

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5584**

1. Opening of Meeting:

The Appeals Board convened at 10:30 a.m., December 12, 2014, in Sacramento with Chair Robert Dresser presiding.

2. Roll Call: <u>Members</u>	<u>Present</u>	<u>Absent</u>
Robert Dresser, Chair	X	
Michael Allen, Vice Chair	X	
Roy Ashburn	X	
John Adkisson	X	

3. Approval of the Minutes:

The October 14, 2014 and November 12, 2014 minutes were approved unanimously.

4. Chair's Report:

Chair Dresser thanked and expressed his appreciation to his three colleagues. He doesn't know what the future holds. To Michael Allen, Vice Chair, he stated he appreciates his valuable wise council, intelligent analysis and his appreciation for the staff at CUIAB, board members, judges and support staff. He's worked very hard with the big case load and headed up the coordination of the revision of the Precedent Committee which required a lot of time and he knows CUIAB will see the fruits of that effort in 2015. To Member Ashburn, who he anticipates will be here another 60 days, Chair Dresser wanted to recognize him for the thousands of cases that he's done, plugging along every day and in split panels he takes a great and collegial approach frequently displaying a biting wit but never out of frustration. Then the news hit in the Brady decision where Member Ashburn prepared a dissent which unfortunately was persuasive to the San Francisco Superior Court judge who overturned CUIAB's noble precedent in P-B-505. In Ostapenko Member Ashburn again penned a dissent which was very well crafted and raised some interesting points so even though he might not agree with it he did read it very carefully. Chair Dresser thanked Member Ashburn for his hard work, his thoughtful

contributions to the board, both in terms of the cases that he decided and the operation of the agency. He brought a load of experience to his supervisor position with Kern County as well as being a senator and an assemblyman, his wisdom on the operation of government and the need to work with different points of view should be a model for all public entities and legislative bodies. Lastly, Chair Dresser thanked Member Adkisson for the excellent work he has done, in particular, on his gigantic effort to help improve the standard paragraphs. Chair Dresser commented that the fruits of Member Adkisson's, efforts as well as that of Elise Rose and the staff, will be apparent before the end of this month. He anticipates there will be some standard paragraph revisions approved thanks in large part to Member Adkisson's proposals, it's ongoing though he understands this may be his last meeting and he thanked him for bring to their attention the need to make more current the standard paragraphs and he does appreciate that. Chair Dresser commented that Member Adkisson has been very diligent and insightful and gone way beyond what might have been expected to bring his legal views to the agency.

Chair Dresser reported, with respect to CUIAB's budget, the Governor is going to announce his budget January 10 or thereabouts and CUIAB is trying to find efficiencies to avoid budget cuts for the next fiscal year 2015/16. Whether they are successful or not he cannot predict but they will work hard to try to avoid more cuts.

Chair Dresser reported that with regards to the IHSS case, Ostapenko, three to one decision, was taken off calendar whether to make it a precedent.

Member Adkission had a question regarding the notice which he believes was done pursuant to his request it be taken off because of a flood of briefs which they received that he considers to be argumentative and not analytical but more importantly, there is a question as to who are the parties in interest here and obviously EDD is one of the parties and they provided briefing which he studied very carefully and he considers it to be a frivolous argument. It essentially boils down to we've always done it this way so let's not change it. He stated more importantly it's a question of who represents future claimants because the claimant in this case, as the Chair pointed out, is not going to have her benefits taken away so even her attorneys may not have any real interests in whether or not this becomes a precedent or not but he believes all of the IHSS workers, and he may be mistaken, are represented by SEIU and possibly by other organizations, and someone should make sure that these organizations are provided with not only the original decision that's under consideration but any briefings that CUIAB has received so that they may if they chose to appear or at least make comments or

file briefs on behalf of these future claimants. He just wants to be sure that we are not simply notifying Legal Services of Northern California, who he is not sure even has an interest in the question of the precedent.

