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In the Supreme Court of the State of California

UNITED EDUCATORS OF SAN FRANCISCO AFT/CFT, AFL/CIO NEA/CTA, Plaintiffs and Appellants, **v.** **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,** Defendant and Appellee. **SAN FRANCISCO UNIFIED SCHOOL DISTRICT.** Real Party in Interest and Respondent.	Case No.
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, **v.** **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,** Defendant and Appellant.	

First Appellate District, Division One, Case Nos. A142858 & A147957
San Francisco County Superior Court, Case No. CPF 12-512437
The Honorable Richard B. Ulmer, Judge

2ND PETITION FOR REVIEW

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FEDERAL

PETITION FOR REVIEW

The California Unemployment Insurance Appeals Board (Board) respectfully petitions for review of the published decision of the First Appellate District, Division One, in *United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA v. California Unemployment Insurance Appeals Board, et al.* (2016) 247 Cal.App.4th 1235. The published opinion is attached as Exhibit A. The Board precedent decision invalidated by the Court of Appeal, *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505, is attached as Exhibit B. The Court of Appeal filed its decision June 6, 2016. No petition for rehearing was filed. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

ISSUES PRESENTED

Whether section 1253.3, subdivision (b) of the Unemployment Insurance Code precludes on-call substitute public school teachers and other on-call school workers—who are on-call throughout the year and usually paid only for days worked—from collecting unemployment insurance benefits where they are not called during the summer months due to no fault of their own, but only because there is a lack of available work.

Whether a provision in federal law, as incorporated in section 1253.3, subdivision (b), that is designed to prevent overcompensation of salaried public school teachers during the summer and other vacation periods was intended to deny benefits to on-call substitute teachers who do not share in the financial stability or the predictable employment enjoyed by salaried teachers.

REASONS FOR GRANTING REVIEW

This case raises an important question of law: whether on-call substitute teachers and other year-round, on-call school workers may in

certain circumstances be eligible to collect unemployment insurance benefits during summer school sessions where they are available to work, but are not called due to lack of work. The Court of Appeal held that section 1253.3, subdivision (b) of the Unemployment Insurance Code—which mirrors a federal provision designed to prevent a windfall to salaried teachers who are paid for the full year—operates as a per se bar to these on-call workers ever collecting benefits during the summer semester, regardless of the circumstances.[1] In so doing, it invalidated a well-reasoned Board precedent decision, disrupted the settled practice of the agency in charge of making initial benefits decisions, and potentially called into question decades of Board precedent related to benefits for workers who serve in our public educational institutions.

Review is necessary to correct the erroneous course charted by the Court of Appeal's decision and ensure that state law remains in alignment with federal law and Congressional intent; to avoid harm to a significant number of the State's most economically vulnerable public school employees working for over 1,000 districts across California; and to prevent other unintended consequences that may flow from this significant change in unemployment insurance benefits law.

LEGAL BACKGROUND

California, through the Unemployment Insurance Code, participates in a cooperative unemployment insurance program with the federal government. (*American Federation of Labor v. Unemp. Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024.) Together the state and federal governments operate a system "'designed to cushion the impact of ... seasonal, cyclical and technological idleness.' [Citation]." (*Chrysler Corp. v. Cal. Employ.*

[1] All further statutory references in this brief are to the Unemployment Insurance Code unless otherwise noted.

Stabilization Com. (1953) 116 Cal.App.2d 8, 16; see also § 100 [purpose is to provide for persons "unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum"].) As part of this joint system, California must align its unemployment insurance laws with the Federal Unemployment Tax Act (FUTA). (*American Federation of Labor, supra,* 13 Cal.4th at p. 1024.)

Originally, the system provided benefits only to private-sector employees. (See, e.g., Social Security Act, Pub. L. No. 74-271 (Aug. 14, 1935) ch. 531, Title IX, § 903, 49 Stat. 640.) Over time, the laws were amended to cover public-sector employees, including teachers and school employees. (See, e.g., Unemployment Insurance Amendments of 1976, Pub. L. No. 94-566 (Oct. 20, 1976) 90 Stat. 2667.) In general, in awarding unemployment benefits, public-sector employees must be treated in the same manner as private-sector employees. (See, e.g., 26 U.S.C. § 3304, subd. (a)(6)(A); § 1253.3, subd. (a).) Congress recognized, however, that employment terms for full-time public school teachers differ from other employment arrangements. It acknowledged such teachers typically are paid an annual salary. (See Remarks of Sen. Long, 122 Cong. Rec. 33285 (1976).) And summer vacations are included in that annual salary. (*Ibid.*) Congress decided that this specific class of public employees should not be eligible for unemployment benefits during the summer and other vacations because they are not "unemployed" during those periods; the summer break is built into these employees' salary, and benefits in this situation thus would be a windfall. (See 26 U.S.C. § 3304(a)(6)(A)(i).) At the same time, however, Congress also intended to provide protections for those school employees who had, through no fault of their own, lost employment at any time. (See Remarks of Sen. Javitts, 122 Cong. Record 33284-33285.)

California amended its laws to mirror these federal provisions. (See, e.g., § 1253.3; see generally *Russ v. Unemp. Ins. Appeals Bd.* (1981) 125

Cal.App.3d 834, 844.) Relevant to this case, the Legislature added Unemployment Insurance Code section 1253.3, subdivision (b), which provides that unemployment benefits are not payable to employees of public educational institutions

> with respect to any week which begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms, during that period, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs services in the first of the academic years or terms and if there is a contract or a reasonable assurance that the individual will perform services for any educational institution in the second of the academic years or terms.

In California, a claimant is potentially eligible to receive up to 26 weeks of state unemployment compensation. (§ 1281, subds. (a) & (b)(1).) The weekly benefit amount depends on each claimant's individual wages earned. (§ 1279, subd. (a).) An individual may receive unemployment benefits during a week of part-time work if his or her earnings are below the weekly benefit amount. (§ 1252, subd. (a)(2).) Individuals are generally disqualified for unemployment compensation benefits only if the employee left his or her most recent work voluntarily without good cause, or that he or she has been discharged for misconduct connected with his or her most recent work. (§ 1256.)

California's unemployment benefits system is administered through the work of two expert state entities. The Employment Development Department (EDD), in the Labor and Workforce Development Agency, is charged with a number of employment-related duties and responsibilities, including "[m]aking manual computations and making or denying recomputations of the amount and duration of [unemployment] benefits." (§ 301, subd. (b).) A claimant is entitled to file an appeal of an adverse EDD decision with an ALJ, and, if he or she is dissatisfied with the ALJ's

decision, a further appeal with the Board. (§§ 1328, 1332, 1336.) Board decisions are subject to judicial review pursuant to Code of Civil Procedure section 1094.5. (§ 410.) The Board reviews unemployment assessment and benefit decisions. (§ 401, et seq.) In addition, the Board has the power to designate certain of its decisions as precedent. (§ 409; *Pacific Legal Foundation v. Unemp. Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 106.)

EDD, the Board, and the courts must construe the Unemployment Insurance Code "liberally ... to further the legislative objective of reducing the hardship of unemployment." (*Sanchez v. Unemp. Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584.)

STATEMENT OF THE CASE

During the 2010-2011 school year, the San Francisco Unified School District employed 26 employees, some of whom were substitute teachers hired on an on-call or as-needed basis. (Slip. opn. at p. 2.)[2] At the end of the 2010-2011 year, each of these 26 employees received a letter informing them that they had a "reasonable assurance" of employment during the following school year. (*Ibid.*)

The District's regular academic year 2010-2011 ended on May 27, 2011. (Slip opn. at p. 2.) The District operated a summer session during which instruction was given from June 9, 2011 through July 7, 2011 for elementary school students, and from June 9, 2011 through July 14, 2011 for middle and high school students. (*Ibid.*) No instruction was offered by the District between May 27, 2011 and June 9, 2011, or between July 14,

[2] These facts are taken from the Court of Appeal's opinion, which were based on the facts stipulated to by the parties during the superior court proceedings.

2011 and August 15, 2011, the first date of instruction for the 2011-2012 school year. (*Id.* at pp. 2-3.)[3]

After the end of the 2010-2011 school year, each of the 26 employees applied for unemployment benefits for the entire period between May 27, 2011 and August 15, 2011. (Slip opn. at p. 3.) EDD denied each claim. (*Ibid.*) Each employee appealed the EDD's decision, and, after holding an administrative hearing, an Administrative Law Judge (ALJ) reversed the EDD's determinations and held that each employee was entitled to benefits for the period of time during Summer 2011 when that claimant did not work. (*Ibid.*)

On appeal, the Board reversed the ALJ's decisions as to each of the claimants, either in whole or in part. (Slip opn. at p. 3.) The Board concluded that substitute teachers and other employees may collect unemployment benefits for the period during which summer school was in session if they had worked during the prior summer session. (*Id.* at pp. 3-4.)

On September 6, 2012, United Educators of San Francisco, AFL-CIO, NEA/CTA (UESF), which is the exclusive representative of all 26 employees in this case, filed a first amended petition for writ of administrative mandate against the Board as respondent and the District as the real party in interest. (Slip opn. at p. 4.) In UESF's view, the 26 claimants were entitled to unemployment benefits for the entire period between the end of the Spring 2011 semester and the start of Fall 2011 semester. (*Ibid.*) On October 26, 2012, the District filed a cross-complaint seeking declaratory relief against both the Board and UESF. (*Ibid.*)

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[3] Each district has discretion to make its own decisions concerning budgetary planning, hiring, and organizational activities for summer sessions.

