Case No. S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Plaintiff and Respondent.

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,
Defendant and Appellant.

Court of Appeal of the State of California, 1st District, Division 1
No. A142858/A143428
Superior Court of the State of California, County of San Francisco
The Honorable Richard B. Ulmer, Jr., Judge
Civil Case No. CPF 12-512437

SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ANSWER BRIEF ON THE MERITS TO UNITED EDUCATORS OF SAN FRANCISCO'S OPENING BRIEF ON THE MERITS

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I.

INTRODUCTION

Petitioner CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD ("CUIAB") asks this Court to legislatively prescribe a rule that substitute teachers who are "on-call" during a school district's summer session, and who are unable to find work, should be eligible for unemployment benefits. The plain language of California Unemployment Insurance Code § 1253.3[1] establishes that school-term employees (those whose work schedules coincide with the academic year) who have reasonable assurance of returning the following academic year or term shall not be eligible to receive unemployment benefits for the period between academic years or terms. Nothing in the statute, or the legislative history, countenances such an ad-hoc rule as urged by CUIAB.

The court of appeal agreed, stating that "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." (*United Educators of San Francisco v. California Unemployment Insurance Appeals Board et al.*, Case Nos. A142858/A143428, Slip Opinion, p. 18 (hereafter "*UESF*, p. 18" or "*United Educators*").)

The clear legislative intent was that the end of an academic year or term, for a school employee with reasonable assurance of returning, does not constitute "unemployment." There is no indication in the legislative history or the plain language of the statute that being on call for a voluntary summer school session[2] would constitute

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[1] Hereafter "U.I. Code § 1253.3."

[2] A summer session, the court of appeal noted, not required for "compulsory education laws that mandate public schools to provide instruction," and that does not "allow certificated employees to receive credit toward permanent status. (See, e.g., Ed.Code, §§ 37620, 41420, 48200, 44913.)" (UESF, pp. 14-15.)

"unemployment" in the form of being "attached to the general labor force which is seeking other employment on a permanent basis." (*Board of Education of the Long Beach Unified School Dist. v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 690, fn. 7 ("*Long Beach*").)

A 1976 amendment to the federal unemployment statute reinforces this intent. This amendment created the only trigger for overriding between-term eligibility: the loss of the employee's right to return during the second academic year. This amendment was codified in state law in U.I. § 1253.3(i)(4), which provides that "the individual shall be entitled to a retroactive payment of benefits [between-term] if the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms" (*e.g.*, is permanently removed from the job market.).

Similarly, CUIAB erred in issuing the *Brady* decision when it concluded that the period between academic years was not a "recess" period, therefore overriding U.I. §1253.3. However, the plain language of the federal and state statute establishes that ineligibility attaches to the period between academic years and terms, and not only to "recess" periods. In fact, the federal legislative intent clearly demonstrates that Congress contemplated that employees could still procure other work during the period between academic years[3] without eviscerating the non-eligibility of that period, as urged by CUIAB here.

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[3] The Congressional Record recognizes that a teacher may seek other employment during the period between academic years or terms. ("So a schoolteacher is really not unemployed during the summer recess. He/[she] can take other employment, if he/[she] wants to.") (Congressional Record, Vol. 122, Part 26, 33285, September 29, 1976, Attached as Exhibit H to CUIAB Request for Judicial Notice in Support of Opening Brief (hereafter "CUIAB RJN"), pp. 108-109.)

"The role of the courts is not to legislate or to rewrite the law, but to interpret what is before them [Citation omitted.]" (*UESF* at 13.) This Court should decline CUIAB's invitation to legislatively rewrite U.I. 1253.3 to the effect that the reasonable assurance rule is eviscerated if a substitute teacher is "on-call" for summer school work and is unable to obtain such work.

II.

LEGAL ARGUMENT

A. Summary Of Legal Argument

The traditional academic year, starting in the fall, ending in the spring, with a summer break in between, is well established in California public schools.

