CASE NO. S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA
PETITIONER AND APPELLANT

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DEFENDANT, CROSS-DEFENDANT AND APPELLANT;

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
REAL PARTY IN INTEREST

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
PLAINTIFF AND RESPONDENT

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DEFENDANT AND RESPONDENT

AFTER DECISION BY THE COURT OF APPEAL
CASE NO. A142858/A143428

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF SAN FRANCISCO
CASE NUMBER CPF 12-512437
HONORABLE RICHARD B. ULMER, JR., PRESIDING

REPLY BRIEF OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO TO THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ANSWERING BRIEF ON THE MERITS TO OPENING BRIEFS ON THE MERITS OF THE UNITED EDUCATORS OF SAN FRANCISCO AND THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

STEWART WEINBERG, BAR NO. 031493
DAVID A ROSENFELD, BAR NO. 058163
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001
ATTORNEYS FOR PETITIONER UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA

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I. INTRODUCTION

Petitioner/Appellant United Educators of San Francisco ("Petitioner" or "UESF") submits this Reply Brief to the Answering Brief of the Real Party in Interest, the San Francisco Unified School District ("SFUSD"). This Reply Brief also addresses the arguments of the California Unemployment Insurance Appeals Board ("CUIAB") and the Answering Brief of the SFUSD to the CUIAB's Opening Brief.[1]

All parties agree that the purpose of granting unemployment to education employees was to treat them on an equal basis with other employees. But Congress recognized that education employees are often paid on a yearly salary basis and they do not work during summer vacations and other recess periods. Congress intended that such yearly salaried employees should not receive unemployment during those vacation periods. However, in this case we have employees who are not paid on a yearly salary and a school district that has an education program where work is available during a summer session. The question is whether those factors warrant the application of the denial provisions or the broader principle of providing unemployment benefits to employees who are not working

The central issue in this case is what constitutes an "academic term" for purposes of Unemployment Insurance Code section 1253.3, subdivisions (b), (c), which denies unemployment benefits to school employees during any week that begins during the period between two successive academic years or terms. The SFUSD offers a summer school (also referred to as "summer session") to students. Summer school is offered during what would otherwise be a recess period between the spring semester of one school year and the fall semester of the succeeding academic year or term. If the summer session is an academic term, then a school district, if it wishes to avoid paying

[1] We refer to the SFUSD Answer Brief to UESF's Opening Brief as "SFUSD-Ans.-Br.-UESF." We refer to the SFUSD Answer Brief to the CUIAB Opening Brief as "SFUSD-Ans.-Br.-CUIAB." We refer to the CUIAB Opening Brief as "CUIAB-Op.-Br." UESF's Opening Brief is "UESF-Op.-Br."

unemployment benefits to the employees and take advantage of the denial language of section 1253.3, subdivisions (b), (c), must either give reasonable assurance to employees of employment during the summer session or offer them employment during that summer session. The SFUSD did not give reasonable assurance of employment to 26 members of the Petitioner during the summer session that was maintained by the SFUSD in 2011. Nor did the District employ them during the summer session. The 26 claimants should have been paid unemployment benefits by the CUIAB because that summer session was an academic term, and those payments should have been charged against the unemployment insurance account of the SFUSD.

In a similar case brought by the CUIAB against the SFUSD in 2005, a San Francisco Superior Court judge found that the summer session is an academic term. That finding is entitled to issue preclusion.

Both of the Answering Briefs of the SFUSD repeat arguments made to the court below without addressing directly Petitioner's arguments.

Although Petitioner also addressed, to a limited degree, the position of the CUIAB in the UESF-Op.-Br., we more fully address it in this Reply Brief. Petitioner does not fully agree with the CUIAB's position but recognizes that it is an alternative interpretation, which may be sustainable only if this court determines that the summer session was not an academic term.

As a final introductory note, this record concerns only the unemployment insurance rights of 26 employees, 10 of whom are permanent classified paraprofessional employees, and the remaining 16 substitute certificated employees.

