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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.	Case No. S235903
SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent, v. **CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,** Defendant and Appellant.	

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The Honorable Richard B. Ulmer, Jr., Judge

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

The petition for review filed by the California Unemployment Insurance Appeals Board presents the following issues:

1. 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.

2. 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.

The petition for review filed by United Educators of San Francisco AFT/CFT, AFL-CIO, NEA/CTA (United Educators or Union) presents the following issues:

1. When determining eligibility for unemployment benefits, does summer school in a K-12 district constitute an "academic term"?

2. Were the School District and Unemployment Insurance Appeals Board collaterally estopped from re-litigating the issue of what constitutes an academic term?

INTRODUCTION

The Court of Appeal erred in holding that substitute teachers and certain other public school employees who do not receive an annual salary, but instead are paid only for days worked, are categorically precluded from obtaining unemployment benefits when they are placed "on call" for a summer school session but are not called in due to a lack of work. These employees, just like their counterparts in the private sector, are entitled to the essential temporary support provided by California's unemployment insurance program when they find themselves without work and without pay through no fault of their own. Nothing in the relevant statute, Unemployment Insurance Code section 1253.3, requires or tolerates a contrary result.[1]

Subdivision (a) of section 1253.3 provides that unemployment benefits are available to persons working for government or non-profit educational institutions, just as they are to persons working in the private sector, subject to specific exceptions. Subdivisions (b) and (c) prohibit benefits for school workers "during the period between two successive academic years or terms" where the employee worked in the first academic year or term and has been given a "reasonable assurance" of work in the second. For ease of reference, the Board will call this the "between-term" exception.

The statutory scheme does not clearly define "between ... terms," but traditional tools of statutory construction establish that this exception is intended to exclude benefits only where a school employee is on a scheduled recess or vacation period, as determined by the individual employee's contract and schedule. The legislative history makes clear that

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

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. This specific type of educational employee is thus precluded from receiving unemployment benefits during contractually contemplated recess or vacation periods, including the summer term, for which these employees are already paid. There is no indication, however, that Congress intended to create a blanket exclusion of summer benefits for all educational employees, regardless of the terms of their employment.

Consistent with this legislative intent, the Board and other agencies charged with implementing the between-term exception have consistently construed it to deny benefits only where a school employee is not working due to a recess or vacation reflected in his or her contract or schedule. That interpretation is longstanding, consistent, and based on state and federal agencies' subject-matter expertise, and thus is entitled to great weight. Further, it is consistent with the purpose of the Unemployment Insurance Code, which is to protect those who become unemployed without fault, thereby "reduc[ing] involuntary unemployment and the suffering caused thereby to a minimum." (§ 100.) A categorical exclusion of summer benefits for on-call, non-salaried school employees would directly undermine this statutory purpose, causing hardship for a significant number of the State's most economically vulnerable workers.

This Court should hold that where a non-salaried school employee is placed "on call" by a school district for a summer school session, that employee is not between academic terms during that session. Rather, that employee is scheduled to work, is generally expected to be available to work, and in many cases will forgo other employment during that period. If the employee is not called in to work during this "academic term," he or

she is generally entitled to receive unemployment benefits under the Unemployment Insurance Code, and section 1253.3 should not be read to preclude benefits.

The Board respectfully requests that this Court reverse the Court of Appeal's decision and remand for proper application of the between-term exception.[2]

BACKGROUND

Unemployment insurance is a cooperative venture between the state and federal governments. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024, citing 26 U.S.C. §§ 3301, et seq.)[3] The Federal Unemployment Tax Act (FUTA) imposes an annual federal tax on affected "'employers'" equal to a specified percentage of the "'total wages'" paid in a calendar year. (*Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 842, quoting 26 U.S.C. § 3301.) Employers may claim a partial credit against the federal tax if they make contributions to a state unemployment compensation program that meets certain minimum requirements set forth in FUTA. (*Ibid.*; see also 26 U.S.C. §§ 3302, 3304.) State programs that conform to the federal criteria receive subsidizing grants from the federal government.

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[2] The Union contends that the District and the Board are collaterally estopped from re-litigating the question of what constitutes an "academic term," and that the law was settled by a 2005 superior court decision in a different case involving the District and the Board. (See Union Question Presented 2.) But this Court has now granted review. In the Board's view, this Court is uniquely positioned to reach and settle the issues presented in this case, which present pure questions of law affecting the public interest.

