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

ANSWERING BRIEF OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO TO AMICI CURIAE BRIEFS

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

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I. INTRODUCTION

The two briefs *amici curiae* assist in focusing the issues before this Court. Principally, the brief of the *amicus curiae* California School Boards Association's Educational Legal Alliance ("ELA") addresses what Respondent and Amici in support of Respondent claim is the "plain language" of Unemployment Insurance Code section 1253.3, which is at issue. We utilize the organizational structure of the ELA brief.[1]

II. PRELIMINARY STATEMENT

This case is not about all employees of the San Francisco Unified School District ("SFUSD"). It is limited to the 26 claimants whose factual circumstances were agreed to in the Stipulation of Facts. (See UESF-Op.-Br., pp. 8-12.) Benefits are not sought nor are benefits at issue with respect to any other employee of the San Francisco Unified School District. The ELA and the OUSD are incorrect that this Court's decision will have broad implications. This case is limited to issues involving on-call and day-to-day substitutes who had some expectation of working during the summer academic term of the SFUSD.[2]

These 26 employees are substitute teachers and paraprofessional employees. Their employment relationship is markedly different from that

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[1] We refer to the CUIAB Opening Brief as "CUIAB-Op.-Br." We refer to UESW's Opening Brief as "UESW-Op.-Br." We refer to the SFUSD Answer Brief to the CUIAB Opening Brief as "SFUSD-Ans.-Br.-CUIAB." We refer to the SFUSD Answer Brief to UESF's Opening Brief as SFUSD-Ans.Br.-USEF." We refer to the UESW's Reply Brief as "UESW-Reply-Br." We refer to the CUIAB Reply Brief as "CUIAB-Reply-Br." We refer to the brief of the ELA as "ELA-AC-Br." We refer to the brief of the Oakland Unified School District as "OUSD-AC-Br." We refer to the brief of the AFT as "AFT-AC-.Br."

[2] The OUSD is wrong that this Court's decision could substantially increase costs to school districts. (OUSD-AC-Br., pp. 11-12.) This case involves a limited number of on-call employees. The number of such persons is controlled by the relevant school district.

of permanent or probationary employees of the SFUSD. (See UESF-Op.-Br., pp. 9-10.)

Contrary to the suggestion of ELA at footnote 2 of its brief, we have not haphazardly used "labels to describe the employees in this action ...." These employees are on-call or per diem, meaning day-to-day substitutes or paraprofessional employees. Some are paraprofessional employees, meaning classified employees, and others are certificated, in this case, substitute teachers. They are all non-salaried. We agree with ELA that for shorthand purposes, it is appropriate to call them "on call" employees because they have no employment relationship other than as a day-to-day, as needed employees.

For purposes of this case, however, the SFUSD needed them "on call" during its summer session. In our past briefs, we have referred to this as a summer session, although it is, for the purposes of this case, an academic term. This is because the parties stipulated that "the San Francisco Unified School District operated a summer session during which instruction was given to students of the San Francisco Unified School District. (See Stipulation of Fact No. 10, UESF-Op.-Br., p. 9). As we have previously described to this Court, that Stipulation means that this was an academic term with no meaningful difference from the spring and fall terms.[3] Thus, the fact that we refer to it as a summer session does not distinguish it from an "academic term."

Below, we address what ELA and OUSD, as well as SFUSD, argue are the plain language arguments supporting their positions. The plain

[3] We address *infra* the suggestions by ELA and OUSD, which to some degree mirrors the claim of SFUSD, that the non-mandatory nature of the summer academic term distinguishes it from the mandatory nature of the spring and fall terms.

language arguments raised by *amici* have been addressed before, but this reply brief offers an opportunity to narrow and focus those arguments.