II. FACTS

The facts were the subject of a stipulation and are not contested here. However, the SFUSD ignores the following critical stipulations:

> 8. The last date that the San Francisco Unified School District schools operated during the "regular" session of the 2010-2011 school year was May 27, 2011.

[¶] ... [¶]

10. The San Francisco Unified School District operated a summer session during which instruction was given to students of the San Francisco Unified School District. The summer session began on June 9, 2011 and ended on July 7, 2011 for elementary school students, and began on June 9, 2011 and ended on July 14, 2011 for middle and high school students.

(2CT720.)

The parties stipulated that both the term ending May 27, 2011, and the term beginning August 15, 2011, were sessions and that the summer instructional period was also a session. The SFUSD offered no evidence that the summer session was any different from the sessions that ended in May 2011 or began in August 2011. Nor did the SFUSD offer any rationale in its brief why it should not be bound by this stipulation. Indeed, the SFUSD conceded that the District "operated a summer session during which instruction was given to students." (SFUSD-Ans.-Br.-UESF,p.10.) It correctly points out that there were periods between the sessions when no instruction was given. As we point out, however, the on-call employees and substitute teachers involved in this case are entitled to unemployment benefits for the entire period.

The SFUSD suggested that there "are additional material facts elicited elsewhere in the record." (SFUSD-Ans.-Br.-UESF,pp.11-12.) None of those facts is explained as in any way distinguishing the prior spring session from the summer sessions. Thus, this Court should accept the basic proposition that the summer session is fundamentally the same as the fall and spring sessions for purposes of entitlement to unemployment insurance. As we noted in UESF-Op.-Br., there are several principles of statutory construction that govern and should compel this Court to conclude that there is no difference between the summer session and the spring and fall sessions for purposes of the issues in this case.

Once the conclusion is reached that the summer session is indistinguishable from the spring and fall sessions, it logically follows that it is also an academic term. The

SFUSD offers no facts to support a different conclusion. The SFUSD, like the court below, retreats to an argument that one provision in the Education Code, section 37620, compels the conclusion that this summer session is not an academic term or part of an academic year. See Part III.A.4,7.

III. ARGUMENT

A. THE SFUSD'S ARGUMENTS THAT THE SUMMER SESSION CANNOT BE AN ACADEMIC TERM MUST BE REJECTED.

1. The SFUSD retreats to the argument that even though the summer session is no different than the spring or fall sessions, it cannot be an academic term as a matter of law.

Since there are no relevant factual differences between the summer session and the preceding spring session and the succeeding fall session, the SFUSD argues that the summer session (term) cannot be considered "an 'academic term' under U.I. Code § 1253.3(c)." (SFUSD-Ans.-Br.-UESF,p.15.) The SFUSD offers that "it makes no sense to treat the DISTRICT's summer session as an 'academic term.'" (*Ibid.*) We address those arguments below.[2]

2. The 26 employees are substitute teachers and paraprofessional employees whose employment relationship is different from permanent or probationary employees.

There is a significant difference to the outcome in this case because the employees in question are either day-to-day substitute teachers or on-call classified employees of the SFUSD and not permanent or probationary. In order to offer an academic program to students in grades K through 12, the SFUSD must employ both certificated and classified employees. In the normal course of events, substitute employees are going to be

[2] We concede that the summer term instructs fewer students than the fall and spring terms. However, the day-to-day substitute teachers serve the same need of being available to fill in when otherwise engaged teachers are unable to be present. The on-call classified employees serve the same function they serve during the other terms, assisting the school to provide its instructional program. Thus the number of students and employees involved in the summer session is not relevant to the issues in this case. The number of certificated and other employees contracted to provide services during summer sessions may affect the number of on-call and day-to-day substitutes who are needed and those who are entitled to unemployment benefits. The fewer employees contracted to provide services, the fewer opportunities there will be to substitute.

necessary for the SFUSD to replace certificated and classified employees who are ill or otherwise unable to come to work during the summer session just as in the spring and fall terms. The SFUSD expected that, otherwise it would not have given any of those employees a reasonable assurance of employment letter for the fall semester of the succeeding academic year. The permanent employees or probationary employees are not on-call during the spring and fall terms. They are employed throughout the term and have no expectancy of being on-call or working during the summer session. As for the 26 employees involved in this case, they had an expectancy of some work in the summer. (CUIAB-Op.-Br.,p.9.)

