S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
REAL PARTY IN INTEREST AND RESPONDENT.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
PLAINTIFF AND RESPONDENT

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DEFENDANT AND RESPONDENT

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

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF SAN FRANCISCO
CASE NO. CPF 12-512437
THE HONORABLE RICHARD B. ULMER, JR., PRESIDING

OPENING BRIEF OF PETITIONER UNITED EDUCATORS OF SAN FRANCISCO

STEWART WEINBERG, BAR NO. 031493
DAVID ROSENFELD, BAR NO. 058163
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 945011001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001(510) 337-1001
ATTORNEYS FOR PETITIONER-APPELLANT UNITED EDUCATORS OF SAN FRANCISCO AFT/CFT, AFL-CIO, NEA/CTA

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This Brief is filed on behalf of the Petitioner and Appellant United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA ("Appellant" or "UESF").

I. ISSUES PRESENTED

Statement pursuant to California Rules of Court, rule 8.520(b)(2):

(1) When determining eligibility for unemployment benefits for on-call classified employees and day-to-day certificated employee substitutes, does a summer school session in a K-12 district constitute an "academic term"?

(2) Were the School District and the California Unemployment Insurance Appeals Board subject to issue preclusion from re-litigating the issue of whether these educators are entitled to benefits during a summer session?

II. INTRODUCTION

This case presents a matter of first impression in California appellate courts.[1] Unemployment Insurance Code section 1253.3, subdivision (b) (all undesignated section references are to the Unemployment Insurance Code), referring to certificated employees of school districts, provides that "[b]enefits ... are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms or, ... 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." Section 1253.3, subdivision (c) pertains to classified employees and has a similar preclusion of benefits for classified employees during the period between two successive academic years or terms if they have performed services in the first of those years or

[1] There is a superior court judgment involving two of the parties in the instant case, which is discussed *infra* and which constitutes issue preclusion on the issue in this case.

terms and are given reasonable assurance of employment in the second academic year or term. This case explores the effect of a summer school session that is offered between the spring semester of an academic year and the fall semester of the next academic year. This case applies only to day-to-day substitute teachers and the on-call classified employees who are paid according to how many days they actually work. It raises the issue of whether or not that summer school session (during which the employees did not work) qualifies as an "academic term" for purposes of section 1253.3, subdivisions (b) or (c), where, although reasonable assurance was given for employment in the fall semester, no assurance was given for employment during the intervening summer school session.

A second issue is whether a decision of the superior court in earlier litigation between the District and the California Unemployment Insurance Appeals Board ("CUIAB") in 2005, holding educators are entitled to unemployment insurance benefits, constitutes issue preclusion and may be asserted in this litigation by Appellant, UESF.

III. APPLICABLE STATUTES

Section 1253.3, subdivisions (a), (b), (c) states as follows:

> (a) Notwithstanding any other provision of this division, unemployment compensation benefits, extended duration benefits, and federal-state extended benefits are payable on the basis of service to which Section 3309(a)(1) of the Internal Revenue Code of 1954 applies, in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to this division, except as provided by this section.
>
> (b) **Benefits specified by subdivision (a) 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 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.

(c) **Benefits specified by subdivision (a) 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 any other capacity than specified in subdivision (b) for an educational institution **shall not be payable to any individual with respect to 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.** However, if the individual was not offered an opportunity to perform the services for an educational institution for the second of the academic years or terms, the individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this subdivision. Retroactive benefits shall be claimed in accordance with the department's procedures which shall specify that except where the individual was entitled to benefits based on services performed for other than an educational institution, an individual who has a reasonable assurance of reemployment may satisfy the search for work requirement of subdivision (e) of Section 1253, by registering for work pursuant to subdivision (b) of Section 1253 during the period between the first and second academic terms or years. A claim for retroactive benefits may be made no later than 30 days following the commencement of the second academic year or term. (Emphasis added.)

Subdivisions (b) and (c) are at issue. Subdivision (b) applies to certificated educators, research and principal administrators. Subdivision (c) applies to classified employees. Although there are differences between the sections, the governing language for this case is the same. We have bolded the language involved in this case. Subdivision (a) is the "equal benefits" provision.

