so since he was paying Petitioner a fee to dispatch business to him. Franchisee-driver Chipman never carried passengers not referred to him by Supershuttle. He thought that he worked for Petitioners only and would be terminated if he were to transport other passengers not dispatched by Petitioner. Franchisee-driver Larry White felt obligated to protect Petitioner's contract with the Sacramento International Airport in order to maintain his livelihood.

Petitioners exerted control over the van interior by prohibiting drivers from keeping personal items therein, even though airport authorities required only clean interiors free from "dust," "debris," "any substance in the seating area which could cause harm, damage, or injury to any passenger or their clothing," and "any papers or objects on dash." Petitioners would conduct quality control of the drivers by utilizing their past customers reservation database to take random telephone surveys of the quality of the franchisees' services, and by making guest surveys and comment cards available to their customers.

6. *The local, state and federal government agencies; airport authorities; and other regulatory bodies (collectively, "the regulating authorities") regulate the airport ground transportation business.*

a. *The Federal Trade Commission governs, and the California Department of Corporations oversees franchising.*

The Federal Trade Commission governs franchising, and the Department of Corporations oversees the franchising activity in the State of California. A franchise currently offered in the United States must have a franchise disclosure document (FDD), which was referred to as the unit franchise offering circular (hereafter "UFOC") during the relevant audit period in the instant cases. The franchisor had to give the prospective franchisee at least 10 days to examine the UFOC, and a five-day cooling down period between deciding to purchase the franchise and signing the franchise document; to allow the prospective franchisee an opportunity to have a professional of their choosing, an accountant, an attorney, or an impartial third party, review the documents.

b. *Petitioners must satisfy the following requirements under Public Utilities Code section 1032, and CPUC General Order 158-A.*

(i) *Equipment list and preventive vehicle maintenance program.* CPUC requires Petitioners to maintain on file with CPUC an equipment list of all vehicles (owned or leased by the drivers) in use under each PSC certificate. (Public Utilities Code § 1032(b)(1)(C); and CPUC Gen. Order 158-A, section 4.01.) CPUC requires Petitioners to have a preventive maintenance program that conforms to safety regulations of the Department of the California Highway Patrol, as described in Title 13 of the California Code of Regulations. (Public Utilities Code § 1032(b)(1)(C); and CPUC Gen. Order 158-A, section 4.02.) Petitioners are authorized to inspect the vehicle from time to time and keep a maintenance record on all the vehicles. The airport inspection of the vehicles, consisting of documentation and visual inspection, is minimal in scope.

(ii) *Drivers' driving record.* CPUC authorizes Petitioners to regularly check the driving records of all persons, whether employees or subcarriers, operating vehicles used in transportation for compensation requiring a class B driver's license under the certificate. (Public Utilities Code § 1032(b)(1)(D); and CPUC General Order 158-A, section 5.02.) Every driver of a vehicle has to be licensed under the California Vehicle Code and has to comply with Motor Carrier Safety provisions identified by the CPUC. The drivers have to participate in the Department of Motor Vehicles "pull notice program" under Vehicle Code Section 1808.1, by submitting their driving records to the CPUC for regular review.

(iii) *Display and removal of carrier's name, and vehicle number.* The SuperShuttle name and the assigned identifying vehicle number must be painted or displayed or otherwise permanently attached to the rear and each side of the exterior of each vehicle. The carrier's name and vehicle numbers shall be sufficiently large and color contrasted as to be readable, during daylight hours, at a distance of 50 feet. All certificate numbers and identification symbols must be removed when a vehicle is sold or transferred. (CPUC Gen. Order 158-A, sections 4.03 and 4.08.) Petitioners charged the drivers a \$250 decal fee for this function.

(iv) *Record-keeping.* Each Petitioner is required to maintain in its office a set of records on the services it performed, including tariffs (charges to passengers for transportation services); timetables; the number of passengers transported by each driver; copies of all lease and sub-carrier agreements; maintenance and safety records; driver records; and consumer complaint records. The CPUC staff has the right to enter Petitioners' premises to inspect Petitioners' books and records and to inspect each and any vehicle used to drive for Petitioners. (CPUC Gen. Order 158-A, sections 6.01-6.02.)

(v) *Response to complaints.* Petitioners are required to respond within 15 days to any written complaint concerning transportation service provided or arranged by Petitioners. (CPUC Gen. Order 158-A, section 7.01.)

(vi) *Tariffs and timetables.* Petitioners are required to file their tariffs and service timetables. That information is to be considered public record, for use of the general public, and has to be published in a manner that is readable and easily understood. (CPUC Gen. Order 158-A, sections 8.01 and 8.02.)

(vii) *Posting of pertinent information.* Petitioners have to post information concerning the tariffs, timetables and complaint procedures that customers can use, in each vehicle used to provide service to the airport and in each location where airport tickets are sold. (CPUC Gen. Order 158-A, section 8.04.)

(viii) *Holding CPUC authority as charter party carriers (TCP).* Petitioners are the "carriers," and the franchisee drivers the "sub-carriers." Petitioners enter into unit franchise agreements with the sub-carriers. The sub carriers, also the franchisees, provide the vehicles and the drivers, and are required to hold CPUC authority as charter party carriers (TCP). The unit franchise agreement between the franchisees and Petitioners has to be evidenced by a written document, and shall contain the carriers' names, the charter party carrier numbers, and the services to be provided. (CPUC Gen. Order 158-A, section 3.03.)

The driver has to comply with all CPUC rules and regulations. The driver is also subject to regulation by the California Motor Vehicle Department and the Department of Airports based on agreements Petitioners have entered with various metropolitan airports. The U.S. Department of Transportation also restricts the number of hours per day drivers can drive and determines the required amount of rest periods.

(ix) *Vehicle maintenance.* Petitioners agree to maintain their vehicles used in transportation for compensation in safe operating condition and in compliance with applicable laws and regulations relative to motor vehicle safety. Petitioners require the franchise drivers to maintain the mechanical condition and the appearance of their vehicles in accordance with the SuperShuttle preventative schedule. (Public Utilities Code § 1032(b)(1)(F).)

(x) *Use of alcoholic beverage and drugs are forbidden.* Petitioners are prohibited from allowing drivers to consume or be under the influence of a drug or alcoholic beverage while on duty. (CPUC Gen. Order 158-A, section 5.04.) Petitioners have a safety education and training program in effect for all franchisees or subcarriers operating vehicles used in transportation for compensation. (Public Utilities Code § 1032(b)(1)(E).) A franchisee has to take one to four days of training consisting of certain safety requirements, map reading and training on how to use the Nextel phone system.

7. *Petitioners' concession agreements with airport authority require them to comply with safety or traffic rules and regulations.*

"No carrier shall conduct any operations on the property of or into any airport unless such operations are authorized by both this Commission and the airport authority involved." (CPUC General Order 158-A, Section 3.01.)

"The City Licensee provides shared-ride van shuttle services under concession agreements with airport authorities.... [that] specify the services to be provided and dictate the operating requirements contained in this Unit Franchise Agreement, including without limitation van specifications, driver uniforms and driver conduct." (SuperShuttle Los Angeles Unit Franchise Agreement.)

Each vehicle operated at the airport had to be clean inside and out, free of exterior body damage, mechanically safe, and in excellent working order. All the vehicles had to possess identical color schemes and markings so as to be readily identifiable as belonging to Petitioner. All vehicles had to display Petitioner's name or its "d.b.a.," and vehicle identification number on the front, rear, and sides of each vehicle in a readily identifiable type, style and size.

The Public Utilities Code required uniforms as a means to identify the service provider to the public as being associated with a specific charter party carrier, but there were no provisions in the CPUC regulations or airport rules defining dress code features, such as color, type of hat, sweater, jacket, vest or visor that the drivers should wear. The Los Angeles Airport Authority, for instance, required each driver, while on airport, to wear "neat and clean" uniform which clearly identified the wearer "as an employee" of SuperShuttle Los Angeles, and wear a valid photographic identification badge issued by SuperShuttle Los Angeles of a design approved by the Executive Director of the Airport Authority.

Petitioners mandated the drivers to wear specific colors and hats to create a distinctive visual impression identifiable with SuperShuttle. They could not simply wear a plain jacket over a shirt with a valid photographic identification badge identifying them as a SuperShuttle representative. There was no outward appearance to the public that these drivers were independent business owners.

If drivers were seen without the proper uniform, Petitioner SuperShuttle Los Angeles could lock the driver's computer and the curb coordinator at the Los Angeles airport would send the driver away from the line in the holding lot. A driver for Petitioner SuperShuttle Los Angeles was "fired" for wearing a red-colored jacket when working at the LAX.

REASONS FOR DECISION

We concur with the result of the administrative law judge's decision based on the following rationale.

"The objects and purposes of the Unemployment Insurance Act are not limited to the raising of revenue. It is a remedial statute and the provisions as to benefits must be liberally construed for the purpose of accomplishing its objects. (*Empire Star Mines Company, Ltd. v. California Employment Commission* (1946) 28 Cal.2d 33, 38.) The legislatively declared public policy of the state requires the extension of unemployment insurance benefits to persons "unemployed through no fault of their own." (Unemp. Ins. Code, § 100.)

In determining whether a person rendering service to another is an "employee" or an excluded "independent contractor," the "control-of-work-details test ... must be applied with deference to the purposes of the protective legislation." (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations, supra*, 48 Cal.3d at p. 353. See *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778.)

California decisions applying statutes for the protection of employees "uniformly declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. . . .' [Citations, including unemployment insurance benefits cases that draw direct analogy to workers' compensation law.]" (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal. 3d at p. 358. See also, *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal. App. 3d at p. 1371; and Precedent Decision P-T-495, affirmed by *Messenger Courier Association of the Americas et al v. Unemp. Ins. Appeals Board*, (2009) 175 Cal. App. 4th 1074.)

In *S. G. Borello & Sons, Inc. v. Department of Industrial Relations, supra*, 48 Cal.3d 341, the California Supreme Court has upheld a determination of employee status by the Department of Industrial Relations' Division of Labor Standards Enforcement ("DLSE") following the state agency's evidentiary hearing. The Court ruled that "the determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences, and the Division's decision must be upheld if substantially supported." (*Id.*, at p. 349.) Deference to the DLSE's determination of employment status is implied. Accordingly, for the purpose of administering the unemployment insurance benefits program, this Board has the power to make a factual determination of employee or independent-contractor status of franchisee driver that is dependent upon the resolution of disputed evidence or inferences, and to draw direct analogy to workers' compensation law and Labor Code statutes enforced by DIR.

Contributions are due the Department from employers with respect to wages paid in employment for unemployment insurance (Unemp. Ins. Code, § 976), disability insurance (Unemp. Ins. Code, § 984), employment training (Unemp. Ins. Code, § 976.6), and personal income taxes (Unemp. Ins. Code, § 13020). California unemployment insurance taxes accrue only on amounts paid as remuneration for services rendered by employees.

If the Department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. (Unemp. Ins. Code, § 1127.)

I. *Petitioners have the burden of proof by a preponderance of the evidence.*

“By statute, any person rendering ‘service’ to another is presumed to be an employee except as excluded from that status by law. (Lab. Code, § 3357.)” (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board* (1991) 226 Cal.App.3d 1288, 1293; see *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777–778.)

“[T]he fact that one is performing work and labor for another is *prima facie* evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary. [Citation]” (*Robinson v. George* (1940) 16 Cal. 2d 238, 242; see also *Cristler v. Express Messenger Sys., Inc.*, (2009) 171 Cal. App. 4th 72, 83.⁵) “Once the employee establishes a *prima facie* case, the burden shifts to the employer, which may prove, if it can, that the presumed employee was an independent contractor.” (*Narayan v. EGL, Inc.* (9th Cir. 2010) 616 F.3d 895, 900.) “It is best understood as creating a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise.” (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board, supra*, 226 Cal.App.3d at p. 1295.)

The courts have long held that the burden of proof generally is on the party attacking the employment relationship. Petitioner therefore has the burden of proof in the instant tax matter. (*Isenberg v. California Employment Stabilization Commission* (1947) 30 Cal.2d 34, 38, relying on *Robinson v. George*, 16 Cal.2d 238, 244; *Aladdin Oil Company v. Perluss* (1964) 230 Cal.App.2d 603, 610 [in actions for refunds of taxes, the burden of proof is upon the taxpayer-plaintiff]; *Smith v. Unemployment Ins. Appeals Board* (1976) 62 Cal.App.3d 206, 213 [the burden is upon the party seeking to recover an unemployment tax assessment to

⁵ After reviewing the court decision in *Cristler v. Express Messenger Systems, Inc.*, (2009) 171 Cal. App. 4th 72, 81, we have decided that their class definition of drivers is based on facts that are distinguishable from those in the instant case, and is thus not controlling here.

prove that it was illegally assessed]; and *Santa Cruz Transportation Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1367.)

The California Unemployment Insurance Appeals Board (hereafter "Board") has held that petitioner generally bears the burden of proof in a tax case and it is by a preponderance of the evidence. (P-T-493; Evidence Code § 115.)

II. *Analysis of the employment relationship between Petitioners and the franchisee-drivers.*

The relationships of employer and employee and of principal and independent contractor have long been recognized to be mutually exclusive. They cannot exist simultaneously with respect to the same transaction. The proof of the one status automatically precludes the existence of the other. Accordingly, the services of an independent contractor are not "employment" within the meaning of Unemployment Insurance Code, section 601, and the remuneration paid for such services is not taxable. (Precedent Decision P-T-2.)

"Employment" means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express, or implied. (Unemp. Ins. Code, § 601.) "Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemp. Ins. Code, § 621(b).)

A. *The label of "franchisee" is not dispositive of Petitioners' relationship with the drivers.*

The essence of the common law test of employment is the "control of details," whether the principal has the right to control the manner and means by which the worker accomplishes the result desired. (*Empire Star Mines Company, Ltd. v. California Employment Commission, supra*, 28 Cal.2d at pp.43-44.)

Here, Petitioners, SuperShuttle International, Inc. and its wholly-owned subsidiaries are PSCs authorized and licensed by CPUC to provide shared ride shuttle services. They conduct their business as shared ride ground transportation providers in San Francisco, Los Angeles and Sacramento. Their stated mission is to operate and provide "a demand responsive and/or scheduled airport shuttle" service.

Petitioners used employees in all of their operations until 1993 when they decided to convert the employee model to the independent contractor - franchisee model in order to avert financial trouble and save costs.⁶

⁶ Yellow Cab Cooperative, Inc. made a similar business decision. "Prior to 1976, the drivers of Yellow cabs were unionized employees. In 1976 the company went into bankruptcy. In 1979 it adopted a system

Petitioners argue that franchisee-drivers are operating a business independent of and distinct from those of SuperShuttle and the Petitioners according to the unit franchise agreement of Petitioner SuperShuttle Los Angeles which states verbatim, "FRANCHISEE IS NOT AN EMPLOYEE OF EITHER SUPERSHUTTLE OR CITY LICENSEE".

Contrarily, the evidentiary record has established that the drivers continue to perform the identical work they had carried out when they were previously known as employees, even after the conversion of their employment status from "employee" to "franchisee." Drivers continue to transport passengers who have made reservations directly with SuperShuttle, to and from designated airports.

Even though Petitioners reclassified the drivers from "employees" to "franchisees," "[t]he parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship." (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal. App. 4th 1, 11.) "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.]" (*S. G. Borello v. Department of Industrial Relations* (1989) 48 Cal.3d at p. 349.) "The agreement characterizing the relationship as one of 'client -- independent contractor' will be ignored if the parties, by their actual conduct, act like "employer -- employee." (*Toyota Motor Sales U.S.A., Inc.* (1990) 220 Cal. App. 3d, at 877 (*Toyota*); *Empire Star Mines Co. v. Cal. Emp. Com.*, *supra*, 28 Cal.2d at p. 45; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d at p. 952.) Thus, we do not find the label of "franchisee" to be dispositive of the relationship between Petitioners and the drivers.

B. *The franchise agreement contains many indicia of control.*

Like the lease between Yellow Cab and the taxi driver in *Santa Cruz Transportation*, the unit franchise agreement in the instant case contains "many indicia of control" that give the franchisor-petitioners the right of substantial control over the franchisee-shuttle drivers. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board*, *supra*, 235 Cal.App.3d at p. 1372.)

The unit franchise agreement and the operations manual set forth the SuperShuttle System standards that all individual franchisees have to accept. The SuperShuttle standards consist not only of requirements imposed by regulating authorities such as the CPUC and airport authorities; but also set forth additional obligations determined unilaterally by SuperShuttle to be necessary for the overall quality and growth of the SuperShuttle brand.

California courts have recognized that a franchisor's interest in the reputation of its entire marketing system may allow it to exercise certain controls over the

under which drivers leased cabs and were no longer deemed employees of the company." (*Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Board* (1991) 226 Cal.App.3d 1288, 1291.)

enterprise without running the risk of transforming its independent contractor franchise into an agent. (*Kaplan v. Coldwell Banker* (1997) 57 Cal.App.4th 958, 961, citing *Cislav v. Southland Corp.* (1992) 4 Cal.App.4th, at p. 1292.) However, an agency relationship may exist if the franchisor retains to itself control exceeding that necessary to protect its legitimate interests. (*Id.* at p. 1295-1296 [“The above franchise agreements gave the franchisor control beyond that necessary to protect and maintain its interest in its trademark, trade name and goodwill.”].)

1. *The franchise agreement requires the franchisee to accept all assignments, within certain specified hours and a certain geographic area determined by Petitioners.*

Petitioners’ objectives of serving customers “promptly, courteously, and safely,” and upholding the SuperShuttle brand image can be achieved only by exerting substantial control over the driver through the dispatch and bidding “systems.” Thus, Petitioners’ contentions that franchisees “decided whether to transport incoming or out-going passengers, provided private charter services for passengers with no connection to SuperShuttle, negotiated inducements with SuperShuttle” do not support a conclusion that the drivers are other than employees.

Unlike the leaseholders in *Empire Star*, whom the court found were not employees because they determined for themselves what work they would do, where and when they would mine, and how it should be done, drivers in the instant cases are not “free” to determine the nature, terms and conditions of their jobs. (*Empire Star Mines Company, Ltd. v. California Employment Commission*, *supra*, 28 Cal.2d at pp. 44–45, 49.) Petitioners have substantial control over the entire “systems,” from reservations, route design, bidding, dispatch, to the final delivery of passengers to their destinations. Petitioners have complete control over the centralized reservations systems, a highly technical computerized algorithm program, that serve as the backbone of their business of providing “demand responsive and/or scheduled airport shuttle” service to their customers.”

Contrary to Petitioners’ contention that the “franchisees enjoyed significant freedoms and, as business owners, were responsible for independently making significant business decisions” such as setting “their own hours of work,” “whether to work a particular day”; the evidence shows that the drivers’ control over their hours and days of operation is restricted to the Petitioners’ designated duration of the 24-hour, AM or PM franchise, and to the drivers’ economic need to work. Franchisees must provide shared ride airport shuttle transportation service, within “scheduled hours” and designated “territory,” to customers who have made reservations directly with SuperShuttle. Drivers are obligated under the unit franchise agreement to provide Petitioners with a schedule of availability

in advance. There is an adverse consequence if they do not accept trips assigned to them while they are logged into the dispatch system.

Petitioners' control over the beginning and ending times of each of the AM and PM Franchises is akin to that of Yellow Cab Cooperative, Inc. "[U]nder the lease Yellow Cab designates the time period when a daily shift begins and ends. (Cf. [Yellow Cab Cooperative, Inc., supra, 226 Cal.App.3d] at pp. 1298-1299. 'Yellow controlled drivers' hours by assigning shifts. Yellow imposed this control so that it could lease each cab to more than one driver in one day. This practice resembled a paradigmatic employment relationship and significantly restricted applicant's independence.') (Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra, 235 Cal.App.3d at p. 1372.)

Petitioners exercise a broad control over the operation of the enterprise under a provision requiring the franchise holders to conduct their daily job activities within a designated territory; and to maintain and manage their work hours according to pre-determined "AM or PM Franchise" schedules, in accordance with the general policies of the franchisor. (Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d, 610, at pp. 615-616⁷.)

As stated in *Toyota*, "a certain amount of freedom of action that is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it. [Citation]" (*Toyota Motor Sales U.S.A., Inc. v. The Superior Court of Los Angeles County, supra*, 220 Cal. App. 3d, at p. 875.) "Such factors generally have been considered to be simply a freedom inherent in the nature of the work and not determinative of the employment relation." (*Id.*, at p. 876.)

The franchisee's freedom may appear to exceed that of a typical employee, but it is largely illusory. Petitioners do not require drivers to be on duty on any particular day, and permit them to take vacation whenever they wish. Unless Petitioners agree ahead of time, however, the franchisees must continue to make their payments to Petitioners for their franchise, van lease and system fee for access to the dispatch system even when they are not working. To earn a livelihood, franchisee drivers have to work productively, and that means logging on the Nextel bidding system, bidding for routes and transporting passengers. (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board, supra*, 226 Cal.App.3d at p. 1295.)

⁷ In *Nichols v. Arthur Murray, Inc., supra*, 248 Cal.App.2d 610, the court affirmed a judgment against the franchisor on an actual agency basis. The franchise agreement conferred upon the franchisor the right to control the employment of all employees of the franchise holder; to fix the minimum tuition rates to be charged; to designate the location of the studio, its layout and decoration; to control all advertising by the franchise holder; and to exercise a broad control over the operation of the enterprise under a provision requiring the franchise holder to conduct, maintain and manage the studio in accordance with the general policies of the franchisor, and "directing that failure to maintain such policies shall be sufficient cause for immediate cancellation of the agreement." (*Id.* at p. 615.)

The bidding system provides little room for autonomy for the drivers. Detailed information of the trip, including the address, pick up location, city, state, zip, fare, tip, payment method, and number of passengers is not displayed on the Nextel device until after the drivers hit the "bid" button. A franchisee that rejects a route after hitting the "bid" button may receive a verbal reprimand or even suffer an adverse financial consequence.

Dispatchers use a "bid monitor" that is part of the "systems" to view driver availability and pending rides, strategically group passengers on the most optimal routes, monitor the execution of each trip, and assign trips directly. A dispatcher can manipulate the assignment process by designing specially packaged bids, or assigning a more lucrative "piggyback" route to a particular driver, thus blocking certain trips from the bidding process. Conversely, the drivers' earning capacity is partially dependent on the dispatchers' cooperation and willingness to assemble "piggyback" packages that can compensate for the adverse economic consequence of unprofitable routes.

