SUPREME COURT
FILED

MAY 02 2017

Jorge Navarrete Clerk

Deputy

Case No.: S235903

In The Supreme Court of the State of California

United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA,

Petitioner and Appellant,

vs.

California Unemployment Insurance Appeals Board,

Defendant, Cross-Defendant and Appellant,

San Francisco Unified School District

Real Party in Interest

On Review From The Court Of Appeal For the First Appellate District, Division One
Case No.: A142858/A143428

After An Appeal From the Superior Court of San Francisco County
Judge Richard B. Ulmer
Case Number CPF 12-512437

CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE'S BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT

LAURA SCHULKIND, BAR NO. 129799
MICHAEL D. YOURIL, BAR NO. 285591
LIEBERT CASSIDY WHITMORE
135 MAIN STREET, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
TEL: 415.512.3000

Case No.: S235903

In The Supreme Court of the State of California

United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA,

Petitioner and Appellant,

vs.

California Unemployment Insurance Appeals Board,

Defendant, Cross-Defendant and Appellant,

San Francisco Unified School District

Real Party in Interest

On Review From The Court Of Appeal For the First Appellate District, Division One
Case No.: A142858/A143428

After An Appeal From the Superior Court of San Francisco County
Judge Richard B. Ulmer
Case Number CPF 12-512437

CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE'S BRIEF OF AMICUS CURIAE IN SUPPORT OF POSITION OF THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT

LAURA SCHULKIND, BAR NO. 129799
MICHAEL D. YOURIL, BAR NO. 285591
LIEBERT CASSIDY WHITMORE
135 MAIN STREET, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
TEL: 415.512.3000

KEITH BRAY, BAR NO. 128002
GENERAL COUNSEL/ELA DIRECTOR
MICHAEL AMBROSE, BAR NO. 274952
STAFF ATTORNEY
CALIFORNIA SCHOOL BOARDS ASSOCIATION/EDUCATION LEGAL ALLIANCE
3251 BEACON BOULEVARD
SACRAMENTO, CALIFORNIA 95691
TELEPHONE: 916.669.3248/FACSIMILE: 916.374.3407

Attorneys for Amicus Curiae
California School Boards Association's Education Legal Alliance

Table of Contents

I. INTRODUCTION 8

II. LEGAL ARGUMENT 10

A. THE PLAIN LANGUAGE OF SECTION 1253.3, DECISIONAL LAW AND OTHER INTERPRETIVE GUIDANCE SUPPORT THE INTERPRETATION OF THE COURT OF APPEAL 10

1. "Academic year" and "academic term" must be given independent meaning 11

2. "Academic year" does not include the summer period between the academic terms when students complete one school year and grade and advance to the next school year and grade, and therefore does not mean "calendar year" 12

3. Even if the "academic year" language were not controlling, summer school does not constitute an "academic term," and such an interpretation would render the "academic year," language superfluous and the reasonable assurance language illusory 16

4. The denial of benefits provision does not provide any exception for on-call employees 20

5. The authority in other jurisdictions overwhelmingly supports the Court of Appeal's decision 23

B. CUIAB URGES AN INTERPRETATION OF 1253.3 THAT IS GROUNDED IN POLICY NOT LAW, HAS SWEEPING IMPLICATIONS FOR LABOR REALTIONS AND SUMMER SCHOOL PROGRAMS, AND FAR EXCEEDS ITS RULEMAKING AUTHORITY 30

1. CUIAB's interpretation constitutes a substantive and novel departure from existing law that must be effectuated through legislation 30

2. Even if CUIAB's interpretation falls within the pruview of rulemaking, , it should be required to proceed through the formal rulemaking process 34

3. CUIAB cannot rely on *Brady* or its nonprecedent decisions to assert that it has complied with its formal rulemaking obligations 38

III. CONCLUSION 40

Table of Authorities

Federal Cases

Chicago Teachers Union v. Johnson (7th Cir. 1980) 639 F.2d 353 30

State Cases

Baker v. Department of Employment and Training Bd. of Review (R.I. 1994) 637 A.2d 360 30