[3] (See generally *California Dept. of Human Resources Development v. Java* (1971) 402 U.S. 121, 125 [describing the unemployment insurance compensation scheme]; *Campos v. Employment Development Dept.* (1982) 132 Cal.App.3d 961, 966-967 [describing the federal-state structure of unemployment insurance].)

(*Russ v. Unemployment Ins. Appeals Bd.*, *supra*, 125 Cal.App.3d at p. 842, citing 42 U.S.C. §§ 501-503.) California has chosen to participate in the federal unemployment insurance program by "adopting and maintaining an unemployment compensation law which closely conforms to the criteria established in [FUTA]." (*Ibid.*; see also § 101 [California's Unemployment Insurance Code is "part of a national plan of unemployment reserves and social security"].)

In general, FUTA requires unemployment benefits to be paid to public-sector employees "in the same amount, on the same terms, and subject to the same conditions" as private-sector employees. (26 U.S.C. § 3304(a)(6)(A); see also § 1253.3, subd. (a).)[4] But FUTA includes a few exceptions to this equal treatment mandate. Relevant here, FUTA provides that for individuals providing "services in an instructional, research, or principal administrative capacity for an educational institution"—such as teachers—unemployment compensation "shall not be payable"

> 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) ... 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.

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[4] Originally, the unemployment compensation system provided benefits only to private-sector employees. (See, e.g., Social Security Act, Pub.L. No. 74-271, § 903 (Aug. 14, 1935) 49 Stat. 640.) Over time, the system was expanded to include most public-sector employees. (See, e.g., Unemployment Compensation Amendments of 1976, Pub.L. No. 94-566 (Oct. 20, 1976) 90 Stat. 2667 [expanding unemployment benefits to public school employees, among others].)

(26 U.S.C. § 3304(a)(6)(A)(i), italics added.) FUTA similarly provides that for individuals providing other "services … for an educational institution"—such as support staff—compensation "may" be denied between two successive academic years or terms if the employee worked in the first academic year or term and has a reasonable assurance of working in the second. (*Id.*, § 3304(a)(6)(A)(ii).)

The between-term exception was originally added to FUTA as part of the Employment Security Amendments of 1970, which expanded benefits to most employees of "institution[s] of higher education." (Pub.L. No. 91-373, § 104 (Aug. 10, 1970) 84 Stat. 697.) Congress included the exception to address a "distinctive characteristic of the contractual employment relationship between the instructor, researcher, or administrative employee and the institution" of higher education. (Sen.Rep. No. 91-752, 2d Sess., p. 16 (1970).) As Congress concluded, "[i]t is common for faculty and other professional employees of a college or university to be employed pursuant to an annual contract at an annual salary, but for a work period of less than 12 months." (*Ibid.*) These annual salaries are "intended to cover the entire year, including the summer periods, a semester break, a sabbatical period or similar nonwork periods during which the employment relationship continues." (*Ibid.*) The exception was adopted to "preclude payment [of unemployment benefits] in such situations." (*Ibid.*)

Six years later, Congress extended unemployment benefits to all remaining educational employees as part of the Unemployment Compensation Amendments of 1976. (Pub.L. No. 94-566, § 115(a) (Oct. 20, 1976) 90 Stat. 2670.) In the Amendments, Congress also broadened the 1970 Act's between-term exception to include instructors, researchers, and principals employed by any educational institution. (*Id.*, § 115(c).) Like college professors and administrators, school teachers are paid an annual salary, but are only expected to be in the classroom for nine months.

(Remarks of Sen. Long, 122 Cong. Rec. 33285 (daily ed. Sept. 29, 1976).) The exception was intended to preclude these types of employees from collecting unemployment benefits during the "summer recess." (*Ibid.*)[5]

In 1978, California adopted a between-term exception for educational employees that closely tracks FUTA, as the State was required to do to participate in the federal program.[6] California's exception for teachers and principal administrators provides that individuals who serve "in an instructional, research, or principal administrative capacity for an educational institution" are not entitled to benefits for (a) "the period between two successive academic years or terms"; (b) the "period between two regular but not successive terms" where the between-term period is contemplated by the employment agreement; or (c) a paid sabbatical provided for by 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

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[5] In 1977, Congress amended the between-term exception to add the words "or terms" after the phrase "[between] two successive academic years." (Emergency Unemployment Compensation Extension Act of 1977, Pub.L. No. 95-19, § 302(c)(1)(B) (Apr. 12, 1977) 91 Stat. 44.) Congress provided little explanation for this amendment, explaining that it was intended to correct an "oversight" in the language added by the 1970 Act, which only precluded awarding benefits "during the period between two successive academic years." (Employment Security Amendments of 1970, Pub.L. No. 91-373, § 104(a) (Aug. 10, 1970) 84 Stat. 697.) Congress added the words "or terms" to ensure that the between-term exception would "provide for the denial of benefits during the period between successive academic terms as well as between successive academic years." (H.R.Rep. No. 95-82, 1st Sess., p. 12 (1977).)