The intent of the unemployment insurance statutes is that employees are eligible for benefits for losing work that they held – not for the inability to obtain work that they did not hold. The CUIAB itself seemed to realize this in its November 30, 2012 decision in the matter involving claimant Arthur Calandrelli (CUIAB Case No. AO-278558) ("the 2012 Calandrelli Decision"), which the CUIAB had agendized to designate as a Precedent Benefit Decision at its January, 2013 meeting. (Court of Appeal Clerk's Transcript, Volume 3, Pages 0805-0806 (hereafter "CT, Vol. 3, 0805-0806").)[4] In the 2012 Calandrelli Decision, the CUIAB recognized that school employees who work during the academic year do not "lose" employment once the academic year ends and the summer begins:

> Congress did not intend to provide school employees with paid vacations over the summer, *but wanted to provide protections for those school employees who had lost employment.* [Citation omitted.] According to

[4] The item was subsequently taken off calendar and no action taken. (CT, Vol. 2, 0746.)

> Congress, teachers who worked during the 9-month academic year are 'really not unemployed during the summer recess' but can choose 'to take other employment' during the summer. [Citation omitted.] (CT, Vol. 3, 811.) (Emphasis provided.)

CUIAB contends that there is no definition of the term "academic year" that excludes summer school. Contrary to CUIAB's argument, Education Code § 37620 clearly establishes the "academic year" as the 175-day regular school year, and excluding the summer session:

> 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.* (Emphasis provided.)

CUIAB's opening brief fails to mention this statute.

The clear legislative intent demonstrates that the only trigger for overriding between-term eligibility occurs when "the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms" under U.I. § 1253.3(i)(4). The statute precludes the legislative amendment that CUIAB proposes to add here.

B. The Standard Of Review

Questions of statutory interpretation are subject to de novo review. (*Sutco Construction Co. v. Modesto High School Dist.* (1989) 208 Cal.App.3d 1220, 1228.)

For reviewing courts assessing the validity of precedent benefit decisions under § 409.2, this Court has set forth the proper standard of review: "in a third-party declaratory action under § 409.2 the courts may only determine whether the board

decision accords with the law that would govern were the rule announced articulated as a regulation." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 58, *quoting Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111.)

While it is true that "a court will give great weight to an 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." (*Messenger Courier Ass'n of Americas v. California Unemployment Ins. Appeals Bd.* (2009) 175 Cal.App.4th 1074, 1086-87 *quoting American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal.App.4th 51, 58; *See also, Sunnyvale Unified School District v. Jacobs* (2009) 171 Cal. App.4th 168, 176.)

In deciding whether the CUIAB's application of governing law should be upheld, the Court is bound to apply settled standards and review whether the CUIAB's interpretation was contrary to statutory intent. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd., supra,* 29 Cal.3d 101 at 111.)

C. Pertinent Sections Of The California Unemployment Insurance Code

The plain language of the U.I. Code makes it clear that school-term employees with reasonable assurance of returning are not eligible for benefits during the period between academic years or terms. U.I. Code § 1253.3, subsection (b), governs instructional personnel (the substitute teachers in this matter):

> [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, 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....

U.I. Code § 1253.3, subsection (c), applies to those employees not serving in an "instructional, research, or principal administrative capacity" (the classified [noncredentialed] employees in this matter):

> 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.

The court in *Long Beach, supra,* 160 Cal.App.3d 674, 682 affirmed that the rule applied to substitute teachers. In *Russ v. California Unemployment Appeals Board* (1982) 125 Cal.App.3d 834, the court affirmed the application of the reasonable assurance rule to non-instructional employees.