Board of Education v. Unemployment Ins. Appeals Bd. (1984) 160 Cal.App.3d 674 .... 23, 25, 32

Bonnell v. Medical Bd. of California (2003) 31 Cal.4th 1255 31

California Chamber of Commerce v. Brown (2011) 196 Cal.App.4th 233 32

California Welfare Rights Organization v. Brian (1974) 11 Cal.3d 237 31

Campbell v. Department of Employment Sec. (Ill. App. Ct. 1991) 211 Ill.App.3d 1070 27

Chester Community Charter School v. Unemployment Compensation Bd. of Review (Pa. Commw. Ct. 2013) 74 A.3d 1143 29

Claim of Alexander (N.Y. App. Div. 1988) 136 A.D.2d 788 26

Claim of Huff (N.Y. App. Div. 1995) 222 A.D.2d 919 26

Claim of Sifakis (N.Y. App. Div. 1987) 133 A.D.2d 511, 512 27

DeLuca v. Com., Unemployment Compensation Bd. of Review (Pa. Commw. Ct. 1983) 74 Pa.Cmwlth. 80 27

Doran v. Department of Labor (Ill. App. Ct. 1983) 116 Ill.App.3d 471 27

Evans v. State Dept. of Employment Sec. (Wash. Ct. App. 1994) 72 Wash.App. 862 .... 28, 29, 30

Friedlander v. Employment Div. (1984) 66 Or.App. 546 .... 25, 26

Glassmire v. Unemployment Compensation Bd. of Review (Pa. Commw. Ct. 2004) 856 A.2d 269 27

Halvorson v. County of Anoka (Minn. Ct. App. 2010) 780 N.W.2d 385 27

Harker v. Shamoto (Hawaii Ct. App. 2004) 104 Haw. 536 26

Herrera v. Industrial Claim Appeals Office of State of Colo. (Colo. App. 2000) 18 P.3d 819 27

McKeesport Area School Dist. v. Com., Unemployment Compensation Bd. of Review (Pa. Commw. Ct. 1979) 40 Pa.Cmwlth. 334 30

Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal.3d 101 31

POET, LLC v. California Air Resources Board (2013) 217 Cal.App.4th 1214 36

San Diego Police Officers' Assn. v. City of San Diego Civil Service Com. (2002) 104 Cal.App.4th 275 13

Sims v. Department of Corrections and Rehabilitation (2013) 216 Cal.App.4th 1059, 1077 36

South Bend Community School Corp. v. Swartz (Ind. Ct. App. 2008) 881 N.E.2d 1093 27

Styrene Information and Research Center v. Office of Environmental Health Hazard Assessment (2012) 210 Cal.App.4th 1082 32

Thomas v. Department of Labor, Licensing, and Regulation (Md. Ct. Spec. App. 2006) 170 Md.App. 650 27

Thomas v. State, Dept. of Employment Sec. (Wash. Ct. App. 2013) 176 Wash.App. 809 .... 28, 29

United Educators of San Francisco AFT/CFT v. California Unemployment Insurance Appeals Board (2016) 247 Cal.App.4th 1235 .... 13, 24

