

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5557**

1. Opening of Meeting:

The Appeals Board convened at 10:30 a.m., October 9, 2012, in Sacramento with Chair Robert Dresser presiding.

2. Roll Call: Members

Present

Absent

Robert Dresser, Chair

x

Kathleen Howard, Vice Chair

x

Alberto Torrico

x

Roy Ashburn

x

3. Approval of the Minutes:

The September 11, 2012 minutes were approved by all members.

4. Chair's Report:

Pursuant to Chair Dresser's request, Vice Chair Howard presented a certificate, signed by the Governor, to Marylynn Kashuba for her 25 years of service with CUIAB. Marylynn Kashuba began working for the Appeals Board in December 1987, as an Office Assistant-Typing II, permanent intermittent, and is now a Legal Support Supervisor I in Appellate Operations.

Chair Dresser reported that in terms of the mission critical travel drill that was done for Agency, they are going to allow us to have travel money to do all of the hearings and the necessary support functions for those hearings, such as IT or security. Although we have not received final word and we have cut about \$100,000 from our travel budget on "non-essential" matters, we are going to be able to do our mission critical travel.

Chair Dresser reported that the final ALJ training sessions for Sacramento will be held today and tomorrow. He commented that they are very much indebted to ALJs Angela Bullard and Kim Steinhardt for putting together an excellent training

session, which almost universally was well received. He also thanked Carl Vega for his presentation in each of the offices on security.

Chair Dresser reported that the Best Practices training for the support staff begins today in San Diego and Inland. It will be a one or two day training and will be ongoing in different segments. He also reported that most of the security cameras have been installed, and thanked Rob Silva and Doug Mattes for their work on that project. He knows that it will add security for our judges and support staff.

Chair Dresser reported that there will be a NAUIAP Conference from May 12 to May 16, 2013. The conference will be in Los Angeles and will be an excellent opportunity to meet and share information with judges from other states.

Chair Dresser reported that he is going to resume his visits to each of the field offices in November. In addition he will be giving a short presentation on the status of the board at the ALJA Conference this Thursday.

Chair Dresser has asked Vice Chair Howard to help in the implementation of our Filebound Paperless Project in Appellate Operations. We are devoting the necessary resources to ensure its success. He has also asked that Vice Chair Howard help him with a few other organizational matters and thanked her for her help.

5. Board Member Reports:

Vice Chair Howard acknowledged all of the hard work and difficult decisions that, with the support of senior staff, they have been able to make, and in particular on the travel issues that the Chair mentioned. It is very gratifying to her that Agency remains supportive of CUIAB having the necessary travel to complete our mission critical work. She also appreciates the Chair's continued focus on getting the work done and taking responsible measures with regard to the necessary budget cuts.

6. Public Comment:

My name is Paul Portugal, and I am a Supershuttle franchise owner in L.A. I'm going to be very quick. I just want to make a very quick analogy about the Supershuttle business and the fact that I am here in United States. When I became a citizen of United States about 12 years ago, I was very grateful for the opportunity that this country give to me to become a citizen. For me it was an honor. But the opportunity was given to me, was an opportunity for me to do

something with that. Was not to just sit down, lay down and wait for things to come to me. So with the opportunities given by the company to me was for me to work on it and make something. Supershuttle is the same thing. It is a business opportunity they give it to me and what I do with that is totally up to me. And my success depend how I develop that opportunity. And I do believe to be in the best interest of this board and as well the state, to join forces as with Supershuttle and try to bring people like me up. You know, try to kind of, instead of having dependent people on the government and welfare, have people to be self-sufficient. And I think the one way people can be self-sufficient is by owning a business and that is why I do Supershuttle. I own my own business and I am so proud of that. My family in Portugal is very proud of that because in Portugal it be very difficult for me to own anything. Because opportunities is very, not equal. Here they are very equal. They are so proud of me. When they come over here I show them Supershuttle. I show what I have. I start as a drivers and now I have four or five vehicles. It is very important when I have Supershuttle work for me and not the other way around. I used to be an employee for Supershuttle. I used to work for Supershuttle. In 2001 I became, 2003, I became a franchise. From that moment on the tables they change. I not any longer work for Supershuttle. This point now I make Supershuttle work for me. I make Supershuttle work for my success. It'd be very disappointing for me if you take that opportunity away from me. For me just the fact that I can get up in the morning and just get up in the morning, kind of make the decision what I am going to do today. Is very important for me. That's freedom. And that's the freedom that I hope you folks don't take away from me. Once again, like I say, I do appreciate this coming, the fact getting the opportunity to be here and make something of my life. Let me make something of my life. Let me use the tools that I have to be better at what I am. I cannot be an employee. I am too motivated to be an employee. And this way I can put all my thoughts, all my energies into something I can grow. Something I can show off, it's a legacy. Maybe one day I can pass on to my son and so forth. So, just on this I want to tell you, I want to tell you this, thank you very much for the opportunity they give it to me and I want to say thank you Supershuttle as well for the opportunity they give it to me.

