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

v.

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

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
REAL PARTY IN INTEREST

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 NUMBER CPF 12-512437
HONORABLE RICHARD B. ULMER, JR., PRESIDING

REPLY BRIEF OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO TO THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ANSWERING BRIEF ON THE MERITS TO OPENING BRIEFS ON THE MERITS OF THE UNITED EDUCATORS OF SAN FRANCISCO AND THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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

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

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
REAL PARTY IN INTEREST

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 NUMBER CPF 12-512437
HONORABLE RICHARD B. ULMER, JR., PRESIDING

REPLY BRIEF OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO TO THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT'S ANSWERING BRIEF ON THE MERITS TO OPENING BRIEFS ON THE MERITS OF THE UNITED EDUCATORS OF SAN FRANCISCO AND THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

State Cases

State Statutes

TABLE OF AUTHORITIES (cont'd)

Page

I. INTRODUCTION

Petitioner/Appellant United Educators of San Francisco ("Petitioner" or "UESF") submits this Reply Brief to the Answering Brief of the Real Party in Interest, the San Francisco Unified School District ("SFUSD"). This Reply Brief also addresses the arguments of the California Unemployment Insurance Appeals Board ("CUIAB") and the Answering Brief of the SFUSD to the CUIAB's Opening Brief.[1]

All parties agree that the purpose of granting unemployment to education employees was to treat them on an equal basis with other employees. But Congress recognized that education employees are often paid on a yearly salary basis and they do not work during summer vacations and other recess periods. Congress intended that such yearly salaried employees should not receive unemployment during those vacation periods. However, in this case we have employees who are not paid on a yearly salary and a school district that has an education program where work is available during a summer session. The question is whether those factors warrant the application of the denial provisions or the broader principle of providing unemployment benefits to employees who are not working

The central issue in this case is what constitutes an "academic term" for purposes of Unemployment Insurance Code section 1253.3, subdivisions (b), (c), which denies unemployment benefits to school employees during any week that begins during the period between two successive academic years or terms. The SFUSD offers a summer school (also referred to as "summer session") to students. Summer school is offered during what would otherwise be a recess period between the spring semester of one school year and the fall semester of the succeeding academic year or term. If the summer session is an academic term, then a school district, if it wishes to avoid paying

[1] We refer to the SFUSD Answer Brief to UESF's Opening Brief as "SFUSD-Ans.-Br.-UESF." We refer to the SFUSD Answer Brief to the CUIAB Opening Brief as "SFUSD-Ans.-Br.-CUIAB." We refer to the CUIAB Opening Brief as "CUIAB-Op.-Br." UESF's Opening Brief is "UESF-Op.-Br."

unemployment benefits to the employees and take advantage of the denial language of section 1253.3, subdivisions (b), (c), must either give reasonable assurance to employees of employment during the summer session or offer them employment during that summer session. The SFUSD did not give reasonable assurance of employment to 26 members of the Petitioner during the summer session that was maintained by the SFUSD in 2011. Nor did the District employ them during the summer session. The 26 claimants should have been paid unemployment benefits by the CUIAB because that summer session was an academic term, and those payments should have been charged against the unemployment insurance account of the SFUSD.

In a similar case brought by the CUIAB against the SFUSD in 2005, a San Francisco Superior Court judge found that the summer session is an academic term. That finding is entitled to issue preclusion.

Both of the Answering Briefs of the SFUSD repeat arguments made to the court below without addressing directly Petitioner's arguments.

Although Petitioner also addressed, to a limited degree, the position of the CUIAB in the UESF-Op.-Br., we more fully address it in this Reply Brief. Petitioner does not fully agree with the CUIAB's position but recognizes that it is an alternative interpretation, which may be sustainable only if this court determines that the summer session was not an academic term.

As a final introductory note, this record concerns only the unemployment insurance rights of 26 employees, 10 of whom are permanent classified paraprofessional employees, and the remaining 16 substitute certificated employees.

II. FACTS

The facts were the subject of a stipulation and are not contested here. However, the SFUSD ignores the following critical stipulations:

> 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.

[¶] ... [¶]

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.

(2CT720.)

The parties stipulated that both the term ending May 27, 2011, and the term beginning August 15, 2011, were sessions and that the summer instructional period was also a session. The SFUSD offered no evidence that the summer session was any different from the sessions that ended in May 2011 or began in August 2011. Nor did the SFUSD offer any rationale in its brief why it should not be bound by this stipulation. Indeed, the SFUSD conceded that the District "operated a summer session during which instruction was given to students." (SFUSD-Ans.-Br.-UESF,p.10.) It correctly points out that there were periods between the sessions when no instruction was given. As we point out, however, the on-call employees and substitute teachers involved in this case are entitled to unemployment benefits for the entire period.

The SFUSD suggested that there "are additional material facts elicited elsewhere in the record." (SFUSD-Ans.-Br.-UESF,pp.11-12.) None of those facts is explained as in any way distinguishing the prior spring session from the summer sessions. Thus, this Court should accept the basic proposition that the summer session is fundamentally the same as the fall and spring sessions for purposes of entitlement to unemployment insurance. As we noted in UESF-Op.-Br., there are several principles of statutory construction that govern and should compel this Court to conclude that there is no difference between the summer session and the spring and fall sessions for purposes of the issues in this case.

Once the conclusion is reached that the summer session is indistinguishable from the spring and fall sessions, it logically follows that it is also an academic term. The

SFUSD offers no facts to support a different conclusion. The SFUSD, like the court below, retreats to an argument that one provision in the Education Code, section 37620, compels the conclusion that this summer session is not an academic term or part of an academic year. See Part III.A.4,7.