The dispatcher arranges for a taxi or alternative service to pick up passengers if the shuttle vans are late. The dispatchers' tracking of assigned routes and direct involvement in making alternative transportation of passengers weakens Petitioners' contention that "transportation of passengers is the business of the franchisees." Petitioners are doing more than "maintaining and increasing the value of the franchises through their marketing plan." They are actively controlling the business of operating and providing "a demand responsive and/or scheduled airport shuttle" service to their customers.

The *Borello* statutory test of "control" may be satisfied even where "complete control" or "control over details" is lacking -- at least where the principal retains pervasive control over "all meaningful aspects of the operation," the worker's duties are an integral part of the operation, the nature of the work makes detailed control unnecessary, and adherence to statutory purpose favors a finding of coverage. (*S. G. Borello v. Department of Industrial Relations, supra*, at pp. 355-358.) As will be discussed in further details below, the franchisee drivers' duties are an integral part of the SuperShuttle "System," and Petitioners' substantial control over the operation as a whole and pervasive control over "all meaningful aspects of the operation," have made detailed control unnecessary.

Petitioners further contend on appeal to this Board that "[t]he responsibility of a franchisee in providing passenger transportation is typical of the responsibilities of any independent contractor. While they are required to provide an end result that meets the quality standards of the franchisor, how they do so is up to them." This contention is without merit. Petitioners can use the Nextel system to track the drivers' day-to-day work details, and conduct quality control of drivers by inviting past customers to participate in random telephone surveys of the franchisees' service quality, or to complete and submit comment cards.

The drivers have limited opportunity to pursue entrepreneurship by enhancing the profitability of their own franchises. While drivers can view a summary of the financial information related to their franchises on their Nextel phones; the Nextel system is not an interactive tool with which the drivers can use to manage their day-to-day work activities, or analyze the profitability of their routes.

Petitioner's exertion of all the necessary control over the operation as a whole is analogous to that of JKH in *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046. The *JKH Enterprises* court stated, "By obtaining the clients in need of the service and providing the workers to conduct it, JKH retained all *necessary* control over the operation as a whole. Under *Borello*, and similar to its facts, these circumstances are enough to find an employment relationship for purposes of the Workers' Compensation Act, even in the absence of JKH exercising control over the details of the work and with JKH being more concerned with the results of the work rather than the means of its accomplishment." (*Id.* at p. 1064.) A business entity may not avoid its statutory obligations by carving up its business process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible drivers. (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal. 3d at p. 357.)

2. *The franchise agreement gives Petitioners the right to terminate the agreement based on "good cause," and to determine in their sole discretion that termination is in the best interest of the SuperShuttle "System."*

Petitioners have unilaterally defined "good cause" for terminating a unit franchise agreement. "Good cause" to terminate the agreement "shall also include City Licensee's determination[,] *in its sole discretion*, that termination of the Agreement is *in the best interest of the SuperShuttle system.*" [emphasis added] This contract provision gives Petitioners the right to terminate the franchise agreement "virtually at will." (*Porter v. Arthur Murray, Inc.* (1967) 249 Cal.App.2d, at p. 421; *Empire Star Mines Company, Ltd. v. California Employment Commission, supra*, 28 Cal.2d, at pp.43-44 ["Strong evidence in support of an employment relationship is the right to discharge at will, without cause."]; see *Cislaw v. Southland Corp., supra*, 4 Cal.App.4th at pp. 1289-1290.)

Conclusive proof of an employer-employee relationship is provided by Petitioners' right to terminate a franchise agreement if they determine, in their "sole discretion," that termination "is in the best interest of the SuperShuttle system." "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." (*Empire Star Mines Company, Ltd. v. California Employment Commission, supra*, 220 Cal. App. 3d, at 875; *Toyota Motor Sales*

U.S.A., Inc. v. The Superior Court of Los Angeles County, supra, 220 Cal.App. 3d at p. 875.)

In addition, Petitioners can “immediately terminate” a unit franchise agreement on delivery of a notice of termination to the driver and with no opportunity to cure. Twenty-five events, including but not limited to, insolvency, failure on three or more separate occasions to make timely payment of fees, receipt of excessive number of complaints, citations, notices from airport representatives, customers, or federal, state or local regulatory agencies, are “deemed to be an incurable breach” and “good cause” for terminating the agreement.

In *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d, 541, the court found that the franchise agreement provided a plethora of controls and supervisory privileges on behalf of the franchisor, based on the franchisor’s right to cancel the franchise relationship at any time by reason of [the franchisee’s] insolvency, failure to maintain sufficient gross sales, or failure to comply with any contractual obligation, including [the franchisee’s] duty to comply with all building codes and to obtain necessary building permits.” (*Id.* at p. 550) In sustaining the punitive damage award against the franchisor, the court held that the franchisee “may be equated in all respects with an *employee*, officer or manager.” (*Ibid.*) [emphasis added]

Petitioners’ right to terminate a franchise agreement based on excessive number of complaints from customers is akin to “the lease [that] cites failure to maintain good public relations as a specific reason for termination. This is an unquestionable control upon Gallegos’s behavior as a taxicab driver.” (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal.App.3d at p. 1372.) It strongly suggests that the franchise agreement has provided a plethora of controls and supervisory privileges on behalf of Petitioners. (*Kuchta v. Allied Builders Corp., supra*, 21 Cal.App.3d, at p. 550 [“The most significant control an *employer* has over the acts of an official is the right to terminate his employment for misconduct. Allied had even this control over the franchisee.”].)

The court in *Nichols* stated that the subject franchise agreement between the franchisor and the franchise holder, in substance, conferred upon the franchisor the right “to exercise a broad control over the operation of the enterprise under a provision ... directing that failure to maintain [the franchisor’s] policies shall be sufficient cause for immediate cancellation of the agreement.” (*Nichols v. Arthur Murray, Inc., supra*, 248 Cal.App.2d, at pp. 615-616.)

3. *The franchise agreement requires the drivers to maintain and submit trip sheets.*

CPUC requires each petitioner to maintain in its office a set of records on the services it performed which included tariffs, timetables, and the number of

passengers transported by each of its drivers; copies of all lease and sub-carrier agreements; maintenance and safety records; driver records; and consumer complaint records. (CPUC Gen. Order 158-A, sections 6.01 and 6.02.)

The evidence here shows that petitioners require the franchisee-drivers to "maintain and accurately report" to Petitioners "all information" beyond what is required under CPUC General Order 158-A, sections 6.01 and 6.02 that Petitioners "may from time to time require." Petitioners also require all drivers to "maintain and submit" a daily "trip sheet" on which they record a list of each fare; pick up and drop off time and location; number of fares; amount of prepaid fares; method of payment, credit card or cash, and where the payment is rendered.

The franchisee-drivers' obligation to keep a "trip sheet" in the instant case is similar to that in *Nichols*, wherein the franchise holder was required to maintain records, and submit copies thereof weekly to the franchisor, setting forth the names and addresses of pupils enrolled during the week, the amounts paid by all pupils, number of lessons taken by each pupil, and the names of all pupils taking lessons. The court in *Nichols* affirmed the trial court's judgment against the franchisor on an actual agency basis. (See *Nichols v. Arthur Murray, Inc.*, *supra*, 248 Cal.App.2d, at pp. 615-616.) In *Santa Cruz Transportation*, the Court stated, "[T]he presence of a trip sheet requirement militates strongly in favor of employer control." [Citation]" (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board*, *supra*, 235 Cal.App.3d at p. 1372.)

4. *The franchise agreement requires the drivers to pay all fees with respect to gross revenues, in addition to the franchise fee.*

The franchisee is required to pay a franchise fee under section 31005 of the Corporations Code. In the instant case, Petitioners unilaterally set the amount of the franchisee fee at twenty-one thousand dollars (\$21,000) in 2004, and within a year, increased it to fifty thousand dollars (\$50,000) in 2005. Petitioners are deemed to have fully earned the franchise fee upon execution of the unit franchise agreements and would not have to refund it, in whole or in part, to the franchisees at any time.

Petitioners' contention that the "franchisees invested their money and their entrepreneurial skills in acquiring and building their franchise businesses" is illusory. A franchisee could sell his or her franchise to a new franchisee upon Petitioners' approval, at a sale price to be determined by the seller. However, there is barely any evidence showing that any franchisees have actually recovered their original investments or profited from the sale of their franchises. Upon termination of the unit franchise agreement, the driver would no longer be liable for any further franchise payments only if he or she had signed a waiver at the time when the unit franchise agreement was executed.

In addition, Petitioners require the franchisees to share the overhead expenses associated with maintaining the equipment, dispatching, cashiering, and other business-related expenses. Franchisees have to reimburse Petitioners for any and all costs Petitioners incurred on behalf of the franchisees such as vehicle insurance costs; vehicle leasing fees if the franchisees lease their vehicles from Petitioners; alternative fuel costs; pager costs; toll fees; vehicle maintenance and/or inspection fees; Nextel phone charges or similar phone system charges; any fines assessed against Petitioners due to the franchisees' acts or failure to act; any parking tickets; costs in resolving the customer complaints about franchisees or franchisees' services; and for all other articles that Petitioners may order on the franchisees' behalf, such as uniforms. In addition, franchisees are responsible for payment of the license fees and system fee; reimbursement to Petitioners for all airport and incidental expenses; payment of a \$1,500.00 deposit for the communication and specialized equipment, a \$250 decal fee, and a \$50.00 per occurrence handling charge for failure to pick up a passenger.

The purposes of these fees and incidental expenses, other than that of the franchise fee, are unrelated to the protection of Petitioners' trade name, good will and business image. The fee and incidental expense provisions in the unit franchise agreement vest in Petitioners "the right to control a substantial part of the obligations incurred in the operation of the business through its right to require and assert the nature, extent and amount of most of the contemplated expenses incident to the operation." (*Nichols v. Arthur Murray, Inc., supra*, 248 Cal.App.2d, at p. 617.)

The *Toyota* court stated that the franchisee driver's payment of his own payroll and income taxes and expenses related to his own worker's compensation insurance, are "merely the legal consequences of an independent contractor status not a means of proving it. An employer cannot change the status of an employee to one of independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer." (*Toyota Motor Sales U.S.A., Inc. v. The Superior Court of Los Angeles County, supra*, 220 Cal.App. 3d at p. 877.) Similarly, the fact that the Petitioners have imposed overhead expenses on their employees as if they were independent contractors does not make them independent contractors.

5. *The franchise agreement obligates the drivers to charge the fares set by Petitioners pursuant to Petitioners' agreements with the various airports.*

The unit franchise agreement obligates the drivers to accept assignments to transport passengers and to charge the fares set by Petitioners pursuant to Petitioners' agreements with the various airports. The CPUC's authority over shuttle carriers includes the power to fix rates. (Cal. Const. art. XII, § 4 & 5). The rates must be just and reasonable. (Cal. Pub. Util. Code § 45 1). The

CPUC's rate regulation of these carriers is quite flexible, permitting "zones of rate freedom," (Cal. pub. Util. Code § 454.2), as well as the ability to raise or lower rates. (Cal. Pub. Util. Code § 491.1).⁸

The fact that the rates are subject to the approval of various regulating agencies does not, by itself, show an absence of control by Petitioners over the drivers. "That the City of Santa Cruz set taxicab fare rates has no tendency in reason to prove Yellow Cab's lack of control over Gallegos." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal.App.3d at p. 1375.)

In *Nichols*, the court affirmed a judgment against the franchisor on an actual agency basis, in part because the franchise agreement conferred upon the franchisor the right to fix the minimum tuition rates, and to require the franchise holder to honor unused lessons purchased by a pupil from another franchise holder. (*Nichols v. Arthur Murray, Inc., supra*, 248 Cal.App.2d, at pp. 615-616.)

In the instant case, a driver is not free to change a fare. Moreover, SuperShuttle would occasionally provide discounted rates for special groups or occasions, including discount vouchers and coupons that drivers have to agree to accept. On the rare occasions when the drivers conduct "occasional charter operations," they have to use the SuperShuttle set hourly rate of \$55. Such evidence shows the existence of an agency relationship between Petitioners and the drivers.

6. *The franchise agreement permits the hiring of sub-drivers upon Petitioners' approval of the sub-drivers.*

Drivers are allowed to hire sub-drivers to operate their vans; but only upon Petitioners' approval of the drivers. (See, *Nichols v. Arthur Murray, Inc., supra*, 248 Cal.App.2d, at pp. 615-616, wherein the court found the franchise holder to be agents of the principal Arthur Murray, Inc. partially based on the principal's right to control the employment of all employees.)

Petitioner SuperShuttle Los Angeles instructed at least one driver to terminate his partnership with another driver because the other driver wore a red-colored jacket when working at the LAX. The court in *Empire Star*, in determining the independent contractor status of leaseholders, found that no leaseholder was ever requested to discharge anyone. (*Empire Star Mines Company, Ltd. v. California Employment Commission, supra*, 28 Cal.2d at pp. 44-45, 49.)

⁸ The CPUC "may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified[.]" (Cal. Const. art. XII, § 4.)

"Notwithstanding Section 491, the commission may authorize a passenger stage corporation, upon one day's notice, to reduce its rates and charges to not less than those of a competing passenger transportation service operating over substantially the same route pursuant to federal operating authority. The commission may attach any conditions it finds reasonable or necessary." (Pub. Util. Code, § 491.1.)

7. *The franchise agreement requires franchisees to purchase or lease a van meeting the System's specifications, including but not limited to make, model, color, size, age and mechanical condition.*

Petitioners' contention on appeal that drivers have "complete discretion over whether to buy new, used or lease vans, or invest in alternative fuel vehicles" is insufficient to show that the drivers are independent of Petitioners' control.

In *Nichols*, the court affirmed a judgment against the franchisor on an actual agency basis in part because the franchisor designated the location of the studio, its layout and decoration. (*Nichols v. Arthur Murray, Inc.*, *supra*, 248 Cal.App.2d, at pp. 615-616.)

Here, drivers' vehicles are analogous to "the studio" in *Nichols*. Drivers have to grant Petitioners a security interest in the vans they use to transport SuperShuttle passengers; and modify their vehicles in accordance with the specifications set forth in the operations manual. The vans have to meet the System's specifications, including but not limited to make, model, color (blue), size (nine to 15-passenger), age and mechanical condition. Drivers have to distinctively paint and mark their vans with the SuperShuttle logo and colors. Thus, SuperShuttle and Petitioners have demonstrated their control over the franchisee drivers. (*Yellow Cab Cooperative, Inc., v. Workers' Comp. Appeals Board*, *supra*, 226 Cal.App.3d at p. 1294.)

8. *Under the franchise agreement, franchisees shall not engage in any advertising or promotional activities.*

In the instant case, SuperShuttle and Petitioners control all advertising upon the rationale that a franchise entitles the driver to a nonexclusive right to the SuperShuttle trademark, marketing plan and advertising. The franchisee-drivers are not allowed to advertise their services to the public, and the business cards they hand out to the customers are printed and distributed by SuperShuttle with contact information only for SuperShuttle and not for their own franchises.⁹

In *Nichols*, by analogy, the court determined that Arthur Murray, Inc. was the principal of an agent, as opposed to an independent contractor, when it controlled all advertising of the franchise holder's services. (*Nichols v. Arthur Murray, Inc.*, *supra*, 248 Cal.App.2d, at pp. 615-616.)

⁹ At hearing, Petitioners produced the business card of only one franchisee, Robert Ash, who owned two franchises, two vans, and had a separate charter operation. He had a driver for the second van and a third backup driver. He had obtained contract work outside of the SuperShuttle system under the name of his limited liability company, Rob's Ultimate Transportation.

9. *Under a franchise agreement, the drivers are not allowed to keep personal items within their own shuttle vans.*

Drivers are not allowed to keep personal items within their own shuttle vans. The First Amendment to Airport on Demand Van Service Agreement, executed on April 19, 2005 between Sacramento County Airport System and SuperShuttle, contains this provision on "cleanliness." Every ground transportation vehicle shall be required to have clean interiors free from "dust," "debris," "any substance in the seating area which could cause harm, damage, or injury to any passenger or their clothing," and "any papers or objects on dash." [emphasis added]

The above-stated prohibition restricts dust and debris in the interiors, harmful substance in the seating area, and papers or objects on the dash, but Petitioners' blanket restrictions extend to personal items in the entire van interior. Petitioners' control in this regard extends beyond what the airport authorities require and beyond what is necessary to protect the value of their goodwill and trademarks.

C. Examination of secondary factors supports an employee status determination.

The *Empire Star* court did not solely consider "control" in evaluating the employment relationship. The court noted other factors that should be taken into consideration. Pertinent to the facts in the cases at hand are these factors: (1) whether or not the drivers are engaged in a distinct occupation or business; (2) whether the operation of an airport shuttle van for the transportation of passengers is the kind of occupation or work usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the operation of a nine- to 15-passenger van; (4) whether Petitioners or the drivers supply the instrumentalities, tools, and the place of work for the drivers doing the driving; (5) the length of time for which the services are to be performed; (6) the method of payment, whether by the time or by the fare; (7) whether or not transportation of passengers to and from airports is a part of Petitioner's regular business; and (8) whether or not the drivers and Petitioners believe they are creating the relationship of employer-employee.

1. *The drivers are not engaged in any distinct occupations or businesses.*

Petitioners strongly recommend to the franchisee-drivers to form a business entity and to obtain an identification number from the Internal Revenue Service. However, the preponderance of the evidence has established that few franchisee drivers engage in separate and distinct occupations of their own. (*Grant v. Woods* (1977) 71 Cal. App. 3d at p. 653; *Air Couriers International v. Employment Development Department*, *supra*, 150 Cal.App.4th at p. 939,

"Drivers were not being engaged in a separate profession or operating an independent business and infrequently declined job assignments.")

They incur no opportunity for "profit" or "loss." Like employees, they are simply paid by the quantity of fares they transport. They rely solely on Petitioners' dispatch of customers for their subsistence and livelihood. (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal.3d at pp. 351-358.)

Many franchisees hire sub-drivers upon Petitioners' approval of the drivers, or form a partnership with another driver. All sub-drivers have to follow the same rules and regulations as the franchisees themselves. Both drivers and sub-drivers perform the same work. With the exception of only a few franchisees that have multiple vans and multiple drivers, almost all drivers who hire sub-drivers are not in the business of operating their own airport shuttle transportation services and hiring employees for that purpose.

Franchisees may conduct "occasional charter operations," which are incidental scheduled transportation between locations other than the airport, without using Petitioners' dispatch system, provided that they notify Petitioners and the CPUC, pay a license fee to SuperShuttle, and use the SuperShuttle set hourly rate of \$55. However, the evidence shows that few franchisees actually conduct private charter operations, or own and operate their own distinct business.

The Public Utilities Code requires uniforms as a means of identifying to the public the service provider's association with a specific charter party carrier, but the CPUC regulations or airport rules contain no definition for a dress code, such as color, type of hat, sweater, jacket, vest or visor that the drivers should wear.

The SuperShuttle dress code requires the drivers to wear black pants, black shorts, black shoes, black socks, and a blue or white shirt with a black tie, in order to create a distinctive visual impression identifiable with SuperShuttle. There is no outward appearance to the public that these drivers are proprietors of their own business enterprises. Petitioners have the prerogative to lock a driver's computer if that driver does not comply with the SuperShuttle dress code, and to "fire" a driver for wearing a red-colored jacket when working at the LAX. A dress code requirement is an indicium of control by Petitioners over the franchisee-drivers, as well as a strong indication that the franchisee-drivers are not engaged in a distinct occupation or business. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal. App. 3d at p. 1372.)

2. *The operation of an airport shuttle van for the transportation of passengers is usually not done under the direction of the principal or by a specialist without supervision.*

Driving an airport shuttle van does not involve the kind of expertise which requires entrustment to an independent professional. The skill required on the

job is such that it can be done by employees rather than specially skilled independent drivers. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal.App.3d, at p. 1373.)

The *Air Couriers* court noted that simplicity of the work (taking packages from point A to point B), and regularity of daily routes in drivers' schedules, even though the driver had the discretion on when to take breaks or vacation, made detailed supervision, or control, unnecessary. Drivers were given delivery deadlines and had to notify the dispatchers when the delivery was complete. (*Air Couriers International v. Employment Development Department, supra*, 150 Cal.App.4th at pp. 947-948.)

3. *There is no affirmative evidence that specially skilled independent drivers are required to accomplish the desired result.*

We do not find sufficient evidence to support Petitioners' contention that the "drivers must exercise considerable skill - not only in negotiating the airports and city traffic, but also in doing so in compliance with the myriad legal requirements, and regulations which impact their chosen profession."

All drivers, whether employees or subcarriers, operating vehicles used in transportation for compensation are required to possess a class B driver's license under the PSC certificate. (Public Utilities Code § 1032(b)(1)(D), and CPUC General Order 158-A, section 5.02) Every vehicle driver who is licensed under the California Vehicle Code and willing to comply with Motor Carrier Safety provisions identified by the CPUC, is qualified to be a franchisee driver for Petitioners.

An analogy can be drawn between the skill level of an airport shuttle van driver and that of a taxicab or a courier driver. As stated in *Santa Cruz Transportation*, "there was no evidence that taxicab driving is an unskilled occupation. This finding is not affirmative evidence that taxicab driving is a skilled occupation, which might justify an inference of independent contractor status." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal.App.3d at p. 1377.) The work of a courier driver "did not require a high degree of skill and it was an integral part of the employer's business. The employer was thus determined to be exercising all *necessary* control over the operation as a whole." "The minimal degree of control that the employer exercised over the details of the work was not considered dispositive[.]" (*JKH Enterprises, Inc. v. Department Of Industrial Relations, supra*, 142 Cal. App. 4th at p. 1064.)

4. *Drivers provide the vans, but Petitioners supply the centralized reservation system and the customers; and control the geographical area of routes.*

Franchisees are not required to possess any special vehicles. They are required to possess vans that meet the System's specifications, including but not limited to make, model, color (blue), size (nine to 15-passenger), age and mechanical condition. Franchisees are required to modify the vehicles in accordance with the specifications set forth in the operation manual. Drivers can either lease their vehicles from Petitioners, or purchase them from other drivers or independent car dealers, but they have to grant Petitioners a security interest in their vans. (*Air Couriers International v. Employment Development Department, supra*, 150 Cal.App.4th at pp. 947-948.)

As stated herein previously, Petitioners provide and have complete control over the centralized reservations system, a highly technical computerized algorithm program that is the backbone of their dispatch system and business of providing "demand responsive and/or scheduled airport shuttle" service to their customers. Petitioners "loaned" to the drivers the SuperShuttle specialized communication transmission equipments, and other equipment, such as a headsign and credit card processing equipment upon the drivers' payment of a \$1,500 deposit.