The SFUSD does not articulate why the fact that these employees "have to apply separately to work during the summer session" affects their entitlement to unemployment. (SFUSD-Ans.-Br.-UESF,p.15.) The solicitation and acceptance of the application suggests that they will be working. If a substitute or on-call employee does not apply, then the person is not seeking work from the SFUSD and presumably is not entitled to benefits.[3] That has no effect on the fact that the SFUSD operates a summer session which is indistinguishable from the spring and fall sessions.

3. The SFUSD's argument that because employment during the summer is voluntary, summer session is not an academic term, is irrelevant to the issue in this case.

The SFUSD argues that because employees are not guaranteed employment during the summer that, therefore working during the summer is "voluntary." The SFUSD states, "Therefore, it makes no sense to treat the DISTRICT's summer session as an 'academic term' conferring the same rights of eligibility as employment during the DISTRICT's regular school year." (SFUSD-Ans.-Br.-UESF, p.15.) Our point is that the SFUSD solicits these employees to work during the summer. The employees make themselves available. If they are asked to work, they get paid. If they don't work, it is

[3] The person could be working elsewhere or choose to take the summer off as a vacation, either of which would disqualify them from benefits. Thus, to the extent the work is "voluntary" (SFUSD-Ans.- Br.-UESF,p.15), this supports the position of UESF.

because the SFUSD does not offer them work. Their entitlement to unemployment benefits may vary with the amount of work offered each week. Thus, they are not on vacation or recess. They have made themselves available, but they are not working.

It is not clear why the SFUSD describes summer employment as "at will" employment. . "At will employment," a common law concept is employment that the employer may terminate at any time without cause.[4] That does not describe anything that pertains in this case. It is a "red herring," a device that detracts from the main issue in this case.

4. The SFUSD engages in circular reasoning when it asserts the argument that summer school cannot be an "academic term" because it falls outside of the academic year.

In our Opening Brief, we extensively addressed the issue of whether there was an applicable statutory definition of academic year which necessarily excluded the summer session from being outside of any academic year. (UESF-Op.-Br.,pp.19-29.) The SFUSD has not addressed directly the arguments in the UESF-Op.-Br..

The SFUSD argues that a summer session, because it is not required for "compulsory education laws that mandate public schools to provide instruction," and does not "allow certificated employees to receive credit for permanent status" cannot be an "academic term." There is no legal or logical relationship between the characterization of an academic term and receiving credit towards achievement of permanency. Permanent status, or tenure, is a creature of the Legislature, and can be extended or denied based upon legislative action. "Statutes enacted to establish tenure for state employees must be strictly construed. No person can gain permanent tenure or be advanced to a higher class in the service save only by following the statutes enacted by the legislature and the rules adopted by the administrative board." (*Brintle v. Board of Education* (1941) 43 Cal.App.2d 84, 89.)

[4] Labor Code section 2922 defines at will employment. These principles do not govern the application of the employees of the SFUSD whose employment is governed by the Education Code.

The SFUSD argues that Education Code section 37620, which states, "The teaching sessions and vacation periods established pursuant to section 37618 shall be established without reference to the school year as defined in section 37200. The schools and classes shall be conducted for a total of no fewer than 175 days during the academic year." The SFUSD's argument is puzzling. As we pointed out, there is no formal definition of "academic year" in the Education Code that applies. There are definitions that apply only to community colleges, private colleges, and vocational schools. (UESF-Op.-Br.,p.24 and CUIAB-Op.-Br.,p.15.)