While the trial court proceedings were ongoing, the Board adopted its precedent benefit decision *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505. (Exhibit B.) Consistent with its earlier decision, the Board in *Brady* held that on-call substitute teachers who are "qualified and eligible to work" during a summer school session are eligible for unemployment benefits. (*Brady, supra,* P-B-505 at pp. 10-11.) The Board reasoned that this conclusion was consistent with Congress's intent in enacting FUTA's denial provision, which was meant only to ensure that traditional, "nine-month" teachers who were paid annually—and therefore did not need unemployment benefits during the summer vacation period—were not overcompensated. (*Id.* at pp. 6-7.) The Board also held that this conclusion was consistent with cases that had construed statutory denials of unemployment benefits narrowly. (*Id.* at pp. 7-8.)

The District then filed an amended cross-complaint in the trial court, alleging that *Brady* was wrongly decided and asked the court to declare the decision invalid under Code of Civil Procedure section 409.2. (Slip opn. at p. 5.)

On July 15, 2014 the trial court issued its decision, concluding that the teachers and classified employees in the 26 San Francisco cases before the court were not entitled to unemployment benefits for any time between the end of Spring 2011 semester and the start of the Fall 2011 semester. (Slip opn. at p. 5.) In addition, the court declared *Brady* invalid. (*Ibid.)*

Both the Board and UESF appealed. The Court of Appeal consolidated both the Union and the Board's appeals. On June 6, 2016, the Court of Appeal affirmed the superior court's ruling in a published decision. (Slip opn. at pp. 1-2.) Relying on various provisions of the Education Code and the California Department of Education's Year-Round Education Program Guide, the Court of Appeal held that the term

"academic year" in section 1253.3, subdivision (b) meant the traditional nine-month period during which school is "regularly in session for all students." (*Id.* at pp. 14-15; see also *id.* p. 14, fn. 16.) The Court also reasoned that treating the summer session as an "academic term" would render another provision of section 1253.3 "meaningless and inoperable," and that the majority of jurisdictions to consider similar statutory provisions had reached the same conclusion. (*Id.* at pp. 15-18.)

DISCUSSION

The potential of the Court of Appeal's decision to harm thousands of essential, but economically vulnerable, substitute teachers and other year-round, on-call public school workers is self evident. Others reasons to grant review warrant additional discussion.

I. REVIEW IS NECESSARY TO ENSURE THAT STATE LAW REMAINS ALIGNED WITH CONGRESSIONAL INTENT, WHICH WAS LIMITED TO PREVENTING A WINDFALL TO SALARIED TEACHERS

The touchstone for the Board's interpretation of section 1253.3 has been and is Congress's intent in enacting the federal counterpart, 26 U.S.C. § 3304(a)(6)(A)(i). Since at least 2005, the Board has interpreted section 1253.3, subdivision (b) as allowing substitute teachers to collect unemployment benefits during the weeks in which summer school is in session in certain circumstances. (See slip opn. at pp. 8-11, citing *San Francisco Unified School District v. Cal. Unemp. Ins. Appeals Bd.* (Super. Ct. S.F. City and County 2005), No. CPF 05-504939.)[4] In 2013, the Board

[4] This decision was a non-precedent benefit decision, and therefore is not entitled to the same weight as precedent benefit decisions. (See § 409.) In 2005, the District filed a writ of mandate, challenging the Board's 2003 decision. (Slip opn. at p. 8.) The San Francisco Superior Court denied the District's request for a writ, agreeing with the Board's conclusion that section 1253.3, subdivision (b), did not preclude substitute

(continued...)

formalized this interpretation in its precedent benefit decision in *Brady*. (*Brady, supra*, P-B-505.) In reaching this conclusion, the Board relied on familiar principles of statutory interpretation. First, the Board acknowledged that neither Congress nor the California Legislature had defined the phrase "between two successive academic years or terms." (*Id.* at p. 4.) The Board then conducted a thorough analysis of Congress' intent in passing FUTA, concluding that, while Congress intended to prohibit the payment of unemployment benefits during "summer and other vacation periods," it did not expressly preclude substitute teachers and other nonprofessional employees who were not paid an annual salary from collecting unemployment benefits during these times. (*Id.* at pp. 6-7.)

The Board also explained that courts and federal and state agencies alike had consistently construed "denial" exceptions like section 1253.3, subdivision (b) narrowly. (*Brady, supra,* P-B-505 at p. 7.) In light of Congress' intent in passing FUTA and the requirement that statutory denials of benefits must be construed narrowly, the Board concluded that the period during which summer school is in session, an on-call substitute teacher is not on "recess"—in other words, that this period of time is not a "period between two successive academic years or terms" for purposes of section 1253.3, subdivision (b). (*Id.* at p. 9.) The Board also concluded, however, that the weeks between the end of the spring semester and the start of summer school, as well as the end of summer school and the start of the fall semester, are "period[s] between two successive academic years,"

(...continued)
teachers from collecting unemployment benefits during summer school sessions. (*Id.* at pp. 8-9.) Both the Board and UESF argued that the 2005 decision collaterally estopped the District from pursuing a writ in this case. (*Ibid.*) The Court of Appeal rejected this argument. (*Ibid.*) The Board is not seeking review of the Court of Appeal's decision not to give res judicata effect to the 2005 decision.

and that substitute teachers are not eligible for benefits during these periods. (*Id.* at pp. 9, 11.)

This conclusion is consistent with the U.S. Department of Labor's view that an "academic term" is a period "within an academic year when classes are held," which may include "nontraditional periods of time when classes are held, such as summer sessions." (U.S. Dept. of Labor, Employment & Training Admin., *Benefit Standards of Conformity Requirements for State UC Laws, Between/Within Terms Denial.*)[5] And it is also in accord with the Department's suggestion that an "academic year" "usually"—but not always—"means a fall and spring semester." (*Ibid.*) The Department of Labor's perspective confirms the Board's conclusion that there is no per se bar to awarding unemployment benefits to on-call substitutes during the summer term.[6]

The Board's decision in *Brady* is also consistent with the EDD's standard practice of granting benefits to on-call employees who are not called in to work. EDD—which makes all initial unemployment benefit eligibility determinations—has provided the same interpretation as the Board for many years. As EDD explained in its 2007 directive on school employee coverage in 2007:

> [i]f the claimant is scheduled to work "on-call" during the summer recess period, but does not get called to work, the claimant is not on a

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[5] (<http://workforcesecurity.doleta.gov/unemploy/conformity-benefits.asp> [as of July 14, 2016].) The Department of Labor is charged with assuring that States conform to Congressional intent in administering the program. (See U.S. Dept. of Labor, Employment & Training Admin., *Conformity Requirements for State UC Laws*, <http://workforcesecurity.doleta.gov/unemploy/conformity.asp> [(as of July 14, 2016].)

[6] (See also *Evans v. Employment Security Dept.* (Wn.Ct.App. 1994) 866 P.2d 687, 689 [community college teacher may collect unemployment benefits during the summer term].)

> recess period. The reason the claimant did not work is not due to the recess period, but due to lack of work during the summer school session.

(Economic Development Dept., Miscellaneous MI 65 School Employee Claims.)[7]

This Court should grant review to ensure that section 1253, subdivision (b) is interpreted in a way that is consistent with Congressional intent and in accord with the rule that the law should be interpreted in favor of extending benefits, and afford EDD's and the Board's well-reasoned, expert views appropriate weight. (See *Pacific Legal Foundation, supra,* 29 Cal.3d at p. 111 [because of the Board's "expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized"]; see also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

II. REVIEW IS NECESSARY TO AVOID THE POTENTIAL FOR UNINTENDED, ADVERSE EFFECTS ON OTHER AREAS OF UNEMPLOYMENT INSURANCE BENEFITS LAW

The effect of the Court of Appeal's error extends well beyond the individuals who filed for benefits in this case. It may preclude every substitute teacher and on-call school worker in the State from collecting unemployment benefits during the summer months, no matter the facts and circumstances of an individual case, unless and until other Courts of Appeal reach different conclusions. Likewise, it may prevent other on-call school workers from collecting unemployment benefits if they are laid off for the summer months. Review is necessary to correct this far-reaching error.

In overruling *Brady*, the Court of Appeal decision may also be read as calling into question more than 30 years of Board precedent. Two

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[7] (<http://www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm> [as of July 14, 2016].)

examples are illustrative. In 1981, the Board held that a clerical school district employee whose year-round work-schedule had been reduced to ten months was eligible for unemployment benefits, even though the off months were during the summer session. (*In re Dorothy C. Rowe* (1981) CUIAB Case No. 79-6736, Precedent Benefit Decision No. P-B-417.)[8] Benefits were appropriate in that case, the Board concluded, because the worker had "in effect [been] laid off" from her normal year-round work. (*Id.* at pp. 1, 4.) And, the Board held, section 1253.3, subdivision (b) did not preclude the worker from receiving benefits, because her unemployment was not caused by a "normal summer recess or vacation period, but was instead "a loss of customary summer work." (*Id.* at p. 4.)

