

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5573**

1. Opening of Meeting:

The Appeals Board convened at 10:30 a.m., January 14, 2014, in Sacramento with Chair Robert Dresser presiding.

2. Roll Call: Members

Present

Absent

Robert Dresser, Chair
Roy Ashburn
Michael Allen
John Adkisson

x
x
x
x

3. Approval of the Minutes:

The December 10, 2013 minutes were approved unanimously with one correction, on the bottom of page four: "February 2" is changed to "April."

4. Chair's Report:

Chair Dresser announced that right before the meeting he was able to swear in John Adkisson, appointed by the Senate, and they are really glad to have him there. Member Adkisson stated he was honored to be here.

Chair Dresser reported he sent letters to the legislative leaders including the Senate Pro Tem, the Assembly Speaker and Committee Chairs advising them that CUIAB is officially out of Corrective Action for timeliness standards after 12 years. That was a significant milestone for CUIAB.

Chair Dresser reported that there have been some developments in the budget, with the Governor's recent issuance of the document. Rob Silva will speak to the budget issues in his remarks.

Chair Dresser stated he was proud to say that CUIAB now ranks 11th in the country on first level UI appeals. CUIAB has come a long way; he stated that we were 51st out of 52. Thanks to all the staff and the board we've done well. He added that

when he was appointed three years ago he was asked about tax cases and he now can report that in the past three years through December 31, 2013, we've processed approximately 6,224 first level tax petitions that are appeals. Just to note, the first level of judges upheld 4,257 of the assessments by EDD in the amount of about \$360 million. The board upheld about 568 of the appeals from the first level decisions for another \$38 million. So about \$400 million has been upheld in the past three years and about a third of that if collected would go into the UI Fund. This figure reflects the importance of both the role of the appeals board in assuring a fair hearing for the parties as well as the fiscal impact.

5. Board Member Reports:

Member Allen welcomed Member Adkisson and tells him that we have really a terrific staff working together for a common goal. He hopes Member Adkisson's stay here will be as productive and positive as his has been.

Member Ashburn thanked Chair Dresser for his report and commented that he certainly wants to concur with the progress that has been made and to thank the excellent staff and judges for the hard work and the commitment to moving these cases. He's always reminded that the cases involve real people and real life circumstances that are sometimes extraordinarily difficult with the loss of a job and what that means to a family and their income. He welcomed Member Adkisson to the board. He commented that he knows John very well from the years in the Senate and knows of his excellent work there.

Chair Dresser noted parenthetically that when Member Ashburn and he had their confirmation hearing during the summer of 2011, Member Ashburn reminded him that they represented to the Senate Rules Committee that they would get rid of the backlog. Member Ashburn stated promises made, promises kept.

Member Adkisson commented that he is very honored to join this team and he looks forward to what is only a one year appointment, the remainder of an incomplete term. But he'd like to thank the staff that has just in one day helped him from everything to trying to understand the separation issues that will be the subject of some of the first cases that he is going to be looking at all the way to general assistance and help with every aspect of the job. He congratulated the board for the work that has been done before his arrival and assures them that it is well known in the Legislature.

6. Public Comment:

No public comment.

7. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Gonzales welcomed Member Adkisson.

Chief ALJ/Executive Director Gonzales reported that the open inventory is a little over 31,000; still quite low although higher than last month. Last month they were below 30,000 for the first time and they are now 31,701 for all the cases; the UI balance is 23,364 cases in the workload. This is the 11th month that they have made all of the federal timeliness standards, so next month will be a full year if we do it then. They have made all the standards for closing cases within 30 days; they closed 78.4% of the cases and for the 45 days, 94.9% of the cases. Their average case age is 24.1 days and the DOL standard is 30 days on that. Rob Silva will give the report on the budget and how we are doing in terms of our savings.

Lori Kurosaka reported that EDD for the month of December lost about 104 staff, and the total for July through December is 428 staff loss, so they have lost about 4.8% of their workforce thus far. She also gave an update on the federal budget. Both the House and the Senate are working on the final appropriations bills. For all federal programs the budget is now at \$1.1 trillion proposed in Congress and they expect to vote on that by the end of this week. The compromise budget does provided some relief to the sequestration cuts however we won't know how that impacts the unemployment insurance program until the Department of Labor releases their final allocations after the budget is passed. They are still waiting to hear about any action on an extension of the federal unemployment program that is under consideration in the Senate.