III. ARGUMENT

A. THE ELA RAISES FOUR ARGUMENTS AS TO THE PLAIN LANGUAGE OF UNEMPLOYMENT INSURANCE CODE SECTION 1253.3, SUBDIVISIONS (b) AND (c)

The ELA has four related arguments claiming there is a plain meaning to the provisions at issue. (See ELA-AC-Br., pp. 10-23.) ELA begins with the proposition, with which we agree, that the "denial provisions" provide generally that any "individual employed by an educational institution" is not eligible for unemployment benefits "during the period between two successive academic years or terms." Predictably, ELA emphasizes the use of the word "or." ELA focuses its argument on whether the summer term is an academic term within an academic year, arguing that it is not.[4]

In the traditional setting there is an "academic year" of a period which is up to 365 days. However, typically it was less than a full year and usually about nine months with two academic terms falling within that "academic year." The period between the academic years was also a period between academic terms, and it was easy to resolve questions of unemployment eligibility. Educators were denied benefits during the summer vacation. If a school district extended the academic year to three terms within a year extending to a full year, there still were periods between "academic terms" when benefits would be denied.

[4] Although, it is also possible that an education program could have an academic year and a separate academic term outside of what that state law defines as an academic year, that is not a likely configuration and does not apply here. It is, however, a theoretical possibility depending on state or local law configurations of academic terms and years. This illustrates the flexibility that the terms "academic year" and "academic term" possess.

The use of the word "or" in that sentence means that between academic years or between terms within the academic years, educational employees are generally not entitled to unemployment benefits. The word "between" complements the word "or" and the meaning of the denial provisions. We address the four arguments below.

Logically and practically, it is useful to think of an "academic term" as a subset or part of the "academic year." However, it is possible for a school district to have only one academic term and one academic year. It's also possible for a school district to have an academic year that is the length of a calendar year. Indeed, year round schools have congruent academic years and academic terms. (See Ed. Code §§ 37600, *et seq.*)

During any academic year or academic term, there are periods of recess for example for vacations, holidays, and weekends and so on. During those periods no unemployment benefits are available unless the employee has no assurance of returning.

Finally nothing in the Education Code or the Unemployment Insurance Code says that the academic year or academic term has to be the same for all employees. Some may be employed for only terms of a three term program. Some maybe employed for one term. Here, SFUSD provided a reasonable expectation to these claimants that they would work during the summer academic term.

Before proceeding with analysis, however, we note that in the argument contained in Part II(A)(4) of its brief, ELA argues that either all employees of the school district are entitled to benefits or none of them are. We again address the point that we have made in our Opening Brief, that this case applies only to the 26 employees and that, contrary to the use of the phrase "carve out," there are individuals who are entitled to

unemployment benefits because of their employment relationship with the school district, while there are other individuals who are not entitled to unemployment benefits because of their different relationship with the school district. That point is central to our position, but we address it when we address Part II(A)(4) of the ELA-AC-Br., *infra*.

B. ELA CORRECTLY POINTS OUT THAT THE WORDS "ACADEMIC YEAR" AND "ACADEMIC TERM" SHOULD BE GIVEN INDEPENDENT MEANING

ELA's point that the terms "academic year" and "academic term" should be given an independent meeting (ELA-AC-Br., pp. 11-12) is correct. This suggests that the phrase "academic term" is a subset of an academic year, but, as we have noted, it is possible that the school district could have one academic year and one congruent academic term.[5] ELA's argument proves our point. Here, where the summer session is an academic term, it falls inside, not outside, the academic year. As noted, academic years often have periods of time during which school is not in session. This occurs, for example, during holiday recesses or vacations and weekends.

Moreover, an academic year can contain one, two, three or more academic terms. All this is left to the flexibility of each local school district consistent with state law requirements. An academic year can include a summer term if that summer term or summer session is an academic term.

ELA correctly points out that the term "academic year" does not necessarily coincide with a calendar year. (See ELA-AC-Br., p. 12.) But that conclusion is a sleight of hand because only if an academic year extends for an entire calendar year is there no period between academic years. Nothing in the statute, however, requires that there be any period

[5] Although it is unusual, a state law could contemplate an academic year of less than one year and a stand-alone academic term outside of that academic year.

between academic years because a school with a full academic year can run a full calendar year.

Contrary to the suggestion of ELA, this doesn't render the term "academic year" meaningless. It just means that a school district that chooses to run an academic year coincident with a calendar year chooses such an educational program.