III. ARGUMENT

A. THE SFUSD'S ARGUMENTS THAT THE SUMMER SESSION CANNOT BE AN ACADEMIC TERM MUST BE REJECTED.

1. The SFUSD retreats to the argument that even though the summer session is no different than the spring or fall sessions, it cannot be an academic term as a matter of law.

Since there are no relevant factual differences between the summer session and the preceding spring session and the succeeding fall session, the SFUSD argues that the summer session (term) cannot be considered "an 'academic term' under U.I. Code § 1253.3(c)." (SFUSD-Ans.-Br.-UESF,p.15.) The SFUSD offers that "it makes no sense to treat the DISTRICT's summer session as an 'academic term.'" (*Ibid.*) We address those arguments below.[2]

2. The 26 employees are substitute teachers and paraprofessional employees whose employment relationship is different from permanent or probationary employees.

There is a significant difference to the outcome in this case because the employees in question are either day-to-day substitute teachers or on-call classified employees of the SFUSD and not permanent or probationary. In order to offer an academic program to students in grades K through 12, the SFUSD must employ both certificated and classified employees. In the normal course of events, substitute employees are going to be

[2] We concede that the summer term instructs fewer students than the fall and spring terms. However, the day-to-day substitute teachers serve the same need of being available to fill in when otherwise engaged teachers are unable to be present. The on-call classified employees serve the same function they serve during the other terms, assisting the school to provide its instructional program. Thus the number of students and employees involved in the summer session is not relevant to the issues in this case. The number of certificated and other employees contracted to provide services during summer sessions may affect the number of on-call and day-to-day substitutes who are needed and those who are entitled to unemployment benefits. The fewer employees contracted to provide services, the fewer opportunities there will be to substitute.

necessary for the SFUSD to replace certificated and classified employees who are ill or otherwise unable to come to work during the summer session just as in the spring and fall terms. The SFUSD expected that, otherwise it would not have given any of those employees a reasonable assurance of employment letter for the fall semester of the succeeding academic year. The permanent employees or probationary employees are not on-call during the spring and fall terms. They are employed throughout the term and have no expectancy of being on-call or working during the summer session. As for the 26 employees involved in this case, they had an expectancy of some work in the summer. (CUIAB-Op.-Br.,p.9.)

The SFUSD does not articulate why the fact that these employees "have to apply separately to work during the summer session" affects their entitlement to unemployment. (SFUSD-Ans.-Br.-UESF,p.15.) The solicitation and acceptance of the application suggests that they will be working. If a substitute or on-call employee does not apply, then the person is not seeking work from the SFUSD and presumably is not entitled to benefits.[3] That has no effect on the fact that the SFUSD operates a summer session which is indistinguishable from the spring and fall sessions.

3. The SFUSD's argument that because employment during the summer is voluntary, summer session is not an academic term, is irrelevant to the issue in this case.

The SFUSD argues that because employees are not guaranteed employment during the summer that, therefore working during the summer is "voluntary." The SFUSD states, "Therefore, it makes no sense to treat the DISTRICT's summer session as an 'academic term' conferring the same rights of eligibility as employment during the DISTRICT's regular school year." (SFUSD-Ans.-Br.-UESF, p.15.) Our point is that the SFUSD solicits these employees to work during the summer. The employees make themselves available. If they are asked to work, they get paid. If they don't work, it is

[3] The person could be working elsewhere or choose to take the summer off as a vacation, either of which would disqualify them from benefits. Thus, to the extent the work is "voluntary" (SFUSD-Ans.- Br.-UESF,p.15), this supports the position of UESF.

because the SFUSD does not offer them work. Their entitlement to unemployment benefits may vary with the amount of work offered each week. Thus, they are not on vacation or recess. They have made themselves available, but they are not working.

It is not clear why the SFUSD describes summer employment as "at will" employment. . "At will employment," a common law concept is employment that the employer may terminate at any time without cause.[4] That does not describe anything that pertains in this case. It is a "red herring," a device that detracts from the main issue in this case.

4. The SFUSD engages in circular reasoning when it asserts the argument that summer school cannot be an "academic term" because it falls outside of the academic year.

In our Opening Brief, we extensively addressed the issue of whether there was an applicable statutory definition of academic year which necessarily excluded the summer session from being outside of any academic year. (UESF-Op.-Br.,pp.19-29.) The SFUSD has not addressed directly the arguments in the UESF-Op.-Br..

The SFUSD argues that a summer session, because it is not required for "compulsory education laws that mandate public schools to provide instruction," and does not "allow certificated employees to receive credit for permanent status" cannot be an "academic term." There is no legal or logical relationship between the characterization of an academic term and receiving credit towards achievement of permanency. Permanent status, or tenure, is a creature of the Legislature, and can be extended or denied based upon legislative action. "Statutes enacted to establish tenure for state employees must be strictly construed. No person can gain permanent tenure or be advanced to a higher class in the service save only by following the statutes enacted by the legislature and the rules adopted by the administrative board." (*Brintle v. Board of Education* (1941) 43 Cal.App.2d 84, 89.)

[4] Labor Code section 2922 defines at will employment. These principles do not govern the application of the employees of the SFUSD whose employment is governed by the Education Code.