The federal statute that is the basis of Unemployment Insurance Code provides in relevant part:

> (a) Requirements The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—
>
> (6)
>
> (A) compensation is payable on the basis of service to which section 3309(a)(1) 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; except that—
>
> (i) with respect to services in an instructional, research, or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing 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 such period) 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 in any such capacity for any educational institution in the second of such academic years or terms,
>
> (ii) with respect to services in any other capacity for an educational institution to which section 3309(a)(1) applies—
>
> (I) compensation payable on the basis of such services may be denied to any individual for any week which commences during a period between 2 successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms, except that ...

(26 U.S.C. § 3304(a)(6)(A).)

Section 1253 adopts the federal statute, using identical language (with some modifications not relevant here). They "'are, in substance, exact counterparts ... .'" (*Bd. of Education of the Long Beach Unified School District v. Unemp. Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 686 [quoting *Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 384] (hereafter *Long Beach Unified School District.*) We refer to the state statute in this brief, although we will comment on the purposes animating the federal statute below.

IV. STATEMENT OF THE CASE

This case began as an administrative claim when 26 unemployment insurance benefits claimants filed unemployment claims in the summer of 2011. Each of them was denied benefits by the Employment Development Department for any period during the summer of 2011. Each appealed, and an administrative law judge reversed in each case and awarded benefits for various periods during the summer. The District appealed to the CUIAB, which reversed and found none was eligible for benefits. Those decisions were issued in March of 2012. The record of the administrative proceedings consisting of the CUIAB's decision, which attaches the ALJ's decision, are contained in the record as Exhibits A through Z to the Second Amended Petition. (2 CT 360–683.)

Appellant initiated the action by the filing of a Petition for Writ of Mandate/Prohibition on August 27, 2012. (1 CT 1.) On April 11, 2013, the Appellant filed a Second Amended Petition for Writ of Administrative Mandamus. (2 CT 360.) The action named the CUIAB as the Respondent and the San Francisco Unified School District ("District" or SFUSD") as the Real Party in Interest. (2 CT 360.)

After several rounds of pleadings, and while this was pending, the CUIAB adopted the decision in *Matter of Brady* (2013) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-505 (hereafter *Brady*) as a Precedent Benefit Decision on December 10, 2013. (3 CT 890–903.) That decision had direct impact upon the 26 claimants although its reasoning and holdings were at odds with the earlier decisions. The District filed a First Amended Cross-Complaint against the California Unemployment Appeals Board, seeking to nullify the *Brady* decision. (3 CT 879–905.)

The trial court denied the Second Amended Writ filed by the Appellant. The trial court granted the relief sought in the First Amended Cross-Complaint and vacated *Brady*. The Appellant and the CUIAB appealed, but the Court of Appeal affirmed. The Union, on behalf of 26 members, and the CUIAB petitioned this Court for review. This Court granted review in both Petitions for Review.

V. FACTS

A. PROCEEDINGS RELATING TO THE ISSUE OF SUMMER SESSION AS AN ACADEMIC TERM FOR PURPOSES OF UNEMPLOYMENT INSURANCE CODE SECTION 1253.3

On August 15, 2014, the trial court filed its judgment denying the petition. (3 CT 1104–1107.) The court incorporated its statement of decision into the judgment. (3 CT 1105:20; 1106:6.) The court made an express finding that benefits are "'not payable to any individual with respect to any week between' the end of one academic year and the beginning of the next whether that week (or those weeks) is called 'summer recess,' 'summer vacation,' 'summer vacation period,' 'summer school,' 'summer session,' or anything else ... ." (3 CT 1105:25–28.) The effect is to deny benefits during a summer session even if it is an academic term.

After so finding, the court reversed the decisions of the CUIAB and remanded each of the cases back to the CUIAB with instructions to find the 26 claimants not eligible for the unemployment benefits requested. The court also invalidated the decision of the CUIAB in the *Brady* case. That result is the subject of the appeal that is consolidated with this appeal.