Moreover, as we have pointed out, another configuration could include a fall, spring and summer term, which extends 11 months. That means the academic year would be 11 months with one month between the end of the academic year and the beginning of another year. That would also mean there is a one month period (or a one week or one weekend) between the summer academic term and the fall academic term. Alternatively, the month "between" could be between the fall and spring terms. All of this is possible and fully resolves the alleged conundrum that the court below expressed and on which ELA, OUSD and SFUSD rely.[6]

In the following analysis (ELA-AC-Br., pp. 12-16), ELA ignores the stipulated fact that there is a summer session and that there is no distinction in the stipulation or in the record between that summer session and the fall and spring sessions. (See UESF-Op.-Br., pp. 19-26, and UESF-Reply-Br., pp. 7-9.)

ELA, like the SFUSD, tries to find a definition of "academic year" that would clearly apply. It fails. ELA argues that Education Code

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[6] Nothing, moreover, requires that those academic terms within the academic year be of the same size, or the same duration, or have the same academic programs or the same staff. Theoretically, a fall academic term could be twice as long as a spring academic term and the summer academic term could be longer than both, depending on the schedule. This reflects the flexibility necessary in the statute to comply with various scheduling alternatives.

section 45102, subdivision (d) is of substantial assistance in interpreting whether a summer "period" can be an academic term. (ELA-AC-Br., p. 13.) Two points should be made. Education Code section 45102, subdivision (d)(1) only deals with the circumstance where a classified employee has a service agreement that excludes "the period between the end of the academic year in June to the beginning of the next academic year in September ...." There is no suggestion that applies here. This provision does not concern certificated personnel. This provision does not even apply to the employees of the SFUSD who are specifically excluded. (Ed. Code § 45100 [second paragraph excludes San Francisco].) Finally, this provision suggests that there are classified employees whose contract includes a summer term. (See Ed. Code § 45102(d) [the section only applies to classified employees who have a yearly contract].)

In citing this provision, ELA and OUSD ignore the fact that the term "academic year" is used approximately 150 times in the Education Code. (See UESF-Op.-Br. pp. 26-27). They thus ignore the point that this Court has made clear that where a term is used one place in a code doesn't mean it has the same meaning elsewhere in the code. (See *People v. Johnson* (2015) 61 Cal.4th 674, 692.) Given the variety of issues that arise under the Education Code, this principle applies with greater force. More importantly, this merely illustrates that the Legislature used these terms in differing circumstances in differing contexts. No conclusion can be drawn from these references except that the terms are flexible and may only be understood in their context.[7]

[7] An employee who is paid on a yearly salary as provided for in Education Code section 45102, subdivision (d) would not then be entitled to unemployment benefits. This section deals with what happens if such an employee is asked to work during periods that are not covered by another academic term or are covered by vacation.

Similarly, ELA's reference to Education Code section 51851, subdivision (c) illustrates the same mistake. This involves driver's education. The statute allows that the driver education course be completed "within the academic year or summer session in which it was begun." Of course, if the summer term is included in the academic year, then the reference to "summer session" supports our position because the driver's education course may be completed "within the academic year."

Similarly, the reference to Education Code section 66028.3, subdivision (d) applies only to the university system, which has never had a summer term.

As a number of these references demonstrate, the terms can be used for one purpose in one part of the Education Code and have a different meaning in another part of the Education Code.[8] Here, we interpret those terms in the context of the Unemployment Insurance Code. ELA and OUSD, as well as SFUSD, ignore the canon of interpretation that the Unemployment Insurance Code is to be interpreted liberally to provide benefits. (UESF-Op-Br. pp. 17-19.) The Court is asked to interpret these terms in that context.

