Case No. A131327
Superior Court No. SCV 247840

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DAWN McINTYRE	Plaintiff/Appellant
v.	
SONOMA VALLEY UNIFIED SCHOOL DISTRICT, and the GOVERNING BOARD OF THE SONOMA VALLEY UNIFIED SCHOOL DISTRICT	Defendants/Respondents

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Appeal from the Superior Court of Sonoma County
Mark Tansil, Judge

APPELLANT'S OPENING BRIEF

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I.
STATEMENT OF THE CASE

Appellant/Petitioner Dawn McIntyre ("Appellant" or "McIntyre") seeks the reversal of the Trial Court's denial of the Petition for Peremptory Writ of Mandate seeking reinstatement to employment, back salary and benefits from Respondents/Appellees, Sonoma Valley Unified School District and the Governing Board of the Sonoma Valley Unified School District (collectively "District"). The Trial Court issued a tentative ruling in which McIntyre's evidentiary objections to information supplied by Ashley Halliday, District's former Director of Human Relations were overruled and District's objections to McIntyre's request for judicial notice of legislative history were sustained. The Trial Court found that McIntyre's incidental compensation claims were not barred by the failure to satisfy the Tort Claims Act (CT 460), that McIntyre's claim that she was improperly classified as a temporary teacher during the 2006-2007 school year was barred by the three-year statute of limitations (CT 460) and that the District had more permanent and probationary employees on leaves of absence than it had certificated employees working under temporary contracts during the 2006-2007, 2007-2008 and 2008-2009 school years. (CT 460) Thus McIntyre failed to prove that she was entitled to reemployment due to teacher classification errors by the District under Education Code sections 44917, 44918 and 44920 [1].

[1] All statutory references are to the Education Code unless indicated otherwise.

In her Memorandum of Points and Authorities and in oral argument at the hearing, December 17, 2010, McIntyre argued that an ambiguity exists in Education Code sections 44918(b) and 44954(b) which the District exploits improperly to extend a certificated teacher's status as a temporary employee (RT pg. 10, line 17- pg. 11, line 7) and that the evidence supplied by the District through the Declaration of Ashley Halliday was inaccurate and should be subjected to closer scrutiny. The Trial Court confirmed its tentative ruling and denied the Petition. (RT pg. 15, lines 5-7).

Appellant filed a timely Notice of Appeal on February 28, 2011.

II.
STATEMENT OF FACTS

McIntyre was initially employed by District at the beginning of the 2006-2007 school year. At that time McIntyre was placed in a fifth grade class at Dunbar School, one of the schools regularly maintained by District in a full time [1.0 FTE (Full Time Equivalent)] position. The position filled by McIntyre for the 2006-2007 school year had been vacated by another teacher, Raymond Fredricks, who retired at the end of the previous school year. McIntyre was classified as a temporary employee under Education Code § 44920 (CT 18).

On or about March 15, 2007 McIntyre received a letter from the District informing her that she had been non-reelected to continued employment as a temporary teacher pursuant to § 44954(b) (CT 20-26).

On or about May 1, 2007, notwithstanding the recent notice of non-reelection, McIntyre received a letter offering her renewed employment, again as a temporary teacher, for the 2007-2008 school year (CT 28-29). This letter was accompanied by a certificated employment contract for employment in a 1.0 FTE position as a temporary teacher under Education Code § 44920. The May 1, 2007 offer of employment was for a position in Dunbar School.

On her return to Dunbar School, McIntyre was assigned to a Third Grade class. The Third Grade position had been held by a teacher named Gwen Watson. Ms. Watson held substantial seniority in the school district and had requested a transfer to another school site. She was not taking a leave of absence with the expectation of returning to her classroom at Dunbar School, but rather was vacating that position to move to another school.

McIntyre is informed and believes that before she was offered the job opening at Dunbar School which was created by Gwen Watson's transfer, it was advertised within the district as available to permanent and probationary teachers already employed by District. Petitioner was placed in that Third Grade classroom because no teacher already employed by District wanted to take that job.