The SFUSD argues that Education Code section 37620, which states, "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." The SFUSD's argument is puzzling. As we pointed out, there is no formal definition of "academic year" in the Education Code that applies. There are definitions that apply only to community colleges, private colleges, and vocational schools. (UESF-Op.-Br.,p.24 and CUIAB-Op.-Br.,p.15.)

The SFUSD, like the court below, reaches for the definition that is contained in section 37200 of the Education Code that defines a school year: "The school year begins on the first day of July and ends on the last day of June." There is no reference in that description to "academic year." The Legislature did provide that during an academic year there shall be at least 175 days, during which schools and classes shall be conducted. There is nothing in that description of the minimum length of an academic year that precludes a summer session from being an "academic term." Thus, when the SFUSD argues, "summer school cannot be an 'academic term' because it falls outside of the academic year" it merely begs the question, since, except for stating that an academic year shall have no fewer than 175 days of instruction, there is no formal definition in Education Code section 37620 or anywhere else in the Code, of an academic year.

The Legislature described a "school year" in Education Code section 37200. It used the term but did not define an "academic year" in Education Code section 37620. However, in section 37620, the Legislature instructs us that teaching sessions and vacation periods shall be established without reference to the school year as defined in section 37200, and that during the "academic year" schools and classes shall be

conducted for no fewer than 175 days.[5] The "no fewer than" establishes a minimum. The inference is that it can be longer, up to no more than 365 days (less mandated holidays). Including weekends, vacations and holidays, that period could extend anywhere from 35 to 45 weeks for just a spring and fall term. Adding a third or fourth term, it could extend to 52 weeks. It leaves open further how those academic terms are staggered, broken up or created within that academic year. The "no fewer than" phrase confirms that the SFUSD's maintenance of a spring, fall and summer academic term is consistent with the provision.

We further pointed out that "[t]he term 'academic year' appears roughly 150 times in the Education Code."[6] (UESF-Op.-Br.,p.26.) The SFUSD has not explained how so many references could have a common and certain meaning which would exclude a summer session. There are so many varied applications of the phrase that it cannot categorically exclude the summer session. Moreover, it is not a natural use of the word "year" to make it 175 days, which is less than half of the year. Similarly, the term "school year" can be found 453 times in the Education Code. But the Code makes it clear it cannot have a dual meaning of either a fiscal year or an academic year. (Ed.Code §25926.) Nothing suggests the academic year must be consecutive without recess or vacations or holidays or weekends or that it must be anything less than 365 days.

5. **The citations to *Russ v. Unemployment Ins. Appeals Bd.* and *Board of Education v. Unemployment Ins. Appeals Bd.* are not relevant.**

The SFUSD quotes language in *Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834 that states:

---

[5] SFUSD's argument suggests that the instructional days requirement of Educational Code section 37620 would not include instructional days of a summer session. (SFUSD-Ans.-Br.-UESF p.30.) SFUSD offers no support for that contention which would mean that such instruction would not count for many other purposes, such as graduation.

[6] This number was determined by using the search tool available at http://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml and searching for "academic year" within the Education Code. The same search for "academic term" reveals only 20 references.

> "Subparagraph (i) of the amended subsection requires in effect that a conforming state must deny eligibility for summertime benefits to a professional school employee (such as a teacher), at any grade level, if there is 'a contract' providing for his or her reemployment *in the fall* or 'reasonable assurance' of such reemployment. Subparagraph (ii) of the amended subsection provides in effect that a conforming state may deny eligibility for summertime benefits to a nonprofessional school employee at a subcollegiate grade level (such as appellant) if there is 'reasonable assurance' (only) of his or her reemployment *in the fall*."

(SFUSD-Ans.-Br.-UESF,p.17, original italics and underscoring [quoting *Russ*, at p.843].)

The quoted language in *Russ* is not applicable to the instant case. The *Russ* case raised the question of what words or actions constituted "reasonable assurance" that an individual would perform services in the second of two successive academic years or terms. It did not raise the issue of what constituted an academic term. In fact, there was no summer session or summer school in that school district in the summer of 1978, so the question of whether summer session constituted an academic term could not arise. The issue was not whether or not the summer session constituted an "academic term" for purposes of receiving benefits during the summer between the two academic years. Thus, the language quoted above from the *Russ* case is merely dicta.

The SFUSD's reliance on *Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, 690 footnote 7, is also dicta. In that footnote, the court noted that a substitute teacher in between academic years or terms was not unemployed in the sense of being attached to the general labor force which was seeking other employment on a permanent basis. . There was no issue in that case as to whether or not a summer session constituted an "academic term" because there was no summer session. The appellant in that case was simply attempting to get unemployment insurance benefits during the summer recess. Since there was no summer session, there was no issue of whether or not summer session constituted an academic term.

6. The SFUSD's reliance upon the Congressional Record is misplaced.

The SFUSD argues that the Congressional Record demonstrated that school-term employees were not intended to be eligible for unemployment benefits during the summer period between academic years. The SFUSD quotes the Congressional Record:

> The bill prohibits payments of unemployment compensation benefits during the summer, and other vacation periods, to permanently employed teachers and other professional school employees. ... (Congressional Record, Vol. 122, Part 27, 35132.)(CT, Vol 3, 0755)

(SFUSD-Ans.-Br.-UESF,pp.17-18.)

It is difficult to understand the SFUSD's reliance on this reference since the quotation refers to "*permanently* employed teachers and other professional school employees." This has no relevance to the 26 individuals in the instant case, who are substitute employees and paraprofessional employees who have no "permanent" rights to employment in the District.

