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

ALICIA K BRADY
Claimant

Precedent Benefit
Decision No. P-B-505

ONTARIO MONTCLAIR SCHOOL DISTRICT
Employer-Appellant

DECISION

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

ROBERT DRESSER

MICHAEL ALLEN

ROY ASHBURN, Dissenting

Pursuant to section 409 of the California Unemployment Insurance Code, AO-337099 is hereby designated as Precedent Decision No. P-B-505.

Adopted as Precedent: December 10, 2013

The employer appealed from the portion of the decision of the administrative law judge that held the claimant eligible for unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code[1] for the period beginning May 26, 2013 through July 13, 2013.

ISSUE STATEMENT

The issue presented is whether a substitute teacher may be entitled to benefits during the weeks a school district operates summer school within the meaning of section 1253.3 of the code.

FINDINGS OF FACT

The claimant works as a substitute teacher for the Ontario-Montclair School District (hereinafter, the district). Substitute employees, whether professional or nonprofessional, are not paid an annual salary. They receive wages, only if called, for days worked. (See definitions per U.S. Dept. of Labor, UIPL No. 15-92 (Jan. 27, 1992), citing 26 U.S.C. Section 3304(a)(6)(A).)

During the 2012-2013 school year, the claimant worked for the district as an on-call substitute teacher. The spring term ended on May 22, 2013. The claimant filed a claim for unemployment insurance benefits and the employer filed a timely protest to the claim.

The employer protested that the summer break would run from May 28, 2013 to July 31, 2013, and that the claimant was not on-call during the summer break. On June 13, 2013, the Employment Development Department determined the claimant was not eligible for benefits under code section 1253.3, beginning May 26, 2013. The claimant filed a timely appeal from the determination and the matter was set for hearing before an Administrative Law Judge (hereinafter ALJ).

At the hearing before the ALJ, the employer introduced a copy of the letter of reasonable assurance addressed to “Substitute Employee.” The letter stated, in relevant part: “If your services are needed for the 2013 summer school session, you will be called or notified by mail.” (Exhibit 10.) The district’s summer school

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

session was conducted from May 28, 2013 through June 21, 2013. The claimant was available for work as an on-call substitute teacher during the summer school session.

The claimant was not called to work as a substitute teacher for summer school because the district contacted all interested permanent teachers before substitute teachers were called.[2] There is no list for substitute teachers for summer school in the record before us.

On July 9, 2013, the employer offered the claimant a contract for permanent employment beginning August 1, 2013, which she accepted. The claimant began the fall school term as a permanent teacher August 1, 2013.

The ALJ held the claimant eligible for unemployment insurance benefits for the period beginning May 26, 2013 through July 13, 2013. But, the ALJ held the claimant ineligible for benefits beginning July 14, 2013 through July 31, 2013.

REASONS FOR DECISION

The claimant, a substitute public school teacher for the district, sought unemployment insurance benefits during the summer of 2013. Because the claimant performs services for a public school and has base period wages from that service, the case meets the threshold test of Unemployment Insurance Code section 1253.3. In this case, we are called upon to examine the possible entitlement to benefits for a substitute teacher during the weeks the district conducted a summer school session.

On October 20, 1976, Congress passed the omnibus "Unemployment Insurance Amendments of 1976." (90 Stat. 2667, Public Law 94-566.) Becoming effective on January 1, 1978, it substantially amended the Federal Unemployment Tax Act, (hereinafter referred to as FUTA). (26 U.S.C.A. sections 3301 through 3311.) Public school employees, at the primary and secondary levels, were added to unemployment insurance coverage for "service" wages to which FUTA applies.

Both the federal and state statutes created the "equal treatment" provision for school employees. The federal statute, 26 USC Chapter 23, Section

[2] The employer has submitted additional evidence with its appeal that should have been presented at the hearing. There was no showing why the employer could not have submitted the evidence at the hearing before the ALJ. The claimant and the ALJ were denied the opportunity to rebut or consider it. In the notice of hearing, the parties were advised to bring all evidence to the hearing. To consider this information now would be improper and would violate due process. Therefore, the additional evidence has not been considered in reaching our decision.

3304(a)(6)(A), provides in pertinent part: “compensation is payable on the basis of service to which section 3309(a)(1) [26 USCS section 3309] applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law...” (See also, Unemployment Insurance Code section 1253.3, subdivision (a).)