Similarly, in 1980, the Board held that a community college professor whose schedule was reduced from 11.5 months to 10 months was eligible for unemployment benefits, even though the professor's new contract provided that he would be out of work during the summer months. (*In re Vincent J. Furriel* (1980) CUIAB Case No. 79-6640, Precedent Benefit Decision No. P-B-412.)[9] The Board concluded that section 1253.3, subdivision (b) did not preclude "year-round employees or those regularly scheduled for summer work who, due to the cancellation of normal or scheduled summer work, became unemployed" from collecting benefits. (*Id.* at pp. 3-4.)

The Court of Appeal's decision may cast doubt on these precedents. By effectively holding that any time between the end of the spring semester and the start of the fall semester is a "period between two successive academic years or terms," the Court of Appeal may preclude clerical

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[8] (<http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb417.pdf> [as of July 14, 2016].)

[9] (<http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb412.pdf> [as of July 14, 2016].)

workers, community college professors, and many other individuals employed by educational institutions on a year-round basis from collecting unemployment benefits if they are temporarily laid off for the summer months. Review is necessary to prevent this result, which neither Congress nor the state Legislature intended.

CONCLUSION

For the reasons mentioned above, the Board respectfully requests that the petition for review be granted.

Dated: July 15, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3559 words.

Dated: July 15, 2016

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Exhibit A

Court of Appeal Opinion in *United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA v. California Unemployment Insurance Appeals Board*, filed 6/6/16

Filed 6/6/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

UNITED EDUCATORS OF SAN FRANCISCO AFT/CFT, AFL-CIO, NEA/CTA, Plaintiff and Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant, Cross-defendant and Appellant; SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Real Party in Interest and Respondent.	A142858 (San Francisco City & County Super. Ct. No. CPF 12-512437)
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant and Appellant.	A143428 (San Francisco City & County Super. Ct. No. CPF 12-512437)

Plaintiff United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA (UESF) petitioned the superior court for a writ of administrative mandate on behalf of certain of its members who were employed by the San Francisco Unified School District (District). UESF contended that these members—all of whom had been provided reasonable assurance of continued employment in the fall of 2011—were improperly

denied unemployment benefits during the summer of 2011. The petition was successfully opposed below by the District. In a companion appeal, the California Unemployment Insurance Appeals Board (CUIAB) challenges a separate ruling in favor of the District invalidating a precedent benefit decision that would have permitted public school employees to receive unemployment benefits during summer months provided certain conditions are met. We affirm the lower court as to both rulings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Background and Administrative Rulings

The parties have stipulated to the following facts. UESF is a union that is the exclusive representative of the District's certificated employees and classified paraprofessional employees. In the academic year 2010-2011, the District employed UESF member Aryeh B. Bernabei and 10 others as substitute teachers who worked on an on-call or as-needed basis.[1] The District also employed UESF member Celina R. Calvillo and 14 others as paraprofessional classified employees.[2] Paraprofessional classified employees are not paid during summer months unless they are retained for a summer session or perform special tasks, such as custodial services. Each of the 26 employees received a letter during the spring of the 2010-2011 school year advising that they had a reasonable assurance of employment for the following 2011-2012 school year.

The last date District schools operated during the regular session of the 2010-2011 school year was May 27, 2011. The first day of instruction for the 2011-2012 school year was August 15, 2011. The District operated a summer school session that began on June 9, 2011 and ended on July 7, 2011 for elementary school students and ended on July 14, 2011 for middle and high school students. The District did not offer any

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[1] The other named substitute teacher employees are Arthur A. Calandrelli, Mark J. Fiore, Doug Jones, Stephen S. Kaslikowski, Tyree Leslie, Luis A. Novoa, Jose M. Rios, Linda Weil, Gladys L. Wong, and Natalia Yuzbasheva.

[2] Other named paraprofessional classified employees are Kevin A. Batiste, Stephanie R. Brooks, Jose S. Ferrer, Remigio Flood, Emily I. Frances, Jose D. Hernandez, Shan L. Lei, Martha C. Letona, Jonathan B. Matthews, Paul L. Michaels, Joseph R. Moreland, David J. Picariello, Frances F. Smith, and Lester L. Rubin.

instruction between May 27, 2011 and June 9, 2011, or between July 14, 2011 and August 15, 2011.

The UESF members described above filed claims for unemployment benefits for the period of time between May 27, 2011 and August 15, 2011. The Employment Development Department (EDD) denied benefits to each named claimant. The claimants appealed to a CUIAB administrative law judge (ALJ) who reversed the EDD and held that each claimant was entitled to benefits covering all the weeks for which they had applied.

The CUIAB reversed the ALJ's decisions as to each of the claimants, either in whole or in part.[3] The CUIAB held that the entire summer session was a "recess period" as defined in Unemployment Insurance Code[4] section 1253.3, subdivision (b), a provision that restricts public school employees' eligibility for unemployment benefits if they have been given reasonable assurance of continued employment.[5] It also held, however, that if

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[3] "In California, the unemployment insurance (UI) program consists of three phases: (1) UI claims are submitted to and initially processed by the [EDD] [citation]; (2) any appeal from EDD's benefit determination is heard by an [ALJ] employed and assigned by the [CUIAB] (referred to as the 'first-level appeal'); and (3) any appeal of the ALJ's determination is submitted to and decided by the appellate division of the CUIAB based upon the record, including the transcript of the hearing before the ALJ (referred to as the 'second-level appeal')." (*Acosta v. Brown* (2013) 213 Cal.App.4th 234, 238.)

[4] All further statutory citations are to the Unemployment Insurance Code except where indicated otherwise.

[5] We note the statute does not contain the term "recess period." Section 1253.3, subdivision (b) provides, in relevant part: "Benefits . . . based on service performed in the employ of a nonprofit organization, or of any entity as defined by Section 605, with respect to service in an instructional, research, or principal administrative capacity for an educational institution *are not payable* to any individual with respect to *any week* which begins during the period *between two successive academic years or terms* . . . if the individual performs services in the first of the academic years or terms and *if there is a contract or a reasonable assurance that the individual will perform services . . . in the second of the academic years or terms.*" (Italics added.) Section 1253, subdivision (c), is similarly worded and applies to persons employed "in any other capacity than specified in subdivision (b) for an educational institution."

an individual claimant had been employed during the 2010 summer session, he or she had a "reasonable expectation" of employment during the 2011 summer session. Based on this reasoning, the CUIAB held that unemployment benefits could be paid to such employees for days not worked during the 2011 summer school session, but not for the days when school was not actually in session.[6]

II. Trial Court Proceedings

On September 6, 2012, UESF filed a first amended petition for writ of administrative mandamus against the CUIAB as respondent and the District as real party in interest. UESF asserted the 2011 summer school session was an "academic term" under section 1253.3, contending all 26 claimants were eligible for benefits between May 27, 2011 and August 15, 2011, because the District had not provided reasonable assurance of employment for the 2011 summer session, instead providing such assurance for the 2011-2012 academic year that started August 15, 2011.

On October 26, 2012, the District filed a cross-complaint seeking declaratory relief against both the CUIAB and UESF. The District asserted the CUIAB erroneously determined that employees who receive notices of reasonable assurance of employment for the next academic year or term are nonetheless eligible for summer unemployment benefits by virtue of either having worked during the prior summer school session, or having an availability or expectation of procuring work during the current summer session.

On December 10, 2013, the CUIAB adopted its decision in *Alicia K. Brady v. Ontario Montclair School District* (2013) CUIAB Precedent Benefit Decision No. P-B-505 (*Brady*) as a precedent benefit decision.[7] In *Brady,* the CUIAB held that

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[6] The CUIAB also held that employees who were called to work for a portion of the summer session could receive benefits for any days during the session that they did work. As the trial court noted in its statement of decision, each of the 26 cases has factual distinctions; however, the differences are immaterial in light of our resolution of this matter.

[7] Precedent benefit decisions may be issued when the CUIAB's ruling involves an important issue of law. (§ 409; Gov. Code, § 11425.60.)

substitute teachers who are "qualified and eligible for work" during a school district's summer school session are not on recess for purposes of section 1253.3 and are eligible for unemployment benefits.

On January 31, 2014, the District filed a first amended cross-complaint in response to the *Brady* decision. In addition to maintaining its challenge to the UESF members' claims by seeking declaratory relief, the District alleged that *Brady* was wrongly decided and requested the trial court declare the decision invalid under section 409.2.[8]

On August 15, 2014, the trial court filed its judgment denying UESF's petition. The court incorporated its statement of decision into the judgment and made an express finding as follows: "This Court finds that . . . [section] 1253.3 means that unemployment benefits, so long as an employee has the contract or reasonable assurance required by [section] 1253.3, are 'not payable to any individual with respect to any week between' the end of one academic year and the beginning of the next (1) whether that week (or those weeks) is called 'summer recess,' 'summer vacation,' 'summer vacation period,' 'summer school,' 'summer session,' or anything else, (2) whether that individual is any type of employee of any educational institution . . . , be she or he any permanent teacher, any substitute teacher, any non-teacher employee, or any other job classification covered by [section] 1253.3, and (3) whether or not any employee in any job classification covered by [section] 1253.3 is 'eligible' or 'qualified' for work, is 'on a list,' has a 'reasonable expectation of work' during the summer, is 'available' for work during the summer, or worked during the prior summer.' " After so finding, the court reversed the CUIAB's decisions and remanded them with instructions to find the claimants not eligible for the unemployment benefits requested. The court also invalidated *Brady* to the extent it is inconsistent with the court's decision. That ruling is the subject of the CUIAB's appeal, which has been consolidated with UESF's appeal.

