Employment Development Department
San Francisco Adjudication Center
Date

Appeal of Claimant Name
SSN:

To whom it may concern:

This appeal is submitted in response to a denial of eligibility. As explained below, Claimant is eligible for benefits.

The Notice results from the deferred payment of wages earned in a previous period of employment by the University of California, which ended on DATE. (See **Exhibit 1 (attach past appointment letter with end date)**) Under the *Cervisi* decision, and the UI Code, as explained below, Claimant qualified for benefits as his "Fall assignment" was contingent on funding, enrollment, UC's needs, and being "bumped" by other employees (See **Exhibit 2 (attach new appointment letter)**), and hence does not provide a reasonable assurance of re-employment. Similarly, his/her receipt of deferred compensation does not qualify as wages for the summer, and cannot be the basis of a finding of ineligibility, as explained below.

Appeal of Claimant

Introduction

This appeal is filed on behalf of the claimant. Claimant was previously employed by UC Campus as a lecturer. His/Her contingent appointment ended on DATE, thereby entitling him/her to UI benefits. (See **Exhibit 1**)

The first controlling precedent in this matter, the decision of the California Court of Appeals in *Cervisi v. California Unemployment Insurance Appeals Board* (1989) 208 Cal. App.3d 635, holds that every assignment of a faculty member which is **contingent** upon enrollment, funding, employer needs or "bumping" by another lecturer or even a tenured teacher, does not amount to "reasonable assurance" within the meaning of CUIAB Code §1253.3. Claimant's appointment letter dated DATE, contains the contingency:

> Insert whatever contingency is in your appointment letter for the upcoming year. "Please be advised that appointments in this title are temporary and self-terminating. Therefore, no further notice of non-reappointment will be sent to you and the University is not obligated to extend or renew the appointment. **The University has the right to change your teaching assignment when necessary due to enrollment, curricular or budgetary needs** ..." (**Exhibit 2**, UC to Claimant, emphasis added)

Because Claimant's 2012-2013 and her Fall 2013 assignments are contingent upon enrollment, funding, employer needs and bumping by another lecturer or even a permanent teacher, it legally cannot provide reasonable assurance of employment, regardless of Claimant's history of district employment.

In addition, Claimant's status as a previously employed **lecturer** who was paid for 9

months of employment over a 12-month period (a 1/12 lecturer) cannot disqualify Claimant because this salary is for work performed during Claimant's previous **9 months of employment**, and is paid pursuant to a **group-based employer payroll plan, to a large class of similarly situated lecturers**. These lecturers do not have any input on what payment plan they are placed on. UC solely makes this decision, "NSF appointed for the entire academic year will be paid on a 1/12 basis" (UC Contract Administration Manual, Article 6: Academic Year-Appointment).

The EDD should be aware of this situation, as in 2010 the Claimant qualified for benefits and, as now, had been previously employed by UC on a 1/12 appointment. (See 2010 ALJ Decision, **Exhibit 3** hereto.)Use only if you have previously qualified for unemployment while receiving summer paychecks.

Plaintiff's pay during the summer months, pursuant to the Employer's 1/12 plan, does not constitute wages within the meaning of section 926 et seq. of the Unemployment Insurance Code.

The EDD appears to have based its decision not on *Cervisi,* but on the employer's having paid the lecturer, **for nine months of work, over a period of 12 months**. In essence, the Employer and/or EDD is claiming that these wage payments should disqualify the Claimant, despite indisputable evidence that Claimant is not actually employed by the Employer during the 3 summer months. The Claimant was in a non-employment or a sort of "layoff period" – that is an "involuntary separation from employment" resulting from the self-terminating nature of her temporary appointment.

II. Benefits Are Payable Under *Cervisi*

In *Cervisi* the court of appeals, in overruling the Department and sustaining the trial judge, held that *as a matter of law* claimants did not have a "reasonable assurance of re-employment" as defined in Section 1253.3. *Id*. at 637, 639. As the court explained,

> "Under the statute, an assignment that is contingent on enrollment, funding, or program changes is not a 'reasonable assurance' of employment. (§ 1253.3)(g).)"

As in *Cervis*i, the facts here establish that the DATE of past appointment letter assignment given to the claimant was contingent. It depends, if the class began, on Claimant's ability to attract a sufficient number of students to justify offering the classes. Furthermore, the class was subject to cancellation by the administration, under the same conditions recognized in section 1253.3.

A contingent offer, as here, cannot be transformed into "reasonable assurance" because the contingency had not previously been exercised. It bears emphasis that in *Cervisi*, despite a

history of claimants having "continued in employment for several ensuing semesters," (*Cervisi*,

208 Cal.App.3d at 637) the contingent assignment in and of itself meant there was no "reasonable assurance." *Id.* at 638.

III. Claimant's Summer "Earnings" Are Not Wages Under the UI Code

The second principle which animates this case is that the Claimant has not been employed by UC this summer - her assignment ended at the conclusion of the last semester, and she subsequently filed for UI benefits.