Exceptions to the provisions of FUTA are called the ‘denial provisions.’ (26 USC Chapter 23, Section 3304(a)(6)(A),subsections i-vi, see also Unemployment Insurance Program Letter (hereinafter UIPL) No.15-92 (1992).) California’s statute was amended in 1978 to mirror the federal provisions in FUTA. In essence, unemployment insurance benefits 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 such academic years or terms and if there is a contract or reasonable assurance that such individual will perform services for any educational institution in the second of such academic years or terms. (Code section 1253.3, subdivisions (b) and (c) in pertinent part, emphasis added.)

Neither Congress nor the California Legislature defined the highlighted words used in the denial provisions, above. The Court of Appeal has construed the meaning of the term “reasonable assurance” in three cases, discussed below.

In *Russ v. California Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d. 834, the Court noted that the term “reasonable assurance” was used in, but was not defined in, FUTA. The *Russ* Court relied on Congressional intent, quoting the Joint Explanatory Statement of the Committee of Conference, 1976 U.S. Code Congressional and Administrative News at pp. 6033, 6036. (*Russ*, *supra*, at 843-846.) “…[T]he ‘federal law’ underlying section 1253.3 may be interpreted to define ‘reasonable assurance’ of reemployment as an unenforceable ‘agreement’ …, and that this interpretation may apply to the definition of ‘reasonable assurance’ provided in section 1253.3…”. (*Russ*, at 295.) Thus, section 3304 (a), subsection (6)(A) was “…amended to provide, in effect, that public school employees might be eligible for benefits ‘except’ in certain instances involving their unemployment during periods of summer **recess** at the employing schools.” (*Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834, 843, emphasis added.)

Within a few years California’s Court of Appeal again interpreted the meaning of “reasonable assurance.” It clarified that “[a] contingent assignment is not ‘reasonable assurance’ of continued employment within the meaning of section 1253.3.” (*Cervisi v. Unemployment Insurance Appeals Board* (1989) 208 Cal.App.3d 635, 639.)

In 1984, *Board of Education of the Long Beach Unified School District v. Unemployment Insurance Appeals Board* (1984) 160 Cal.App.3d 674, (hereinafter, *Long Beach*) the Court held that the inherently tenuous nature of employment status as an on-call, substitute teacher did not defeat the "reasonable assurance" given to a substitute school employee. The court applied the denial provisions to substitute teachers without substantial reference to the Congressional discussion of the 1976 Congress. Relying on legislation passed after the 1976 amendments (1977 Public Law No. 95-19), the *Long Beach* court addressed Congressional intent to include substitute school employees in the denial provisions in a footnote. In footnote 2, the Long Beach court observed that Congress did not specify that substitute teachers were not to be included in the 'denial' provisions.[3]

In *Long Beach*, the Court noted the realities of the situation applicable to substitute teaching employment, and cautioned that for a substitute teacher there can be no absolute guarantee of work. The Court reasoned, "There is nothing in section 1253.3 which sets, as a criteria, the tenuous nature of a substitute teacher's position as a basis for determining the 'reasonable assurance' issue." (Ibid. at 683.) The Court concluded the claimant was "ineligible for **summer recess** unemployment benefits **during summer vacation periods** having 'reasonable assurance' of such post recess employment within the meaning and intent of section 1253.3." (*Long Beach*, *supr*a, at 691, emphasis added.)

The *Long Beach* Court, like *Russ* used the terms "**summer recess**" or "**summer vacation periods**" interchangeably for the statutory language, "period between two successive academic years or terms." This terminology can be traced to deliberations in Congress. The issue in this case is whether there is a "summer recess" or "summer vacation period" for substitute teachers when the district schedules summer school sessions for which the substitute teacher is eligible to work.