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[8] Section 409.2 provides: "Any interested person or organization may bring an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the appeals board issued under Section 409 or 409.1."

DISCUSSION

I. Standard of Review

" 'Interpretation and applicability of a statute or ordinance is clearly a question of law.' [Citation.] It is the duty of an appellate court to make the final determination from the undisputed facts and the applicable principles of law." (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.) Here, the facts are undisputed and the issues on appeal center on the interpretation of section 1253.3. We therefore apply the de novo standard.

II. The Unemployment Insurance Program

"California's unemployment insurance program, as promulgated by the Unemployment Insurance Code, is part of a national system of reserves designed to provide insurance for workers 'unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.' [Citation.] Under the Unemployment Insurance Code, the state participates in a cooperative unemployment insurance program with the federal government, codified as the Federal Unemployment Tax Act." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024.)

As currently codified, the Federal Unemployment Tax Act (26 U.S.C. §§ 3301–3311) (FUTA) requires that a state's unemployment law must contain a provision similar to 26 United States Code section 3304(a)(6)(A)(i),[9] which prohibits employees of

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[9] 26 United States Code section 3304(a)(6)(A)(i) provides, in relevant part: "The Secretary of Labor shall approve any State law submitted to him, . . . which he finds provides that— [¶] . . . [¶]. . . compensation is payable on the basis of service . . . in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service . . .; except that— [¶] . . . with respect to services in an instructional, research, or principal administrative capacity for an educational institution . . . compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services . . . for any educational institution in the second of such academic years or terms." Subparagraph (ii)(I) of this subsection extends similar conditions to

educational institutions from collecting unemployment benefits between and within academic terms: "The [FUTA] was substantially amended by Public Law No. 94-566, which was enacted by the Congress in 1976. [Citation.] Public Law No. 94-566 amended section 3309(a)(1) of the [FUTA] to extend eligibility for unemployment compensation benefits to certain employees of state and local governments within the several states. [Citation.] It also amended section 3304(a) of the [FUTA] to include the corresponding provisions of state law to be exacted of conforming states upon review by the Secretary of Labor. Subsection (6)(A) of section 3304(a) was thus amended to provide in effect that public school employees might be eligible for benefits 'except' in certain instances involving their unemployment during periods of summer recess at the employing schools. 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 . . . if there is 'reasonable assurance' (only) of his or her reemployment in the fall." (*Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 843, italics added (*Russ*).)

The California Legislature responded to the 1976 amendment to the FUTA by amending section 1253.3: "In the 1978 enactment which amended section 1253.3 . . . , the California Legislature expressly declared that it was 'necessary to implement Public Law 94-566' [citation]; i.e., that it was 'necessary' to keep the unemployment compensation program of this state in conformity with the [FUTA] as amended in 1976. Consistent with this purpose, the Legislature amended subdivisions (a) and (b) of the statute to incorporate the successively mandatory provisions of the first paragraph of

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nonprofessional school employees if there is "reasonable assurance" of reemployment in the second academic year or term.

subparagraph (i) of subsection (6)(A) of section 3304(a) of the amended [FUTA]; [and] amended subdivision (c) of the statute to incorporate an optional provision authorized by subparagraph (ii) of the subsection . . . ." (*Russ, supra,* 125 Cal.App.3d at p. 844.)

III. The Superior Court's 2005 Decision and Ruling

Preliminarily, the appealing parties note the trial court did not render its decision in a vacuum. On October 1, 2013, UESF filed a request for the court to take judicial notice of a 2005 superior court ruling, *San Francisco Unified School District v. California Unemployment Insurance Appeals Board* (Super. Ct. S.F. City and County, 2005, No. CPF 05-504939), rendered by now-retired Judge James L. Warren. It appears that the court granted the request for judicial notice because it explicitly declined to give the prior ruling res judicata effect. The 2005 case differs from the instant case in that the claimants in the prior case sought unemployment benefits for the period when summer school was in session only, whereas the claimants in the instant case seek benefits that would cover the entire period between the conclusion of the regular school term of 2010-2011 and the beginning of the regular school term in 2011-2012.

In the 2005 case, Judge Warren considered whether to grant a petition for writ of mandate filed by the District against the CUIAB. The CUIAB had found 10 substitute teachers eligible for unemployment insurance benefits after they were unable to obtain work during the six-week summer school term in 2003. In the course of denying the District's petition, Judge Warren agreed with the CUIAB that the teachers' period of unemployment did not occur " 'between two successive academic years or terms' " under section 1253.3, subdivision (b) because "in California, there is no gap between successive academic years."

Judge Warren noted the Legislature "did not define the 'academic year' " in section 1253.3. He then observed, " 'Year,' of course, has a common sense meaning of 365 days. Consistent with this common sense meaning, the Legislature has defined a 'school year' as running from July 1 to June 30 . . . .[10] The Legislature has stated that

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[10] See Education Code section 37200.

'academic year' and school year are synonymous in at least some contexts. . . .[11] By contrast, petitioner has not identified any potentially applicable California legislation that defines 'academic year' as something less than a 'year.' In light of these authorities, considering the underlying purposes of the unemployment insurance code as a whole and § 1253.3(b) in particular, and giving appropriate deference to the CUIAB's interpretation, the court holds that the CUIAB's interpretation of 'academic year' is correct." Judge Warren found the teachers' period of unemployment "did not begin 'between two consecutive academic terms,' " concluding that the District's six-week summer school session was an "academic term" for purposes of section 1253.3 because "educational instruction was provided to students" and "at least some teachers were employed to provide that instruction . . . ."

UESF and the CUIAB contend principles of res judicata and collateral estoppel make Judge Warren's opinion binding on the District. Although the doctrine of collateral estoppel and the concept of res judicata have distinct meanings (see *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179 (*Union Pacific*)),[12] both require a strict identity of the issues being litigated. (*Ibid.*; *Kilroy v. State of California* (2004) 119 Cal.App. 4th 140, 149.) We note the issues in the 2005 case and the present case are not precisely identical. In the 2005 case, the question was whether the six-week summer session constituted an academic term. In the present case, the eligibility question is broader in that it includes the weeks before and after the summer session.[13]

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[11] See Education Code sections 22169 and 25926.

[12] Res judicata is claim preclusion and collateral estoppel is issue preclusion. (*Union Pacific, supra,* 231 Cal.App.4th 134 at p. 179.)

[13] UESF, somewhat inconsistently, argues that while the CUIAB and the District are bound by the Judge Warren's 2005 conclusion that "summer session" is an "academic term," the judge's ruling "did not go far enough."

UESF also contends Judge Warren's decision is in line with the Legislative public policy of "protecting the unemployed."[14] It also faults the court below for failing to account for the temporary status of substitute teachers and temporary employees, who, unlike "regular, permanent and probationary certificated and classified employees," do not have tenure or contracts guaranteeing their return in the fall semester. We conclude the trial court properly declined to give Judge Warren's ruling res judicata effect. Notably, the 2005 opinion makes no reference to relevant federal law. Federal law, however, is essential to understanding section 1253.3 because, as noted above, this statute was substantially amended in response to the 1976 FUTA legislation.

A prior determination is not conclusive where the issue is purely a question of law if injustice would result or if the public interest requires relitigation of the issue. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 257.) As our Supreme Court has explained, "In *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, we allowed the state to relitigate the issue of whether extension of the state's unemployment insurance law to include state and local governments constituted a reimbursable state mandate. We noted that the state was the losing party in the earlier litigation and that it was the only entity legally affected by the earlier judgment. 'Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.' [Citation.] We observed, however, that ' "when the issue is a question of law rather than of fact, the prior determination is not conclusive either if

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[14] Section 100 "declares the public policy of the state with regard to unemployment compensation. It provides in pertinent part: 'The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.' " (*Jefferson v. Unemployment Ins. Appeals Bd.* (1976) 59 Cal.App.3d 72, 78, italics omitted.)

injustice would result or *if the public interest requires that relitigation not be foreclosed.*" ' " (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 621–622.)

Applying this rule to the facts, in *City of Sacramento v. State of California, supra*, 50 Cal.3d 51, the Supreme Court concluded: "[T]he consequences of any error transcend those which would apply to mere private parties. If the result of [the earlier litigation] is wrong but unimpeachable, taxpayers statewide will suffer unjustly the consequences of the state's continuing obligation to fund [the state mandate]. On the other hand, if the state fails to appropriate the funds to meet this obligation, and [the law extending unemployment insurance requirements to local governments] cannot be enforced [citations], the resulting failure to comply with federal law could cost California employers millions." (*Id.* at pp. 64–65.)

Similarly, here the issue to be relitigated involves public funding. An inaccurate interpretation of section 1253.3 might award unemployment benefits to employees who actually fall within the statute's exclusion. The potential impact of an erroneous statutory interpretation extends beyond San Francisco. All school districts in this state offering summer school programs are potentially affected. A correct reading of section 1253.3 is therefore critical to prevent the misdirection of public funds.