A review of the legislative history shows concern only with permanent employees who are on vacation or recess. (CUIAB Motion for Judicial Notice, Exhibits pp.37, 51, 79, 81, 85, 108-109 and 148.) Typical is the following statement:

> There is, however, one distinctive characteristic of the contractual employment relationship between the instructor, researcher or administrative employee and the institution which led the committee include a special provision in the bill. It is common for faculty and other professional employees to be employed pursuant to an annual contract and an annual salary, but for a work period of less than 12 months. The 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 employee relationship continues.

(*id.* at p.37, Senate Report on first version of amendments to FUTA.)

The legislative history thus supports the UESF's position. Congress showed no intention of excluding day-to-day or on-call employees who are not provided an annual salary from their entitlement to unemployment. Moreover, this history supports the

alternative rationale of the CUIAB because these employees are not working because of a loss of work where they otherwise would have some reasonable expectation of employment. (CUIAB-Op-Br.,pp.16-18.) Since Congress's concern was the annual salary expectation, which does not apply to day-to-day and on-call employees, granting them unemployment during periods when they do not work is consistent with the purpose of the FUTA and the state enactments.

The SFUSD argues that the Department of Labor's conformity requirement supports its position because "an academic term must fall 'within an academic year.'" (SFUSD-Ans.-Br.-UESF,p.26.) This reflects the logical failure of the SFUSD's arguments. The summer session is part of the "academic year," not outside of it. As noted even by the SFUSD, "an academic term constitutes 'that period of time within an academic year when classes are held.'" (*Id.* at p.25, italics omitted.) But the SFUSD cannot refute the obvious facts that classes are held during the summer term and that that the instructional program is part of the academic program.

The SFUSD points to the recent Advisory of the U.S. Department of Labor, Unemployment Insurance Program Letter No.05-17 (Dec. 22, 2016), at <https://wdr.doleta.gov/directives/attach/UIPL/UIPL_5-17.pdf> (as of Feb. 24, 2017) (hereafter UIPL No.05-17). (SFUSD-Ans.-Br.-UESF p.26.) That Advisory supersedes an Advisory Letter not relied upon by the SFUSD, CUIAB or UESF or the Court of Appeals because it is largely irrelevant. (U.S. Dept. Labor, Unemp. Ins. Program Letter No.04-87 (Dec. 24, 1986), at <https://ows.doleta.gov/dmstree/uipl/uipl87/uipl_0487.pdf> [as of Feb. 24, 2017].) Both Advisories address what constitutes "reasonable assurance," which is not an issue in this case. The SFUSD disingenuously asserts that the recent Advisory states "that a summer session could only be treated as an academic term if 'the college has a 12-month academic year, consisting of four quarters.'" (SFUSD-Ans.-Br.-UESF p.26 [quoting UIPL No.05-17, *supra*, at Attachment II, p.11].) This misstatement is consistent with the SFUSD's position that a summer term cannot be part of the

academic year. But the DOL recognizes that a four quarter system, or a two term system, or, as in this case, a three term system, all fall within an academic year. The Advisory constantly refers to "the following academic year or term" without in any way suggesting, contrary to other Advisories, that a non-traditional academic year of four quarters or three sessions or terms, do not fall within any academic year. The SFUSD's arguments undermine its own position.[7]

7. The SFUSD confusingly argues that Education Code section 37620 creates only one "academic year."

The SFUSD asserts that the Education Code demonstrates a statutory intent to distinguish the "mandatory regular school year" from the "permissive summer school term." (SFUSD-Ans.-Br.-UESF,p.19.) The phrases "mandatory regular school year" and "permissive summer school term" are not helpful. As it pertains to students, the "regular" school year is mandatory and attendance at summer session is "permissive."[8] It is also the fact that tenured or permanent employees have a right to employment during the regular school year, but cannot compel employment during the summer unless they are twelve month employees. Those facts have nothing whatsoever to do with these 26 substitutes and temporary certificated employees and classified employees whose employment rights have not been tied in any respect to these issues.

The SFUSD makes the following unhelpful statement:

> Education Code § 37620 clearly identifies the "academic year" as that occurring when 'teaching sessions' are occurring, and to be coterminous with the regular school year of no less than 175 days. Likewise, Education Code § 41420(a) provides that "[n]o school district, other than one newly formed, shall, except as otherwise provided in this

[7] As noted below, this Advisory supports, to some degree, the position of the CUIAB that the "totality of the circumstances" needed to be evaluated to determine whether any individual is given assurances of employment in the "following academic year or term." (UIPL No.05-17, *supra*, at p.6.) Here, SFUSD did not give any such assurance to the 26 claimants for the summer term and thus the issues in the Advisory are not before this Court.

[8] SFUSD's citation to *California Teachers Assn. v. Board of Education* (1980) 109 Cal.App.3d 738 (SFUSD-Ans.-Br.-UESF,pp.20-21) is not relevant.

> article, receive any apportionment based upon average daily attendance from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year."

(SFUSD-Ans-Br.-UESF,p.20.)

That statement is not only not helpful it is also inaccurate, because Education Code section 37620 does not identify the academic year as that occurring when teaching sessions are occurring and coterminous with the regular school year. It also does not reference or concern the issue of summer session. Clearly, instruction is given during summer session. That is the purpose for conducting a summer session. It is also difficult to understand why the SFUSD believes that whether or not an employee may use summer session employment to obtain tenure or permanency is relevant. The answer to that question will not help in resolving whether or not summer session is an academic term.[9]

8. The SFUSD's argument that Petitioner's position requires two notice letters demonstrates the logical fallacy of its argument.