ELA, OUSD and SFUSD rely on the argument that an academic term can only occur when the school session is compulsory. OUSD in its brief argues that an academic term can only occur when the school session is compulsory. (See OUSD-AC-Br., pp. 9-10.) SFUSD makes the same reference. (See Answer to our Request for Review.) ELA, OUSD and SFUSD generally take the same position that a summer term cannot be an academic term unless attendance is compulsory. First, there is no evidence

[8] The Legislature appears to have adopted the terms from the federal legislation without indicating how the Education Code would apply.

that for some students the summer session is not compulsory because of mandatory requirements for graduation or other educational requirements. Second, there is nothing in the unemployment statute that even remotely suggests that entitlement to benefits depends upon whether the school session is mandatory for students. We recognize that under California law, school districts must have at least 175 school days. (See Ed. Code § 37200.) That, however, provides no interpretative aid for whether a summer session is an academic term. Indeed, neither ELA nor OUSD (or even SFUSD) suggest that there is any difference in the academic rigor or importance of the instructional program in the summer session from the other sessions.[9]

As we have argued in our opening brief and reply brief, the 175 days is only a minimum, not a maximum. Moreover, as ELA and SFUSD concede, this mandatory minimum period of instruction occurs "during the academic year."[10]

ELA refers to the provisions of the Education Code that permanent and probationary employees are entitled to layoff notices under a complicated set of procedures. (See ELA-AC-Br., pp. 14-15.) We are not dealing with permanent or probationary employees in this case, but rather on-call employees, and statutory layoff procedures are irrelevant.

ELA, like SFUSD, mentions the posting on the California Department of Education ("CDE") website which refers to "the traditional calendar ...." (ELA-AC-Br., p. 15.) None of that deals with the question

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[9] We recognize that the summer term is likely to be composed of a smaller number of students, a smaller curriculum and a lesser number of employees.

[10] Education Code section 37620 is inapplicable because it concerns only year-round schools. (See ELA-AC-Br., p. 14.)

in this case, but the CDE also notes that a non-traditional calendar can include a summer academic term. And the CDE recognizes something that we do not contest, that a school district can conduct a summer program that is not an academic term. For example, it could hold just a driver's education course or adult education program or some other minimal educational program.

ELA misconstrues the Department of Labor's guidance regarding unemployment benefits for education employees. (See ELA-AC-Br., pp. 15-16.) That explanation fails. (See UESF-Op.-Br., p. 21, and UESF-Reply-Br., p. 22.)[11] In conclusion, an academic year can include a summer term. It may not be traditional, but it exists in the San Francisco Unified School District.

C. THE SUMMER SESSION MAINTAINED BY THE SFUSD IS AN ACADEMIC TERM

ELA argues that the summer session cannot, as a matter of law, be an academic term. This claim ignores the factual stipulation and the failure of SFUSD to offer any evidence that the summer session was not an academic term. The parties stipulated the summer period was a session, and the SFUSD offered no factual differentiation from the fall and spring sessions. The SFUSD offered no evidence to rebut Judge Warren's finding in previous litigation that the summer session was an academic term. (UESF-Op.-Br., p. 22, and 2 CT 695:9-18.) Amici are bound by the stipulation of the parties.[12]

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[11] ELA does not provide a website address for its reference to the Department of Labor definition of an academic year. In any case, as we repeatedly point out, the word "usually" makes it clear that there can be a summer term. And, as noted in our Opening and Reply briefs, the DOL expressly recognizes that there can be a summer term.

[12] Neither ELA nor OUSD address the argument that claim preclusion applies.

We do not argue that simply because "school is in session" (ELA-AC-Br., p. 17) that this is an academic term. In any case, that argument doesn't fit the facts here because there was a period of time between the conclusion of the summer term and the beginning of the fall term when no school was in session. Arguably, that period was the end of the academic term and the beginning of the next academic term. It is a period "between terms." This interpretation fully explains why the term "academic year" cannot be superfluous and meaningless. ELA makes the same mistake as SFUSD by arguing that if the summer session is an academic term, then the reasonable assurance language becomes meaningless. But, as we explain earlier and consistent with what ELA has recognized, this case only applies to the 26 claimants, and we are not asserting that unemployment insurance would apply to most of the SFUSD's employees, both professionals and paraprofessionals. They were entitled to "reasonable assurance" for the period between the end of the summer academic term and the beginning of the fall term if the SFUSD wanted to prevent them from receiving unemployment benefits. We discuss that *infra*.[13]

ELA's reference to the Family Medical Leave Act is totally irrelevant. The reference to those special rules regarding educational employees for Family and Medical Leave Act suggest that ELA's brief and arguments are disingenuous. ELA refers to 29 Code of Federal Regulations part 825.602(b). That section only limits an educational institution to two semesters each year for FMLA purposes. This is designed to prevent educational institutions from designating three or four or more academic terms, which would have the effect of limiting the rights of employees

[13] We do not read the CUIAB's position as asserting that all employees are eligible if there is an academic summer term. (See ELA-AC-Br., pp. 17-18.)

under FMLA. It has nothing to do with suggesting that a summer session could not be an academic term. Indeed, literally, under that regulation a school district could have three academic terms but designate two of them, including the summer term, as the academic terms for purposes of applying the special rules regarding educational employees who take leave at the end of an academic term. ELA's reference to this provision is not helpful.