IV. Interpretation of Section 1253.3

Consistent with the FUTA, section 1253.3 provides that unemployment benefits are *not* payable to credentialed public school personnel for any week "which begins during the period *between two successive academic years or terms* . . . if the individual performs services in the first of the academic years or terms *and if there is a contract or a reasonable assurance* that the individual will perform services for any educational institution in the second of the academic years or terms." (*Id.*, subd. (b), italics added.) The companion provision applicable to nonprofessional employees is essentially identical, stating that unemployment benefits are not payable for any week "which commences during a period *between two successive academic years or terms* if the individual performs the service in the first of the academic years or terms *and there is a*

reasonable assurance that the individual will perform the service in the second of the academic years or terms." (*Id.*, subd. (c), italics added.)

The parties dispute the meaning of "academic years or terms." The trial court here concluded that the statutory language unambiguously provides that public school employees who are employed in the spring term, and have received reasonable assurance of reemployment for the following fall term, are not eligible to receive unemployment insurance benefits during the intervening summer, regardless of whether their school district offers a summer session. As we discuss below, we agree.

The principles of statutory interpretation are well settled: "Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.) "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*People v. Knowles* (1950) 35 Cal.2d 175, 183.)

As UESF acknowledges, the thesis of its appeal "is that the summer session that was conducted by the [District] in June and July of 2011 constituted an 'academic term' for purposes of [section] 1253.3. Since [its members] were not given reasonable assurance of employment in the summer session, the letters that they did receive were not

sufficient for the purpose of denying them unemployment benefits during their unemployment in the summer."[15] UESF maintains that none of its members were ever on summer vacation, but instead were "simply unemployed and hoping to return to their jobs." It claims the CUIAB took inconsistent positions in the 26 cases, asserting the CUIAB "should have acknowledged that the summer session is an academic term for all employees, not merely for employees who had worked in the previous summer session."

The CUIAB took a more nuanced approach, finding that if an individual was not called to work during the summers of 2010 and 2011, the entire 2011 summer period was a "normal . . . recess period" as to that individual and they were not entitled to benefits. And even if a claimant had a reasonable expectation of summer work, such as by virtue of having worked during the prior summer, he or she was not eligible for benefits during the weeks between the end of the summer session and the beginning of the fall term, which the CUIAB deemed a "recess period." However, the CUIAB did allow benefits during summer school sessions for those teachers in whom the District had "created an expectation of employment."

Observing neither Congress nor the Legislature makes reference to summer school in the relevant statutes, UESF submits they "neither intended that summer school be considered an academic term nor that summer session was not an academic term." UESF asserts it is our task to "determine how summer session must be treated under the existing statutory structure." We decline this invitation: "The role of the courts is not to legislate or to rewrite the law, but to interpret what is before them." (*Fair v. Fountain Valley School Dist.* (1979) 90 Cal.App.3d 180, 187.) In our view, neither UESF's nor the CUIAB's positions are consistent with the language and purpose of section 1253.3.

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[15] UESF asserts we must read section 1253.3 narrowly because the District's reasonable assurance letter "is merely a pro forma letter that is sent to everyone who has not been outright fired for cause or who has not resigned or retired." Even if this is true, we note the statute does allow employees to claim benefits retroactive to their last day of work if it turns out that they do not obtain work in the fall. (See § 1253.3, subd. (c).)

We conclude summer school is not an "academic term" within the meaning of section 1253.3's reference to "academic years or terms." Both UESF's and the CUIAB's interpretations of section 1253.3 are contrary to the plain meaning of the statute. The CUIAB asserts that because "academic year" is not defined in the statute, it must be given its "ordinary and usual meaning." It is true that while the term "school year" is defined in the Education Code as a 365-day period (see Ed. Code, § 37200 ["The school year begins on the first day of July and ends on the last day of June."]), there is no corresponding definition of "academic year." However, "ordinary meaning" in this context is best derived from the Education Code.

As the District notes, the Education Code establishes a mandatory period of instruction of no fewer than 175 days. The term "academic year" is used in a provision relating to the calendaring for year-round schools: "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*." (Ed. Code, § 37620, italics added.)

As pointed out by amicus curaie the California School Boards Association's Education Legal Alliance (ELA), the California Department of Education (CDE)—the regulatory body charged with interpreting and enforcing the Education Code—treats the traditional academic calendar to mean the period when school is regularly in session for all students, and does not include summer or summer school.[16] Further, during the academic year, the Legislature has provided for compulsory education laws that mandate

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[16] We grant the ELA's request for judicial notice of the CDE's Year-Round Education Program Guide. That guide includes the following passage: "Both traditional and some year-round school calendars can have 180 days of instruction. *The traditional calendar, of course, is divided into nine months of instruction and three months of vacation during the summer.* Year-round calendars break these long instructional/ vacation blocks into shorter units. The most typical instructional/vacation year-round pattern is called the 60/20 calendar (60 days of instruction followed by 20 days of vacation[)] and the second most popular is the 45/15."

public schools to provide instruction, and that allow certificated employees to receive credit toward permanent status. (See, e.g., Ed. Code, §§ 37620, 41420, 48200, 44913.)[17] In contrast, historically, offering summer school has been permissive, attendance voluntary, and permanent employment status has not accrued. (Former Ed. Code, § 37252.) Additionally, as the trial court noted in its statement of decision, when the FUTA was enacted, summer school sessions held between academic years were already a common feature. If Congress had intended to allow for the recovery of benefits during the summer, it could have explicitly so indicated.

Treating an intervening summer session as an "academic term" also renders the reasonable assurance language in section 1253.3 meaningless and inoperable. The term "academic year" cannot reasonably be read to mean "calendar year" or otherwise include the summer period between mandatory academic terms. As the trial court noted, "If the 'academic year' truly ran the entire calendar year . . . , a 'period between two successive academic years' could never exist." Because such a reading would render the phrase "period between two successive academic years" meaningless, it is to be disfavored. In sum, we conclude summer sessions are not academic terms and instead fall between academic years or terms under section 1253.3. The trial court thus correctly ruled that none of the claimants here were eligible for benefits.

V. The Majority of Other Jurisdictions are in Accord

Other jurisdictions considering virtually identical statutory provisions have reached the same conclusion as we do here. As our courts have recognized, where state unemployment insurance codes mirror the federal law and each other, " 'the

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[17] For example, Education Code section 44913 provides: "Nothing in Sections 44882 to 44887, inclusive, [former] Sections 44890, 44891, Sections 44893 to 44906, inclusive, and Sections 44908 to 44919, inclusive, shall be construed as permitting a certificated employee to acquire permanent classification *with respect to employment in a summer school* maintained by a school district, and service in connection with any such employment shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of the district. . . ." (Italics added.)

interpretation placed on that language by federal and other courts is unusually persuasive . . . .' " (*Board of Education of the Long Beach Unified School Dist. v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 685 (*Long Beach*).)

In *In re Claim of Lintz* (N.Y.App.Div. 1982) 89 A.D.2d 1038, 1039 (*Lintz*), the New York Supreme Court Appellate Division addressed our same issue: "The [unemployment insurance] board's holding that because claimant chose to teach two days a week during a five-week summer session she was 'not between academic terms' and, therefore, eligible, is both irrational and unreasonable and thwarts the clear legislative intent. The law was . . . not enacted to supplement the income of a regularly employed teacher who chose to teach a few days during her regular summer vacation while awaiting the commencement of the next academic year for which she had unquestioned assurance of employment."[18]

The Oregon appellate courts have also concluded the term "academic year" does not include summer school sessions: "We conclude that 'academic year' . . . means the traditional fall-through-spring sessions of an educational institution. The fact that claimant worked in the summer of 1981 and hoped to work in the summer of 1982 and the fact that the University operated on a limited basis during summer terms do not preclude this conclusion. That an employee of an educational institution may choose to work during what is traditionally vacation time does not make it a part of the academic year, and an abbreviated summer session can and regularly does co-exist with a traditional academic year. [The unemployment board] correctly determined that

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[18] A subsequent New York opinion followed *Lintz*, *supra*, 89 A.D.2d 1038, with respect to a temporary registration clerk who was laid off during a summer session but rehired for the following fall term: "We perceive no error in the Board's reliance on [*Lintz*], which held that a summer session is not considered an academic term . . . . Hence, the Board properly ruled that claimant was ineligible for benefits . . . since her period of unemployment was between two successive academic years or terms and there was reasonable assurance that she would be rehired to aid in registrations for the next succeeding term . . . ." (*In re Claim of Alexander* (N.Y.App.Div. 1988) 136 A.D.2d 788, 789.)

claimant's summer suspension of work constituted . . . a period between academic years." (*Friedlander v. Employment Div.* (Or.Ct.App. 1984) 676 P.2d 314, 318.)

