

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD  
P O Box 944275  
SACRAMENTO CA 94244-2750

THEODORE D STINSON  
Claimant-Appellant

Precedent Benefit  
Decision No. P-B-501

LONG BEACH USD  
c/o UC EXPRESS  
Employer

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROBERT DRESSER

ALBERTO TORRICO

KATHLEEN HOWARD

ROY ASHBURN

Pursuant to section 409 of the California Unemployment Insurance Code, AO-270683 is hereby designated as Precedent Decision No. P-B-501.

Adopted as Precedent: December 11, 2012

**Case No.: AO-270683**  
**Claimant: THEODORE D. STINSON**

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The claimant appealed from the decision of the administrative law judge that held the claimant ineligible for unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code<sup>1</sup> beginning June 19, 2011.

### ISSUE STATEMENT

The issue before us is whether the claimant, a school employee as specified in code section 1253.3, subdivision (c), is entitled to unemployment insurance benefits given that the employer did not comply with the requirement of providing written notice of reasonable assurance no later than 30 days before the end of the academic term or year, pursuant to code section 1253.3, subdivision (i).

### STATEMENT OF FACTS

The claimant has worked for Long Beach Unified School District, a public educational institution, for approximately six years. Since July 2009, the claimant has worked as a substitute security officer. The spring semester of 2010-2011 ended on June 16, 2011. The claimant's last day of work before the summer recess was June 16, 2011.

As was the case with the summer of 2010, the claimant was not offered any work with the employer in the summer of 2011. In a letter dated May 18, 2011, received by the claimant on May 21, 2011, the employer gave the claimant notice that he had reasonable assurance of returning to work in his usual capacity in the next school year. The letter stated that the claimant's services would not be needed over the recess periods. The letter also advised the claimant that he had the right to file a claim for benefits at the end of the school year, that the determination of eligibility for benefits would be made by the Employment Development Department (EDD), not the employer, and that the claimant had the right to file a claim for retroactive payment of benefits within the first 30 days after the start of the next academic year if the claimant was not afforded the opportunity to work in the new academic year. To be timely, under code section 1253.3, subdivision (i), the employer should have

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<sup>1</sup> All statutory references are to the Unemployment Insurance Code, unless otherwise noted.

provided the written notice on or before May 17, 2011. Thus, the notice required by code section 1253.3, subdivision (i) was given to the claimant 1 day late.

The fall term of the 2011-2012 academic school year began on August 30, 2011. The claimant returned to work on August 30, 2011, and was given a 59-day assignment as a substitute security guard.

### REASONS FOR DECISION

Code section 1253.3 controls whether school employees are entitled to unemployment benefits during a summer recess. As a general rule, benefits will be denied if the claimant worked in an academic year or term and the employer provides "reasonable assurance" of reemployment in the second of the academic years or terms. Separate subdivisions govern the employee's rights and the employer's obligations under the statute, depending upon the type of position held by the employee during the academic year.

Unemployment insurance benefits based on service performed in the employ of a nonprofit or public educational institution in "an instructional, research or principal administrative capacity . . . are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms . . . if the individual performs services in the first of the academic years or terms and if there is a contract or reasonable assurance that the individual will perform services for any educational institution in the second of the academic years or terms." (Unemployment Insurance Code, § 1253.3, subd. (b).)

Unemployment insurance benefits based on service performed in the employ of a nonprofit or public educational institution in other than an instructional, research or principal administrative capacity "shall not be payable to any individual with respect to any week which commences during a period between two successive academic years or terms if the individual performs the services in the first of the academic years or terms and if there is a reasonable assurance that the individual will perform the service in the second of the academic years or terms." (Unemployment Insurance Code, § 1253.3, subd. (c).)

When an employer provides "reasonable assurance," the employer is entering into an agreement which contemplates the reemployment of the employee, but which is not legally enforceable. (*Russ v. California Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834.)

In the case of employees performing substitute work, reasonable assurance of work as a substitute after the summer recess is sufficient even though the

employer may not be able to specify exactly when the claimant would perform services. (*Board of Education of Long Beach Unified School District v. California Unemployment Insurance Appeals Board* (1984) 160 Cal.App.3d 674.)

