S235903

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED EDUCATORS OF SAN FRANCISCO, AFT/CFT, AFL-CIO, NEA/CTA
PLAINTIFF AND APPELLANT,
v.
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
DEFENDANT, CROSS-DEFENDANT AND APPELLANT,.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
REAL PARTY IN INTEREST AND RESPONDENT.

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 THE HONORABLE RICHARD B. ULMER, JR., PRESIDING

PETITIONER UNITED EDUCATORS OF SAN FRANCISCO'S REPLY BRIEF

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PLAINTIFF-APPELLANT UNITED EDUCATORS OF SAN FRANCISCO
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This Reply Brief is filed by the Petitioner United Educators of San Francisco.

I. THE PETITION FOR REVIEW PRESENTS AN IMPORTANT ISSUE OF UNSETTLED LAW IN CALIFORNIA

A. WHERE A SCHOOL DISTRICT OFFERS A SUMMER SCHOOL PROGRAM DOES THAT SUMMER SCHOOL CONSTITUTE AN ACADEMIC TERM FOR THE PURPOSES OF UNEMPLOYMENT INSURANCE CODE § 1253.3?

The Respondent challenges the Petitioner's assertion that a summer session is an "academic term" for purposes of California Unemployment Insurance Code § 1253.3. Respondent asserts that the question has been settled for "at least 34 years." In support of its argument Respondent cites *Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal.App.3d 834 and *Board of Education of Long Beach Unified School District v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674. However, neither of those cases raises, let alone settles, the issue of whether or not, for purposes of section 1253.3, summer school is an academic term.

The issue in the *Russ* case involved a teacher's aide who was employed in the school district during the 1977-78 academic year. She received a notification that "we expect to rehire you when school opens this next fall." Shortly thereafter the district sent her a letter informing her that she would be returning to work on August 28, 1978. The issue was whether or not those letters constituted "reasonable assurance" that she would be re-employed in the successive regular school year, thus disqualifying her for receipt of unemployment insurance benefits? There was no summer school session between the spring term of the 1977-78 school year and the fall term of the 1978-79 school year. Thus, the critical issue in the present case was not presented to the court in the *Russ* case.

In the 1984 decision of the Court of Appeal in *Board of Education of Long Beach Unified School District v. Unemployment Ins. Appeals Bd.* (1984) 160 Cal.App.3d 674, a substitute teacher who worked in one academic year was offered continued employment during the "post recess term." The Court of Appeal held that such an employment offer rendered the substitute teacher ineligible for receiving unemployment insurance benefits

during the summer recess. Once again there was no issue of the impact or effect of a summer school program since there was no summer school program.

The Legislature deliberately chose to use the words "academic year or term."[1] The Respondent acknowledges that in both the *Russ* case and the *Long Beach* case, the Courts of Appeal recognized that the "academic year" began in the fall, ended in the spring, and that the summer was a period between academic years. (Respondent's Answer to Petition, page 7.) However, the Respondent argues that the court in Long Beach, ". . . rejected the notion that summer itself could constitute an 'academic term.' As its authority, the Respondent quotes the *Long Beach* case at 160 Cal.App.3d at 685.

> The practical effect of the [Appeals] Board's decision is to assure that most, if not all, substitute teachers in California will be eligible for unemployment benefits during the annual summer recess periods while probationary and permanent teachers who are by statute or by contract guaranteed employment for the post-recess academic term are ineligible for such benefits. Thus, the Board's precedent benefit decision constituted a violation of the principle of 'like pay for like services' (*Long Beach, supra*, 160 Cal.App.3d 674, 685 (Emphasis Provided.)[2] (Respondent's Answer to Petition, page 8.)

The Long Beach case involved a petition for a writ filed by the Board of Education of the Long Beach Unified School District against the Unemployment Insurance Appeals Board, naming Steven Smith, a substitute teacher, as the real party in interest. The Board of Education of the Long Beach Unified School District was successful in having the trial court set aside the decision of the Unemployment Insurance Appeals Board. The real party in interest, Mr. Smith, received a "reasonable assurance" letter from the Long Beach School District offering him employment for the 1980-81 academic year. Shortly thereafter, he received a second letter addressed to him as a substitute teacher, informing

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[1] Emphasis added.

[2] This quotation is incomplete. It omits the words "as enunciated in cases like *Fry v. Board of Education* (1941) 17 Cal.2d 753; *Kacsur v. Board of Trustees* (1941) 18 Cal.2d 586; and *Aebli v. Board of Education* (1944) 62 Cal.App.2d 706.

him of his election to serve as a substitute teacher for the 1980-1981 school year. It contained additional language,

> Substitute teachers are given no assurance of employment. However, calls are rotated as equitably as possible in the best interest of the school district. Because the work of substitute employees is only from day to day, their services are used as needed. The success of the substitute in the situation to which he/she has been assigned is an important criterion in determining the frequency of calls. (160 Cal.App.3d 674, at 678.)

