

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5616**

Open Session

The Appeals Board convened at 10:30 a.m., March 22, 2017, in Sacramento with Chair Marty Block presiding.

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

2. Approval of the Minutes:

The February 22, 2017 Meeting Minutes were approved unanimously.

3. Chair's Report:

Chair Block reported that the Executive Director and he attended a celebration in Los Angeles earlier this month for Presiding Judge Zaida Hackett. He got to meet several of the presiding judges from different offices in the Los Angeles area and also several of the ALJs from the L.A. Office of Appeals. It was a good chance to get to know them and to get their impressions of the office, which were positive.

Chair Block further reported on his meetings with the Labor Agency and his discussions with them about CUIAB's pending BCP. The Labor Agency is very supportive. Chair Block observed that CUIAB has between 4,000 to 5,000 open tax cases that it hopes to close within two years if the BCP is approved. Chair Block further discussed with the Labor Agency the federal performance measures which, from all indications, will be met at the end of the month.

Chair Block also gave an update on a couple of court cases: *United Educators*, in which CUIAB's Reply Brief is due to be filed in the California Supreme Court by March 23; and the *Skidgel v. CUIAB*, in which CUIAB recently received a favorable decision from the Alameda County Superior Court.

Chair Block continued with some good news, Hugh Harrison has been selected to participate in the federal Department of Labor's National Review of States' UI Appeals.

Lastly, Chair Block acknowledged the IT staff and all the good work they are doing. In particular, he praised their work on our own homegrown Time Reporting System, and indicated that the Labor Agency, EDD and the ALRB are all interested in previewing the system and possibly adopted it for their own use.

4. Board Member Reports:

Vice Chair Allen expressed his gratitude to Member Corbett for working on the educational report that he will be taking to the Speaker's office. Member Allen added that he likes the report because it does not take a position one way or another on any given issue, but rather serves to educate the Legislature on what CUIAB is doing and why it is doing it.

Member Dresser stated that he wants to clarify what he believed to be a misunderstanding at the February Board meeting regarding his past verbal delegations of authority. Member Dresser indicated that he had verbally authorized the Executive Officer/Chief ALJ to go forward with ongoing efforts to achieve efficiencies in the AO operation. His goal was also to see if money was available to convert some Permanent Intermittent employees into permanent staff, and also possibly provide some promotional opportunities. Member Dresser thinks it was stated at the last Board meeting that his verbal delegation went much further than it really did. In his verbal delegation, he did not authorize the Executive Officer/Chief of Field to do any kind of hiring of AO staff, judges or other staff. He knows that the Chair's recent delegation agreement does.

Member Dresser added that he said at the last Board meeting he would send to the other Board members, which he did, a copy of a delegation agreement that was sent to him in February, 2016. He indicated that he was asked to sign that agreement, but did not because he was concerned about maintaining the wall between Appellate Operations and the Field Offices. Member Dresser further observed that the delegation agreement sent to him in February 2016 is not too dissimilar from the one that was issued last month by Chair Block. He realizes that reasonable minds can differ, but he just wanted to clarify for the record that there was a misunderstanding of what he had done verbally a year or two ago. Member Dresser added that it is quite different than the written delegation submitted last month.

Member Corbett thanked the staff who were involved with the email migration. She indicated that her email appeared with no difficulties. She also appreciated the updates to eFile. She further commented about a new procedure that she thinks will work very well, but may have a few issues to discuss, that being the third member assignment button. She wants to make sure that the Board members are all clear on how the procedure works and whether it requires an agreement of the panel to get a third person assignment. She also wants to make sure the new procedure is simply an IT fix and not something involving policy.

CIO Dressler responded that they should talk off line after the Board meeting to address her concerns.

Chair Block commented that he thinks this procedure came from IT as a way to streamline the system. He agreed that CIO Dressler and Member Corbett should discuss this off line. If after their discussion they think something needs to change, they can then bring that up with the Chair. If it needs to go to a vote of the whole Board, then it can be agendized for next month, but he doubts that will be necessary.

Member Corbett commented that she appreciates the fact that the procedure may be purely for efficiency purposes, but she thinks it might be misinterpreted as something different. She wants to clarify that it is a technical change.