Finally, ELA once again refers to the conformity requirements of the Department of Labor. (See ELA-AC-Br., p. 18. See also UESF-Op.-Br., p. 21, and UESF-Reply-Br., p. 22.) ELA uses the word "opine" (ELA-AC-Br., p. 18) to suggest the conformity requirements are valueless. This is, in effect, a concession that the conformity requirements of the Department of Labor, which administers the unemployment insurance program, are the authoritative interpretation.

ELA calls to the Court's attention the Employment Development Department's Benefit Determination Guide Miscellaneous Instruction 65. [14] Taken as a whole, that Miscellaneous Instruction supports our position that although traditionally school districts do not have a summer academic term, they can do so. (UESF Op.-Br. p. 21, and UESF-Reply.-Br. pp. 22-23.) ELA quotes but ignores the reference "[w]hen the school break is between the end of the traditional school year in June, and the beginning of the next

[14] The ELA incorrectly represents to this Court that the Miscellaneous Instruction was prepared after *Matter of Brady* (2013) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-505 (hereafter *Brady*). (See ELA-AC-Br., p. 20, fn. 5.) Although MI 65 is undated, it is clear that it has not been updated since *Brady*. There is no reference to *Brady*, and the last precedent benefit decision to which the Instruction refers is in 1991. As reflected in the CUIAB's brief, there have been other precedent benefit decisions since 1991 that are relevant to this issue. This misrepresentation supports the UESF's interpretation and undermines ELA's arguments to this Court on this issue as well as other issues. Indeed, the fact that as of at least 1991, the Employment Development Department took the same position with respect to academic terms is certainly relevant.

traditional school year in August." (ELA-AC-Br., p. 19, emphasis supplied.) ELA ignores the use of the word "traditional" in this sentence. The maintenance of a summer term may not be "traditional," but it is a reality for many districts including SFUSD.

D. NOTHING IN UNEMPLOYMENT INSURANCE CODE SECTION 1253.3 REQUIRES THE SAME TREATMENT FOR ALL EMPLOYEES OF A SCHOOL DISTRICT

The ELA correctly recognizes that the arguments are limited to on-call employees, and particularly the 26 claimants involved in this case. ELA argues, however, that "such an exception cannot be read into the statute."

Although ELA is correct that there is no specific reference to "on call" or "substitute" or similar categorization of employees, we have established that the legislative history concerns only salaried employees paid on a year-round basis. (See UESF-Op.-Br., pp.16-17, and UESF-Reply-Br., pp. 15-17.)

The statute, however, allows this interpretation that on-call employees are entitled to benefits. The denial provisions of Unemployment Insurance Code section 1253.3, subdivisions (b) and (c) apply to "any individual with respect to any week ...." The reference to "any individual" makes it clear the statute did not contemplate the same result for all individuals of the school district for the same period of time. That is, those who are salaried employees who receive a full-time year-round salary would be subject to the denial provisions. Other individuals could be

subject to different results depending upon their circumstances.[15] Thus, the ELA's assertion that *expressio unius est exclusio alterius* governs is a misapplication of the doctrine. The word "individual" encompasses all school district employees and suggests that there may be different applications of the denial provisions to employees who were not similarly situated. Thus, contrary to the ELA's suggestion, the fact that the Legislature did not specifically deal with on-call employees is not a suggestion that the Legislature intended that all employees would be treated the same.