Chair Dresser stated that that was a point well taken and we will make sure that it gets out there so that he or any other possibly interested bodies will try to figure that out as well as Legal Services and probably California Rural Legal Assistance and it will be open to the public and if they choose they can have input at the appropriate time.

5. Board Member Reports:

Vice Chair Allen thanked the Chair for his kind comments and thanked his fellow board members for the time they have had together. He has always had the attitude you should enjoy what you are doing at the time you are doing it, and it has been his pleasure to serve with them. Vice Chair Allen commented that he thinks the staff knows how much he appreciates all of them and he has no idea at this point in time whether this will be his final board meeting or whether he will be continuing but regardless the work they do here is incredibly important. He thinks all of them know that unfortunately or fortunately, that because of his experience in the private sector and also working for labor organizations he has worked with a lot of organizations that have gone through layoffs and downsizing and he knows that it is always a difficult moral issue for those people who are the survivors after cuts in services but in this saturation we are kind of cyclical and he just wants to let everyone at all levels in the organization know that he for one thinks that a heroic job was done during the deeps of the recession, a heroic job continues to be done now with less staff, lower caseload, nevertheless we are dispensing billions of dollars of benefits each year and the amount of humanitarian agencies that basically try to follow the rules and the precedents and what is put before us. He thanked everyone for their service. He commented that it has been a real pleasure for him to have worked for the Senate, to have been in the Assembly, and to work for this organization. Public service has been incredibly meaningful for him and he stated we are here for the people of California.

Member Ashburn thanked the Chair for his kind comments and stated that it has been and is a great pleasure to work with each of his colleagues here and those who have also served during the nearly four years that he has had the opportunity to be on this board. Forty-two years of continuous public service, local government first then worked for a Member of the House of Representatives who later became the Chair of the Ways and Means Committee, County Supervisor for 12 years in a very hands-on county where the board is very active, the full 6 years in the State

Assembly and 8 years in State Senate. He stated that being here required him to call on whatever he had gained, the good and the bad, over the course of that time, he needed to bring to this task. He commented that this is an incredible agency with wonderful gifted talented people. What we do in serving the public of California is extraordinarily important. This board has the support of the business community and has the support of labor; has the support of the people of California as a body that in coming to final determination on matters that are literally the most important to people in a time crisis, whether they are going to be able to survive financially, to make a house payment, to make the rent, to get to the next step in their lives to find another job or in dealing with a disability and what that future uncertainty holds for individuals. Member Ashburn commented that this has been and continues to be and he hopes continues to be a place where the services provided to the public are provided in fair and meaningful and helpful way and a humanitarian way. Everyday our judges and all of our staff, our support staff at every level of involvement with the claimants, are extraordinarily committed to that task of making sure that what we do is fair and right. We have philosophical differences and we view the world differently and we ought to and that is why we are a board. We bring our experiences, we bring our judgment, we bring our knowledge and we apply it to the facts of the case. Ostapenko is a perfect example of a case where this lady in the circumstance of her life in caring for this child should have received benefits. The problem is how do we do the right thing but then not involve all other claimants who might have some more circumstances but yet in each of their lives the circumstances will be different and then how do you contrast against the reality of the law, in his view. This is a matter for the State Legislature to deal with. A perfect example because it is current to us of in my heart I wanted to grant this particular applicant benefits on the other hand the bigger picture of all the involvement of the law and regulations and what it would mean we weighed that as well. It's an extraordinary privilege to work for the public. He likes it. He enjoys it. He intends to continue. He wanted to wish everyone a joyous, wonderful and blessed holiday season.