The SFUSD argues that treating summer school "as an 'academic term' ... would require school districts to provide two reasonable assurance notices—one in the spring applying to employment for the summer term, and a second in the summer applying to employment in the fall...." (SFUSD-Ans.-Br.-UESF,p.24.) This illustrates our point. If the summer session is an academic term, either the employees are hired and paid for working or they receive unemployment insurance.[10] The reasonable assurance letter only occurs where there is a summer vacation and the next academic term is the fall. The statutory scheme does not allow the school district the choice of not hiring the employees and also denying them unemployment. We agree there cannot be a "two assurance letter"

---

[9] The SFUSD does not assert that this instruction is different such that students do not receive credit towards graduation.

[10] It is important to note that the amount of unemployment insurance may vary. If the employee works a significant amount of time, she may be entitled to no benefits. If the work is sporadic, she may not earn enough to be disqualified. The same applies during all the other academic terms of substitutes and on-call employees. Permanent educators are not entitled to any unemployment benefits since they are paid through the academic terms.

scenario as suggested by SFUSD. This scenario cannot occur because the school district cannot skip two consecutive academic terms for employees and claim that the employees are not entitled to unemployment Benefits.[11] If the result of this case is to require additional letters, it is difficult to see what insurmountable burden would be created for the school district that seeks to deny unemployment insurance benefits to its substitute and temporary certificated and classified employees.

B. NEITHER THE SFUSD NOR THE CUIAB OFFER A REASON WHY THE COURT SHOULD NOT APPLY PRECLUSION TO THE PRIOR DECISION OF THE SUPERIOR COURT ON THE ISSUE OF WHETHER ON-CALL EMPLOYEES ARE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS

As we developed in UESF-Op.-Br., both the SFUSD and the CUIAB are bound by issue preclusion based on the 2005 decision of the San Francisco Superior Court. (UESF-Op.-Br.,pp.32-33.)

The CUIAB only addresses this in a footnote. (CUIAB-Op.-Br.,p.4,fn.2.) Its argument is that this Court should settle the underlying issue and thus ignore this dispositive issue. Although there is some surface appeal to the argument that since this Court has granted review, the Court should just ignore the issue. The problem, then, is that it leaves this issue unresolved on a record where courts will puzzle in the future as to how the doctrine should apply. The Court could note that it need not address the issue if it holds that the summer session is an academic term. However, if the Court were to disagree with the position of UESF, it would have to address why issue preclusion does not apply. By ignoring the issue, the Court will effectively rule that it does not apply. SFUSD approaches the issue differently. (SFUSD-Ans.-Br.-UESF,pp.27-29.) The SFUSD merely parrots the lower court's reasoning without offering any rebuttal to the

[11] There is the theoretical possibility of a four quarter system with alternating quarters as vacations. Then a reasonable assurance letter would go out at the conclusion of the first and third quarters. But that would be more like two short semesters. This illustrates the logic of UESF's position. If there is a true vacation, then the reasonable assurance letter goes out for the next term after the recess or vacation. If there is a summer session or academic term, either the employee at issue is offered employment or receives unemployment benefits.

points UESF made. However, there is one point that deserves more elaboration because it confirms the logic of UESF's position.

The District is correct in quoting the Court of Appeals that "'[i]n the 2005 case, the question was whether the six-week summer session constituted an academic term. In the present case, the eligibility question is broader in that it includes the weeks before and after the summer session.'" (SFUSD-Ans.-Br.-UESF,p.28.)

The point is that this is issue preclusion on the issue of whether the summer session is an academic term. Judge Warren found that it was, and nothing should preclude that finding from applying here to the period when instruction occurred as part of the summer session. Thus, this is an academic term.

However, as we addressed in UESF-Op.-Br., if there is an academic term for which employment is provided, unemployment insurance is payable for the entire period between the end of the prior academic term (here, spring of 2011) and the commencement of the next term (fall of 2011) when the employees would resume work. No party contests that as a matter of unemployment law, benefits are payable for the entire period (less the normal seven day waiting period) if reasonable assurances were not given, or if the employee were permanently laid off. Benefits are not awardable only for periods when instruction occurs during an academic term. Thus, the application of issue preclusion to find that the summer session is an academic term logically leads to the correct and consistent result in the case. As we note, benefits are payable for the entire period between when the employee last worked and when the fall session resumes less the normal waiting period.

C. THE SFUSD'S ANALYSIS OF THE OUT-OF-STATE CASES UNDERMINES ITS POSITION IN THIS COURT

In UESF-Op.-Br., we summarized the import of the out-of state cases:

> These cases illustrate that whether a particular summer session is an academic term or part of an academic year depends, in part, upon state law, how the particular educational institution treats the summer session and of what

> the summer session consists. The SFUSD chose to establish a summer session like other sessions and therefore it is an academic term.

(UESF-Op.-Br.,p.31.)

In a portion of the SFUSD-Ans.-Br.-UESF, the SFUSD doesn't contest this position but focuses on the two relevant Washington cases and the change in Washington law. (SFUSD-Ans.-Br.-UESF,pp.26-27.) SFUSD acknowledges that the Washington court found a summer term was an academic term. (*Id.* at p.27. See also *Evans v. State Dept. of Employment Sec.* (Wash.Ct.App.1974) 866 P.2d 687.) It then correctly points out that the law was clarified. (SFUSD-Ans.-Br.-UESF,p.27.) The amendment made it clear that if certain criteria were met, a summer session could, under Washington law, be an academic term. (*Thomas v. State Dept. of Employment Sec.* (Wash.Ct.App.2013) 309 P.3d 761. See CUIAB-Op.-Br.,pp.26-27&fn.18.)