8. Chief ALJ of Appellate Operations, Elise Rose Report:

Chief ALJ AO Rose echoed welcome to Member Adkisson.

Chief ALJ AO Rose reported that AO's workload statistics for this month show a continuing decline in the caseload. The AO reports for the month of December shows that they registered 1,665 cases which is well below the current year average of 2,021. Looking at it on an annual basis, other than last month, this is the lowest number of registrations that they have had in the last four years. The number of dispositions issued was 2,208 decisions. Other than the past three months, this is the lowest number of dispositions in the last four years. AO has an open balance of 1,970 cases, this is almost 270 cases fewer than their average for this year and with the exception of a couple of months earlier this year the number

of open cases is the lowest it's been over the last four years. Appellate Operations generally lags about six months behind Field Operations and so they are finally seeing the drop that Field has seen. Now that there is a little uptick maybe AO will see that too. In terms of their Department of Labor standards, the case aging statistics for Appellate Operations measures the age of cases that are open and pending in AO. This is the only standard that AO is required to meet by law. The DOL requires that AO's average case age of open cases be no more than 40 days and the DOL looks at the number on March 31 of each year. Their case aging is currently at 33.8 days, improving over last month's number and well within the standard. There are three other statistics the DOL monitors and publishes on a monthly basis along with the statistics of Appellate Operations in other states. These statistics measure the length of time it takes AO to get out a decision from the date of appeal from the field office decision and from the date that an appeal is filed in a field office to the date they close the cases. The AO staff refers to these dates as M-dates and there are three measurements. AO's goal for the number of cases to be decided within 45 days is 50%, in December they decided 52% within the 45 days. Their goal is to decide 80% of their cases within 75 days, they are at 92% and their goal is to decide 95% of their cases within 150 days, they are at 100% of the cases being decided within 150 days. The other number they look at is the days in transit. The appeals from the field office decisions are filed in the 12 field offices throughout the state. When they receive the appeals they scan them into AO's digital system. Currently the number of days from the field office to the Appellate Operations unit is 1.9 days which is very good. As to appeal rates, in December, 6.5% of field office ALJ decisions were appealed to Appellate Operations. This is about average for the year.

Chief ALJ AO Rose reported that the Precedent Committee is meeting this week and they will be discussing the process and other issues with future precedents. Chair Dresser commented that he has asked Vice Chair Allen to coordinate on the Precedent Committee to meet with her, Chief Counsel Steinhardt and others.

Member Allen commented that he wanted to thank everyone. He thinks he discovered an IT problem with files loading at 4:55 on Friday and he really wanted to thank folks because several put a lot of work over the weekend with the cases and it was really appreciated that it got fixed. Chair Dresser added that Presiding Judge Joel Contreras and Carmen Mesick from IT Unit did a really good job along with others.

9. Chief Information Officer, Rafael Placencia Report:

CIO Placencia welcomed Member Adkisson. He started with some information on

the outage that CUIAB had Friday. It was not related to the EDec project. It was related to a project that they have ongoing out of Orange County and it's basically they are migrating the services here to Sacramento. They worked all that out late Friday, worked through the weekend and everything seems to be back to normal now.

CIO Placencia reported that he was pleased to announce that the Ca.Mail project is pretty much complete. All the migration efforts for user accounts are complete. All email accounts are now being serviced out of OTech. The remaining of the work left here at CUIAB is to strictly decommission our old legacy system.

CIO Placencia reported that Windows 7 is their next high priority project. As he mentioned last board meeting the main driver for that project is the end of support for our existing operating system, primarily XP. The end of XP support is targeting in early April. As an example of the magnitude of the project, XP is used everywhere, on every pc that CUIAB has in the department. That project is about 10% complete. It is a matter of making sure that all of the systems are operating on the new Windows 7 platform. A major part of the project is the recording software that we use to conduct our hearings, known as Dictaphone. There is an upgrade that goes along with that as well. There are compatibility issues with the new system with Windows 7 but they have worked through those issues. They have everything pretty much worked out to where they are able to go forward with least interruption to the department. They hope to have that project completed in an April timeframe.

CIO Placencia reported on CUIAB's internal website known as the Bench. They have an upgrade, a new Bench coming out shortly. It is tied with EDec. EDec is a system that is used in AO for managing their decisions so those two projects will be basically implemented about the same time.

CIO Placencia also reported on a project that is in development right now; ACSS, Automated Case Scheduling System which right now is used in AO as Phase One. The next phase of that project is to have the net system available statewide.

