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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN THE MATTER OF:

ARIZONA DEPARTMENT OF ECONOMIC
SECURITY'S COMPLIANCE WITH
ADMINISTRATIVE ORDER 2017-01

No. 1 CA-UB 17-0128 OSC
FILED 10-24-2017

COUNSEL

Arizona Attorney General's Office, Phoenix
By Carol Salvati, JoAnn Falgout
Counsel for Arizona Department of Economic Security

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Michael J. Brown and Judge Margaret H. Downie joined.

T H U M M A, Judge:

¶1 This case arises out of the Arizona Department of Economic Security's (ADES) failure, over a period of years, to timely transmit to this Court hundreds of applications for appeal filed with ADES, notwithstanding the Legislature's statutory directive obligating ADES to

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do so. *See* Ariz. Rev. Stat. (A.R.S.) § 41-1993 (2017).¹ The important but narrow issue addressed here is whether ADES should be held in contempt for failing to comply with Administrative Order 2017-01, issued February 13, 2017 (A.O. 2017-01), which required ADES to transmit to the Court by March 6, 2017 such all applications for appeal filed with ADES by February 13, 2017. Given the factual and procedural background, including an evidentiary hearing before the Court, the Court finds by clear and convincing evidence that ADES is in civil contempt of the Court for its failure to comply with A.O. 2017-01 and imposes consequences for that contempt as set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 ADES administers Arizona’s unemployment compensation, food stamp and cash assistance programs under both Arizona and federal law. *See* A.R.S. §§ 41-1953(E)(1); 23-601 to -799; Ariz. Admin. Code (A.A.C.) §§ R6-12-101 to -1404; R6-14-111. ADES has implemented a multi-stage process to administratively resolve disputes arising from these programs. *See, e.g.*, 7 C.F.R. § 273.15; A.R.S. §§ 23-671, -672, -771, *et seq.*; A.A.C. §§ R6-3-1803, *et seq.*; R6-12-1001 to -1015. The last administrative stage of this process, typically occurring after an evidentiary hearing, is review and decision by the ADES appeals board.

¶3 A party wishing to challenge an ADES appeals board decision may seek review with the Court by filing an application for appeal “with the [ADES] clerk of the appeals board.” A.R.S. § 41-1993. “On the filing of an application for appeal, the clerk of the appeals board shall transmit to” the Court the ADES Record, consisting of “the application for appeal, the decisions issued by the appeals board and all petitions for review and responses of the appeals board,” A.R.S. § 41-1993, as well as the transcript from any evidentiary hearing, A.R.S. § 23-674(A), and related documents.

¶4 After ADES transmits the ADES Record to the Court, the Clerk of Court opens a case and assigns the matter to a three-Judge panel for resolution. The panel considers the ADES Record in light of the issues raised and either grants or denies the application for appeal. *See* A.R.S. § 41-1993(B). If the application is denied, the ADES appeals board decision becomes final and no further appeal can be taken. *Id.* If the application is

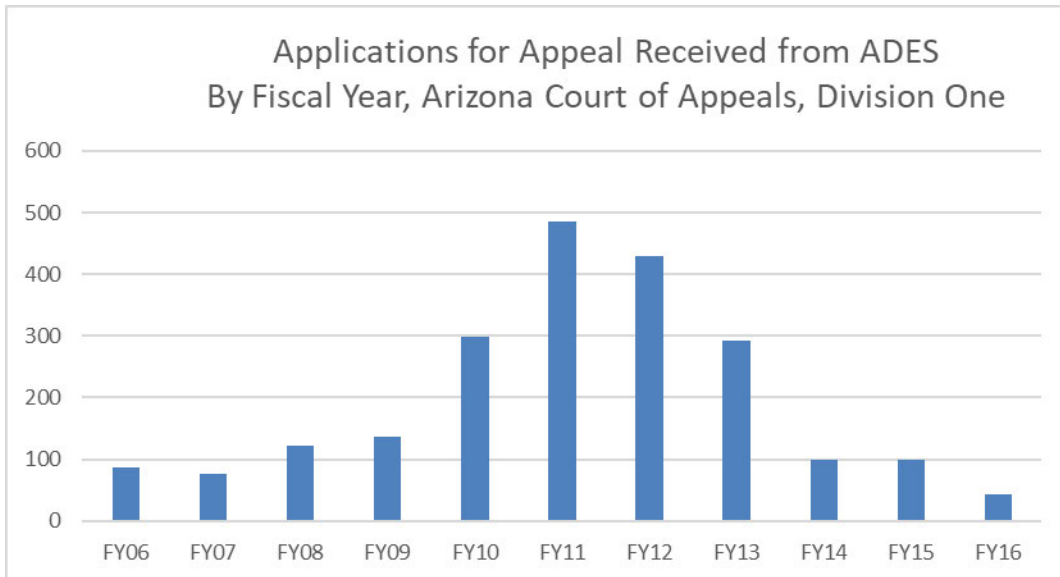
¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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granted, the appeal is treated like an appeal in a civil case according to “the rules for appeals in civil actions.” *Id.*

¶5 Because an application for appeal is filed with ADES, the Court is unaware of such a filing until ADES transmits the application to the Court as required by statute. *See* A.R.S. § 41-1993.

¶6 The number of applications for appeal ADES transmits to the Court each year fluctuates significantly, ranging from a high of 486 to a low of 43 in fiscal years ending June 30, 2006 to June 30, 2016. In FY 2013, ADES transmitted to the Court 292 applications, a significant decline from the 486 and 430 transmitted during FY 2011 and FY 2012. This decline continued in FY 2014 and 2015, years when ADES transmitted 99 applications, and FY 2016, when ADES transmitted 43 applications. Graphically, these trends are reflected as follows:



¶7 This downward trend appeared to continue dramatically during the first half of FY 2017, when ADES transmitted to the Court just two applications for appeal. One of those applications, however, had been filed with ADES on February 24, 2016, more than 300 days before it was transmitted by ADES to the Court.

¶8 By January 20, 2017, ADES had transmitted to the Court 19 applications for appeal in FY 2017, more than half of which had been filed with ADES at least 18 months before they were transmitted to the Court. Seven of those 19 applications had been filed with ADES in 2014 but had not been transmitted by ADES to the Court until January 2017.

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¶9 Later in January 2017, ADES disclosed to the Court for the first time that it had 140 additional applications for appeal that it had not yet transmitted. When the Court received information about those applications, 60 of the 140 had been filed with ADES more than a year earlier and six had been filed with ADES in 2014, yet were not transmitted by ADES to the Court until January 2017.

