DECISION AND AWARD

In the Matter of a Controversy between the
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CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT (CASE)

And

STATE OF CALIFORNIA, CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

Grievance: CalHR Nos. 17-02-0002 & 17-02-0013- consolidated

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For the Union:	**Patrick J. Whalen, Esq.** **CASE, General Counsel** **1231 I Street, Suite 300** **Sacramento, CA 95814**
For the Employer:	**Gail T. Onodera, Esq.** **Labor Relations Counsel IV** **California Department of Human Resources** **State of California** **1515 S Street, North Building #500** **Sacramento, CA 95811**
Arbitrator:	**David A. Weinberg** **Mill Valley, CA**

PROCEDURAL BACKGROUND

Pursuant to the MOU between the State of California, (hereinafter "Employer") and the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE), covering Bargaining Unit 2, (hereinafter "Union"); the parties selected David A. Weinberg as Arbitrator in the above referenced case. The Arbitrator conducted arbitration hearings, in the City of Sacramento on January 16, 17, 28 and 29, 2019. During the course of the hearing, the Arbitrator afforded both parties full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The hearing was closed on April 20, 2019 after the parties filed their post hearing briefs with the Arbitrator. The parties stipulated that the issue to be decided is as follows:

Is the CASE Field Operations ALJ caseload increase grievance, CalHR No. 17-02-0002, and the CASE Appellant Operations ALJ caseload increase grievance, CalHR No. 17-02-0013, procedurally defective under article seven of the BU2 MOU? If not, did the State violate section 4.3 (Entire Agreement) when it increased the caseload of CUIAB Field Operations (FO) and Appellant Operations (AO) administrative law judges (ALJs) under section 13.16 (Case and Hearing Workload-Unemployment Insurance Appeals Board) of the 2016 to 2019 BU 2 MOU effective November 14, 2016 and November 7, 2017, respectively, without notice or meeting and conferring over impact with CASE upon its request or providing ALJs additional decision days? If so, what shall the remedy be? (TR 19-20)

In addition, the parties stipulated the matter is properly before the Arbitrator for resolution and that jurisdiction may be retained to resolve any disputes over the meaning or application of the Decision and Award.

RELEVANT CONTRACT LANGUAGE

Agreement Between the State of California and CASE covering Bargaining Unit 2 Attorneys and Hearing Officers- Effective July 1, 2016 through July 1, 2019

Article 4.3 Entire Agreement

Article 6 Hours of Work

Article 7 Grievance and Arbitration

Article 13.16 Case and Hearing Workload-Unemployment Insurance Appeals Board

Side Letter #2

STATEMENT OF FACTS

The following is a summary of the facts of the case, which were necessary to decide the matter. A more detailed finding may be found in the Analysis and Discussion section of this Award.

Administrative Law Judges (ALJs) conduct appeal hearings of determinations made by the Employment Development Department (EDD) for Unemployment Insurance, State Disability, and related tax assessments made by EDD. The ALJs who work for the California Unemployment Insurance Appeals Board (CUIAB) have a fluctuating caseload that is based on the economic conditions, which may greatly increase or decrease based on the number of applications for unemployment and disability. There are two classifications of ALJs

(I & II), which have historically different workloads assigned for them to complete each week. Section 6.3 of the MOU states: *"Employees are expected to work all hours necessary to complete their assignments and fulfill their responsibilities. Employees will normally average forty (40) hours of work per week including paid leave; however, work weeks of a longer duration may occasionally be necessary."*[1] The ALJs mostly work a 4/10 work week, and are considered FLSA exempt.

According to the testimony of the Assistant to the Chief Judge, Hugh Harrison, the weekly caseload assignment was historically set at 25 cases, as the standard assignment. This standard has fluctuated based on budgetary constraints or falling behind the standards. The CUIAB is largely funded by the federal government, which pays for the UI cases and sets certain time standards for compliance. If those standards are not met then special monitoring may be required. The current caseload and standard assignment according to Judge Harrison is 30 cases for an ALJ II, and 27 cases for an ALJ I, which may be affected by splits, tax cases or special sets.