Member Allen asked if there was going to be much need for training under Windows 7 and if so, what will that consist of.

CIO Placencia responded that there is a need for training with Windows 7, not very long training. It would consist of maybe two hours of training to basically bring the person up to speed to where exactly things are with the new operating system. They do have a plan for that.

10. Chief Administrative Services, Robert Silva Report:

Chief Silva welcomed Member Adkisson to the board.

Chief Silva reported that the only items he will be reporting on will be budget related with the release of the Governor's budget last week. In an effort to address a projected \$113 million funding gap in the 2014/15 State fiscal year, EDD and CUIAB along with Labor and Workforce Development Agency worked with the Department of Finance over the last several months to undertake a zero based analysis of UI program functions, devise process improvements and identify cost saving measures. CUIAB submitted a list of process improvements and cost reductions totaling \$13.8 million, \$4.3 million in the current fiscal year and an additional \$9.5 million by the end of 2014/15. The resulting budget change proposal, Fiscal Summary report, included the formal reduction of \$9.5 million for the 2014/15 fiscal year as well as a position reduction equivalent of 77 permanent positions; \$5.9 million of this dollar reduction is personnel savings and \$3.6 million of it is OE&E. The 77 positions in this document were derived by taking the \$5.9 million associated with the personnel savings portion of our submitted process improvements and dividing it by the average salary of approximately \$79,000 a year.

In the attachment to the original Budget Change Proposal there is a list of 12 bullet points that map out our submitted savings and process improvements. Some of the efforts began as early as August 2013 but again the total is \$13.8 million reductions to be achieved by the end of the State fiscal year 2014/15. Chief Silva reported on the savings items included in Attachment 1 of his report.

11. Chief Counsel's Report:

Chief Counsel Steinhardt also welcomed new Boardmember Adkisson. He reported that there were three writ cases closed last month and in all three the board was affirmed.

12. Unfinished and New Business:

Chair Dresser opened the floor for consideration of AO-314175, Moritz, for designation as a precedent and asked for a summary of the case.

Chief Counsel Steinhardt provided a summary of the case and the issues, and

indicated the Board has already decided the underlying case.

Member Adkisson commented that the thing he didn't derive from the case was what actually happened once the information came to the attention of EDD in terms of future benefits. Were the benefits cut off at some time? She said that she wanted to retire so he assumes that she didn't get a new job and there was extension time left.

Chief ALJ-AO Rose stated that the decision actually doesn't really discuss that particular issue. It does address the issue of the overpayment and the board did decide to set aside the ALJ decision that found the claimant disqualified for benefits under 1256.

Chief Counsel Steinhardt added that the question of the possible cut-off of future benefits essentially would have to be another case because what is really happening in this is focusing on what did happen with regard to the eligibility for the benefits that were provided not the future of possible benefits.

Chief ALJ-AO Rose stated that after the precedent is issued they come up with standard paragraphs that are then used by the ALJs in their decisions in the future. The appellate decision is in great part circumscribed by what has happened at the hearing below and so sometimes we don't even have those facts because they were not elicited at the hearing below. If the facts become crucial to the end decision then we will remand it and have them get those crucial facts.

Member Adkisson stated he agreed with the decision so he is going vote for it to be a precedent but his point simply was when a member of the public or an attorney trying to advise their own client reads an opinion, some effort should be made to, in plain English, describe the complete set of facts. He thinks the public might be concerned about continuing to pay this person even if she acted in good faith more so than whether or not we recovered an overpayment.

Member Ashburn asked about the Precedent Committee and whether this case had been heard by the Committee, considered, deliberated and if there was a decision by the Precedent Committee.

Presiding ALJ Joel Contreras responded that this case is a follow up to a prior board precedent decision that first raised the issue of whether or not employers are responding to the first opportunity they have to provide information to the Employment Development Department so that the department has all the facts that it needs to make an appropriate determination. In the initial precedent decision