Member Allen commented that the Board received a memo stating that in order for there to be a third panel member chosen, both of the assigned panelists have to be in agreement. To him it appears to be an IT change necessary for IT processes. But he thinks what Member Corbett is saying is that it is actually a policy change. He added that in the past it only took one Member to say that he/she wanted to add a third panelist. So it may be an actual change in the way the Board is handling cases.

CIO Dressler asked if the concern was over who was going to assign the tie-breaker.

Chair Block observed that the issue is not who is going to assign the tie-breaker, but how that third member will be assigned. He is informed that in the past just one board member clicked the third member button, and for whatever reason IT wanted two members to click it. In any event, the problem, as he sees it, is that one member, if he/she did not want a decision to issue, could just not click in and, by doing so, prevent a decision from issuing.

CIO Dressler commented that if a tie-breaker was needed, the system automatically generated who would be the third member. Now, as he understands it, there is a change so that the decision of who will be the third panelist is up to the Chair's discretion.

Chair Block stated that it is the Chair's prerogative. In the past, it automatically went to the third member because the Board only had three members.

Member Corbett commented that she thinks there are some fine points that impact policy, but she believes it probably was done in order to streamline the process of getting cases to the Chair so that he can make a third party selection.

5. Public Comment:

Jorge Carrillo asked to speak. Mr. Carrillo commented that he has worked for the CUIAB for 28 years. Most of that time he served as an administrative law judge for Appellate Operations, but he spent four years as the Chief Administrative Law Judge for Appellate Operations. He also served five months as interim Chief Counsel at the request of the Board and he is currently working as a retired annuitant. Prior to coming to CUIAB he worked 10 years for the ALRB and served two and half years as their Board's executive secretary during which he supervised the administrative law judges in the field. Later he was appointed by the Governor and confirmed by the state Senate to serve on the ALRB itself.

Judge Carrillo commented that this week the Board received a letter from 10 appellate judges asking the Chair and the Board to reconsider the placement of Appellate Operations and the Appellate Chief under the Chief of Field Operations. He is one of the 10 AO ALJs who supports that letter. He fully endorses the points made in the letter, but wanted to talk to the Board about his own perspective as a former Appellate Chief.

Mr. Carrillo continued by observing the Board has many responsibilities, but its largest and most important duty is to provide an independent review of appeals filed with the Board from field judges' decisions. The Board relies on the Appellate Chief and the appellate judges to provide the Board with its best legal advice. This relationship is one of attorney/client privilege and is a position of trust. This is the reason why the Chief ALJ of Appellate Operations is in a Career Executive Assignment, with no civil service protection, and serves at the pleasure of the Board. The Board has to have complete confidence and trust in the independence of the Appellate Chief and the appellate judges, and must know that the staff is

going to provide the Board with its best legal advice on appeals to the Board. To preserve the independence of the review, the Board has in the past had the Appellate Chief report to the Chair and has maintained a firewall between the work of the Field Chief and the work of the Appellate Chief. This was the same arrangement that existed at the ALRB when he was there. As the Executive Secretary he supervised the field administrative law judges, but had no supervision over the lawyers that worked for the Board doing appellate review.

Mr. Carrillo continued. At CUIAB we often have to determine whether an individual is working as an employee. We cite to court cases that state the obvious - an employer's ability to fire a worker at will is one of the most powerful indicators of the employer controlling the manner and means of performing the work. This is so because a worker is not likely to disobey the wishes of the person who has the power to determine his or her job security. When the power to fire the Appellate Chief at will is delegated to the Field Chief, it gives the Field Chief a very powerful tool for controlling the work of the Appellate Chief. The Appellate Chief now serves at the pleasure of the Field Chief, not the Board, and the flow of trust is redirected from the Board to the Field Chief.

Mr. Carrillo stated that he realizes that the new delegation excludes the Field Chief's authority over cases appealed to the Board, but just as there is no such thing as 50% due process, there is no such thing as 50% separation of powers. The mere existence of the delegated authority to the Field Chief is enough for the Appellate Chief to think twice about whether he or she can safely give the Board his or her best legal advice without fear that the results, particularly in sensitive cases, may displease the Field Chief and ultimately affect, consciously or subconsciously, the job security of the Appellate Chief, or the Field Chief's decisions regarding the staffing or resources available to the AO division. Regardless of whatever actions the Field Chief may or may not take, and regardless of the decisions that the Appellate Chief may or may not make, the moment such doubt enters into the mind of the Appellate Chief, the firewall that should exist will have been breached, and the independence of the review will have been compromised.