University of Toledo v. Heiny (1987) 30 Ohio St.3d 143 27

Wilkerson v. Jackson Public Schools (Mich. Ct. App. 1988) 170 Mich.App. 133 30

Statutes

29 C.F.R. § 825.602(b) 18

Education Code section 45102(d) 13

Education Code section 45102(d)(1) 13

Education Code section 37620 14

Education Code section 41420 14

Education Code section 44913 14

Education Code section 44949 14

Education Code section 48200 14

Education Code section 51851(c) 13

Education Code section 66028.3(d) 13

Unemployment Insurance Code section 1253.3 .... passim

Other Authorities

Assem. Bill No. 1638 (2013-2014 Reg. Sess.) 34

Assem. Bill No. 2197 (2015-2016 Reg. Sess.) 33

Assem. Bill No. 399 (2015-2016 Reg. Sess.) 33

Assem. Bill No. 615 (2013-2014 Reg. Sess.) 34

Department of Labor Conformity Requirements for State UC Laws 15

Dorothy C. Rowe (1981) Precedent Decision No. P-B-417 38

EDD Benefit Determination Guide, Miscellaneous MI 65 .... 19, 20

In re J.W. (2002) 29 Cal.4th 200 21

Vincent J. Furriel (1980) Precedent Benefit Decision No. P-B-412 38

I. INTRODUCTION

Amicus Curiae, the California School Boards Association's Education Legal Alliance ("ELA") submits this brief in support of the San Francisco Unified School District ("SFUSD" or "District"). The issues presented in this litigation raise issues of statewide concern for hundreds of school districts and county offices of education. ELA asks this court to affirm the decision of the Court of appeal in its entirety, including the Court of Appeal's decision to invalidate *Alicia Brady* (2013) Precedent Benefit Decision No. P-B-505 ("*Brady*").

There are two primary reasons CUIAB ("California Unemployment Insurance Appeal Board") and United Educators of San Francisco's ("UESF") interpretations of Unemployment Insurance Code[1] section 1253.3 should be rejected and the Court of Appeal's decision should be affirmed:

First, the plain language and interpretive guidance support the Court of Appeal's decision. Section 1253.3 regulates the period between two "academic years or academic terms." This disjunctive construction plainly gives independent meaning to the phrases "academic year" and "academic term." Thus, even if summer session is construed as an "academic term," the summer session still occurs between two "academic years." A contrary reading would both render the phrase "academic year" superfluous, and effectively negate the reasonable assurance mechanism for school districts that offer summer session—creating unintended results contrary to the

---

[1] All future references are to the Unemployment Insurance Code unless otherwise indicated.

statute.

Importantly, CUIAB agrees that treating summer session as an academic term for all employees would contravene statutory intent. However, it attempts to cure this consequence by creating an exception (not expressed in its briefing below) between on-call employees and salaried employees that does not exist in statute.[2]

Second, CUIAB's novel interpretation of section 1253.3 exceeds its rulemaking authority. CUIAB asserts a new standard, under which eligibility for benefits turns on an employee's status as an "on-call" employee. However, this approach presents an entirely new way of thinking about benefit eligibility that must come from the Legislature. Notably, both CUIAB and UESF ask this Court to support the on-call employee exception on public policy grounds, and rely heavily on arguments of policy rather than law in their briefing. While ELA does not necessarily disagree with these public policy considerations, reliance on them here signals that CUIAB's concerns are for the Legislature not the courts. Indeed, CUIAB has reached for policy arguments precisely because application of the plain language of the statute does not achieve the result it desires.

Further, even assuming the interpretation CUIAB urges is within its rulemaking authority, at the very least, the sweeping change it advocates must proceed through the formal rulemaking process. CUIAB has crafted

---

[2] CUIAB and UESF use various labels to describe the employees in this action including per diem, on-call, substitute, paraprofessional, nonprofessional, and non-salaried. For simplicity, we generally refer to these individuals as "on-call" employees. However, we also note that CUIAB took the position in the Court of Appeal, that *Brady* extended benefits to full-time teachers that were placed "on call" over the summer.

new legal tests and coins new terms such as "reasonable expectation" of employment and "loss of customary work."

Additionally, as can occur in the litigation arena, CUIAB has shifted its position, and taken internally inconsistent positions with regard to its interpretation of the statute. CUIAB's inconsistency in its own statutory interpretation and definition of terms further demonstrates the inadequacies of this litigation to establish a new standard under which certain school employees, in some districts, may be eligible for benefits during some portion of the summer period. In short, the inevitable confusion that will be caused by such rule-through-litigation also indicates that the changes CUIAB seeks to make must go through the legislative and/or formal rule making processes.

Finally, ELA, ELA's members, stakeholders, and the public should be given the opportunity to provide input into the establishment of a new and novel legal test for benefit eligibility that could have sweeping effects on labor relations and summer school operations. The legislative and/or formal rule making processes provide the opportunity for such input; the litigation process does not. Thus, the unsoundness of CUIAB's rule-through-litigation approach is further evidenced by its inherent inability to adequately consider, address, and balance the competing policy and legal interests at stake.