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[3] *Long Beach* noted that, because the omnibus Unemployment Insurance Amendments of 1976, *supra*, would not become effective until 1978, Congress passed the Emergency Unemployment Compensation Extension [EUC] Act of 1977 a year after the 1976 passage of Public Law 94-566. (Public Law 95-19, H.R. 4800, 91 Stat. 39). This was not the SUA referred to in footnote 6, and was not incorporated into the 1976 omnibus Act, supra. It provided emergency unemployment compensation (EUC) benefits for eligible claimants for one year. It extended the EUC Act of 1974, which had been enacted as a temporary program for workers who exhaust their entitlement to both regular and extended benefits. In the Senate version of the 1977 bill (Senate Report No. 95-67), according to the Senate Report and the House Conference Report, the bill eliminated the House provision disqualifying substitute teachers from unemployment compensation "…if the individual is not employed as a teacher on at least 45 separate days." (Joint Explanatory Statement of the Committee of Conference, 1977, U.S. Code Congressional and Administrative News, at pp. 80 and 103.) Thus, the subsequent bill in 1977 eliminated a disqualification for substitute teachers.

The statute is not clear on its face, in light of existing summer school or year round tracks. Because the phrase "academic years or term," is not defined in the code nor in the cases discussed above, it is necessary to carefully analyze the intent of Congress.

"In determining the intent of the Legislature to effectuate the purpose of the law, '…a court must look first to the words of the statute themselves, giving the language its usual, ordinary import….The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Rules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences. Exceptions to the general provisions of a statute are to be narrowly construed; only those circumstances that are within the words and reason of the exception may be included. [Citations omitted.]" (*Corbett v. Hayward Dodge* (2004) 119 Cal.App.4th 915, 921.)

The conference committee report identified the issues considered by both houses of Congress. [4] It indicated that Congress intended the language "between academic years or terms" to refer to **summer recess** vacation, and that Congress intended to prevent receipt of unemployment benefits by fully employed or salaried professional and nonprofessional school employees, whether they worked pursuant to tenure, contract or agreement. There is no reference in the summary to substitute employees. (Joint Explanatory Statement of the Committee of Conference, 1976, U.S. Code Congressional and Administrative News, at pp. 6030 - 6050.)

In the omnibus "Unemployment Insurance Amendments of 1976" Public Law 94-566 (FUTA, 1976), Congress considered the inclusion of public school employees in the unemployment compensation program. With regard to the summer **recess** period, Congress did not intend to provide fully employed school employees with subsidized **recess** vacations. (122 Cong. Rec. 33284-85 (1976).)

Congress intended the denial provisions of FUTA to address the fact that some traditional, "nine-month" teachers are paid on an annual basis, and should not need unemployment benefits to bridge periods when schools are out of session over a summer **recess**. The "denial" provisions were intended to prevent overcompensation of teachers who are paid a reasonable annual salary based

[4] The House considered the Unemployment Compensation Amendments of 1976 (Public Law No. 94-566) on July 20, 1976, and the Senate considered the bill on September 29, 1976. Both houses considered the conference committee version on October 1. 1976.

on work performed over nine months of the year. (122 Cong. Rec. 33284-33285 and 35132 (1976).)

The intent of Congress was to "prohibit payment of unemployment benefits during the **summer and other vacation** periods, to permanently employed teachers and other school employees." (122 Cong.Rec.35132 (1976), emphasis added.) Nevertheless, the denial provisions do not expressly exclude substitute professional and nonprofessional employees, who are not paid an annual salary and are not permanent employees.

Both the United States Department of Labor and state agencies, as well as case law, have consistently construed the "denial" exceptions narrowly.[5] "Social 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. (citation omitted.)" (UIPL 43-93, Sept. 30, 1994, and Guide Sheet 8, http://wdr.doleta.gov/directives/attach/ETAH/301/guide_sheet_8.htm.)

"The very specificity of the exemptions, …, and the generality of the employment definitions indicate that the [generalities] are to be construed to accomplish the purposes of the legislation." (*United States v. Silk* (1947) 331 U.S. 704, 712.) "The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of *reducing the hardship of unemployment*. (citations omitted.)" (*Prescod v. Unemployment Insurance Appeals Board* (1976) 57 Cal.App.3d 29, 40, emphasis in original.)