Mr. Carrillo added that if there were to be a vacancy in the Appellate Chief's position, given the present delegation, he would not apply. The potential conflicts and the trickle-down effect on the appellate judges would be too much.

Mr. Carrillo continued. The primary work of the Appellate Chief is to provide assistance to the Board, yet it will be the Field Chief that will make decisions over the future of the Appellate Chief. If the Field Chief doesn't have the authority to

look into the work that the Appellate Chief does for the Board, what else is there left for a Field Chief to review when deciding on the Appellate Chief's job security?

Mr. Carrillo concluded by stating that he thinks very few people would apply for an Appellate Chief position if it were open and that should be a concern to the Board. The Board should want the best qualified people who will have independence and the best interest of the Board at heart. So for these reasons he respectfully urges the Board and the Chair to reconsider the new delegation.

Wendy Breckon, ALJ II, with Appellate Operations, also asked to address the Board. Ms. Breckon wanted to express her concern about the delegation. She indicated that it seems to her to be a little bit unclear, and she is not sure why it was implemented because at this point the AO division has just issued the most precedent decisions they've ever issued, and they are meeting their performance expectations.

Ms. Breckon continued. What bothers her is that her primary job is to look at due process issues that arise in the field. She is always looking at continuance issues, or vacates when people do not appear for the hearing. The field by necessity has policies in place where they have to strictly run the show so that things keep moving. Appeals get dismissed if people don't show up. AO takes a look at these things and reviews due process issues. The opinions of AO judges on these matters may result in slowing things down. She added that if the field is in charge of appellate, that may influence how she reviews cases. She hopes it would not, but if her job was on the line or even if she was subject to a performance appraisal or discipline, maybe it would have an effect.

Chair Block asked if there was anyone else in the audience that wished to provide public comment. As there were no other speakers, Chair Block closed public comment.

Member Allen stated that the comments he makes are really his own, and he can't speak for the full Board. He added that he read very carefully the letter that came from Marty Geiger and then another letter came from the AO judges, and he's looked at the issue of delegated authority very carefully, and he hopes that everyone knows by the way he has conducted himself over the past three years that he is very invested in everybody being successful. He stated that it is in that spirit that he is giving these comments.

Member Allen continued by stating that he has looked very carefully at the delegation letter that was done by our new Chair and reads it in concert with the

existing Policy 19, which is very clear about what can and cannot be delegated. The Board's retained its authority to hire and fire the Executive Director, Appellate and all the Deputy Directors. It is all still here. Also the job descriptions everyone has that describe existing job duties have not been changed. If that was going to be changed that would be brought to the Board's attention. He understands the concerns and he thinks the desire to have this very strong firewall is understandable and he supports that, but he does not think the delegation is as major a shift as is being perceived. That said, he honors the concerns that are being voiced. In his estimation if you read all the documents that control the existing relationships he thinks it should give a certain comfort level to those now concerned about the delegation letter.

Member Dresser commented that he always agrees with his colleague, Vice Chair Allen, but he disagrees here. He thinks there is a big difference in this current policy compared with the one that has been around for quite a few years. Whoever the Executive Officer/Chief of Field may be, he is now not sure whether that person would be directly or tangentially involved with the hiring and firing or disciplining of the AO administrative law judges. But as he understands it, the potential is there. That's how he interprets it. Whether he is right or wrong that's his view, and he thinks that the Chair's delegation of authority is not good for the reasons set forth in the letter from the 10 judges and Board Author Geiger. He feels strongly that there is no need for the change.

Board member Dresser added that he is also not sure how the new agreement relates to the Office of the Chief Counsel. He is concerned that the Chief Counsel should be able to go to any Board Member without interference or involvement of anyone else and he would like to see that stand, but he doesn't think under the delegation agreement that will still be the practice and that concerns him greatly. While respectfully recognizing the Chair's authority, he doesn't think this is a proper interpretation of Board Policy 19.

Member Corbett commented that she appreciates the fact that people came to speak to the Board and thanked them. She too read the letters very carefully and she has great respect for the judges. She added that the Board would not be able to do its job without them.