5. *Drivers are mandated to enter into 10-year franchise agreement.*

Most franchisees purchased a 10-year franchise that is renewable for two terms of five years each, thus, the drivers are tenured for lengthy periods of time. (*Grant v. Woods, supra*, 71 Cal. App. 3d at p. 653.) In *Air Couriers*, the court concluded that the drivers were properly classified as employees for the purposes of the Unemployment Insurance Act, since most drivers had lengthy tenures in performing an integral and entirely essential aspect of the employer's business. (*Air Couriers International v. Employment Development Department, supra*, 150 Cal.App.4th at p. 939.)

6. *Petitioners unilaterally establish the formula for calculating the drivers' gross revenue, and the method of payments to the drivers.*

Petitioners require the drivers to record on a daily "trip sheet." The drivers must submit to Petitioners any vouchers and credit card slips they have received during the week. The credit card payments are payable to and processed by Petitioners or SuperShuttle. The driver keeps all cash received from the customers. On a weekly basis, Petitioners calculate the total gross revenue for each van based on the trip sheet submitted by the driver for that van. Petitioners then deduct from the gross revenue all the fees and expenses, including but not limited to the franchise, license, and system fees, and airport expenses.

The franchisees' income is dependent on the quantity of fares they transport. If they have sub-drivers operating their vans, they are obligated to pay the same fees to Petitioners for each van, but may pay their sub-drivers less than the weekly net proceeds generated by operation of that van. Drivers do not have to be on duty on any particular day, but unless Petitioners agree ahead of time, the

franchisees continue to make their payments to petitioners for their franchise, license and system fees; van lease if applicable; and for access to the dispatch system even when they are not working.

In *Santa Cruz*, the court determined that the fixed lease payment to Yellow Cab did not amount to an entrepreneurial risk and make the taxi driver more like independent businessperson than was the case in *Borello*. "The court there found little entrepreneurial character in the work because the workers were paid according to the size and grade of their crop, they did not set the price, and the risk that the crop might be unharvestable was no different from the risk they would run if they were employees." "In the first two respects the cabdrivers' work here is closely analogous: drivers did not set their own rates but were paid according to the number and distance of fares they carried. The only risk they ran beyond that in *Borello* was that in the worst case they might lose money on a given shift." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal.App.3d, at p.1375.) "[T]here is no basis for characterizing this risk as 'entrepreneurial.' There is no evidence that earnings varied with the drivers' skills, entrepreneurial or otherwise. The evidence on this point does not tip the balance far enough to warrant a result different from that in *Borello*." (*Ibid.*)

The evidence in the instant case has established that the franchisee-drivers do not set the rates of the fares, but are paid according to the quantity of fares less the sum of all the fees fixed by Petitioners. In accordance with the rationale in *Santa Cruz*, the franchisee-drivers are not exposed to any entrepreneurial risk since their earnings do not vary with their skills.

7. *The drivers perform an integral and entirely essential aspect of Petitioners' "demand responsive and/or scheduled airport shuttle services."*

The franchisee-drivers perform an integral and entirely essential aspect of the Petitioners' business. As stated in the SuperShuttle Unit Franchise Operation Manual, "*franchisees and employees ... are critical in delivering high quality service.*" [emphasis added] The drivers' work, though "on demand" by nature, is long-term in the business of airport shuttle transportation. This permanent integration of the drivers into the heart of Petitioners' business is a strong indicator that the drivers function as employees under the Unemployment Insurance Act. (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 150 Cal.App.4th at p. 939.)

As the court stated in *Arzate et al v. Bridge Terminal Transport* (2011) 192 Cal. App. 4th 419, 427, "while defendant asserts that its business is to "mak[e] arrangements between customers and the owner-operators of trucks for the movement of containers" and that plaintiffs "did not perform work that was part of [defendant's] regular business," that claim is belied by defendant's own

documentation, which states, correctly, that defendant is a "common carrier by motor vehicle, engaged in the business of transportation of property" Thus, the work plaintiffs do "is a part of the regular business of the principal", a factor suggesting employee status. (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal. 3d 341, 351.)

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service." (*S. G. Borello v. Department of Industrial Relations, supra*, 48 Cal.3d at p.357.)

Contrary to Petitioners' description, the essence of their enterprise is not merely granting to the franchisees the right to use the "reservation system" and be "part of SuperShuttle's comprehensive marketing plan," as "required under franchise law." They cultivate the passenger market by soliciting passengers, processing requests for service through a centralized reservation and dispatching system, requiring shuttle vans be distinctively painted and marked with their brand colors of blue and yellow and SuperShuttle logo, and concerning themselves with various matters unrelated to the franchisor-franchisee relationship.

Petitioners' stated mission is not merely to sell a reservation system or a marketing plan to franchisees, but to operate an airport transportation business by using franchisee drivers to accomplish their mission. The drivers, as active instruments of the SuperShuttle enterprise, provide an essential and indispensable service to Petitioners. Petitioners cannot survive without the drivers. (*S. G. Borello v. Department of Industrial Relations, supra*, 71 Cal. App. 3d at p. 653; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Board, supra*, 235 Cal.App.3d, at p. 1376.)

8. *Petitioners believe that they have created a franchisor-franchisee relationship that classifies the drivers as "independent contractors," but the drivers believe the nature of their work as "employees" has not changed since their status was converted to "franchisees."*

The unit franchise agreements identify the drivers as independent contractors, and many of the drivers believe that to be their correct status. However, the drivers' testimony at hearing has established that the nature of their work as "employees" has not changed since their status was converted to "franchisees." Franchisee-drivers perform essentially the identical work they had carried out when they were previously known as employees, even after the conversion of their employment status from "employee" to "franchisee." Drivers continue to transport passengers who have made reservations directly with SuperShuttle, to and from designated airports.

III. Conclusion

The fact that the franchisee airport shuttle van drivers are performing work and labor for Petitioners is *prima facie* evidence of employment, and the drivers are presumed to be employees unless Petitioners affirmatively prove otherwise. After evaluating the franchise agreement and the relationship between Petitioners and the franchisee drivers, we conclude that Petitioners have not sustained their burden of proof in establishing that the franchisee shuttle van drivers are independent contractors. Thus, we find that the franchisee airport shuttle van drivers are employees under common law and California law.¹⁰ The

¹⁰ Petitioners placed erroneous reliance on a panel decision of this Board that had no precedential value, "M & M Luxury Shuttle Inc.," No. AO-160078(T), issued on June 17, 2008, affirming OA Decision No. 2056607 that was mailed by the San Francisco Office of Appeals on January 11, 2008. The rules regarding precedent decisions of this agency are contained in Unemployment Insurance Code section 409, and California Code of Regulations, Title 22, section 5109. We take official notice under California Code of Regulations, title 22, section 5009(a) that Case No. AO-160078(T) was not designated a precedent decision by the Appeals Board and was not published as such. It is not listed in the index of said decisions. Neither this Board nor any other entity is bound by the holding of Case No. AO-160078(T). (P-T-495, at p. 7, fn.5.)

Petitioners cited two federal district court decisions in their Appellants' Brief. The first case was *Juarez v. Jani-King of California, Inc.* in which the Court granted Jani-King's motion for summary judgment with respect to the plaintiff's labor claims. (Case No. 09-03495 SC, United States District Court for The Northern District Of California, 2012 U.S. Dist. LEXIS 7406, 2012 WL 177564, January 23, 2012). Subsequently, the United States District Court for The Northern District Of California, entered an "order granting plaintiffs' motion for certification pursuant to 28 U.S.C. § 1292(b) and staying further proceedings pending appeal." The court reasoned, "A district court may certify for appellate review any order that, in the court's opinion, "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] [where] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b)." (Case No. 09-03495 SC, 2012 U.S. Dist. LEXIS 19766, February 16, 2012.) Under these circumstances, it would not prudent for this Board to refer to the court decision entered on January 23, 2012, and reported in U.S. Dist. LEXIS 7406, 2012 WL 177564.

The second case is *Ruiz v. Affinity Logistics Corporation* (Case No. 05CV2125 JLS (KSC), United States District Court For The Southern District Of California, 2012 U.S. Dist. LEXIS 121477, 2012 WL 3672561, August 27, 2012.) Affinity, a Georgia corporation, provided regulated, for-hire home delivery and transportation logistics support services to various home furnishing retailers, including Sears. The facts in *Ruiz* are distinguishable from those in the instant cases. For instance, before starting his work for Affinity, Ruiz formed his own business, R&S Logistics ("R&S"), by obtaining a Federal Employer Identification Number and establishing a separate business banking account for R&S. (*Id.* at *5) Ruiz had total control over his start and end time. (*Id.* at *14.) Affinity's control over work details and requirements were attributable to a need to comply with federal regulation or with [their clients'] requirements. (*Id.* at *16.) The drivers "selected or were assigned their routes based on scores they received from customer surveys conducted by Affinity's clients. (*Id.* at *21.) There was a "mutual termination provision" in the contract between Affinity and Ruiz which could be terminated "without cause upon sixty-days written notice." (*Id.* at *27.) Ruiz and other drivers were required to possess substantial skill in proper delivery and appliance-installation, "especially considering the dangers involved in installing appliances hooked to gas lines, or the potential water damage that may arise." (*Id.* at *30-31.) The drivers "were, on occasion, able to negotiate a higher payment for an individual delivery which proved to be particularly difficult." (*Id.* at *38.) Ruiz and other drivers "were required to and did form their own businesses before contracting with Affinity." (*Id.* at *42.)

employment status determination herein covers every driver, including sub-driver, who performs airport shuttle transportation service for Petitioners, regardless of whether or not the driver has hired sub-driver(s) or is in a partnership with another driver or other drivers, or has conducted occasional private charter operations.

DECISION

The decisions of the administrative law judge are affirmed based on the rationale stated herein. The petitions for reassessment are denied.

We do not find *Ruiz* to be persuasive authority, due to the numerous factual differences between that case and our cases. In addition, "[T]he rule [of stare decisis] under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) This Board has chosen not to refer to the *Ruiz* decision for the reasons stated herein.

TO SEEK JUDICIAL REVIEW OF ANY PORTION OF THIS TAX DECISION:

Denying or Dismissing Any Portion of a Claim for Refund:

The petitioner may seek judicial review of any portion of this decision denying or dismissing any portion of its claim for refund by filing an action in the Superior Court in the County of Sacramento against the Employment Development Department (EDD) Director. (Unemp. Ins. Code, § 1241.)

Regarding Reserve Account Charge or Rate Protest or Reserve Account Transfer:

The employer may seek judicial review of a decision on an appeal from a denial of a protest to a reserve account charge or contribution rate, or a decision on an appeal from a denial or granting of an application for transfer of a reserve account, by filing an action in court against the EDD Director. (Unemp. Ins. Code, § 1243.)

Adverse to the Employment Development Department:

EDD may seek judicial review of any portion of this decision adverse to it.

Otherwise:

Judicial review of a decision other than as set forth above may be obtained only upon conclusion of the administrative process, including the payment of sums owed and the filing of a claim for refund with EDD. (Unemp. Ins. Code, §§ 1178, 1241.)

"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." (California. Const., art. XIII, § 32.)

No action that would tend to impede the collection of employment taxes, including a suit for injunctive relief or an action for declaratory relief or mandamus, may proceed in court. (Unemp. Ins. Code, § 1851; *Modern Barber Colleges, Inc. v. Calif. Emp. Stabil. California*. (1948) 31 California.2d 720; *First Aid Services v. California. Emp. Dev. Dep.* (2005) 133 California.App.4th 1470; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 California.3d 805, 838, quoting *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 California.3d 277, 280-281; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 California.3d 208, 214.)

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD



OFFICE OF TAX PETITIONS
2400 Venture Oaks Way, Ste 200
SACRAMENTO CA 95833

(916) 263-6733

SUPERSHUTTLE INTERNATIONAL INC
c/o MARRON & ASSOCIATES LAWYERS
Account No: 326-5719-9
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. **3214568 (T)**

Issue(s): REASSESS

Date Petition Filed: 03/25/2010

Date and Place of Hearing(s):

- (1) 12/14/2010 Long Beach
- (2) 02/10/2011 Long Beach
- (3) 07/18/2011 Sacramento

Parties Appearing:

- Petitioner, Department
- Petitioner, Department
- Petitioner, Department

DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.

David E. Johnson, Administrative Law Judge

FILE COPY

Date Mailed: DEC 08 2011

Case No.: 3214568

Office of Tax Petitions

CLT/PET: Supershuttle International Inc. ALJ: David E. Johnson

Parties Appearing: Petitioner, Department

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The petitioner filed a petition for reassessment of a department assessment issued under Unemployment Insurance (UI) Code section 1127 for the period July 1, 2006, through June 30, 2009. The issues in this case are whether the workers were employees of the petitioner and, if so, whether the petitioner is liable for unemployment, employment training, and disability contributions, personal income tax withholdings, and interest.

FINDINGS OF FACTS

In case number 3214568 the department issued assessment number 22 under section 1127 of the code on March 12, 2010, covering the period of January 1, 2007, through June 30, 2009. The assessment was issued against Supershuttle International Inc. and SFO Airporter Inc.

In case number 3214569 the department issued assessment number 4 under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006 through December 31, 2006. This assessment was issued against Supershuttle Los Angeles.

In case number 3214570 the department issued assessment number 28 under section 1127 of the code covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Supershuttle of San Francisco.

In case number 3214571 the department issued assessment number five under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Sacramento Transportation System.

The assessments dealt with operations in the Sacramento, San Francisco, and Los Angeles areas. Assessments four, five and twenty-eight were issued against the local entities operating in those areas and only covered the third and fourth quarters of 2006. The larger assessment against Supershuttle International and SFO Airportes INC covered the remainder of the assessment period and includes the operational activities carried out in Los Angeles, San Francisco and Sacramento together in one assessment. No penalty was assessed under section 1127 of the code on any of the assessments.

All of the assessments concerned franchise drivers operating Supershuttle vans in the Sacramento, San Francisco and Los Angeles airports driving clients to and from the local airports.

Supershuttle operated as a passenger stage corporation licensed as such by the California Public Utilities Commission (PUC). As such the petitioner was licensed to operate at the various airports but, as a condition of its PUC license, had to also have authorization from the individual airports in order to conduct business there. The petitioner was not authorized to conduct a taxi type transportation system. Supershuttle could only operate under the name it had licensed with the PUC and had to include their PUC number in any advertising they did. The petitioner had to register all vehicles operating under its PUC license with the PUC and have those vehicles identified to the PUC. All of the vehicles had to be certified as complying with the various California Highway Patrol and Motor Carrier Safety provisions for their safety. The petitioner's name and vehicle number had to be displayed on each vehicle operated under its license number. Every driver of a vehicle had to be licensed under the California vehicle code and had to comply with Motor Carrier Safety provisions identified by the PUC. Each driver had to be subject to having his or her driving record inspected by the petitioner and a vehicle could not be operated by any driver who was presumed to be negligent under certain provisions of the vehicle code.

A unique provision of the PUC requirements found in section 5.03 of General Order 158-(A) of "the Public Utilities Commission stated as follows" DRIVER STATUS. Every driver of a vehicle shall be the certificate holder or under complete supervision, direction and control of the operating carrier and shall be:

- (A) an employee of the certificate holder; or,
- (B) an employee of a subcarrier; or,
- (C) an independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier. "

The petitioner was required by the PUC to maintain in its office a set of records on the services it performs which includes the tariffs, timetables and number of passengers transported by each of its drivers. The PUC staff had the right to enter the petitioner's premises to inspect the petitioner's books and records and to inspect each and any vehicle used to drive for the petitioner. Supershuttle was required to file its tariff (charges to passengers for transportation services,) and timetables for providing its service. That information was to be considered a public record, for use of the general public, and had to be published in a manner that was readable and easily understood. In addition, because the petitioner was serving the airport it had to post that information in each vehicle used to provide service to the airport and in each location where airport tickets were sold. In addition to information describing its charges the posted information also had to

describe the complaint procedures that customers could use. The PUC also required that Super Shuttle adhere to any airport rules when serving an airport. The petitioner then entered to service agreements with the various airports. The agreements authorized Supershuttle to transport passengers as a passenger stage corporation between certain designated areas around the airport and the airport itself. As part of an agreement the petitioner would deliver passengers to the airport and pick passengers up at the airport for delivery to hotels and homes. Each of the agreements provided Supershuttle with a nonexclusive concession to transport passengers. But, limited concessions were granted so the petitioner's agreement provided a valuable access to the airport which was limited to a few companies. All of the agreements contained extensive rules that Supershuttle had to follow. For instance, the San Francisco agreement contained approximately 50 pages of such rules. Generally, each airport's agreement required that the vans used to transport passengers be neat and clean, that the vans undergo regular maintenance and records of that maintenance had to be kept by Supershuttle, that the vans have a uniform appearance and identification of the petitioner's name with a uniform color, the drivers had to be neat and clean, the drivers had to have uniforms and identification, the drivers had to be courteous and the drivers could not solicit passengers on the airport grounds, all pick-ups had to be scheduled through Supershuttle, there could be no advertising in the vans for the sale of items, drivers had to be with the vans at all times and could not leave their van when it was parked at an airport curb. All airports had specific rules for picking up passengers that required that the vans wait in a specific holding area and that they be released to go to the curb to pick up passengers at the terminal in a controlled manner, a few vans at a time and be released to a specific location at the curb. Each of the airport agreements required specific recordkeeping to be kept by Supershuttle of the drivers activities, the required safety training for the drivers, required a certain radio dispatch system and provided that any misconduct by the driver could affect the contract Supershuttle had to service the airport. The fares were regulated and the fare rates were set forth in the agreements with the various airports. The vans were required to maintain a certain level of insurance and were required to transport passengers who had agreed to use Supershuttle for transportation.

At each airport location there was a designated staff person charged with the responsibility to enforce the airport rules. At the San Francisco Airport that activity was provided by a contractor for the airport. At other airports that activity was provided by a Supershuttle staff person with review by airport employees.

In addition to license from the PUC as a common carrier and contracts with the various airports to provide transportation services for passengers, Supershuttle then entered into franchise agreements with individuals to be the drivers of the vans servicing the airports. Some franchise agreements were for a one year term when the program was first begun. The normal franchise agreement was

for a period of 10 years and cost between \$18,000 and \$42,000, depending upon the location of the franchise, the time the franchise was entered into and the success of the program and the number of hours per day the franchise driver would operate. But, most franchise agreements were for between \$20,000 and \$30,000 for the 10 year period. The franchise agreement could also be extended for two additional five year terms at a cost of \$1,000 for each extension. Most drivers financed the entire franchise fee by making payments to Supershuttle for the first seven years of the ten year franchise period. The franchise agreement authorized the franchise drivers to provide driving services to the various airports pursuant to the agreement Supershuttle had with the various airports. The franchise driver could purchase either an a.m., p.m., or 24 hour franchise and could alternate between those types of agreements during the year. Each of the franchise agreements identified the specific airports to which the driver was licensed to provide services. The driver had to provide a vehicle and that vehicle had to be the proper size and color to meet the Supershuttle requirements. Supershuttle would then add its logo and color scheme to the vans which had to be a blue color. The franchise drivers were required to maintain the mechanical condition and the appearance of their vehicles in accordance with a preventative schedule provided by Supershuttle. Supershuttle is also authorized to inspect the vehicle from time to time and to maintain a record system on the maintenance of the vehicle. The franchise agreement required the driver to undergo training by Supershuttle and allowed the franchise agreement to be terminated if the driver did not complete the training program to Supershuttle's satisfaction. The franchise drivers were required by the agreement to comply with all rules and regulations imposed by the California Public Utilities Commission. The Public Utilities Commission had also required the petitioner to follow all airport rules so, in effect, the drivers were agreeing in the franchise agreement to follow all of the rules imposed on drivers by the various airports they served. The franchise agreement obligates the drivers to accept assignments to transport passengers and to charge the fees set by Supershuttle including special arrangements Supershuttle may have and vouchers and coupons it had issued to customers. The agreement could be terminated at anytime by the driver and, upon such termination, the driver was no longer liable for additional franchise payments. Supershuttle also, could terminate the agreement if it believed it would be in the best interest of Super Shuttle to terminate the driver's agreement and the driver was then relieved of any additional franchise payments. But, there was no evidence of such a termination ever occurring and some Supershuttle managers were not aware of that provision in the agreement. Most drivers paid their franchise fee by regular weekly payments so, if a franchise was terminated by either Super Shuttle or the driver the payments would cease and no additional payments for the franchise would be made.

The franchise drivers were allowed to hire additional drivers to drive their van under the franchise they had with Supershuttle upon the approval of the driver by Supershuttle.

Most franchise drivers drove their own vans and had no other helpers. Many Supershuttle drivers did have employee drivers of their own that drove the van under their franchise agreement. A few of the franchise drivers had multiple vans and multiple employee drivers of their own. All employee drivers of the franchisees' were subject to the approval of Supershuttle and had to follow all the same rules and regulations as the franchise drivers themselves.

The drivers had a personal communication device (Nextel phone) that they used to communicate with Supershuttle when picking up passengers. The driver would sign on to the device when he was ready to begin picking up passengers at the beginning of his morning or evening shift. The device would then start sending to the driver identification of driving jobs for passengers who needed transportation to an airport. The driver would be told where the pick-up was. The device itself recorded the GPS coordinates of the driver's location and would only send jobs to the driver that were located within his immediate area. The driver could identify how long it would take him to get to the airport from that pick-up location and how many pick-ups (a maximum of four) were included in the job. The rates of Supershuttle were a flat fee for each individual transported to the airport. So a pick-up with a number of individuals a short distance from the airport was more valuable than a pick-up of one individual by him or herself a far distance from the airport. Drivers could accept or not accept the various jobs that appeared on the screen. A driver could also accept a job on a screen and then, as more information developed about the job, back out of that job and, in effect, change his mind. If the pick-up time was close Supershuttle would try to talk a driver out of refusing a job the driver had previously accepted but, in the end if the driver changed his mind and decided not take that job, his wish would be honored by Supershuttle. If no van was available to pick-up a passenger because no driver had accepted that job or drivers had backed out of previous agreements to take the job then Supershuttle would send a taxi to pick-up that passenger and transport the passenger to the airport.

When the driver accepted a job he or she transported the passengers to the airport, accepted payment for the ride from the passenger either in the form of a Supershuttle voucher, a credit card charge or cash. The driver would then drop off the passenger at the airport and leave the airport.

At that point the driver had a choice, the driver could then get line to take passengers from the airport to homes and hotels or go back into the territory the driver normally worked to service another pick-up job or wait for additional jobs to be announced on the Nextel phone screen.