The SFUSD, like the court below, reaches for the definition that is contained in section 37200 of the Education Code that defines a school year: "The school year begins on the first day of July and ends on the last day of June." There is no reference in that description to "academic year." The Legislature did provide that during an academic year there shall be at least 175 days, during which schools and classes shall be conducted. There is nothing in that description of the minimum length of an academic year that precludes a summer session from being an "academic term." Thus, when the SFUSD argues, "summer school cannot be an 'academic term' because it falls outside of the academic year" it merely begs the question, since, except for stating that an academic year shall have no fewer than 175 days of instruction, there is no formal definition in Education Code section 37620 or anywhere else in the Code, of an academic year.

The Legislature described a "school year" in Education Code section 37200. It used the term but did not define an "academic year" in Education Code section 37620. However, in section 37620, the Legislature instructs us that teaching sessions and vacation periods shall be established without reference to the school year as defined in section 37200, and that during the "academic year" schools and classes shall be

conducted for no fewer than 175 days.[5] The "no fewer than" establishes a minimum. The inference is that it can be longer, up to no more than 365 days (less mandated holidays). Including weekends, vacations and holidays, that period could extend anywhere from 35 to 45 weeks for just a spring and fall term. Adding a third or fourth term, it could extend to 52 weeks. It leaves open further how those academic terms are staggered, broken up or created within that academic year. The "no fewer than" phrase confirms that the SFUSD's maintenance of a spring, fall and summer academic term is consistent with the provision.

We further pointed out that "[t]he term 'academic year' appears roughly 150 times in the Education Code."[6] (UESF-Op.-Br.,p.26.) The SFUSD has not explained how so many references could have a common and certain meaning which would exclude a summer session. There are so many varied applications of the phrase that it cannot categorically exclude the summer session. Moreover, it is not a natural use of the word "year" to make it 175 days, which is less than half of the year. Similarly, the term "school year" can be found 453 times in the Education Code. But the Code makes it clear it cannot have a dual meaning of either a fiscal year or an academic year. (Ed.Code §25926.) Nothing suggests the academic year must be consecutive without recess or vacations or holidays or weekends or that it must be anything less than 365 days.

5. **The citations to *Russ v. Unemployment Ins. Appeals Bd.* and *Board of Education v. Unemployment Ins. Appeals Bd.* are not relevant.**

The SFUSD quotes language in *Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834 that states:

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[5] SFUSD's argument suggests that the instructional days requirement of Educational Code section 37620 would not include instructional days of a summer session. (SFUSD-Ans.-Br.-UESF p.30.) SFUSD offers no support for that contention which would mean that such instruction would not count for many other purposes, such as graduation.

[6] This number was determined by using the search tool available at http://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml and searching for "academic year" within the Education Code. The same search for "academic term" reveals only 20 references.

> "Subparagraph (i) of the amended subsection requires in effect that a conforming state must deny eligibility for summertime benefits to a professional school employee (such as a teacher), at any grade level, if there is 'a contract' providing for his or her reemployment *in the fall* or 'reasonable assurance' of such reemployment. Subparagraph (ii) of the amended subsection provides in effect that a conforming state may deny eligibility for summertime benefits to a nonprofessional school employee at a subcollegiate grade level (such as appellant) if there is 'reasonable assurance' (only) of his or her reemployment *in the fall*."

(SFUSD-Ans.-Br.-UESF,p.17, original italics and underscoring [quoting *Russ*, at p.843].)

The quoted language in *Russ* is not applicable to the instant case. The *Russ* case raised the question of what words or actions constituted "reasonable assurance" that an individual would perform services in the second of two successive academic years or terms. It did not raise the issue of what constituted an academic term. In fact, there was no summer session or summer school in that school district in the summer of 1978, so the question of whether summer session constituted an academic term could not arise. The issue was not whether or not the summer session constituted an "academic term" for purposes of receiving benefits during the summer between the two academic years. Thus, the language quoted above from the *Russ* case is merely dicta.