Toward the end of the 2007-2008 school year McIntyre learned that other certificated employees who had been first employed at or near the time of her initial employment had been elevated to probationary status. This information caused her to question the District's decision to keep her as a temporary employee. When she

approached Ashley Halliday, the District Director of Human Resources she was told that the "natural" progression to tenure in the Sonoma Valley Unified School District was that the teacher was first temporary, then probationary level one, probationary level 2 and then a tenured teacher. The district had staffing needs and it hired temporary teachers to fill those needs. It did not make any difference in the broad view whether she was classified as a temporary or a probationary teacher; if the number of students changed a probationary teacher could end up without a position. McIntyre's understanding of Halliday's explanation was that she had no right or expectation to be classified as a probationary teacher except at the discretion of the District.

On or about March 13, 2008 McIntyre was served with a letter from the District informing her that she had been non-reelected to continued employment for the 2008-2009 school year as a temporary teacher pursuant to Education Code § 44954(b) (CT 31-36). Shortly after receipt of the second non-reelection notice pursuant to Education Code § 44954(b), McIntyre was offered continued employment with District. She returned to Dunbar School for a third consecutive year. She was classified as a temporary teacher in a 1.0 FTE position.

On or about October 21, 2008 McIntyre received a letter informing her that the District's Governing Board had approved the elevation of her employment status from temporary to probationary II for the 2008-2009 school year (CT 38).

On or about March 12, 2009 McIntyre was served with a Notice of Non-Reelection (Probationary) informing her that pursuant to Education Code § 44929.21 she would not be reelected to employment for the 2009-2010 school year (CT 40-45).

McIntyre worked one complete school year (2006-2007) as a temporary employee pursuant to § 44920 in a position requiring certification qualifications and performed the duties normally required of a certificated employee of the school district. For the next following school year, 2007-2008, she was employed to fill a position vacated by Gwen Watson, which had not been filled by any permanent or probationary employee of the district.

In support of the petition for the peremptory writ of mandate McIntyre submitted to the Trial Court documents obtained through public record requests under the California Public Records Act (Government Code §§ 6250 et seq) which showed that during the 2005-2006, 2006-2007, 2007-2008 and 2008-2009 school years, in violation of Education Code §§ 44918 and 44920, the District had employed a greater number of certificated teachers who were classified as temporary teachers under § 44920 than the number of certificated teachers regularly employed in permanent or probationary positions who had been granted partial or full time leaves of absence from their employment.

McIntyre's documents showed that during the 2005-2006 school year the District employed only 9.0 FTE permanent certificated employees released on a leave of absence (CT 85-95)

while showing 15.29 FTE employees as temporary teachers under § 44920 (CT 96-98) (CT 7, para. 22, lines 3-6).

During the 2006-2007 school year the District employed 9.5 FTE permanent certificated employees released on a leave of absence (CT 99-109) and 16.0 FTE employees , including McIntyre, as temporary teachers under § 44920 (CT 110-112) (CT 7, para. 23, lines 7-10).

During the 2007-2008 school year the District employed only 7.2 FTE permanent certificated employees released on a leave of absence (CT 115-124) and 11.8 FTE employees, including McIntyre, as temporary teachers under § 44920 (CT 125-130) (CT 7, para. 24. lines 11-14).

During the 2008-2009 school year the District employed only 8.1 FTE permanent certificated employees released on a leave of absence (CT 131-140) while employing 13.3 FTE employees, including McIntyre at the time of her employment, as temporary teachers under § 44920(CT 141-146) (CT 7, para. 25, lines 15-18).

In response the District filed documents concerning the three years of McIntyre's employment, attached as exhibits to the Declaration of Ashley Halliday which controverted McIntyre's evidence. The District's attachments showed that during the 2006-2007 school year the District had granted 19.26 FTE permanent employees leave of absence (CT 184) and employed 15.90 FTE as temporary teachers under § 44920 (CT 186-187), during the 2007-2008 school year the District had 16.88 FTE permanent employees on

leave of absence (CT 189), and employed 13 FTE as temporary teachers under § 44920 (CT 191-192) and during the 2008-2009 school year had 24.05 FTE permanent employees leave of absence (CT 194) and employed 12.27 FTE as temporary teachers under § 44920 (CT 196-197).

III.
ISSUE FOR REVIEW

A. EDUCATION CODE SECTIONS 44918(b) AND 44954(b) ARE NARROW AND PROVIDE ONLY FOR THE RELEASE OF TEMPORARY TEACHERS WITHOUT AN OBLIGATION OF REHIRE

Sections 44918(b) and 44954(b) provide only for the decision to release and not re-hire temporary teachers. The statute does not authorize a school district to release a temporary teacher under § 44954(b) and re-hire that same person as a continuing temporary employee in abrogation of the rights granted by § 44917.