If a driver decided to pick-up passengers from the airport the driver would report to a waiting area managed by Supershuttle. An airport manager at the curb of the pick-up location would then notify the holding area when a van was needed at the curb. There were usually a limited number, up to four, vans at the curb of the pick-up area. That van would then pick-up passengers who had arranged for service through Supershuttle and transport them to their home or hotel and pick-up the fee charged by Supershuttle from the passenger. A Supershuttle driver could not on his own make arrangements with the passenger to pick-up that passenger at the airport or at the individual person's home or hotel for transportation to the airport. All pick-ups had to be arranged through Supershuttle. The drivers chose how much time they wanted to spend at the airport picking passengers up and waiting in the waiting area and how much time they wanted to work out in their territory picking up passengers for delivery to the airport. The drivers also chose which of the pick-up jobs from the territory to the airport that they wished to take. Once the driver was in the line at the airport the driver could choose to leave that line and go back out into the field to pick-up passengers. But, if he stayed at the airport he had to pick-up the next passenger in line at the airport according to the driver's position in line.

All fees were set by Supershuttle pursuant to their agreement with the various airports. A driver was not free to change a fare. The driver was also required to accept any discounted vouchers that passengers had received from Supershuttle. At times Supershuttle would provide discounted rates for special groups or occasions.

Each driver had to maintain a list of each fare transported and the fee received for that fare. Each week the driver had to submit that list to Supershuttle and Supershuttle would calculate the fees owed by the driver to Supershuttle. The driver would also submit to Supershuttle the various vouchers and credit card slips he had received during the week. If the total of that amount exceeded what was owed to Supershuttle, Supershuttle would provide payment to the driver. If not, the driver would then submit additional amounts to Supershuttle. The driver kept all cash received from the customers.

On a weekly basis the drivers paid Supershuttle their weekly payment on the franchise purchase, a license fee of 25 percent of all fares collected in order to use Super Shuttle's license with the airport, a system fee of \$250 for a.m. or p.m. shift or \$375 for a 24 hour shift to use the Super Shuttle dispatch system, an airport loop fee calculated by each visit the van made to an airport and a vehicle payment if the driver had purchased or leased a vehicle from Supershuttle. On average those fees would total about \$750 a week. In addition the driver purchased insurance through Supershuttle and paid for his own gas and maintenance of the van.

As set forth above some drivers leased their van from Supershuttle or purchased it from Supershuttle. Other drivers purchased their vans from other drivers who were leaving their franchise or from independent car dealers. The average price paid for a used van was \$12,000. New vans cost considerably more and some drivers did buy new vans. The vans had to be a certain make and model that would carry nine passengers and had to be painted the Supershuttle blue.

Before a driver was signed on as a franchisee he had to take one to four days of training consisting of certain safety requirements, map reading and training on how to use the Nextel phone system. The amount of training was determined by Supershuttle depending upon the previous experience of the driver.

Drivers themselves had to receive their own license from the PUC as a subcarrier of the petitioner as a charter party carrier (a TCP License). That license authorized the driver to perform services under the authority of a company licensed as a passenger stage corporation (such as Supershuttle). The driver could work for any company that had such a license but, had to be listed as a driver for only one such company at a time. Other company's also had agreements with the airports to transport passengers and were also licensed with the PUC. A driver could choose which company he wanted to drive for but, he could not drive for two companies simultaneously.

The drivers did own the vans that they were purchasing. As a result, they could use those vans for personal use during off hours and could also use those vans to provide a private charter service to and from locations not including airports. When the driver did use a van for private charter, which did not happen very often, the driver had to notify Supershuttle and the PUC and had to pay a license fee to Supershuttle and use the Supershuttle set rate of \$55 an hour.

The drivers did not do any of their own advertising because they could only operate to serve Supershuttle customers.

Because the drivers were required to comply with the airport and PUC rules, they all wore set uniforms, had identification, drove vans that all looked identical identifying Supershuttle as the carrier, maintained their vans without any personal accessories inside the van and kept the vans neat and clean for customers.

The income of the van drivers was determined by how many fares they carried. After they paid the fees to Supershuttle they kept the remainder of the money received from passengers. If they had drivers operating their vans in their place, they still had to pay the same fees to Supershuttle but may pay their employee or helper drivers less and make additional income on that driver's service.

The franchise agreements did identify the drivers as independent contractors and many of the drivers believed that was their correct status.

When a driver received a job offer on his Nextel phone the screen would provide a summary of that job for approximately one minute. If it is was not accepted within that minute then the job would disappear and it would no longer be available to the driver. He would then wait for additional jobs to pop up. There would normally be two or three jobs on each screen that the driver could choose from or delete to wait for additional jobs he thought would be more profitable.

If there was a job that did not provide adequate income to drivers so that it was not being accepted, such as a lone individual 25 miles away from the airport, a dispatcher may contact a driver and provide inducements to that driver to accept that job. Inducements would include an exclusive opportunity to pick-up a future job that was a short distance to the airport with numerous individuals providing a high income and low cost to the driver. If the driver then accepted the hard to sell job, the driver would then later be sent an exclusive opportunity to accept the higher income job as a reward for taking the prior low income job that was not being served. Again, if no driver could be induced to take a low income job a taxi service was used and paid for by Supershuttle.

Drivers could take vacation when they wished but, unless Supershuttle agreed ahead of time, they continued to make their normal weekly payments to Supershuttle when they were not working. There was no requirement that a driver be on duty any particular day but, if the driver was not on duty and did not pick-up any fares, he still had to make his payments to Supershuttle for his franchise, van lease and system fee for access to the dispatch system.

A driver could also sell his franchise, with approval from Supershuttle to a new franchisee and could in essence develop some goodwill he could sell. If the franchise was paid off in seven years, which was the normal payment duration, the last three years the driver did not pay a franchise fee and, if he sold his franchise would have cash in his pocket.

The driver was free to determine what route he should take from the pick-up location to the airport and from the airport to the drop off location.

REASONS FOR DECISION

If the department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part

of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

“Employee” includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

- (a) The extent of control which may be exercised over the details of the work;
- (b) Whether or not the one performing services is engaged in a distinct occupation or business;
- (c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;
- (d) The skill required in the particular occupation;
- (e) Who supplies the instrumentalities, tools and place of work for the one performing services;
- (f) The length of time for which the services are to be performed;
- (g) The method of payment, whether by time or by the job;
- (h) Whether or not the work is part of the regular business of the principal;
- (i) Whether or not the parties believe they are creating a relationship of master and servant; and
- (j) Whether the principal is or is not in business.

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (*Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

In Empire Mines Company, Limited v. California Employment Commission (1946) 28 Cal 2^d 33; 168 P2d 686 the California Supreme Court issued a decision concerning control exercised by a mining company over its leasee miner. In the lease agreement the parties entered into the mining company was authorized to visit the minors work location once a month to ensure the leasers compliance with the safety orders of the Industrial Accident Commission did not constitute the exercise of control by an employer over an employee. In essence, because the rules were required by a government entity, compliance with those rules by the employer was not the exercise of control of an employer over an employee. (*Empire Star Mines Limited, v. California Employment Commission, supra* 28 Cal. 2^d at pp. 40-41, 44-45. In *Southwest Research Institute v. Unemployment Insurance Appeals Board* (2000) 81 Cal. App. 4th 705; 96 Cal Reporter 2^d 769, a worker was performing services collecting samples of gasoline from retail service stations which are tested to assure compliance with various federal, state and industrial standards. The worker was required to follow very precise and detailed instructions as to the manner in which he was to collect the sample and in the manner in which he was to package them and ship them back to the employer. Everything the worker did was contained in those specific instructions. Other than that the only thing he did to complete his job was to submit an invoice to the employer for his work. In that case the court found that all of the instructions concerning the collecting and transmitting of the gasoline samples, including the requirement of one day training on the technique, were dictated by the United States and Environmental Protection Agency, the Reformulated Gasoline Survey Association and the Federal Aviation Association. In that case the court applied the rules set forth in *Empire Star Mines*, that compliance with government safety regulations does not establish control necessary for employment to exist, to the task completed by the worker collecting the gasoline samples. The court characterized all of the very precise and detailed instructions the worker was required to follow as government regulations necessary to comply with health and safety standards and therefore did not allow those controls to be sufficient to establish an employment relationship (*Southwest Research Institute v. Unemployment Insurance Appeals Board*, 81 Cal. App. 4th at 709-710).

As a result of those two cases, compliance with government mandated health and safety rules does not establish control necessary for an employment relationship. Those controls, while exercised by the punitive employer over the punitive employee, just do not count in establishing controls necessary for an employment relationship to exist. Other additional controls must exist in order to establish an employment relationship. Because those factors are neutral, they also do not establish an independent contractor relationship. Compliance with government health and safety requirements just do not count in identifying control or lack of control over the worker.

In this case many of the activities of the drivers were controlled by the PUC and the various airports, which rules were also adopted by the PUC and required to be followed by Supershuttle. Some of the rules clearly are of a health and safety nature such as proper maintenance of the vans. But, many of the controls are for customer convenience such as color of the vans, uniforms of drivers, courteous treatment by drivers, clean inside vans, no advertising for additional items in vans, etc. *The Empire Star Mines* and *Southwest Research* cases do not identify customer convenience rules of a government entity as those which are covered by the exclusion. But, there are no cases that draw a clear distinction between health and safety rules and other rules mandated by government entities that businesses such as Supershuttle must follow. Because the customer convenience rules are government imposed rules which Supershuttle must follow in order to conduct business, they will be considered of the same nature as the health and safety rules set forth in the previous two cases and those controls themselves can not be used or counted towards controls necessary to establish an employment relationship.

Even the PUC requirement found at paragraph 5.03 of General Order 158-A which requires Supershuttle as a certificate holder to have complete supervision direction and control of the driver does not establish the control necessary for an employment relationship because that language has been construed only to be referring to supervision, direction, and control over drivers with respect to health safety and service reliability issues (*Kairy v. Supershuttle International Inc.*, 9th Circuit Court of Appeals, Decision Number CV08-2883 filed November 3, 2011). In short, while a substantial part of the drivers daily activity is controlled by Supershuttle pursuant to the requirements of the PUC and the various airport contracts, those controls, such as uniforms, van color, behavior of the driver, etc are not controls that can be used to establish an employment relationship. Although, they do show a lack of decision making ability by the drivers themselves.

While the franchise agreement does describe the drivers as independent contractors, the fact that the parties may have mistakenly believed they were

entering into that relationship is not conclusive and an analysis of the working relationship is necessary to establish whether their belief was correct.

The franchise agreement could be terminated at any time by the driver without any further liability. If the driver terminated the relationship, the franchise payments stopped and the driver no longer had to make any payments to Supershuttle. If the driver was purchasing his own van he may be stuck with a van but, he could sell that van as a normal automobile sale and, the vans were not so expensive as to be a substantial investment in a business that would be lost by the driver if he terminated his franchise. The franchise agreement could also, by its terms, be terminated by Supershuttle at anytime Supershuttle believed it was in their best interest. But, there was no evidence of that actually happening or even that some management staff knew that right existed. As a result while this factor may show some indication the workers were employees because they could get out of the relationship easily, it is a weak indicator because it did not appear that Supershuttle believed or understood it could get out the relationship easily or freely.

Driving of vans by a taxi or delivery type driver or a Super Shuttle driver is not the kind of activity that is normally subject to direct supervision by an employer. As a result, this factor would indicate independence.

Generally driving by taxi cabs and package delivery drivers has not been considered a skilled occupation, most people are capable of driving and therefore the drivers are not providing a professional service in their driving skill to Super Shuttle (*Air Couriers International v. Employment Development Department*, (2007), 150 Cal. App. 4th 923 at 937 and *Anthony Estrada v. Fed Ex Ground Package System* (2007)154 Cal. App. 4th 1 App. p. 21). While the drivers may have shown some entrepreneurial skill to make money driving the van, that skill will be analyzed later and is not part of the analysis of the skill of driving itself. Because the skill was not a professional service this factor would tend to indicate employment.

It is the driver that provided the van and his or her own PUC License through the PUC. But, Supershuttle provided the dispatch system, the customers and access to the airports which the drivers themselves did not have. Supershuttle in effect provided substantially more of the infrastructure, tools and place of work, necessary to do the job than the drivers did. This factor would indicate employment.

Both the driver and Super Shuttle expected the 10 year franchise to last for 10 years. As a result both believed that the service would be ongoing for a period of time which would indicate a continuing relationship and an employment relationship.

The method of payment was by the job not by the hour which would tend to indicate independence.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

Supershuttle provided a PUC license as a common carrier which was necessary for the drivers to transport passengers. Supershuttle also provided license agreements with the various airports in which they agreed to provide the airports with passenger transportation services through vans. Clearly the driving of vans to the airport to deliver and pick-up passengers was part of the regular business of Supershuttle and it is how they made their money. They made no money if passengers were not moved to and from the airport in the vans. It is Supershuttle that advertised for the customers and it is Supershuttle that provided the customers to the drivers. Clearly, the drivers were performing services in the course of Supershuttle's business.

The drivers had considerable freedom in the way they did their business. Drivers could decide what time they wanted to start work, they could decide which of the driving jobs they wanted to take and they could decide which route they wanted to use to complete the driving assignment. The drivers did purchase their own vans and some had their own employees assisting in the driving. The drivers decided which jobs to take and how to manage their daily business so that they decreased their expenses for gas and wear and tear on the van while increasing the passengers they carried and fares they earned. The drivers did have substantial entrepreneurial ability that they used to make a living. But, the drivers could not exercise any of that entrepreneurial ability without their connection to Supershuttle. Supershuttle provided all of their customers and it provided the rates the drivers would charge. The drivers were not free to charge their own rates and that is why certain fares were productive because the set rates by Supershuttle through its agreements with the airports did not allow the driver to make enough money for long distance trips. The drivers were only providing service to one customer, Supershuttle. If they lost that customer, they would be out of work. As a result, the drivers are not providing an independent business service to Supershuttle. Following the modern tendency, because the drivers are not providing a professional service or an independent business to Supershuttle and because their driving is an integral part of the regular business of Super Shuttle they are found to be employees of Supershuttle in accordance with *Santa Cruz Transportation* and *S. G. Borello & Sons*.

DECISION

The petition is denied. The franchise drivers are found to be employees of Supershuttle and the assessments are sustained. Supershuttle is liable for tax and interest as described in the assessments.

OTP:lsh



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SUPERSHUTTLE LOS ANGELES INC
c/o MARRON & ASSOCIATES LAWYERS
Account No: 445-8344-1
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. 3214569 (T)

Issue(s): REASSESS

Date Petition Filed: 03/25/2010

Date and Place of Hearing(s):

- (1) 12/14/2010 Long Beach
- (2) 02/10/2011 Long Beach
- (3) 07/18/2011 Sacramento

Parties Appearing:

None
None
Petitioner, Department

DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.

David E. Johnson, Administrative Law Judge

FILE COPY

Date Mailed: DEC 08 2011

Case No.: 3214569

Office of Tax Petitions

CLT/PET: Supershuttle International Inc. ALJ: David E. Johnson

Parties Appearing: Petitioner, Department

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The petitioner filed a petition for reassessment of a department assessment issued under Unemployment Insurance (UI) Code section 1127 for the period July 1, 2006, through June 30, 2009. The issues in this case are whether the workers were employees of the petitioner and, if so, whether the petitioner is liable for unemployment, employment training, and disability contributions, personal income tax withholdings, and interest.

FINDINGS OF FACTS

In case number 3214568 the department issued assessment number 22 under section 1127 of the code on March 12, 2010, covering the period of January 1, 2007, through June 30, 2009. The assessment was issued against Supershuttle International Inc. and SFO Airporter Inc.

In case number 3214569 the department issued assessment number 4 under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006 through December 31, 2006. This assessment was issued against Supershuttle Los Angeles.

In case number 3214570 the department issued assessment number 28 under section 1127 of the code covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Supershuttle of San Francisco.

In case number 3214571 the department issued assessment number five under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Sacramento Transportation System.

The assessments dealt with operations in the Sacramento, San Francisco, and Los Angeles areas. Assessments four, five and twenty-eight were issued against the local entities operating in those areas and only covered the third and fourth quarters of 2006. The larger assessment against Supershuttle International and SFO Airportes INC covered the remainder of the assessment period and includes the operational activities carried out in Los Angeles, San Francisco and Sacramento together in one assessment. No penalty was assessed under section 1127 of the code on any of the assessments.

All of the assessments concerned franchise drivers operating Supershuttle vans in the Sacramento, San Francisco and Los Angeles airports driving clients to and from the local airports.

Supershuttle operated as a passenger stage corporation licensed as such by the California Public Utilities Commission (PUC). As such the petitioner was licensed to operate at the various airports but, as a condition of its PUC license, had to also have authorization from the individual airports in order to conduct business there. The petitioner was not authorized to conduct a taxi type transportation system. Supershuttle could only operate under the name it had licensed with the PUC and had to include their PUC number in any advertising they did. The petitioner had to register all vehicles operating under its PUC license with the PUC and have those vehicles identified to the PUC. All of the vehicles had to be certified as complying with the various California Highway Patrol and Motor Carrier Safety provisions for their safety. The petitioner's name and vehicle number had to be displayed on each vehicle operated under its license number. Every driver of a vehicle had to be licensed under the California vehicle code and had to comply with Motor Carrier Safety provisions identified by the PUC. Each driver had to be subject to having his or her driving record inspected by the petitioner and a vehicle could not be operated by any driver who was presumed to be negligent under certain provisions of the vehicle code.

A unique provision of the PUC requirements found in section 5.03 of General Order 158-(A) of "the Public Utilities Commission stated as follows" DRIVER STATUS. Every driver of a vehicle shall be the certificate holder or under complete supervision, direction and control of the operating carrier and shall be:

- (A) an employee of the certificate holder; or,
- (B) an employee of a subcarrier; or,
- (C) an independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier. "

The petitioner was required by the PUC to maintain in its office a set of records on the services it performs which includes the tariffs, timetables and number of passengers transported by each of its drivers. The PUC staff had the right to enter the petitioner's premises to inspect the petitioner's books and records and to inspect each and any vehicle used to drive for the petitioner. Supershuttle was required to file its tariff (charges to passengers for transportation services,) and timetables for providing its service. That information was to be considered a public record, for use of the general public, and had to be published in a manner that was readable and easily understood. In addition, because the petitioner was serving the airport it had to post that information in each vehicle used to provide service to the airport and in each location where airport tickets were sold. In addition to information describing its charges the posted information also had to

describe the complaint procedures that customers could use. The PUC also required that Super Shuttle adhere to any airport rules when serving an airport. The petitioner then entered to service agreements with the various airports. The agreements authorized Supershuttle to transport passengers as a passenger stage corporation between certain designated areas around the airport and the airport itself. As part of an agreement the petitioner would deliver passengers to the airport and pick passengers up at the airport for delivery to hotels and homes. Each of the agreements provided Supershuttle with a nonexclusive concession to transport passengers. But, limited concessions were granted so the petitioner's agreement provided a valuable access to the airport which was limited to a few companies. All of the agreements contained extensive rules that Supershuttle had to follow. For instance, the San Francisco agreement contained approximately 50 pages of such rules. Generally, each airport's agreement required that the vans used to transport passengers be neat and clean, that the vans undergo regular maintenance and records of that maintenance had to be kept by Supershuttle, that the vans have a uniform appearance and identification of the petitioner's name with a uniform color, the drivers had to be neat and clean, the drivers had to have uniforms and identification, the drivers had to be courteous and the drivers could not solicit passengers on the airport grounds, all pick-ups had to be scheduled through Supershuttle, there could be no advertising in the vans for the sale of items, drivers had to be with the vans at all times and could not leave their van when it was parked at an airport curb. All airports had specific rules for picking up passengers that required that the vans wait in a specific holding area and that they be released to go to the curb to pick up passengers at the terminal in a controlled manner, a few vans at a time and be released to a specific location at the curb. Each of the airport agreements required specific recordkeeping to be kept by Supershuttle of the drivers activities, the required safety training for the drivers, required a certain radio dispatch system and provided that any misconduct by the driver could affect the contract Supershuttle had to service the airport. The fares were regulated and the fare rates were set forth in the agreements with the various airports. The vans were required to maintain a certain level of insurance and were required to transport passengers who had agreed to use Supershuttle for transportation.

At each airport location there was a designated staff person charged with the responsibility to enforce the airport rules. At the San Francisco Airport that activity was provided by a contractor for the airport. At other airports that activity was provided by a Supershuttle staff person with review by airport employees.

In addition to license from the PUC as a common carrier and contracts with the various airports to provide transportation services for passengers, Supershuttle then entered into franchise agreements with individuals to be the drivers of the vans servicing the airports. Some franchise agreements were for a one year term when the program was first begun. The normal franchise agreement was

for a period of 10 years and cost between \$18,000 and \$42,000, depending upon the location of the franchise, the time the franchise was entered into and the success of the program and the number of hours per day the franchise driver would operate. But, most franchise agreements were for between \$20,000 and \$30,000 for the 10 year period. The franchise agreement could also be extended for two additional five year terms at a cost of \$1,000 for each extension. Most drivers financed the entire franchise fee by making payments to Supershuttle for the first seven years of the ten year franchise period. The franchise agreement authorized the franchise drivers to provide driving services to the various airports pursuant to the agreement Supershuttle had with the various airports. The franchise driver could purchase either an a.m., p.m., or 24 hour franchise and could alternate between those types of agreements during the year. Each of the franchise agreements identified the specific airports to which the driver was licensed to provide services. The driver had to provide a vehicle and that vehicle had to be the proper size and color to meet the Supershuttle requirements. Supershuttle would then add its logo and color scheme to the vans which had to be a blue color. The franchise drivers were required to maintain the mechanical condition and the appearance of their vehicles in accordance with a preventative schedule provided by Supershuttle. Supershuttle is also authorized to inspect the vehicle from time to time and to maintain a record system on the maintenance of the vehicle. The franchise agreement required the driver to undergo training by Supershuttle and allowed the franchise agreement to be terminated if the driver did not complete the training program to Supershuttle's satisfaction. The franchise drivers were required by the agreement to comply with all rules and regulations imposed by the California Public Utilities Commission. The Public Utilities Commission had also required the petitioner to follow all airport rules so, in effect, the drivers were agreeing in the franchise agreement to follow all of the rules imposed on drivers by the various airports they served. The franchise agreement obligates the drivers to accept assignments to transport passengers and to charge the fees set by Supershuttle including special arrangements Supershuttle may have and vouchers and coupons it had issued to customers. The agreement could be terminated at anytime by the driver and, upon such termination, the driver was no longer liable for additional franchise payments. Supershuttle also, could terminate the agreement if it believed it would be in the best interest of Super Shuttle to terminate the driver's agreement and the driver was then relieved of any additional franchise payments. But, there was no evidence of such a termination ever occurring and some Supershuttle managers were not aware of that provision in the agreement. Most drivers paid their franchise fee by regular weekly payments so, if a franchise was terminated by either Super Shuttle or the driver the payments would cease and no additional payments for the franchise would be made.