¶10 Upon receipt of this information, and after further research by the Court, the Court issued A.O. 2017-01 on February 13, 2017. Although addressing various concerns, as applicable here, A.O. 2017-01 noted that

Regardless of the reasons why ADES did not transmit the applications for appeal to this Court as mandated by A.R.S. § 41-1993, one of the Court's immediate concerns is for ADES to transmit these applications for appeal to the Court as soon as possible to permit the parties to have their applications for appeal resolved by the Court.

As a result, A.O. 2017-01 ordered "that for every application for appeal filed with ADES as of the date of this Order [February 13, 2017] that has not been transmitted to this Court . . . , ADES shall transmit the ADES Record to the Court within 20 days of the date of this Order, [March 6, 2017]." If ADES failed to comply with the March 6, 2017 deadline, A.O. 2017-01 warned that "the Court may place the matter on the Court's Order to Show Cause Calendar so that ADES has an opportunity to show cause, if any exists, why it should not be held in civil contempt and fined and/or sanctioned until such ADES Record or transcript is filed as required . . . and to otherwise ensure compliance with" A.O. 2017-01.

¶11 Notwithstanding this order that ADES transmit to the Court by March 6, 2017 all applications for appeal (and the ADES Record) ADES had received by February 13, 2017, ADES failed to comply with that order. As of March 29, 2017, based on information provided by ADES to the Court,

at least 36 applications for appeal that were pending with ADES as of February 13, 2017, were transmitted by ADES to the Court after the March 6, 2017 deadline. *See* Exhibit 1. Of these 36 applications for appeal, at least six

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were filed with ADES in 2013 (meaning they had been pending with ADES for more than three years before ADES forwarded them to the Court), and seven were filed with ADES in 2014 (meaning they had been pending with ADES for more than two years before ADES forwarded them to the Court).

[Appendix A at 3] As a result, on March 29, 2017, the Court set a show cause hearing to address ADES' failure to comply with A.O. 2017-01. Unfortunately, the situation then got even worse.

¶12 As noted in a second Order to Show Cause issued April 12, 2017,

After the issuance of the March 29, 2017 Order to Show Cause through April 11, 2017, 31 additional applications for appeal that were pending with ADES as of February 13, 2017, were transmitted by ADES to the Court. *See* Exhibit 2. Of these 31 applications for appeal, 8 were filed with ADES in 2013 (meaning they had been pending with ADES for more than three years before ADES forwarded them to the Court), and 10 were filed with ADES in 2014 (meaning they had been pending with ADES for more than two years before ADES forwarded them to the Court).

[Appendix B at 3]

¶13 These Orders to Show Cause described these failures to comply with A.O. 2017-01 and set a hearing to allow ADES an opportunity to show cause, if any existed, why ADES should not be held in civil contempt, fined and/or sanctioned for failure to comply with A.O. 2017-01. The Orders to Show Cause further ordered that, at the hearing,

ADES' representative(s) shall be prepared to testify under oath as to (1) all efforts by ADES to comply with the Order; (2) why ADES failed to comply with the Order (and provide documentation as to which cases have not been transmitted as required by the Order); (3) what steps ADES has taken and will take to ensure

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future compliance with the Order; and (4) what steps ADES has taken and will take to notify each affected party of ADES' delay in transmitting applications for appeal and related records to the Court.

[Appendix A at 3; Appendix B at 4]

¶14 The Court held the show cause hearing on April 19, 2017. At that hearing, ADES was represented by counsel JoAnn Falgout and Carol Salvati. A record of the hearing was made by audio and video recording. See <https://www.youtube.com/watch?v=lsQPHZFWRvY> (*In Re ADES OSC 4 19 2017 parts 1 and 2*). ADES provided testimony under oath from Marilyn J. White, Administrator, ADES Appellate Services Administration, with the Court also questioning Ms. White.

¶15 By the time of the April 19, 2017 hearing, the Court had received an additional 29 applications for appeal that were pending with ADES as of February 13, 2017 but were not transmitted to the Court by March 7, 2017. As a result, the evidence showed that ADES had failed to timely transmit to the Court at least 96 applications for appeal, in violation of A.O. 2017-01. The oldest of these applications was filed with ADES on February 5, 2013, meaning it had been pending with ADES for more than four years (1,527 days) before it was transmitted by ADES to the Court.

¶16 At the April 19, 2017 hearing, Ms. White testified that she had been employed by ADES since February 2015 and had been involved in processing applications for appeal since late October or early November 2016. Ms. White described the processing system for applications for appeal that ADES had used in the past, as well as changes made to that system given the delays that prompted A.O. 2017-01 and the Orders to Show Cause.

¶17 According to Ms. White, from sometime in 2013 to March 6, 2017, ADES employee Cynthia Dominguez, who was Clerk of the ADES appeals board, had administered the appellate services function for ADES. Ms. Dominguez' last day of ADES employment was March 6, 2017, when she resigned. Both through Ms. White's testimony and in filings, ADES advised the Court that Ms. Dominguez exploited weaknesses in the ADES computer systems used in administering applications for appeal. This misconduct included "misdirecting the employee inputting the information [in an ADES computer system] to refrain from entering the

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date that the party filed the appeal application [with ADES] and the date” it was received by ADES.

¶18 ADES further reported that Ms. Dominguez “used concealment, misdirection, and misinformation to prevent [ADES] management from discovering her malfeasance. She hid paper appeal applications in her office and . . . buried appeal applications in a digital file dedicated for another purpose, making detection extremely unlikely.” ADES added that Ms. Dominguez “manipulated unwitting coworkers and exploited a vulnerability” in the computer system “to further disguise the fact that she was not processing all of the appeal applications.” According to ADES, Ms. Dominguez “instructed the receptionists to route any calls about pending appeal applications to her if she was available. She further spread misinformation through the receptionists, telling them that a ruling on an appeal application took about two years, which the receptionists then passed on to parties when they sought information on the status of their applications.”

¶19 Ms. White testified to learning that, during Ms. Dominguez’ ADES employment, ADES received many calls from parties whose applications for appeal were pending. When asked how ADES responded to those inquiries, Ms. White testified that there was no record of written responses. Her investigation, however, revealed that, during Ms. Dominguez’ tenure, she and other ADES employees told inquiring parties that it took the Court of Appeals two years to process applications for appeal. Ms. White conceded that this information was provided by ADES to parties whose applications for appeal had been pending for many months or years with ADES but had not yet been transmitted by ADES to the Court.

¶20 Ms. White testified that, after meeting with the Clerk of this Court, ADES’ investigation found that dozens of applications for appeal filed with ADES were located in Ms. Dominguez’ office. Those applications were unprocessed and placed in a file drawer in Ms. Dominguez’ office and had not been transmitted by ADES to the Court. Further investigation, including work with ADES computer systems, found more applications that had been filed with ADES but that had not been transmitted by ADES to the Court.