Therefore, ELA requests that this Court affirm the Court of Appeal.

II. LEGAL ARGUMENT

A. THE PLAIN LANGUAGE OF SECTION 1253.3, DECISIONAL LAW AND OTHER INTERPRETIVE GUIDANCE SUPPORT THE INTERPRETATION OF THE COURT OF APPEAL

Section 1253.3, subdivisions (b) and (c) operate to make any

individual employed by an educational institution ineligible for unemployment insurance benefits "during the period between two successive academic years ***or*** terms" where the individual performs service in the first of the "academic years ***or*** terms" and there is reasonable assurance that the individual will perform services in the second of the "academic years or terms." (Cal. Unemp. Ins. Code § 1253.3(b),(c), emphasis added).)

This statutory language unambiguously indicates that: a) the phrases "academic year" and "academic term" have independent meaning under the statute; b) "academic year" cannot mean calendar year or otherwise include the summer period; c) summer school does not constitute an "academic term;" and d) the statute makes no distinctions regarding eligibility for benefits based on whether an employee is temporary, on-call, or full-time. Each of these necessary conclusions demonstrates that school district employees who are not employed during a district's summer session, but who receive a contract or reasonable assurance of employment in the next academic year, are not entitled to unemployment insurance benefits during the summer. Further, this conclusion must apply to all school district employees, without regard to the nature of their employment. Nothing in the plain language of the statute creates the distinctions, definitions, structures, or processes that would be necessary to find and implement an unemployment benefit that applies only to certain part-time, per diem, and/or on-call employees.

1. "Academic year" and "academic term" must be given independent meaning

Section 1253.3 subdivisions (b) and (c) provide that benefits are not payable to employees of educational institutions in any week beginning

"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." The statutory language provides for a denial of benefits between "academic terms" *or* "academic years," and any interpretation which renders one meaningless is disfavored under well-established principles of statutory construction. Thus, independent of how "academic term" is defined, the statute provides that benefits shall also not be available between "academic years," and fundamental rules of statutory construction preclude implied nullification of this language.

2. "Academic year" does not include the summer period between the academic terms when students complete one school year and grade and advance to the next school year and grade, and therefore does not mean "calendar year"

As the trial court and Court of Appeal recognized, the term "academic year" as used in section 1253.3, cannot reasonably be read to mean "calendar year" or otherwise include the summer period between mandatory academic terms. "If the 'academic year' truly ran the entire calendar year..., a 'period between two successive academic years' could never exist." (*United Educators of San Francisco AFT/CFT v. California Unemployment Insurance Appeals Board* (2016) 247 Cal.App.4th 1235, 1250.) Since this reading would render the phrase "period between two successive academic years" meaningless, it is disfavored. (*San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 284, as modified (Dec. 11, 2002), as modified on denial

of reh'g (Jan. 9, 2003)

Further, even if the statutory language were considered ambiguous, interpretive aids confirm that "academic year" means the traditional fall and spring semesters. Most importantly, this Court should look to how the Education Code treats terms fundamental to the operation of school districts. Such a review demonstrates that the meanings given to "academic year" and "school year" that permeate the Education Code preclude treating "academic year" in the Unemployment Insurance Code to mean a 12-month period, or to otherwise include the summer period.

For example, Education Code section 45102(d) provides, "[i]f it is necessary to assign classified employees not regularly so assigned *to serve between the end of one academic year and the commencement of another*, that assignment shall be made on the basis of qualifications for employment in each classification of service that is required." (Emphasis added.) Similarly, Education Code section 45102(d)(1) provides, "[a] school district may not require a classified employee whose regular yearly assignment for service excludes all, or any part of, the *period between the end of the academic year in June to the beginning of the next academic year in September to perform services during that period.*" (Emphasis added.)

The Education Code's use of the term "academic year" in the context of educational services also excludes summer session. For example, section 51851(c) provides that driver education courses must "[b]e completed by the pupil within *the academic year or summer session* in which it was begun." (Emphasis added.) Education Code section 66028.3(d) also provides that the regents may not "increase [ ] mandatory systemwide fees after the 90th day prior to the commencement of classes for the *academic year*. This prohibition shall not apply to an increase in

mandatory systemwide fees for a *summer session*." (Emphasis added.)