This counters SFUSD's position that effectively under California law a summer session cannot be an academic term by relying principally on Education Code section 37620. We have demonstrated that contention to be erroneous.

The SFUSD also replies to the position of the CUIAB. (SFUSD-Ans.-Br. – CUIAB,pp.29-40.) The CUIAB correctly points out that those cases deal with full time employees or state statutes that differ in material regard. (CUIAB-Op.-Br.,pp.25-28.):

> Out-of-state cases holding that summer is not a *regular* term under those states' statutes do not speak to whether summer may be an *academic* term under FUTA and California law. In sum, there is no case that provides a reasonable, much less persuasive, explanation for why [Unemployment Insurance Code] section 1253.3's between-term exception should be read to create a blanket exclusion of summer benefits, regardless of the circumstances.

(*Id.* at p.26.)

D. THE SFUSD HAS NOT EXPLAINED WHY THE DOL'S RECOGNITION OF NON-TRADITIONAL SCHOOL TERMS DOES NOT GOVERN WHERE A DISTRICT MAINTAINS A SUMMER TERM

In UESF-Op.-Br. we explained:

> This conclusion is supported by the Department of Labor's interpretation of the statute. The United States Department of Labor defines an "academic term" to be,
>
> > [T]hat period of time within an academic year when classes are held. Examples include semesters and trimesters. Terms can also be other nontraditional periods of time when classes are held, such as summer sessions.
> >
> > (U.S. Dept. of Labor, Conformity Requirements for State UC Laws Educational Employees: The Between and Within Terms of Denial Provisions, at <http://www.ows.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf> [as of Nov. 29, 2016] (hereafter DOL Conformity Requirements).)

(UESF-Op.-Br.,p.21.)

In this case, where the SFUSD chose to conduct a summer session that is an academic tem, benefits are awardable to on-call employees whether substitutes or classified employees.[12]

Moreover, we explained the CUIAB has adopted the same position:

> This is consistent with the Guidance published by the CUIAB:
>
> > The following contains definitions of terms used when discussing recess periods as applied in CUIC Section 1253.3.
> >
> > 1. Academic Year, Term, and Vacation Period Defined
> >
> > a. Academic Year – The period of time when educational institutions are in session and constitute a "school year".
> >
> > b. Term – Those periods which do not fall within the normal "academic year" but

[12] The SFUSD's position is a categorical position that no school district in California and effectively in the United States can maintain a summer session that is an academic term. This contradicts the express recognition by the Department of Labor that school districts may have non-traditional calendars, including quarter or some other systems where the summer period is not a vacation or recess. Such a categorical rule would violate the statutory provisions that would allow a state to establish summer academic terms.

> during which classes are held. Examples include summer terms (summer school), trimesters (each trimester within the academic year is a term), or other non-traditional periods during which classes are held such as in year-round schools which use a "track" schedule.
>
> c. Holiday or Vacation Period – That period within an academic year or term during which school is not in session due to a holiday or school break, such as winter and spring break, Christmas vacation, etc.
>
> ([Cal. Employment Development Dept., Miscellaneous MI 65, at <http://www.edd.ca.gov/UIBDG/Miscellaneous_MI_65.htm> (as of Feb. 24, 2017)] Miscellaneous Instruction 65, supra, at § IV.F Law and Policy; School Recess Period.)

(UESF-Op.-Br.,p.21.)

There is no reference or explanation in the SFUSD-Ans.-Br.-UESF to these positions adopted by the Department of Labor and the CUIAB. There is a footnote reference in the SFUSD-Ans.-Br.-CUIAB page 46 and footnote 8. That is a misreading of the statement in the DOL's Definition of "academic term" and the CUIAB Guidance. Neither reference suggests that a summer session can only occur in a year-round school.[13]

Finally, the CUIAB in its Opening Brief confirms that a summer session can be an academic term. "An 'academic year' can consist of fall, spring, and summer terms, with the period between academic years occurring between the end of the summer term and the beginning of the fall term." (CUIAB-Op.-Br.,p.16.)

SFUSD relies upon a very traditional view belied by modern school schedules. In effect, it makes only one argument that summer school cannot be an academic term and cannot be part of an academic year. Every authority rejects this narrow view of educational programs.

---

[13] Judge Warren reached the same conclusion in the judgment on which issue preclusion is based. (2CT695:9-18.)

E. ALTHOUGH THE POSITION OF THE CUIAB IS AN ALTERNATIVE POSITION, UESF BELIEVES ITS OWN POSITION IS MORE CONSISTENT WITH THE UNEMPLOYMENT INSURANCE CODE

1. The CUIAB's decision in *Brady*, that educators who are not on vacation or recess but who are "on-call" have entitlement to work, is a reasonable interpretation of the denial provisions of Unemployment Insurance Code section 1253.3.

As we noted in UESF-Op.-Br., the reasoning of the Petitioner and the CUIAB "serve the same goal of determining whether an on-call employee is not working the summer session because of lack of work or because of a summer vacation." (UESF-Op.-Br.,p.37.)

In light of the more fully developed position of the CUIAB and the SFUSD Answer Briefs, we more fully address this rationale.