Also, in *Campbell v. Department of Employment Sec.* (Ill.Ct.App. 1991) 570 N.E.2d 812, 819, the Illinois appellate court held that a college professor's "employment or lack of employment during the summer months is irrelevant [in determining eligibility] because the applicable Federal and State statutes [citations] were designed to address the common academic practice of instructors not teaching during the summer months." More recently, the Hawaii Court of Appeals held: "A substitute teacher who teaches during the regular school year is not eligible for unemployment benefits during the summer break even when one or more summer school substitute teaching positions was or were available and unsuccessfully sought." (*Harker v. Shamoto* (Hawaii Ct.App. 2004) 92 P.3d 1046, 1055].)[19]

In a Nebraska Supreme Court case involving a reversed factual context, a teacher had worked during successive summer school sessions only, *not* during the traditional school year. (*School District No. 21 v. Ochoa* (Neb. 1984) 342 N.W.2d 665.) The court considered whether two successive six-week summer school sessions were "regular terms" under that state's unemployment laws, such as to exclude benefits during the 46 weeks falling between those two periods. (*Id.* at p. 667.) The school district argued that

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[19] Additional out-of-state cases that have reached the same conclusion include: *Herrera v. Industrial Claim Appeals Office* (Colo.Ct.App. 2000) 18 P.3d 819, 820 (food service worker was ineligible to receive benefits during the summer break between the two successive academic years); *Doran v. Department of Labor* (Ill.Ct.App. 1983) 452 N.E.2d 118, 122 (teacher who had taught an eight-week summer course not entitled to benefits when the summer session was later eliminated because summer constituted "a period between academic terms"); *DeLuca v. Commonwealth* (Pa.Commw. 1983) 459 A.2d 62, 64 (teacher who was not offered his usual summer position due to budget cuts deemed ineligible for benefits: "Neither section of the Law at issue herein contains any language limiting its applicability to unemployment *resulting* from the period between terms."). Jurisdictions finding summer session to be an academic term are solidly in the minority. (See, e.g., *Evans v. Employment Sec. Dep't* (Wn.Ct.App. 1994) 866 P.2d 687, 688, recently distinguished in *Thomas v. Employment Sec. Dep't* (Wn.Ct.App. 2013) 309 P.3d 761, 765.)

the summer session was a "regular term" and asserted the teacher was disqualified for benefits between those terms because she had a reasonable assurance she would perform services during the following summer. (*Id.* at p. 668.) The court held that the teacher was entitled to benefits because her period of unemployment did not occur between two successive years or terms. (*Ibid.*) In sum, we concur with the majority of out-of-state jurisdictions that in the context of a traditional school year, the terms "academic year" and "academic term" exclude summer sessions.

VI. Brady Decision

It follows that we concur with the trial court's decision to invalidate *Brady, supra*, CUIAB Precedent Benefit Decision No. P-B-505. In *Brady,* the CUIAB held that when a school district deems a claimant qualified and eligible for work during a summer school session, he or she is also eligible for unemployment benefits because the claimant is not on recess during that period. We conclude the trial court properly invalided this aspect of *Brady* in ruling on the District's separate action, initiated pursuant to section 409.2. "[E]ven though a court will give great weight to the agency's view of a statute or regulation, the reviewing court construes the statutes as a matter of law and will reject administrative interpretations where they are contrary to statutory intent." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 58.)

For example, in *Long Beach, supra,* 160 Cal.App.3d 674, the appellate court upheld a superior court ruling invalidating a CUIAB precedent decision under section 409.2. (*Long Beach*, at p. 682.) In that case, CUIAB had relied "on the tenuous impermanent nature" of a substitute teacher's employment in finding he did not have reasonable assurance of continued employment. The appellate court observed: "There is nothing in section 1253.3 which sets as a criteria the tenuous nature of a substitute teacher's position as a basis for determining the 'reasonable assurance' issue." (*Id.* at p. 683.) Similarly, in the present case, there is nothing in section 1253.3 suggesting any exceptions to the rule that school employees who receive reasonable assurance of continued employment are not entitled to unemployment benefits between the spring and fall academic terms.

The practical effect of the *Brady* decision would assure that employees who place themselves on an on-call list for summer but who, like permanent staff generally, do not actually work during that summer, will recover unemployment benefits. Both sets of employees are not working, yet under *Brady* one group is eligible for unemployment benefits while the other is not. Section 1253.3 does not make any exceptions for employees who choose to make themselves available for summer work, and we decline to read such an exception into the statutory language.

The CUIAB itself acknowledges that in enacting the FUTA Congress "had envisioned that many public school teachers would be employed from Fall through Spring, and on recess during the summer. Congress did not wish to award these employees a double-payment—one for their usual salary paid throughout the whole year and another for unemployment benefits in the summer." Yet CUIAB's construction of 1253.3 would accomplish just that. Under its rationale, any teacher with an expectation of obtaining work during the summer session would be entitled to unemployment benefits if they were not hired (or if they were hired but not retained for the entire summer session). However, that same teacher would not be " 'unemployed' in the sense of being attached to the general labor force which is seeking other employment on a permanent basis" (*Long Beach, supra,* 160 Cal.App.3d at p. 690, fn. 7.) As the *Long Beach* court observed: " 'Plainly and simply stated, teachers [including substitute teachers] between academic terms or semesters are not unemployed. They are on vacation.' " (*Id.* at p. 688.)

The CUIAB also contends that "the meaning [of academic year], in a particular district, is a question of fact." In other words, districts that opt to offer summer school can define "academic year" differently from districts that do not. We agree with ELA that the CUIAB's position "turns statutory construction and the enforcement of laws on their head." While the application of a law to different factual situations may produce varying results, the meaning of statutory language must exist as a constant. In our view, both Congress and the Legislature intended that all school employees who understand their regular employment will occur during the fall and spring terms are not entitled to

benefits during the summer break. That some school districts may offer separate summer employment opportunities to certain of its workers does not alter this result.

CONCLUSION

We are not unsympathetic to the loss of wages incurred during periods of academic hiatus. However, in effect what the claimants in this case are requesting is that the government should provide them with a full year's income because they have agreed to work and be paid for only 41 weeks of each year. As one court has explained, "The rationale for this limitation [on benefits] is that school employees can plan for those periods of unemployment and thus are not experiencing the suffering from unanticipated layoffs that the employment-security law was intended to alleviate." (*Baker v. Department of Employment & Training Bd. of Review* (R.I. 1994) 637 A.2d 360, 363.) This rationale "promotes reasonable public policy interests, but if there are other policy concerns that now advise the adoption of a different rule, it is up to the Legislature to craft one." (*In re Marriage of Davis* (2015) 61 Cal.4th 846, 865.)

DISPOSITION

The judgment is affirmed.

DONDERO, J.

We concur:

MARGULIES, Acting P. J.

BANKE, J.

Trial Court	San Francisco City and County Superior Court
Trial Judge	Hon. Richard B. Ulmer, Jr.
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Exhibit B

In re Alicia K. Brady (2013) CUIAB Case No. AO-337099,
Precedent Benefit Decision No. P-B-505, adopted 12/10/13
(Cover page omitted to comply with rule 8.504(e)(2); full decision available at
<http://www.cuiab.ca.gov/Board/precedentDecisions/docs/pb505.pdf>)

The employer appealed from the portion of the decision of the administrative law judge that held the claimant eligible for unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code[1] for the period beginning May 26, 2013 through July 13, 2013.

ISSUE STATEMENT

The issue presented is whether a substitute teacher may be entitled to benefits during the weeks a school district operates summer school within the meaning of section 1253.3 of the code.

FINDINGS OF FACT

The claimant works as a substitute teacher for the Ontario-Montclair School District (hereinafter, the district). Substitute employees, whether professional or nonprofessional, are not paid an annual salary. They receive wages, only if called, for days worked. (See definitions per U.S. Dept. of Labor, UIPL No. 15-92 (Jan. 27, 1992), citing 26 U.S.C. Section 3304(a)(6)(A).)

During the 2012-2013 school year, the claimant worked for the district as an on-call substitute teacher. The spring term ended on May 22, 2013. The claimant filed a claim for unemployment insurance benefits and the employer filed a timely protest to the claim.

The employer protested that the summer break would run from May 28, 2013 to July 31, 2013, and that the claimant was not on-call during the summer break. On June 13, 2013, the Employment Development Department determined the claimant was not eligible for benefits under code section 1253.3, beginning May 26, 2013. The claimant filed a timely appeal from the determination and the matter was set for hearing before an Administrative Law Judge (hereinafter ALJ).

At the hearing before the ALJ, the employer introduced a copy of the letter of reasonable assurance addressed to "Substitute Employee." The letter stated, in relevant part: "If your services are needed for the 2013 summer school session, you will be called or notified by mail." (Exhibit 10.) The district's summer school

[1] All statutory references are to the Unemployment Insurance Code, unless otherwise noted.

session was conducted from May 28, 2013 through June 21, 2013. The claimant was available for work as an on-call substitute teacher during the summer school session.

The claimant was not called to work as a substitute teacher for summer school because the district contacted all interested permanent teachers before substitute teachers were called.[2] There is no list for substitute teachers for summer school in the record before us.

On July 9, 2013, the employer offered the claimant a contract for permanent employment beginning August 1, 2013, which she accepted. The claimant began the fall school term as a permanent teacher August 1, 2013.

The ALJ held the claimant eligible for unemployment insurance benefits for the period beginning May 26, 2013 through July 13, 2013. But, the ALJ held the claimant ineligible for benefits beginning July 14, 2013 through July 31, 2013.

REASONS FOR DECISION

The claimant, a substitute public school teacher for the district, sought unemployment insurance benefits during the summer of 2013. Because the claimant performs services for a public school and has base period wages from that service, the case meets the threshold test of Unemployment Insurance Code section 1253.3. In this case, we are called upon to examine the possible entitlement to benefits for a substitute teacher during the weeks the district conducted a summer school session.