Member Corbett added that she has no doubt that the policy as proposed will not impact their ability to independently review due process claims and other issues. In her experience, AO judges have taken on Board Members and their interpretations of the law, and she knows that takes courage. Notwithstanding the current delegation, she has no doubt that she will continue to see draft decisions from the

AO judges that, when justified, find that a claimant was deprived of due process, or not provided an interpreter, or not given an opportunity to review a file, or that a field judge did not treat someone appropriately. She has no doubt that the process as set up will continue to serve the public because she knows the ALJs will put the Board on notice if the process is not working.

Member Corbett continued by acknowledging the concerns about the firewall, and she thinks everyone understands these concerns. But, she sees it as very clear that this Board gave the Chair the authority, long before she arrived at CUIAB, to make a delegation if it appears to be right thing to do, and she does have full faith in Chair Block and the Governor's decision to appoint Chair Block. She expressed confidence that that the Chair will make changes if problems arise. She added that she supports the Chair in his effort to delegate authority just as she did when the previous Chair delegated authority.

Member Corbett thanked the staff for speaking up and indicated that she recognizes and respects what they have said. She stated that she as a Board Member will be paying very close attention to ensure that the process works under the current delegation. She concluded by indicating that she is open to discuss any problems that are brought to her attention.

6. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Gonzales reported that the main concern during the month of March was to ensure that the Department of Labor's timeliness standards are met. Thankfully, she added, the field offices are well above the percentages needed to meet the standards, and she is confident that will be the case at the end of the month. Presiding Judge Harrison is monitoring case statistics closely to make sure all goes well.

Chief ALJ/Executive Director Gonzales reported that she and Lori Kurosaka attended the Assembly Budget Committee meeting yesterday as part of CUIAB's ongoing effort to obtain approval of a BCP for about \$1.6 to reduce the number of tax appeal cases. Chief Gonzales added that it looks positive. She commented that a Senate budget committee meeting on the BCP is coming up, and that Chair Block is expected to attend.

Member Corbett asked for clarification on the BCP and what CUIAB is expected to do with the requested funds.

Chief ALJ/Executive Director Gonzales provided some background. She credited Lori Kurosaka, Janet Maglinte and Rob Silva for working very hard on the concept and getting the Labor Agency's approval. The processing of tax cases was delayed during the time when there was a high UI workload. That was because of the strict timeliness standards that apply to UI appeals. As a result, the number of pending tax appeals grew and CUIAB found that it did not have sufficient funds to reduce the backlog. Tax appeals currently average about 24 months to resolve. As appeals age, collections get harder. The expectation of CUIAB if funding is obtained is that tax appeals will be resolved in an average of nine months. Nine months is, of course, a target, and may not always be possible, but certainly if the funding is obtained, the average of 24 months will certainly go down.

Vice Chair Allen commented that he hopes the Legislature will view the BCP favorably, as it would help businesses, especially small ones that do not have the resources to engage in lengthy appeals.

Chair Block commented that he appreciated the great news about complying with the federal timeliness standards. He thanked all staff, Field and Appellate, for the great job they are doing. As for the BCP, he added, just so there is no misunderstanding, the item was held open by the Assembly, which means that it neither approved nor disapproved of the proposal. Having chaired the Education Budget Committee in the Senate for four years, he knows this is the norm. Probably 80% of the budget items, he estimated, are held open pending receipt by the Legislature of final revenue projections for the May Revise. So the fact that the BCP item remains open in the Assembly committee reflects neither favorable nor unfavorable on the proposal. He anticipates the same process will occur in the Senate. All in all, everyone seems very positive about the BCP and has complimented the work that our staff has done. He again thanked them all for their efforts.

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

Chief AO ALJ Rose reported that Appellate Operations' open case balance continues to improve. AO's average case age is expected to be under 40 days. It is 26.1 days as of the end of last week. In addition, the 45-day time lapse standard is 50%, with AO far above that at 86.10%. The 75-day time lapse measurement is at 99.10%. Chief Rose indicated that she has no concerns about being able to meet the DOL standards at the end of March.

Chief AO ALJ Rose commented on Chair Block's recent delegation of authority. She stated that she has some questions about it. She stated that she had no involvement in any of the letters the Board received from various ALJs. She indicated that she has not seen those letters, so she cannot tell the Board whether she agrees with what is in them. That said, she does agree with Jorge Carrillo's statements. She continued by stating that confusion still exists. She indicated that she was hired by the Board; her duty statement provides that she works under the direction of the Board; she reports to the Chairman and Board Members; she plays a major role in the formulation, development and implementation of CUIAB Board policy; and she manages the Appellate Operations program. She commented that with the delegation she is already experiencing conflicts in her day to day work, and she is not sure whether she is supposed to be abiding by what Board Members are asking her to do or abiding by what the Executive Officer is asking her to do. She continued by indicating that she does not know what she is supposed to do when she has such a conflict because she is under instructions from both.