In the early 1990's the parties entered in to agreements regarding the number of cases assigned to ALJs.[2] In 1995 a formal agreement was negotiated between the parties that indicated a standard workload of 25 benefit cases in the field, and 20 cases in appellant operations. This agreement allowed an increase in the standard caseload by one case for each type of ALJ, and set other terms and conditions regarding the caseload including a DEC day for FO ALJs. This

[1] State Exhibit #2, current MOU
[2] At this time, the Union was represented by an organization known as ACSA.

agreement also stated that "*Any modification of a condition of employment not contained in this agreement will be noticed to ACSA consistent with the Dills Act prior to implementation of any change in working conditions."* The agreement was to remain in effect for one year from the signing date, and upon expiration the caseloads would return to 25 and 20 cases.[3]

In the 1999-2001 Agreement between ACSA and the State, Section 13.16 was negotiated into the MOU. This Section stated: *"The date, time and number of hearings and cases assigned to employees in Unit 2 working for the Unemployment Insurance Appeals Board shall be determined, and may be changed from time-to-time, by the State."*[4] On October 22, 1999 Gerald James the Labor Relations Counsel for ACSA in reference to Section 13.16, sent a letter to Chief Judge of CUIAB Jay Arcellana, in which he stated that: *"To sum up, the new contractual provision will be utilized only upon a specific showing of a budgetary shortfall. If such a change is demonstrated, ACSA will have the opportunity to request to meet-and-confer over the impact of the change."*[5] ALJ Thomas Engel testified that he participated in meet and confer discussions between 1999-2001 regarding caseload changes and how many splits would equal a case, and he was given time off to participate in these discussions.

In the 2001-2003 MOU the parties negotiated a side letter, which was referenced in 13.16. The side letter was identified as Side Letter #2 – CUIAB Workload, and placed at the end of the Agreement. Side Letter #2 contained the

[3] Union Exhibit #3
[4] Union Exhibit #4
[5] Union Exhibit #5

following provisions: *"This agreement is an addendum in the Memorandum of Understanding (MOU) effective July 1, 1999, reached between the State of California and the California Attorneys Administrative Law Judges and Hearing Officers in State Employment (CASE), as exclusive representative for Bargaining Unit 2. The State of California, Unemployment Appeals Board (CUIAB), the Department of Personnel Administration (DPA) and CASE hereby agree as follows:*

1. *In order to assure that ongoing funding for the 5% pay differential would be available, workload flexibility language was added to the contract. The CUIAB will not use the flexibility provided to it by Article XIII, Section 16 (Case and Hearing Workload-Unemployment Insurance Appeals Board), to increase the number of cases or hearings assigned to Administrative Law Judges except where workload or budgetary needs so require.*
2. *The CUIAB agrees to pay qualifying ALJ's the 5% pay differential contained in Article V, Section 12 of the MOU, as amended by the November 10, 1999 agreement between CASE and the State, beginning with the October 1999 pay period.*
3. *The CUIAB will make an effort to obtain at least one rank and file ALJ II position in each field office and to make appointments to those positions.*
4. *The State and CASE agree pursuant to Title 8 Cal. Code of Regs, Section 32781 to modify Bargaining Unit 2 by designating four (4)Administrative Law Judge II, CUIAB positions as confidential positions in the Field Operations under*

the Ralph C. Dills Act. These positions are in addition to the thirty-six (36) Unit 2 positions CASE and the State previously stipulated to designate as confidential.[6]

During the 2001-2003 contract period Judge Engel testified that he met and conferred over caseload increases, and the CUIAB agreed to give ALJs one extra DEC day for every three month period in which the ALJ had an increased caseload.[7]

On July 26, 2002 the Chief Administrative Law Judge for CUIAB sent a letter to the CASE President stating that *"Pursuant to Section 4.3 of the Unit 2 collective bargaining agreement, this is to notify you that the California Unemployment Insurance Appeals Board will be implementing mandatory split decisions for its Administrative Law Judges effective August 26, 2002. Please notify Linda Buzzini, Assistant Chief of the Labor Relations Division, Department of Personnel Administration, if CASE elects to meet and confer regarding the impact of this decision."* [8] A grievance was filed by the Union regarding the number of splits and the number of appellants needed to qualify for a case according to CUIAB, that was moved to arbitration.