While “reasonable assurance” is an issue in all cases involving eligibility for benefits during school recesses, school employees may have different rights, depending upon whether the employee performs services in an instructional, research or principal administrative capacity (“professional employees”), or performs services in all other capacities (“nonprofessional employees”). (Code section 1253.3, subdivisions (b) and (c).)<sup>2</sup>

Professional school employees are entitled to fewer protections with respect to their rights to unemployment insurance benefits than are nonprofessional school employees. Specifically, professional school employees, who have reasonable assurance during a recess period, have no potential for retroactive benefits in the event an opportunity to perform services in the second academic year is not offered. In contrast, nonprofessional school employees may be entitled to such benefits. (Compare Code section 1253.3, subs. (b) and (c). See also Section 3304 (a)(6)(A)(ii)(II) of the Federal Unemployment Tax Act (FUTA).) Thus, it is important to distinguish whether the school employees are considered professional or nonprofessional because they are treated differently by statute.

Code section 1253.3, subdivision (i) applies only to “nonprofessional” employees. Subdivision (i) provides, in pertinent part, that *no later than 30 days before the end of a “first academic year or term,”* (emphasis added) public school employers shall provide a written statement indicating:

- “(1) Whether or not there is reasonable assurance of reemployment.
- (2) Whether or not it is stated that the individual has no reasonable assurance of reemployment, that the individual should file a claim for benefits at the close of the academic year or term.
- (3) If it is stated that the individual has reasonable assurance of reemployment, the written statement shall also inform the employee that he or she may file a claim for benefits and that the determination

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<sup>2</sup> For ease in reference, these school employees are referred to as “professional employees” or “nonprofessional employees,” as they are in the Unemployment Insurance Program Letters (hereinafter referred to as UIPL) issued by the U.S. Department of Labor. “Professional is the name given to the services described in clause (i) of [26 U.S.C.] Section 3304(a)(6)(A) as services performed in an ‘instructional, research, or principal capacity.’ ‘Nonprofessional’ is the name given to the services described in clause (ii) as services performed in ‘any other capacity.’” (U.S. Dept. of Labor, UIPL No. 15-92 (Jan. 27, 1992), citing 26 U.S.C. Section 3304(a)(6)(A).

for eligibility for benefits is made by the Employment Development Department not by the employer.

- (4) If it is stated that there is reasonable assurance of reemployment, that the individual shall be entitled to a retroactive payment of benefits if the individual is not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms, if the individual is otherwise eligible and he or she filed a claim for each week benefits are claimed, and if a claim for retroactive benefits is made no later than 30 days following the commencement of the second academic year or term.”

Here, it is undisputed that as a substitute security guard at a public education institution, the claimant falls within the class of “nonprofessional school employees” and is thus protected by the rights to unemployment insurance benefits of code section 1253.3, subdivisions (c) and (i). Code section 1253.3, subdivision (i) requires that the employer provide written notice of reasonable assurance to work in the next academic year or term “no later than 30 days before the end of the first of the academic years or terms.” The written notice provided by the employer was dated May 18, 2011 and mailed on or about that date, less than 30 days before the end of the academic term.

The question presented in this case concerns the consequence of the employer’s failure to comply with the 30 day requirement for the written notice under code section 1253.3, subdivision (i).

“The policy underlying the Unemployment Insurance Act is to promote public and private enterprise by establishing ‘a system of unemployment insurance providing benefits to persons unemployed through no fault of their own, and to reduce the suffering caused thereby to a minimum.’” (*Metric Man, Inc. v. Unemployment Insurance Appeals Board* (1997) 59 Cal.App.4<sup>th</sup> 1041, 1051, quoting, in part, Unemployment Insurance Code, § 100.)

“The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment. [Citations omitted.]” (*Gibson v. Unemployment Insurance Appeals Board* (1973) 9 Cal.3d 494, 499.)