B. PROCEEDINGS RELATING TO THE DENIAL OF ISSUE PRECLUSION

On October 1, 2013, the Appellant filed a request that the superior court take judicial notice of its own court records in an earlier case, *San Francisco Unified School District v. California Unemployment Insurance Appeals Board* (Super. Ct. S.F. City and County, 2005, No. CPF-05-504939) (hereafter *San Francisco Unified School District*). (2 CT 686–687.) The court did not respond directly to the request that it take judicial notice of the earlier decision of the superior court. However, it appears that the court granted the request for judicial notice because the court discussed and rejected the argument that issue preclusion applied in footnote 13 of its statement of decision.

> The Union relies in part on an opinion of a now-retired San Francisco Judge. However, *res judicata* does not apply "if

> 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, 622; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 (California Supreme Court declines to apply *res judicata* in unemployment insurance context).

(3 CT 1098.)

The judgment that the trial court declined to follow as issue preclusion was rendered by San Francisco Superior Court Judge James L. Warren. In that case, *San Francisco Unified School District, supra*, No. CPF-05-504939, the trial court was called upon to decide whether or not to grant a petition for writ of mandate filed by the SFUSD against the CUIAB. The CUIAB had held that ten substitute teachers who were employed by the SFUSD were eligible for unemployment insurance benefits after they had been unable to find work during a six week summer school term in 2003.[2] (2 CT 692:5–12.) In the course of rendering his judgment denying the petition for writ of mandate, Judge Warren made the following finding:

> Real Parties' period of unemployment also did not begin "between two consecutive academic terms." The CUIAB held that real parties potentially were eligible for benefits during the summer term, which ran from June 19, 2003 through July 25, 2003. Consistent with the express language of § 1253.3, CUIAB appropriately limited real parties' potential liability to the summer term, and excluded the true summer recess periods on either side of it. At oral argument, SFUSD contended that summer school is not a "term" because it is different in length from a regular term and attendance is not mandatory. However, no such limitation appears in the text of the statute, which uses the phrase "academic term" without qualification. To conclude that SFUSD's six-week summer school was an academic term for purposes of § 1253.3, its suffices that during that period educational instruction was provided to students, and that at least some teachers were employed to provide that instruction (which is not in dispute).

(2 695:8–18.)

[2] None of the substitute teachers who were affected by those decisions are involved in this case. (2 CT 689.)

Judge Warren denied the petition for writ of mandate, and the ten substitute teachers were granted unemployment benefits, since they failed to find work during the six week summer school term conducted by the SFUSD in 2003. That case differs from the instant case in the sense that the claimants in that case were seeking unemployment benefits only while the summer school was in operation, whereas the claimants in the instant case seek benefits for the entire period between the conclusion of the regular school year of 2010–2011 and the beginning of the regular school year 2011–2012.

C. STATEMENT OF THE FACTS

In lieu of a hearing, the parties filed a Stipulation of Facts. (2 CT 718–725.) We repeat the facts with some deletions which are noted below in brackets:

> 1. United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA ("Union") is an employee organization that has been recognized as the exclusive representative of certificated employees of the San Francisco Unified School District, and classified para-professional employees of the San Francisco Unified School District.
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> 2. The San Francisco Unified School District is a public school employer, as defined by California Government Code Section 3540.1(e).
>
> 3. In the Spring academic year 2010-2011, the San Francisco Unified School District employed employees in the position of substitute teachers for the purpose of replacing individuals who were temporarily absent or on leave. (Education Code § 3540.1(e).)
>
> 4. The following individuals were employed as substitute teachers by the San Francisco Unified School District on an on-call or as-needed basis during academic year 2010-2011: [naming eleven]. Each of those persons was a member of the Union.
>
> 5. During academic year 2010-2011, the San Francisco Unified School District employed individuals in the capacity of para-professional classified employees who are not paid during summer months unless they are actually employed for a summer session during which instruction is provided or are paid to perform special projects during the summer such as custodial services.

6. The following individuals were all members of the Union and were employed as para-professional classified employees during the 2010-2011 school year: [naming fifteen].

7. Each of the substitute teachers and classified employees claimants who are identified in paragraphs 4 and 6, above, received a "reasonable assurance" letter during the Spring of the 2010-2011 school year advising him or her that he or she had a reasonable assurance of employment during the 2011-2012 school year (with the exception of Novoa, who received the letter on July 25, 2011).