Member Adkisson thanked everyone and the Chair for his kind words. He wanted to make a couple of points because he's always known he would be here for just one year and as he told one of his friends on the staff, he very intentionally stayed very objective in terms of the work culture here which is a good work culture but he tried to remain in the role of an outsider looking inside, consistent with his last job which was as a director of oversight of executive branches, agencies for the California State Senate. So he was constantly looking for ways to improve things even sometimes when he found out there wasn't any need and then he would change his mind but his recommendations have sometimes been seen as just too critical, too negative. He wanted to clear out a couple points because he has

deliberately been provided written criticism of especially legal precedents and standard paragraphs but he is not going to go through what that criticism has been but it has been an avalanche of it. What he wanted to clear up is that his overall impression on this agency is quite opposite of critical in the negative sense. He believes this agency, and he's looked at many, many agencies and has represented as a lawyer all three branches of government for many years, and he is very familiar with most state agencies and the way they operate including adjudicatory agencies and including federal and state courts, there is no agency that he has ever seen that provides this level of due process for people who cannot afford to higher expensive lawyers. This is one of the most important agencies in California and for reasons that Member Ashburn just outlined, we are dealing with people who the outcome of their cases may determine whether they are homeless the next day or whether they are thrown into dire poverty so these are very important cases. Anyone who thinks this is a minor agency doing minor work is absolutely wrong. His overall impression of this agency is that the professionals, and he doesn't know what percentage, almost always get it right because they are such experts on the unemployment insurance code and if they make a mistake it is usually because of some precedent or guideline written in 1940 or 1950 not by some member of the current staff and it's in a tiny, tiny percentage of cases. He stated that nevertheless it is important that we do look at those issues because even that tiny of percentage may affect thousands of people in the future and he thinks it is important that we get the law right. The second thing he wanted to clarify is that although he does have a philosophy about all matters, he has an opinion about everything, he's kept a little bit of track of the actual cases and this is his favorite part of the job is looking at the actual decisions every day. He does not know if his fellow colleagues have as much fun with it as he does but he likes to read and listen to as many hearings as he possibly can and he writes, as he has been informed, the longest comments in the history of the agency and he does it because he loves doing it and he hopes it is helpful to the analysis. But during the entire year he thinks he has been in the minority, in the dissents less than 10 times on any case, out of thousands of cases that they have seen. He doesn't believe that his philosophy is out of the norm or he doesn't believe that his views have to do with his philosophy but it's his bringing his lawyer experience, his lawyerly skills which are quite different, and in the end he has been in agreement almost all the time and in those dissents he has sometimes dissented in favor of the employer and not the claimant so he's been sort of on both sides. That said, he thinks the changes that he has recommended and he hopes are taken very seriously, mostly affect claimants. He believes thousands of claimants have been denied benefits incorrectly over the last few decades and it will continue to happen unless we face the legal problems of not updating the standard paragraphs and not looking to see if they actually reflect what our normally excellent precedents say. The precedents

are much better than the standard paragraphs and sometimes the problem is simply that you read the instructions to the hearing judge and that is what they are supposed to follow and it misstates or mis-cites the precedents. So change is not that difficult but it requires three things; one is a willingness to be open minded, not to feel defensive; secondly, it takes the legal competence to understand that the change needs to be made and we certainly have that in this agency; and third, it requires really a lot of work. Every time he looked up one little standard paragraph he would spend on average 75 hours researching the similar laws, the actual precedents, looking at considering cases that had come before us, it is a lot of work to make even small changes in these things. He does think that one of the issues is not simply open-mindedness and excellence but also giving the proper resources and time to people to spend, lots and lots of time, reconsidering what is probably 60 years of neglect in certain areas, and he hasn't looked at 80% of the standard paragraphs so he does not know how much there is to do, but if those resources are applied and people are given the time and instruction to look for things that can be improved it will happen. He stated that even with all of that this is the best agency he has ever been associated with either as a lawyer, an investigator of the agency or now as a member of the board. He commented that this is an excellent agency and doing what my old friend Darryl Steinberg would call God's work. This needs to be done properly and the humanitarian purpose behind the code is one of the best things the federal, state and local governments have conspired to do in our history and never think what you are doing is not important.

6. Public Comment:

No public comment.

7. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Gonzales commented that she has had the pleasure or working with the board as it is presently constituted. She does not want to say goodbye to the members who won't be here but it has been a very complex, complicated year for the board, for the staff, for everyone. The support of the board, the understanding of the board, the friendship of the board, the ability of the board to adapt and be supportive of staff has been appreciated certainly by her and she thinks other members of senior staff and she believes the judges in the field and the other staff in the field recognize that the board has been a very supportive body for over the last year. She stated that she will miss the members of the board who will not be here in January.

Chief ALJ/Executive Director Gonzales reported that they had a three day hearing for those who appealed the layoffs. She stated that they have been rehashing what they had put aside, trying to move forward, but they did have to go through it in the hearings knowing that as the workload report shows the intake for cases is the lowest its been since February 2001. With the booming economy we are continuing to decline in our cases and as we are basically funded from the federal government based on the cases that we hear and projected cases. It is not a surprise that our budget may be impacted in the future. She commented that the plans for January obviously involve, what happens with our budget and how we plan moving forward. That won't happen until the Governor's budget and when that comes to pass we will make plans on how to deal with what it is that we have.

Chief ALJ/Executive Director Gonzales reported that in the field it is pretty quiet because the layoffs occurred, the field is getting back to normal, people are having their holiday parties, people are coming to work, people are getting their paychecks and so she thinks people have gotten a little more comfortable with the fact that it was necessary to undergo reduction in force and that the field offices do understand.

Chief ALJ/Executive Director Gonzales announced that they selected Albert Michael Cutri as presiding judge for the San Diego Office of Appeals.

Chief ALJ/Executive Director Gonzales reported that there is no report from IT for this month and the only thing from Rob Silva is the overtime report which is in the board packet.

Chair Dresser stated that apropos Chief ALJ/Executive Director Gonzales comment about the reducing case load, the Henderson Business School in UCLA estimates the unemployment rate in California will be 5% by the end of 2016, right now it is 7.3%. It had been 12.4 and then a couple years ago it was 10%. So we can see the decline, unfortunately for CUIAB, because as it was pointed out we are countercyclical which means that the budget by this coming year could be difficult.

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

Chief ALJ of Appellate Operations Rose expressed her appreciation for all the hard work and dedication of the board members who may be leaving. She worked with Michael Allen on the Precedent Process and they went through several iterations and it is complete.

Chief ALJ of Appellate Operations Rose commented that she worked on a few

different issues with Member Ashburn. They assisted on the dissent in IHSS as well as with the majority. She stated that they really appreciate Member Ashburn willingness, being there, responsive to the log in staff and all his work on the board.

Chief ALJ of Appellate Operations Rose commented that she had a lot of interaction and worked a lot on the standard paragraphs with Member Adkisson. She thinks that they have made progress. She thinks that Member Adkisson's enthusiasm and commitment to making this agency better can't go unnoticed. She appreciates all his hard work and wished him well.

Chief ALJ of Appellate Operations Rose reported that for the first time in 21 months AO did not make its case aging. They were just over the 40-day standard at 41.1 and she'd like to think the problem was attributable, in part, to one case that was 1,000 days old when they got it and so that messed up AO's numbers for a while but they did get that one out. So they have in the last two weeks been able to meet the case aging at about 37 days at last measure. The time lapse is a little bit harder. AO is not making the 45-day time lapse. She commented that as the board knows there is that balance when you are trying to reduce the number of cases, the age of the cases that are left which is the case aging, you are not working on those cases that are less than 45 days old because those are not hurting the case aging. It is always a balance and they are doing some work on that right now to bring that up a little bit, don't know if they will be able to meet it but they are working hard on that.

Chief ALJ of Appellate Operations Rose reported that they have raised the case assignment number from 22 to 24 cases per week as the MOU allows. As of the end of next week they will only have ALJIs so they will all be working at that level. The appeal rate in November was lower than the average at 5.1%. Last month she told the board that she had never seen over 8% now she can tell them she has never seen 5% or very rarely 5%.

9. Project Director, Lori Kurosaka Report:

No report.

10. Chief Administrative Services, Robert Silva Report:

The Monthly Overtime/Lump Sum Payout Report is contained in the board packets.

