

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5601**

Open Session

The Appeals Board convened at 10:32 a.m., December 15, 2015, in Sacramento with Chair Robert Dresser presiding.

Chair Dresser announced that the Board will accept public comment on any agenda item, or on any other matter under its jurisdiction. Speakers are asked to limit their testimony to approximately 5 minutes on each agenda item, and on any other matter under its jurisdiction not listed on the agenda. The order of agenda items may be changed to accommodate the Board or the public.

1. Roll Call: <u>Members</u>	<u>Present</u>	<u>Absent</u>
Robert Dresser, Chair	x	
Michael Allen, Vice Chair	x	
Ellen Corbett	x	

2. Approval of the Minutes:

The minutes of November 10, 2015, were approved unanimously.

3. Chair's Report:

Chair Dresser reported that CUIAB continues to make its Department of Labor timelines and quality standards.

Chair Dresser reported that he and Chief ALJ Gonzales addressed the California Unemployment Insurance Council employer group last week in Los Angeles. Several of CUIAB judges were there as well. Chief Gonzales talked about the status of the agency and he talked about court decisions and precedent decisions.

Chair Dresser reported that back pay has been provided to all the judges who were ordered reinstated by the CalHR judge.

Chair Dresser reported that with Vice Chair Allen's help and Chief Rose's assistance the Precedent Committee has worked very hard to prepare two proposed precedents for the board's consideration today.

Lastly, the time frame in which to apply for the Chief Counsel position has been extended to this Friday, December 18, to allow everyone who is interested an opportunity to apply. The interviews will be conducted in January.

4. Board Member Reports:

Vice Chair Allen expressed his gratitude to the entire organization, judges, support staff, clerical staff and IT. He stated the he is very well aware of all the work that goes into making this organization successful. It has not been an easy year but the people do a marvelous job. His wish for the New Year is that people will appreciate one another within the organization and treat each other with kindness.

Member Corbett echoed Vice Chair Allen's comments and added that she is glad to see that they are moving forward with the Chief Counsel Application process and she looks forward to working with the new person. Also, she was very pleased to read the precedents that are before the board for approval today and also the work that being done on the precedents coming in the future. In echoing partly what Board Member Allen said, she thinks when they start reading through these precedents they really do realize how much work goes into each and every one of these pieces of important work that they do. She does know that people have been very diligent the last few weeks trying to put all this together for the board and thanked them for their efforts. She very much appreciates the fact that there are so many layers of review to make sure they do a good job. She thanked the work of the Precedent Committee in particular because she knows that some of these issues have been very tricky and complex. She commented that it is their job to make sure that employees and employers are treated fairly within the systems that they are sworn to uphold.

Chair Dresser added a personal thank you to Will Hilton. He's got a promotion and will be leaving the agency's IT unit at the end of the month.

5. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Gonzales stated that the report this month is consistent with the recent trend; the intake of cases for this month was one of the lowest since November 2014. The dispositions are also below average and the reason for this is that it is the holidays and people are taking time off. The judges

have professional development days that they take off the last few months as well as vacation time. Also, interviewing for new positions with the judges that are on SROA has resulted in fewer cases to be calendared in the field. Currently the open balance of all cases is 27,600, with just a little over 17,000 of those being UI cases. She reported that the Field has made all of its timeliness standards for the federal government.

Chief ALJ/Executive Director Gonzales commented on the incident in San Bernardino where there was an active shooter. The Inland Office of Appeals has a large office in San Bernardino which was nearby. They learned through that experience the coordination that needs to take place with both the Governor's Office and with our own staff. It went well. The presiding judge in the office handled the situation according to the policies and procedures set forth. It was nice to see how prepared we are for such a situation. After the incident, through coordination with the Employment Development Department, EAP counselors were available to any employees who wanted to take advantage of that service the morning after the shooting. Other than closing that afternoon for hearings the office was open for the rest of the week. Through the Security Committee they sent some tips that Homeland Security had suggested. They did attempt to send a video this morning but it was the wrong video. They are going to send a video for all staff to watch but want to make sure that the streaming part works right and that it doesn't disturb the bandwidth. The video was recalled and hopefully by the end of the day they will send out a video for all employees, if they wish to watch it, on how to handle a situation with a shooter.