D. Legislative History

1. CUIAB's Argument That The Original Federal Legislation Intended To Exclude Substitute Teachers Is Rebutted By The Legislative History And Subsequent Case Law

CUIAB relies heavily on the contention that Congress, in enacting the original unemployment insurance statute, certainly must have intended to exclude substitute teachers. CUIAB contends that:

- "The legislative history makes it clear that Congress, in enacting the federal provision on which section 1253.3 is based, intended only to *ensure that full-time teachers and educational professionals*, who are typically paid a salary that covers the entire year while only working for nine months, do not receive a windfall." (CUIAB Opening Brief, p. 3, para. 1.) (Emphasis provided.)
- "The limited purpose of the [reasonable assurance] exception – to avoid conferring a windfall *to salaried, full-time educational professionals,* whose compensation is designed to cover contemplated recess periods – is clear throughout the legislative history." (CUIAB Opening Brief, p. 17, para. 3.) (Emphasis provided.)

These arguments are neither new, nor novel, and have been rebutted for over 30 years by the legislature, and by courts interpreting the statute.

a. The District's Substitute Teachers Are "Professionals"

CUIAB's claim that "[t]here is no indication that Congress intended to create a blanket exclusion of summer benefits for all educational employees, regardless of the terms of their employment," is contradicted both by the plain language of, and legislative

history behind, the federal legislation. As CUIAB notes, the original legislation was intended to cover employees rendering "service in an instructional, research, or principal administrative capacity for an institution of higher education ..." (*See, e.g.,* Public Law No. 91-737 (August 10, 1970), CUIAB RJN, Exh. A, p. 2.) When the statute was amended six years later, it extended the reasonable assurance rule to any educational institution, and to include others rendering "services in *any other* capacity for an educational institution (other than an institution of higher education) ...." (*See*, Public Law No. 94-566 (October 20, 1976), CUIAB RJN, Exh. D, pp. 57, 77.) Neither the plain language of the statute, nor its legislative history, evidence any intent to limit the application of the reasonable assurance rule based on characterizations of positions as "professional" or "nonprofessional," or other terms of employment. The statute contains no limiting language whatsoever as to its scope.

It is clear from the legislative intent and statute that Congress saw the distinction between "professionals" and "non-professionals" as aligning with those rendering "service in an instructional, research, or principal administrative capacity" and those rendering "services in any other capacity (other than an instructional, research, or principal administrative capacity)" for an educational institution. (*See*, *e.g.,* Public Law No. 94-566 (October 20, 1976), [attached as CUIAB RJN, Exh. D, pp. 77].) This is borne out elsewhere in the legislative record, which makes reference to the reasonable assurance rule for "teachers and other professional employees" and as subsequently extended to "nonprofessional employees" (Senate Report No. 94-1265, 2d. Sess. (1976), CUIAB [attached as RJN, Exh. E, p. 79]; *See also*, *Id.* at P. 86; Joint Report, Senate Committee on Finance and House Committee on Ways and Means, H.R. 102110, 94th

Cong., 2d Sess. (1976), [attached as CUIAB RJN, Exh. F, p. 94].)[5]

Therefore, neither the plain language of the federal statute, nor its legislative history, support the CUIAB's attempt to carve out an exception to the reasonable assurance rule based on employees that it deems to be "professionals" as opposed to "nonprofessionals." In any event, substitute teachers, as instructional personnel, would be considered "professionals," in the nomenclature of Congress.

The case law interpreting the unemployment statutes drives this point home with even more resonance. The court in *Long Beach, supra,* 160 Cal.App.3d 674 explicitly stated that the non-vested nature of substitute employment did not exempt that classification of employees from the operation of the reasonable assurance rule:

> The exclusion of benefits under section 1253.3 applies to instructional educational employees regardless of whether their employment status is vested or non-vested. If there is a contract or a reasonable assurance that a teacher, who has taught for the District during the pre-recess period, will perform teaching services for the employer in the academic year or term during the post-recess period, then the teacher must be denied unemployment benefits during summer recess regardless of whether he or she is a tenured or non-tenured teacher or whether his or her employment is vested or non-vested. [¶] 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

[5] The State law analogy for the distinction between teaching and non-teaching personnel is not "professional/non-professional," but consists of the classifications of certificated employees (*i.e.*, those serving in positions requiring certification requirements, such a teaching or pupil services credential per Education Code § 44830(a)); and classified employees (*i.e.*, those serving in positions not requiring certification requirements per Education Code section 45103(a).)

determining the "reasonable assurance" issue. (*Id.* at P. 683.)