On October 20, 1976, Congress passed the omnibus "Unemployment Insurance Amendments of 1976." (90 Stat. 2667, Public Law 94-566.) Becoming effective on January 1, 1978, it substantially amended the Federal Unemployment Tax Act, (hereinafter referred to as FUTA). (26 U.S.C.A. sections 3301 through 3311.) Public school employees, at the primary and secondary levels, were added to unemployment insurance coverage for "service" wages to which FUTA applies.

Both the federal and state statutes created the "equal treatment" provision for school employees. The federal statute, 26 USC Chapter 23, Section

[2] The employer has submitted additional evidence with its appeal that should have been presented at the hearing. There was no showing why the employer could not have submitted the evidence at the hearing before the ALJ. The claimant and the ALJ were denied the opportunity to rebut or consider it. In the notice of hearing, the parties were advised to bring all evidence to the hearing. To consider this information now would be improper and would violate due process. Therefore, the additional evidence has not been considered in reaching our decision.

3304(a)(6)(A), provides in pertinent part: "compensation is payable on the basis of service to which section 3309(a)(1) [26 USCS section 3309] applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law..." (See also, Unemployment Insurance Code section 1253.3, subdivision (a).)

Exceptions to the provisions of FUTA are called the 'denial provisions.' (26 USC Chapter 23, Section 3304(a)(6)(A),subsections i-vi, see also Unemployment Insurance Program Letter (hereinafter UIPL) No.15-92 (1992).) California's statute was amended in 1978 to mirror the federal provisions in FUTA. In essence, unemployment insurance benefits are not payable to any individual with respect to any week which begins **during the period between two successive academic years or terms** if the individual performs services in the first of such academic years or terms and if there is a contract or reasonable assurance that such individual will perform services for any educational institution in the second of such academic years or terms. (Code section 1253.3, subdivisions (b) and (c) in pertinent part, emphasis added.)

Neither Congress nor the California Legislature defined the highlighted words used in the denial provisions, above. The Court of Appeal has construed the meaning of the term "reasonable assurance" in three cases, discussed below.

In *Russ v. California Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d. 834, the Court noted that the term "reasonable assurance" was used in, but was not defined in, FUTA. The *Russ* Court relied on Congressional intent, quoting the Joint Explanatory Statement of the Committee of Conference, 1976 U.S. Code Congressional and Administrative News at pp. 6033, 6036. (*Russ, supra*, at 843-846.) "...[T]he 'federal law' underlying section 1253.3 may be interpreted to define 'reasonable assurance' of reemployment as an unenforceable 'agreement' ..., and that this interpretation may apply to the definition of 'reasonable assurance' provided in section 1253.3...". (*Russ*, at 295.) Thus, section 3304 (a), subsection (6)(A) was "...amended to provide, in effect, that public school employees might be eligible for benefits 'except' in certain instances involving their unemployment during periods of summer **recess** at the employing schools." (*Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834, 843, emphasis added.)

Within a few years California's Court of Appeal again interpreted the meaning of "reasonable assurance." It clarified that "[a] contingent assignment is not 'reasonable assurance' of continued employment within the meaning of section 1253.3." (*Cervisi v. Unemployment Insurance Appeals Board* (1989) 208 Cal.App.3d 635, 639.)

In 1984, *Board of Education of the Long Beach Unified School District v. Unemployment Insurance Appeals Board* (1984) 160 Cal.App.3d 674, (hereinafter, *Long Beach*) the Court held that the inherently tenuous nature of employment status as an on-call, substitute teacher did not defeat the "reasonable assurance" given to a substitute school employee. The court applied the denial provisions to substitute teachers without substantial reference to the Congressional discussion of the 1976 Congress. Relying on legislation passed after the 1976 amendments (1977 Public Law No. 95-19), the *Long Beach* court addressed Congressional intent to include substitute school employees in the denial provisions in a footnote. In footnote 2, the Long Beach court observed that Congress did not specify that substitute teachers were not to be included in the 'denial' provisions.[3]

In *Long Beach*, the Court noted the realities of the situation applicable to substitute teaching employment, and cautioned that for a substitute teacher there can be no absolute guarantee of work. The Court reasoned, "There is nothing in section 1253.3 which sets, as a criteria, the tenuous nature of a substitute teacher's position as a basis for determining the 'reasonable assurance' issue." (Ibid. at 683.) The Court concluded the claimant was "ineligible for **summer recess** unemployment benefits **during summer vacation periods** having 'reasonable assurance' of such post recess employment within the meaning and intent of section 1253.3." (*Long Beach*, *supra*, at 691, emphasis added.)

The *Long Beach* Court, like *Russ* used the terms "**summer recess**" or "**summer vacation periods**" interchangeably for the statutory language, "period between two successive academic years or terms." This terminology can be traced to deliberations in Congress. The issue in this case is whether there is a "summer recess" or "summer vacation period" for substitute teachers when the district schedules summer school sessions for which the substitute teacher is eligible to work.

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[3] *Long Beach* noted that, because the omnibus Unemployment Insurance Amendments of 1976, *supra*, would not become effective until 1978, Congress passed the Emergency Unemployment Compensation Extension [EUC] Act of 1977 a year after the 1976 passage of Public Law 94-566. (Public Law 95-19, H.R. 4800, 91 Stat. 39). This was not the SUA referred to in footnote 6, and was not incorporated into the 1976 omnibus Act, supra. It provided emergency unemployment compensation (EUC) benefits for eligible claimants for one year. It extended the EUC Act of 1974, which had been enacted as a temporary program for workers who exhaust their entitlement to both regular and extended benefits. In the Senate version of the 1977 bill (Senate Report No. 95-67), according to the Senate Report and the House Conference Report, the bill eliminated the House provision disqualifying substitute teachers from unemployment compensation "...if the individual is not employed as a teacher on at least 45 separate days." (Joint Explanatory Statement of the Committee of Conference, 1977, U.S. Code Congressional and Administrative News, at pp. 80 and 103.) Thus, the subsequent bill in 1977 eliminated a disqualification for substitute teachers.

The statute is not clear on its face, in light of existing summer school or year round tracks. Because the phrase "academic years or term," is not defined in the code nor in the cases discussed above, it is necessary to carefully analyze the intent of Congress.

"In determining the intent of the Legislature to effectuate the purpose of the law, '...a court must look first to the words of the statute themselves, giving the language its usual, ordinary import....The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Rules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences. Exceptions to the general provisions of a statute are to be narrowly construed; only those circumstances that are within the words and reason of the exception may be included. [Citations omitted.]" (*Corbett v. Hayward Dodge* (2004) 119 Cal.App.4th 915, 921.)

The conference committee report identified the issues considered by both houses of Congress. [4] It indicated that Congress intended the language "between academic years or terms" to refer to **summer recess** vacation, and that Congress intended to prevent receipt of unemployment benefits by fully employed or salaried professional and nonprofessional school employees, whether they worked pursuant to tenure, contract or agreement. There is no reference in the summary to substitute employees. (Joint Explanatory Statement of the Committee of Conference, 1976, U.S. Code Congressional and Administrative News, at pp. 6030 - 6050.)

In the omnibus "Unemployment Insurance Amendments of 1976" Public Law 94-566 (FUTA, 1976), Congress considered the inclusion of public school employees in the unemployment compensation program. With regard to the summer **recess** period, Congress did not intend to provide fully employed school employees with subsidized **recess** vacations. (122 Cong. Rec. 33284-85 (1976).)

Congress intended the denial provisions of FUTA to address the fact that some traditional, "nine-month" teachers are paid on an annual basis, and should not need unemployment benefits to bridge periods when schools are out of session over a summer **recess**. The "denial" provisions were intended to prevent overcompensation of teachers who are paid a reasonable annual salary based

[4] The House considered the Unemployment Compensation Amendments of 1976 (Public Law No. 94-566) on July 20, 1976, and the Senate considered the bill on September 29, 1976. Both houses considered the conference committee version on October 1. 1976.

on work performed over nine months of the year. (122 Cong. Rec. 33284-33285 and 35132 (1976).)

The intent of Congress was to "prohibit payment of unemployment benefits during the **summer and other vacation** periods, to permanently employed teachers and other school employees." (122 Cong.Rec.35132 (1976), emphasis added.) Nevertheless, the denial provisions do not expressly exclude substitute professional and nonprofessional employees, who are not paid an annual salary and are not permanent employees.

Both the United States Department of Labor and state agencies, as well as case law, have consistently construed the "denial" exceptions narrowly.[5] "Social legislation such as the FUTA is to be construed broadly with respect to coverage and benefits. Exceptions to its statutory remedies are to be narrowly construed. (citation omitted.)" (UIPL 43-93, Sept. 30, 1994, and Guide Sheet 8, http://wdr.doleta.gov/directives/attach/ETAH/301/guide_sheet_8.htm.)

"The very specificity of the exemptions, ..., and the generality of the employment definitions indicate that the [generalities] are to be construed to accomplish the purposes of the legislation." (*United States v. Silk* (1947) 331 U.S. 704, 712.) "The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of *reducing the hardship of unemployment.* (citations omitted.)" (*Prescod v. Unemployment Insurance Appeals Board* (1976) 57 Cal.App.3d 29, 40, emphasis in original.)