Education Code § 44917 provides in part,

> "Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualification, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status."

Section 44918(b) allows a school district to deviate from this statutory scheme by serving the temporary employee a notice that she or he has been released from further employment pursuant to § 44954(b). This relieves the school district of the burden of having to rehire a temporary teacher when that would result in an excess of certificated staff. However, the provisions of § 44918(b) and § 44954(b) do not give a school district the right to avoid the mandate of § 44917 by releasing a temporary teacher pursuant to § 44954(b) and immediately rehiring the teacher for employment in the next school year as a temporary employee with no reference to the prior year's service as a certificated teacher.

B. THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE TRIAL COURT'S RULING

The evidence relied on by the Trial Court is not substantial and does not support the finding that the District had more permanent and probationary certificated employees on leaves of absence than it had certificated employees working under temporary contracts during each of the 2006-2007, 2007-2008 and 2008-2009 school years. If the evidence is not sufficient to support the Trial Court's ruling the question remains whether the District violated Education Code § 44920.

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IV.
STANDARD OF REVIEW

The issue above is a question of law, a matter of statutory interpretation requiring critical consideration of legal principles and their underlying values. As such, it is subject to independent review. *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 271 [32 Cal.Rptr.2d 807, 878 P.2d 566].

If a question involves the establishment of historical or physical facts, it is a question of fact to which the "substantial evidence" standard applies. *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139].

If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently. *Crocker National Bank v. City and County of San Francisco, supra.* citing *People v. Louis* (1986) 42 Cal.3d 969, 985-987 [232 Cal.Rptr. 110, 728 P.2d 180]. Where mixed questions of law and fact exist, if the question requires the consideration of legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo. *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801 [35 Cal.Rptr.2d 418, 883 P.2d 960].

The first issue for consideration is an issue of legal interpretation and is subject to independent review.

The second issue for consideration is one of factual context and falls under the substantial evidence test.

V.
ARGUMENT

A. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE TRIAL COURT

1. THE APPELLANT MUST DEMONSTRATE THE INSUFFIENCY OF THE EVIDENCE

The Trial Court denied McIntyre's petition for a peremptory writ of mandate, finding that the District had more permanent and probationary employees on leaves of absence than it had certificated employees working under temporary contracts during the 2006-2007, 2007-2008 and 2008-2009 school years. Therefore the analysis of the case must begin with an examination of the evidence presented to the Trial Court and the question of whether it is sufficient to support the Trial Court's finding.

The scope of review begins and ends with the determination whether, on the entire record there is any substantial evidence, contradicted or uncontradicted supporting the Trial Court's conclusion. *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51[248 Cal.Rptr. 217]. However, " 'Any substantial' evidence is not synonymous with 'any' evidence. To constitute sufficient substantiality to support the verdict, the evidence must be reasonable

in nature, credible and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case." *Bridgeman v. McPherson* (2006) 141 Cal.App.4th 277, 286 [45 Cal.Rptr.3d 813]; *Kruse v. Bank of America, supra.* 38, 51-52.

It is the appellant's burden, not the Court's to identify and establish deficiencies in the evidence [Citation omitted]. *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409 [58 Cal.Rptr.3d 527]. "A party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable and show how and why it is insufficient. [Citation]." *Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208 [249 Cal.Rptr. 743]. "[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient." *Hickson v. Thielman* (1956) 147 Cal.App.2d 11, 14-15 [304 P.2d 122].

2. THE EVIDENCE PRESENTED BY THE DISTRICT IS NEITHER SUBSTANTIAL OR CREDIBLE

Appellant submitted to the Trial Court, through the declaration of her attorney (CT79-82), evidence showing the discrepancy between the number of certificated teachers regularly employed by the District who had taken a full or partial leave of absence from their employment and the number of certificated teachers employed in temporary positions under Education Code § 44920 to fill-in for them.

The evidence on which this declaration was based was provided by the District.

Appellant produced documents from the District for the 2005-2006 school year showing that for that school year the District employed 9 FTE permanent certificated employees granted leaves of absence (CT85-95) and 15.29 FTE employees as temporary teachers under § 44920 (CT 96-98). (CT 7, para. 22, lines 3-6).