[6] The California Legislature adopted these provisions to comply with the requirements to obtain federal funding under 26 U.S.C. §§ 3302 & 3304(a)(6)(A)(i)-(ii) and 42 U.S.C. §§ 501-503. (See Stats. 1978, ch. 2, § 106 [enactment of act containing between-term exception was "necessary to implement" FUTA].)

> that the individual will perform services for any educational institution in the second of the academic years or terms.

(§ 1253.3, subd. (b).) California adopted a similar provision applying to all other types of educational employees, precluding benefits "during a period between two successive academic years or terms" when the employee worked in the first academic year or term and has a "reasonable assurance" of work in the second. (§ 1253.3, subd. (c).)[7]

STATEMENT OF THE CASE

The 26 claimants in this case were employed by the San Francisco Unified School District during the 2010-2011 school year either as substitute teachers on an on-call or as-needed basis, or as paraprofessional classified employees such as classroom paraprofessionals, instructional aides, custodians, and others who are not paid for the summer months unless they are actually performing services. (CT 10, 719.)[8] Each claimant was informed by the District that he or she had a "reasonable assurance" of employment during the 2011-2012 school year, beginning August 15, 2011. (CT 719-720.)

The spring semester of the District's 2010-2011 school year ended on May 27, 2011, and the fall semester of the 2011-2012 school year began on

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[7] While subdivision (c) closely tracks the language of subdivision (b) with respect to the between-term exception, teachers and principal administrators are treated differently than other school employees in some respects. For example, employees who are denied benefits solely under subdivision (c) may obtain retroactive benefits if they are not offered employment in the next term (§ 1253.3, subd. (c)), while teachers and administrators denied benefits under subdivision (b) are not entitled to such retroactive benefits (§ 1253.3, subd. (b)). These differences are not relevant to the issues before the Court. (Cf. slip opn. at p. 13, fn. 15.)

[8] The facts are undisputed and were stipulated by the parties. (CT 718-725.) Each of the 26 claimants is a member of the Union. (CT 719.)

August 15, 2011. (CT 720.) The District operated a summer academic session 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. (CT 720.) No instruction was offered by the District between May 27, 2011 and June 9, 2011, or between July 14, 2011 and August 15, 2011. (CT 720.)[9]

After the end of the 2010-2011 school year, each of the claimants applied for unemployment benefits for the entire period between May 27, 2011 and August 15, 2011. (CT 720.) The Employment Development Department (EDD) denied each claim. (CT 720.) The claimants appealed to an Administrative Law Judge (ALJ) who, after hearings at which each claimant was represented by the Union, reversed EDD and held that each employee was entitled to benefits for the period of time during the summer of 2011 when that claimant did not work. (CT 720.)

On appeal, the Board reversed the ALJ's decisions as to each of the claimants, either in whole or in part. (CT 720.) The Board concluded that substitute teachers and other employees may collect unemployment benefits for the period during which summer school was in session in 2011 if they had worked during the 2010 summer session and thus had a reasonable expectation of work during the 2011 summer session. (CT 720-722.)

On September 6, 2012, United Educators, which is the exclusive representative of the 26 claimants in this case, filed a first amended petition for writ of administrative mandamus against the Board as respondent and the District as the real party in interest. (CT 7.) United Educators alleged that the claimants were entitled to unemployment benefits for the entire

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[9] In California, each district has discretion to make its own decisions concerning budgetary planning, hiring, and organizational activities for summer sessions.

period between the end of the Spring 2011 semester and the start of the Fall 2011 semester. (CT 15.) On October 26, 2012, the District filed a cross-complaint seeking declaratory relief against both the Board and United Educators, alleging that all of the claimants were ineligible for benefits during the entire period between the Spring 2011 and Fall 2011 semesters. (CT 328-333.)