¶21 When asked about compliance with the requirements of A.O. 2017-01 for applications for appeal filed with ADES in the future, Ms. White testified that ADES could and would comply with those requirements. She testified the new internal process flow for such

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applications is designed to ensure that the ADES Record (including the application for appeal) in each matter is transmitted to the Court within 25 days of receipt of the application for appeal by ADES, a period of time that complies with A.O. 2017-01 where the transcript is not available at that time. Ms. White acknowledged that A.O. 2017-01 has a different deadline for the submission of a transcript when an application for appeal is filed and that ADES was able to comply with that requirement as well.

¶22 Ms. White testified that ADES has taken remedial action to cross-train various ADES employees to work with applications for appeal. In addition, ADES has revised the procedures used to ensure an audit function and to use both technology and personnel to ensure that more than one individual knows of and is responsible for transmitting applications and the ADES Record to the Court. She added that ADES has a continuous improvement program that is being re-invigorated to ensure that nothing like this happens again.

¶23 Ms. White conceded that ADES had not complied with the deadlines ordered by the Court in A.O. 2017-01. The evidence at the April 19, 2017 hearing showed that ADES had not transmitted to the Court by March 6, 2017 approximately 100 applications for appeal that had been filed with ADES by February 13, 2017. Ms. White testified that failure was because ADES did not know that Ms. Dominguez had retained the applications for appeal in her file drawer. She added that ADES had scheduled a March 6, 2017 meeting to discuss the situation with various ADES employees in Ms. Dominguez' office. At the time set for the meeting, Ms. Dominguez arrived, submitted a letter of resignation and left, never to return. ADES then discovered the many unprocessed applications for appeal in Ms. Dominguez' office.

¶24 The Court asked Ms. White whether ADES considered letting the Court know in writing that it would not meet the March 6, 2017 deadline set forth in A.O. 2017-01 before that deadline passed. Ms. White responded that ADES should have advised counsel and the Court that it would not meet that deadline, but it failed to do so. Ms. White indicated that, as of the April 19, 2017 hearing, no formal action had been taken against Ms. Dominguez for her actions and omissions.

¶25 Ms. White testified that, as of the April 19, 2017 hearing, all applications for appeal filed with ADES had been transmitted to the Court. These applications were filed from 2013 to the beginning of 2017.

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¶26 Through counsel, ADES asserted that it had adopted new systems, that Ms. Dominguez was the apparent cause of the problem and was no longer an ADES employee and measures were put in place that would not allow this type of situation to happen in the future. Although confessing error, ADES asked that no sanctions be imposed but, that if sanctions were imposed, they be remedial and not punitive. ADES also offered to provide monthly reports to show compliance with the Court's requirements going forward. After receiving testimony and hearing argument, the Court took the matter under advisement.

¶27 At a May 17, 2017 status conference, the Court continued to take the matter under advisement and ordered that:

ADES shall file each month until further order of this Court audit reports and inventory reports in substantially similar form to those examples attached to their May 5, 2017 Notices, with such filings to be made in this matter and to be made no later than the fifth day of each month (or the next business day following the fifth day of each month should the fifth day of the month be a Saturday, Sunday or legal holiday), providing audit and inventory information for the previous month.

¶28 On August 17, 2017, the Court issued an order providing ADES up to and including September 18, 2017 in which to file any memorandum it wished to provide addressing: (1) the appropriate standard for contempt; (2) whether ADES should be held in contempt and (3) possible consequences if ADES was held in contempt. The order also stated that, after September 18, 2017, the Court would, without further hearing or order, consider the record provided and resolve whether ADES should be held in contempt and, if so, appropriate consequences. The Court has considered ADES' September 18, 2017 filing as well as the entire record in this matter.

ANALYSIS

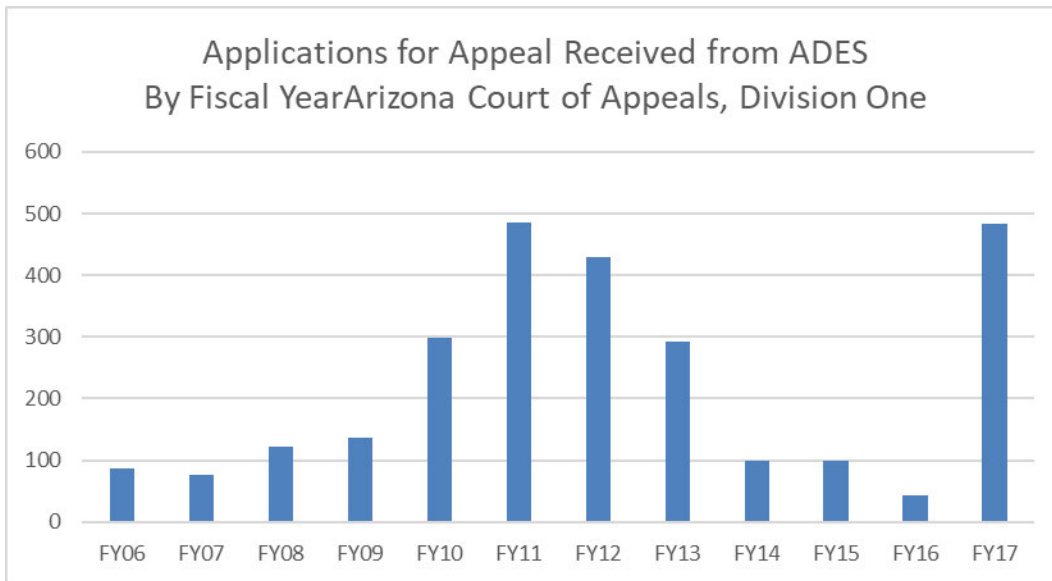
I. Scope Of These Show Cause Proceedings And This Decision.

¶29 As ADES conceded before the April 19, 2017 hearing, the number of applications for appeal that had not been timely transmitted by ADES to the Court identified in late 2016 "was only the tip of the iceberg." In fact, given ADES' inaction over a period of years, an enormous number

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of applications for appeal were not transmitted to the Court in a timely fashion.

¶30 In the fiscal year ending June 30, 2017, ADES transmitted to the Court 483 applications for appeal. In calendar year 2017, ADES had transmitted to the Court 546 applications as of September 18, 2017. Some of these applications were first filed with ADES in 2013. The spike in cases transferred in fiscal year 2017 is staggering when compared to recent years:



The reason for this spike is the failure of ADES to timely transfer such applications for appeal to this Court over a period of years. This has prompted the Court to proceed in three very different ways to work through this unfortunate situation caused by ADES' repeated failures.