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

9. The first day of instruction for the 2011-2012 school year was August 15, 2011.

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

11. No instruction was offered by the San Francisco Unified School District between May 27, 2011 and June 9, 2011 or between July 14, 2011 and August 15, 2011.

12. Each of the above-named claimants, including the substitute teacher claimants and the classified employee claimants applied for unemployment benefits for the period of time between May 27, 2011 and August 15, 2011.

13. The Employment Development Department denied benefits to each named claimant. The claimants appealed to an administrative law judge, who after hearings at which each claimant was represented by the Union, reversed the EDD and held that each claimant was entitled to benefits for the period of time during the summer of 2011 that the claimant did not work.

14. The California Unemployment Insurance Appeals Board reversed all of the decisions of the administrative law judge as to each of the substitute teacher and the classified employee claimants, either in whole or in part. The California Unemployment Insurance Appeals Board, in each

case involving the substitute teacher and the classified employee claimants held that the entire summer session was a recess period as defined in Unemployment Insurance Code section 1253.3(b). However, it also held that if an individual claimant was employed during the summer of 2010, he or she generally had a reasonable expectation of employment during the summer session 2011. Thus, the Respondent generally held that all individual substitute teacher and classified employee claimants who were employed during the summer of 2010 were eligible for unemployment benefits during the period of summer session 2011 but ineligible for unemployment benefits thereafter. Respondent also held that those individual claimants who had worked in the preceding summer were generally eligible for benefits during the summer session of 2011.

a.) Substitute teacher claimants [naming four], all of whom did not work in either the summer session of 2011 or 2010, were held by Respondent to be ineligible for benefits from the last date that they worked in 2010-2011 to August 13, 2011 (and in the case of [naming one], to August 21, 2011).

b.) Substitute teacher claimant [naming one] was employed during summer sessions 2010 and 2011 in a special facility that operated from June 6, 2011 through August 5, 2011 but which did not operate from August 6, 2011 to August 13, 2011. The Unemployment Insurance Appeals Board held that claimant [naming one] was ineligible for benefits for one week ending August 13, 2011.

c.) Substitute teacher claimant [naming one] was employed during summer 2010 and 2011. The Unemployment Insurance Appeals Board held that claimant [naming one] was ineligible for benefits for two weeks ending June 4, 2011.

d.) The remaining substitute teacher claimants, [naming four], were held by Respondent to be ineligible only for the period of time following the end of summer session 2011 to August 13, 2011, but eligible for benefits for summer session 2011.

15. Classified employees who did not work during the summer session of 2011 were declared to be ineligible generally from the time they ceased work in the spring term of 2011 to August 13, 2011. That group included the following classified employees: [naming four].

16. Classified employees who worked during the summer session of 2011 were declared to be ineligible from the period that they ceased working the summer session, July 10 or 17, 2011, to August 13, 2011. That group included the following classified employees: [naming eight].

17. Some individuals were called to work in the period between the conclusion of the spring term in 2010-2011 and the beginning of the 2011-2012 school year. These individuals were employed as 20 Day Substitutes. They were declared to be ineligible for the period of time before they began their stint as 20 Day Custodians, but eligible once their work as 20 Day Custodians ceased. That group included the following: [naming three and identifying time periods of eligibility].

(2 CT 719–722.)

The Court of Appeal accurately summarized the facts as follows:

> 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. 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 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. It also held, however, that if 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.

(*United Educators of San Francisco AFT/CFT v. California Unemployment Insurance Appeals Board* (2016) 247 Cal.App.4th 1235, 1240, fns. omitted (hereafter *United Educators*).)

Essentially, these few classified employees and certificated teachers were paid on an as needed basis and worked during the school term ending in May 2011 The District maintained a summer session for both high school and elementary and middle school students. The 26 claimants were not asked to work, nor were they provided employment during that summer session or term.

D. PROCEEDINGS RELATED TO THE ISSUE OF ISSUE PRECLUSION

This Court has recently clarified the difference between issue and claim preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 818–819 (hereafter *DKN Holdings*).) This is a matter of issue preclusion because the Appellant and the individuals whom it represents were not parties to the litigation, and the decision is asserted against the District and the CUIAB. (*Id.* at p. 818.) We use this Court's recent clarification and assume this is a question of issue preclusion.