My name is Ralph Johnson, I am from Ontario Division of Supershuttle. I work about 30 years in the supermarket industry and decided to somewhat retire but start my own business with Supershuttle. It's given me the opportunity and the freedom to earn money for my family as well as have the freedom to take three vacations per year, select my runs, set up my day the way I choose to do it. My mom is sick with Alzheimer's so it allows me the flexibility to be able to not only to earn but also to be able to be there for my family and I really appreciate that. I have already done the employee side of work here in California. I was born in

raised in L.A. and that is where I have done all my work. But now it is a pleasure to finally have my own business, select my own hours, and pretty much work the way I choose to work. It is a benefit for me and my family and I appreciate the opportunity.

My name is Robinson Arias, and I own multiple franchises of Supershuttle here in Sacramento. I just want to say that my 15 year old daughter, she wants to start a business, because she started looking forward to take over the family business. And quite honestly, I drove a truck for 12 years delivering auto parts and now my salary was capped. I can only go so far. Once we started purchasing the Supershuttle brand that ceiling became our floor. We were able to send the family to New York for the entire summer, go to the Caribbean, and me and my wife have been together for 15 years you always hard to get a vacation. As an employee there was always a day late and a penny too short. Once we became a franchise owner we can do things that we could not do. We can actually host Thanksgiving dinner at our house and we don't have to worry about do we have enough to pay the electric bill or perhaps to save here or cut there. We can actually splurge. Supershuttle has given us that opportunity and we will be very appreciative if we can continue to grow our own small business. Thank you.

My name is Ashik Hussain, and I am from the San Francisco and I own three of the franchises with Supershuttle. It makes me proud to be an owner of franchise and I have people working for me. I make my own schedule the company doesn't make any schedule for me. As we are talking here for our self and for hundreds of thousands of franchises that's out there who are proud to be a franchise owner and would not like to be an employee of the company.

My name Larry White, I am from the Sacramento branch. I've been with Supershuttle for 14 years, first four was as an employee the last 10 as a franchise owner. I would not want to go back to being an employee for reasons that have been mentioned. For small reasons like as an employee I'd have to get up, drive across town to the yard, get a vehicle there that I didn't know who had drive before. Now all I have to do is walk out my front door, my vehicle is right there, it is the same vehicle every day. I am allowed to maintain it and keep it in tip top shape. There are financial considerations that I do make more money as a franchise owner but the freedom to name my own hours and to work my own system is just as important as the money considerations. I'll keep it short. That's about all I have and I just urge the board to allow me to keep my freedom and my franchise and not make me go back as an employee. Thank you.

My name is Jose Machuca, I am here from San Diego. I am a multiple franchise owner with four vehicles. I have six members on my LSE. I joined Supershuttle five or six years ago because it give me the opportunity to open my own business, invest in secure future because Supershuttle was in tight corners. And it give me the opportunity to grow from owning one franchise to four franchise now with four vehicles and six members. If you take that opportunity from me to keep owning the same business and manage my own business and my drivers have the freedom to choose their own business, their own money, how much money they want to make a day, you are going to leave me with no business at all. Please don't take the opportunity to have, to choose my freedom and to choose my own type of business that I want to do, working with Supershuttle.