The court of appeal in *Long Beach* noted as part of the record a memorandum from the Department of Labor's Unemployment Insurance Service acknowledging the tenuous nature of substitute employment:

> The record on appeal contains a copy of a memorandum from the Administrator, Unemployment Insurance Service, United States Department of Labor, Washington, D.C. to the Regional Administrator, San Francisco, dated October 3, 1979, concerning the subject of "Between-Terms Denial for Substitute Teachers."
>
> This memorandum addressed inquiries from organizations in several states concerning the meaning of "a reasonable assurance" for a prospective substitute teacher. The memorandum contained the following:
>
> > "The heart of the problem of 'a reasonable assurance' for substitute teachers is the nature of the work. The amount of work available cannot be determined. It is dependent on the number of regular teachers who will be absent during the school year. This is not susceptible to precise prediction. While the educational employer may have a general idea of the number of 'substitute days' needed on the basis of past experience, the exact number of days and substitutes needed cannot be forecast. Accordingly, it would be relatively impossible for the educational employer to guarantee, in effect, if and when work would be available for a particular

> substitute. In our view when an individual applies for and is accepted for work as a substitute teacher, the application and acceptance is made with the full knowledge of the realities of the situation: namely that there is no guarantee of work. There is only the opportunity to work if work is available." (*Long Beach, supra*, 160 Cal.App.3d at P. 684 (fn. 4).)

The court of appeal in *Long Beach* cited this letter in concluding that "[s]uch a guarantee of post-recess employment is not required in order to resolve eligibility or non-eligibility for unemployment benefits during summer recess periods." (*Id.* at 685.)

The *Long Beach* case also expressly rebuts CUIAB's contention that "[t]he limited purpose of the [reasonable assurance] exception – to avoid conferring a windfall *to salaried, full-time educational professionals,* whose compensation is designed to cover contemplated recess periods – is clear throughout the legislative history." (CUIAB Opening Brief, p. 17, para. 3.) (Emphasis provided.) In fact, the court in *Long Beach* also extended this same rationale to substitute teachers when it rejected the same contention made by CUIAB in that case:

> The practical effect of the [Unemployment] Board's decision is to assure that most, if not all, substitute teachers in California will be eligible for unemployment benefits during the annual summer recess periods while probationary and permanent teachers who are by statute or by contract guaranteed employment for the post-recess academic term are ineligible for such benefits. Thus, the Board's Precedent Benefit Decision constituted a violation of the principle of "like pay for like services." (*Long Beach, supra*, at 160 Cal.App.3d at 685.)

By like measure, the Court of Appeal in *United Educators*, like its predecessors in *Russ* and *Long Beach*, recognized that it is not the intent of the federal legislation, or its State counterpart, that substitute teachers should be exempt from the reasonable assurance rule, and therefore guaranteed a full calendar year's wage, when permanent and probationary teachers with reasonable assurance of returning had no such guarantee:

> 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). ... 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. (*UESF*, p.19.)

The court in *Long Beach*, *supra,* also conducted a survey of case law in other states and concluded as follows:

> The weight of decisional authority in other states, who have enacted legislation identical or substantially similar to California's section 1253.3 in order to conform to applicable federal law (See 26 U.S.C. 3304(a)(6)(A)), is that substitute teachers without written contracts, and professional school

district employees, permanent and non-permanent, are ineligible for summer recess benefits because the legislators intended the disqualification to apply to continuing school employees. (*Long Beach, supra*, 160 Cal.App.3d 674; 686-691.)