Appellant similarly procured and produced documents from the District for the Trial Court showing that during the 2006-2007 school year the District had employed 9.5 FTE permanent employees on leaves of absence (CT99-109) while employing 16.0 FTE employees, including Appellant McIntyre, as temporary teachers under § 44920 (CT110-112), (CT 7, para. 23, lines 7-10); that during the 2007-2008 school year the District had granted 7.2 FTE permanent employees leaves of absence (CT115-124) and employed 11.8 FTE employees in temporary positions under § 44920 (CT 125-130) (CT 7, para. 24, lines 11-14); and during the 2008-2009 school year the District had only 8.1FTE permanent certificated employees on leave of absence (CT131-140) but employed 13.3 FTE certificated employees in temporary positions under § 44920 (CT 141-146) (CT 7, para. 25, lines 15-18).

Exhibit I to the Declaration, which requested the staffing information from the District was prefaced with a copy of the letter to the District making the request for the 2005-2006 and 2006-2007 school years, dated September 28, 2007 (CT 84). Exhibit J to the

Declaration which made the same request for the 2007-2008 and 2008-2009 school years was prefaced with a copy of the letter making that request dated November 13, 2009 (CT 114).

In response to Appellant's evidentiary offering, the District submitted the Declaration of Ashley Halliday, the former Assistant Superintendent for Human Resources for the District. The Halliday declaration sets forth similar but substantially different statistics of temporary teachers employed under §44920 and permanent teachers on leaves of absence for the 2006-2007, 2007-2008 and 2008-2009 school years (CT 178-179, para. 5).

The District asserts that during the 2006-2007 school year it had 19.26 FTE certificated employees on leave of absence (CT184) and 15.90 FTE certificated employees employed in temporary contracts (CT 186-187); that during the 2007-2008 school year it had 16.88 FTE employees on leaves of absence (CT189) and 13.0 FTE employees in temporary contracts (CT 191-192); and during the 2008-2009 school year it had 24.05 FTE certificated employees on leaves of absence (CT194) and 12.27 FTE certificated employees in temporary positions to fill-in for regular employees on leave (CT 196-197).

The District further asserts through the Halliday declaration that during each of the years in question, (2006-2007, 2007-2008, 2008-2009) the number of temporary employees as compared to the number of employees on leave was reviewed and that the names of temporary employees who were recommended for conversion to probationary status were forwarded to the District's Governing Board. Following

the approval of the conversion of the status of those teachers, the status of these individuals was corrected in the District's database. (CT181 para. 14, lines 11-17).

This raises two questions:

If the District had vacant positions, why did it not classify the teachers filling those positions as probationary employees at the time of their hiring, pursuant to Education Code § 44915?; or in the alternative, why were temporary teachers being elevated to probationary status if the District had no vacant positions for them to fill?

The action taken by the District, as outlined by Halliday shows that in fact certificated positions within the District's schools were open and were filled by teachers classified as temporary employees in violation of § 44915, some of whom were later in the school year elevated to probationary status.

Appellent objected to the Halliday declaration and the exhibits providing the District's statistics on permanent employees on leaves of absence compared to temporary employees placed under temporary contracts based in the inherent lack of credibility in the evidence proffered by the District. The letter making the public record request for the 2006-2007 school year (CT 84) was served in the District in September 2007, approximately three months after that school year had closed. The letter making the public record request for information from the 2007-2008 and 2008-2009 school years (CT 114) was served on the District in November 2009, five months after the close of the 2008-2009 school year, and seventeen months after

the close of the 2007-2008 school year. It is important for the Court to note that the records for the 2005-2006 and 2006- 2007 school years, on which McIntyre's petition is in part founded, were requested almost three years before the petition was filed.

The California Public Records Act makes public access to government records a fundamental right of citizenship. "Implicit in the democratic process is the notion that government should be accountable for its actions, and in order to verify accountability, individuals must have access to government files. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651, fn. 5 [230 Cal.Rptr. 362, 725 P.2d 470])" *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476 [23 Cal.Rptr.2d 41]. Equally implicit is the obligation of the public entity to provide a complete and accurate disclosure of the records requested.