My name is Paul Infantino. I think that somehow you guys are under the impression that we're people that come into Supershuttle and we don't really know what kind of business decisions we are making. I worked with Fed Ex Ground as an owner-operator, had no control. Totally different animal there. I had no control over my business. They kind of controlled everything. So I left there. I wanted to be independent. I found Supershuttle and I love the fact that I am independent to work the days I want. I am kind of semi-retired. I'll work real hard one week, lay back another week. You know, I like being able to make those decisions for myself. The fact that I have control over my own hours, I start when I want, I don't start when I want, I don't report to anybody. I am committed to the next run. You know, picking people up, that's my commitment. I like that fact. I like to be, have my own business. Same as these guys. You know, I mean, we feel like we are businessmen, we're entrepreneurs. We're trying to build up our business from the ground up and work as hard as we want or not as hard as we want. And that's all I have to say. I know that you know that the decisions that were made as far as Fed Ex Ground went you know, independent, not independent, how they ruled. This is a totally different animal. We really are independent franchisees.

Chair Dresser commented that under the law we have a record that we have to consider and the record in terms of testimony and witnesses is where the witnesses were under oath and have been examined and cross-examined. Chair Dresser is not in any way suggesting that what you say is not true, but he wants them to know that the board is bound by the record. Chair Dresser stated he did not know if some of them were on the transcript, if some of them or all of them testified at the hearing. If they did, of course, their testimony will deserve the appropriate weight. He stated that their comments here, like written argument or oral argument, are very much appreciated. They are going to have more argument at 1:30 today from the attorneys and representatives. On behalf of the board Chair

Dresser thanked them for their participation and for their comments.

7. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Roldan reported that there are written reports, with the trends and analyzes and also a two-page executive summary, included in the board packets. He reported that they are winding down the ALJ training, which involved taking the ALJs offline for two days at a time in each office and subject them to a block of training related to security, decision writing, and substantive training to ensure that we continue to meeting DOL quality standards. Regarding workload, there has been an upward trend, with the month of September ending with a balance of 51,402 cases, the second time this year that we have been above 50,000 cases. We were as low as 39,388 cases in March. This is due to a couple of factors: appeals continue at a high level, averaging 35,653 cases a month; the other is the PLP days which the staff must take each month. The upward trend resulted in an order that beginning October 1 the judges were to receive one additional hearing per week to try and drive down caseload. In a one week period they have reduced the open workload by well over 800 cases. Having that trend continuing for the period of this effort and also increasing the number of mass calendars that are being done in all offices should help us get the workload into the low 40,000 – upper 30,000 range.

Chief ALJ/Executive Director Roldan reported average case age in September was 27 days, well within the required federal standard. They are also in compliance with the 90-day guideline and the 45-day standard, and closed 50% of cases within 30 days, only 10% off the standard. They are well on their way to full compliance with all of the federal timeliness standards, and he thinks it's achievable within this fiscal year.

8. Special Assistant to the Board, Lori Kurosaka Report:

Special Assistant Kurosaka reported that last month the President signed the Continuing Resolution for the new federal fiscal year that began last week. The Continuing Resolution will establish the six-month spending plan through March 2013.

Special Assistant Kurosaka also reported that our third quarter Corrective Action Plan status report was sent to EDD to forward to DOL this week. We are in compliance with our status report and meeting all of our targeted goals in our CAP at this point. DOL Region 6 Office is scheduled for a site visit on December 12.

Special Assistant Kurosaka reported that Labor Agency approved CUIAB's request for exemption for 63 retired annuitant ALJs and 23 support and executive staff. We will continue to submit requests for new retired annuitants as employees are retiring throughout the year.

Special Assistant Kurosaka reported that they hoped to add a couple more offices to the Co-Location Pilot in November. Just for appeals registered in the month of September and closed in the month of September we are saving on average five days in processing time.

Special Assistant Kurosaka reported with regard to the Flat File Expansion Project that they are going to begin working with the Judicial Advisory Council and the Staff Advisory Council next week, to begin gathering business requirements for the expansion of the nightly data file from EDD. They would like to be able to include all of the paper that EDD prints out from their single client database each day with the appeals transmittals in data form each night, and save a tremendous amount of mail time for those transmittals.

Lastly, Special Assistant Kurosaka reported on the Feasibility Study Report that the draft was submitted to Labor Agency for their review on July 31. They continue to work with Labor Agency on scope changes and edits and revisions to the document.