Generally, a state may afford greater coverage for unemployment benefits than FUTA, but may not provide less. "This state has always been able to provide coverage beyond the extent provided by federal law. However, it must provide coverage to those who would qualify for benefits under federal law, and specifically in this case under Section 3304(a)(6) of Title 26." (Precedent Benefit Decision P-B-461, p. 4 construing a legislative amendment to section 1253.3

[5] The Employment Training Administration of the Department of Labor, has published guidance for states to follow in application of the denial provisions affecting educational employees: "Conformity Requirements for State UC [Unemployment Compensation] Laws; Educational Employees: The Between and Within Terms Denial Provisions." (http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_termsdenial.pdf.) The Department of Labor (DOL) answered "Frequently Asked Questions," explaining "An academic term is that 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." This directive is an interpretative rule which explains or defines particular terms in a statute, within the meaning of *Cabais v. Egger* (D.C. Cir. 1982) 690 F.2d 234. *Cabais* specifically addressed the Dept. of Labor's UIPLs. (Pub. Law 89-553; 5 U.S.C. sections 551-559, 553(b).) As a Department of Labor directive, the "Conformity Requirements" statement carries the weight of law. (UIPL No. 01-96, 1995.)

which resulted in expanded benefit coverage. See also, Dept. of Labor, UIPL No. 43-93, 1993; and UIPL No. 01-96, 1995.)

As an exception to the general statutory goal of providing benefits to the unemployed, section 1253.3 should be narrowly construed. Since the original purpose of the law is not served by including employees other than traditional 'nine month' school employees with permanent employment, a narrow application of the denial provision is warranted.

In California, this Board has found the denial provisions inapplicable in certain cases, despite the presence of reasonable assurance, during the period between successive academic years or terms for fulltime permanent employees. California amended code section 1253.3 in 1978, the year FUTA denial provisions became effective. During that year, California voters passed Proposition 13, resulting in reductions in school budgets. By the summer of 1979, many school districts across the state closed down for a month or more during summer, due to budgetary constraints. Despite the fact that the lack of work occurred during the summer between two successive academic years or terms, and despite the fact that claimants had reasonable assurance of returning to work in the fall, benefits were payable because that was not a normal **recess** period.

"During the summer of 1978, the Employment Development Department and the United States Department of Labor reevaluated the applicability of section 1253.3 to professional and nonprofessional school employees who were scheduled to teach or work during the 1978 summer school session." (Precedent Benefit Decision P-B- 412 (1980), p.3.) Following an analysis of the Congressional Record, this Board determined, "…it is not the intent of Congress to deny benefits to year–round employees or those regularly scheduled for summer work who, due to cancellation of normal or scheduled summer work, became unemployed. (Congressional Record, September 29, 1976, Vol.122, No. 149, S17013-4; September 29, 1976, Vol.122, No. 149, S17022-3; October 1, 1976, Vol.151, Part II, H12172 [see also Public Law 94-566].)" (P-B-412, at page 3.)

The Appeals Board, in Precedent Decision P-B-417 (1981), relied on the same analysis, finding a clerical employee whose year round contract was reduced to ten months, to be eligible for benefits. The Board found that "…the cause of her unemployment was not a normal **summer recess**[6] or vacation period, but loss of customary summer work." (*Id*., emphasis added.)

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[6] The court in Russ explained that "…public school employees might be eligible for benefits 'except' in certain instances involving their unemployment during periods of summer **recess** at the employing schools." (*Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834, 843, emphasis

Thus, Congress and California case law, as well as Board Precedent Decisions use "summer recess" "summer vacation recess" interchangeably for the statutory language "during the period between two successive academic years or terms." The fact that an employee's services end at the conclusion of an academic year or term, does not mean that the separation is a result of a summer **recess.**[7] The lack of employment is due to loss of scheduled work. Therefore, benefits are payable.

California's Precedent Decisions establish that salaried professional and nonprofessional school employees, who are unemployed due to budget cutbacks, are not disqualified within the meaning of section 1253.3 even though the claim was filed between "two successive academic years or terms," and even though they had reasonable assurance of returning to work. Although the employees had reasonable assurance of employment in the fall, the loss of work, due to budget constraints, excluded their claims from analysis under the denial provisions of section 1253.3.

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 a summer school session there is no recess period for eligible substitute teachers because school is in session. Just as during the fall and spring terms, those teachers are not on recess. 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.

Generally, the burden of proof is on the party for each fact the existence or nonexistence of which is essential to its claim for relief or affirmative defense. (Evidence Code section 500.) The Court may alter the normal allocation of the burden of proof depending upon such factors as the knowledge of the parties

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added.) And, the *Long Beach* Court concluded the claimant was "ineligible for **summer recess** unemployment benefits **during summer vacation periods** having 'reasonable assurance' of such post recess employment within the meaning and intent of section 1253.3." (*Long Beach*, *supr*a, at 691, emphasis added.)