As an example, Chief AO ALJ Rose indicated that she sent to the Board Chair and Vice Chair an email asking for guidance on referrals of field office complaints or complaints that the Board Members have asked her to send to the ALJ Complaints unit. She indicated that the Board usually receives a copy of those referrals. Now she has been asked not to provide copies of the referrals, and feels caught in the middle. She continued by indicating that she is very concerned that the delegation can be used to replace the needs and desires of the Board Members with those of the Chief of Field/ Executive Officer. So, Chief Rose continued, she has to deal with the conflict of being appointed by the Board, and with her duty statement reflecting that she operates under the Board, while not being sure if the Board retains the authority to terminate her Career Executive Assignment. She added that it seems like under Policy 19 the Board does retain that authority, but that now there is a question whether that authority has been delegated to the Executive Officer. She stated she will do her best to carry out her responsibilities, as it is the Board's desire to proceed with the delegation, but she really does need some guidance in this regard.

Chair Block responded that he thinks the documents are clear, but if not to her, he can have his assistant schedule a meeting for them to talk about it.

Vice Chair Allen commented that he thinks clarification on process for referrals will be forthcoming. He added that full Board input was sought and that is why an answer to her memo has not yet been provided.

Member Dresser commented that his understanding of Policy 19 is that the Board still retains authority to hire and fire the executive staff specifically identified in the policy.

Chair Blocked thanked Chief Rose and Appellate Operations for the good news about their case processing statistics.

8. Chief Information Officer, Nick Dressler Report:

CIO Dressler indicated that the agency-wide email migration is 99% complete. He emphasized that the vendor selected for the projected has praised CUIAB's IT staff for their knowledge and skill. CIO Dressler thanked both his staff and the vendor for their excellent work.

CIO Dressler reported that last week the IT branch demonstrated CUIAB's Time Reporting System for EDD, the ALRB and the ETP. Another demonstration is scheduled with the Labor Agency's Information Officer. There is some thought that CUIAB's system will be adopted by the departments and agencies throughout the Labor and Workforce Development Agency.

Member Corbett thanked and complimented the IT staff for being proactive and very supportive during the email migration.

9. Chief Administrative Services, Robert Silva Report:

Chief Silva reported on monthly overtime and lump sum payouts. He indicated that both overtime use and lump sum payouts are expected to decrease as the fiscal year progresses. In January, 2017 the only dollar expense for overtime was \$1,700, all of which was within the IT branch. Overtime usage continues to trend downward. Consequently, the projected budget year shortfall for overtime has been reduced to \$26,200 from the \$33,000 reported last month.

Chief Silva also reported that lump sum payouts continue to trend downward. The projected surplus has now crept up to over \$500,000, although there are some anticipated retirements in the next few months that will significantly reduce this amount. Nevertheless, the projected surplus is not likely to turn into a shortfall.

Chief Silva reported that all branches within CUIAB with the exception of IT have submitted Call Letter requests for the fiscal year 2017/2018. Chief Silva further reported that he and CIO Dressler are working to fine tune requests for the IT branch.

Chief Silva indicated that lease renewals have been initiated for outstations in Visalia, Salinas, Long Beach and Murrieta. The leases for these offices do not expire for at least another year, so there is plenty of time to work on the renewals.

Vice Chair Allen asked whether Chief Silva is monitoring developments in Washington D.C., and in particular talk of steep cuts in the Department of Labor's budget.

Chief Silva responded that the Department of Labor sent several emails recently expressing its concern with many of the proposed cuts. The DOL further advised that the states will be updated as the specific impact of cuts becomes clearer.

Closed Session:

The Board adjourned Open Session at 11:06 a.m. The Board commenced a Closed Session at approximately 11:15 a.m. Closed Session was adjourned at approximately 12:06 p.m.

Open Session:

The Board reconvened in Open Session at approximately 12:06 p.m. Pursuant to Unemployment Insurance Code Section 1236(e), Chair Block reported that in Closed Session the Board took a vote on Cases AO-391949 and AO-391950.

Chair Block adjourned Open Session at 12:06 p.m.