As the record requests were all made after the closing of the school year it would be expected that the District and its representative would have established and be aware of the proper employment classification of the District's certificated staff, permanent, probationary and temporary and that it would have provided accurate responses to the public record requests for that information. Thus the discrepancies between the numbers for the respective employment classifications offered by Appellant and District to the Trial Court are suspect. These objections were raised in writing (CT 247, lines 8-18), and in oral argument before the Trial Court (RT pp. 6, line 25- 7, line 13). These serious discrepancies

were never effectively refuted by the District before or at the time of hearing, and were not addressed by the Trial Court in either its tentative ruling or its final decision. The District's argument was that the Public Records Act documents were merely snapshot of documents at that time. (RT 14, lines 1-3). It was never explained why the "snapshot" of a document made long after the school year had closed provided substantially different information from the documents created by the District at a later time.

In *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-652 [51 Cal.Rptr.2d 907] the Court sets out an analysis of the Substantial Evidence Test. " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d 191], quoting *Estate of Tweed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) "Substantial evidence ... is not synonymous with 'any' evidence. Instead it is " ' "substantial" proof of the essentials which the law requires.'" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864 871-872 [269 Cal.Rptr. 647]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51[248 Cal.Rptr. 217]). The focus is on the quality, rather than the quantity, of the evidence. 'Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial'.(*Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra.* 220 Cal.App.3d 864 871-872.)" *Roddenberry v. Roddenberry, supra.* 44 Cal.App.4th 634, 651.

"The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. (*Kuhn v. Department of General Services, supra.* 22 Cal.App.4th 1627, 1633.) 'A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment, ... risks misleading the court into abdicating its duty to appraise the whole record." *Roddenberry v. Roddenberry, supra.* 44 Cal.App.4th 634, 652.

The evidence presented by the District in support of its claim that a greater number of permanent teachers were on leave of absence than the number of teachers hired as temporary employees is not substantial or credible. Given that the information was solely in the control of the District at all times and that the responses to Appellant's public record requests were served after the close of each school year in question, and presumably after all changes in the status of any temporary employees who were elevated to probationary status had been confirmed, no reasonable explanation to support the credibility of that evidence can be made. Based on its evidentiary ruling, the Trial Court declined to proceed and rule on the question of statutory interpretation which is presented on appeal. That decision was based on evidence which is not reasonable, credible and of solid value, and which is insufficient to support the Trial Court's ruling *Kuhn v. Department of General Services, supra.* 22 Cal.App.4th 1627, 1633.

B. EDUCATION CODE SECTION 44918(b) DOES NOT ALLOW THE DISTRICT TO DISREGARD THE PROPER CLASSIFICATION OF RETURNING TEACHERS

1. THE DEFAULT CLASSIFICATION FOR A CERTIFICATED TEACHER IS PROBATIONARY

The default employment classification for certificated teachers is probationary. *Education Code* § 44915, *California Teachers Assn. v. Vallejo City Unified School Dist.* (2007) 149 Cal.App.4th 135, 143 [56 Cal.Rptr.3d 712]. Section 44915 establishes probationary status as the default classification for teachers whom the Education Code does not require to be classified otherwise. *Id.* at pg. 146; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist* (2006) 145 Cal.App.4th 1260, 1280 [52 Cal.Rptr.3d 486]; *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 109 [18 Cal.Rptr.3d 562]. Section 44916 provides that at the time of initial employment by a school district a teacher shall be given written notice of his or her employment status and if such notice is not given in a timely manner, the teacher is as a matter of law a probationary employee. *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 926 [129 Cal.Rptr. 2d 811 62 P.3d 54].

The Education Code authorizes temporary classification in certain narrowly defined situations. *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist., supra.* 145 Cal.App.4th at pp. 1279-1280;(see e.g. §§ 44917, 44919, 44920) , *California Teachers Assn. v. Vallejo City Unified School Dist., supra.* 149 Cal.App.4th 135, 146. Notwithstanding the flexibility given school districts to classify

certificated employees as temporary employees, the Education Code also limits that right. "The Legislature . . . has restricted the flexibility of a school district in the continued use of temporary employees [citations omitted] for otherwise the benefits resulting from employment security for teachers could be subordinated to the administrative needs of the district [citation omitted]." *Haase v. San Diego Community College District* (1980) 113 Cal.App.3d 913, 918 [170 Cal.Rptr. 366]. "The tenure law may not be circumvented by the district through techniques or practices designed to frustrate the valid expectations of reemployment established by tenure statutes." *Id.; Santa Barbara Federation of Teachers v. Santa Barbara High School Dist.* (1977) 76 Cal.App.3d 223, 230[142 Cal.Rptr. 749]. Sections 44917, 44918, 44919 and 44920 all include language which mandates the classification of a temporary teacher upon rehire by the district (§§ 44917, 44918(b), (c), 44920) or after employment beyond a specified time period (§ 44919(a)) and provide that upon the rehire and reclassification to probationary status the previous year's employment as a temporary employee is to be deemed one year's employment as a probationary employee.

