BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JOAN J. BROWN
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-163
Case No. 73-8000

The claimant appealed from the decision of the referee in Case No. LB-30105 which held that the claimant was not entitled to benefits under section 1253.4 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant's initial appeal was from a Department determination which held her ineligible for unemployment Insurance benefits for an indefinite period beginning August 5, 1973, on the ground that she was a classified school employee who was unemployed during the school recess period.

The claimant was employed by the Lynwood Unified School District as a classified service teacher's aide in September of 1972. She assisted the classroom teacher for approximately six hours each day in the areas of reading, art and physical education and was compensated at approximately $300 per month.

There is frequently some uncertainty whether funding will be forthcoming for the next successive year. Here, the school year ended on June 15, 1973 and, although there was the usual uncertainty with respect to funding for the claimant's program during the 1973-1974 school year, the claimant was not officially notified in writing that her services would be terminated.

Ultimately, during the recess period, federal funds were budgeted in an amount approximately $25,000,000 for the program in which the claimant participated. These were "Title I" funds. When the appropriation was made, those classified employees who had not been notified of termination by the

end of the school year 1972-1973 were expected to return for the school year 1973-1974.

The claimant filed her initial claim for benefits on July 16, 1973 indicating she was no longer working on her last job because she had been "Laid off for summer." It was determined that she had insufficient earnings for a valid claim but, after accruing additional wage credits, the claimant again filed a claim for benefits on August 6, 1973, giving the same reason for her being unemployed.

In early September 1973, the claimant received two communications from the school district. One reported a wage increase amounting to 5.6 percent for the following school year and the other directed her to report for her work assignment on September 6, 1973. At the time of the hearing before the referee on October 25, 1973, the claimant was employed and working as a teacher's aide for the school district.

REASONS FOR DECISION

Sections 135.3 and 605.2 of the California Unemployment Insurance Code provide for unemployment benefits for classified employees of a school district. Section 13658 of the Education Code defines eligible employees as follows:

> "Every regularly employed classified school employee employed by any of the following: (a) governing board of a school district, (b) county board of education, (c) county superintendent of schools, or (d) personnel commission of a school district which has a merit system as provided in Article 5 (commencing with Section 13701) of Chapter 3 of Division 10 of Education Code, shall be covered for unemployment insurance pursuant to Sections 135.3, 605.2, and 802 of the Unemployment Insurance Code.
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> "As used in this section, 'regularly employed classified school employees' includes all persons employed pursuant to Sections 872, 934, 949, 13581.2, 13581.5, 13599.7, and Sections 13581.1 and 13712 and any other similar provisions heretofore or hereafter enacted. Persons serving as substitute, short-term, part-time playground, full-time day student employed part-time where enrolled, apprentice, temporary professional expert, emergency, limited term, or provisional employees or

volunteers are, unless otherwise eligible, excluded from the meaning of the term.

"This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 5 (commencing with Section 13701) of this chapter."

The claimant is a classified employee within the meaning of section 13658.

Section 1253.4 of the Unemployment Insurance Code provides as follows:

"Notwithstanding any other provision of this division, unemployment compensation benefits, extended duration benefits, and federal-state extended benefits based on service performed in a classified service position that is included in covered employment pursuant to Section 605.2, shall not be payable to any individual with respect to any week if any day of the week is within any school vacation, summer or special school session, recess or holiday (hereinafter referred to as 'recess period') and he is scheduled to return to work at the end of the recess period, except that if he is not returned to work at the end of the recess period or is laid off within 30 working days thereafter, the department may reconsider any determination denying benefits and may pay benefits to him for any week in the recess period if he is otherwise eligible in all respects except for the requirement of subdivision (b) of Section 1253 that he report for each week benefits are claimed."

We believe, taking section 1253.4 as a whole, that the Legislature intended to deny benefits where there was any expectancy at all of return. The last part of the section confirms this belief in that, if the funds are not appropriated and the individual is not taken back, there is retroactive coverage provided which excuses reporting requirements. There need be no unconditional guarantee; the expectancy is sufficient.