Therefore, there is no basis for CUIAB's claim that substitute teachers should be exempt from the reasonable assurance rule.

E. <u>The Federal Legislative History Makes Clear That Congress Did Not Consider The Period Between Academic Years Or Terms To Be "Bona Fide Unemployment"</u>

The record of the United States Senate Proceedings to enact H.R. 14705 demonstrates what the legislature intended in defining "unemployment" for school employees. Dr. Arthur M. Ross, Vice President, University of Michigan, in statements during a hearing before the Committee on Finance, United States Senate, stated as follows:

- "We recognize the responsibilities of educational institutions to provide protection for their employees against *bona fide unemployment.*" (CUIAB Request for Judicial Notice, Exh. C, p. 50.) (Emphasis provided.)
- "By covering those who are *genuinely unemployed* the bill is equitable ... (*Id.* at p. 51.) (Emphasis provided.)
- "We believe that in this typical situation the employee should not be considered unemployed during the summer periods, semester break, a sabbatical period or similar periods during which the employment relationship continues." (*Id.*)

- "Appended hereto as appendix A is suggested statutory language which we believe would aid in solving the problem of extending protection to those instructional, research and administrative employees who may *become genuinely unemployed.*" (*Id.*) (Emphasis provided.)

The legislative history clearly shows the intent of Congress in establishing when a school employee became "genuinely unemployed." During the 1976 amendments to the unemployment statute allowing for retroactive eligibility if an employee in fact did not return to work during the succeeding academic year, Senator Javits confirmed that it was not in fact the end of an academic year that occasioned "unemployment," but the loss of employment during the succeeding academic year. As the Congressional Record reflects Senator Javits' remarks:

> ... The amendment provides that if, at the beginning of the term following the vacation period, the employee, whether professional or non-professional, is in fact not offered reemployment by the educational agency that gave him/[her] the reasonable assurance in the first place, he/[she] will be entitled to a redetermination of benefits applicable to the period for which he/[she] has been denied his/[her] entitled to compensation. In short, if this restrictive provision has worked unfairly to the detriment of an *actually unemployed* school employee, he or she will be entitled to a lump sum payment for the denial period. (Congressional Record, Vol. 122, Part 26, 33284-33285, September 29, 1976, [Attached as Exhibit H to CUIAB RJN, pp. 108-109].) (Emphasis provided.)

Senator Long, during the same hearing, made it clear that Congress did not intend to equate the end of an academic year to unemployment: "So a schoolteacher is really not

unemployed during the summer recess. He/[she] can take other employment, if he/[she] wants to. ..." (Congressional Record, Vol. 122, Part 26, 33285, September 29, 1976 [Attached as Exhibit H to CUIAB RJN, pp. 108-109].) As the Court in *Long Beach,* recognized, the period between academic years or terms does not constitute unemployment as contemplated by the statute: "[w]e note that the substitute teacher Smith, having not resigned or retired, was not '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 674, 690, fn. 7.) Likewise, here, substitute teachers are not "attached to the general labor force which is seeking other employment on a permanent basis," precisely because they have a reasonable assurance of returning to work during the succeeding academic year.

F. The Federal Statute Only Contemplates Retroactive Eligibility Over The Summer If An Employee Lost His/Her Job For The Following Fall

There is only one exception to the rule of ineligibility for the period between academic years or terms – if the employee does *not* return to work during the successive academic year or term. This rule was incorporated into California's unemployment statutes in U.I. Code § 1253.3(i)(4). Under U.I. Code § 1253.3(i)(4), an employee can only be retroactively eligible for the summer period if he/she loses his/her job and does not have the opportunity to return in the next academic year. This interpretation is consistent with the intent of unemployment insurance: to compensate employees who customarily held but lost employment.

The legislative history behind this exception demonstrates not only the Congressional intent that unemployment benefits for school employees be limited to those seeking other employment on a permanent basis, but also that the interpretation