Further, excluding summer session from the definition of "academic year" coincides with the general exclusion of summer session from school districts' mandatory program. The California Education Code establishes a mandatory period of instruction of at least 175 days. (Ed. Code, § 37620.) During this period, schools are mandated to provide instruction; attendance is compulsory; and certificated employees receive credit toward permanent status. (See, e.g., Ed. Code, §§ 37620, 41420, 48200, 44913.) Moreover, Education Code section 37620 expressly describes this mandatory period of instruction as occurring "during the *academic* year," which it distinguishes from the "*school* year." Although Education Code 37620 concerns year-round schools, this provision further demonstrates that the Education Code uses the term "academic year" to reference the compulsory education period. Under a traditional school schedule, compulsory education occurs during the fall and spring semesters. In contrast, summer sessions are typically non-compulsory.

Moreover, the Education Code provides no right to summer employment, as indicated by the Education Code's detailed statutory scheme regarding teacher layoffs. This scheme makes clear that the on-going right to employment applies to the academic year—and that the "academic year" does not include summer. (Ed. Code, § 44949.) Under this scheme, the rights and protections of a layoff arise upon notice that a teacher will not be employed in the next *academic* year. There is no duty to provide notice that a teacher will not be employed during the intervening summer, and the failure to do so does not constitute a layoff. Accordingly, the Education Code and the realities of summer employment in the school context require reading "academic year" to mean the period during which

schools are required to be open and students required to attend.

The California Department of Education ("CDE"), the regulatory body with the authority and expertise to interpret the Education Code, is in accord. In explaining the difference between a traditional school year and a year-round school calendar, CDE explains:

> 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.

(Year Round Education Program Guide, California Department of Education.)[3] CDE further notes, in discussing the potential merits of year-round schools, that "summer school, the typical time for remediation in traditional calendar schools, is held just once a year. *It is scheduled after the school year has been completed* . . . ." (*Ibid.* Emphasis added.)

The Department of Labor's ("DOL") guidance also demonstrates that "academic year" does not include summer. CUIAB and UESF both assert the persuasive value of DOL definitions in referencing DOL's definition of "academic terms" in the Conformity Requirements for State UC Laws, Educational Employees, the Between and Within Terms Denial Provisions (Hereafter, "Conformity Requirements").[4] However, they fail to acknowledge DOL's separate and relevant definition of "academic year." DOL defines an "academic year" as "the period of time characteristic of a

---

[3] Available at: http://www.cde.ca.gov/ls/fa/yr/guide.asp.

[4] Available at: https://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf.

school year. It most usually means a fall and spring semester."

Finally, CUIAB appears to concede the point, in acknowledging that the Merriam-Webster's Collegiate Dictionary defines "academic year" as "the annual period of sessions of an educational institution usually beginning in September and ending in June." (CUIAB OB, p. 15.) Thus, technical sources such as the Education Code, plain meaning sources such as the dictionary, and the regulatory guidance of CDE and DOL all support ELA's position that the "academic year" does not include summer session.

In sum, regardless of how "academic term" is defined, the statutory prohibition against providing benefits between "academic years" must be given meaning. Therefore, school employees who work in an academic year, and are given reasonable assurance of work in the next academic year, are not eligible to receive unemployment benefits between those years. Because the plain language of Section 1253.3, and the interpretive aids relied upon by all parties, demonstrate "academic year" does not include summer, the statute must be read to mean that any school employee who is employed in the spring term, and given reasonable assurance of employment in the next fall term, is not entitled to receive benefits during the intervening summer period.

3. Even if the "academic year" language were not controlling, summer school does not constitute an "academic term," and such an interpretation would render the "academic year," language superfluous and the reasonable assurance language illusory

CUIAB argues that the period during a district's optional summer session constitutes an "academic term"—but only for some employees. This interpretation should be rejected because it is not grounded in the plain

meaning of the statute. Indeed, such a reading would create superfluous language and render key statutory language virtually meaningless.