In 2005 a new MOU was negotiated for the July 1, 2005 through July 1,2007 time period. This MOU contained the same contractual language in Section 13.16 and the Same Side Letter #2 as was found in the parties 2001-2003 Agreement.[9]

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[6] Union Exhibit #7
[7] Union Exhibits #8,#9
[8] Union Exhibit #10
[9] Union Exhibit #17

In 2006 a settlement was reached between the parties to the grievance filed regarding splits and appellants that was scheduled for arbitration. In this settlement it was agreed that splits were mandatory and normal caseload figures were specified (25 & 28 for FO and 20 & 22 for Appellate). This settlement also granted DEC days based on increased caseloads, and stated that CUIAB shall "*provide CASE with notice and an opportunity to meet and confer over impact when it intends to increase the ALJ case load beyond that provided in paragraph 3"*[10]

In the 2011 through 2013 MOU the parties replaced this settlement language as Side Letter #2, for the previous side letter #2.[11] The parties also continued this Side Letter #2 in the parties 2013 through 2016 MOU, although the State did propose during bargaining to remove the Side Letter from the MOU.[12] CUIAB continued with the practices as described in Side Letter #2 during this time period.

The most recent and in effect MOU at the time of this grievance is the July 1, 2016 through July 1, 2019 Agreement. Brooks Ellison was the chief negotiator for CASE Bargaining Unit 2, and Pam Manwiller, who was at the time the Deputy Director of Labor Relations for CalHR, was the chief negotiator for the State. Mr. Ellison testified that on August 18, 2016 the parties had already come to terms on the financial aspects of the Agreement and were officially signing or initialing all of the tentative agreements. The chief negotiators for each side initialed Management

[10] Union Exhibit #18
[11] Union Exhibit #19. The parties stipulated that this side letter was incorrectly referenced in 13.16 as side letter 1.
[12] Union Exhibit #20

Proposal 13.16 Case and Hearing Workload- Unemployment Insurance Appeals Board. This Section states: *The date, time and number of hearings and cases assigned to employees in Unit 2 working for the Unemployment Insurance Appeals Board shall be determined, and may be changed from time-to-time, by the State (~~See Side Letter #2).~~*[13] Side Letter #2 was deleted from this Agreement. There was no discussion at the table between the parties with respect to whether this provision eliminated the obligation to meet and confer, nor was there any substantive discussion about the effects of this deletion of Side Letter #2 from the MOU. Mr. Ellison testified that he was aware the State had wanted to remove the Side Letter from the Agreement. Ms. Manwiller testified that she did not articulate the reasons CUIAB wanted to pull Side Letter #2 out of the Agreement but that this was not a surprise to any of the parties, and there was no discussion or questions asked.

On October 25, 2016 Katherine Regan on behalf of CASE, sent an email to Kim Hickox at CUIAB stating that CASE members were notified about a change in working conditions related to an increased caseload. She requested that a meet and confer was necessary unless CUIAB was going to maintain the increase under the terms of the previously negotiated caseload agreement, which provided for a DEC day.[14] On October 27, 2016 Ms. Regan sent an email to Ms. Hickox asking to schedule a meet and confer as CASE was made aware that an increased caseload would be implemented. On October 28, 2016 Ms. Hickox replied that the increase would not take effect until 11/14/16, and Ms. Hickox also sent a letter on that date

[13] Union Exhibit #23
[14] Joint Exhibit #1

to Ms. Regan outlining the reasons for the caseload increase. Ms. Hickox also in this letter explained that the new provision of 13.16 granted CUIAB the right to implement the increased caseload. This letter stated that: *"With the elimination of Side Letter #2 from the current Unit 2 MOU, there is no reason or basis upon which to grant an additional DEC day".* Ms. Hickox confirmed that the two case per week increase will be effective November 14, 2016 and CUIAB would be glad to hear any concerns or questions CASE had, and would be willing to meet.[15]

On November 2, 2016 Ms. Regan emailed Ms. Hickox requesting the State grant DEC days, even though there is no language in the current MOU, in order to alleviate the impact that the case increase will have on the limited about of ALJs, and once again requested to meet and confer prior to the caseload increase. On November 3, 2016 Ms. Hickox emailed a response to Ms. Regan and stated: *"As a preliminary matter, please note that our October 28, 2016 letter says nothing one way or the other about whether we have an obligation to notify CASE or meet and confer over impact.* The email response continues to dispute the applicability of 4.3(B), but offered to meet to discuss concerns. Ms. Regan sent an email to Ms. Hickox on November 8, 2016 asking if the meeting would be considered a meet and confer and if CalHR would be in attendance. The parties agreed to meet on November 10, 2016. Ms. Regan in an email dated November 10, 2016 told Ms. Hickox that since CUIAB did not view this meeting as meet and confer, she did not see the need to request that ALJs be taken off calendar to attend the meeting.[16]