To be clear about UESF's position, it is that there is a subset, probably a relatively small subset, of employees who are needed for the summer academic term. If they are salaried employees, they are likely excluded from unemployment benefits during the summer academic term. If they are substitute or other on-call employees, they may also be excluded from unemployment benefits if their employment relationship is only for the spring and fall terms and they are given reasonable assurance of reemployment in the fall term.

The Unemployment Insurance Code contemplates that there will be different treatment of school employees depending on their individual employment relationship and the nature of the school district's educational program. Unemployment Insurance Code section 1253.3, subdivisions (b) and (c) both deny benefits "to any individual with respect to any week which begins during ...." The use of the word "individual" allows

[15] Indeed, a review of the state cases relied upon by both sides indicate that in many cases, the state courts reviewed the factual circumstances of each school district employee to determine whether he or she was entitled to benefits. None suggested that the same rule would have to apply to all, either all or none would get unemployment insurance during a particular disputed period.

individual treatment of different education employment. This is further confirmed by the phrase in the same sentence: "if the individual performs services in the first of the academic years ...." The word "individual" appears four times in subdivision (b) and eight times in subdivision (c). It is thus clear that the statute mandates individual treatment and individual analysis.[16]

The employees who are involved in this case were needed by the school district to make the summer academic term work. Their availability is what made the school district able to conduct a summer academic term. Whether they worked or not was wholly the choice of the SFUSD. Thus, their benefits depended upon their availability and the SFUSD's use of them during the summer academic term. For many on-call employees, the summer session may have been a summer vacation, and they had no expectation of employment and/or had other plans.

By this point, we are not suggesting this Court devise such a clear rule. That's going to be up to the Employment Development Department. (See *infra*, at p. 19.)

E. THERE IS NO CONFLICT WITH THE CUIAB AS TO THE ENTITLEMENT TO BEENFITS; ONLY AS TO THE DURATION OF THOSE BENEFITS.

Contrary to ELA's suggestion, there is no dispute between the UESF and the CUIAB about whether these on-call employees are entitled to benefits. (See ELA-AC-Br., pp. 21-22.) The difference is only whether the employees are entitled to benefits for the entire time between the end of the spring term and the beginning of the fall term, or whether the entitlement is

[16] This explains the varying treatment of these issues under differing state laws and differing education employment relationships.

only for the period of the summer term.[17] (See UESF-Reply-Br., pp. 24-30.) ELA and OUSD have offered no explanation why these employees should be treated differently than any other employee who is entitled to benefits. Indeed, this is the requirement of Unemployment Insurance Code section 1253.3, subdivision (a) that "unemployment compensation benefits ... are payable on the basis of service ... in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to this division, except as provided by this section." That is, unless subject to the denial provisions, benefits are awardable on the basis as any other employee otherwise eligible. This is the force of this provision known as the "equal benefits" provision.

ELA is again incorrect that this interpretation "would negate the reasonable assurance language for the hundreds of school districts that offer a summer session." (ELA-AC-Br., p. 22.) To be clear again, all that the school district has to do to avoid having its unemployment insurance account affected is to give those employees who have no expectation of employment or who are precluded by contract from working during a summer term reasonable assurance that they will be employed for the fall term. The reasonable assurance requirement clearly applies as to them for the complete period.

As to that different subset of employees who are available and/or asked to work during the summer term, no reasonable assurance letter needs to be given to them because they will be presumably working for the

[17] Had the school district given these employees reasonable assurances at the conclusion of the summer term that they would be rehired for the fall term, they would not have been eligible for that five week period between the conclusion of the summer academic term and the fall academic term. This is quite practical for the SFUSD or any other school district that employs on-call employees during a summer academic term.

district during the summer term. Obviously, if there isn't work or work is less than expected, they may be entitled to some unemployment insurance during that time.[18]

F. SUMMARY

In summary, contrary to the suggestion of ELA, there is no "carve-out."[19] The individuals for whom the summer term was an academic term were entitled to benefits. They were not given reasonable assurances that they would be employed during that academic term, and thus the denial provisions were not triggered and they were entitled to unemployment benefits during that academic term.[20]