First, if "academic term" applied to any period where school is in session, it would make the phrase "between academic years" indistinguishable from the phrase "between academic terms." In other words, there could never be a situation where a school employee was between "academic *years*," and not also between "academic *terms*." Thus, interpreting a summer session to be an academic term renders the phrase "academic years" superfluous.

Rather, the plain language of section 1253.3 operates to deny eligibility for summer-month benefits to employees who work the spring term and receive contracts or assurances for work in the next fall term. That a district offers a summer school session has no impact on the ongoing employment or assurance of employment of academic-year employees.

Second, treating a district's intervening summer session as the next "academic term" would render the "reasonable assurance" language virtually meaningless for districts that offer a summer session. This is because, under this interpretation, providing notice of reasonable assurance in the spring that an employee will be employed in the fall, cannot constitute reasonable assurance of employment in the *next* "academic term." As a result, in districts that offer summer school, all district employees who do not actually receive work during the summer "academic term" are necessarily employees who are: a) unemployed; and b) without reasonable assurance of future work, thereby entitling them to benefits.

ELA asserts that such a result contravenes the plain meaning and intent of the statute, and that CUIAB's interpretation must therefore be rejected. Indeed, CUIAB agrees that making all employees eligible for

summer benefits would work an absurd result contrary to the statute. CUIAB attempts to address the problems arising from its own statutory interpretation by limiting its application through a "carve-out" for certain employees. However, as discussed more fully below, this exception appears nowhere in section 1253.3, and neither CUIAB nor this Court has the authority to read it into the statute.

Further, other statutory schemes administered by the DOL support the conclusion that a district's summer session does not constitute an "academic term." For example, the DOL has grappled with "academic terms" under the Family Medical Leave Act ("FMLA"). In discussing intermittent leave for instructional employees, the FMLA regulations provide in part, "[f]or purposes of these provisions, academic term means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA." (29 C.F.R. § 825.602(b).) Here, the phrase "academic term" should be read consistently with other laws concerning employee leaves of absence.

CUIAB and UESF point to DOL's interpretation of "academic term" in the Conformity Requirements for support. Their reliance is misplaced. First, as discussed above, CUIAB and UESF ignore the publication's definition of an "academic year." Second, while the Conformity Requirements generally opine that, ". . . terms can also be other nontraditional periods of time when classes are held, such as summer sessions," this statement is insufficient to support CUIAB's position. Indeed, CUIAB *opposes* application of a sweeping rule that summer session constitutes an academic term for all employees. (CUIAB RB, p. 27, fn. 16.)

CUIAB also cites the EDD's Benefit Determination Guide, Miscellaneous MI 65 ("MI 65") in support of its interpretation. However, the portions cited by CUIAB are unpersuasive. Indeed, when read as a whole, the guide supports the position of ELA. The MI 65 has a section entitled "between two successive years or terms." In discussing professional employees, it provides as follows:

> "Two successive" periods means the second term immediately follows the first. The fall semester and the spring semester are two successive terms. The end of the one traditional school year in June and the beginning of the new school year in August or September is considered two successive years.

Similarly, with respect to nonprofessional employees, the MI 65 states:

> Nonprofessional school employees are considered to be on a school recess when the break is between two successive academic years or terms. When the school break is between the end of the traditional school year in June, and the beginning of the next traditional school year in August or September, this is considered a break between two successive terms, as well as two successive academic years.

Thus, regardless of whether the summer is an "academic term," the "academic year" ends in June and a new one starts in August or September. This treatment of "academic year" by EDD supports ELA's position that, even if summer session is defined as an "academic term," benefits are still not payable because the summer falls between "academic years," at least for schools that do not operate on a continuous schedule.

Finally, as noted above, CUIAB agrees that treating summer session as an academic term for all purposes is unworkable, as it would "require

[CUIAB] to provide benefits precisely during recess periods that are fully contemplated by the parties, allowing employees to seek additional employment if they so choose." (CUIAB RB, p. 27.) It attempts to address this by applying the summer "academic term" only to on-call employees.[5] However, as discussed below, the on-call employee "carve-out" urged by CUIAB appears nowhere in the statute.