[15] Joint Exhibit #1
[16] Joint Exhibit #1

On December 15, 2016, Ms. Regan sent to Ms. Hickox an email confirming that a second level grievance dated December 14, 2016 was placed in the mail to CUIAB.[17] This grievance alleged a unilateral change in working conditions without meeting and conferring with CASE over the impact of the caseload increase in violation of 4.3. On January 17, 2017 Elena Gonzales the Chief Administrative Law Judge at CUIAB responded to this grievance and explained that CUIAB did not have a duty to notice CASE nor meet and confer over the impact of the November 14, 2016 caseload increase under the provisions of the current MOU, Sections 4.3 and 13.16, and denied the grievance.[18]

CASE advanced this grievance to CalHR on February 15, 2017. On March 15, 2017 Nathaniel Allen at CalHR responded and denied the grievance and stated that; *"In reviewing the response provided by CUIAB dated January 19, 2017, I have determined that CUIAB appropriately and thoroughly addressed the matters raised in this grievance".*[19] On March 29, 2017 Ms. Regan elevated the grievance to Step 3 of the grievance procedure and requested to select an arbitrator. On April 12, 2017 Gail Onodera responded to the grievance on behalf of CalHR and in this letter stated: *"In making this response, the State reserves all, rights and defenses with respect to any request for arbitration including timeliness and arbitrability."*

On October 27, 2017 Ms. Regan filed a second level caseload grievance related to Appellant Operation ALJs.[20] CUIAB had informed the AO ALJs on

[17] Union Exhibit #1
[18] Joint Exhibit #1
[19] Union Exhibit #1
[20] Union Exhibit #2

October 6, 2017 that their caseload would increase to 24 per week beginning November 7, 2017.[21]

On November 27, 2017 Executive Director / Chief Administrative Law Judge, Elena Gonzales responded to the grievance stating that Article 4.3 (B) is inapplicable as the parties negotiated over the contents of Section 13.16 in the recent negotiations, and made an alteration which eliminated Side Letter #2 that defined maximum caseloads. She noted that CUIAB is not required to notice or meet with CASE regarding changes in caseloads. In this response letter Ms. Gonzales offered to meet to hear the Union's concerns. The grievance was advanced to CalHR on December 15, 2017, and was denied by the State on January 23, 2018. On February 5, 2018 the Union requested an arbitrator be selected to hear the grievance, and on February 23, 2018 Cal HR acknowledged the request and in the response reserved all rights and defenses.[22] The parties agreed to consolidate this grievance with the grievance filed regarding FO ALJs.

[21] State Exhibit #8
[22] Union Exhibit #2

POSITION OF THE PARTIES

The following represents a summary of the arguments raised by the parties in this Arbitration.

Union's Arguments:

The Union argues that the Field Operations grievance is timely. Neither the department nor CalHR asserted any procedural defect until the first day of arbitration.

The Union argues that Section 7.7 of the MOU requires the grievance to be filed within 21 calendar days after the employee can reasonably be expected to have known of the event occasioning the grievance, and the event is the failure to meet and confer. The facts show that discussions were going on between CASE and management about the meet and confer process into late 2016, and the Union did not become aware of the State's refusal to meet and confer until November 14, 2016. Therefore, the grievance was due to be filed by December 5, 2016. Although the grievance was filed on December 15, 2016 there is circumstantial evidence that Ms. Regan requested a 10-day extension. Had CASE failed to obtain the 10-day extension CUIAB would have asserted so in their first response, which they did not.

The Union argues there is a strong public policy favoring arbitration that should not be denied by strict limitations on timelines. This combined with the State's failure to raise any objection prior to the arbitration should lead the Arbitrator to reject their claim of untimeliness.

The Union argues that relations between the employer and state employees are governed by the Dills Act which sets forth a basic duty to meet and

confer in Government Code 3516.5. The caseload increase is undeniably a rule imposed by CUIAB because it directly impacts working conditions, and is within the scope of representation. By statute the State had an obligation to meet and confer in good faith, which it failed to do.

The Union argues that Section 13.16 is not a waiver of the right to meet and confer. Waiver is the intentional relinquishment of a known right after knowledge of the facts, and the burden is on the party claiming a waiver by clear and convincing evidence. The State cannot meet this burden, and while the language of 13.16 gives CUIAB the right to adjust caseloads, it does not relieve the State of the obligation to meet and confer over such changes. There was no evidence that the parties ever discussed waiving the right to meet and confer over caseloads.