[7] The Employment Development Department published its twenty four page directive in 2007, explaining three elements are required for the denial provisions to apply: school wages in the base period; claim filed during a school recess period; and reasonable assurance must exist. (www.edd.ca.gov/uibdg/Miscellaneous_MI_65.htm.) This directive is in accord with the U.S. Dept. of Labor "Conformity Requirements for State UC [Unemployment Compensation] Laws; Educational Employees: The Between and Within Terms Denial Provisions." (*supra*, at footnote 5.)

concerning the particular facts, the availability of the evidence to the parties, the probability of the existence of a fact, and public policy. (*Morris v. Williams* (1967) 67 C.2d 733, cited in P-B-490. (See also *Sanchez v. Unemployment Insurance Appeals Board* (1977), 20 Cal. 3d 55, *Glick v. Unemployment Insurance Appeals Board* (1979), 23 Cal. 3d 493.)[8]

The claimant may produce evidence that he or she is on a list to be called for substitute work during the summer session. If there is no list, the claimant may produce evidence that he or she is considered eligible for summer school work. Thereafter, the burden of proof on the issue lies with the employer.

A claimant's evidence might include, but is not limited to, the claimant's contacts with the district or a school site, informing them of his or her availability and requests for work. The evidence might show there are school site-specific lists, or there is a stratified list (for instance, one preferring permanent teachers or laid-off teachers, but on which the claimant is potentially reachable to be called). In this case, the evidence established the claimant was notified "If your services are needed for the 2013 summer school session, you will be called or notified by mail."

Once a claimant produces credible evidence he or she is on a list or is eligible to be called for summer school employment, the employer must prove that the claimant is not eligible. The fact that the claimant is not called for work is insufficient to find he or she is not eligible for work. In this case, the employer's witness testified that the district did not call the claimant because the district calls permanent teachers first, and there was not enough work for the regular substitute teachers during the summer session. In addition, the employer's letter to the claimant states the claimant might be called or notified by mail, if her services are needed during the summer school session. This established that the claimant was unemployed due to lack of work, and not that she was unemployed due to a summer recess period. The fact that the claimant was not called to work during the summer session does not result in a denial of benefits.

Benefits are payable to substitute teachers during traditional school sessions or year round tracks, who are qualified and eligible to teach, for the days that teacher is not needed or called. During a summer school session, benefits are

[8] The Employment Development Department assists employers with *The Claims Management Handbook for School Employers* (DE 3450SEF rev. 3, May, 2008) ("Employer's Handbook") The department advises school employers to respond to the DE 1101CZ to protect the district's unemployment insurance tax account from charges. "Responding to the DE 1101CZ also allows the employer to be included as an interested party in any appeal that may be filed. And, [t]he employer's UI tax account will only be protected by returning a timely response to the EDD." ("Employer's Handbook", page 31.)

equally payable to substitute teachers who are qualified and eligible for substitute work.

The weight of the evidence establishes that the claimant was qualified and eligible for work during the summer school session. Therefore, she was not on recess within the meaning of section 1253.3 of the code and the denial provisions do not apply for the weeks of the summer school session. The administrative law judge in this case held that the claimant was eligible for benefits during the weeks the summer school session was scheduled, from May 28, 2013 through June 22, 2013. We will affirm that portion of the decision on modified rationale.

The claimant was given reasonable assurance that she would have work as a substitute teacher in the fall term. This issue was not contested at the hearing before the ALJ. Accordingly, the claimant is not eligible for benefits during the weeks beginning June 23, 2013 through July 31, 2013, since those weeks were a summer recess and the claimant had reasonable assurance of working in the fall term.

DECISION

The appealed portions of the decision of the administrative law judge are reversed in part and affirmed in part, on modified rationale. The claimant is eligible for benefits beginning May 26, 2013 through June 22, 2013, pursuant to section 1253.3 of the Code. Benefits are payable provided the claimant is otherwise eligible.

The claimant is not eligible for benefits beginning June 23 through July 13, 2013, pursuant to section 1253.3 of the code. Benefits for those weeks are denied.