

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5651**

Open Session

The Appeals Board convened at 1:00 p.m., February 19, 2020, in Sacramento with Chair Marty Block presiding.

1. Roll Call: <u>Members</u>	<u>Present</u>	<u>Absent</u>
Marty Block, Chair	X	
Dan Reeves, Vice-Chair	X	
Mike Eng	X	
Michael Allen	X	

2. Approval of the Minutes:

The January 15, 2019, Meeting Minutes were approved unanimously.

3. Chair's Report:

Chair Block welcomed those watching the live-streamed Board Meeting, stating the purpose of live-streaming is to provide transparency and allow employees, constituents and parties to actions a chance to see the Board at work. He reminded that most of the Board Members' work is performed between the monthly Board meetings by reviewing individual appeals. The Board reviewed and resolved 822 appeals the past month.

Chair Block reported that the agency is working towards the March 31 deadline to meet the Department of Labor's (DOL) timeliness and case-aging standards. Chair Block indicated that the Board's Appellate Operations is doing an outstanding job and asked the Board Members and all ALJs to be conscientious in working to meet this deadline. Chair Block welcomed the new ALJ's to CUIAB and noted that they will be helping CUIAB reach its goals.

Chair Block reported that he anticipates a fifth Board Member will be appointed soon.

Chair Block reported that he, Chief ALJ/Executive Director Gonzales and other members of CUIAB's Senior Staff, met with employee advocate groups yesterday. Chair Block also reported he attended the Labor and Workforce Development

Agency's monthly meeting, during which the Labor Secretary discussed the budget and the Governor's State of the State Address.

4. Board Member Reports:

Member Eng announced that Chair Block had been included in a highly regarded publication regarding lobbying and advocacy in California. Member Eng commended Chair Block on being the only former elected official included in the publication and stated it was a positive reflection on the Board for the Chair to have been included.

Chair Block thanked Member Eng and stated the publication was edited by Chris Micheli and Ray LeBov, with several well-known lobbyists contributing. Chair Block worked with Chris Micheli on a chapter addressing advocacy from the elected officials' perspective.

Member Allen expressed appreciation for employees in all levels of CUIAB's organization and commented that good performance should never be taken for granted. He noted the attention to detail and civility displayed by our judges in the hearings. Member Allen stated he is proud of this organization and he will always thank CUIAB's employees in his report for what he considers a job well done.

5. Public Comment

Ira Jacobowitz, Administrative Law Judge II with the Bay Area Office of Appeals, addressed the Board and distributed a written statement, a letter from CASE and a letter from a former employee, Judge Krowech. Judge Jacobowitz expressed concern over several management issues.

6. Chief ALJ/Executive Director Report:

Executive Director Gonzales reported that the meeting with employee advocate groups was very productive. The groups were provided a booklet on *How to Properly Prepare for a Hearing* along with other written materials involving appeal procedures. She reported that as a result of the discussions, CUIAB will incorporate some of the suggestions into ALJ trainings. The groups advised that the last time they met with CUIAB was five years ago, and overall, felt CUIAB was performing positively.

Executive Director Gonzales reported that January was the first full month CUIAB was able to reinstate higher caseload levels following its temporary agreement with CASE. As a result, the average case age fell from 32.3 days in December, to 26.6

in January—meeting federal case aging standards.

CUIAB is currently meeting DOL's 45-day timeliness standard on an annualized basis but is two points short of meeting DOL's 30-day standard. CUIAB is working towards meeting that standard by March 31. In this, CUIAB has continued measures previously discussed including restricting and revoking vacations, and requiring mass calendars in all offices.

Executive Director Gonzales reported a security incident occurred in early February in which a claimant became hostile during a hearing. The Highway Patrol was contacted and the hearing recommenced. The claimant left following the hearing with no further incident.

Executive Director Gonzales reported CUIAB received approval to use the Office of Administrative Hearing's ALJ I list and recruitment for these positions will begin in approximately one week.

Vice Chair Reeves noted that CUIAB closed 1,500 more cases than had been opened last month, but the overall percentage of cases closed within 30 days fell to 46.1%, and asked the reason. Executive Director Gonzales advised that while the goal is to meet all timing standards at the same time, in prioritizing workload CUIAB balances efforts to meet average case age requirements with the age of closed cases because concentrating on one metric can negatively impact the other. Case age is measured on one day, March 31, therefore CUIAB prioritized closing the oldest case and those over 45 days. This impacted the percentage of cases closed within 30 days.