The Union argues the parties conduct over twenty years demonstrates that the parties always understood that Section 13.16 requires meeting and conferring over changes in CUIAB caseload. The evidence shows that the parties have been negotiating over caseload as early as 1995, and the same language for 13.16 has existed since 1999. Since the language was negotiated in 1999 the parties have met and conferred over caseload changes, and during this time period CUIAB has never asserted they did not have an obligation to meet and confer.

The Union argues that the testimony of Judge Engel shows that in 2001-2003 CUIAB met and negotiated DEC days even though Side Letter #2 had no provision to meet and confer. In 2004 after DEC days were stopped due to an auditor's report, CUIAB agreed to award DEC days both retroactively and

prospectively after CASE sent a letter requesting they resume. In 2006 a new side letter was executed that provided for DEC days along with an agreement that split days were mandatory. Judge Engel testified that he understood the deletion of Side Letter #2 meant that 13.16 would be interpreted as it always had, and that if there was an increase in caseload, CUIAB would meet and confer with the Union about that change just as it had in the past.

The Union argues that the 20 year history shows that 13.16 always carried with it an obligation to meet and confer if there was a change in workload proposed by CUIAB.

The Union argues that the parties have different understandings of the meaning of Section 13.16 in the current MOU and that case law supports the concept that the contract should be reformed and revised based on the application of the aggrieved party. The aggrieved party is the Union who has been suffering under a caseload increase for more than two years.

The Union argues that section 13.16 should be interpreted to allow CUIAB to change the caseload, but to require CUIAB to meet and confer before doing so. The proper remedy for their failure to do so would be to award the ALJs the DEC days they were denied by the failure to meet and confer and should be awarded back pay depending on their classification of 9 or 10 weeks for Field ALJs and 6.7 or 7.4 weeks for Appellant ALJs. For those who have left or gone to management they should receive the commensurate amount based on their length of time carrying the extra workload.

The Union argues that as an alternative remedy ALJs should receive DEC days consistent with what they traditionally would have received. This should be retroactive to the time of implementation and prospective until CUIAB honors its obligation to meet and confer. There needs to be some retroactive remedy that would prohibit CUIAB from benefiting from its failure to meet and confer.

The Union argues that the remedy should include an immediate reduction in the case load to 26 and 28 appellants per week for ALJ Is and ALJ IIs, and 20 and 22 for AO ALJs, and to meet and confer over any subsequent change in caseload, in compliance with Section 3517 of the Dills Act.

Employer's Arguments:

The Employer argues that the plain language of Section 13.16 of the 2016-2019 MOU waives any right of the Union to bargain the impact of changes to ALJ caseloads. The plain language of section 13.16 reserves solely to the state the discretion to adjust and change ALJ caseloads.

The Employer argues that the arbitrator should not look at any extrinsic evidence as the plain language of 13.16 reserves caseload assignments to CUIAB. There is no language in 13.16 that creates any duty on the state to meet and confer with the Union regarding any changes, and to do so would render the language reserving this right to CUIAB as meaningless.

The Employer argues that the MOU contains an entire agreement or zipper clause in Section 4.3 that waives the right to bargain over matters raised in negotiations or covered in the MOU, and only creates an obligation to meet and

confer over matters not covered by the MOU. Any duty to bargain over caseloads would violate the plain language of 13.16 and 4.3.

The Employer argues the Arbitrator is without jurisdiction to change the plain language of Section 13.16 by requiring the State to meet and confer or to provide additional DEC days to the ALJs, as the arbitrator has no power to, add to, subtract from, or modify the MOU according to section 7.11.

The Employer argues that MOU section 3.1, the Management Rights clause, reserves CUIAB's authority to change ALJ caseloads. This reserves the exclusive right to schedule and assign its employees and determine the methods and means by which state operations are to be conducted. By agreeing to the clause CASE waived any right to meet and confer on ALJ workloads.

The Employer argues that section 6.3 regarding workweek schedules provides CASE a recourse for excessive workweeks, and they could grieve any alleged violation under this section of the agreement.

The Employer argues the prior MOUs specifically constrained CUIABs unilateral authority to increase caseloads via the 2006 grievance settlement in Side Letter #2, and that CUIAB was required to grant additional DEC days if it increased the caseload. These requirements were specifically and intentionally removed by the State during bargaining, along with any duty to meet and confer, even over impact. The zipper clause precludes any right to bargain over or meet and confer over any matter covered in the MOU.