Chief ALJ/Executive Director Gonzales reported, as the Chair mentioned, they did speak to a California Unemployment Insurance Council employer group. Going to these events helps us to understand what issues are of concern to employers, and that sometimes there is just a misunderstanding of the process. She stated that they are trying to do more outreach to interested groups, dealing with things such as how to properly prepare for and present your case to a judge. Of course, the same advice is given whether it is an employer or an employee group.

Member Corbett asked which groups CUIAB makes itself available to. Chief ALJ/Executive Director Gonzales responded that they are available to any groups that ask. The CUIC in Southern California has a tradition for over 10 years of asking CUIAB to speak at their December meeting. These are a group of HR professionals, representing school districts and hospital groups, such as the California Hospital Association. Chair Dresser mentioned that other interested groups include the Workers' Rights Committee, the Chamber of Commerce, and the Laborers' Union Underground Economy association.

Member Corbett stated she was very pleased to hear that because, as you know, a lot of people have a misunderstanding of what we do and she spends a lot of her time explaining to people what it is we do. She's glad to hear about this and would like to discuss possibly some other venues.

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

Chief ALJ Rose reported that in November AO pretty much echoed what the Chief of FO said in terms of the state of the current workload. AO's registrations were up a tiny bit but the dispositions were down about 300 cases. AO has staff out because they have been asked to burn excess leave. Also, people are taking time for the holidays. As a consequence the open balance is up a little bit but still well below the average by about 400 cases. AO is meeting all of its case aging and time lapse standards.

Chief ALJ Rose reported that they had a meeting of the Precedent Committee.

7. Chief Information Officer, Nick Dressler Report:

CIO Dressler reported that last month he stated that they were pushing out the new Internet Explorer upgrade and that he had hoped to have 95% of the devices upgraded by the December 1. He's proud to announce that they met that goal and that they are just now basically tracking down the devices that are mobile, like the laptops and things that are not turned on on a regular basis. They hope to get those done by mid-January. It was a good goal and they made their timelines on that.

CIO Dressler reported that by the end of the month they will be sending out an email notifying employees that it is time for our Annual Security Awareness training. That will start in January and will be an online training course to make the employees re-aware of what is proper IT protocol and so forth to ensure that we are meeting our security requirements and that we are keeping our information and data safe.

Vice Chair Allen asked if CIO Dressler ever meets with the technology people from the state, the overall umbrella group that gives advice to all the agencies. CIO Dressler responded that they attend quarterly meetings with Carlos, head of OTech, and also meets with the agency chief as well, Carlos Quant. There are different seminars that he attends as well to meet with peers, in the private industry as well as state and local government.

8. Chief Administrative Services, Robert Silva Report:

Chief Silva directed the board to the Monthly Overtime/Lump Sum Payout Report in the board packets. Chief Silva stated that since the budget was not passed until the last board meeting this is actually the first overtime report for the current fiscal year for review. During the last board meeting the board approved an overtime allocation of \$35,494 which was a 60% reduction from the previous fiscal year.

At the bottom of the document is the lump sum payout through October 2015. Through 1/3 of the fiscal year we have only expended 20% of the lump sum payout allocation of just over \$1 million. A straight line projection of that figure shows a surplus of just over \$376,000. However, fiscal lump sum payments historically balloon in January because of the close of the calendar year when people tend to retire and cash out lump sum and we certainly expect that to be the case this fiscal year. With that understanding, the projected surplus that is shown of \$376,000 will probably shrink significantly come February 2016.

Chief Silva reported on office supplies that the board adopted the budget last board meeting which included 32% allocation reduction in office supplies from the previous fiscal year. That left a statewide allocation of \$145,000 which is historically low for this agency. However, through the month of October CUIAB only expended \$44,700 which is 30% of the allocation through 1/3 of the fiscal year. So we are right on pace to stay within that lower allocation.

Chief Silva reported that the Bi-annual Bi-lingual audit was done in November. As we entered 46 employees were receiving the bilingual pay differential and there was one additional employee requesting to receive that bilingual pay. So the 46 plus the 1 did complete time ladders in the month of November and all 47 employees were at or above the 10% threshold to receive bilingual pay. The next audit will take place in May 2016.

