

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5630**

Open Session

The Appeals Board convened at 1:00 p.m., May 16, 2018, in Sacramento with Chair Marty Block presiding.

1. Roll Call: Members

Present Absent

Marty Block, Chair	x
Michael Allen, Vice Chair	x
Ellen Corbett	x
Robert Dresser	x

2. Approval of the Minutes:

The April 18, 2018 Meeting Minutes were approved unanimously.

3. Chair's Report:

Chair Block reported on three items which he shared at the Labor and Workforce Development Agency (LWDA) meeting. He provided them with an update of the many personnel changes happening at California Unemployment Insurance Appeals Board (CUIAB). First, that the Board will be interviewing candidates for the position of presiding judge for Appellate Operations. Secondly, that former Board Chairman, Robert Dresser, will be retiring at the end of June 2018. Third, that CIO Nick Dressler was also retiring. Chair Block also reported on the remarkable job CUIAB is doing with the additional funds received through the Budget Change Proposal (BCP). He reported that CUIAB has the lowest backlog of tax cases it has had for a long time.

4. Board Member Reports:

Vice Chair Allen expressed his gratitude to all of the judges from the field offices to Appellate Operations for their hard work. He thanked the administrative staff, support staff and his fellow Board members.

Vice Chair Allen conveyed his appreciation for the time he has served on the

Board with Member Dresser. Vice Chair Allen wished Member Dresser success in retirement. Additionally, he wished CIO Nick Dressler and Michelle Frachevois success in their upcoming retirement and stated how much he enjoyed working with them.

Vice Chair Allen reported he will be working on an internal newsletter and will be enlisting the assistance from Assistant Executive Director Kurosaka.

Vice Chair Allen thanked Acting PALJ Rebecca Bach, for her outstanding service as Acting Presiding Administrative Law Judge for Appellate Operations.

Member Corbett echoed Vice Chair Allen comments. She added that she was pleased operations were running smoothly and on track. She was happy to contribute to bringing the work load down.

Member Corbett commented she was sorry to see Member Dresser leave. She noted he was Board Chairman when she arrived at CUIAB and she expressed her appreciation to Member Dresser for his support and guidance throughout the years.

Member Dresser thanked Members Allen and Corbett for their kind words. He requested the Board look into and respond to his four suggestions from the previous Board meeting

5. Public Comment:

No public comment.

6. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Gonzales reported that for the April numbers the Field closed 78.2% of UI cases within 30 days, the standard is 60%. They closed 95.1% within 45 days; the standard due is 80%. The average case age was 21.2 days. Director Gonzales reported the overall workload was down and the open inventory was 17% lower than fiscal year average.

Director Gonzales reported the tax workload is at the lowest it has been since 2007. The good news is they are working through the tax backlog, using the BCP funding and reassigning ALJs to process tax appeals. She noted this meant more tax cases will be coming to Appellate Operations thus to the Board.

In response to an inquiry of Vice Chair Allen, Executive Director Gonzales gave a

security report that summarized security incidents addressed by the Field during the past month. Director Gonzales reported there were four security incidents recorded for April. The first was reported by the San Diego Office of Appeals that they had an agitated claimant during a hearing. The ALJ reported the incident after the hearing, filled out a report and it was handled appropriately. The second involved a suspected email phishing scam reported by a staff member. The email was forwarded to the IT Department who determined it was nothing of significance and didn't warrant sending out email alerts throughout the agency. The next incident involved the Pasadena field office which had to call the California Highway Patrol (CHP) because of a suspicious person in the parking lot tapping on car windows and "petting" cars. CHP responded but no arrests were made. The final incident was an aggressive claimant at the hearing facility in Long Beach. The claimant left the hearing abruptly after becoming unpleasant to the ALJ. The ALJ reported the event to the Security Committee.

Vice Chair Allen asked about the procedure after incidents are reported. Specifically, if there was discussion amongst the local offices and the Safety Committee regarding whether the situation was handled appropriately.

Director Gonzales responded that the presiding judge of the office discusses reported incidents with all involved parties. They cover how the situation was handled and how it might have been handled in a better manner. She noted that these incidents sometimes occur in the field offices where staff may be involved or may occur in an outstation hearing facility where the ALJ is without support staff. Director Gonzales stated the Security Committee encourages the ALJs to report all incidents. In addition to reporting the incident the presiding judges are responsible to discuss the situation with staff and determine if follow-up is needed or additional action as deemed appropriate. Procedures are specific to each office because the offices are set up different from one another. As situations arise they are handled locally but the Security Committee receives a report. The Security Committee keeps track of any patterns developing and makes recommendations. Director Gonzales stated the field offices have received informational visits which include local CHP.