The Employer argues that CASE has not demonstrated the existence of a past practice concerning the awarding of DEC days, or meeting and conferring over

ALJ workloads. The evidence of DEC days agreements from 2002 and 2004, were simply memoranda from the Chief Judge exercising CUIAB's inherent authority to grant time off in the form of ATO, and not DEC days, and these offers from the Chief Judge were not agreements. The 2006 settlement that became Side Letter #2 is not evidence of past practice as it contains disclaimers that it was non-precedential, and expired upon ratification of a successor agreement.

The Employer argues that none of the side letters, alleged agreements, or non-precedential settlement agreements ever provided a meet and confer when not increasing the ALJ caseload by a specified amount listed in those agreements and settlements. These agreements were expired and were all removed from the current 2016-2019 MOU.

The Employer argues the FO ALJ caseload grievance is procedurally barred as it was untimely filed. The MOU contains specific timelines for filing and elevating grievances. The FO grievance (CalHR 17-02-0002) was untimely filed as it should have been filed 21 days after October 17, 2016 when all ALJs were emailed notice of the increased caseload. The grievance should have been filed by November 7, 2016, but it was not filed until December 15, 2016 and thus it is untimely.

The Employer argues that both grievances are procedurally defective as they bypassed two steps of the grievance procedure by filing the grievances at the second level, and there was no mutual agreement of the parties to waive the informal or first level of the parties MOU. Therefore, both grievances are defective and should be dismissed with prejudice.

Analysis and Discussion

In a contract interpretation case it is the obligation of the arbitrator to first and foremost honor the language that the parties negotiated at the bargaining table and memorialized in the collective bargaining agreement. When there is a dispute between the parties over the interpretation of that language, it is the arbitrators' job to determine the intent of the parties. If the language is clear and unambiguous then the arbitrator must follow the language as written in the agreement. If there is some ambiguity, then the arbitrator may look to other factors such as past practices involving that language, and bargaining history to determine the intent of the parties. The burden is on the Union as the grieving party in a contract interpretation case to support their case, although the burden is placed on the Employer with respect to their claim that the grievance is not arbitrable.

It is well accepted since the issuance of the "Trilogy" decisions by the Supreme Court that there exists a presumption of arbitrability. The underlying basis of this theory is that it is conducive to labor peace and overall labor management relations to resolve the merits of disputes between the parties. This does not mean that the Arbitrator should not enforce and give meaning to the parties grievance procedure that was negotiated and placed in the CBA. However, it is the obligation of a party seeking to enforce strict compliance with timelines to raise this concern when it occurs, and not wait until the arbitration hearing. The failure to raise a procedural violation by the other party when it occurs and which they have knowledge of, can be construed as a waiver to the right to demand strict adherence to procedural timelines. If a party wishes strict compliance with the procedural

guidelines in the grievance procedure it may do so by informing the other party that it will demand and expect strict compliance by all parties. The facts in this case show that the although the Employer may have raised a generic reserving of all defenses including arbitrability in their April 2017 (for the FO grievance) response to the request for arbitration, it did not contest the failure of any timelines until the Arbitration Hearing.

The parties also disagree over what should be the initiating action that should trigger the grievance procedure timelines. The Employer argues that the October 17 letter announcing the proposed caseload increases should trigger the 21-day timeline for submission of a grievance, while the Union argues the trigger date should be the actual date of the caseload increase, November 14, 2016. I believe that the correct triggering event should be calculated from the date of the initiation of caseload increases, November 14, 2016, as this would be the actual date that any possible violation of rights would occur. In any event, the Union did not file the grievance within the 21-day requirement in the grievance procedure, which would have been December 5, 2016. The Union has advanced the defense that it believes it asked for a 10-day extension, which was its common practice for a delay, but does not provide hard evidence that this in fact occurred. The Employer also raises the argument that both grievances in this case were deficient in that they were filed at the second step of the procedure and not the first, as is required in the grievance procedure. This fact cannot be disputed as a technical violation of the grievance procedure as outlined in Section 7 of the MOU.