11. Chief Counsel's Report:

Chief Counsel Levy commented that just as he is getting to know the board members most of them are moving on to different places and it will be almost a completely new board than the one that hired him almost two months ago. People have asked him how he has enjoyed the job so far and he kind of likens it to a sipping a drink of water through a fire hose. The volume comes through very quickly but fortunately the nozzle is only so big so you have relatively large bite sizes you can chew it up with at time. He stated it is a lot of fun and he is learning lots though he doesn't relish some of the things that have to be done, it's unpleasant, layoffs aren't pleasant.

Chief Counsel Levy reported that the layoff appeals were three days of very intense hearings with impassioned testimony from many people. He thinks that the judge in the hearing did a remarkable job, understands the issues, she was very attentive, professional and kept really good control of her courtroom and he applauds her mannerisms and her performance as a judge even not knowing how she is going to rule yet.

Chief Counsel Levy reported that during the time that he has been wrapped up in the layoff appeals there have been a number of appellate decisions and superior court decisions that have come out that he has not had the opportunity to review yet so he will send the board a write up in writing so that they may see what they are as soon as he is able to get to that.

Chief Counsel Levy commented, on a side note, the board may have noticed from his resume that he is on the California Commission on Access to Justice and one of that Commission's newer endeavors is about to come out early next year is a recommendation that the full Commission is going to consider on minimum access to justice standards for administrative agencies. Access to Justice has been a big issue of course in the judicial arena for some considerable period of time and the Commission is exploring recommendations on access standards for administrative agencies as well. At least a number of CUIAB judges are on that Commission, Mary Kelley is on that Commission and representatives from other agencies as well who can speak to things that the agencies can do to facilitate better participation by members of the public especially when they are largely unrepresented or self-represented parties whether they are claimants, employers or otherwise. He thinks they'll look forward to seeing the recommendations of the report.

On a final note, Chief Counsel Levy, expressed his gratitude for the opportunity to

be at the board and stated that it has been a privilege working and learning from all of them. He looks forward to the next term equally as well but hopes they are remain in touch.

12. Unfinished and New Business:

Vice Chair Allen asked Chair Dresser for how long can CUIAB be out of compliance with the 45-day time limit before the Department of Labor starts giving us warning notices we are in trouble.

Chair Dresser responded that that was a good question. He stated that in March they do a review and they take a look at our 12 month average for the preceding 12 months and they make the decision whether we are in compliance or not. He stated that CUIAB has been in compliance since November of last year and he is hoping that in AO and in the field that for a variety of reasons we will be able to catch up so that the 12-month average both for field and AO will make us in full compliance.

Chief ALJ of Appellate Operations Rose added that the standards are different for the field and appellate. For AO the actual law only requires that AO meets the case aging. DOL keeps track of the other but their ability to do something to CUIAB as a result of not meeting the time lapse is limited. It is the case aging that is really the most important standard for AO. She stated that that is why they are focusing on that and if they have to choose that would be what they would choose to meet.

Chair Dresser commented that AO hadn't been in Corrective Action since 2010 he thinks that was the year they extricated themselves from that.

Member Adkisson stated that he has not really been actively involved in the work that has been done on compliance to federal standards but he had reviewed probably a dozen different agencies who had found themselves in Corrective Action mode for similar issues. He commented that in every case the problem has been so much more serious than anything facing CUIAB and their diligence has been really exceptional. He stated that some of the cases have been the other agencies what the federal agency concern finds is that in order to meet these standards the agencies have actually lowered their standard of quality and that is when things get really bad and that is when federal agencies really come down hard, and that has never happened at CUIAB, so keep it up but don't beat yourself up because this is one of the best agencies at this level for federal compliance and he bets they consider CUIAB in the highest regard.

Vice Chair Allen expressed his appreciation to the IT staff for their help. He commented that he has probably been one of the biggest users of the IT Helpdesk over the past year and it has been appreciated.

13. Closed Session:

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

Adjournment