The CUIAB has offered a slightly more nuanced position from its position in *Matter of Brady* (2013) CUIAB Precedent Benefit Dec. No.P-B-505 (hereafter *Brady*). It explains that *Brady* holds:

> [t]hat this provision [Unemployment Insurance Code section 1253.3, subdivisions (b) and (c)] is intended to preclude benefits only when an educational employee is on a contractually contemplated recess-that period when, according to the employee's contract and schedule, he or she is not expected to perform services on campus. This provision is not intended to deny benefits when an employee experiences unemployment due to the loss of contractually contemplated work. Accordingly, where a non-salaried substitute teacher or classified employee is placed "on-call" for a summer session but is not called in to work, that employee is not on recess, but instead is unemployed due to a lack of work, and thus is not precluded from benefits under [Unemployment Insurance Code] section 1253.3.

(CUIAB-Op.-Br.,p.14,fn. omitted.)

As to eligibility, the positions of the UESF and the CUIAB are not significantly different. If the on-call employee is scheduled to work or has some contractual entitlement to work or other circumstances that warrant a finding that the employee has an expectation of working during the summer session (term), the benefits are awardable if

the employee does not work. The CUIAB held that the summer period was not a recess or vacation period for Brady: "Benefits are payable to listed or eligible substitute teachers during a summer school session because while school is in session, it is not a recess period." (*Brady, supra*, p.9.) It was not a "vacation" since Brady was on-call and was available for work. The CUIAB effectively held the same thing in that each of the 26 claimants in this case had a reasonable expectation of working during the summer session of 2011 and thus were eligible for benefits. Stipulation No. 14 addresses this finding:

> 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.

(2CT719-22, italics added.)

Of course, each Claimant had also worked some time during the 2010-2011 fall and spring terms. The CUIAB concluded, for example:

> Due to the claimant's actual work during the Summer 2010 Term and his availability during the Summer 2011 Term, the weeks in question [in 2011] are not between terms for the claimant, he had a reasonable expectation of work during [the Summer 2011 Term], and [Unemployment Insurance Code] section 1253.3 does not apply.

(2CT378.)

When the CUIAB issued *Brady*, benefits were awarded because Brady had a reasonable expectation of working during the summer session since Brady was "on-call." Brady was not working but work was not made available; not because he was on recess or on a vacation period.

> When a substitute teacher is scheduled to work "on-call" during the spring term or the fall term and then is not called to work, that claimant's unemployment results from a lack of work, and benefits are payable. Similarly, when a substitute teacher is "on-call" during a summer school session, and is not called to work, the claimant is not on **recess,** but is unemployed due to a lack of work.
>
> Accordingly, during the summer school session there is no recess period for eligible substitute teachers because school is in session. ... Benefits are payable to listed or eligible substitute teachers during a summer school session because while school is in session, it is not a recess period.

(3CT898.)

The CUIAB suggested in *Brady* what factors could show that a substitute teacher is on-call to warrant the payment of benefits. (3CT899.) Where claimants have a reasonable expectation of employment during the summer, it is not a recess or vacation, and benefits are awardable. That reasonable expectation may occur in many ways, past work history, oral or written commits, contractual entitled or other factors. Because certificated or classified employees hired to work during the summer term will necessarily be absent, these on-call and day-to-day substitutes have a reasonable expectancy of some work. This Court need not address those issues. Here, the CUIAB found that each of the claimants had such "a reasonable expectation of employment during the summer session" and that finding should not be disturbed. Nor is it prudent for this Court to establish some formulation that undermines the function of the CUIAB to establish through Precedent Benefit Decisions the contours of the law.[14]

---

[14] Since the CUIAB is entitled to designate Precedent Benefit Decisions rather than use formal rulemaking, this is an additional reason to avoid setting aside the initial determinations of "reasonable expectancy."

Concededly, the CUIAB did not expressly hold that the summer session for Brady was an academic term. Nor did it expressly hold that it was during an academic year. It just found that where the educational employee is not on recess or vacation and has some expectation of work by being on-call and available to substitute, then the teacher is entitled to unemployment benefits during periods of non-work. As established above, however, the summer session of the SFUSD was an academic term. Thus, this Court need not address the issue posed by *Brady* as to whether benefits can be awarded to educational employees who are not working during a period that is not an academic term although they have some expectancy of work because they are on call or in a similar situation, but are not on recess or vacation.

In either case, however, the claimant is entitled to benefits for the entire period because no assurance letter was given.

Here, we depart from the position of the CUIAB. We assert the claimants are entitled to benefits for the entire period from when they last worked until when the fall term begins, not just the period of the summer session.

2. The claimants are entitled to unemployment benefits from their last day worked until the fall term by operation of law.

What follows is compelled by the general application of the unemployment laws and Unemployment Insurance Code section 1253.3. The substitute teachers and paraprofessional employees did not receive reasonable assurance of employment in the "second of two academic terms." They did not have reasonable assurance if the summer session is an academic term.[15] They were only given reasonable assurance of employment for the fall school term of 2011-2012 and not the intervening or "second of two successive academic terms." They were not given reasonable assurance of employment in the summer term, and the equal benefits provision, section 1253.3,

[15] The CUIAB has held that an educator is entitled to benefits during any period between successive terms. (*Matter of Johnson* (1985) CUIAB Precedent Benefit Dec. No.P-B-440.)

subdivision (a), and section 1253.3, subdivisions (b), (c), require that they receive benefits.

Unemployment benefits are payable for the period between the end of one term and the beginning of another term if the district "skipped" an academic term. This makes sense. If the employees are laid off, and there is one upcoming or successive term, or two terms, or three terms, and the school only gives assurance of employment in some later non-successive term, the employees are out of work because of a loss of work (the intervening term or multiple terms) and not because of vacation. This prohibits manipulation by school employers to avoid unemployment benefits.