While either party has the right to demand compliance with grievance procedure timelines, the party that wishes to enforce strict adherence must inform the other party that it wishes to employ such compliance so as to not unreasonably deny a resolution on the merits, which is fundamentally what the grievance procedure is designed to accomplish. The argument that the grievance should be denied on the basis that it was filed at the second step as opposed to informal consult or first step, does not comport with the presumption of arbitrability especially considering that this grievance, given its subject matter, was never going to be resolved at the informal departmental level and was always going to be advanced to a higher level. This simply would not be a fair application of the intent of the grievance procedure language, absent other evidence of past practices or harm to the Employer by such a procedure of filing at Level 2. Similarly, I do not find that denying a resolution on the merits on the basis of a possible non-consensual 10-day delay in filing of the grievance, (if I do not accept the Union's belief that they asked for such an extension) to be a fair resolution. This is especially true given that the Employer did not raise this defense until the Arbitration hearing, and that this failure supports a waiver of the Employer's right to ask for dismissal with prejudice of the grievance. Based on the totality of the evidence regarding the procedural arbitrability of the consolidated grievances, I find that they are arbitrable, and should proceed to a resolution on the merits.

The fundamental issue that must be resolved in this case is not whether CUIAB had the right to raise the caseloads of the ALJs, but whether it could do so without meeting and conferring with the Union first. For the following reasons I find

that the deletion of Side Letter #2 did not constitute an agreement by the parties to waive the obligation to meet and confer over caseload increases, according to the requirements listed in 4.3 of the MOU.

The requirement to meet and confer in accordance with the Dills Act is probably the most fundamental right of employee organizations in the State. While specific agreements are undeniably important to employee organizations, the right to meet and confer and represent their membership by having a voice in the workplace on issues affecting their working conditions, is as important and essential to the existence of such organizations as any individual Section of an MOU. This does not mean that the parties cannot agree to waive this fundamental right, but I agree with the Union's argument that an agreement to waive such a fundamental right must be done so in clear and unmistakable language. Courts and arbitrators have consistently upheld this high standard for waiver of fundamental and statutory rights.

The State has not provided sufficient evidence that this was the clear intent of the parties when they eliminated the Side Letter. The evidence is undisputed that during bargaining for the MOU, there was no substantive discussion over what the elimination of the Side Letter intended to accomplish. There was no testimony or evidence submitted that mentions the right to meet and confer in the discussions surrounding the elimination of the Side Letter. The only evidence submitted by the State was that it was made clear to the Union that there would not be an overall agreement reached without its elimination. The Employer cannot reasonably claim that the issue of "meet and confer" was ever raised during

bargaining around Article 13.16, and therefore was covered by 4.3 (A) waiver language.

It should also be noted that the Side Letter had expired long before its elimination in bargaining for the 2016-2019 MOU, as the final sentence of this 2006 agreement stated "*This settlement will expire on the ratification by the Union and approval by the Legislature of a successor agreement to the 2005-2007 Bargaining Unit 2 Memorandum of Understanding".* Neither party offered any explanation as to why the Side Letter was left in the MOU unaltered, possibly because the settlement terms seems to have been followed until its final elimination from the current MOU.

With the elimination of the reference to the Side Letter in 13.16, we are left with the same language in this Section as it first appeared in 1999. While this language clearly gives the State the right to determine and change the caseload, it makes no mention of the right to meet and confer. The evidence presented in this Arbitration shows that since 1999 the parties consistently met and conferred over ALJs caseload, sometimes as a result of a filed grievance, with a variety of different resolutions including Side Letter #2. While I cannot conclude that this past practice of meet and confer inferred any specific result (such as specific DEC days) that should be applied to this Section, it is evidence of an intent by the parties to meet and confer over caseload changes, given the same language since 1999 in effect.

One of the standards of contract interpretation is that one should avoid a conclusion that leads to harsh, absurd or nonsensical results. In this Arbitration the State asserted that it would have the right to raise the ALJs caseload to whatever level it decided, with no requirement to meet and confer over such changes, even if

it decided to raise it by 30-50 cases per week. Had there been evidence that the State raised this understanding during bargaining, or that there was explicit language placed in 13.16 denying the right to meet and confer, I could have supported such an analysis. There is no evidence to support this, and the State's argument in the closing brief that the Union could still grieve this type of caseload increase under the workload section of the MOU in Article 6 does not answer the fundamental question of whether the Union explicitly waived their right to meet and confer as a consequence of deleting the Side Letter. Other fundamental standards of contract interpretation such as; avoidance of a forfeiture, and interpretation against the party selecting the language, support the Union's grievance. In the final analysis if the State wished to bar the Union from exercising their right to meet and confer over caseload changes it would have been obligated to make this requirement explicitly clear during bargaining when insisting the Side Letter be deleted from the MOU, or place specific language to this effect in the MOU. Therefore, I find there was no bar to the requirement to meet and confer over workload changes in accordance with 4.3 B.