Appellant submits to the Court that the District misinterprets § 44918(b) to avoid its statutory obligation to reclassify temporary certificated teachers it has released under § 44954(b) as probationary teachers. Had it acted within the limited intent of the statute, McIntyre would have been classified as a probationary teacher on her rehire for the 2007-2008 school year and would have been credited

with the prior year's temporary service as a year's probationary employment. She would then have become permanent when the District failed to non-reelect her from probationary employment under § 44929.21 on or before March 15, 2008.

2. THE DISTRICT IMPUTES A MEANING TO EDUCATION CODE SECTON 44918(b) WHICH WAS NOT INTENDED

Section 44918 provides at subdivisions (a) and (b):

> "(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.
>
> (b) Any such employee shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954."

Section 44918(b) as it now reads is the result of *Kalamaras v. Albany Unified School District* (1991) 226 Cal.App.3d 1571 [277 Cal.Rptr. 577], where the Court interpreting (former) § 44918 held that it required a district to rehire a temporary employee once she had worked for 75 percent of the days in a school year, notwithstanding the fact she had been given an unsatisfactory evaluation. The Court acknowledged that this interpretation arguably gave temporary employees more rights than probationary employees, (who can be nonreelected at the end of the school year), but left that to the

Legislature to resolve. [*Citation omitted*] The Legislature responded by amending section 44918 in 1992 to provide, among other things, that a temporary employee shall be reemployed the following year in a vacant position "unless the employee has been released pursuant to subdivision (b) of Section 44954." (Stats. 1992, ch. 336, § 1, p.1303; see also Historical and Statutory Notes, 27B West's Ann. Ed. Code (1993 ed.) foll. § 44918, p. 339.) *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1284 fn. 18 [52 Cal.Rptr. 3d 486].

Section 44954 subd (b) states:

> "Governing boards of school districts may release temporary employees requiring certification qualifications under the following circumstances:
> (b) After serving during one school year the number of days set forth in subdivision (a), if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next school year."
> Added Stats 1992 ch 336 § 3 (SB 1281)

In essence, § 44918(b) says if a school district does not want a temporary certificated employee to return to his or her employment in the next school year it can release that employee with no obligation to rehire that individual by delivering a notice under § 44954(b) before the end of the school year. That is all it says.

The District interprets the statute much more broadly, to allow first the release of an employee who has been classified as a temporary employee, eliminating any obligation on the District's part to rehire the employee and then the immediate offer of reemployment

for the next school year as a continuing temporary employee with no credit from the school year just completed toward permanent status. Following this course of action, based on the expansive interpretation of §§ 44918(b) and 44954(b) the District ignores the prior year or years service as a temporary teacher, and creates a de facto extension of the statutory two year probationary period. In doing so, the District imputes a meaning to the statute which is not evident from the words set out in the code and which McIntyre submits to the Court does not exist and was not intended.

3. THE LEGISLATIVE HISTORY SUPPORTS THE NARROW INTERPRETATION OF SECTION 44918(b)

Pursuant to the Motion for Judicial Notice of the Legislative History of SB 1281 (1992) , served and filed herewith, Appellant requests that the Court take judicial notice of the relevant parts of the Legislative history of Senate Bill 1281 (1992) (See: Local Rules of the Court of Appeal First Appellate District, Rule 9(b)).

SB 1281 was introduced after the Court held in *Kalamaras v. Albany Unified School District*, supra. 226 Cal.App.3d 1571, that the school district was required to reemploy a certificated teacher who had served in a temporary position for at least 75 percent of the days of the regular school session to fill any vacant position the teacher was credentialed and qualified to fill, without regard to whether the district found that teacher's job performance satisfactory. If there was no vacant position the teacher could fill, he or she had to be rehired as a temporary or substitute. This gave rise to the perception that

temporary teachers had greater rights to continued employment than probationary teachers, who could be released during their probationary period.