The facts show that many lecturers at UC may be classified as 9-month lecturers paid *over 9 months*, or as 9-month lecturers paid *over 12 months*. Those in the first category are classified in Title Code 1632, while those who work 9 months but are *paid over 12 months* are classified in Title Code 1630. Lecturers in Title Codes 1630 and 1632 work the same amount of months, but those in 1630 are paid over 12 months instead of 9 months. This later situation is that of Claimant - her appointment letter clearly shows she was hired to work for 9 months, but her work ended as of May 17, 2013. Her pay continued for her previous work, as UC had assigned her to the 1/12 lecturer category. (See **Exhibit 2**) Her letter makes it clear her "actual service" ended on May 17, 2013. *Id.*

In other words, both groups of lecturers work the same 9 months, but the 1/12 lecturers are paid over a period of 12 months, for their nine months of work. Such lecturers have no choice. The law allows UC to elect to pay 9-month lecturers over 9 or 12 months. During the three months of "summer pay" these T.C. 1630 lecturers are not actually working as lecturers. And they receive no additional "service credit" above that earned by a 9-month lecturer for the 3 summer months when they collect pay. Therefore, these payments cannot be considered wage continuance or salary continuance.

Both the 1/9 and 1/12 lecturers earn the same amount of retirement service credit, regardless of their pay schedule as service credit is a function of a lecturer's earned compensation in equal ratio to the full-time compensation. *See University of California Retirement Plan Document 2012, Article 5, 5.04 Service Credit, page 47.* In other words, a half-time lecturer, earning 50% of the annual salary with pay spread over 9 months, will earn the same amount of service credit as a half-time lecturer, earning 50% of the annual salary with pay spread over 12 months. Both lecturers in this example will earn half a year's service credit.

What happens instead is merely that the employer defers payment of their wages (those in T.C. 1630) until the summer, so that 12 checks are issued for 9 months of work instead of 9 checks. This scheme is for the convenience of the employer, which is able to defer some wage payments for a period of 1 to 3 months.

It would appear that said employer has another advantage as well. In P-B-417, it was determined that Sections 1253.3(b) and (c) of the Code were based on Section 3304(a)(6)(A), clauses (I) and (II) of the Federal Unemployment Tax Act, as was enacted by Public Law 94-

566. After reviewing Public Law 94-566, it was concluded that Congress had the intent to deny benefits to school employees who are normally off during a summer recess. Claimant however, is normally not employed during this time period because that is how her contract is designed, that her employment ends. Further, there is this additional crucial element: she has no reasonable assurance of employment for the upcoming college term.

In P-B-4 the CUIAB held that an employee who had been laid off but paid for an additional month of service, was disqualified from receiving benefits under the "salary continuation" rule. This is a rule of administrative construction, and it does not apply to the lecturers' situation. In other words, it does not apply to the Claimant.

The question of whether these three months of "wages" disqualify Claimant from receiving what would otherwise be benefits required under *Cervisi*, turns on whether these 3 months of payments constitute "wages" under the Code. Or, alternatively stated, whether these payments constitute "salary continuation" under P-B-4. And the answer is clear to both questions: they do not.

It makes sense to first discuss P-B-4. There the payments were for **one employee, the claimant**. **The Appeals Board distinguished between a situation involving a single claimant and those affecting a "group or class" of employees.**

Where the payments are the result of a **"plan" or a collective bargaining agreement**, for a class or group of employees, they are not considered wages under the Code. This position was affirmed by the Court of Appeal in *Citroen Cars Corp. v. CUIAB* (1980) 107 Cal. App. 3d 945, which held that in the circumstances present there, such post-employment payments supplemented unemployment benefits.

While the instant matter is not identical in all respects, to *Citroen Cars*, it is sufficiently close. In P-B-4 the crucial factor was that the single employee was treated as if he had been employed for the period at issue. This was the result of an agreement involving his separation from employment. That is not the case with 1/12 lecturers. They just as easily might have received not 1/12 of their wages over 12 months, but 1/9 of their wages over nine months of actual work - that is, one month of pay for every month of additional work. Instead, for *its* convenience, UC chose to pay them over 12 months, deferring their pay over an additional 3 months. In *Citroen* the CUIAB correctly classified an employee as earning regular wages [at the same, regular pay rate] for the continuation period, but affirmed eligibility for UI benefits.

The case of 1/12 lecturers is, of course, distinct from P-B-4, and similar to *Citroen* in that lecturers are the recipient of previously earned pay on a deferred basis. Lecturers such as Claimant earn the same 1/12 salary for each of the three summer months, as they earned for each of the 9 months when they were serving. The 1/9 lecturers have 9 pay periods to compensate them for their work, and the 1/12 lecturers have 12 pay periods for the **same amount of work and same annual pay**.

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As is evident, both 1/9 and 1/12 lecturers are performing the *same amount of work* over *the same nine months of actual service*, and getting *the same pay*, with one difference - for its convenience, UC extends the payment of some of these lecturers - whom it classifies as 1/12 lecturers, over the entire year, not just the "academic year." If lecturers performing the same work, and paid the same, are differently qualified for their receipt of UI benefits, then the 1/12 lecturers would be treated arbitrarily, and denied the equal protection of the laws. Without a doubt, their deferred wage payments are not "salary continuation" as defined in P-B-4.

Given this situation, the Claimant is entitled to the balance of pay earned during the 9-month assignment, **and to unemployment compensation for the period of unemployment following the end of Claimant's assignment**. EDD is thus forbidden by law from construing these payments as wages for purposes of calculating Claimant's "earnings" after her actual service ended. This result for *accrued salary* payments is consistent with the Board's treatment of *accrued vacation pay* - where such pay, payable after one is laid off or terminated, is considered "exempt from the offset provisions of section 1265" of the code, which apply to pension benefits. See *Evans v. Unemployment Insurance Appeals Board* (1985) 39 Cal. 3d 398, 415.

As provided in section 1279 of the Code, both 1/9 and 1/12 lecturers are unemployed during the three summer months after their appointments end in June. Hence, benefits are payable for the three months in question.

Respectfully submitted,

Signature

NAME TYPED