The franchise drivers were allowed to hire additional drivers to drive their van under the franchise they had with Supershuttle upon the approval of the driver by Supershuttle.

Most franchise drivers drove their own vans and had no other helpers. Many Supershuttle drivers did have employee drivers of their own that drove the van under their franchise agreement. A few of the franchise drivers had multiple vans and multiple employee drivers of their own. All employee drivers of the franchisees' were subject to the approval of Supershuttle and had to follow all the same rules and regulations as the franchise drivers themselves.

The drivers had a personal communication device (Nextel phone) that they used to communicate with Supershuttle when picking up passengers. The driver would sign on to the device when he was ready to begin picking up passengers at the beginning of his morning or evening shift. The device would then start sending to the driver identification of driving jobs for passengers who needed transportation to an airport. The driver would be told where the pick-up was. The device itself recorded the GPS coordinates of the driver's location and would only send jobs to the driver that were located within his immediate area. The driver could identify how long it would take him to get to the airport from that pick-up location and how many pick-ups (a maximum of four) were included in the job. The rates of Supershuttle were a flat fee for each individual transported to the airport. So a pick-up with a number of individuals a short distance from the airport was more valuable than a pick-up of one individual by him or herself a far distance from the airport. Drivers could accept or not accept the various jobs that appeared on the screen. A driver could also accept a job on a screen and then, as more information developed about the job, back out of that job and, in effect, change his mind. If the pick-up time was close Supershuttle would try to talk a driver out of refusing a job the driver had previously accepted but, in the end if the driver changed his mind and decided not take that job, his wish would be honored by Supershuttle. If no van was available to pick-up a passenger because no driver had accepted that job or drivers had backed out of previous agreements to take the job then Supershuttle would send a taxi to pick-up that passenger and transport the passenger to the airport.

When the driver accepted a job he or she transported the passengers to the airport, accepted payment for the ride from the passenger either in the form of a Supershuttle voucher, a credit card charge or cash. The driver would then drop off the passenger at the airport and leave the airport.

At that point the driver had a choice, the driver could then get line to take passengers from the airport to homes and hotels or go back into the territory the driver normally worked to service another pick-up job or wait for additional jobs to be announced on the Nextel phone screen.

If a driver decided to pick-up passengers from the airport the driver would report to a waiting area managed by Supershuttle. An airport manager at the curb of the pick-up location would then notify the holding area when a van was needed at the curb. There were usually a limited number, up to four, vans at the curb of the pick-up area. That van would then pick-up passengers who had arranged for service through Supershuttle and transport them to their home or hotel and pick-up the fee charged by Supershuttle from the passenger. A Supershuttle driver could not on his own make arrangements with the passenger to pick-up that passenger at the airport or at the individual person's home or hotel for transportation to the airport. All pick-ups had to be arranged through Supershuttle. The drivers chose how much time they wanted to spend at the airport picking passengers up and waiting in the waiting area and how much time they wanted to work out in their territory picking up passengers for delivery to the airport. The drivers also chose which of the pick-up jobs from the territory to the airport that they wished to take. Once the driver was in the line at the airport the driver could choose to leave that line and go back out into the field to pick-up passengers. But, if he stayed at the airport he had to pick-up the next passenger in line at the airport according to the driver's position in line.

All fees were set by Supershuttle pursuant to their agreement with the various airports. A driver was not free to change a fare. The driver was also required to accept any discounted vouchers that passengers had received from Supershuttle. At times Supershuttle would provide discounted rates for special groups or occasions.

Each driver had to maintain a list of each fare transported and the fee received for that fare. Each week the driver had to submit that list to Supershuttle and Supershuttle would calculate the fees owed by the driver to Supershuttle. The driver would also submit to Supershuttle the various vouchers and credit card slips he had received during the week. If the total of that amount exceeded what was owed to Supershuttle, Supershuttle would provide payment to the driver. If not, the driver would then submit additional amounts to Supershuttle. The driver kept all cash received from the customers.

On a weekly basis the drivers paid Supershuttle their weekly payment on the franchise purchase, a license fee of 25 percent of all fares collected in order to use Super Shuttle's license with the airport, a system fee of \$250 for a.m. or p.m. shift or \$375 for a 24 hour shift to use the Super Shuttle dispatch system, an airport loop fee calculated by each visit the van made to an airport and a vehicle payment if the driver had purchased or leased a vehicle from Supershuttle. On average those fees would total about \$750 a week. In addition the driver purchased insurance through Supershuttle and paid for his own gas and maintenance of the van.

As set forth above some drivers leased their van from Supershuttle or purchased it from Supershuttle. Other drivers purchased their vans from other drivers who were leaving their franchise or from independent car dealers. The average price paid for a used van was \$12,000. New vans cost considerably more and some drivers did buy new vans. The vans had to be a certain make and model that would carry nine passengers and had to be painted the Supershuttle blue.

Before a driver was signed on as a franchisee he had to take one to four days of training consisting of certain safety requirements, map reading and training on how to use the Nextel phone system. The amount of training was determined by Supershuttle depending upon the previous experience of the driver.

Drivers themselves had to receive their own license from the PUC as a subcarrier of the petitioner as a charter party carrier (a TCP License). That license authorized the driver to perform services under the authority of a company licensed as a passenger stage corporation (such as Supershuttle). The driver could work for any company that had such a license but, had to be listed as a driver for only one such company at a time. Other company's also had agreements with the airports to transport passengers and were also licensed with the PUC. A driver could choose which company he wanted to drive for but, he could not drive for two companies simultaneously.

The drivers did own the vans that they were purchasing. As a result, they could use those vans for personal use during off hours and could also use those vans to provide a private charter service to and from locations not including airports. When the driver did use a van for private charter, which did not happen very often, the driver had to notify Supershuttle and the PUC and had to pay a license fee to Supershuttle and use the Supershuttle set rate of \$55 an hour.

The drivers did not do any of their own advertising because they could only operate to serve Supershuttle customers.

Because the drivers were required to comply with the airport and PUC rules, they all wore set uniforms, had identification, drove vans that all looked identical identifying Supershuttle as the carrier, maintained their vans without any personal accessories inside the van and kept the vans neat and clean for customers.

The income of the van drivers was determined by how many fares they carried. After they paid the fees to Supershuttle they kept the remainder of the money received from passengers. If they had drivers operating their vans in their place, they still had to pay the same fees to Supershuttle but may pay their employee or helper drivers less and make additional income on that driver's service.

The franchise agreements did identify the drivers as independent contractors and many of the drivers believed that was their correct status.

When a driver received a job offer on his Nextel phone the screen would provide a summary of that job for approximately one minute. If it is was not accepted within that minute then the job would disappear and it would no longer be available to the driver. He would then wait for additional jobs to pop up. There would normally be two or three jobs on each screen that the driver could choose from or delete to wait for additional jobs he thought would be more profitable.

If there was a job that did not provide adequate income to drivers so that it was not being accepted, such as a lone individual 25 miles away from the airport, a dispatcher may contact a driver and provide inducements to that driver to accept that job. Inducements would include an exclusive opportunity to pick-up a future job that was a short distance to the airport with numerous individuals providing a high income and low cost to the driver. If the driver then accepted the hard to sell job, the driver would then later be sent an exclusive opportunity to accept the higher income job as a reward for taking the prior low income job that was not being served. Again, if no driver could be induced to take a low income job a taxi service was used and paid for by Supershuttle.

Drivers could take vacation when they wished but, unless Supershuttle agreed ahead of time, they continued to make their normal weekly payments to Supershuttle when they were not working. There was no requirement that a driver be on duty any particular day but, if the driver was not on duty and did not pick-up any fares, he still had to make his payments to Supershuttle for his franchise, van lease and system fee for access to the dispatch system.

A driver could also sell his franchise, with approval from Supershuttle to a new franchisee and could in essence develop some goodwill he could sell. If the franchise was paid off in seven years, which was the normal payment duration, the last three years the driver did not pay a franchise fee and, if he sold his franchise would have cash in his pocket.

The driver was free to determine what route he should take from the pick-up location to the airport and from the airport to the drop off location.

REASONS FOR DECISION

If the department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part

of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

- (a) The extent of control which may be exercised over the details of the work;
- (b) Whether or not the one performing services is engaged in a distinct occupation or business;
- (c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;
- (d) The skill required in the particular occupation;
- (e) Who supplies the instrumentalities, tools and place of work for the one performing services;
- (f) The length of time for which the services are to be performed;
- (g) The method of payment, whether by time or by the job;
- (h) Whether or not the work is part of the regular business of the principal;
- (i) Whether or not the parties believe they are creating a relationship of master and servant; and
- (j) Whether the principal is or is not in business.

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (*Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

In Empire Mines Company, Limited v. California Employment Commission (1946) 28 Cal 2^d 33; 168 P2d 686 the California Supreme Court issued a decision concerning control exercised by a mining company over its leasee miner. In the lease agreement the parties entered into the mining company was authorized to visit the miners work location once a month to ensure the leasers compliance with the safety orders of the Industrial Accident Commission did not constitute the exercise of control by an employer over an employee. In essence, because the rules were required by a government entity, compliance with those rules by the employer was not the exercise of control of an employer over an employee. (*Empire Star Mines Limited, v. California Employment Commission, supra* 28 Cal. 2^d at pp. 40-41, 44-45. In *Southwest Research Institute v. Unemployment Insurance Appeals Board* (2000) 81 Cal. App. 4th 705; 96 Cal Reporter 2^d 769, a worker was performing services collecting samples of gasoline from retail service stations which are tested to assure compliance with various federal, state and industrial standards. The worker was required to follow very precise and detailed instructions as to the manner in which he was to collect the sample and in the manner in which he was to package them and ship them back to the employer. Everything the worker did was contained in those specific instructions. Other than that the only thing he did to complete his job was to submit an invoice to the employer for his work. In that case the court found that all of the instructions concerning the collecting and transmitting of the gasoline samples, including the requirement of one day training on the technique, were dictated by the United States and Environmental Protection Agency, the Reformulated Gasoline Survey Association and the Federal Aviation Association. In that case the court applied the rules set forth in *Empire Star Mines*, that compliance with government safety regulations does not establish control necessary for employment to exist, to the task completed by the worker collecting the gasoline samples. The court characterized all of the very precise and detailed instructions the worker was required to follow as government regulations necessary to comply with health and safety standards and therefore did not allow those controls to be sufficient to establish an employment relationship (*Southwest Research Institute v. Unemployment Insurance Appeals Board*, 81 Cal. App. 4th at 709-710).

As a result of those two cases, compliance with government mandated health and safety rules does not establish control necessary for an employment relationship. Those controls, while exercised by the punitive employer over the punitive employee, just do not count in establishing controls necessary for an employment relationship to exist. Other additional controls must exist in order to establish an employment relationship. Because those factors are neutral, they also do not establish an independent contractor relationship. Compliance with government health and safety requirements just do not count in identifying control or lack of control over the worker.

In this case many of the activities of the drivers were controlled by the PUC and the various airports, which rules were also adopted by the PUC and required to be followed by Supershuttle. Some of the rules clearly are of a health and safety nature such as proper maintenance of the vans. But, many of the controls are for customer convenience such as color of the vans, uniforms of drivers, courteous treatment by drivers, clean inside vans, no advertising for additional items in vans, etc. *The Empire Star Mines* and *Southwest Research* cases do not identify customer convenience rules of a government entity as those which are covered by the exclusion. But, there are no cases that draw a clear distinction between health and safety rules and other rules mandated by government entities that businesses such as Supershuttle must follow. Because the customer convenience rules are government imposed rules which Supershuttle must follow in order to conduct business, they will be considered of the same nature as the health and safety rules set forth in the previous two cases and those controls themselves can not be used or counted towards controls necessary to establish an employment relationship.

Even the PUC requirement found at paragraph 5.03 of General Order 158-A which requires Supershuttle as a certificate holder to have complete supervision direction and control of the driver does not establish the control necessary for an employment relationship because that language has been construed only to be referring to supervision, direction, and control over drivers with respect to health safety and service reliability issues (*Kairy v. Supershuttle International Inc.*, 9th Circuit Court of Appeals, Decision Number CV08-2883 filed November 3, 2011). In short, while a substantial part of the drivers daily activity is controlled by Supershuttle pursuant to the requirements of the PUC and the various airport contracts, those controls, such as uniforms, van color, behavior of the driver, etc are not controls that can be used to establish an employment relationship. Although, they do show a lack of decision making ability by the drivers themselves.

While the franchise agreement does describe the drivers as independent contractors, the fact that the parties may have mistakenly believed they were

entering into that relationship is not conclusive and an analysis of the working relationship is necessary to establish whether their belief was correct.

The franchise agreement could be terminated at any time by the driver without any further liability. If the driver terminated the relationship, the franchise payments stopped and the driver no longer had to make any payments to Supershuttle. If the driver was purchasing his own van he may be stuck with a van but, he could sell that van as a normal automobile sale and, the vans were not so expensive as to be a substantial investment in a business that would be lost by the driver if he terminated his franchise. The franchise agreement could also, by its terms, be terminated by Supershuttle at anytime Supershuttle believed it was in their best interest. But, there was no evidence of that actually happening or even that some management staff knew that right existed. As a result while this factor may show some indication the workers were employees because they could get out of the relationship easily, it is a weak indicator because it did not appear that Supershuttle believed or understood it could get out the relationship easily or freely.

Driving of vans by a taxi or delivery type driver or a Super Shuttle driver is not the kind of activity that is normally subject to direct supervision by an employer. As a result, this factor would indicate independence.

Generally driving by taxi cabs and package delivery drivers has not been considered a skilled occupation, most people are capable of driving and therefore the drivers are not providing a professional service in their driving skill to Super Shuttle (*Air Couriers International v. Employment Development Department*, (2007), 150 Cal. App. 4th 923 at 937 and *Anthony Estrada v. Fed Ex Ground Package System* (2007) 154 Cal. App. 4th 1 App. p. 21). While the drivers may have shown some entrepreneurial skill to make money driving the van, that skill will be analyzed later and is not part of the analysis of the skill of driving itself. Because the skill was not a professional service this factor would tend to indicate employment.

It is the driver that provided the van and his or her own PUC License through the PUC. But, Supershuttle provided the dispatch system, the customers and access to the airports which the drivers themselves did not have. Supershuttle in effect provided substantially more of the infrastructure, tools and place of work, necessary to do the job than the drivers did. This factor would indicate employment.

Both the driver and Super Shuttle expected the 10 year franchise to last for 10 years. As a result both believed that the service would be ongoing for a period of time which would indicate a continuing relationship and an employment relationship.

The method of payment was by the job not by the hour which would tend to indicate independence.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

Supershuttle provided a PUC license as a common carrier which was necessary for the drivers to transport passengers. Supershuttle also provided license agreements with the various airports in which they agreed to provide the airports with passenger transportation services through vans. Clearly the driving of vans to the airport to deliver and pick-up passengers was part of the regular business of Supershuttle and it is how they made their money. They made no money if passengers were not moved to and from the airport in the vans. It is Supershuttle that advertised for the customers and it is Supershuttle that provided the customers to the drivers. Clearly, the drivers were performing services in the course of Supershuttle's business.

The drivers had considerable freedom in the way they did their business. Drivers could decide what time they wanted to start work, they could decide which of the driving jobs they wanted to take and they could decide which route they wanted to use to complete the driving assignment. The drivers did purchase their own vans and some had their own employees assisting in the driving. The drivers decided which jobs to take and how to manage their daily business so that they decreased their expenses for gas and wear and tear on the van while increasing the passengers they carried and fares they earned. The drivers did have substantial entrepreneurial ability that they used to make a living. But, the drivers could not exercise any of that entrepreneurial ability without their connection to Supershuttle. Supershuttle provided all of their customers and it provided the rates the drivers would charge. The drivers were not free to charge their own rates and that is why certain fares were productive because the set rates by Supershuttle through its agreements with the airports did not allow the driver to make enough money for long distance trips. The drivers were only providing service to one customer, Supershuttle. If they lost that customer, they would be out of work. As a result, the drivers are not providing an independent business service to Supershuttle. Following the modern tendency, because the drivers are not providing a professional service or an independent business to Supershuttle and because their driving is an integral part of the regular business of Super Shuttle they are found to be employees of Supershuttle in accordance with *Santa Cruz Transportation* and *S. G. Borello & Sons*.

DECISION

The petition is denied. The franchise drivers are found to be employees of Supershuttle and the assessments are sustained. Supershuttle is liable for tax and interest as described in the assessments.

OTP:lsh



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SUPERSHUTTLE OF SAN FRANCISCO INC
c/o MARRON & ASSOCIATES LAWYERS
Account No: 325-4539-4
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. 3214570 (T)

Issue(s): REASSESS

Date Petition Filed: 03/25/2010

Date and Place of Hearing(s):

- (1) 12/14/2010 Long Beach
- (2) 02/10/2011 Long Beach
- (3) 07/18/2011 Sacramento

Parties Appearing:

None
None
Petitioner, Department

DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.

David E. Johnson, Administrative Law Judge

Case No.: 3214570

Office of Tax Petitions

CLT/PET: Supershuttle International Inc. ALJ: David E. Johnson

Parties Appearing: Petitioner, Department

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The petitioner filed a petition for reassessment of a department assessment issued under Unemployment Insurance (UI) Code section 1127 for the period July 1, 2006, through June 30, 2009. The issues in this case are whether the workers were employees of the petitioner and, if so, whether the petitioner is liable for unemployment, employment training, and disability contributions, personal income tax withholdings, and interest.

FINDINGS OF FACTS

In case number 3214568 the department issued assessment number 22 under section 1127 of the code on March 12, 2010, covering the period of January 1, 2007, through June 30, 2009. The assessment was issued against Supershuttle International Inc. and SFO Airporter Inc.

In case number 3214569 the department issued assessment number 4 under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006 through December 31, 2006. This assessment was issued against Supershuttle Los Angeles.

In case number 3214570 the department issued assessment number 28 under section 1127 of the code covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Supershuttle of San Francisco.

In case number 3214571 the department issued assessment number five under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Sacramento Transportation System.

The assessments dealt with operations in the Sacramento, San Francisco, and Los Angeles areas. Assessments four, five and twenty-eight were issued against the local entities operating in those areas and only covered the third and fourth quarters of 2006. The larger assessment against Supershuttle International and SFO Airportes INC covered the remainder of the assessment period and includes the operational activities carried out in Los Angeles, San Francisco and Sacramento together in one assessment. No penalty was assessed under section 1127 of the code on any of the assessments.

All of the assessments concerned franchise drivers operating Supershuttle vans in the Sacramento, San Francisco and Los Angeles airports driving clients to and from the local airports.

Supershuttle operated as a passenger stage corporation licensed as such by the California Public Utilities Commission (PUC). As such the petitioner was licensed to operate at the various airports but, as a condition of its PUC license, had to also have authorization from the individual airports in order to conduct business there. The petitioner was not authorized to conduct a taxi type transportation system. Supershuttle could only operate under the name it had licensed with the PUC and had to include their PUC number in any advertising they did. The petitioner had to register all vehicles operating under its PUC license with the PUC and have those vehicles identified to the PUC. All of the vehicles had to be certified as complying with the various California Highway Patrol and Motor Carrier Safety provisions for their safety. The petitioner's name and vehicle number had to be displayed on each vehicle operated under its license number. Every driver of a vehicle had to be licensed under the California vehicle code and had to comply with Motor Carrier Safety provisions identified by the PUC. Each driver had to be subject to having his or her driving record inspected by the petitioner and a vehicle could not be operated by any driver who was presumed to be negligent under certain provisions of the vehicle code.

A unique provision of the PUC requirements found in section 5.03 of General Order 158-(A) of "the Public Utilities Commission stated as follows" DRIVER STATUS. Every driver of a vehicle shall be the certificate holder or under complete supervision, direction and control of the operating carrier and shall be:

- (A) an employee of the certificate holder; or,
- (B) an employee of a subcarrier; or,
- (C) an independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier. "

The petitioner was required by the PUC to maintain in its office a set of records on the services it performs which includes the tariffs, timetables and number of passengers transported by each of its drivers. The PUC staff had the right to enter the petitioner's premises to inspect the petitioner's books and records and to inspect each and any vehicle used to drive for the petitioner. Supershuttle was required to file its tariff (charges to passengers for transportation services,) and timetables for providing its service. That information was to be considered a public record, for use of the general public, and had to be published in a manner that was readable and easily understood. In addition, because the petitioner was serving the airport it had to post that information in each vehicle used to provide service to the airport and in each location where airport tickets were sold. In addition to information describing its charges the posted information also had to

describe the complaint procedures that customers could use. The PUC also required that Super Shuttle adhere to any airport rules when serving an airport. The petitioner then entered to service agreements with the various airports. The agreements authorized Supershuttle to transport passengers as a passenger stage corporation between certain designated areas around the airport and the airport itself. As part of an agreement the petitioner would deliver passengers to the airport and pick passengers up at the airport for delivery to hotels and homes. Each of the agreements provided Supershuttle with a nonexclusive concession to transport passengers. But, limited concessions were granted so the petitioner's agreement provided a valuable access to the airport which was limited to a few companies. All of the agreements contained extensive rules that Supershuttle had to follow. For instance, the San Francisco agreement contained approximately 50 pages of such rules. Generally, each airport's agreement required that the vans used to transport passengers be neat and clean, that the vans undergo regular maintenance and records of that maintenance had to be kept by Supershuttle, that the vans have a uniform appearance and identification of the petitioner's name with a uniform color, the drivers had to be neat and clean, the drivers had to have uniforms and identification, the drivers had to be courteous and the drivers could not solicit passengers on the airport grounds, all pick-ups had to be scheduled through Supershuttle, there could be no advertising in the vans for the sale of items, drivers had to be with the vans at all times and could not leave their van when it was parked at an airport curb. All airports had specific rules for picking up passengers that required that the vans wait in a specific holding area and that they be released to go to the curb to pick up passengers at the terminal in a controlled manner, a few vans at a time and be released to a specific location at the curb. Each of the airport agreements required specific recordkeeping to be kept by Supershuttle of the drivers activities, the required safety training for the drivers, required a certain radio dispatch system and provided that any misconduct by the driver could affect the contract Supershuttle had to service the airport. The fares were regulated and the fare rates were set forth in the agreements with the various airports. The vans were required to maintain a certain level of insurance and were required to transport passengers who had agreed to use Supershuttle for transportation.