Appellant's motion is indexed by ten attachments noting relevant documents excerpted from the Legislative history and set out according to the standard established by the Third Appellate District, *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31 [34 Cal.Rptr.3d 520].

SB 1281 was first presented in the Legislative Counsel's Digest January 9, 1992, *The Legislative Counsel's Digest of Senate Bill No. 1281* (1991-1992 Reg. Sess.) (CT 265-268; Motion for Judicial Notice, Ex.1). The bill was amended and read a second time March 16, 1992, (CT 266-271; Motion for Judicial Notice, Ex. 2) a third time after further amendments April 21, 1992 (CT 272-274; Motion for Judicial Notice, Ex. 3) and passed by the Senate, *Senate Final History Senate Bill 1281* (1991-1992 Reg. Sess.) (CT 280- 281; Motion for Judicial Notice, Ex. 5).

The Assembly first heard the bill April 30, 1992, (CT 318-321; Motion for Judicial Notice, Ex. 9) it was amended passed by the Assembly after the third reading July 7, 1992, (CT 387; Motion for Judicial Notice, Ex. 10) and returned to the Senate which concurred with the Assembly amendments, *Senate Final History Senate Bill 1281* (1991-1992 Reg. Sess.) (CT 387-392; Motion for Judicial Notice, Ex. 10).

Appellant cannot prove what the Legislature did not intend, nor what was not discussed in the formation and amendment of the statute, other than by illustrating what is not there. In none of the attachments to the motion, which illustrate the collective thought process of the Legislature and "...[t]he collegial view of the Legislature *as a whole ...*" *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., supra.* 133 Cal.App.4th 26, 30; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701 [170 Cal.Rptr. 817, 621 P.2d 856] is there any discussion expressing directly or by inference the intention to limit the prevailing public policy regarding classification for certificated teachers. (See: *California Teachers Assn. v. Vallejo City Unified School Dist., supra.* 149 Cal.App.4th at pg. 143; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist., supra.* 145 Cal.App.4th at pg. 1280; *Motevalli v. Los Angeles Unified School Dist, supra.* 122 Cal.App.4th at pg. 109).

Education Code § 44918(c) grants priority to an employee who has been released pursuant to subdivision (b) of section 44954 and still retained as a temporary or substitute employee and worked the requisite 75 percent of the days of the school year to be rehired into a vacant position. This does little for McIntyre and others in the same position. Education Code § 44929.21 was added in 1987 (ch 1452 § 380), providing for a two year probationary period. Nothing in §§ 44918(b) and 44954(b) or the Legislative history for the drafting of those statutes as they now read suggests that in 1992 it was the

intention of the Legislature to establish a two tiered probationary system in which teachers hired as probationary employees at the outset of their employment with a school district become tenured after two consecutive years of employment, but teachers who are first hired as temporary employees must serve a probationary term of three years or longer. However that is the operative result of the District's treatment of McIntyre under §§ 44918(b) and 44954(b).

"... [t]he Legislature is presumed to have meant what it said, and the plain meaning of the language governs." *Lennane v. Franchise Tax Board* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563, 885 P.2d 976]; *Kizer v. Hanna* (1989) 48 Cal.3d 1, 8 [255 Cal.Rptr. 412, 767 P.2d 679]. Therefore we must also presume that if the Legislature did not include particular words in a statute, it did not intend for those words to be read into the statute. The Legislature made no statement directly or by inference limiting the rights of temporary teachers released under § 44954(b) who are rehired for the following school year, after working at least 75 percent of the days in which the schools of that district were maintained. The District imputes those absent words into the statute. Contrary to the District's expansive interpretation of §§ 44918(b) and 44954(b), teachers released through those sections are entitled to placement in vacant positions they are credentialed and qualified to fill and to classification as probationary employees when they are rehired for the next consecutive school year.