dealing with a Fed-Ed notice, initial notice went out, years later a Fed-Ed notice went out to the same employer. The employer did not respond to the first notice, responded to the second notice. That EDD wanted to go all the way back to the initial date of the claim filing and find the claimant was not entitled to benefits and very large overpayments resulted. The board's precedent decision in that case held that, no, EDD can only move forward with the notice that was provided on the future Fed-Ed benefits. You can't go all the way back because the employer had an opportunity to present evidence, there was no showing why they didn't present the evidence to go back and allow EDD to relieve the employer's reserve account and hold the claimant liable for substantial overpayments. We're talking \$20,000 to \$30,000 were some of the average ones. This proposed precedent follows the same principle because that one was limited to Fed-Ed. This goes to other overpayments similar to the other one. The employer had an opportunity to provide the information, failed to provide the information, EDD in these non-Fed-ED cases wanted to go back and find the claimant shouldn't be entitled to those benefits, and another large overpayment would result. So in this instance the future benefits may be effected that's why this case is going back to EDD to look at the information now available, that the employer wants to make available so the claimant's future entitlement may be effected. However it is very clear that EDD cannot again with these types of cases go all the way back because the employer hasn't established good cause or any reason for not having responded. So the whole focus of these two precedents is to again emphasis to the employers, you have an opportunity, you need to provide that information so that there can be a timely resolution of these issues with full information provided from the employer, don't wait for several years before coming back and then finally saying oh well here's the information that clearly should have been provided in the first instance.

Chief ALJ-AO Rose noted these decisions are circulated to the Precedent Committee and they are invited to comment as to whether or not they have any concerns that it become a precedent. They are circulated after the board has already voted on the merits. This did not generate any controversy or concerns by members of the Precedent Committee.

Member Ashburn asked if there was a vote of the Committee to recommend adoption as a precedent.

Chief ALJ-AO Rose responded that they don't actually formally vote; it's more of soliciting any informal concerns or feedback.

Chair Dresser asked that if there were opposition from members of the Committee he assumes that she would let the board know that. Chief ALJ-AO Rose stated she

would.

Member Ashburn commented that he voted for this decision. It is an interesting case because this particular employee was at a retirement age and the employer was reorganizing. She was quite unsure about what to do; whether there was going to be an opportunity for continued employment in a restructured environment or whether she should opt for retirement. So that's the employee's aspect of the case. The employer on the other hand waited 14 months to provide information, ignored the two notices, the two opportunities to provide information. The concern that he has is not so much with this case because she said laid off, she actually retired but the question of willfulness on the false statement the judge found that she did not purposely make a false statement. There's room there for interpretation he supposes. Then the employer obviously is at fault for completely ignoring the notices. Anyway, his concern is about adoption as a precedent. He's not sure how much guidance this provides. The facts and circumstances of this case are pretty specific. If someone is receiving benefits and they should not be receiving benefits and it comes to light later there ought to be an opportunity to say no, you're not going to receive these benefits based on the information. This is contrary to that view that he holds that if somebody's receiving something that they ought not be rightfully receiving there ought to be an opportunity to stop it. For that reason he is very concerned about adopting it as a precedent. Especially since our decision sends back to the department some of the fundamental questions here. Why are we adopting it as a precedent when EDD is still being asked to take a look at all this procedure? How can we have a precedent with EDD giving a whole new look or review of these underlying matters?

Chair Dresser stated that as he understands it we had a precedent in the Fed-Ed extension kind of case but this kind of case was not addressed and so it is kind of filling a hole and making it consistent for all these types of cases that the employer must timely file the protest or any other response or that's it, the claimant is going to possibly be eligible. You can't come in 14 months later and do it unless there is a good cause for the delay. That's his understanding for the need for this as a precedent.

Member Adkisson stated he found Member Ashburn's comments very interesting. One of the things that Member Ashburn said was that we ought to have a mechanism for stopping payments and he agrees with that completely for the future. Member Allen commented his experience with EDD is they have a huge tool box to stop payments if they realized that for some reason someone should not be paid. So to him, part of the solution is, it is a portion of it, it's going back to remand and EDD is really well equipped to look at this and make a determination

going forward as to what they are going to do. Most of the cases he's seen where there has been a situation as to whether someone got future payment the EDD has been really good about figuring out whether there is some applicable rule why they should or shouldn't be continuing payment. So Member Allen feels like, to him, the precedent is fairly limited as to what we're saying and he is comfortable in adopting it.

Chief ALJ-AO Rose addressing Member Ashburn's issue about the fraud, she thinks that part of the factor in this case was that the administrative law judge below found that there was no fraud and neither did the department and the employer had the opportunity to weigh in.

Chief Counsel Steinhardt added that on remand the question about good cause will be considered. If it turns out that there was good cause for the employer not filing the information early on then of course the whole matter gets revisited

The vote was called. Member Ashburn opposed; Chair Dresser, Member Allen and Member Adkisson voted yes. The precedent was adopted three to one.

13. Closed Session:

The Board went into closed session. No votes were reported.

Adjournment