At each airport location there was a designated staff person charged with the responsibility to enforce the airport rules. At the San Francisco Airport that activity was provided by a contractor for the airport. At other airports that activity was provided by a Supershuttle staff person with review by airport employees.

In addition to license from the PUC as a common carrier and contracts with the various airports to provide transportation services for passengers, Supershuttle then entered into franchise agreements with individuals to be the drivers of the vans servicing the airports. Some franchise agreements were for a one year term when the program was first begun. The normal franchise agreement was

for a period of 10 years and cost between \$18,000 and \$42,000, depending upon the location of the franchise, the time the franchise was entered into and the success of the program and the number of hours per day the franchise driver would operate. But, most franchise agreements were for between \$20,000 and \$30,000 for the 10 year period. The franchise agreement could also be extended for two additional five year terms at a cost of \$1,000 for each extension. Most drivers financed the entire franchise fee by making payments to Supershuttle for the first seven years of the ten year franchise period. The franchise agreement authorized the franchise drivers to provide driving services to the various airports pursuant to the agreement Supershuttle had with the various airports. The franchise driver could purchase either an a.m., p.m., or 24 hour franchise and could alternate between those types of agreements during the year. Each of the franchise agreements identified the specific airports to which the driver was licensed to provide services. The driver had to provide a vehicle and that vehicle had to be the proper size and color to meet the Supershuttle requirements. Supershuttle would then add its logo and color scheme to the vans which had to be a blue color. The franchise drivers were required to maintain the mechanical condition and the appearance of their vehicles in accordance with a preventative schedule provided by Supershuttle. Supershuttle is also authorized to inspect the vehicle from time to time and to maintain a record system on the maintenance of the vehicle. The franchise agreement required the driver to undergo training by Supershuttle and allowed the franchise agreement to be terminated if the driver did not complete the training program to Supershuttle's satisfaction. The franchise drivers were required by the agreement to comply with all rules and regulations imposed by the California Public Utilities Commission. The Public Utilities Commission had also required the petitioner to follow all airport rules so, in effect, the drivers were agreeing in the franchise agreement to follow all of the rules imposed on drivers by the various airports they served. The franchise agreement obligates the drivers to accept assignments to transport passengers and to charge the fees set by Supershuttle including special arrangements Supershuttle may have and vouchers and coupons it had issued to customers. The agreement could be terminated at anytime by the driver and, upon such termination, the driver was no longer liable for additional franchise payments. Supershuttle also, could terminate the agreement if it believed it would be in the best interest of Super Shuttle to terminate the driver's agreement and the driver was then relieved of any additional franchise payments. But, there was no evidence of such a termination ever occurring and some Supershuttle managers were not aware of that provision in the agreement. Most drivers paid their franchise fee by regular weekly payments so, if a franchise was terminated by either Super Shuttle or the driver the payments would cease and no additional payments for the franchise would be made.

The franchise drivers were allowed to hire additional drivers to drive their van under the franchise they had with Supershuttle upon the approval of the driver by Supershuttle.

Most franchise drivers drove their own vans and had no other helpers. Many Supershuttle drivers did have employee drivers of their own that drove the van under their franchise agreement. A few of the franchise drivers had multiple vans and multiple employee drivers of their own. All employee drivers of the franchisees' were subject to the approval of Supershuttle and had to follow all the same rules and regulations as the franchise drivers themselves.

The drivers had a personal communication device (Nextel phone) that they used to communicate with Supershuttle when picking up passengers. The driver would sign on to the device when he was ready to begin picking up passengers at the beginning of his morning or evening shift. The device would then start sending to the driver identification of driving jobs for passengers who needed transportation to an airport. The driver would be told where the pick-up was. The device itself recorded the GPS coordinates of the driver's location and would only send jobs to the driver that were located within his immediate area. The driver could identify how long it would take him to get to the airport from that pick-up location and how many pick-ups (a maximum of four) were included in the job. The rates of Supershuttle were a flat fee for each individual transported to the airport. So a pick-up with a number of individuals a short distance from the airport was more valuable than a pick-up of one individual by him or herself a far distance from the airport. Drivers could accept or not accept the various jobs that appeared on the screen. A driver could also accept a job on a screen and then, as more information developed about the job, back out of that job and, in effect, change his mind. If the pick-up time was close Supershuttle would try to talk a driver out of refusing a job the driver had previously accepted but, in the end if the driver changed his mind and decided not take that job, his wish would be honored by Supershuttle. If no van was available to pick-up a passenger because no driver had accepted that job or drivers had backed out of previous agreements to take the job then Supershuttle would send a taxi to pick-up that passenger and transport the passenger to the airport.

When the driver accepted a job he or she transported the passengers to the airport, accepted payment for the ride from the passenger either in the form of a Supershuttle voucher, a credit card charge or cash. The driver would then drop off the passenger at the airport and leave the airport.

At that point the driver had a choice, the driver could then get line to take passengers from the airport to homes and hotels or go back into the territory the driver normally worked to service another pick-up job or wait for additional jobs to be announced on the Nextel phone screen.

If a driver decided to pick-up passengers from the airport the driver would report to a waiting area managed by Supershuttle. An airport manager at the curb of the pick-up location would then notify the holding area when a van was needed at the curb. There were usually a limited number, up to four, vans at the curb of the pick-up area. That van would then pick-up passengers who had arranged for service through Supershuttle and transport them to their home or hotel and pick-up the fee charged by Supershuttle from the passenger. A Supershuttle driver could not on his own make arrangements with the passenger to pick-up that passenger at the airport or at the individual person's home or hotel for transportation to the airport. All pick-ups had to be arranged through Supershuttle. The drivers chose how much time they wanted to spend at the airport picking passengers up and waiting in the waiting area and how much time they wanted to work out in their territory picking up passengers for delivery to the airport. The drivers also chose which of the pick-up jobs from the territory to the airport that they wished to take. Once the driver was in the line at the airport the driver could choose to leave that line and go back out into the field to pick-up passengers. But, if he stayed at the airport he had to pick-up the next passenger in line at the airport according to the driver's position in line.

All fees were set by Supershuttle pursuant to their agreement with the various airports. A driver was not free to change a fare. The driver was also required to accept any discounted vouchers that passengers had received from Supershuttle. At times Supershuttle would provide discounted rates for special groups or occasions.

Each driver had to maintain a list of each fare transported and the fee received for that fare. Each week the driver had to submit that list to Supershuttle and Supershuttle would calculate the fees owed by the driver to Supershuttle. The driver would also submit to Supershuttle the various vouchers and credit card slips he had received during the week. If the total of that amount exceeded what was owed to Supershuttle, Supershuttle would provide payment to the driver. If not, the driver would then submit additional amounts to Supershuttle. The driver kept all cash received from the customers.

On a weekly basis the drivers paid Supershuttle their weekly payment on the franchise purchase, a license fee of 25 percent of all fares collected in order to use Super Shuttle's license with the airport, a system fee of \$250 for a.m. or p.m. shift or \$375 for a 24 hour shift to use the Super Shuttle dispatch system, an airport loop fee calculated by each visit the van made to an airport and a vehicle payment if the driver had purchased or leased a vehicle from Supershuttle. On average those fees would total about \$750 a week. In addition the driver purchased insurance through Supershuttle and paid for his own gas and maintenance of the van.

As set forth above some drivers leased their van from Supershuttle or purchased it from Supershuttle. Other drivers purchased their vans from other drivers who were leaving their franchise or from independent car dealers. The average price paid for a used van was \$12,000. New vans cost considerably more and some drivers did buy new vans. The vans had to be a certain make and model that would carry nine passengers and had to be painted the Supershuttle blue.

Before a driver was signed on as a franchisee he had to take one to four days of training consisting of certain safety requirements, map reading and training on how to use the Nextel phone system. The amount of training was determined by Supershuttle depending upon the previous experience of the driver.

Drivers themselves had to receive their own license from the PUC as a subcarrier of the petitioner as a charter party carrier (a TCP License). That license authorized the driver to perform services under the authority of a company licensed as a passenger stage corporation (such as Supershuttle). The driver could work for any company that had such a license but, had to be listed as a driver for only one such company at a time. Other company's also had agreements with the airports to transport passengers and were also licensed with the PUC. A driver could choose which company he wanted to drive for but, he could not drive for two companies simultaneously.

The drivers did own the vans that they were purchasing. As a result, they could use those vans for personal use during off hours and could also use those vans to provide a private charter service to and from locations not including airports. When the driver did use a van for private charter, which did not happen very often, the driver had to notify Supershuttle and the PUC and had to pay a license fee to Supershuttle and use the Supershuttle set rate of \$55 an hour.

The drivers did not do any of their own advertising because they could only operate to serve Supershuttle customers.

Because the drivers were required to comply with the airport and PUC rules, they all wore set uniforms, had identification, drove vans that all looked identical identifying Supershuttle as the carrier, maintained their vans without any personal accessories inside the van and kept the vans neat and clean for customers.

The income of the van drivers was determined by how many fares they carried. After they paid the fees to Supershuttle they kept the remainder of the money received from passengers. If they had drivers operating their vans in their place, they still had to pay the same fees to Supershuttle but may pay their employee or helper drivers less and make additional income on that driver's service.

The franchise agreements did identify the drivers as independent contractors and many of the drivers believed that was their correct status.

When a driver received a job offer on his Nextel phone the screen would provide a summary of that job for approximately one minute. If it is was not accepted within that minute then the job would disappear and it would no longer be available to the driver. He would then wait for additional jobs to pop up. There would normally be two or three jobs on each screen that the driver could choose from or delete to wait for additional jobs he thought would be more profitable.

If there was a job that did not provide adequate income to drivers so that it was not being accepted, such as a lone individual 25 miles away from the airport, a dispatcher may contact a driver and provide inducements to that driver to accept that job. Inducements would include an exclusive opportunity to pick-up a future job that was a short distance to the airport with numerous individuals providing a high income and low cost to the driver. If the driver then accepted the hard to sell job, the driver would then later be sent an exclusive opportunity to accept the higher income job as a reward for taking the prior low income job that was not being served. Again, if no driver could be induced to take a low income job a taxi service was used and paid for by Supershuttle.

Drivers could take vacation when they wished but, unless Supershuttle agreed ahead of time, they continued to make their normal weekly payments to Supershuttle when they were not working. There was no requirement that a driver be on duty any particular day but, if the driver was not on duty and did not pick-up any fares, he still had to make his payments to Supershuttle for his franchise, van lease and system fee for access to the dispatch system.

A driver could also sell his franchise, with approval from Supershuttle to a new franchisee and could in essence develop some goodwill he could sell. If the franchise was paid off in seven years, which was the normal payment duration, the last three years the driver did not pay a franchise fee and, if he sold his franchise would have cash in his pocket.

The driver was free to determine what route he should take from the pick-up location to the airport and from the airport to the drop off location.

REASONS FOR DECISION

If the department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part

of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

- (a) The extent of control which may be exercised over the details of the work;
- (b) Whether or not the one performing services is engaged in a distinct occupation or business;
- (c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;
- (d) The skill required in the particular occupation;
- (e) Who supplies the instrumentalities, tools and place of work for the one performing services;
- (f) The length of time for which the services are to be performed;
- (g) The method of payment, whether by time or by the job;
- (h) Whether or not the work is part of the regular business of the principal;
- (i) Whether or not the parties believe they are creating a relationship of master and servant; and
- (j) Whether the principal is or is not in business.

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (*Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

In Empire Mines Company, Limited v. California Employment Commission (1946) 28 Cal 2^d 33; 168 P2d 686 the California Supreme Court issued a decision concerning control exercised by a mining company over its leasee miner. In the lease agreement the parties entered into the mining company was authorized to visit the miners work location once a month to ensure the leasers compliance with the safety orders of the Industrial Accident Commission did not constitute the exercise of control by an employer over an employee. In essence, because the rules were required by a government entity, compliance with those rules by the employer was not the exercise of control of an employer over an employee. (*Empire Star Mines Limited, v. California Employment Commission, supra* 28 Cal. 2^d at pp. 40-41, 44-45. In *Southwest Research Institute v. Unemployment Insurance Appeals Board* (2000) 81 Cal. App. 4th 705; 96 Cal Reporter 2^d 769, a worker was performing services collecting samples of gasoline from retail service stations which are tested to assure compliance with various federal, state and industrial standards. The worker was required to follow very precise and detailed instructions as to the manner in which he was to collect the sample and in the manner in which he was to package them and ship them back to the employer. Everything the worker did was contained in those specific instructions. Other than that the only thing he did to complete his job was to submit an invoice to the employer for his work. In that case the court found that all of the instructions concerning the collecting and transmitting of the gasoline samples, including the requirement of one day training on the technique, were dictated by the United States and Environmental Protection Agency, the Reformulated Gasoline Survey Association and the Federal Aviation Association. In that case the court applied the rules set forth in *Empire Star Mines*, that compliance with government safety regulations does not establish control necessary for employment to exist, to the task completed by the worker collecting the gasoline samples. The court characterized all of the very precise and detailed instructions the worker was required to follow as government regulations necessary to comply with health and safety standards and therefore did not allow those controls to be sufficient to establish an employment relationship (*Southwest Research Institute v. Unemployment Insurance Appeals Board*, 81 Cal. App. 4th at 709-710).

As a result of those two cases, compliance with government mandated health and safety rules does not establish control necessary for an employment relationship. Those controls, while exercised by the punitive employer over the punitive employee, just do not count in establishing controls necessary for an employment relationship to exist. Other additional controls must exist in order to establish an employment relationship. Because those factors are neutral, they also do not establish an independent contractor relationship. Compliance with government health and safety requirements just do not count in identifying control or lack of control over the worker.

In this case many of the activities of the drivers were controlled by the PUC and the various airports, which rules were also adopted by the PUC and required to be followed by Supershuttle. Some of the rules clearly are of a health and safety nature such as proper maintenance of the vans. But, many of the controls are for customer convenience such as color of the vans, uniforms of drivers, courteous treatment by drivers, clean inside vans, no advertising for additional items in vans, etc. *The Empire Star Mines* and *Southwest Research* cases do not identify customer convenience rules of a government entity as those which are covered by the exclusion. But, there are no cases that draw a clear distinction between health and safety rules and other rules mandated by government entities that businesses such as Supershuttle must follow. Because the customer convenience rules are government imposed rules which Supershuttle must follow in order to conduct business, they will be considered of the same nature as the health and safety rules set forth in the previous two cases and those controls themselves can not be used or counted towards controls necessary to establish an employment relationship.

Even the PUC requirement found at paragraph 5.03 of General Order 158-A which requires Supershuttle as a certificate holder to have complete supervision direction and control of the driver does not establish the control necessary for an employment relationship because that language has been construed only to be referring to supervision, direction, and control over drivers with respect to health safety and service reliability issues (*Kairy v. Supershuttle International Inc.*, 9th Circuit Court of Appeals, Decision Number CV08-2883 filed November 3, 2011). In short, while a substantial part of the drivers daily activity is controlled by Supershuttle pursuant to the requirements of the PUC and the various airport contracts, those controls, such as uniforms, van color, behavior of the driver, etc are not controls that can be used to establish an employment relationship. Although, they do show a lack of decision making ability by the drivers themselves.

While the franchise agreement does describe the drivers as independent contractors, the fact that the parties may have mistakenly believed they were

entering into that relationship is not conclusive and an analysis of the working relationship is necessary to establish whether their belief was correct.

The franchise agreement could be terminated at any time by the driver without any further liability. If the driver terminated the relationship, the franchise payments stopped and the driver no longer had to make any payments to Supershuttle. If the driver was purchasing his own van he may be stuck with a van but, he could sell that van as a normal automobile sale and, the vans were not so expensive as to be a substantial investment in a business that would be lost by the driver if he terminated his franchise. The franchise agreement could also, by its terms, be terminated by Supershuttle at anytime Supershuttle believed it was in their best interest. But, there was no evidence of that actually happening or even that some management staff knew that right existed. As a result while this factor may show some indication the workers were employees because they could get out of the relationship easily, it is a weak indicator because it did not appear that Supershuttle believed or understood it could get out the relationship easily or freely.

Driving of vans by a taxi or delivery type driver or a Super Shuttle driver is not the kind of activity that is normally subject to direct supervision by an employer. As a result, this factor would indicate independence.

Generally driving by taxi cabs and package delivery drivers has not been considered a skilled occupation, most people are capable of driving and therefore the drivers are not providing a professional service in their driving skill to Super Shuttle (*Air Couriers International v. Employment Development Department*, (2007), 150 Cal. App. 4th 923 at 937 and *Anthony Estrada v. Fed Ex Ground Package System* (2007)154 Cal. App. 4th 1 App. p. 21). While the drivers may have shown some entrepreneurial skill to make money driving the van, that skill will be analyzed later and is not part of the analysis of the skill of driving itself. Because the skill was not a professional service this factor would tend to indicate employment.

It is the driver that provided the van and his or her own PUC License through the PUC. But, Supershuttle provided the dispatch system, the customers and access to the airports which the drivers themselves did not have. Supershuttle in effect provided substantially more of the infrastructure, tools and place of work, necessary to do the job than the drivers did. This factor would indicate employment.

Both the driver and Super Shuttle expected the 10 year franchise to last for 10 years. As a result both believed that the service would be ongoing for a period of time which would indicate a continuing relationship and an employment relationship.

The method of payment was by the job not by the hour which would tend to indicate independence.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

Supershuttle provided a PUC license as a common carrier which was necessary for the drivers to transport passengers. Supershuttle also provided license agreements with the various airports in which they agreed to provide the airports with passenger transportation services through vans. Clearly the driving of vans to the airport to deliver and pick-up passengers was part of the regular business of Supershuttle and it is how they made their money. They made no money if passengers were not moved to and from the airport in the vans. It is Supershuttle that advertised for the customers and it is Supershuttle that provided the customers to the drivers. Clearly, the drivers were performing services in the course of Supershuttle's business.

The drivers had considerable freedom in the way they did their business. Drivers could decide what time they wanted to start work, they could decide which of the driving jobs they wanted to take and they could decide which route they wanted to use to complete the driving assignment. The drivers did purchase their own vans and some had their own employees assisting in the driving. The drivers decided which jobs to take and how to manage their daily business so that they decreased their expenses for gas and wear and tear on the van while increasing the passengers they carried and fares they earned. The drivers did have substantial entrepreneurial ability that they used to make a living. But, the drivers could not exercise any of that entrepreneurial ability without their connection to Supershuttle. Supershuttle provided all of their customers and it provided the rates the drivers would charge. The drivers were not free to charge their own rates and that is why certain fares were productive because the set rates by Supershuttle through its agreements with the airports did not allow the driver to make enough money for long distance trips. The drivers were only providing service to one customer, Supershuttle. If they lost that customer, they would be out of work. As a result, the drivers are not providing an independent business service to Supershuttle. Following the modern tendency, because the drivers are not providing a professional service or an independent business to Supershuttle and because their driving is an integral part of the regular business of Super Shuttle they are found to be employees of Supershuttle in accordance with *Santa Cruz Transportation and S. G. Borello & Sons*.

DECISION

The petition is denied. The franchise drivers are found to be employees of Supershuttle and the assessments are sustained. Supershuttle is liable for tax and interest as described in the assessments.

OTP:lsh



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SACRAMENTO TRANSPORTATION SYSTEM INC.
c/o MARRON & ASSOCIATES LAWYERS
Account No: 416-7553-9
Petitioner

EMPLOYMENT DEVELOPMENT DEPARTMENT
Respondent

Case No. 3214571 (T)

Issue(s): REASSESS

Date Petition Filed: 03/25/2010

Date and Place of Hearing(s):

- (1) 12/14/2010 Long Beach
- (2) 02/10/2011 Long Beach
- (3) 07/18/2011 Sacramento

Parties Appearing:

None
None
Petitioner, Department

DECISION

The decision in the above-captioned case appears on the following page(s).

This decision is final unless appealed within 30 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal.

David E. Johnson, Administrative Law Judge

FILE COPY

Date Mailed: DEC 08 2011

Case No.: 3214571

Office of Tax Petitions

CLT/PET: Supershuttle International Inc. ALJ: David E. Johnson

Parties Appearing: Petitioner, Department

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The petitioner filed a petition for reassessment of a department assessment issued under Unemployment Insurance (UI) Code section 1127 for the period July 1, 2006, through June 30, 2009. The issues in this case are whether the workers were employees of the petitioner and, if so, whether the petitioner is liable for unemployment, employment training, and disability contributions, personal income tax withholdings, and interest.

FINDINGS OF FACTS

In case number 3214568 the department issued assessment number 22 under section 1127 of the code on March 12, 2010, covering the period of January 1, 2007, through June 30, 2009. The assessment was issued against Supershuttle International Inc. and SFO Airporter Inc.

In case number 3214569 the department issued assessment number 4 under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006 through December 31, 2006. This assessment was issued against Supershuttle Los Angeles.

In case number 3214570 the department issued assessment number 28 under section 1127 of the code covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Supershuttle of San Francisco.

In case number 3214571 the department issued assessment number five under section 1127 of the code on March 12, 2010, covering the period of July 1, 2006, through December 31, 2006. This assessment was issued against Sacramento Transportation System.

The assessments dealt with operations in the Sacramento, San Francisco, and Los Angeles areas. Assessments four, five and twenty-eight were issued against the local entities operating in those areas and only covered the third and fourth quarters of 2006. The larger assessment against Supershuttle International and SFO Airportes INC covered the remainder of the assessment period and includes the operational activities carried out in Los Angeles, San Francisco and Sacramento together in one assessment. No penalty was assessed under section 1127 of the code on any of the assessments.

All of the assessments concerned franchise drivers operating Supershuttle vans in the Sacramento, San Francisco and Los Angeles airports driving clients to and from the local airports.

Supershuttle operated as a passenger stage corporation licensed as such by the California Public Utilities Commission (PUC). As such the petitioner was licensed to operate at the various airports but, as a condition of its PUC license, had to also have authorization from the individual airports in order to conduct business there. The petitioner was not authorized to conduct a taxi type transportation system. Supershuttle could only operate under the name it had licensed with the PUC and had to include their PUC number in any advertising they did. The petitioner had to register all vehicles operating under its PUC license with the PUC and have those vehicles identified to the PUC. All of the vehicles had to be certified as complying with the various California Highway Patrol and Motor Carrier Safety provisions for their safety. The petitioner's name and vehicle number had to be displayed on each vehicle operated under its license number. Every driver of a vehicle had to be licensed under the California vehicle code and had to comply with Motor Carrier Safety provisions identified by the PUC. Each driver had to be subject to having his or her driving record inspected by the petitioner and a vehicle could not be operated by any driver who was presumed to be negligent under certain provisions of the vehicle code.