4. The denial of benefits provision does not provide any exception for on-call employees

CUIAB and UESF appear to recognize that uniform application of "academic year" and "academic term" as creating a summer academic term would create an absurd result contrary to the plain meaning and intent of section 1253.3. Hence, they purport to limit the reach of their interpretation by stating, without providing any textual support, that the application of the denial provision is limited to specified "on-call" employees. However, such an exception cannot be read into the statute. Indeed, under standard rules of statutory construction, such an interpretation must be read as contrary to the statute's plain meaning and intent.

First, there can be no dispute that the carve-out advocated by CUIAB and UESF cannot be found in the statutory language. The statute nowhere discusses, defines or distinguishes among "on-call," "substitute,"

---

[5] The MI 65 states that claimants placed on call during the summer recess period may be entitled to benefits. However, the statement is unpersuasive because it simply informs the reader as to the current state of the law by restating *Brady,* which is still listed as a precedential decision. The EDD neither endorses *Brady*, nor interprets or elucidates the law. Indeed, it is noteworthy that the EDD denied benefits for every claimant who is a part of this litigation before the decisions were reversed by CUIAB.

"per diem," or "full-time" employees. Instead, the denial of benefits provisions are plainly made applicable to "any individual."

Second, the absence of the exception should be considered intentional. Lack of the carve-out constitutes evidence that it was not intended, and therefore should not be inferred. (*In re J.W.* (2002) 29 Cal.4th 200, 209 ["The other principle, commonly known under the Latin name of *expressio unius est exclusio alterius,* is that the expression of one thing in a statute ordinarily implies the exclusion of other things."].) This is especially true given that the interpretation urged by appellants —if intentional—would necessarily be express, as it asserts an exception to the otherwise-stated rule in the statute. Further, implementation of the purported exception requires distinguishing among employees based upon their employment status (e.g., full-time, on-call, per diem, substitute, etc.). Had had the Legislature intended a carve-out based upon various possible employment relationships, these terms and distinctions would have been identified and defined in the statute. That they are not further indicates that the Legislature intended no such distinctions or exceptions.

Moreover, the perils of creating broad rules through litigation are exemplified by the strained (and contradictory) attempts of CUIAB to establish this exception. Not only do CUIAB and UESF disagree with each other over how far this contrived "on-call exception" extends, but in distancing itself from UESF, CUIAB advances an internally inconsistent interpretation of section 1253.3.

For example, in distancing itself from UESF's more extreme position that all on-call employees are entitled to unemployment benefits when a summer session is offered, CUIAB actually concedes ELA's position. It states, "[t]he Union suggests that its interpretation of section

1253.3 applies only to 'substitute teachers and paraprofessional employees,' and not to full-time salaries professionals. [Cite.] But that view cannot be reconciled with the text of the between-term exception which states that it applies to '*any* individual' who performs services for an educational institution." (CUIAB RB, p. 27, fn. 16.) Thus, at least in the context of analyzing reasonable assurance, CUIAB recognizes that there is no statutory language that limits benefits to substitutes, nonprofessionals, or on-call employees.

CUIAB cannot have it both ways. Coherent law must give the same term the same meaning throughout its provisions. CUIAB appears unaware that its statement concerning UESF's interpretation must apply equally to CUIAB's own interpretation of "academic term" or "academic year." As such, CUIAB's own creation of an "academic term" for some on-call employees based on "reasonable expectations," or "loss of customary work," or being placed "on-call" is equally unsupported and violates the plain language of the statute. It also would negate the reasonable assurance language for the hundreds of school districts that offer a summer session.

Moreover, CUIAB has previously been counseled by courts that distinctions based on the employee's status as a substitute are impermissible in the face of clear statutory language to the contrary. In *Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 682 (*Long Beach*), the court agreed with the trial court that "[CUIAB]'s reliance on the tenuous impermanent nature of substitute teacher Smith's employment...are irrelevant to the 'reasonable assurance' issue within the meaning of section 1253.3." "Consideration of such tenuous aspects are extrinsic to clear legislative language and sources and therefore cannot be a basis for resolving the 'reasonable assurance' issue."