While the trial court proceedings were ongoing, the Board adopted a precedent benefit decision in *In re Alicia K. Brady* (2013) CUIAB Case No. AO-337099, Precedent Benefit Decision No. P-B-505 (*Brady*). (CT 990-1000.)[10] In *Brady*, the Board 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 explained that the phrase "during the period between two successive academic years or terms" in section 1253.3, subdivision (b) is not clear on its face, and thus analyzed Congress's intent in enacting the federal statute on which section 1253.3 is based. (*Id.* at pp. 4, 6.) It noted that in enacting this between-term exception under FUTA, Congress meant 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 noted that the case law and state and federal agencies have consistently construed statutory denials of unemployment benefits narrowly. (*Id.* at pp. 7-8.) Accordingly, the Board concluded that "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," and

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[10] The Board may issue a precedent benefit decision when a case involves a significant legal or policy determination of general application that is likely to recur. (§ 409; Gov. Code, § 11425.60.)

thus that benefits are not precluded under section 1253.3, subdivision (b). (*Id.* at p. 9.)

The District then filed an amended cross-complaint, alleging that *Brady* was wrongly decided. It asked the court, in addition to ruling on the individual claims, to declare the precedent decision invalid under section 409.2. (CT 879-886.)

On July 15, 2014 the trial court issued a decision concluding that none of the claimants were entitled to unemployment benefits for any time between the end of the Spring 2011 semester and the start of the Fall 2011 semester. (CT 1091-1102.) In addition, the court declared the *Brady* decision invalid. (CT 1102.)

The Board and United Educators appealed. (CT 1108, 1131.) After consolidating the 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.) It held that the term "academic year" in section 1253.3, subdivision (b) means the traditional nine-month period during which school is "regularly in session for all students." (*Id.* at pp. 14-15; see also *id.* at p. 14, fn. 16.) The court also reasoned that treating the summer session as an "academic term" would render the "reasonable assurance" language in section 1253.3 "meaningless and inoperable." (*Id.* at p. 15.) It further determined that the majority of jurisdictions to consider similar statutory provisions had reached the same conclusion. (*Id.* at pp. 15-18.) Based on its statutory analysis, the court held that under section 1253.3, a summer school session can never constitute an "academic term," and always falls "during the period between two successive academic years or terms." (*Id.* at pp. 11-18.)

Both the Board and United Educators petitioned this Court for review. On September 14, 2016, this Court granted both petitions.

STANDARD OF REVIEW

The interpretation of a statute is a question of law that this Court reviews de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) In undertaking its independent review, this Court "consider[s] the interpretation of the agency charged with its implementation" and "afford[s] the agency's interpretation the deference that is appropriate under the circumstances." (*California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 381, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).) The weight given to the agency's interpretation depends on several factors, including (1) the agency's specialized "'expertise and technical knowledge,'" which is especially relevant "'where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion'"; (2) whether the agency's interpretation is based on "careful consideration by senior agency officials"; (3) whether the agency has "'consistently maintained the interpretation in question, especially if [it] is long-standing'"; and (4) whether the agency's interpretation was "contemporaneous with legislative enactment of the statute being interpreted." (*Yamaha*, *supra*, 19 Cal.4th at pp. 12-13, citations omitted.)

As set out below, these factors weigh in favor of giving significant weight to the Board's longstanding and considered view that section 1253.3 permits an award of unemployment benefits to non-salaried school employees in certain circumstances. But whether or not this Court gives weight to the Board's interpretation, the Court of Appeal's categorical prohibition of any employee from collecting unemployment benefits for a summer school session must be rejected.

ARGUMENT

I. LEGAL STANDARD AND SUMMARY OF ARGUMENT

The Court's "fundamental task" in interpreting statutes "is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.]" (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198, quotation marks omitted.) This analysis "begin[s] with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent. [Citation]." (*Ibid.*, quotation marks omitted.) If there is "'no ambiguity in the statutory language,'" then the "'plain meaning controls.' [Citation.]" (*Ibid.*)

If, however, the statute's text "may reasonably be given more than one interpretation," then the Court "may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.]" (*Ibid.*, quotation marks omitted.) The views of the agency charged with implementing the statute may also assist the Court in conducting its independent review. (*California Bldg. Industry Assn. v. Bay Area Air Quality Management Dist.*, *supra*, 62 Cal.4th at p. 381.) Courts "must … give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*In re Reeves* (2005) 35 Cal.4th 765, 771, fn. 9, quoting *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.)

Section 1253.3 precludes benefits "during the period between two successive academic years or terms" where an educational employee