Vice-Chair Reeves commented that it appears there is a hierarchy of target dates CUIAB is working to meet and asked if the first one is average days and the next, 60% cases closed within 30 days. Executive Director Gonzales advised there are three different standards. CUIAB was meeting the 45-day standard and focused on closing cases older than 30 days. CUIAB should now be able to resolve most new appeals within 30 days.

Vice-Chair Reeves indicated that last month he inquired about the Inland field office and has seen improvement in resolving unemployment insurance cases and overall work, but noted that the ages of paid family leave and disability insurance cases remains high and ask about the reason for this. Executive Director Gonzales responded that Inland's statistics do not accurately reflect its performance as an individual office because the statewide management group transferred cases to that office due to the greater number of ALJs headquartered there in comparison to other offices.

Member Allen requested the materials exchanged with the advocacy groups. Executive Director Gonzales advised they would be provided. Member Allen further asked whether there are signaling devices in the offices to alert of a problem during hearing. Executive Director Gonzales responded that all hearing rooms have “panic” buttons. Investigator Vega further explained that the button signals an alarm company that notifies law enforcement and opens a door enabling the ALJ to exit the room, which then locks.

7. Presiding ALJ of Appellate Operations, Jodi Remke Report:

PALJ/AO Remke reported that Appellate Operations continues to meet all DOL guidelines and standards. Cases closed within 45 days or less, on the annual basis is 91.2%, and cases closed within 75 days or less is 98.9%. The monthly averages decreased since last month because four AO ALJs have been working part-time in the field to assist hearing cases. The average case age has also increased over the last several months to 26.7 days. The federal standard is 40 days and AO will continue to monitor and determine the need to adjust AO ALJ deployment in the field offices.

8. Chief Information Officer, Jeff Willoughby Report:

Albert Hernandez, Infrastructure Supervisor, provided the Information Technology report on behalf of CIO Jeff Willoughby. Supervisor Hernandez reported that they are finalizing work with EDD Procurement and the California Department of Technology to create a contract package for their vendor to assist them in developing the new Appeals Systems.

Supervisor Hernandez reported the IT Branch has worked on projects including: a new ticketing system for greater functionality and efficiency triaging support requests; Information Security and Privacy training; network speed upgrades; and new anti-virus and end-point protection systems. Supervisor Hernandez expressed CIO Willoughby’s appreciation for the IT Leadership Award he received at the California Public Sector CIO Academy, and emphasized that the IT Branch is working as a team to bring positive change for the organization.

Member Eng inquired about the “My Analytics” emails he has been receiving in Microsoft Outlook in his CUIAB account and expressed his concern about its linking of sensitive information. Member Eng asked the reason for the My Analytics emails, CUIAB’s policy concerning its implementation, and the use of the data analyzed. Supervisor Hernandez advised that My Analytics is a Microsoft tool intended to assist in increasing individual performance. The information is not transmitted to all

and individuals can unsubscribe from it. Member Eng asked whether the agency had approved its use, whether the tool is helpful to CUIAB, how we are aware of where the data is transmitted, and whether potential privacy concerns had been vetted by CUIAB or the state.

Chair Block thanked Member Eng for raising these issues and indicated he was not aware of the Board specifically approving use of My Analytics. Executive Director Gonzales advised that she understood its function was intended for individual use, but appreciated Member Eng's concerns and will talk to CIO Willoughby to discuss the issues raised. Member Eng advised that he would unsubscribe from My Analytics, but if it was determined helpful to CUIAB, would re-subscribe. Chair Block requested further information on Member Eng's questions regarding My Analytics in the Board's next meeting.

9. Chief Administrative Services, Robert Silva Report:

Chief Silva reported on monthly overtime and lump-sum payouts, noting higher overtime in December and January, primarily due to decision typing in the field offices but that CUIAB remains within its fiscal allocation. Regarding lump-sum payments, Chief Silva reported that seven employees separated in December, one in January and that CUIAB's lump-sum payments are also within its allocation.

Chief Silva reported that the Employment Development Department's (EDD) Fiscal Programs Divisions is getting closer to resolving technical issues regarding the State's FI\$cal System tracking of CUIAB's expenditures. Chief Silva reported that the November report received shows that CUIAB is within its budget for both salaries and operating expenses. CUIAB has been preparing for the State's fiscal year 2020/21.

Chief Silva reported on CUIAB facility usage and advised that the Agricultural Labor Relations Board (ALRB) will be utilizing additional space in CUIAB's Oxnard Office of Appeals, but CUIAB continues to have sufficient space in this facility for additional staff as needed. CUIAB has requested to renew its agreement with the Alcoholic Beverage Control Board (ABC) in the Board's San Diego Office of Appeals to enable ABC to use the facility on an as-needed basis. Additionally, the Labor Agency has inquired about using space in CUIAB's Los Angeles Office of Appeals.