7. Chief ALJ of Appellate Operations Report:

Acting Presiding Judge Bach reported AO's April numbers, the time lapse requirement for completion of cases within 45-days is 50% but AO had a completion rate of 87.2%. The time lapse requirement for 75-days is 80% but that AO had a completion rate of 99.3 %. She reported the case aging is expected to be at 40 days or less and AO's case aging for April was 25.6, still excellent. AO opened 1,076 cases and closed 829 cases with an open balance of 1,156 cases of

which 1,069 cases were UI cases. Judge Bach expressed her gratitude and appreciation to the Board, Director Gonzales, Assistant Director Kurosaka and Ralph Hilton for their extreme patience and mentoring over the past months.

Member Dresser thanked Judge Bach for her excellent work.

Vice Chair Allen expressed his appreciation to Judge Bach for her hard work as acting presiding judge of Appellate Operations and particularly her dedication to the precedent decision process and forwarding Precedent Committee ideas. Judge Bach responded she thought the process had been helpful and she thanked Vice Chair Allen.

Member Corbett also thanked Judge Bach for hard work and dedication. She expressed her appreciation for Judge Bach's professionalism in making even the most difficult cases sound easy and her cheerful attitude, making it a joy to work with her.

Chair Block also thanked Judge Bach for stepping in to temporarily fill the position of presiding judge and for all the remarkable work she has done. He commented she set a very high bar for the next presiding judge and her work was greatly appreciated on behalf of the Board, support staff and judges.

8. Chief Information Officer, Nick Dressler Report:

CIO Dressler reported the IT Department, along with assistance from Assistant Director Kurosaka and Research Coordinator Maglinte, has identified 43 projects planned for the IT Department. They will be working on prioritizing the 43 projects and will update the Board on the top ten projects at the next meeting.

CIO Dressler reported the Board should soon be getting a preview of the portal the IT Department is developing for the public. The portal is very user friendly and it is anticipated to be a huge success.

CIO Dressler commented that although he is retiring this June his official retirement date will not be until next year. He stated this would be his last Board meeting and thanked the Board Members and all the CUIAB staff for their support over the years.

Vice Chair Allen asked CIO Dressler if he would be assisting in the recruitment process for his successor. CIO Dressler responded he is more than willing to assist. Vice Chair Allen opined CIO Dressler would be uniquely qualified to help find a successor.

Member Dresser thanked CIO Dressler for all of his good work.

Member Corbett thanked CIO Dressler for helping to modernize agency systems and for the help he provided when anyone felt technologically challenged.

Chair Block thanked CIO Dressler for the many projects he has handled so well over the years and said his help hiring a successor would also be great.

9. Chief Administrative Services, Robert Silva Report:

No Report.

Action Item:

10 CUIC 412 Board Takeover, Case Nos. 5611370 and 5611371

Chief Counsel Gonzalez introduced the possible Board Takeover case, Connor-Nolan. She explained the intent of this item would take this tax case back from the field to the Board for review and for the Board to issue a decision. The dispute in this tax case is whether the employees of Connor-Nolan are employees or franchisees, which would make them independent contractors. The Board originally remanded this case for a decision to be consistent with the *SuperShuttle* case. In the meantime the *SuperShuttle* case was overturned by the superior court so it is no longer effective law. Chief Counsel Gonzalez recommended the Board take this case back to reduce confusion since *SuperShuttle* bears no authority and the original decision contains language relying on the *SuperShuttle* case.

Counsel for EDD, Shannon Pavao addressed the Board and recommended the Board not take back the case. Mr. Pavao commented that the remand was not specifically to address P-B-502. The remand wanted specific evidence, taken on specific issues, that the Board, at that time, felt was relevant. Right now even today it is relevant so it is not just a remand for P-B-502 and we, EDD, do not think that P-B-502, the superior court decision in *SuperShuttle* has any impact in regards to the law the Board is going to apply. In the superior court decision on *SuperShuttle* Judge Hom purported to apply the *Borello* test to our facts. There is a half day of oral argument on that issue and he opined *Borello* is the law.

However, when the decision came down it appeared to be a combination of *Borello* and also Franchise law. That was just the superior court decision. If it was something more than just that legal issue the EDD would have appealed the case further but the judge did not leave us much room. So we think that case just binds the director and *SuperShuttle*. The law is still unsettled there is case pending at the Ninth Circuit, Court of Appeal, *Juarez v. Johnny King*, similar case and that court just ordered briefing to the parties to address the recently decided *Dynamex West Operations* case. The courts have not really found in the worker protection arena the bright line of what constitutes a franchisor of doing too much.

Mr. Pavao continued, obviously in *SuperShuttle* the judge said they did not do enough for them to overturn the franchisee status. So the cases are different but that was the issue on remand. The EDD today did not want to get into the merits of *SuperShuttle*. What the possible takeover notice did to EDD is put us tough position because the Board is saying they are going to take this case over possibly but they are not telling EDD what they are going to do? That is why my position paper says you should do exactly what the final Board decision ordered an ALJ to do. That is to take this testimony, EDD completely agrees P-B-502 is completely off the table, but the law remains the same and the specific issues in that remand order can be addressed and should be addressed. We submit on that unless you have other questions.