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

Chief ALJ AO Elise Rose reported that AO registered 2,430 cases last month, which is down from the month before. However, keeping things in perspective, the number is far above the 1,958 that AO registered in June. The balance of open cases has dropped to 2,509 cases, but the caveat is that there are a number of cases still waiting for intake. The number of dispositions is 2,709 for the month of September, just below the average for the year so far. Regarding time lapse, their goal is 50% of cases to be decided within 45-days. Last month we decided 49% of cases within 45-days. Unfortunately, however, case aging increased to 49 days. That is often the case if you focus on time lapse, then the case aging goes up.

Chief ALJ AO Elise Rose reported that the average number of days in transit from a field office to Appellate Operations dropped to an all time low of 2.5 days, which is excellent, however there is an increase in the number of scanning errors so they need to have some training in the field offices. The appeal rate last month was

6.5%, a little below the average.

Chief ALJ AO Elise Rose stated that the steps they are taking to improve these numbers include a comprehensive review of each unit's work to identify changes in process that are necessitated by going digital and to eliminate unnecessary steps. They've made recent changes to the board appeals intake process so that they can identify some of those late appeals that take longer to process. They have requested a number of new reports that will allow the supervisors to identify at a glance where the slow downs are occurring so that they can redirect staff or assign overtime.

Chief ALJ AO Elise Rose reported on the status of the Filebound Project, stating that they still have a few impediments to getting rid of the paper files all together. They are waiting for the programming of a number of reports that they are going to need before they go paperless to keep track of the workload. They have requested and are told they will be getting a number of IT fixes that will help them increase their efficiency. Without the fixes many of the units complain they are making duplicative entries and other efforts which slow down the process, so they are not able to even do it as quickly as they were with the paper files.

Chief ALJ AO Elise Rose reported that the board paragraph committee has finished its complete revision of the standard decisions, now accessible to the AO ALJs. The committee is also working on finishing up its comprehensive revision of the board paragraphs by the end of this month.

10. Chief Information Officer, Rafael Placencia Report:

CIO Placencia reported that they are in Phase II of the Automated Calendaring Scheduling System (ACSS) project. Phase I is completed and in maintenance mode within AO. The project is in the business and functional requirements process and they are anticipating reviewing the comments, edits and approval for the requirements to be approved by the ACSS steering committee on October 23.

CIO Placencia reported on E-CATS, which is a replacement to our existing client server system. We are hoping to create a system easy to maintain as well as build in some new functionality for moving us towards the paperless environment. The project is currently in the testing phase.

CIO Placencia reported on the AO Paperless Project that they are working through a few glitches to make the system more usable. A lot of these issues have been

addressed and fixed so that they can use the system more towards what it was designed for, that is to streamline the process. One of the initial plans for the project was to go into AO and introduce a paperless system without introducing much change to the existing business processes. They are now looking at some of those existing business processes to streamline and make the system more useable. This reengineering wasn't necessarily to be done at this phase, but priorities are such that we need to address some of those issues now. However, it is impacting the ability to get to the next phase, which is having the system fully functional within AO.

CIO Placencia reported that the other high priority projects IT is working on are the IT service consolidation projects. There are two of them, the Tier 3 Data Center consolidation which is going to require us to move some of our services over to the Office of Technology Services. They had a major milestone within that project, with a final installation date for the circuit they are going to use to tie back CUIAB to OTech. That is scheduled to be installed on October 16, and will allow them to use that connection to bring in the CA mail project, which is the other part of the consolidation project. Those are moving and they are hoping to have CA mail basically completed by the end of this year.

11. Chief Administrative Services, Robert Silva Report:

Chief Silva directed the board to the Monthly Overtime Report included in the board packet, which reflects a significant uptick in overtime usage in the month of August. There was a 23% agency wide increase in overtime from the month of July 2012. We have several recruitments pending in both Appellate Operations and Field Operations in the classes of Senior Legal Typists, LSS I, Program Tech, Management Services Tech, and a lot of those should come to fruition in the month of October. Once these positions are in place and trained that should significantly reduce the use of overtime in those two branches. Overtime is one component of our temporary help budget and this overtime over use during the first couple of months of the fiscal year has contributed to us over-utilizing temp help positions by two or three positions over the first two months of the fiscal year. However, during the same timeframe we have under-utilized our permanent fulltime budget to the tune of almost 40 positions. As a whole, though, we are significantly under spending in our personnel budget so far in the current fiscal year. Another contributor to the temp help budget are the lump sum payouts which can be difficult to predict, but so far this fiscal year we are right on target.