¶31 *First*, upon receipt of these applications for appeal from ADES, the Court has undertaken to process the ADES Record, assign the applications to three-Judge panels and to have those panels consider and resolve the applications by either granting or denying them. As of September 18, 2017, the Court had considered and either granted or denied 482 applications for appeal received from ADES earlier in the year, leaving 64 applications for appeal pending. As noted by the Court at the May 17, 2017 status conference, *the decision by these three-Judge panels to either grant or deny an application for appeal is based on the assessment of the merits of the specific application, not on ADES' failure to timely transmit the application to the Court.* The resolution and actions of those

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individual applications by those three-Judge panels are separate from, and independent of, issues addressed in this case.

¶32 *Second*, two days after issuing A.O. 2017-01, the Court consolidated various representative applications for appeal into Case No. 1 CA-UB 17-0004, to “evaluat[e] potential due process violations or other considerations that may be relevant to ADES’s failure to timely transmit these applications for appeal to the Court.” Appointing pro bono counsel through the Arizona Court of Appeals Pro Bono Representation Program, <http://www.azcourts.gov/coal/Pro-Bono-Representation-Program>, the three-Judge panel in those consolidated cases issued an order directing that,

in light of these unusual circumstances and for good cause, that pro bono counsel will submit amicus curiae briefing addressing (1) whether the right of procedural due process or other rights have been violated, and (2) whether any specific actions should be taken to appropriately address ADES’s delay in transmitting these applications for appeal to the Court. *See* Ariz. R. of Civ. App. P. 16 (b)(“An appellate court may allow an amicus curiae brief if . . . [it] can provide information, perspective, or argument that can help the appellate court beyond the help the parties . . . can provide); and Ariz. R. of Civ. App. P. 3 (a) (stating that appellate court may suspend any provision of appellate rules for good cause and “may order such proceedings as the court directs”). It is also contemplated that it may be appropriate for more than one law firm or attorney to participate in preparing the amicus briefing.

Pro bono counsel filed such a brief in May 2017; ADES filed an answering brief in August 2017; pro bono counsel filed a reply brief later in August 2017 and oral argument will be held on November 16, 2017, at 2:00 p.m. in Courtroom 1, State Courts Building, 1501 West Washington Street, Phoenix. The outcome of that briefing may involve the imposition of consequences on ADES for its failure to timely transmit the applications for appeal to the Court. Again, however, the actions and resolution of

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those issues by that three-Judge panel are separate from, and independent of, issues addressed in this case.

¶33 *Third*, the Court issued A.O. 2017-01 that, as applicable here, ordered ADES to provide to the Court by March 6, 2017 all applications for appeal ADES had received by February 13, 2017. ADES' failure to do so prompted the Orders to Show Cause, the April 19, 2017 evidentiary hearing and the May 17, 2017 status conference. This decision now addresses the issue of ADES' failure to comply with A.O. 2017-01 and appropriate consequences for that failure.

¶34 With this background, the Court now resolves the issues taken under advisement at the April 19, 2017 evidentiary hearing, including whether ADES is in contempt of court for failing to comply with A.O. 2017-01 and, if so, the appropriate consequences for that contempt.

II. Applicable Legal Standards.

¶35 Contempt may be defined as “[a]ny act which is calculated to hinder, obstruct or embarrass a court in the administration of justice, or which lessens the dignity or authority of a court.” *Ong Hing v. Thurston*, 101 Ariz. 92, 98 (1966). Civil contempt is the disobedience of a court order directing an act for the benefit or disadvantage of a party to the litigation. *Id.*; accord *Stoddard v. Donahoe*, 224 Ariz. 152, 154 ¶ 8 (App. 2010) (citing *Hirschfeld v. Superior Court*, 184 Ariz. 208, 215 (App. 1995)). The purpose of civil contempt is remedial (not punitive) and the purpose of classifying the type of contempt is to determine the procedure to apply in each case. *Ong Hing*, 101 Ariz. at 98; accord *Stoddard*, 224 Ariz. at 155 ¶ 14 (quoting Ariz. R. Crim. P. 33.1 cmt.).

¶36 “[C]ontempts committed by failure to obey a lawful . . . order . . . of the court, and all other contempts not specifically embraced within” A.R.S. §§ 12-861 to -865 may be addressed “in conformity to the practice and usage of the common law.” A.R.S. § 12-864. In addition, as ADES concedes, “a court may exercise its inherent contempt power to remedy a violation of a court order.” *Sheehan v. Flower*, 217 Ariz. 39, 43 (App. 2007); accord *Hirschfeld*, 184 Ariz. at 215.

¶37 The common law regarding civil contempt in this context is not established with precision. See *Ex Parte Quan*, 39 Ariz. 13, 16 (1931) (noting that, in identifying “what the common law [of contempt] is, . . . most of the decisions, as well as the statements of the law by text-writers, are largely reflections of local statutes, not at all uniform”). That said, there appears to be uniformity in many issues involving contempt:

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To establish liability for civil contempt, three elements must be proven by clear and convincing evidence: (1) a valid order of the court existed; (2) the party had knowledge of the order; and (3) the party disobeyed the order. Contemptuous conduct is required for a finding of civil contempt, based on disobedience to the rules and orders of the court. Generally, there is no requirement of bad faith, intent, or willfulness for civil contempt, since the purpose of civil contempt proceedings is remedial and not penal, although some jurisdictions provide to the contrary and require willfulness or intent.

...

Elements of civil contempt usually must be proven by clear and convincing evidence, and ambiguities must be resolved in favor of the party charged with contempt. Once contempt is so proven, the burden shifts to the alleged contemnor to demonstrate inability to comply without regard to intent.

17 Am. Jur. 2d CONTEMPT §§ 13, 180 (2017) (citing authority). ADES properly concedes that, under applicable Arizona law, it could be held in civil contempt for a non-intentional or non-willful violation of A.O. 2017-01.

¶38 Procedurally, an entity subject to a civil contempt finding should be provided notice of the issue, the nature of the proceedings and the obligations that allegedly were not complied with; an opportunity to prepare, be heard and offer any defenses (including why the court order could not be complied with) and that the consequences be remedial (and not punitive). *See generally Ex Parte Quan*, 39 Ariz. 13 (1931) (discussing common law of contempt). The Court applies these standards here, with findings of fact made by clear and convincing evidence where applicable.²

² Civil contempt can be direct or indirect (sometimes called constructive); “direct contempt is an act committed in the presence of the court or so

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III. Findings of Fact And Conclusions Of Law.

¶39 The Court finds that ADES had prompt and timely notice of A.O. 2017-01 as well as the Orders to Show Cause issued March 29, 2017 and April 12, 2017.

¶40 The Court finds that ADES was advised in A.O. 2017-01 of its obligation to transmit to the Court by March 6, 2017 all applications for appeal as well as the ADES Record for all applications filed with ADES on or before February 13, 2017 that had not previously been transmitted to the Court.