A unique provision of the PUC requirements found in section 5.03 of General Order 158-(A) of "the Public Utilities Commission stated as follows" DRIVER STATUS. Every driver of a vehicle shall be the certificate holder or under complete supervision, direction and control of the operating carrier and shall be:

- (A) an employee of the certificate holder; or,
- (B) an employee of a subcarrier; or,
- (C) an independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier. "

The petitioner was required by the PUC to maintain in its office a set of records on the services it performs which includes the tariffs, timetables and number of passengers transported by each of its drivers. The PUC staff had the right to enter the petitioner's premises to inspect the petitioner's books and records and to inspect each and any vehicle used to drive for the petitioner. Supershuttle was required to file its tariff (charges to passengers for transportation services,) and timetables for providing its service. That information was to be considered a public record, for use of the general public, and had to be published in a manner that was readable and easily understood. In addition, because the petitioner was serving the airport it had to post that information in each vehicle used to provide service to the airport and in each location where airport tickets were sold. In addition to information describing its charges the posted information also had to

describe the complaint procedures that customers could use. The PUC also required that Super Shuttle adhere to any airport rules when serving an airport. The petitioner then entered to service agreements with the various airports. The agreements authorized Supershuttle to transport passengers as a passenger stage corporation between certain designated areas around the airport and the airport itself. As part of an agreement the petitioner would deliver passengers to the airport and pick passengers up at the airport for delivery to hotels and homes. Each of the agreements provided Supershuttle with a nonexclusive concession to transport passengers. But, limited concessions were granted so the petitioner's agreement provided a valuable access to the airport which was limited to a few companies. All of the agreements contained extensive rules that Supershuttle had to follow. For instance, the San Francisco agreement contained approximately 50 pages of such rules. Generally, each airport's agreement required that the vans used to transport passengers be neat and clean, that the vans undergo regular maintenance and records of that maintenance had to be kept by Supershuttle, that the vans have a uniform appearance and identification of the petitioner's name with a uniform color, the drivers had to be neat and clean, the drivers had to have uniforms and identification, the drivers had to be courteous and the drivers could not solicit passengers on the airport grounds, all pick-ups had to be scheduled through Supershuttle, there could be no advertising in the vans for the sale of items, drivers had to be with the vans at all times and could not leave their van when it was parked at an airport curb. All airports had specific rules for picking up passengers that required that the vans wait in a specific holding area and that they be released to go to the curb to pick up passengers at the terminal in a controlled manner, a few vans at a time and be released to a specific location at the curb. Each of the airport agreements required specific recordkeeping to be kept by Supershuttle of the drivers activities, the required safety training for the drivers, required a certain radio dispatch system and provided that any misconduct by the driver could affect the contract Supershuttle had to service the airport. The fares were regulated and the fare rates were set forth in the agreements with the various airports. The vans were required to maintain a certain level of insurance and were required to transport passengers who had agreed to use Supershuttle for transportation.

At each airport location there was a designated staff person charged with the responsibility to enforce the airport rules. At the San Francisco Airport that activity was provided by a contractor for the airport. At other airports that activity was provided by a Supershuttle staff person with review by airport employees.

In addition to license from the PUC as a common carrier and contracts with the various airports to provide transportation services for passengers, Supershuttle then entered into franchise agreements with individuals to be the drivers of the vans servicing the airports. Some franchise agreements were for a one year term when the program was first begun. The normal franchise agreement was

for a period of 10 years and cost between \$18,000 and \$42,000, depending upon the location of the franchise, the time the franchise was entered into and the success of the program and the number of hours per day the franchise driver would operate. But, most franchise agreements were for between \$20,000 and \$30,000 for the 10 year period. The franchise agreement could also be extended for two additional five year terms at a cost of \$1,000 for each extension. Most drivers financed the entire franchise fee by making payments to Supershuttle for the first seven years of the ten year franchise period. The franchise agreement authorized the franchise drivers to provide driving services to the various airports pursuant to the agreement Supershuttle had with the various airports. The franchise driver could purchase either an a.m., p.m., or 24 hour franchise and could alternate between those types of agreements during the year. Each of the franchise agreements identified the specific airports to which the driver was licensed to provide services. The driver had to provide a vehicle and that vehicle had to be the proper size and color to meet the Supershuttle requirements. Supershuttle would then add its logo and color scheme to the vans which had to be a blue color. The franchise drivers were required to maintain the mechanical condition and the appearance of their vehicles in accordance with a preventative schedule provided by Supershuttle. Supershuttle is also authorized to inspect the vehicle from time to time and to maintain a record system on the maintenance of the vehicle. The franchise agreement required the driver to undergo training by Supershuttle and allowed the franchise agreement to be terminated if the driver did not complete the training program to Supershuttle's satisfaction. The franchise drivers were required by the agreement to comply with all rules and regulations imposed by the California Public Utilities Commission. The Public Utilities Commission had also required the petitioner to follow all airport rules so, in effect, the drivers were agreeing in the franchise agreement to follow all of the rules imposed on drivers by the various airports they served. The franchise agreement obligates the drivers to accept assignments to transport passengers and to charge the fees set by Supershuttle including special arrangements Supershuttle may have and vouchers and coupons it had issued to customers. The agreement could be terminated at anytime by the driver and, upon such termination, the driver was no longer liable for additional franchise payments. Supershuttle also, could terminate the agreement if it believed it would be in the best interest of Super Shuttle to terminate the driver's agreement and the driver was then relieved of any additional franchise payments. But, there was no evidence of such a termination ever occurring and some Supershuttle managers were not aware of that provision in the agreement. Most drivers paid their franchise fee by regular weekly payments so, if a franchise was terminated by either Super Shuttle or the driver the payments would cease and no additional payments for the franchise would be made.

The franchise drivers were allowed to hire additional drivers to drive their van under the franchise they had with Supershuttle upon the approval of the driver by Supershuttle.

Most franchise drivers drove their own vans and had no other helpers. Many Supershuttle drivers did have employee drivers of their own that drove the van under their franchise agreement. A few of the franchise drivers had multiple vans and multiple employee drivers of their own. All employee drivers of the franchisees' were subject to the approval of Supershuttle and had to follow all the same rules and regulations as the franchise drivers themselves.

The drivers had a personal communication device (Nextel phone) that they used to communicate with Supershuttle when picking up passengers. The driver would sign on to the device when he was ready to begin picking up passengers at the beginning of his morning or evening shift. The device would then start sending to the driver identification of driving jobs for passengers who needed transportation to an airport. The driver would be told where the pick-up was. The device itself recorded the GPS coordinates of the driver's location and would only send jobs to the driver that were located within his immediate area. The driver could identify how long it would take him to get to the airport from that pick-up location and how many pick-ups (a maximum of four) were included in the job. The rates of Supershuttle were a flat fee for each individual transported to the airport. So a pick-up with a number of individuals a short distance from the airport was more valuable than a pick-up of one individual by him or herself a far distance from the airport. Drivers could accept or not accept the various jobs that appeared on the screen. A driver could also accept a job on a screen and then, as more information developed about the job, back out of that job and, in effect, change his mind. If the pick-up time was close Supershuttle would try to talk a driver out of refusing a job the driver had previously accepted but, in the end if the driver changed his mind and decided not take that job, his wish would be honored by Supershuttle. If no van was available to pick-up a passenger because no driver had accepted that job or drivers had backed out of previous agreements to take the job then Supershuttle would send a taxi to pick-up that passenger and transport the passenger to the airport.

When the driver accepted a job he or she transported the passengers to the airport, accepted payment for the ride from the passenger either in the form of a Supershuttle voucher, a credit card charge or cash. The driver would then drop off the passenger at the airport and leave the airport.

At that point the driver had a choice, the driver could then get line to take passengers from the airport to homes and hotels or go back into the territory the driver normally worked to service another pick-up job or wait for additional jobs to be announced on the Nextel phone screen.

If a driver decided to pick-up passengers from the airport the driver would report to a waiting area managed by Supershuttle. An airport manager at the curb of the pick-up location would then notify the holding area when a van was needed at the curb. There were usually a limited number, up to four, vans at the curb of the pick-up area. That van would then pick-up passengers who had arranged for service through Supershuttle and transport them to their home or hotel and pick-up the fee charged by Supershuttle from the passenger. A Supershuttle driver could not on his own make arrangements with the passenger to pick-up that passenger at the airport or at the individual person's home or hotel for transportation to the airport. All pick-ups had to be arranged through Supershuttle. The drivers chose how much time they wanted to spend at the airport picking passengers up and waiting in the waiting area and how much time they wanted to work out in their territory picking up passengers for delivery to the airport. The drivers also chose which of the pick-up jobs from the territory to the airport that they wished to take. Once the driver was in the line at the airport the driver could choose to leave that line and go back out into the field to pick-up passengers. But, if he stayed at the airport he had to pick-up the next passenger in line at the airport according to the driver's position in line.

All fees were set by Supershuttle pursuant to their agreement with the various airports. A driver was not free to change a fare. The driver was also required to accept any discounted vouchers that passengers had received from Supershuttle. At times Supershuttle would provide discounted rates for special groups or occasions.

Each driver had to maintain a list of each fare transported and the fee received for that fare. Each week the driver had to submit that list to Supershuttle and Supershuttle would calculate the fees owed by the driver to Supershuttle. The driver would also submit to Supershuttle the various vouchers and credit card slips he had received during the week. If the total of that amount exceeded what was owed to Supershuttle, Supershuttle would provide payment to the driver. If not, the driver would then submit additional amounts to Supershuttle. The driver kept all cash received from the customers.

On a weekly basis the drivers paid Supershuttle their weekly payment on the franchise purchase, a license fee of 25 percent of all fares collected in order to use Super Shuttle's license with the airport, a system fee of \$250 for a.m. or p.m. shift or \$375 for a 24 hour shift to use the Super Shuttle dispatch system, an airport loop fee calculated by each visit the van made to an airport and a vehicle payment if the driver had purchased or leased a vehicle from Supershuttle. On average those fees would total about \$750 a week. In addition the driver purchased insurance through Supershuttle and paid for his own gas and maintenance of the van.

As set forth above some drivers leased their van from Supershuttle or purchased it from Supershuttle. Other drivers purchased their vans from other drivers who were leaving their franchise or from independent car dealers. The average price paid for a used van was \$12,000. New vans cost considerably more and some drivers did buy new vans. The vans had to be a certain make and model that would carry nine passengers and had to be painted the Supershuttle blue.

Before a driver was signed on as a franchisee he had to take one to four days of training consisting of certain safety requirements, map reading and training on how to use the Nextel phone system. The amount of training was determined by Supershuttle depending upon the previous experience of the driver.

Drivers themselves had to receive their own license from the PUC as a subcarrier of the petitioner as a charter party carrier (a TCP License). That license authorized the driver to perform services under the authority of a company licensed as a passenger stage corporation (such as Supershuttle). The driver could work for any company that had such a license but, had to be listed as a driver for only one such company at a time. Other company's also had agreements with the airports to transport passengers and were also licensed with the PUC. A driver could choose which company he wanted to drive for but, he could not drive for two companies simultaneously.

The drivers did own the vans that they were purchasing. As a result, they could use those vans for personal use during off hours and could also use those vans to provide a private charter service to and from locations not including airports. When the driver did use a van for private charter, which did not happen very often, the driver had to notify Supershuttle and the PUC and had to pay a license fee to Supershuttle and use the Supershuttle set rate of \$55 an hour.

The drivers did not do any of their own advertising because they could only operate to serve Supershuttle customers.

Because the drivers were required to comply with the airport and PUC rules, they all wore set uniforms, had identification, drove vans that all looked identical identifying Supershuttle as the carrier, maintained their vans without any personal accessories inside the van and kept the vans neat and clean for customers.

The income of the van drivers was determined by how many fares they carried. After they paid the fees to Supershuttle they kept the remainder of the money received from passengers. If they had drivers operating their vans in their place, they still had to pay the same fees to Supershuttle but may pay their employee or helper drivers less and make additional income on that driver's service.

The franchise agreements did identify the drivers as independent contractors and many of the drivers believed that was their correct status.

When a driver received a job offer on his Nextel phone the screen would provide a summary of that job for approximately one minute. If it is was not accepted within that minute then the job would disappear and it would no longer be available to the driver. He would then wait for additional jobs to pop up. There would normally be two or three jobs on each screen that the driver could choose from or delete to wait for additional jobs he thought would be more profitable.

If there was a job that did not provide adequate income to drivers so that it was not being accepted, such as a lone individual 25 miles away from the airport, a dispatcher may contact a driver and provide inducements to that driver to accept that job. Inducements would include an exclusive opportunity to pick-up a future job that was a short distance to the airport with numerous individuals providing a high income and low cost to the driver. If the driver then accepted the hard to sell job, the driver would then later be sent an exclusive opportunity to accept the higher income job as a reward for taking the prior low income job that was not being served. Again, if no driver could be induced to take a low income job a taxi service was used and paid for by Supershuttle.

Drivers could take vacation when they wished but, unless Supershuttle agreed ahead of time, they continued to make their normal weekly payments to Supershuttle when they were not working. There was no requirement that a driver be on duty any particular day but, if the driver was not on duty and did not pick-up any fares, he still had to make his payments to Supershuttle for his franchise, van lease and system fee for access to the dispatch system.

A driver could also sell his franchise, with approval from Supershuttle to a new franchisee and could in essence develop some goodwill he could sell. If the franchise was paid off in seven years, which was the normal payment duration, the last three years the driver did not pay a franchise fee and, if he sold his franchise would have cash in his pocket.

The driver was free to determine what route he should take from the pick-up location to the airport and from the airport to the drop off location.

REASONS FOR DECISION

If the department is not satisfied with any return or report made by any employing unit of the amount of employer or wage earner contributions, it may compute the amount required to be paid upon the basis of facts contained in the return or reports or may make an estimate upon the basis of any information in its possession and make an assessment of the amount of the deficiency. If any part

of the deficiency is due to negligence or intentional disregard of the law, a penalty of 10 percent of the amount of the deficiency shall be added to the assessment. (Unemployment Insurance Code, section 1127.)

"Employee" includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. (Unemployment Insurance Code, section 621(b).)

In addition to the primary factor of the right to control the manner and means by which the work is completed, the following secondary factors are considered in determining whether or not an employment relationship exists (*Tieberg v. California Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 950):

- (a) The extent of control which may be exercised over the details of the work;
- (b) Whether or not the one performing services is engaged in a distinct occupation or business;
- (c) Whether the work is usually done under the direction of an employer or by a specialist without supervision;
- (d) The skill required in the particular occupation;
- (e) Who supplies the instrumentalities, tools and place of work for the one performing services;
- (f) The length of time for which the services are to be performed;
- (g) The method of payment, whether by time or by the job;
- (h) Whether or not the work is part of the regular business of the principal;
- (i) Whether or not the parties believe they are creating a relationship of master and servant; and
- (j) Whether the principal is or is not in business.

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments* (1977) 71 Cal.App.3d 647.)

The fact that one is performing work and labor for another is prima facie evidence of employment and such an individual is presumed to be a servant in the absence of evidence to the contrary. (*Hillen v. Industrial Accident Commission* (1926) 199 Cal. 577.)

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that the individual may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant. (Rest.2d Agency, section 220, p.489.)

In Empire Mines Company, Limited v. California Employment Commission (1946) 28 Cal 2^d 33; 168 P2d 686 the California Supreme Court issued a decision concerning control exercised by a mining company over its leasee miner. In the lease agreement the parties entered into the mining company was authorized to visit the miners work location once a month to ensure the leasers compliance with the safety orders of the Industrial Accident Commission did not constitute the exercise of control by an employer over an employee. In essence, because the rules were required by a government entity, compliance with those rules by the employer was not the exercise of control of an employer over an employee. (*Empire Star Mines Limited, v. California Employment Commission, supra* 28 Cal. 2^d at pp. 40-41, 44-45. In *Southwest Research Institute v. Unemployment Insurance Appeals Board* (2000) 81 Cal. App. 4th 705; 96 Cal Reporter 2^d 769, a worker was performing services collecting samples of gasoline from retail service stations which are tested to assure compliance with various federal, state and industrial standards. The worker was required to follow very precise and detailed instructions as to the manner in which he was to collect the sample and in the manner in which he was to package them and ship them back to the employer. Everything the worker did was contained in those specific instructions. Other than that the only thing he did to complete his job was to submit an invoice to the employer for his work. In that case the court found that all of the instructions concerning the collecting and transmitting of the gasoline samples, including the requirement of one day training on the technique, were dictated by the United States and Environmental Protection Agency, the Reformulated Gasoline Survey Association and the Federal Aviation Association. In that case the court applied the rules set forth in *Empire Star Mines*, that compliance with government safety regulations does not establish control necessary for employment to exist, to the task completed by the worker collecting the gasoline samples. The court characterized all of the very precise and detailed instructions the worker was required to follow as government regulations necessary to comply with health and safety standards and therefore did not allow those controls to be sufficient to establish an employment relationship (*Southwest Research Institute v. Unemployment Insurance Appeals Board*, 81 Cal. App. 4th at 709-710).

As a result of those two cases, compliance with government mandated health and safety rules does not establish control necessary for an employment relationship. Those controls, while exercised by the punitive employer over the punitive employee, just do not count in establishing controls necessary for an employment relationship to exist. Other additional controls must exist in order to establish an employment relationship. Because those factors are neutral, they also do not establish an independent contractor relationship. Compliance with government health and safety requirements just do not count in identifying control or lack of control over the worker.

In this case many of the activities of the drivers were controlled by the PUC and the various airports, which rules were also adopted by the PUC and required to be followed by Supershuttle. Some of the rules clearly are of a health and safety nature such as proper maintenance of the vans. But, many of the controls are for customer convenience such as color of the vans, uniforms of drivers, courteous treatment by drivers, clean inside vans, no advertising for additional items in vans, etc. *The Empire Star Mines* and *Southwest Research* cases do not identify customer convenience rules of a government entity as those which are covered by the exclusion. But, there are no cases that draw a clear distinction between health and safety rules and other rules mandated by government entities that businesses such as Supershuttle must follow. Because the customer convenience rules are government imposed rules which Supershuttle must follow in order to conduct business, they will be considered of the same nature as the health and safety rules set forth in the previous two cases and those controls themselves can not be used or counted towards controls necessary to establish an employment relationship.

Even the PUC requirement found at paragraph 5.03 of General Order 158-A which requires Supershuttle as a certificate holder to have complete supervision direction and control of the driver does not establish the control necessary for an employment relationship because that language has been construed only to be referring to supervision, direction, and control over drivers with respect to health safety and service reliability issues (*Kairy v. Supershuttle International Inc.*, 9th Circuit Court of Appeals, Decision Number CV08-2883 filed November 3, 2011). In short, while a substantial part of the drivers daily activity is controlled by Supershuttle pursuant to the requirements of the PUC and the various airport contracts, those controls, such as uniforms, van color, behavior of the driver, etc are not controls that can be used to establish an employment relationship. Although, they do show a lack of decision making ability by the drivers themselves.

While the franchise agreement does describe the drivers as independent contractors, the fact that the parties may have mistakenly believed they were

entering into that relationship is not conclusive and an analysis of the working relationship is necessary to establish whether their belief was correct.

The franchise agreement could be terminated at any time by the driver without any further liability. If the driver terminated the relationship, the franchise payments stopped and the driver no longer had to make any payments to Supershuttle. If the driver was purchasing his own van he may be stuck with a van but, he could sell that van as a normal automobile sale and, the vans were not so expensive as to be a substantial investment in a business that would be lost by the driver if he terminated his franchise. The franchise agreement could also, by its terms, be terminated by Supershuttle at anytime Supershuttle believed it was in their best interest. But, there was no evidence of that actually happening or even that some management staff knew that right existed. As a result while this factor may show some indication the workers were employees because they could get out of the relationship easily, it is a weak indicator because it did not appear that Supershuttle believed or understood it could get out the relationship easily or freely.

Driving of vans by a taxi or delivery type driver or a Super Shuttle driver is not the kind of activity that is normally subject to direct supervision by an employer. As a result, this factor would indicate independence.

Generally driving by taxi cabs and package delivery drivers has not been considered a skilled occupation, most people are capable of driving and therefore the drivers are not providing a professional service in their driving skill to Super Shuttle (*Air Couriers International v. Employment Development Department*, (2007), 150 Cal. App. 4th 923 at 937 and *Anthony Estrada v. Fed Ex Ground Package System* (2007)154 Cal. App. 4th 1 App. p. 21). While the drivers may have shown some entrepreneurial skill to make money driving the van, that skill will be analyzed later and is not part of the analysis of the skill of driving itself. Because the skill was not a professional service this factor would tend to indicate employment.

It is the driver that provided the van and his or her own PUC License through the PUC. But, Supershuttle provided the dispatch system, the customers and access to the airports which the drivers themselves did not have. Supershuttle in effect provided substantially more of the infrastructure, tools and place of work, necessary to do the job than the drivers did. This factor would indicate employment.

Both the driver and Super Shuttle expected the 10 year franchise to last for 10 years. As a result both believed that the service would be ongoing for a period of time which would indicate a continuing relationship and an employment relationship.

The method of payment was by the job not by the hour which would tend to indicate independence.

"The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer." (*Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1376, citing *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 357.)

Supershuttle provided a PUC license as a common carrier which was necessary for the drivers to transport passengers. Supershuttle also provided license agreements with the various airports in which they agreed to provide the airports with passenger transportation services through vans. Clearly the driving of vans to the airport to deliver and pick-up passengers was part of the regular business of Supershuttle and it is how they made their money. They made no money if passengers were not moved to and from the airport in the vans. It is Supershuttle that advertised for the customers and it is Supershuttle that provided the customers to the drivers. Clearly, the drivers were performing services in the course of Supershuttle's business.

The drivers had considerable freedom in the way they did their business. Drivers could decide what time they wanted to start work, they could decide which of the driving jobs they wanted to take and they could decide which route they wanted to use to complete the driving assignment. The drivers did purchase their own vans and some had their own employees assisting in the driving. The drivers decided which jobs to take and how to manage their daily business so that they decreased their expenses for gas and wear and tear on the van while increasing the passengers they carried and fares they earned. The drivers did have substantial entrepreneurial ability that they used to make a living. But, the drivers could not exercise any of that entrepreneurial ability without their connection to Supershuttle. Supershuttle provided all of their customers and it provided the rates the drivers would charge. The drivers were not free to charge their own rates and that is why certain fares were productive because the set rates by Supershuttle through its agreements with the airports did not allow the driver to make enough money for long distance trips. The drivers were only providing service to one customer, Supershuttle. If they lost that customer, they would be out of work. As a result, the drivers are not providing an independent business service to Supershuttle. Following the modern tendency, because the drivers are not providing a professional service or an independent business to Supershuttle and because their driving is an integral part of the regular business of Super Shuttle they are found to be employees of Supershuttle in accordance with *Santa Cruz Transportation and S. G. Borello & Sons*.