Action Items

9. Board to Consider Board Decision AO-375883, Sevilla, for designation as precedent:

Chief Rose reported that this is a case where the claimant was discharged for taking a photo of his genitals in the men's bathroom at work and texting it to a female coworker during work hours. He was aware that the employer had a specific policy that prohibited distribution of sexual suggestive pictures at work and his action violated that policy. The board in this decision holds that the claimant

was discharged for deliberately violating a reasonable employer rule designed to prevent sexual harassment and protect the employer from liability which is a legitimate business interest. The conduct violated not only the rule but was potentially disruptive to the workplace and although he received no prior warnings the board found a warning was not necessary because the behavior interfered with the employer's business and threatened the employer's interest in having a work environment free from sexually harassing behavior. Also, the board noted the claimant's conduct, even if there had been no rule, was more than a good faith error in judgment and in fact, was egregious and disregarded the standard of behavior the employer has a right to expect. The staff recommends that the board vote to adopt that decision as a precedent. Chief Rose noted that they did send out a notice to the parties, interested parties and EDD and asked that they send any comments in writing. Nothing has been received to date.

Chair Dresser called for comments from the public. No public comment.

Member Corbett commented that she appreciates the writing of this precedent. In the short time she has been with the board she recognized that we don't have a precedent with regard to sexual harassment and she appreciates the work of the staff and her colleagues in searching out an appropriate case to ensure that they have such a very important part of employment law to protect people from these types of activities. She appreciates the seriousness with which this precedent was put together and appreciates the fact that they will have a precedent available.

Vice Chair Allen commented that he thinks one of their most significant responsibilities is to adopt precedents that provide guidance to our judges, and this decision certainly does that, making it clear that judges do not have to make a finding that sexual harassment in fact occurred. He thinks the board author and the Precedent Committee did a wonderful job on this and he is prepared to adopt it as a precedent.

The board unanimously voted to designate Case No. AO-375883 as a precedent decision.

10. Board to Consider Board Decision AO-374577, Cecil, for designation as precedent:

Chief Rose stated that this is a case about a claimant who was injured in January 2013. He filed for Workers' Compensation at the time but appears to have been dissuaded from filing for state disability at the same time. After he received temporary disability benefits under the Workers' Compensation system for two years he applied for state disability insurance. EDD denied the benefits on the grounds he was not an industrially disabled individual under the definitions set forth

in the Unemployment Insurance Code. In this case the board held that just because a claimant does not meet the definition of an industrially disabled individual set forth in § 2776 does not mean that he is not entitled to SDI. The board refers the matter back to EDD to determine under § 2706.1 whether the claimant had good cause for failing to file for SDI back in 2013, and whether the fact that he received Workers' Compensation benefits precludes his receipt of any state disability insurance benefits to which he would have otherwise have been entitled. The staff recommends adoption of this decision as precedent.

Vice Chair Allen commented that there is a huge amount of confusion by practitioners out in the field anytime they get a case involving both Workers' Compensation and SDI. Anything that the board can do to provide more guidance as to how to deal with kinds of cases is very helpful to general practitioners and specialists.

Member Corbett asked if CUIAB works with the State Bar and any specialty sections to get the word out about, for example, this new precedent. It appears to her that there is a lot of confusion with the law and it seems like we should be notifying people or attorneys who practice in this area.

Chair Dresser asked if CUIAB precedents went to the State Bar as a matter of course. Acting Chief Counsel Hilton replied that we do not do a separate mailing to the State Bar or any of its subcommittees. He stated that there is not a subcommittee that he is aware of that deals with unemployment insurance specifically, but he believes there is an labor or employment law committee, and we could make it a practice to mail our precedent decisions to them, particularly in this case that overlaps into Workers' Compensation Law, which is a section in the Bar. Member Corbett commented that she does not know if it would be possible to make a presentation to the Workers' Comp Section of the Bar. Acting Chief Counsel Hilton replied that we can send it to them and ask if they would like a presentation.

Chair Dresser asked Chief Rose to look into that and let the board know at the next board meeting what if anything can be done.

The board unanimously voted to designate Case No. AO-374577 as a precedent decision.

Closed Session:

The Board adjourned to closed session.

11. The Board reconvened in open session at approximately 11:55 a.m. The Board went back on record, and Chair Dresser noted the passing of Rochelle Ramsey, retired AO ALJ, and commented that she will be missed. Further, Member Corbett expressed that the Board was adjourning in memory of the people who lost their lives in the San Bernardino shooting.