¶41 The Court finds that ADES failed to comply with A.O. 2017-01 by failing to transmit to the Court by March 6, 2017 all applications for appeal and related documents that ADES had received by February 13, 2017 that had not previously been transmitted to the Court.

¶42 The Court finds that ADES failed to provide to this Court by March 6, 2017 approximately 100 applications for appeal that ADES had received by February 13, 2017 that had not previously been transmitted to the Court.

¶43 The Court finds that ADES was able to comply with A.O. 2017-01 but failed to do so. ADES argues that Ms. White's testimony "demonstrated that ADES was simply unable to comply with this Court's order to transmit all appeal applications that were pending as of the February 2017 order by March 6, 2017, because -- despite its best efforts -- it had not been able to locate all of them by that date." ADES, however, became aware of applications for appeal not being timely transmitted to

near thereto as to obstruct the administration of justice." *Ong Hing*, 101 Ariz. at 98. "[D]irect contempts and constructive contempts are handled under the common law in a summary manner (constructive contempts in a little less summary manner, but still nevertheless summary)." *State v. Cohen*, 15 Ariz. App. 436, 439 (1971). ADES has not suggested that the procedures used here would differ if viewed as direct civil contempt or indirect civil contempt and, accordingly, the court need not decide the issue. *Accord Stoddard*, 224 Ariz. at 154 ¶ 5 n.2 (noting that "[t]he distinction [between direct or indirect civil contempt] does not affect our analysis"). In addition, the issue here is whether ADES is in civil, not criminal, contempt. *See Ariz. R. Crim. P. 33.1.*

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the Court in late 2016, yet still did not transmit such applications to the Court until after the March 6, 2017 deadline in A.O. 2017-01. Significantly, a key meeting to investigate the issue and to discuss compliance with A.O. 2017-01 did not occur until March 6, 2017, the date the ADES was required to transmit the applications to the Court. Although Ms. Dominguez resigned as that meeting was to begin, ADES holding that meeting on the day ADES was required to transmit the applications to the Court negates any claim that ADES undertook its “best efforts” to comply with A.O. 2017-01. Regardless of the outcome of that meeting, by not holding that meeting until March 6, 2017 -- the same day ADES was required to transmit the applications to the Court -- ADES’ own actions made it virtually impossible that it would comply with that Court-ordered deadline.

¶44 The Court finds that ADES has provided no just defense, cause or explanation for its failure to transmit to the Court by March 6, 2017 all applications for appeal and related documents that ADES had received by February 13, 2017 that had not previously been transmitted to the Court. *See also* A.R.S. § 41-1993(B) (“On the filing of an application for appeal, the clerk of the appeals board *shall* transmit” the ADES Record to the Court) (emphasis added).

¶45 The Court finds that ADES is in contempt of this Court for its failure to comply with the Court order contained in A.O. 2017-01 that ADES transmit to the Court by March 6, 2017 all applications for appeal and related documents that ADES had received by February 13, 2017 that had not previously been transmitted to the Court.

IV. Consequences For ADES’ Contempt.

¶46 Having found ADES in contempt, the issue becomes what consequences are appropriate. Appropriate consequences for civil contempt are remedial, not punitive. *See Ong Hing*, 101 Ariz. at 98. “Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order or to compensate the complainant for losses sustained.” 17 Am. Jur. 2d CONTEMPT § 191 (2017) (citations omitted).

¶47 Identifying proper consequences for ADES’ contempt requires the comparison of: (1) what actually happened with (2) what should have happened if ADES had complied with A.O. 2017-01. Stated differently, the proper consequences for ADES’ contempt are the result of

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examining what would have happened if ADES had transmitted to this court, by March 6, 2017 instead of April 19, 2017, all applications for appeal filed with ADES by February 13, 2017 that had not previously been transmitted to this Court. Thus, the focus is the proper consequences for this 44-day delay by ADES in transmitting approximately 100 applications.

¶48 As indicated above, this comparison is an important limitation on possible consequences for ADES' contempt in failing to comply with A.O. 2017-01. The relevant inquiry is not the consequences for ADES' shocking delay in transmitting to this Court any specific application for appeal, an issue that the three-Judge panel in consolidated Case No. 1 CA-UB 17-0004 is considering. Nor is the relevant inquiry the consequences for ADES' failure to timely transmit to this Court applications for appeal filed with ADES in the years before the Court entered A.O. 2017-01 on February 13, 2017. Those delays appear inexcusable and contrary to ADES' statutory obligations. But the contempt for which consequences are being imposed here is ADES' failure to comply with the Court's March 6, 2017 deadline set forth in A.O. 2017-01 issued on February 13, 2017.

¶49 As noted above, one purpose of consequences for civil contempt is to compensate the complainant for losses sustained. 17 Am. Jur. 2d CONTEMPT § 191 (2017) (citations omitted). Here, the Court on its own motion issued the Orders to Show Cause and held the evidentiary hearing, indicating the Court itself was the complainant. Looking at losses to the Court caused by ADES' 44-day delay, clearly, ADES' failure to comply with A.O. 2017-01 diverted from other efforts time spent researching and issuing the two Orders to Show Cause; preparing for and conducting the April 19, 2017 evidentiary hearing and corresponding follow up. None of those activities would have been required had ADES complied with A.O. 2017-01. When the costs of such avoidable actions are incurred and quantified, such costs properly may be imposed on the party held in contempt. *See Dyer v. Dyer*, 92 Ariz. 49, 52-53 (1962) (affirming, as a contempt consequence, order awarding attorney's fees incurred in contempt proceedings necessitated by party's failure to comply with court order).

¶50 Although there are a variety of court-incurred costs associated with any unnecessary hearing, many of those costs either are unquantifiable or are what the judicial branch fairly is asked to incur. Here, the Orders to Show Cause, hearing and follow up did not impose upon a party that was not held in contempt the obligation to incur costs or

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attorneys' fees; the show cause hearing involved ADES and its counsel alone. Although the Orders to Show Cause, hearing and follow up clearly required Court personnel to divert time from otherwise productive matters to address ADES' failure to comply with A.O. 2017-01, the resulting costs were not quantified and are not valued monetarily with any degree of specificity.³ Moreover, the costs are a function of the Court's work. Accordingly, the Court will not impose upon ADES as a consequence for its contempt the Court's added costs and lost productivity as a result of ADES' contempt.