The U.S. Department of Labor requires that “[s]ocial legislation such as the FUTA is to be construed broadly with respect to coverage and benefits. Exceptions to its statutory remedies are to be narrowly construed. . . . Accordingly, since the denial provisions are exceptions to the broad coverage provisions of Section 3304(a)(6)(A), they are given a narrow reading. . . . Such a reading, which

permits a State to differentiate among services, or to otherwise limit application of a clause, could also result in extending coverage to the broadest number of unemployed persons, thereby accomplishing the basic purpose of the coverage requirements of Section 3304(a)(6)(A), FUTA.” (U.S. Dept. of Labor, Unemployment Insurance Program Letter (UIPL) No. 43-93 (April 23, 1993) (internal citations omitted).)<sup>3</sup>

Code section 1253.3, subdivision (a) declares that unemployment insurance benefits will be paid to school employees in equal measure and under equal terms as those paid to non-school employees, except as provided by the terms of section 1253.3. (Unemployment Insurance Code, § 1253.3, subd. (a).)

The language of code section 1253.3, subdivision (a) is almost identical to the proposed draft language for the States offered by the U.S. Department of Labor. (See U.S. Dept. of Labor, UIPL No. 15-92 (Jan. 27, 1992).) The section includes the general provision of legislative intent to avoid or mitigate major disruptions to the economy resulting from involuntary unemployment and the suffering so caused. (See Unemployment Insurance Code, § 100; see also, FUTA, 26 U.S.C. §§ 3301-3311.)

By the terms of subdivision (a), any restriction on unemployment benefits afforded to school employees under code section 1253.3 is to be limited. (Unemployment Insurance Code, § 1253.3, subd. (a).) Subdivision (i) of that section mandates what the school employer must do to provide the reasonable assurance that results in the denial of benefits to nonprofessional school employees benefits between academic years or terms. Basic principles of legislative intent dictate that “[e]xceptions to the general provisions of a statute are to be narrowly construed.” (*Corbett v. Hayward Dodge* (2004) 119 Cal.App.4<sup>th</sup> 915, 921.) The requirements are clear, explicit, specific and mandatory. The one at issue here mandates the notice of reasonable assurance for nonprofessional school employees to be provided in writing, “...no later than 30 days before the end of the first of the academic years or terms.” (Unemployment Insurance Code, § 1253.3, subd. (i).)

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<sup>3</sup> “The United States Department of Labor is the federal agency responsible for ensuring that state unemployment laws comply with the mandatory federal criteria set out by Congress.” (*Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 426 (Haw. 1990) (internal citations omitted).) In order for California to qualify for federal funding for this State’s unemployment insurance program and for private employers in California to be eligible for federal tax credits for unemployment contributions, California’s unemployment compensation laws must comply with the standards set forth in the Federal Unemployment Tax Act of 1954 (hereinafter referred to as “FUTA”), codified at 26 U.S.C. §§ 3301-3311.). (See e.g., *Russ v. Unemployment Insurance Appeals Board*, *supra*, 125 Cal.App.3d at 891.) Thus, the UIPL’s by the Department of Labor may be used as persuasive interpretations of the federal law. (*Ibid.*)

Since the language is unambiguous, the plain meaning of the language governs. (See *Estate of Thomas* (2004) 124 Cal. App. 4<sup>th</sup> 711, 719.) Specifically, the language of code section 1253.3, subdivision (i) mandates that specified employers of nonprofessional school employees, "...shall provide a written statement ...to the individual no later than 30 days before the end of the first of the academic years or terms." (Emphasis added.) The Unemployment Insurance Code, itself, directs that "...[s]hall' is mandatory and 'may' is permissive'." (Unemployment Insurance Code, § 15.) Moreover, the use of the word *shall* is typically construed as mandatory, while the word *may* is construed as permissive. (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4<sup>th</sup> 538, 542; *Doe v. Albany Unified School District* (2010) 190 Cal.App.4<sup>th</sup> 668, 676-677.) The mandatory nature of section 1253.3, subdivision (i) is further evidenced by its imperative language "...no later than 30 days before the end of the first academic years or terms." (Emphasis added.) [See *Ursino v. Superior Ct.* (1974) 39 Cal.App.3d 611, 619 (finding that the use of the word "shall" in conjunction with the phrase "not later than" shows an intent for a mandatory time period).]