Generally, a state may afford greater coverage for unemployment benefits than FUTA, but may not provide less. "This state has always been able to provide coverage beyond the extent provided by federal law. However, it must provide coverage to those who would qualify for benefits under federal law, and specifically in this case under Section 3304(a)(6) of Title 26." (Precedent Benefit Decision P-B-461, p. 4 construing a legislative amendment to section 1253.3

[5] The Employment Training Administration of the Department of Labor, has published guidance for states to follow in application of the denial provisions affecting educational employees: "Conformity Requirements for State UC [Unemployment Compensation] Laws; Educational Employees: The Between and Within Terms Denial Provisions." (http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf.) The Department of Labor (DOL) answered "Frequently Asked Questions," explaining "An academic term is that period of time within an academic year when classes are held. Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions." This directive is an interpretative rule which explains or defines particular terms in a statute, within the meaning of *Cabais v. Egger* (D.C. Cir. 1982) 690 F.2d 234. *Cabais* specifically addressed the Dept. of Labor's UIPLs. (Pub. Law 89-553; 5 U.S.C. sections 551-559, 553(b).) As a Department of Labor directive, the "Conformity Requirements" statement carries the weight of law. (UIPL No. 01-96, 1995.)

which resulted in expanded benefit coverage. See also, Dept. of Labor, UIPL No. 43-93, 1993; and UIPL No. 01-96, 1995.)

As an exception to the general statutory goal of providing benefits to the unemployed, section 1253.3 should be narrowly construed. Since the original purpose of the law is not served by including employees other than traditional 'nine month' school employees with permanent employment, a narrow application of the denial provision is warranted.

In California, this Board has found the denial provisions inapplicable in certain cases, despite the presence of reasonable assurance, during the period between successive academic years or terms for fulltime permanent employees. California amended code section 1253.3 in 1978, the year FUTA denial provisions became effective. During that year, California voters passed Proposition 13, resulting in reductions in school budgets. By the summer of 1979, many school districts across the state closed down for a month or more during summer, due to budgetary constraints. Despite the fact that the lack of work occurred during the summer between two successive academic years or terms, and despite the fact that claimants had reasonable assurance of returning to work in the fall, benefits were payable because that was not a normal **recess** period.

"During the summer of 1978, the Employment Development Department and the United States Department of Labor reevaluated the applicability of section 1253.3 to professional and nonprofessional school employees who were scheduled to teach or work during the 1978 summer school session." (Precedent Benefit Decision P-B- 412 (1980), p.3.) Following an analysis of the Congressional Record, this Board determined, "...it is not the intent of Congress to deny benefits to year–round employees or those regularly scheduled for summer work who, due to cancellation of normal or scheduled summer work, became unemployed. (Congressional Record, September 29, 1976, Vol.122, No. 149, S17013-4; September 29, 1976, Vol.122, No. 149, S17022-3; October 1, 1976, Vol.151, Part II, H12172 [see also Public Law 94-566].)" (P-B-412, at page 3.)

The Appeals Board, in Precedent Decision P-B-417 (1981), relied on the same analysis, finding a clerical employee whose year round contract was reduced to ten months, to be eligible for benefits. The Board found that "...the cause of her unemployment was not a normal **summer recess**[6] or vacation period, but loss of customary summer work." (*Id.*, emphasis added.)

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[6] The court in Russ explained that "...public school employees might be eligible for benefits 'except' in certain instances involving their unemployment during periods of summer **recess** at the employing schools." (*Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834, 843, emphasis

Thus, Congress and California case law, as well as Board Precedent Decisions use "summer recess" "summer vacation recess" interchangeably for the statutory language "during the period between two successive academic years or terms." The fact that an employee's services end at the conclusion of an academic year or term, does not mean that the separation is a result of a summer **recess.**[7] The lack of employment is due to loss of scheduled work. Therefore, benefits are payable.

California's Precedent Decisions establish that salaried professional and nonprofessional school employees, who are unemployed due to budget cutbacks, are not disqualified within the meaning of section 1253.3 even though the claim was filed between "two successive academic years or terms," and even though they had reasonable assurance of returning to work. Although the employees had reasonable assurance of employment in the fall, the loss of work, due to budget constraints, excluded their claims from analysis under the denial provisions of section 1253.3.

When a substitute teacher is scheduled to work "on-call" during the spring term or the fall term and then is not called to work, that claimant's unemployment results from a lack of work, and benefits are payable. Similarly, when a substitute teacher is "on-call" during a summer school session, and is not called to work, the claimant is not on **recess**, but is unemployed due to a lack of work.

Accordingly, during a summer school session there is no recess period for eligible substitute teachers because school is in session. Just as during the fall and spring terms, those teachers are not on recess. Benefits are payable to listed or eligible substitute teachers during a summer school session because while school is in session, it is not a recess period.

Generally, the burden of proof is on the party for each fact the existence or nonexistence of which is essential to its claim for relief or affirmative defense. (Evidence Code section 500.) The Court may alter the normal allocation of the burden of proof depending upon such factors as the knowledge of the parties

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added.) And, the *Long Beach* Court concluded the claimant was "ineligible for **summer recess** unemployment benefits **during summer vacation periods** having 'reasonable assurance' of such post recess employment within the meaning and intent of section 1253.3." (*Long Beach*, *supra*, at 691, emphasis added.)

[7] The Employment Development Department published its twenty four page directive in 2007, explaining three elements are required for the denial provisions to apply: school wages in the base period; claim filed during a school recess period; and reasonable assurance must exist. (www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm.) This directive is in accord with the U.S. Dept. of Labor "Conformity Requirements for State UC [Unemployment Compensation] Laws; Educational Employees: The Between and Within Terms Denial Provisions." (*supra*, at footnote 5.)

concerning the particular facts, the availability of the evidence to the parties, the probability of the existence of a fact, and public policy. (*Morris v. Williams* (1967) 67 C.2d 733, cited in P-B-490. (See also *Sanchez v. Unemployment Insurance Appeals Board* (1977), 20 Cal. 3d 55, *Glick v. Unemployment Insurance Appeals Board* (1979), 23 Cal. 3d 493.)[8]

The claimant may produce evidence that he or she is on a list to be called for substitute work during the summer session. If there is no list, the claimant may produce evidence that he or she is considered eligible for summer school work. Thereafter, the burden of proof on the issue lies with the employer.

A claimant's evidence might include, but is not limited to, the claimant's contacts with the district or a school site, informing them of his or her availability and requests for work. The evidence might show there are school site-specific lists, or there is a stratified list (for instance, one preferring permanent teachers or laid-off teachers, but on which the claimant is potentially reachable to be called). In this case, the evidence established the claimant was notified "If your services are needed for the 2013 summer school session, you will be called or notified by mail."

Once a claimant produces credible evidence he or she is on a list or is eligible to be called for summer school employment, the employer must prove that the claimant is not eligible. The fact that the claimant is not called for work is insufficient to find he or she is not eligible for work. In this case, the employer's witness testified that the district did not call the claimant because the district calls permanent teachers first, and there was not enough work for the regular substitute teachers during the summer session. In addition, the employer's letter to the claimant states the claimant might be called or notified by mail, if her services are needed during the summer school session. This established that the claimant was unemployed due to lack of work, and not that she was unemployed due to a summer recess period. The fact that the claimant was not called to work during the summer session does not result in a denial of benefits.

Benefits are payable to substitute teachers during traditional school sessions or year round tracks, who are qualified and eligible to teach, for the days that teacher is not needed or called. During a summer school session, benefits are

[8] The Employment Development Department assists employers with *The Claims Management Handbook for School Employers* (DE 3450SEF rev. 3, May, 2008) ("Employer's Handbook") The department advises school employers to respond to the DE 1101CZ to protect the district's unemployment insurance tax account from charges. "Responding to the DE 1101CZ also allows the employer to be included as an interested party in any appeal that may be filed. And, [t]he employer's UI tax account will only be protected by returning a timely response to the EDD." ("Employer's Handbook", page 31.)

equally payable to substitute teachers who are qualified and eligible for substitute work.

The weight of the evidence establishes that the claimant was qualified and eligible for work during the summer school session. Therefore, she was not on recess within the meaning of section 1253.3 of the code and the denial provisions do not apply for the weeks of the summer school session. The administrative law judge in this case held that the claimant was eligible for benefits during the weeks the summer school session was scheduled, from May 28, 2013 through June 22, 2013. We will affirm that portion of the decision on modified rationale.

The claimant was given reasonable assurance that she would have work as a substitute teacher in the fall term. This issue was not contested at the hearing before the ALJ. Accordingly, the claimant is not eligible for benefits during the weeks beginning June 23, 2013 through July 31, 2013, since those weeks were a summer recess and the claimant had reasonable assurance of working in the fall term.

DECISION

The appealed portions of the decision of the administrative law judge are reversed in part and affirmed in part, on modified rationale. The claimant is eligible for benefits beginning May 26, 2013 through June 22, 2013, pursuant to section 1253.3 of the Code. Benefits are payable provided the claimant is otherwise eligible.

The claimant is not eligible for benefits beginning June 23 through July 13, 2013, pursuant to section 1253.3 of the code. Benefits for those weeks are denied.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **United Educators of San Francisco, et al. v. CUIAB**
No.: **A142858**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On July 15, 2016, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 15, 2016, at San Francisco, California.

Erika Y. Gomez
Declarant

Signature

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