This point seems undisputed. The SFUSD seems to acknowledge that if the summer session is an academic term then benefits would be awardable for the entire period. Cases concerning whether reasonable assurance has been given, in this state or in other jurisdictions, have concluded that benefits are awardable for the entire intervening period if no reasonable assurance is given. (See, e.g., *Cervisi v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal.App.3d 635.) The claimants were entitled to benefits from the end of the 2010-2011 year until the beginning of the 2011-2012 year.[16]

There is no anomaly in awarding benefits for the weeks after the end of the 2010-2011 year and before the beginning of the summer session and for the weeks after the end of the summer term and before the beginning of the 2011-2012 academic year. This happens every time anyone is laid off under the unemployment system. He or she gets benefits until they are reemployed (or their benefits run out) or they are otherwise disqualified. Here, the statutory scheme provides for such benefits for all educators. The point where those benefits end, however, is when they are employed by the school district

[16] They were not automatically entitled to benefits. There is a seven day waiting period, (Unemp.Ins.Code §1253, subd.(d)) they had to have earned enough wages during the base period to qualify (Unemp.Ins.Code §1275) and otherwise qualify for benefits. For example, a substitute might have worked a few days during the base period and not earned enough to qualify for benefits. On the other hand, the employee might be eligible because of wages earned from other employers. (Miscellaneous Instruction 65, *supra*.) Similarly, the amount of benefits may be affected by the amount of work they performed.

in some later term. Alternatively, the District can give reasonable assurances for the successive term but not a successor to a "successive" term. In the latter case, benefits would be awardable.

Seasonal workers are entitled to benefits. (*Rios v. Employment Development Dept.* (1986) 187 Cal.App.3d 489, and *Juan Ceja* (2017) CUIAB Precedent Benefit Dec. No.P-D-513 [discussing seasonal employees entitlement to benefits in context of disability benefits].) Workers who are laid off for periods of time are entitled to benefits. This result is compelled by the equal benefits requirement of Unemployment Insurance Code section 1253.3. All other workers would be entitled to benefits from the date of lay off or termination subject to the normal seven day waiting period.

The statutory scheme allows an exception if "reasonable assurance" is given. Since reasonable assurance was not given, benefits must be paid.

If the individual worked during the summer, the CUIAB held that they were not ineligible for benefits for the period from the end of the spring of 2010, since that is consistent with the 2005 decision. But the CUIAB inconsistently held that the employees were ineligible for benefits after the summer session ended until the 2010-2011 academic year began in August of 2010. That is inconsistent with the fact that the CUIAB is bound by the determination that summer session constituted an "academic term" and the employees did not receive "reasonable assurance" of employment during that "academic term" of employment that followed the summer academic term.

Moreover, even under the CUIAB's rationale in *Brady*, the claimants are entitled to unemployment benefits. Assuming that they were on-call or otherwise contractually not on vacation or recess, they, like every other unemployment claimant, are entitled to benefits for the entire time when no work is provided. If an employer lays off employees, the employees receive benefits even during a period when no work is available because the facility is temporarily closed. Seasonal employees likewise are entitled to benefits through the period of the layoff until recalled.

Finally, this case involves only 26 claimants. This does not involve the unemployment benefit issues of employees who are paid a yearly salary and who do not work during the summer session. It does not involve most SFUSD employees whose work was limited to the fall and spring term. For most of the SFUSD employees, the summer term was not an academic term for which work was available or for which the SFUSD had to give reasonable assurance until the fall term. The SFUSD can negotiate its employment practices with the UESF in the Memoranda of Understanding so as to define those who are year-round employees paid on a salary, for whom there is no entitlement to unemployment benefits in the summer term provided they are given reasonable assurances at the conclusion of the spring term that they will be employed for the fall term. These 26 under the circumstances here are entitled to unemployment benefits.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that this Court reverse the decision of the Court of Appeal and remand the matter to the Superior Court with instructions to grant the writ and determine Claimants were entitled to benefits for the period of May 27, 2011, to August 15, 2011, subject to any waiting period.

Dated: March 22, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

Stewart Weinberg
David A Rosenfeld

By: STEWART WEINBERG

ATTORNEYS FOR PETITIONER UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA

141771\907303

CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 8.204(c)(1).)

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached Petitioner/Appellant United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA's Reply Brief, was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 8,371 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: March 22, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

Stewart Weinberg
David A Rosenfeld

By: _____
STEWART WEINBERG

ATTORNEYS FOR PETITIONER UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA

PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 23, 2017, I served the following documents in the manner described below:

PLAINTIFF/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO'S APPLICATION FOR AN EXTENSION OF TIME TO FILE ITS REPLY BRIEF

☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

On the following part(ies) in this action:

Xavier Beccera
Attorney General
Gregory D. Brown
Deputy Attorney General
Office of the State Attorney General
455 Golden Gate Avenue
San Francisco, CA 94102
gregory.brown@doj.ca.gov
Attorneys for California Unemployment Insurance Appeals Board

John Yeh
Burke, Williams & Sorensen, LLP
1503 Grant Road, Suite 200
Mountain View, CA 94040-3270
jyeh@bwslaw.com
Attorneys for San Francisco Unified School District

Clerk of the Court for
The Honorable Richard B. Ulmer, Jr.
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

Clerk of the Court
Court of Appeal, First Appellate District, Division 1
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 23, 2017, at Alameda, California.

Mary Piro