¶51 As noted above, the other purpose guiding consequences for civil contempt is to coerce compliance with the court's order. 17 Am. Jur. 2d CONTEMPT § 191 (2017) (citations omitted). ADES, obviously, cannot comply with the March 6, 2017 deadline, which has long since passed. But A.O. 2017-01 and the Court's May 19, 2017 order put in place a mechanism to ensure ADES' compliance in addressing future applications for appeal filed with ADES. Specifically, A.O. 2017-01 directed the following:

IT IS FURTHER ORDERED that, until further order of the Court, for all applications for appeal filed with ADES after the date of this Order [February 13, 2017], the ADES Record shall be transmitted to the Court within **30** days of the filing of the application for appeal with ADES. If the transcript has been prepared in that timeframe, it shall be included with the transmittal of the ADES Record. Otherwise, the transcript shall be transmitted to the Court separately, but in any event no later than **40** days after the filing of the ADES Record with this Court.

The order issued after the May 17, 2017 status conference directed the following:

IT IS FURTHER ORDERED that ADES shall file each month until further order of this

³ Indeed, to the extent such costs could be identified through overtime expenses or otherwise, had ADES complied with A.O. 2017-01 and delivered the applications for appeal by March 6, 2017, it likely would have required the Court to incur additional overtime expenses to process the same number of applications received in a shorter time period.

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Court audit reports and inventory reports in substantially similar form to those examples attached to their May 5, 2017 Notices, with such filings to be made in this matter and to be made no later than the fifth day of each month (or the next business day following the fifth day of each month should the fifth day of the month be a Saturday, Sunday or legal holiday), providing audit and inventory information for the previous month.

Given ADES' contempt in failing to comply with A.O. 2017-01, as a consequence, the Court will continue to impose these obligations until further order of the Court.

¶52 In imposing these ongoing obligations, the Court notes that it has the power "to enforce or coerce compliance with [its] lawful orders through civil contempt and to impose a penalty for contempt reasonably commensurate with the gravity of the offense, the social harm caused by the [contemnor's] actions, and the objective of deterring such conduct in the future." 17 Am. Jur. 2d CONTEMPT § 191 (2017) (citations omitted). Given the critical importance of ADES timely transmitting to this Court applications for appeal filed with ADES, should ADES fail to comply with any of these ongoing obligations without good cause shown for such failure, the Court may impose additional consequences, including monetary consequences, against ADES for each day ADES fails to comply.

CONCLUSION

¶53 The Court holds ADES is in contempt of this Court for its failure to comply with the Court order contained in A.O. 2017-01 that ADES transmit to the Court by March 6, 2017 all applications for appeal and related documents that ADES had received by February 13, 2017 that had not previously been transmitted to the Court. To ensure that no such delay occurs in the future,

- Until further order of this Court, for all applications for appeal filed with ADES after the date of this Decision, the ADES Record shall be transmitted to the Court within **30** days of the filing of the application for appeal with ADES. If the transcript has been prepared in that timeframe, it shall be included with the

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transmittal of the ADES Record. Otherwise, the transcript shall be transmitted to the Court separately, but in any event no later than **40** days after the filing of the ADES Record with this Court.

- Until further order of this Court, ADES shall file each month audit reports and inventory reports in substantially similar form to those examples attached to their May 5, 2017 Notices, with such filings to be made in this matter no later than the fifth day of each month (or the next business day following the fifth day of each month should the fifth day of the month be a Saturday, Sunday or legal holiday), providing audit and inventory information for the previous month.

ADES' failure to comply with these ongoing obligations without good cause shown by ADES for that failure may result in this Court imposing additional consequences, including monetary consequences, against ADES for each day ADES fails to comply.

¶54 To help ensure an awareness of these obligations by all who may be involved, the Court will issue a new Administrative Order that contains these requirements.



AMY M. WOOD • Clerk of the Court
FILED: AA

IN THE
Court of Appeals
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 03/29/17
AMY M. WOOD,
CLERK
BY: JT

IN THE MATTER OF:) Court of Appeals
) Division One
ARIZONA DEPARTMENT OF) No. 1 CA-UB 17-0128 OSC
ECONOMIC SECURITY'S)
COMPLIANCE WITH ADMINISTRATIVE)
ORDER 2017-01)
)
)

ORDER TO SHOW CAUSE

On February 13, 2017, the Court issued Administrative Order 2017-01 (Order), outlining circumstances relating to the Arizona Department of Economic Security's (ADES) failure to timely transmit to the Court applications for appeal arising from unemployment compensation, food stamp and cash assistance programs as mandated by Arizona Revised Statutes (A.R.S.) section 41-1993. As noted in the Order, some applications for appeal had been pending with ADES since 2014, yet they were first transmitted to the Court in 2017. The Order also noted that, on January 30, 2017, ADES provided a list of "applications for appeal that had been filed with ADES but not transmitted to the court listing 144 such cases." Given these issues, the Order stated:

Regardless of the reasons why ADES did not transmit the applications for appeal to this Court as mandated by A.R.S. § 41-1993, one of the Court's immediate concerns is for ADES to transmit these applications for appeal to the Court as soon as possible to permit the parties to have their applications for appeal resolved by the Court. Additionally, every litigant who filed with ADES an application for appeal that was not properly transmitted to the Court should be made aware of the status of the application for appeal.

(Emphasis added.)

Based on those considerations, and given the list ADES provided to the Court on January 30, 2017 listing 144 appeals that had not been transmitted by ADES to the Court, the Order imposed specific deadlines for ADES to transmit all pending and all future applications for appeal and related documents.

As pertinent here, the Order provided that for every application for appeal filed with ADES as of the date of the Order (February 13, 2017) that had not been transmitted by ADES to the Court as of that date, "ADES shall transmit the ADES Record [as that phrase is defined in the Order] to the Court within 20 days" **(March 6, 2017)**. The Order gave notice that if ADES failed to comply with any of the deadlines set forth in the Order, "the Court may place the matter on the Court's Order to Show Cause Calendar so that ADES has an opportunity to show cause, if any exists, why it should not be held in civil contempt and fined and/or sanctioned until such ADES Record or transcript is filed as required by" the Order "and to otherwise ensure compliance with" the Order.

Notwithstanding the Order's requirement that ADES transmit to the Court by March 6, 2017 all applications for appeal (and all related documents constituting the ADES Record) that ADES had received by February 13, 2017, from information ADES has provided to the Court after March 6, 2017, ADES has failed to comply with that requirement. More specifically, to date, at least 36 applications for appeal that were pending with ADES as of February 13, 2017, were transmitted by ADES to the Court after the March 6, 2017 deadline. See Exhibit 1. Of these 36 applications for appeal, at least six were filed with ADES in 2013 (meaning they had been pending with ADES for more than three years before ADES forwarded them to the Court), and seven were filed with ADES in 2014 (meaning they had been pending with ADES for more than two years before ADES forwarded them to the Court).

From information ADES has provided to the Court after March 6, 2017, ADES has violated the Order by failing to timely transmit those 36 appeals to the Court as required by the Order, and continues to violate the Order to the extent that additional applications for appeal received by ADES by February 13, 2017 have not been timely transmitted to the Court.