Finally, Chief Silva reported that the security cameras installation is on schedule and almost complete.

12. Chief Counsel's Report:

Chief Counsel Hilton reported 11 new cases were filed last month and 10 cases were closed, all but one affirming the decisions of the board. One notable development was a published decision in the matter of *Paratransit v CUIAB*, in which the Court of Appeal agreed with the Superior Court in reversing the board's decision on a separation. This case involved an employee who refused to sign an acknowledgment of receipt of a disciplinary memorandum, not to admit fault. The employee was discharged for refusal to sign. The ALJ had found him ineligible but the board reversed and found him eligible. The Superior Court and the Court of Appeal reversed the board and found him ineligible, misconduct. The California Supreme Court has granted review in this case, very unusual.

13. Unfinished and New Business:

Consideration of AO-260877 for designation as Precedent Decision: Chief ALJ AO Rose presented the case, stating that the standard for whether a decision should be designated as a precedent is set forth in Government Code 11425.60, and the issue is basically whether the case involves a significant policy determination of general application that is likely to recur. This case was identified by our Precedent Decision Committee as one that raised some issues that had frequently been presented to our ALJs and had been decided inconsistently. The case involves an individual who had been working as a customer service person for a cable company. He filed a worker's comp claim for stress. He was sent to a clinic and drug tested positive for marijuana. Then he was discharged based on the results of that test. The case raised a couple of issues. The first had to do with some of the procedural difficulties that come up when a case raises questions under both section 1256 whether the claimant was discharged and section 1256.4 whether the claimant discharge was due to behavior that was caused by an irresistible compulsion to use intoxicants. What this decision does is to set out in detail the procedures that a field office ALJ must follow in these kinds of cases. This decision clarifies the various procedural issues. The bottom line is the decision says that those issues need to be decided in tandem, it does not make sense to decide one and not address the other. The second issue has to do with whether the claimant's violation of an employer rule prohibiting off duty use of controlled substances constitutes misconduct if it is not established that the claimant was impaired at work due to such off duty behavior and if there is no nexus between the off duty behavior and the job that justifies enforcement of the rule.

Member Torrico commented that he finds the decision to be very instructive and very helpful. He did notice also there is inconsistency in some of the decisions when it comes to the interplay between different issues, one and two, the nexus issue. He had never really seen it very clearly articulated, as always there was a little bit too much grey area there for his liking. He definitely supports the adoption of the decision as precedent decision just to add clarity for them as board members and for our judges.

Member Ashburn commented that he very strongly disagrees with the decision on the merits in this case, and his written dissent lays out what he believes is the right of an employer to establish a drug free workplace and to set rules and for employees who violate those rules, knowing what those rules are. He has concerns about this being adopted as a precedent. Each of these kinds of cases, especially involving substance abuse, are unique and different. It seems to him that CUIAB judges are well capable of reviewing the circumstances that occurred in each case involving the employee, those circumstances under which a testing occurred for substance, the results of that substance abuse and then dealing with the various facts that may present themselves with the employer's action and the employee's actions in that case. He understands why there would be some consideration for this being a precedent but this matter of drugs is so serious, and substance abuse in general, is so serious in the workplace that he thinks, at least for him, he would much rather see this not be adopted as a precedent.

Member Howard agreed with Member Ashburn that these cases involving potential substance abuse are difficult. However, she agrees with Member Torrico that the decision does a good job of setting out the procedures in detail, providing guidance that the field needs for consistency in handling the interplay of the two issues. As an appellate body this is a really critical function for the board, providing guidance to the field. For that reason, she supports the decision for precedent designation.

Chair Dresser commented that he thinks Member Ashburn raises some significant issues, and recognizes that each case must be decided on the facts. However, in the years he has worked as both a judge here and as a board member he felt that there hasn't been the needed guidance in these types of cases. Because this case does provide guidance, and because the judges will still have their independent discretion to decide the case on the facts, he supports the precedent designation.

Chair Dresser called for a roll-call vote. Vice Chair Howard – approved, Member Ashburn – no. Member Torrico – approved. Dresser – approved. Precedent designation is approved on a three to one vote.

14. Closed Session:

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

Adjournment