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MEMORANDUM

To: Charlotte Lofft, President, Chabot-Las Positas Faculty Association
From: Bob Bezemek
Date: November 11, 2010
Re: How Adjunct Faculty Can Win Unemployment Insurance Application and Appeals - A Primer

According to recent reports, the State's Unemployment Insurance Benefits fund is \$ 8 Billion in debt - no wonder EDD and the California Unemployment Insurance Appeals Board ("CUIAB") are doing everything they can to deny unemployment benefits to faculty.

The current situation means that when it comes to presenting one's case for benefits to the EDD and CUIAB, it is more important than ever to do it the right way. And to do this you need to make sure the Union and its members understand both the procedures and the right way to present a case. This memo is written for Unions and their members, to prepare them to secure benefits to which adjunct faculty are entitled by law.

I. CUIAB Procedures

A. EDD Information

If EDD denies benefits, one files an appeal with the CUIAB. It is crucial to mention *Cervisi* in the appeal, and to use these magic words,

"My future employment as an adjunct employee (or temporary employee or part-timer, depending on the local vernaculs) is **contingent on funding, enrollment, bumping by a tenured faculty member, and District needs**. Therefore, under the precedential decision of *Cervisi v. CUIAB* (1989) 208 Cal. App. 3d 635, I am entitled to unemployment benefits as I have no reasonable assurance of re-employment during the next term."

It is crucial that the above wording be specified on the EDD questionnaire.

B. An Appeal to the CUIAB

1. The Appeal

If one are denied benefits, the employee must file a timely appeal. In this appeal one MUST use the magic words cited above.

If one is still denied benefits, or if benefits are granted and the District appeals claiming one is ineligible, then the claimant will have to attend a hearing before the CUIAB. A hearing is a trial - the employee must be ready for it.

2. The CUIAB ALJ Appeal Hearing

The CUIAB assigns administrative law judges to conduct the hearing. Often an EDD representative will attend representing the EDD decision. These hearings are very brief - often lasting no more than 15 minutes to half an hour. Because of the amount of work CUIAB judges have, one has to be well prepared - meaning, bring at least 4 copies of each exhibit you plan to present, to the hearing.

It is best to bring a Union representative who can credibly testify that adjunct faculty are given no reasonable assurance of employment with this District. But saying this a a mere conclusion and is not credited. The claimant has to PROVE every factual assertion by introducing evidence, such as: the assignment of future work is: contingent on funding, enrollment, bumping by a tenured faculty member, and District needs.

If a claimant doesn't present EVIDENCE, then s/he will probably LOSE.

What is evidence? Evidence is (1) oral testimony about the contingencies and (2) written confirmation. Oral testimony is worth very little to the CUIAB - they will disccount it. In other words, if all you do is say your employment is contingent, EXPECT TO LOSE.\

A history of re-employment and a copy of *Cervisi*. Often, judges ask questions about one's prior experience in being rehired. You should "object" and state, evidence of prior employment is legally irrelevant according to the *Cervisi* decision. And, bring copies of *Cervisi*.

In *Cervisi*, the CUIAB had relied on a history of re-employment to deny benefits. The Court of Appeal explained that this "reliance" had proven crucial in the CUIAB's decision:

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“Those whose requests were denied appealed the decision to appellant Unemployment Insurance Appeals Board. Hearings were conducted before an administrative law judge, who ruled that none of the instructors were eligible for benefits. *The judge held that although “classes might have been subject to cancellation for lack of funds and/or enrollment, the evidence indicates that the general experience was that the claimants had continued in employment for several ensuing semesters.” This was found to constitute a “reasonable assurance” of continued employment precluding eligibility for benefits. Cervisi at p. 637.*

The Court of Appeals held this history was irrelevant, finding:

“Under the statute, an assignment that is contingent on enrollment, funding, or program changes is not a “reasonable assurance” of employment. (§ 1253.3, subd. (g).) The administrative record provides sufficient evidence that the assignments given to these hourly instructors depended on their ability to attract a sufficient number of students to justify offering the classes. In fact, the standard faculty assignment form states that “employment is contingent upon ... adequate class enrollment.” The record also establishes that district enrollment had dropped. A contingent assignment is not a “reasonable assurance” of continued employment within the meaning of section 1253.3; therefore, the trial court properly issued the writ requiring the respondents to be paid unemployment benefits for the period between the fall and spring semesters.” *Cervisi at p. 639.*

Written proof: written proof of the contingency of one’s assignment consists of (1) assignment forms which specify the contingency, (2) Governing Board policies or regulations which specify the contingency, and (3) provisions of the Collective Bargaining Agreement which specify the contingency.

HOW do you present evidence? By testifying and identifying the documents and explaining the contingency. Most ALJ’s “conduct” the hearing by questioning you.

DON’T EXPECT THE ALJ TO BE FAIR OR DO A GOOD JOB OF FINDING THE EVIDENCE - remember the \$8 Billion short-fall, and how busy the judges are!

So, INSIST ON TESTIFYING AFTER THE ALJ ASKS YOU QUESTIONS - PRESENT YOUR CASE - HAVE AN OUTLINE SO YOU REMEMBER TO OFFER YOUR

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PROOF.

Explain what a funding contingency is - if the District has insufficient funds, it can cancel one's class.