Upon consideration of the foregoing,

IT IS ORDERED that ADES, through representative(s) with information known or reasonably available to ADES regarding the issues summarized above and in the Order, shall appear in Courtroom 1, 2nd Floor, 1501 W. Washington, Phoenix, Arizona, on **Wednesday, April 5, 2017, at 3:00 p.m.** to show cause, if any, why ADES should not be held in civil contempt and fined and/or sanctioned for failure to comply with the Order.

IT IS FURTHER ORDERED that at the Show Cause hearing, ADES' representative(s) shall be prepared to testify under oath as to (1) all efforts by ADES to comply with the Order; (2) why ADES failed to comply with the Order (and provide documentation as to which cases have not been transmitted as required by the Order); (3) what steps ADES has taken and will take to ensure future compliance with the Order; and (4) what steps ADES has taken and will take to notify each affected party of ADES' delay in transmitting applications for appeal and related records to the Court.

IT IS FURTHER ORDERED that the Clerk of the Court shall distribute this Order to Mark Brnovich, Arizona Attorney General; Carol A. Salvati, Assistant Attorney General, Arizona Attorney General's Office; Henry Darwin, Interim Director, Arizona Department of Economic Security; and Clerk, Arizona Department of Economic Security Board.

_____/s/_____
Michael J. Brown, Chief Judge

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To:

Mark Brnovich

Carol A Salvati

Henry R Darwin

Kristina Churchill

Exhibit 1

Claimant Name	Case #	Pgm	Date Received by Court from ADES	Date Appeal Filed with ADES (as represented by ADES)	Days Pending with ADES
HUBBARD, LATOYA	1505387	FS	3/08/2017	1/3/2017	64
LEDEZMA, LUIS	1491001	UI	3/08/2017	2/4/2016	398
LEDEZMA, LUIS	1491004	UI	3/08/2017	2/4/2016	398
LARKE, DAMIEN	1376706	UI	3/10/2017	8/23/2013	1,295
RIZVI, MAHROZ	1390762	PA	3/13/2017	11/4/2013	1,225
RIZVI, MAHROZ	1390763	PA	3/13/2017	11/4/2013	1,225
MATA, REGINA	1420124	PA	3/13/2017	4/24/2014	1,054
BERNIER, DENISE	1444015	MA	3/13/2017	12/3/2014	831
MANICKAM, SENT	1463378	UI	3/13/2017	4/30/2016	317
SMITH, ROBBIE	1464514	UI	3/13/2017	5/4/2015	679
SMITH, ROBBIE	1464518	UI	3/13/2017	5/4/2015	679
SOTO, VERONICA	1417514	PA	3/14/2017	4/10/2014	1,069
MASSIE, GERALD	1389741	UI	3/14/2017	10/24/2013	1,237
MASSIE, GERALD	1390610	UI	3/14/2017	10/24/2013	1,237
CANTRELL, RHONDA	1481920	UI	3/14/2017	10/26/2015	505
HALE, JON	1489920	UI	3/14/2017	2/1/2016	407
HALE, JON	1489926	UI	3/14/2017	2/1/2016	407
HALE, JON	1489930	UI	3/14/2017	2/1/2016	407
ZEREGA, MAURICIO	1491606	UI	3/14/2017	12/5/2015	465
SIM, GRACE	1372977	PA	3/16/2017	11/7/2013	1,225
MASSEY, JOSEPH	1483163	UI	3/16/2017	12/14/2015	458
NGUYEN, DEBBIE	1500782	UI	3/17/2017	5/9/2016	312
ARVIZU, LIZZETTE	1463391	UI	3/17/2017	5/14/2015	673
WALSH, JANET	1511780	UI	3/21/2017	12/1/2016	110
SMEAL, KAYLEE	1431930	UI	3/21/2017	8/7/2014	957
TRASK, JORDAN	1425059	UI	3/21/2017	6/8/2014	1,017
PURSELL, AUDREY	1452832	UI	3/21/2017	9/30/2014	903
MILLARD, SCOTT	1458184	UI	3/21/2017	2/16/2015	764
MORALES, GLENDA C	1534255	UI	3/22/2017	12/23/2016	89
MARTIN, TAMMI	1464241	UI	3/22/2017	7/22/2015	609
MARTIN, TAMMI	1472466	UI	3/22/2017	10/5/2015	534
WOLFF, CELESTE	1455604	UI	3/22/2017	1/18/2015	794
PARKER, GEORGEANNE	1451234	UI	3/22/2017	02/12/2015	769
LOPEZ, LUISA	1460055	UI	3/22/2017	1/16/2015	796
CAZARES, RAMON	1454752	UI	3/22/2017	10/27/2014	877
VICORY, ANTHONY	1537136	UI	3/23/2017	12/23/16	90

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 04/12/17
AMY M. WOOD,
CLERK
BY: JT

IN THE MATTER OF:) Court of Appeals
) Division One
ARIZONA DEPARTMENT OF) No. 1 CA-UB 17-0128 OSC
ECONOMIC SECURITY'S)
COMPLIANCE WITH ADMINISTRATIVE)
ORDER 2017-01)
)
)
)

**ORDER TO SHOW CAUSE
(SECOND)**

Given the receipt of additional applications for appeal filed after the Order to Show Cause filed March 29, 2017, the Court finds it necessary to issue this Second Order to Show Cause in advance of the April 19, 2016 hearing to address these additional filings.

On February 13, 2017, the Court issued Administrative Order 2017-01 (Order), outlining circumstances relating to the Arizona Department of Economic Security's (ADES) failure to timely transmit to the Court applications for appeal arising from unemployment compensation, food stamp and cash assistance programs as mandated by Arizona Revised Statutes (A.R.S.) section 41-1993. As noted in the Order, some applications for appeal had been pending with ADES since 2014, yet they were first transmitted to the Court in 2017. The Order also noted that, on January 30, 2017, ADES provided a list of "applications for appeal that had been filed with ADES but not transmitted to the court listing 144 such cases." Given these issues, the Order stated:

Regardless of the reasons why ADES did not transmit the applications for appeal to this Court as mandated by A.R.S. § 41-1993, *one of the Court's immediate concerns is for ADES to transmit these applications for appeal to the Court as soon as possible to permit the parties to have their applications for appeal resolved by the Court. Additionally, every litigant who filed with ADES an application for appeal that was not properly transmitted to the Court should be made aware of the status of the application for appeal.*

(Emphasis added.)

Based on those considerations, and given the list ADES provided to the Court on January 30, 2017 listing 144 appeals that had not been transmitted by ADES to the Court, the Order imposed specific deadlines for ADES to transmit all pending and all future applications for appeal and related documents.