The SFUSD's reliance on *Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 690 footnote 7, is also dicta. In that footnote, the court noted that a substitute teacher in between academic years or terms was not unemployed in the sense of being attached to the general labor force which was seeking other employment on a permanent basis. . There was no issue in that case as to whether or not a summer session constituted an "academic term" because there was no summer session. The appellant in that case was simply attempting to get unemployment insurance benefits during the summer recess. Since there was no summer session, there was no issue of whether or not summer session constituted an academic term.

6. The SFUSD's reliance upon the Congressional Record is misplaced.

The SFUSD argues that the Congressional Record demonstrated that school-term employees were not intended to be eligible for unemployment benefits during the summer period between academic years. The SFUSD quotes the Congressional Record:

> The bill prohibits payments of unemployment compensation benefits during the summer, and other vacation periods, to permanently employed teachers and other professional school employees. ... (Congressional Record, Vol. 122, Part 27, 35132.)(CT, Vol 3, 0755)

(SFUSD-Ans.-Br.-UESF,pp.17-18.)

It is difficult to understand the SFUSD's reliance on this reference since the quotation refers to "*permanently* employed teachers and other professional school employees." This has no relevance to the 26 individuals in the instant case, who are substitute employees and paraprofessional employees who have no "permanent" rights to employment in the District.

A review of the legislative history shows concern only with permanent employees who are on vacation or recess. (CUIAB Motion for Judicial Notice, Exhibits pp.37, 51, 79, 81, 85, 108-109 and 148.) Typical is the following statement:

> There is, however, one distinctive characteristic of the contractual employment relationship between the instructor, researcher or administrative employee and the institution which led the committee include a special provision in the bill. It is common for faculty and other professional employees to be employed pursuant to an annual contract and an annual salary, but for a work period of less than 12 months. The annual salaries are intended to cover the entire year, including the summer periods, a semester break, a sabbatical period or similar nonwork periods during which the employee relationship continues.

(*id.* at p.37, Senate Report on first version of amendments to FUTA.)

The legislative history thus supports the UESF's position. Congress showed no intention of excluding day-to-day or on-call employees who are not provided an annual salary from their entitlement to unemployment. Moreover, this history supports the

alternative rationale of the CUIAB because these employees are not working because of a loss of work where they otherwise would have some reasonable expectation of employment. (CUIAB-Op-Br.,pp.16-18.) Since Congress's concern was the annual salary expectation, which does not apply to day-to-day and on-call employees, granting them unemployment during periods when they do not work is consistent with the purpose of the FUTA and the state enactments.

The SFUSD argues that the Department of Labor's conformity requirement supports its position because "an academic term must fall 'within an academic year.'" (SFUSD-Ans.-Br.-UESF,p.26.) This reflects the logical failure of the SFUSD's arguments. The summer session is part of the "academic year," not outside of it. As noted even by the SFUSD, "an academic term constitutes 'that period of time within an academic year when classes are held.'" (*Id.* at p.25, italics omitted.) But the SFUSD cannot refute the obvious facts that classes are held during the summer term and that that the instructional program is part of the academic program.

The SFUSD points to the recent Advisory of the U.S. Department of Labor, Unemployment Insurance Program Letter No.05-17 (Dec. 22, 2016), at <https://wdr.doleta.gov/directives/attach/UIPL/UIPL_5-17.pdf> (as of Feb. 24, 2017) (hereafter UIPL No.05-17). (SFUSD-Ans.-Br.-UESF p.26.) That Advisory supersedes an Advisory Letter not relied upon by the SFUSD, CUIAB or UESF or the Court of Appeals because it is largely irrelevant. (U.S. Dept. Labor, Unemp. Ins. Program Letter No.04-87 (Dec. 24, 1986), at <https://ows.doleta.gov/dmstree/uipl/uipl87/uipl_0487.pdf> [as of Feb. 24, 2017].) Both Advisories address what constitutes "reasonable assurance," which is not an issue in this case. The SFUSD disingenuously asserts that the recent Advisory states "that a summer session could only be treated as an academic term if 'the college has a 12-month academic year, consisting of four quarters.'" (SFUSD-Ans.-Br.-UESF p.26 [quoting UIPL No.05-17, *supra*, at Attachment II, p.11].) This misstatement is consistent with the SFUSD's position that a summer term cannot be part of the