The claimant herein was unemployed because the 1972-1973 school year had ended on June 15, 1973 and the summer recess was in progress. She did not file for benefits until July 16 for reasons which are not pertinent to the issues before us. When her claim filed August 6, 1973 resulted in a

determination that she had accrued earnings sufficient to establish an award, she then became subject to the eligibility test set out in section 1253.4 above. She would only be eligible for benefits under that section if she were not scheduled to return for the 1973-1974 school year. While she explained that her return to work was uncertain because of the uncertainty of funding, we find such uncertainty frequently occurs when funds have to be allocated for the job. It is clear, however, that the claimant had an expectancy to return to work. Beyond the expectancy, we also note that section 13583.7 of the Education Code provides as follows:

> "(a) When, as a result of the expiration of a specially funded program, classified positions must be eliminated at the end of any school year, and classified employees will be subject to layoff for lack of funds, the employees to be laid off at the end of such school year shall be given written notice on or before May 29 informing them of their layoff effective at the end of such school year and of their displacement rights, if any, and reemployment rights. However, if the termination date of any specially funded program is other than June 30, such notice shall be given not less than 30 days prior to the effective date of their layoff.
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> "(b) When, as a result of a bona fide reduction or elimination of the service being performed by any department, classified employees shall be subject to layoff for lack of work, affected employees shall be given notice of layoff not less than 30 days prior to the effective date of layoff, and informed of their displacement rights, if any, and reemployment rights.
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> "(c) Nothing herein provided shall preclude a layoff for lack of funds in the event of an actual and existing financial inability to pay salaries of classified employees, nor layoff for lack of work resulting from causes not foreseeable or preventable by the governing board, without the notice required by subsections (a) or (b) hereof.
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> "This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 5 (commencing with Section 13701) of this chapter."

In the absence of the official written notice required by section 13583.7, it must be inferred that the claimant was scheduled to return to work at the end of the recess period. It is clear from the record she received no such official written notice and therefore she was scheduled to return and is

ineligible for benefits attributable to her earnings as a classified school employee under section 1253.4 of the Unemployment Insurance Code.

DECISION

The decision of the referee is affirmed. The claimant is not eligible for benefits attributable to her earnings as a classified school employee during the recess period.

Sacramento, California, April 9, 1974

CALIFORNIA UNEMPLOYMEN INSURANCEAPPEALSBOARD

JOHN B. WEISS, Vice-Chairman

CARL A. BRITSCHGI

EWING HASS

DISSENTING - Written Opinion Attached

DON BLEWETT

DISSENTING OPINION

I dissent.

While the claimant had a hope of returning after the recess period, she was not told she was "scheduled to return" if, in fact, she was so scheduled. We know only that her job depended upon funding which was in doubt and I do not construe her "hope" or "expectancy" as a scheduling to return.

The legislature, in enacting section 1253.4, did not place conditions upon the scheduling. The wording of the statute is clear and unambiguous. It provides that the claimant will be ineligible if "scheduled to return to work at the end of the recess period." It does not refer to a "hoped for" or an "expected return"; it treats only of a "scheduled" return to work. We must therefore look to the meaning of the verb "schedule." The general rule of statutory construction is that if the language is unambiguous and the statute's meaning is clear, the statute must be accorded the expressed meaning without deviation. Any departure would constitute an invasion of the province of the legislature.

Webster's Third New International Dictionary defines schedule as follows: "To appoint, assign, or designate to do or receive something at a fixed time in the future."

In the instant case, when the school year ended in June, the claimant was not appointed, assigned or designated to report back to work at the end of the recess period. It was not until some time in September when funds were appropriated that she was so scheduled. She may have expected to return, but there was no assurance that she would and there was considerable uncertainty because funds had not been appropriated.

In order for employees to be scheduled to return to work after the recess, there must be, in my view, an assurance communicated to those employees that they definitely will be returning to work after the recess. Such an assurance cannot be communicated when funding is uncertain as in the instant case. The most the claimant herein could have been told was that she was scheduled to return to work <u>provided funds were available</u>. That is not "<u>scheduled to return to work</u>" within the meaning of section 1253.4 of the code as I read it.

Absent the funding uncertainty, it would be a simple matter to provide written notice to classified employees that they are scheduled to return to work on a date certain. Then, if for some unforeseen reason it became impossible to rehire some or all of the classified employees, the retroactive provision of section 1253.4 would take effect. But, absent a formal scheduling with notice to the employee, I do not think the ineligibility provision should apply.

The majority opinion is legislation by the board which extends the scope of the restriction in section 1253.4 beyond the expressed limitation set out by the legislature in the statute.

I am aware of at least one prior nonprecedent decision by this board involving a factual situation almost identical to that of the instant case. The board found the claimant eligible for benefits in that case. I am of the opinion that the prior case expressed the better view.

I would find the claimant eligible for benefits up to the benefit period in which she received notice that she was to report for work.

DON BLEWETT