As pertinent here, the Order provided that for every application for appeal filed with ADES as of the date of the Order (February 13, 2017) that had not been transmitted by ADES to the Court as of that date, "ADES shall transmit the ADES Record [as that phrase is defined in the Order] to the Court within 20 days" (**March 6, 2017**). The Order gave notice that if ADES failed to comply with any of the deadlines set forth in the Order, "the Court may place the matter on the Court's Order to Show Cause Calendar so that ADES has an opportunity to show cause, if any exists, why it should not be held in civil contempt and fined and/or sanctioned until such ADES Record or transcript is filed as required by" the Order "and to otherwise ensure compliance with" the Order.

Notwithstanding the Order's requirement that ADES transmit to the Court by March 6, 2017 all applications for appeal (and all related documents constituting the ADES Record) that ADES had received by February 13, 2017, from information ADES has provided to

the Court after March 6, 2017, ADES has failed to comply with that requirement.

The March 29, 2017 Order to Show Cause addresses 36 applications for appeal that were pending with ADES as of February 13, 2017 that were transmitted by ADES to the Court after the March 6, 2017 deadline. That March 29, 2017 Order to Show Cause remains in full force and is the subject of the hearing previously set for Courtroom 1, 2nd Floor, 1501 W. Washington, Phoenix, Arizona, on **Wednesday, April 19, 2017, at 3:00 p.m.** to show cause, if any, why ADES should not be held in civil contempt and fined and/or sanctioned for failure to comply with the Order.

After the issuance of the March 29, 2017 Order to Show Cause through April 11, 2017, 31 additional applications for appeal that were pending with ADES as of February 13, 2017, were transmitted by ADES to the Court. See Exhibit 2. Of these 31 applications for appeal, 8 were filed with ADES in 2013 (meaning they had been pending with ADES for more than three years before ADES forwarded them to the Court), and 10 were filed with ADES in 2014 (meaning they had been pending with ADES for more than two years before ADES forwarded them to the Court).

For these 31 additional applications for appeal, from information ADES has provided to the Court after March 6, 2017, ADES has violated the Order by failing to timely transmit those 31 appeals to the Court as required by the Order, and continues to violate the Order to the extent that additional applications for appeal received by ADES by February 13, 2017 have not been timely transmitted to the Court.

Upon consideration of the foregoing, and in addition to the setting for the return hearing as a result of the March 29, 2017 Order to Show Cause,

IT IS ORDERED that ADES, through representative(s) with information known or reasonably available to ADES regarding the issues summarized above and in the Order, shall appear in Courtroom 1, 2nd Floor, 1501 W. Washington, Phoenix, Arizona, on **Wednesday, April 19, 2017, at 3:00 p.m.** to show cause, if any, why ADES should not be held in civil contempt and fined and/or sanctioned for failure to comply with the Order.

IT IS FURTHER ORDERED that at the Show Cause hearing, ADES' representative(s) shall be prepared to testify under oath as to (1) all efforts by ADES to comply with the Order; (2) why ADES failed to comply with the Order (and provide documentation as to which cases have not been transmitted as required by the Order); (3) what steps ADES has taken and will take to ensure future compliance with the Order; and (4) what steps ADES has taken and will take to notify each affected party of ADES' delay in transmitting applications for appeal and related records to the Court.

IT IS FURTHER ORDERED that the Clerk of the Court shall distribute this Order to Mark Brnovich, Arizona Attorney General; Carol A. Salvati, Assistant Attorney General, Arizona Attorney General's Office; Henry Darwin, Interim Director, Arizona Department of Economic Security; and Clerk, Arizona Department of Economic Security Board.

_____/s/_____
Michael J. Brown, Chief Judge

A copy of the foregoing
was sent to:
Mark Brnovich
Carol A Salvati
Henry R Darwin
Kristina Churchill

Exhibit 2

Claimant Name	Case #	Pgm	Date Received by Court from ADES	Date Appeal Filed with ADES (as represented by ADES)	Days Pending with ADES
SULLINS, KIMBERLY	1435750	UI	4/10/2017	2/11/2015	789
SHERMAN, LESLYE	1455326	UI	4/10/2017	1/4/2015	827
JUMAH, ALLAA	1457378	UI	4/10/2017	12/19/2014	843
ANDREWS MATT	1450214	UI	4/10/2017	7/15/2015	635
BUSHEE, ALEXANDRA	1413647	UI	4/10/2017	3/20/2014	1,117
AMARO, CHRITINE	1406583	UI	4/10/2017	3/25/2014	1,112
CHRISTENSEN IV, ALTER	1400161	UI	4/10/2017	11/12/2013	1,245
KONGRATSAKHOT, BOUNCHANH	1392759	UI	4/10/2017	7/23/2013	1,357
HVEEM, CAROL	1407698	UI	4/10/2017	2/10/2014	1,155
VAN PELT, REBECCA	1441473	UI	4/10/2017	12/18/2014	844
LEIGHTON, MINDY	1405189	UI	4/10/2017	11/10/2013	1,247
GUZMAN, RAFAEL	1452096	UI	4/10/2017	12/17/2014	845
GUZMAN, RAFAEL	1452093	UI	4/10/2017	12/17/2014	845
MONROE, EDWIN	1461946	UI	4/10/2017	3/2/2015	770
BROWN, ALANA	1463828	UI	4/11/2017	2/25/2015	776
KONGRATSAKHOT, BOUNCHANH	1392750	UI	4/11/2017	7/23/2013	1,358
KONGRATSAKHOT, BOUNCHANH	1392755	UI	4/11/2017	7/23/2013	1,358
KONGRATSAKHOT, BOUNCHANH	1392767	UI	4/11/2017	7/23/2013	1,358
TEBYANIAN, HAMID	1350032	UI	4/11/2017	6/4/2014	1,042
LEFUR, ROMAN	1456163	UI	4/11/2017	1/12/2015	820
MARTIN, MISTY	1329568	UI	4/11/2017	1/16/2015	816
MARTIN, MISTY	1329574	UI	4/11/2017	1/16/2015	816
DARLING, LORETTA	1453011	UI	4/11/2017	2/16/2015	785
FLORES, JUAN	1516806	UI	4/11/2017	9/26/2016	197
BROWN, ALANA	1463825	UI	4/11/2017	2/25/2015	776
BROWN, ALANA	1457480	UI	4/11/2017	1/5/2015	827
BLAND, BARBARA	1406666	UI	4/11/2017	11/14/2013	1,244
LIRA, ALMA	1443008	UI	4/11/2017	12/2/2014	861
CASTRO, ROCIO	1382183	UI	4/11/2017	7/29/2013	1,352
KURU, VICTOR	1439989	UI	4/11/2017	2/10/2015	791
BEVAN, AMY	1438296	UI	4/11/2017	10/6/2014	918