G. OTHER JURISDICTIONS

ELA claims that the authority from other jurisdictions supports a denial of benefits. Making the same mistake the court below made and that SFUSD makes, it primarily relies upon cases involving employees who were not on-call employees. The first case it cites involved a "regularly employed teacher who chose to teach a few days during her regular summer vacation while awaiting the commencement of the next academic year." (ELA-AC-Br., p. 24 [quoting from a New York case].) ELA fails to suggest one case that reflects the same facts: A summer session that is an

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[18] Here, the SFUSD chose to give a reasonable assurance letter for the fall, rather than for the summer term for this group. Had it given reasonable assurance to these employees that they would be employed for the summer term, then it would not have faced the consequences of their entitlement to benefits. The SFUSD cannot claim ignorance because the prior decision of Judge Warren made it clear to the SFUSD that there was such a requirement.

[19] We have previously distinguished *Board of Education v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674. (See UESW-Op.-Br., p. 29.)

[20] Again, as we have previously stated, the amount of benefits is still undetermined depending upon other circumstances such as whether they had income elsewhere or were otherwise available for employment.

academic term and on-call employees who had reasonable expectation of working during that period. ELA finds no case with the same statutory scheme governing school districts. And certainly there is no California case applying the provisions of the California Unemployment Insurance Code and the Education Code.

We did not rely on cases from other jurisdictions except to highlight the necessity of evaluating the statutory scheme governing academic years and terms and the facts of the case. These out-of-state cases illustrate the breadth of the terms found in the various state statutes enacted to implement federal legislation providing for unemployment insurance to education employees. They prove that the school districts have the flexibility to create academic terms, including academic terms during the summer or other periods which may be a vacation for some. They prove, furthermore, that each state can apply its unemployment laws differently, subject ultimately to federal law requirements. Here, as we have demonstrated, federal law allows California law to construe a summer session as an academic term and award unemployment insurance benefits to some employees who may be rendered unemployed.[21]

Perhaps most helpful is the language from a Michigan case in which benefits were awarded when a summer session was eliminated:

> In construing the statute, appellate courts have the duty to ascertain and effectuate the intent of the Legislature. *Bonnette,* 165 Mich.App. 471, 419 N.E.2d 593; *The Lamphere Schools v. The Lamphere Federation of Teachers,* 400 Mich. 104, 110, 252 N.W.2d 818 (1977). The Legislature's intent in passing MESA was to safeguard the

[21] If the Court finds that the summer session is an academic term, the federal law would require that California pay benefits to at least the claimants. A state cannot deny benefits that are awardable under the federal law governing unemployment benefits. (*Chicago Teachers Union v. Johnson* (7th Cir. 1980) 639 F.2d 353.)

> general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment. The provisions of the act are to be liberally construed in order to give effect to this remedial policy. For the same reason, the disqualification provisions should be narrowly construed. *Bonnette,* 165 Mich.App. 471, 419 N.E.2d 593; *Laya v. Cebar Construction Co.,* 101 Mich.App. 26, 34-35, 300 N.W.2d 439 (1980).

Wilkerson v. Jackson Pub. Sch. (Mich.Ct.App. 1988) 427 N.W.2d 570, 571.

This applies with at least equal force under California law.

IV. THE CUIAB IS ENTITLED BY STATUTE TO ISSUE PRECEDENT BENEFIT DECISIONS

The ELA argues at length that the CUIAB should resolve these questions by regulatory proceedings. (See ELA-AC-Br., pp. 30-40.) We leave to the CUIAB to provide a more complete response. Nonetheless, as the CUIAB pointed out in its Opening Brief, it has statutory authority to issue precedent benefit decisions. (See Unemp. Ins. Code § 409; and Gov. Code § 11425.60. See CUIAB-Op.-Br., p. 10.)

V. THE SAN FRANCISCO UNIFIED SCHOOL DISTRICT AND OTHER SCHOOL DISTRICTS THAT PROVIDE FOR A SUMMER ACADEMIC TERM HAVE THE AUTHORITY TO CREATE RULES DESCRIBING THOSE ON-CALL EMPLOYEES WHO HAVE SOME EXPECTATION OF EMPLOYMENT DURING A SUMMER TERM BUT WHO MAY END UP UNEMPLOYED THROUGH NO FAULT OF THEIR OWN

What we suggest is that there are individuals within the meaning of the denial provisions for whom the summer academic term is an academic term for which they have some expectation of work. That expectation of work can be created by various mechanisms.