Explain what an enrollment contingency is - there is a minimum enrollment for every class, which is set by the District or the union contract. And if the class fails to meet minimum enrollment, it can be cancelled. Some contracts allow wide latitude to administration in cancelling classes - be sure to present that evidence.

Explain what a bumping contingency is - how a tenured or probationary instructor can be assigned to YOUR class to fill out their full load.

Explain District needs - that due to budgetary reasons, classes can be cut; that if a program is doing poorly or costs too much, classes can be cut. Make it clear it is YOUR class which can be cut, hence you have no reasonable assurance of re-employment.

Although one's history of getting assignments is legally irrelevant, prior instances in which classes have been cut corroborates the contingency of one's assignment. So, you can offer testimony about prior terms in which the contingencies came to pass. Likewise, if the District has cut hundreds of classes, that is the sort of relevant evidence you should offer into evidence.

What if the ALJ refuses to listen? You should say to the ALJ, "I wish to make an offer of proof," and "if I were permitted to testify I would say that my assignment is contingent - and then explain the contingencies - that there is a minimum class size of XXX, and that if my class is less than that, it will be cancelled; that if a full-time tenured faculty member needs an assignment to complete his/her full load, I will be bumped; that if the district decides it doesn't need my class, it will be cancelled. That if the district realizes it cannot afford my class, it will be cancelled. That I have no assurance of employment next term. IF YOU DON'T PRESENT THIS, EXPECT TO LOSE.

In most districts you can locate evidence of contingencies in District policies or the Union contract.

In addition, the Union can provide a statement to adjunct faculty reminding them of their contingent employment, using the magic words cited above.

Reminder: If you go to the hearing, BRING A COPY OF THE *CERVISI* DECISION.

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With ALJs hearing up to 20 cases a DAY - they aren't going to have the time to look up anything to help you. Many of the ALJ's are hired on an *ad hoc* basis and have NO EXPERIENCE with adjunct faculty and could care less about *CERVISI*. It is the CLAIMANTS job to educate the ALJ.

Finally, be sure to have your evidence MARKED [i.e. Claimant exhibit 1, 2, etc.] and OFFER it into evidence (I move into evidence exhibits XXX." Keep a COPY of every exhibit for yourself, and have a copy for the EDD rep or the employer rep.

Remember, you cannot rely on any facts in arguing your case, or in an appeal, unless you PRESENT THE EVIDENCE at the hearing. So, be prepared with documents and testimony.

3. What to do if You LOSE Before the ALJ

If you lose you get to appeal - but it has to be filed on time - don't screw up the appeal.

1. File the appeal and follow the directions to **request a copy of the transcript and the exhibits**. Requesting a copy of the transcript and exhibits **delays** the filing of your argument (your "Brief"). This is advantageous to you. Without the transcript and exhibits, you will probably LOSE on appeal.

2. After you receive the transcript and appeal, you must file an appeal letter or brief arguing the facts and *Cervisi*. The brief should be well written and succinct and emphasize the facts. It should cite the proof you presented at the hearing (the exhibits and the testimony) that your future employment is contingent. You cite exhibits by referring to the Exhibit number and page of the key information and you cite transcript references by noting who said something and the page where the testimony is located.

C. The Peculiar Situation of Faculty Who Are Also Substitute Teachers in A K-12 School District

You need to know this and keep it clear in your mind - SUBSTITUTE TEACHERS ALWAYS LOSE - they are generally **not** entitled to UI Benefits. See *Russ v. Unemployment Insurance Appeals Board* (1981) 125 Cal. App. 3d 834.

Substitute teachers are disqualified from receiving UI Benefits because a substitute job is always "uncertain." I know, this makes no sense - but it's the law. Read the *Russ* decision if you doubt this.

1. NEVER FEAR - if you are ALSO an adjunct in a community college,

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the Substitute employment is PROBABLY IRRELEVANT to qualifying for benefits. But the date of your last paid work may prove crucial. Under the Unemployment Insurance Code, you qualify for benefits based on your MOST RECENT WORK. (See UI Code sections 1256, 1256.1 AND 1256.2) And to count as “work,” this means work done in employment for earnings or wages. (CUIAB Precedent decision P-B-269) Thus, being on a substitute list is not “employment,” but working and being paid as a substitute is. So, when you are last employed in the community colleges, that is when to file for UI benefits.

If your last day of community college employment took place after the date you last were paid as a substitute, then your community college work is what counts as your most recent work. If your college assignment ends before your K-12 employment ends, you should try to file your application for benefits BEFORE you accept any more substitute service. But since you cannot turn down offered work, you have to be quick with the application to EDD!

Serving as sub after your community college service ends probably won’t disqualify you from receiving UI benefits based on your adjunct service, but it might affect the amount of your benefits.

2. How to deal with the complication of two jobs, one of which is substitute service:

MANY ALJ’S don’t understand how to deal with “dual employment.” So, what do you do? If most of your employment is from a community college, there is potentially no value in being on a sub list for which you rarely are called, especially if sub employment might disqualify you from benefits.

1. Make it clear to EDD and to the CUIAB that most of your primary earnings came from community college adjunct work. Bring proof in the form of pay stubs, etc.!

2. Be aware of when you last earned money as a sub - if you worked for a community college after that date, and now seek benefits based on the discontinuance of that community college work, the community college employment should “trump” the K-12 employment.

D. Conclusion

If you follow these rules you will be better prepared to prove your case.

Attachment: *Cervisi* decision

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