Chief Counsel Gonzalez stated she did not want to get into the merits, because the Board is voting to take it up under section 412.

Vice Chair Allen commented he was pleased Counsel Pavao came to clarify what EDD's concerns are and appreciated his testimony.

Counsel Pavao thanked Vice Chair Allen.

Member Dresser commented that Counsel Pavao made some good points. He read the remand order and there were some questions about whether it was clear or not, whether certain requirements were imposed by the franchisee or by the petitioner. He said there was conflicting testimony whether the franchisees were required to use the billing services of the petitioner and, if so, when that requirement was changed and what the consequences were, if any. He believed there were a couple of credibility issues. He stated that was why there was a vote to remand it to another judge to expand the record and to answer Board questions.

Member Dresser agreed P-T-502 is no longer valid law, but he said it does not mean the principles set forth in P-T-502, which was a unanimous decision of the Board, were not well reasoned, would not be accepted by another superior court judge. Member Dresser believes it should still be remanded to another judge and then it will still come back to us and we can decide if we want to reapply certain principles of the law that were set forth in P-T-502. Then if the parties disagree it can go to a superior court judge. Member Dresser felt P-T-502 was well reasoned and made sense. The fact remains that the remand is not just due to P-T-502. He stated it was to clarify the record and to get more credibility resolution. Member Dresser respectfully suggests and so moves that the Board continue with the order that it issued on July of 2015 and remand it to another judge.

Chair Block expressed his concern was that in the Board's Remand order there was specific mention of P-T-502. Also the decision said the administrative law judge did not fully analyze all facts bearing on the issue and would have to weigh in P-T-502 *SuperShuttle*. Chair Block pointed out that in the decision the Board also said that a more detailed analysis of the applicability of P-T-502 is needed. Chair Block stated had we not directly mentioned P-T-502 and just used it in the rationale that would be one thing. Chair Block noted if we take the case back, the Board may well decide to go ahead and remand without the specific allusion to P-T-502 which according to the superior court is bad law at this particular point and time. He commented we know that this law and independent contractors/franchisee law is very much in flux at various levels of state agencies and in the courts. He stated to apply law or to tell the field office ALJ, to whom this will be remanded, that he or she needs to specifically consider P-T-502 when we know it is bad law just does not make sense and does not speak well of this Board if we do that knowing that the superior court found P-T-502 is bad law. He suggested the Board take back the case and then make a decision whether it should be four Member panel or a two Member panel.

Member Corbett believes that taking the case over would be the best option because the Board could look at all the considerations. She agrees it would be confusing to send this back with the language that is in the order, applying a precedent that is no longer a precedent. She understands what Member Dresser said but believes the best option is to take the decision over and thoroughly review it to come up with the best decision.

Vice Chair Allen made a motion to accept the recommendation of Board Counsel to take jurisdiction of the Connor-Nolan case. The motion to take back case numbers 5611370 and 5611371, Connor-Nolan, was seconded by Member Corbett. Chair Block called for a roll call vote. The motion passed 3-1, with Member Dresser opposing.

Chair Block thanked Counsel Pavao and EDD and stated he thought it was in the best interest of the Board for the case to be brought back for another review. Counsel Pavao responded by saying he knew the Board had already voted but he wanted to address the concern which he stated Member Corbett raised. Procedurally it is not a difficult thing to do the remand. Connor-Nolan specifically stated that the underlying administrative record was to become a part of the record and if the parties wished to stipulate to any portion of the record they could. It would be as simple as a remand consistent with the decision that was issued on July 10, 2015 to another judge. The parties could agree that part of the analysis is not going to be PT-502 and the parties could further stipulate to what facts are relevant and then what facts pursuant to the remand would need to be flushed out. The remand order, from EDD's perspective, the most important thing, was the ability for EDD to now question the account managers of Connor-Nolan. So that is a very important part of the franchise law analysis and I cannot as an attorney call former employees of Connor-Nolan without getting the permission of Connor-Nolan's counsel. So I was waiting for a remand so that the judge could order the production of these account managers that then we could examine on the record to find out what the role and what their duties were. So I do not think it is procedurally confusing. This Board is lucky it has very seasoned ALJ's that have been doing tax cases for a long time and I think that could be handled very easily between myself and opposing counsel.

Chair Block again thanked Counsel Pavao for his input but, he stated the matter has been already decided. Chair Block thanked everyone in attendance.

Closed Session:

The Board adjourned Open Session at 1:34 p.m. and went into Closed Session. Closed Session was adjourned at approximately 3:27 p.m.

Open Session:

The Board reconvened in Open Session at approximately 3:28 p.m. Pursuant to

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Government Code Section 11126(a), Chair Block reported that in Closed Session the Board voted to offer the position of Presiding Judge of Appellate Operations to Joann Remke, contingent upon reference checks. The meeting was adjourned at 3:28.

Adjournment