ELA is correct as follows:

> For example, CUIAB and UESF's arguments ignore the collective bargaining process and the status quo under which these types of issues are negotiated, and which permeate the school district employment market. The employees in this action are members of a collective bargaining unit and their

> wages, hours, and terms and conditions of employment are negotiated with the District. Discussions regarding the lack of summer work and compensation are a common feature at the bargaining table and are a factor in discussions concerning wages. In many cases, the summer periods are factored into the compensation negotiations for employees. These negotiations also undoubtedly impact the wages paid to unrepresented employees, as districts must compete for labor. If the legal landscape that serves as the backdrop for collective bargaining and school district employment is to be changed, it should be done through a deliberative and reasoned process, not through ad hoc and arbitrary administrative action or through the judicial process.

(ELA-AC-Br., p. 35.)

We concur that in this context the SFUSD and UESF can create by collective bargaining a defined group of on-call employees for whom the summer term is an academic term. If they are employed, they are not entitled to unemployment benefits. If they are unemployed because of no fault of their own, that defined group may be entitled to some unemployment benefits. They made themselves available to serve an important educational purpose. The SFUSD operates a summer term to accommodate the educational needs of the students. Students who have missed an academic term, because of illness or other issues, can complete their education in the summer term. Students who want additional opportunities can takes classes. The district can better allocate its resources through a summer academic term. There are many valid reasons for a school district to have such an additional academic term

The claimants here served this valid interest. They did not work through no fault of their own. This is a classic case of entitlement to unemployment benefits.

That same process would then necessarily exclude the remainder of the employees, including the regular and probationary employees who are

paid a yearly salary. Thus, this problem is, as ELA suggests, easily resolvable through the process of collective bargaining.[22]

VI. CONCLUSION

For these reasons the decision of the Court below should be reversed and this matter remanded to the trial court with directions to grant benefits, subject to any other offsets, to the 26 claimants.

Dated: June 26, 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

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[22] As to those few school districts that may not have a collective bargaining representative, they could adopt the appropriate rules if they choose to have a summer term.

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 Answering Brief of Petitioner/Appellant United Educators of San Francisco To *Amici Curiae* Briefs, was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 6,128 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: June 29, 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 June 29, 2017, I served the following documents in the manner described below:

ANSWERING BRIEF OF PETITIONER/APPELLANT UNITED EDUCATORS OF SAN FRANCISCO TO AMICI CURIAE BRIEFS

☑ (BY OVERNIGHT COURIER) 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 delivery charges 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
Gregory D. Brown
Beverly R. Meyers
Janill L. Richards
Julie Weng-Gutierrez
Susan M. Carspon
Samuel P. Siegel
Office of the State Attorney General
455 Golden Gate Avenue, Suite 1100
San Francisco, CA 94102

Attorneys for California Unemployment Insurance Appeals Board

John Yeh
Burke, Williams & Sorensen, LLP
1503 Grant Road, Suite 200
Mountain View, CA 94040-3270

Attorneys for San Francisco Unified School District

Marion L. McWilliams
Michael L. Smith
Amy D. Brandt
Office of the General Counsel
Oakland Unified School District
1000 Broadway, Suite 680
Oakland, CA 94607

Attorneys for Amicus Ciriae, Oakland Unified School District

Laura Schulkind
Michael D. Youril
Libert Cassidy Whitmore
135 Main Street, 7th Floor
San Francisco, CA 94105

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

Keith Bray, General Counsel/ELA Director
Michael Ambrose, Staff Attorney
3251 Beacon Boulevard
Sacramento, CA 95691

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

Glenn Rothner
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101

Attorneys for Amicus Curiae American Federation of Teachers, AFL-CIO

David J. Strom
Samuel J. Lieberman
American Federation of Teachers, AFL-CIO
555 New Jersey Avenue, NW
Washington, D.C. 20001

Attorneys for Amicus Curiae American Federation of Teachers, AFL-CIO

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 June 29, 2017, at Alameda, California.

Karen Kempler

Karen Kempler