academic year. But the DOL recognizes that a four quarter system, or a two term system, or, as in this case, a three term system, all fall within an academic year. The Advisory constantly refers to "the following academic year or term" without in any way suggesting, contrary to other Advisories, that a non-traditional academic year of four quarters or three sessions or terms, do not fall within any academic year. The SFUSD's arguments undermine its own position.[7]

7. The SFUSD confusingly argues that Education Code section 37620 creates only one "academic year."

The SFUSD asserts that the Education Code demonstrates a statutory intent to distinguish the "mandatory regular school year" from the "permissive summer school term." (SFUSD-Ans.-Br.-UESF,p.19.) The phrases "mandatory regular school year" and "permissive summer school term" are not helpful. As it pertains to students, the "regular" school year is mandatory and attendance at summer session is "permissive."[8] It is also the fact that tenured or permanent employees have a right to employment during the regular school year, but cannot compel employment during the summer unless they are twelve month employees. Those facts have nothing whatsoever to do with these 26 substitutes and temporary certificated employees and classified employees whose employment rights have not been tied in any respect to these issues.

The SFUSD makes the following unhelpful statement:

> Education Code § 37620 clearly identifies the "academic year" as that occurring when 'teaching sessions' are occurring, and to be coterminous with the regular school year of no less than 175 days. Likewise, Education Code § 41420(a) provides that "[n]o school district, other than one newly formed, shall, except as otherwise provided in this

[7] As noted below, this Advisory supports, to some degree, the position of the CUIAB that the "totality of the circumstances" needed to be evaluated to determine whether any individual is given assurances of employment in the "following academic year or term." (UIPL No.05-17, *supra*, at p.6.) Here, SFUSD did not give any such assurance to the 26 claimants for the summer term and thus the issues in the Advisory are not before this Court.

[8] SFUSD's citation to *California Teachers Assn. v. Board of Education* (1980) 109 Cal.App.3d 738 (SFUSD-Ans.-Br.-UESF,pp.20-21) is not relevant.

> article, receive any apportionment based upon average daily attendance from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year."

(SFUSD-Ans-Br.-UESF,p.20.)

That statement is not only not helpful it is also inaccurate, because Education Code section 37620 does not identify the academic year as that occurring when teaching sessions are occurring and coterminous with the regular school year. It also does not reference or concern the issue of summer session. Clearly, instruction is given during summer session. That is the purpose for conducting a summer session. It is also difficult to understand why the SFUSD believes that whether or not an employee may use summer session employment to obtain tenure or permanency is relevant. The answer to that question will not help in resolving whether or not summer session is an academic term.[9]

8. The SFUSD's argument that Petitioner's position requires two notice letters demonstrates the logical fallacy of its argument.

The SFUSD argues that treating summer school "as an 'academic term' ... would require school districts to provide two reasonable assurance notices—one in the spring applying to employment for the summer term, and a second in the summer applying to employment in the fall...." (SFUSD-Ans.-Br.-UESF,p.24.) This illustrates our point. If the summer session is an academic term, either the employees are hired and paid for working or they receive unemployment insurance.[10] The reasonable assurance letter only occurs where there is a summer vacation and the next academic term is the fall. The statutory scheme does not allow the school district the choice of not hiring the employees and also denying them unemployment. We agree there cannot be a "two assurance letter"

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[9] The SFUSD does not assert that this instruction is different such that students do not receive credit towards graduation.

[10] It is important to note that the amount of unemployment insurance may vary. If the employee works a significant amount of time, she may be entitled to no benefits. If the work is sporadic, she may not earn enough to be disqualified. The same applies during all the other academic terms of substitutes and on-call employees. Permanent educators are not entitled to any unemployment benefits since they are paid through the academic terms.