Mr. Smith applied for unemployment benefits for the summer recess of 1980. The Employment Development Department denied his claim since he was "reasonably assured" of returning to work following the recess period. The California Unemployment Insurance Appeals Board reversed the decision of an administrative law judge who had denied benefits. The Appeals Board held that benefits were payable to Mr. Smith since he did not have a "reasonable assurance" of returning to work following the summer recess period. The School District obtained a writ of mandate from the superior court. Relying upon the *Russ* case, the Court of Appeal affirmed the decision. The Court of Appeal held that the "unambiguous language of section 1253.3 and substantial evidence supports the trial court's findings and judgment." (Supra, p. 682.) The evidence before the trial court convinced the Court of Appeal that it was substantial enough to support the finding that Mr. Smith had a "reasonable assurance" of post-recess employment and was thus ineligible for summer recess employment benefits. The Court of Appeal added,

> Additionally, the fact that the District must resort to advertising in order to fill its need for substitute teachers compels the inescapable conclusion that there is a demand for substitute teachers in the school district. This demand, along with evidence of Mr. Smith's previous assignments, indicates that his continued employment was reasonably assured. (*Supra*, p. 684.)

The Court of Appeal brushed aside the qualification in the District's form letter that stated, "Substitute teachers are given no assurance of employment . . . ." "This sentence, reasonable construed in light of the whole record, merely advises the recipient of the

'realities of the situation' applicable to substitute teaching employment. It merely cautions that for a substitute teacher there could be no absolute guarantee of work." (Emphasis in the original, p. 684.)

Clearly, there was no issue in the *Long Beach* case of the effect or impact of a summer school, and whether or not a summer school constituted an academic term for purposes of section 1253.3, since there was no summer school involved in the *Long Beach.*

B. THE RELEVANCE OF THE SUBSTITUTE STATUS OF THE TEACHERS.

There has been a great deal of emphasis by all parties upon the fact that half of the real parties in interest in this case are substitute teachers. However, their status as substitutes is a red herring. The real issue in this case is whether or not summer school counts as an academic term for purposes of section 1253.3. Obviously, section 1253.3 was designed primarily to cover permanent and probationary teachers and other employees as to whom there was no doubt as to their return in the successive academic year. There is no reference in the statute to substitute employees. The apparent purpose of the statute was to prevent giving regular employees a "double paid" summer vacation. But the statute does not distinguish between regular employees and substitutes. The statute applies to "any individual."

There are obvious differences between regular employees and substitute employees. Regular employees, whether permanent or probationary, are entitled to return in successive academic years unless they resign, retire, or are discharged. That is not the case with a substitute employee who receives a contract for a single academic year or term. When the contract expires pursuant to its own terms, the employment relationship is severed for all purposes. In order to continue the substitute must be rehired and given a new contract. (Calif. Ed. Code § 44918.) Thus, there is an apparent inconsistency between that fact and the language of section 1253.3 which permits a school district to

treat a person whose employment has come to a conclusion as though that person was a continuing employee. This is clearly an inequity in the law that flies in the face of the Legislature's statement of public policy which is quoted below.

II. COLLATERAL ESTOPPEL

Petitioner contends that the School District and the Unemployment Insurance Appeals Board are collaterally estopped from re-litigating the issue of what constitutes an academic term. Respondent only devotes slightly more than one page to the issue of whether or not the superior court's 2005 decision should have a preclusive effect and collaterally estop re-litigation of the issue of whether or not summer school constituted an academic term. In 2005, in a case brought by the Unemployment Insurance Appeals Board against the San Francisco Unified School District the Superior Court of the State of California decided that summer session was an academic term. The Court of Appeal in the present case upheld the trial court's refusal to give the 2005 decision res judicata effect. The Court of Appeal criticized the 2005 Superior Court opinion because it made no reference to federal law. It further stated that a prior determination is not conclusive where the issue is purely a question of law "if injustice would result where if the public interest requires re-litigation on the issue."

In so stating, the Court of Appeal in this case has turned the issue of the "public interest" on its head. Section 100 of the California Unemployment Insurance Appeals Code enunciates the public policy of the State of California.

> As a guide to the interpretation and application of this division the public policy of this State is declared as follows:
>
> Experience has shown that large numbers of a population of California do not enjoy permanent employment by reason of which their purchasing power is unstable. This is detrimental to the interests of the people of California as a whole. The benefit to all persons resulting from public and private enterprise is realized in final consumption of goods and services. It is contrary to public policy to permit the supply of consumption, goods and services at prices that do not provide against that harm to the population consequent upon

> periods of unemployment of those who contribute to production and distribution of such goods and services . . . .
>
> The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum . . . .

The Respondent argues that "the issue to be re-litigated involves public funding. An inaccurate interpretation of section 1253.3 might award unemployment benefits to employees who actually fall within the State's exclusion."

The Court of Appeal cannot declare public policy on behalf of the State of California. That is a task and function of the Legislature. The Legislature has spoken as to what the public policy of the State of California is. The Respondent fails to cite Unemployment Insurance Code § 100 and ignores the declared public policy of the State of California.

Dated: August 9, 2016

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: Stewart Weinberg

PLAINTIFF-APPELLANT UNITED EDUCATORS OF SAN FRANCISCO
AFT/CFT, AFL-CIO, NEA/CTA

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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 Appellant United Educators of San Francisco, AFT/CFT, AFL-CIO, NEA/CTA's Reply Brief, was prepared with a proportionately spaced font, with a typeface of 13 points or more, and contains 1,951 words. Counsel relies on the word count of the computer program used to prepare the brief.

Dated: August 9, 2016

WEINBERG, ROGER &
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STEWART WEINBERG

Attorneys for Plaintiff/Appellant
United Educators of San Francisco,
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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 August 10, 2016, I served the following documents in the manner described below:

PETITIONER UNITED EDUCATORS OF SAN FRANCISCO'S REPLY BRIEF

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

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 10, 2016, at Alameda, California.

Mary Piro