Chief Silva reported the Administrative Law Judge I recruitment is moving forward, noting this classification remains subject to a re-employment list.

Member Eng inquired regarding possible impacts of AB 5, particularly in connection with classification disputes in tax cases. Member Eng stated that he believes there

will be a need for more investigations, potentially more ALJs with expertise in tax, asked about the processes and status for projecting workload needs, and CUIAB's role in seeking budget increases. Chief Silva advised that CUIAB plans to meet with EDD in March to discuss impacts on CUIAB and the potential for a Budget Change Proposal for the next fiscal year. EDD provides projections and estimates to CUIAB, and CUIAB provides input to EDD on these and seeks to reach an agreement.

Chair Block inquired whether EDD has provided CUIAB its workload projection. Chief Silva advised that he expects EDD to provide this in mid to late March.

Member Allen noted that a legislative analyst's opinion had been recently issued regarding AB 5, recommending a measured approach to changes due to the great amount of litigation involving AB 5's implementation and the likelihood of legislative changes to the law in the coming year.

10. Consideration of Board Decision Case No. AO-337099, *Brady*, regarding the removal of precedential designation status P-B-505

Chief Counsel Woo-Sam reported on the California Supreme Court's decision in the matter *United Educators of San Francisco v. CUIAB*, and its impact on the Board's Precedential Decision, P-B 505, in the matter of *Alicia Brady v. Ontario Montclair School District*. This precedent involves the interpretation of Unemployment Insurance Code (UIC) section 1253.3, which makes certain employees ineligible for unemployment insurance benefits during the period between two academic terms where the employees performed work in the first part of the academic term and have received reasonable assurance of work in the second academic term. The Supreme Court's decision in *United Educators* was issued on January 16, 2020, and has become final. Chief Counsel Woo-Sam recommended that the Board rescind its precedential designation of the *Brady* decision based on the California Supreme Court's disapproval of CUIAB's analysis.

Member Eng inquired about the legal effect of not rescinding the *Brady* decision. Chief Counsel Woo-Sam advised that Unemployment Insurance Code section 409.1 provides that the Board shall take prompt action with respect to any precedential decisions that have been overruled by a higher authority. Chair Block added that his understanding was that the Board essentially has no other option and the failure to act would incur potential liability.

Member Eng asked if there was anything left standing in the *Brady* precedent or whether it had been completely reversed on every point. Chief Woo-Sam advised that the Supreme Court expressed its disapproval to the extent that *Brady* was inconsistent with the Supreme Court's decision. *Brady* held that the summer session was essentially an academic term that did not preclude benefits. The Supreme

Court's decision provides factors to be used to analyze a summer session as a potential academic term in which benefits would not be denied. But the factors it identified are very different than what the Board described, and the Court's analysis of section 1253.3 is very different than the Board's.

Member Eng asked whether Chief Counsel Woo-Sam was recommending the Board completely reverse *Brady*, or would the terminology be more correct to reverse only where inconsistent with the Supreme Court's decision. Chief Counsel Woo-Sam indicated that it is his understanding that the Board has most recently responded to subsequent developments by higher authorities that overturn or disapprove Board precedents by taking action to remove the precedential designation. To the extent that there are any aspects of *Brady* which are relevant for future analysis, the Board may analyze this in later cases. Chair Block clarified that the proposed action is to remove the precedential designation of *Brady*, rather than reverse the decision.

Vice-Chair Reeves commented that almost by definition all sessions during summer breaks are reduced sessions in which districts may offer remedial or scaled back academic offerings, and therefore in those situations benefits are not available. Chief Counsel Woo-Sam responded that was one of the Supreme Court's examples of a situation in which benefits would be denied, but in the Board's work every case is fact-specific. He noted that one of the themes in the Court's opinion is the potential for the year-round school to meet its criteria. Vice-Chair Reeves acknowledged that year-round schools do not have traditional summer breaks and instead have shorter breaks between sessions with different tracks. He advised he looks forward to learning more about the precedent and nuances of applying it.

Chair Block asked for a motion to remove the precedential designation from the Board's *Brady* decision in accordance with the California Supreme Court's decision in *United Educators*. The motion was made by Vice-Chair Reeves and seconded by Board Member Allen. By way of unanimous roll call vote the precedential designation for P-B 505, *Brady*, was removed.

Closed Session:

The Board adjourned Open Session at 1:59 p.m. The Board commenced a Closed Session at 2:00 p.m. Closed Session was adjourned at approximately 2:10 p.m.

Adjournment