Well-settled principles of statutory construction require the interpretation of the statute "in a manner to implement the legislative intent." (*Worthington v. Alcala* (1992) 10 Cal.App.4<sup>th</sup> 1404, 1408.) The intent is derived by looking first at the ordinary meaning of the words used in the statute and construing "them in the context of the statutory scheme in which they appear." (*Ibid.*)

The statute's plain language conveys an unambiguous prerequisite to a finding of reasonable assurance that results in a denial of benefits to nonprofessional school employees. Further, the statutory scheme of code section 1253.3 is to allow for benefits to school employees with limited exceptions as outlined within the statute. Significantly, by the use of the word "shall," the California Legislature clearly stated an expectation that the school employer provide the notice of reasonable assurance within the 30 day time limit. The California Legislature intended it, to be a consistent practice in providing reasonable assurance to nonprofessional school employees. Thus, the enactment of subdivision (i) gives further definition of the requirements of reasonable assurance under subdivision (c) for the nonprofessional school employees. Accordingly, if the employer fails to provide the nonprofessional school employee with 30 days written notice of reasonable assurance, as required under code section 1253.3, subdivision (i), then the nonprofessional school employee has not received reasonable assurance under subdivision (c) and is not ineligible for unemployment insurance benefits under subdivision (c).

This conclusion is supported by a review of the code section, and its interplay with the enabling federal legislation. In 1991, the federal government amended

subsection (a)(6)(A)(ii)(I) of 26 USC 3304 by substituting "may be denied" in place of "shall be denied" for nonprofessional school employees only. (See The Emergency Unemployment Compensation Act of 1991 (Public Law 102-164).) The federal amendment allows the states the option of providing benefits between consecutive academic years or terms to nonprofessional school employees, regardless of reasonable assurance. Under code section 1253.3 subdivision (c), California opted to deny benefits to nonprofessional school employees if there is reasonable assurance of working in the next academic year or term, provided the employer has satisfied the requirements of subdivision (i).

Under Public Law 102-164, the States can choose to make the requirements less restrictive for nonprofessional employees to receive benefits. (See U.S. Dept. of Labor, UIPL No. 15-92 (Jan. 27, 1992).) If the States should choose to deny benefits to the employees, the States "have the option of adopting a more restrictive test than the reasonable assurance test for nonprofessionals." (U.S. Dept. of Labor, UIPL No. 15-92 (Jan. 27, 1992).) "For example, instead of requiring the reasonable assurance requirement . . . , the State law may include a provision requiring a contract to return to work in the next year or term." (*Ibid.*)

In California, the Legislature chose to include subdivision (i), and thereby adopted a more restrictive test for reasonable assurance for nonprofessional school employees. Accordingly, the school employer must provide the written letter of reasonable assurance 30 days before the end of the academic year or term in order to provide reasonable assurance to nonprofessional school employees. There is no question that the school employer must satisfy the further requirements under subdivision (i) if benefits are to be denied under subdivision (c). With the enactment of subdivision (i), the California Legislature provided greater protection to nonprofessional school employees than professional school employees.

For all the foregoing reasons, we find that to give reasonable assurance to this claimant, the employer had to provide the written notice 30 days before the end of the academic term. The academic term ended on June 16, 2011. Accordingly, in order to meet the 30 day requirement, the written statement needed to be provided on or before May 17, 2011. The written statement is dated May 18, 2011. Therefore, the employer did not satisfy the notice requirements for giving notice of reasonable assurance to this claimant.

Under these circumstances, we find that the lack of timely notice precludes a finding of reasonable assurance of employment. The claimant is not ineligible for benefits beginning June 19, 2011, under code section 1253.3.



## DECISION

The decision of the administrative law judge is reversed. The claimant is not ineligible for benefits under code section 1253.3, subdivision (i), beginning June 19, 2011. Benefits are payable, provided the claimant is otherwise eligible.