DECISION

The petition is denied. The franchise drivers are found to be employees of Supershuttle and the assessments are sustained. Supershuttle is liable for tax and interest as described in the assessments.

OTP:lsh

DECISIONS WERE MAILED TO THE FOLLOWING

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ARTHUR A CALANDRELLI
c/o ERIC M. HALL
Claimant

SAN FRANCISCO USD - HR DEPT
c/o JOHN R. YEH, ESQ.
Account No.: 800-3855
Employer-Appellant

Case No.: **AO-278558**

OA Decision No.: 3783299
EDD: 0170 BYB: 05/22/2011

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

KATHLEEN HOWARD

ALBERTO TORRICO

This is the final decision by the Appeals Board. The Appeals Board has no authority to reconsider this decision. If you disagree with the decision, please refer to the information attachment which outlines your rights.

Date Mailed:

NOV 30 2012

Case No.: AO-278558
Claimant: ARTHUR A CALANDRELLI

The employer appealed from the decision of the administrative law judge that held the claimant eligible for unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code¹ beginning May 29, 2011.

ISSUE STATEMENT

The claimant is a substitute teacher who works at a school with a traditional (not year-round) schedule and who has not worked during the summer recess. The issue in this case is whether the summer session can be considered "the next successive academic term" under code section 1253.3, such that the claimant would be entitled to unemployment benefits over the summer recess.

STATEMENT OF FACTS

The claimant worked for San Francisco Unified School District ("district"), a public educational institution. In this district, the spring semester of the 2010-2011 academic school year ended on May 27, 2011. The summer recess was scheduled between May 28, 2011 and August 14, 2011. The school was not a year-round school, requiring all students to attend year round and teachers and staff to render services year round. The school had a traditional school year, with a fall and spring semester. The district, however, held a summer session for some of the students during the summer recess. The summer session for elementary students was held from June 9, 2011 to July 7, 2011 and for middle and high school students from June 9, 2011 to July 14, 2011. The 2011-2012 academic school year began on August 15, 2011, thus commencing the fall term.

The claimant worked for the district as a day-to-day substitute teacher. In the 2010-2011 academic school year, the claimant's last day of work was on or about May 24, 2011. He stopped work due to the summer recess. For the 2011-2012 academic school year, the claimant returned to work on or about August 21, 2011.

In a letter sent on May 6, 2011, the district informed the claimant that he had reasonable assurance of returning to work in his usual capacity in the 2011-

¹ Unless otherwise indicated, all code references are to California's Unemployment Insurance Code.

2012 school year. The reasonable assurance notice was included as part of a "day-to-day substitute teacher update form" which asked the claimant to provide information about his availability. The claimant completed and dated the form May 14, 2011. On the form, the claimant indicated that he was available for the employer's summer school session in 2011 and for the 2011-2012 school year.

The claimant was not put on the on-call list for summer substitute work and was not offered any work for the summer of 2011. The claimant had never before worked in the summer for this employer. The claimant had only worked during the traditional school year.

The claimant filed a claim for unemployment benefits with a benefit year beginning May 22, 2011. The Employment Development Department (EDD) determined that the claimant was not eligible for benefits under code section 1253.3 beginning May 29, 2011 because the claimant had reasonable assurance of work in the fall semester. Following the hearing on the claimant's appeal of EDD's determination, the administrative law judge determined that the next successive academic term was the summer session and, therefore, the claimant was eligible for benefits under code section 1253.3 because he did not have reasonable assurance for the next successive academic term, i.e., the summer session.

REASONS FOR DECISION

Section 1253.3 controls whether school employees are eligible for unemployment benefits between academic years or terms. As a general rule, benefits will be denied if the employer provides "reasonable assurance" of reemployment in the next of the academic years or terms.

As a substitute teacher, the claimant falls within the provisions of code section 1253.3, subdivision (b), which provides, in pertinent part, that unemployment insurance benefits are not payable:

" . . . to any individual with respect to any week which begins during the period between two successive academic years or terms . . . if the individual performs services in the first of the academic years or terms and if there is a contract or reasonable assurance that the individual will perform services for any educational institution in the second of the academic years or terms."

(Unemployment Insurance Code, § 1253.3, subd. (b).)

Unemployment Insurance Code section 1253.3 (the statute at issue here) was modeled after the Federal Unemployment Tax Act (FUTA), 26 U.S.C. Section 3304(a)(6). In order for California to qualify for federal funding for this State's unemployment insurance program and for private employers in California to be eligible for federal tax credits for unemployment contributions, California's unemployment compensation laws must comply with the standards set forth in FUTA, codified at 26 U.S.C. §§ 3301-3311.). (See e.g., *Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834, 891.) Accordingly, the congressional intent of FUTA provides a basis for determining the California Legislature's intent regarding code section 1253.3.

Section 3304(a)(6)(A)(i) of FUTA states, in pertinent part, the following regarding school employees, such as substitute teachers:

[C]ompensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years (or terms) and if 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.

In 1976, Congress declared that those school employees who had "reasonable assurance" of employment in the successive academic year would not be eligible for benefits between academic years. (See Unemployment Compensation Amendments of 1976 (Public Law 94-566).) Congress discussed how to address the summer time period for school employees who work a traditional school year and have a summer recess period. Congress did not intend to provide school employees with paid vacations over the summer, but wanted to provide protections for those school employees who had lost employment. (122 Congressional Record [CR] 33284-85 (1976).) According to Congress, teachers who worked during the 9-month academic year are "really not unemployed during the summer recess" but can choose "to take other employment" during the summer. (122 CR 33285.) The intent of Congress was to "prohibit payment of unemployment benefits during the summer, and other vacation periods, to permanently employed teachers and other professional school employees." (122 CR 35132.)

In 1977, Congress amended 26 USC, Section 3304(a)(6)(A)(i) by adding the reference to "terms." (Emergency Unemployment Compensation Extension Act of 1977 (Public Law 95-19) (substituting "two successive academic years or terms" for "two successive academic years").) In doing so, Congress intended to clarify the "provision of existing law which pertains to the denial of benefits to

teachers during the summer months.” (123 CR 8204 (March 21, 1977).) As drafted in 1976, the law required “denial of benefits to teachers during periods between academic years for those teachers . . . who have reasonable assurance that they will be reemployed in the fall.” (*Ibid.*) The 1977 amendment was intended to “expand the denial provision to include periods of time between academic terms as well as years in an effort to clarify the intent of the legislation adopted last year.” (*Ibid.*) Accordingly, “teachers will not be able to obtain benefits in periods between terms as well as periods between years.” (*Ibid.*) With the addition of the reference to “term,” the Congress did not intend to limit the application of this provision but intended to expand the coverage of the provision.

Shortly thereafter, the United States Department of Labor², provided the states a memorandum which explained the effect of the amendments under P.L. 95-19:

The amendment made by P.L. 95-19 added to that section that the professional between-terms denial will apply “. . . during the period between two successive academic years or terms. . . .” Thus, any period or term within the institution’s academic year which occurs between . . . two regular and successive terms, and during which the individual is not required under his-her contract to perform services would be a period to which the prohibition against the payment of benefits applies.

The period between two regular and successive terms is the short period of weeks between regular semesters or quarters, whether the institution operates on a two or three semester or a four-quarter basis. The suspension of classes during that short period in which services are not required is not a compensable period.

(Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P.L. 94-566, Supplement 3, 1976 Draft Legislation, May 6, 1977.)

Thus, the academic term is a term within the regular academic year.³ For example, if a school district has a regular academic year that is on a trimester

² “The United States Department of Labor is the federal agency responsible for ensuring that state unemployment laws comply with the mandatory federal criteria set out by Congress.” (*Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 426 (Haw. 1990) (internal citations omitted).)

³ In an undated document relied upon by the Administrative Law Judge in the underlying case, the United States Department of Labor, in response to frequently asked questions, offered the following colloquy regarding academic year and term:

“What is an academic year?”

system, the academic terms would be the three trimesters and unemployment benefits would be disallowed between each of the three regular trimesters for a teacher with reasonable assurance for the next trimester. In another example, if the school is a year round school, then the academic terms are terms within the entire year. In addition to disallowing benefits between "academic years," the addition of the word "terms" was added to disallow benefits between the terms within the academic year.

In this case, the claimant was only required to perform services during the traditional academic school year. Because the claimant was not required to perform services during the summer school session and because the summer session is outside of the traditional schedule, it cannot be argued that the summer session became part of the regular academic year for this claimant and was thus a term for this claimant.

In 1978, the California Legislature amended code section 1253.3 to language almost identical to the federal statute. Under code section 1253.3, subdivision (b), unemployment benefits are not payable to professional employees "during the period between two successive academic years or terms" who have reasonable assurance of returning to work in the same or similar capacity "in the second of such academic years or terms." We conclude, therefore, that the California Legislature sought to give effect to Congress' intentions, including its goal of preventing teachers, who historically work the traditional academic year, with reasonable assurance of employment in the fall term, from collecting summer recess benefits.

"Reasonable assurance" includes, but is not limited to, an offer of employment or assignment made by an educational institution, provided that the offer or

An academic year is the period of time characteristic of a school year. It most usually means a fall and spring semester.

What is an academic term?

An academic term is that period of time within an academic year when classes are held.

Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions."

(Conformity Requirements for State UC Laws Educational Employees: The Between and Within Terms Denial Provisions, http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf). When the Administrative Law Judge cited to this document, he failed to include the definition of "academic year." Without the definition of "academic year," the definition of "academic term" offers little assistance because the academic term is a period within the academic year. Under this definition, an academic term is the period of time within an academic year, which could be a nontraditional academic school year. For example, if the school had a nontraditional academic school year that encompassed a summer term (perhaps a year round school) and employees are required to perform services, then the summer term, being part of that school's academic year, would be an academic term for purposes of code section 1253.3 for those employees.

assignment is not contingent on enrollment, funding, or program changes. An individual who has been notified that he or she will be replaced and does not have an offer of employment or assignment to perform services for an educational institution is not considered to have reasonable assurance. (Unemployment Insurance Code, section 1253.3(g).)

In *Russ v. California Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834, the claimant was a teacher's aide who had been employed for six years. She was terminated at the end of each academic year and rehired the following academic year. The school district notified the claimant that it expected to rehire her in the fall. The court held the claimant had reasonable assurance of reemployment in the fall term, and that, "reasonable assurance" is an agreement which contemplates the reemployment of the employee but which is not legally enforceable.

In *Board of Education of Long Beach Unified School District v. California Unemployment Insurance Appeals Board* (1984) 160 Cal.App.3d 674, the claimant worked as a substitute teacher and was offered continuing work as a substitute after a summer recess. The court held the claimant had reasonable assurance of reemployment even though the employer could not specify exactly when or if the claimant would perform services.

If there is a contract or a reasonable assurance that a teacher, who has taught for the District during the prerecess period, will perform teaching services for the employer in the academic year or term during the postrecess period, then the teacher must be denied unemployment benefits during the summer recess regardless of whether he or she is a tenured or nontenured teacher or whether his or her employment is vested or nonvested.

(*Id.* at 683.)

The legislature intended "continuing school employees" such as substitute teachers to be "ineligible for summer recess benefits." (*Id.* at 686.)

The California Unemployment Insurance Appeals Board, in Precedent Benefit Decision P-B-440, found that ineligibility under code section 1253.3, subdivision (b) only applies to work between two successive academic years or terms. In P-B-440, the claimant was laid off from her teaching position at the end of the spring term of the 1982-1983 academic year. She did not work in the fall term of the 1983-1984 academic year. On December 18, 1983, she received an offer to be reinstated to her position and work in the spring term of the 1983-1984 academic term. Because her reasonable assurance was not for the next

successive term, i.e. fall of the 1983-1984 academic year, but was for spring term of the 1983-1984 academic year, she could not be found ineligible due to reasonable assurance under code section 1253.3, subdivision (b). We concluded:

In short, we find that code section 1253.3 is inapplicable to any week for which benefits are claimed, if the week begins other than between two successive terms or academic years. . . .

(P-B-440, p. 4.)

The Appeals Board considered the issue of benefits for school employees during the summer months in Precedent Benefit decisions P-B-412, P-B-417, and P-B-431 following the 1978 "passage of Proposition 13 and the concomitant reduction of funds available to school districts." (P-B-412, p. 3.)

In Precedent Benefit Decisions P-B-412 and P-B-417, the claimants were school employees who worked year round during the school year prior to their application for unemployment benefits. Due to budgetary restrictions, classes were not scheduled during the summer months. In P-B-412 (1980) the Board explained that "[d]uring the summer of 1978, the Employment Development Department and the United States Department of Labor reevaluated the applicability of section 1253.3 to professional and nonprofessional school employees who were scheduled to teach or work during the 1978 summer school session." (P-B-412, p. 3.) The Board found the following:

Review of the congressional debates on Public Law 94-566 and earlier legislation satisfies us that the intent of Congress in enacting such legislation was to deny benefits to those school employees who are normally off work during summer recess or summer vacation periods. However, it was not the intent of Congress to deny benefits to year-round employees or those regularly scheduled for summer work who, due to cancellation of normal or scheduled work, became unemployed.

(*Ibid.* (internal citations omitted)).

Precedent Benefit Decision P-B-417 (1981) relied on the same analysis finding a clerical employee whose year round contract was reduced to ten months, to be eligible for benefits. The Board found that "the cause of her unemployment was not a normal summer recess or vacation period but loss of customary summer work." (P-B-417, p. 3.) It reasoned that "[t]he claimant has always worked during this period and has been forced to cease work due to a mandatory layoff caused by funding problems, unlike actual 'school year' employees (such as tenured

teachers).” (P-B-417, p. 4.) The Board construed the claimant’s separation from employment as a layoff. “She is involuntarily unemployed through no fault of her own, and the provisions of Section 1253.3 of the Code do not apply in her case.” (*Ibid.*)

In Precedent Benefit Decision P-B-431 (1982), the Board restricted the layoff analysis to those cases involving the year in which the change in employment conditions takes place or the first summer the claimant is affected by the cancellation of regularly scheduled classes. In P-B-431, the claimants were school employees who originally worked a twelve month schedule. One year these school employees were reduced to eleven months of work and the following year they worked only ten months. For each of these years, they received unemployment benefits during the summer recess periods. The claimants were then notified that they again would only work ten months. The appeals board held that unlike the situation in P-B-417, the two month summer break had become a normal recess period for the claimants. As a result, their unemployment insurance benefits were denied, pursuant to the provisions of section 1253.3 of the code.

Here, the claimant historically worked the traditional academic year. In the 2010-2011, the academic school year ended on May 27, 2011, and the 2011-2012 academic school year commenced on August 15, 2011. Accordingly, the academic terms in this case are the terms that fall between the start of academic year, in August, and the end of the academic year, in May. Although the school district had a summer session, the claimant had no summer work experience, no reasonable expectation of working in the summer session, and was not required to work in the summer session. Because the summer session was not a part of the school’s traditional academic year and because the claimant had no loss of customary summer work, the summer school session was not a term for this claimant.

In this case, the claimant was a continuing school employee, working as a substitute teacher. He had last worked during the spring term of the 2010-2011 academic year. He had reasonable assurance of work in the fall term of the 2011-2012 academic year, which was the successive academic year. Accordingly, the claimant is ineligible for benefits under code section 1253.3 during the summer break.

DECISION

The decision of the administrative law judge is reversed. The claimant is not eligible for benefits under code section 1253.3 beginning May 29, 2011. Benefits are denied.

FURTHER APPEAL INFORMATION

The Appeals Board's decision is final and can be changed only by action of a judicial court. (Unemp. Ins. Code § 410). The Appeals Board cannot reconsider or set aside the enclosed decision. (37 Ops.Cal.Atty.Gen. 133.)

If you wish to appeal the enclosed decision, you may seek review in Superior Court by filing a ***Petition for Writ of Mandate*** against the California Unemployment Insurance Appeals Board (Appeals Board) pursuant to section 1094.5 of the Code of Civil Procedure.

The Appeals Board does not process petitions for court review. **You must file such petitions directly with the Superior Court not later than six (6) months after the date of the decision of the Appeals Board. You must also serve a copy of the Petition for Writ of Mandate on the Appeals Board** at its headquarter, 2400 Venture Oaks Way, Suite 100, Sacramento, California 95833. Service of the Petition must comply with legal requirements set forth in the Code of Civil Procedure, sections 414 to 415.95.

The Appeals Board does not pay benefits, handle claims or claim forms, or collect overpayments. If you have questions about these matters, you must contact the Employment Development Department (EDD), not the Appeals Board. It is important that you notify the appropriate EDD office of any change in your address. You may contact EDD at (800) 300-5616 for further information.

If you are a claimant, you are reminded to continue to file weekly claim forms with the EDD while seeking a writ of mandate. If you prevail in court, you will only be paid for those weeks in which you file weekly claim forms and meet other eligibility requirements.



SAN FRANCISCO OFFICE OF APPEALS
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SAN FRANCISCO CA 94107

(415) 357-3801

ARTHUR A CALANDRELLI
c/o ERIC M. HALL
Claimant-Appellant

SAN FRANCISCO USD - HR DEPT
c/o JOHN R. YEH, ESQ.
Account No: 800-3855
Employer

Case No. 3783299

Issue(s): 1253.3

Date Appeal Filed: 06/22/2011

EDD: 0170 BYB: 05/22/2011

Date and Place of Hearing(s):
(1) 10/26/2011 San Francisco

Parties Appearing:
Claimant, Employer

DECISION

The decision in the above-captioned case appears on the following page(s).

The decision is final unless appealed within 20 calendar days from the date of mailing shown below. See the attached "Notice to Parties" for further information on how to file an appeal. If you are entitled to benefits and have a question regarding the payment of benefits, call EDD at 1-800-300-5616.

Eric Wildgrube Administrative Law Judge

Case No.: 3783299

San Francisco Office of Appeals

CLT/PET: Arthur A. Calandrelli

ALJ: Eric Wildgrube

Parties Appearing: Claimant, Employer

Parties Appearing by Written Statement: None

ISSUE STATEMENT

The claimant appealed from a determination that held the claimant ineligible for benefits under Unemployment Insurance Code section 1253.3 beginning May 29, 2011. The issue in this case is whether the claimant is a school employee who is ineligible for benefits between terms, or during an established and customary vacation or recess period.

FINDINGS OF FACT

The claimant is employed as a Day to Day Substitute Teacher for the San Francisco Unified School District.

The last day of instruction for the San Francisco Unified School District during the Spring 2011 Term was May 27, 2011. The District then held a Summer Term for elementary school students beginning June 9, 2011 and ending July 7, 2011 and for middle school and high school students beginning June 9, 2011 and ending July 14, 2011. The first day of instruction for the Fall 2011 Term was August 15, 2011.

On May 6, 2011, the district mailed the claimant a letter stating he had a reasonable assurance of returning to work for the 2011-2012 school year (beginning with the Fall Term) as an on-call substitute. The claimant returned a survey stating he was available for work during Summer 2011 and for the 2011-2012 school year.

The claimant last worked during the Spring Term on or about May 24, 2011. He resumed working on August 21, 2011.

The claimant was available for work during the Summer Term of 2011 but he was not called for work during that term. He had not been called for work during the Summer Term of 2010.

REASONS FOR DECISION

Unemployment insurance was established to provide "benefits for persons unemployed through no fault of their own, and to reduce involuntary

unemployment and the suffering caused thereby to a minimum.” (Unemployment Insurance Code section 100.) It was “designed to cushion the impact of seasonal [and] cyclical ... idleness.” (*Chrysler Corp. v. California Employ. Stabilization Comm.* (1953) 116 Cal.App.2d 8, 16.

“The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objection of reducing the hardship of unemployment.” [Citations omitted.] *Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499. Exceptions however, “to the general provisions of a statute are to be narrowly construed”. *Corbett v. Hayward Dodge* (2004) 119 Cal.App.4th 915, 921.

Unemployment Insurance Code section 1253.3 (the statute at issue here) was modeled on a federal statute, a provision of the Federal Unemployment Tax Act (FUTA) of 1976 (Stats. 1978, ch. 2, section 109; Stat. 2667, 2670-2671); therefore, Congressional intent is relevant to construing the section. The intent of Congress in enacting the corresponding provision of FUTA was to prevent overcompensation of teachers who are paid a reasonable annual salary based on work performed over nine months of the year. (See, 122 Congressional Record [CR] 33284-33285 and 35132 (1976).) The debate in Congress confirms it was Congress’ intent to prohibit payment of unemployment benefits to salaried personnel during “vacation” or “recess” periods. (122 CR 22899 and 35136 (1976).)

Unemployment Insurance Code, section 1253.3(b) provides, unemployment insurance benefits based on service performed in the employ of a non-profit or public educational institution in an instructional, research or principal administrative capacity are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms if the individual performs services in the first of such academic years or terms and if there is a contract or reasonable assurance that such individual will perform services for any educational institution in the second of such academic years or terms.

The United States Department of Labor defines an “academic term” to be,

that period of time within an academic year when classes are held. Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions.

Conformity Requirements for State UC Laws Educational Employees: The Between and Within Terms Denial Provisions
(http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf).

During 2011 the San Francisco Unified School District provided instruction during a Spring Term which ended May 27, 2011. The next period of time when classes were held was the Summer Term. Instruction resumed during the Summer Term on June 9, 2011.

The claimant worked during the Spring Term. He was provided a reasonable assurance that he would perform services for the San Francisco Unified School District during the Fall Term. The successive academic term following the Spring Term, however, was the Summer Term. The claimant was not provided a reasonable assurance of employment during the Summer Term. He had a reasonable expectation of work during that term.

The eligibility for unemployment benefits of teachers and other school district employees who are not paid during the summer unless they actually work is consistent with construing 1253.3 narrowly and follows Congressional intent and the purposes of unemployment insurance. It will not result in the type of double compensation Congress sought to avoid. Therefore, the claimant is eligible for benefits under section 1253.3.

DECISION

The determination of the department is reversed. The claimant is eligible for unemployment benefits under section 1253.3.

SFOA:ew

DECISIONS WERE MAILED TO THE FOLLOWING

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