The Union has met their burden to show that: 1) The workload changes implemented by CUIAB in November of 2016 for FO ALJs, and November of 2017 for AO ALJs had an impact on working conditions of a significant number of employees in Unit 2; 2) The subject matter of this change is within the scope of representation pursuant to the Dills Act; and 3) CASE requested to negotiate over these changes with the State. The State did violate Section 4.3 when it refused to meet and confer with CASE over these workload increases.

Having found a violation of the MOU by the State, I must now turn my attention to the proper remedy for this contractual violation. The Union has argued that in addition to an order to meet and confer, the Arbitrator should order back pay in specific amounts as compensation for the extra work they performed as a result of CUIAB's refusal to meet and confer, or in the alternative order the award of DEC days consistent with the parties past practice of one DEC day for each quarter of increased caseload. I do not find this to be a proper remedy.

While the Union has met their burden to show that the State had an obligation to meet and confer over the workload changes, it cannot be then construed that the removal of Side Letter #2 had no effect on the past agreement to Award DEC days for extra work. It cannot be disputed that the removal of the Side Letter, ended any obligation of the State to award DEC days and the language in 13.16 that is in the current MOU clearly gives the right to CUIAB to set the caseload and make changes from time to time in the assigned caseload. For the Arbitrator to Award the past agreement that was clearly deleted as a remedy would be improper in my view, and not in line with the intent of the parties during bargaining when they agreed to delete Side Letter #2. Thus the awarding of either back pay for the increased caseload or the prior deleted remedy of DEC days, does not have a proper contractual basis. While I understand the Union's contention that in the absence of this remedy CUIAB would unjustly profit from its failure to meet and confer, I cannot order a remedy that reinstates what the parties agreed to discontinue in bargaining. The evidence did show that there were benefits gained by the Union in bargaining, and I cannot untie that deal in its entirety. It is up to the

parties to determine in their meet and confer process what should be done when the caseload is increased by the State.

Therefore, I find that the proper remedy for the violation is to return the caseload to its prior levels before implementation of the caseload increases in 2016 and 2017, and to meet and confer over any subsequent change to the caseload.

I have considered all of the evidence and arguments made by both parties. I, however, may not have repeated every item of documentary evidence or testimony, nor may I have repeated completely all of the arguments presented in the respective briefs.

AWARD

Having received and considered all of the evidence and arguments relevant to this matter, I make the following award:

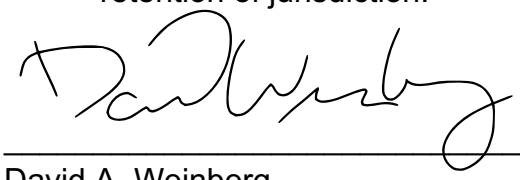
1. CASE Field Operations ALJ caseload increase grievance CalHR No. 17-02-0002, and the CASE Appellant Operations ALJ caseload increase grievance CalHR No. 17-02-0013, are not procedurally defective under article seven of the BU2 MOU and is therefore arbitrable on the merits.

2. The state violated section 4.3 (Entire Agreement) when it increased the caseload of CUIAB Field Operations (FO) and Appellant Operations (AO) Administrative Law Judges (ALJs) under section 13.16 (Case and Hearing Workload-Unemployment Insurance Appeals Board) of the 2016 to 2019 BU 2 MOU effective November 14, 2016 and November 7, 2017, respectively, without notice or meeting and conferring over impact with CASE upon its request or providing ALJs additional decision days.

3. I therefore order CUIAB to reduce the case load to the prior levels before implementation of the caseload increases in 2016 and 2017, and to meet and confer over any subsequent change to that caseload.

4. The Arbitrator retains jurisdiction over this matter for the sole purpose of resolving any issue pertaining to the remedy so ordered. A request to the Arbitrator to exercise jurisdiction shall be made in writing as to the exact issue and shall be served on the other party at the same time that it is filed with the Arbitrator. It is within the sole discretion of the

Arbitrator to determine whether the issue presented by the party or parties is within the jurisdiction of this provision pertaining to the Arbitrator's retention of jurisdiction.



David A. Weinberg
Arbitrator
July 12, 2019