4. THE DISTRICT HAD VACANT POSITIONS FOR THE YEARS IN WHICH APPELLANT WAS EMPLOYED

The District argued to the Trial Court that for each school year during McIntyre's employment there were more permanent and probationary teachers taking leaves of absence than there were temporary teachers employed under § 44920 to fill-in for them and in fact it had no vacant positions. However by its own declaration the District shows that this is not true. Ashley Halliday, District's former Director of Human Relations states in his declaration supporting the District's opposition to McIntyre's petition that during each of the 2006-2007, 2007-2008 and 2008-2009 school years, he and his staff reviewed the number of temporary employees as compared to the number of employees on leave of absence. The names of temporary employees who were recommended to be converted to probationary status were presented to the District's Governing Board for consideration. Following the Governing Board's approval of those recommendations, the affected employees were notified and their classification and seniority date were updated. (CT 181, para. 14, lines 11-17). As argued *supra. pp. 11-16*, this fails to explain why the District's count of permanent teachers on leaves of absence and temporary teachers hired as temporary fill-in's under § 44920 were substantially different than those produced at the Trial Court by McIntyre.

A plain reading of Halliday's declaration, giving the words their commonsense meaning tells us that the comparison of teachers

on leave and teachers working in temporary classification and the subsequent elevation of some temporaries to probationary status occurred during each of the school years at issue. We return to the question raised previously: Why were these figures not the same as those provided to McIntyre when the request was made, months after those school years had concluded and all staffing issues were settled?

A further difficulty with the Halliday declaration is that if the District had vacant positions it properly should have classified those teachers filling such positions as probationary at the time they were hired. *California Teachers Assn. v. Vallejo City Unified School Dist., supra.* 149 Cal.App.4th 135, 143; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist., supra.* 145 Cal.App.4th at pg. 1280, 1285; *Motevalli v. Los Angeles Unified School Dist., supra.* 122 Cal.App.4th 97, 109. The course of action described in the Halliday declaration is a tacit admission on the part of the District that it was improperly classifying teachers as temporary employees at the time they were hired or, as in McIntyre's case, rehired.

McIntyre asserts that the District had vacant positions open for certificated teachers during the 2007-2008. Therefore she was entitled to classification as a probationary II teacher when she began her employment for that school year, (See: § 44918(a); § 44920 second paragraph). After March 15, 2008 as a matter of law she was entitled to reemployment as a tenured or permanent employee for the 2008-2009 school year. McIntyre further asserts that under *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist., supra.*

145 Cal.App.4th at pg. 1285, because the District employed a greater number of certificated teachers in temporary positions than it had permanent or probationary teachers on leave of absence she was entitled to be classified as a probationary teacher for the 2007-2008 year.

CONCLUSION

Respondents, the Sonoma Valley Unified School District, et al. answered the petition for peremptory writ of mandate filed by Appellant, Dawn McIntyre with statistical evidence which was not credible and which was insufficient to sustain the ruling of the Trial Court. The declaration filed in support of that evidence demonstrated that the District, during the school years in question, changed the employment classification of some of the certificated employees hired as temporary employees to probationary status, thus showing that during those years vacant job positions existed within the District.

Education Code §§ 44918(b) and 44954(b) allow a school district to release a temporary employee at the end of the school year without any obligation to rehire that employee. Sections 44918(b) and 44954(b) have a narrow and specific meaning. Those sections are not intended to and do not give a school district the ability to release a temporary teacher and rehire the teacher for the next school year while failing to honor the statutory classification rights given by the Education Code.

Because the District had vacant positions at the beginning of the 2007-2008 school year, Appellant McIntyre was entitled to be

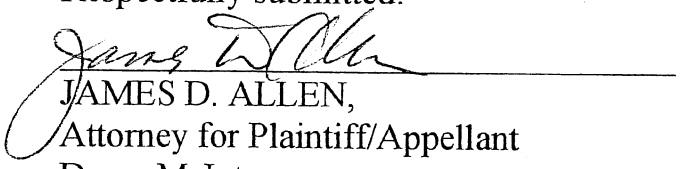
classified as a probationary II teacher at the beginning of that school year, notwithstanding her release under § 44954(b) and rehire as a temporary teacher. When the District failed to non-reelect her as a probationary teacher on or before March 15, 2008, she became a permanent employee of the District.

Because the District employed more teachers as temporary fill-in's under Education Code § 44920 than it could show permanent or probationary teachers on leaves of absence, the District violated § 44920. Those teachers classified as temporary employees in excess of the number of permanent or probationary teachers on leave of absence were entitled to be classified as probationary employees.

For the reasons set forth above, the ruling of the Trial Court denying Appellant's petition should be reversed and the writ issued.

July 12, 2011

Respectfully submitted:



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