Case No. A131327

COURT OF APPEAL, STATE OF CALIFIORNIA
FIRST APPELLATE DISTRICT
DIVISION 4

DAWN McINTYRE,

Plaintiff / Appellant,

v.

SONOMA VALLEY UNIFIED SCHOOL DISTRICT, GOVERNING BOARD OF THE SONOMA VALLEY UNIFIED SCHOOL DISTRICT

Defendants / Respondents.

BRIEF OF AMICUS CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS SONOMA VALLEY UNIFIED SCHOOL DISTRICT AND GOVERNING BOARD OF SONOMA VALLEY UNIFIED SCHOOL DISTRICT

On Appeal from the Superior Court of Sonoma County
Superior Court Case No. SVC 247840
The Honorable Mark Tansil, Presiding

School and College Legal Services of California
Nancy L. Klein, Sr. Associate General Counsel SBN 127662
5350 Skylane Boulevard, Santa Rosa, CA 95403
Telephone: (707) 524-2690

Attorneys for Amicus Curiae
California School Boards Association

Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A131327 Division Four

Case Name: Dawn McIntyre v. Sonoma Valley Unified School District

Please check the applicable box:

☑ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: Nancy L. Klein
Address: 5350 Skylane Boulevard
Santa Rosa, California 95403
State Bar No: 127662
Party Represented: California School Boards Assoc., Amicus Curiae

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASE AUTHORITY

STATUTES

OTHER AUTHORITY

BRIEF OF AMICUS CURAE IN SUPPORT OF RESPONDENTS SONOMA VALLEY UNIFIED SCHOOL DISTRICT AND THE GOVERNING BOARD OF THE SONOMA VALLEY UNIFIED SCHOOL DISTRICT

I. UNDISPUTED FACTS

Appellant Dawn McIntyre ("Appellant") and Respondents Sonoma Valley Unified School District and the Governing Board of the Sonoma Valley Unified School District (collectively hereinafter "District") agree that the District employed Appellant for three consecutive years as follows:

1. Year 1: The District employed Appellant in 2006-07 and classified her as a temporary employee pursuant to Education Code section 44920.[1] The District assigned Appellant to teach 5th grade and released her pursuant to Section 44954, subdivision (b), on or about March 15, 2007. (Open. Brief, p. 2) (Resp. Brief, p. 7) (CT 18, 20-26)
2. Year 2: The District employed Appellant in 2007-08 and classified her as a temporary employee pursuant to Section 44920. (CT 29.) The District assigned Appellant to teach 3rd grade and released her pursuant to section 44954, subdivision (b), on or about March 13, 2008. (Open. Brief, p. 3) (Resp. Brief, p. 7-8) (CT 31-36)
3. Year 3: The District employed Appellant in 2008-09, and initially classified her as a temporary employee. (CT 222) On or about October 21, 2008, the District notified Appellant that her employment status would be reclassified from temporary to probationary for the duration of the 2008-09 school year. (CT 38)

---

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

On or about March 12, 2009, the District served Appellant with a notice of non-reelection pursuant to Education Code section 44929.21. (Open. Brief, p. 4-5) (Resp's. Brief 8-9) (CT 40-45)

It is also undisputed that in each year of Appellant's employment there were a number of District employees on leave of absence. (CT 85-95; 99-109; 115-124; 177-182.) While Appellant and District disagree on the numbers, by Appellant's count they were 9.5 in Year 1; 7.2 in Year 2; and 8.1 in Year 3. (Open. Brief, p. 12.)

II. ISSUES ON APPEAL

Appellant raises two issues on appeal:

1. Does Section 44917 override Section 44918 to preclude a school district from releasing and rehiring a temporary teacher in temporary status the following year; and
2. Was the Trial Court's finding that the District had more permanent and probationary employees on leave of absence than it had certificated employees working under temporary contracts during Appellant's employment supported by substantial evidence?

The first issue presents a question of law; the second, a question of fact.

The Trial Court found that Appellant's "claims for relief in connection with her District employment for Year 1 were barred by the three-year limitations period set forth in Code of Civil Procedure section 338...." (C.T. 460, para. 4) By choosing not to address the Trial Court's finding as to the applicability of the statute of limitations to her Year 1 claims, Appellant has waived on appeal any right to challenge her Year 1 temporary employment status. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345, fn 6 [100 Cal.Rptr.2d 446] (failure to raise an issue

in the opening brief waives it on appeal). Appellant acknowledges the same and indicates her course of action on appeal was "an informed decision, not an oversight." (Reply, p. 4.)

III. STANDARD OF REVIEW.

A. ON APPEAL QUESTIONS OF LAW ARE REVIEWED INDEPENDENTLY, AND QUESTIONS OF FACT ARE REVIEWED UNDER THE SUBSTANTIAL EVIDENCE STANDARD.

Questions of law are reviewed independently while questions of fact are reviewed under the "substantial evidence" standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139].) The interpretation and applicability of a statute is a question of law. (*Bodinson Mfg. Co. v. California, Emp. Com.* (1941) 17 Cal.2d 231 [109 P.2d 935]; *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.45h 216, 271 [32 Cal.Rptr2d 807, 878 P.2d 566].)

The trial court's findings of fact will be reversed only when there is no substantial evidence to support them. (*Marriage of Mix* (1975) 14 Cal.3d 604, 614 [122 Cal.Rptr. 79].) Evidence must be viewed in the light most favorable to the respondent, accepting the respondent's evidence as true and resolving all conflicts and drawing all inferences that may be drawn. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920 [101 Cal.Rptr. 568].) On appeal rejection of statements believed in the trial court is warranted only when they present a "physical impossibility" or "their falsity [is] apparent without resorting to inferences or deductions." (*Evje v. City Title Insurance Co.* (1953) 120 Cal.App.2d 488, 492 [261 P.2d 279.])

> The absence of decisions rejecting testimony believed in a trial court is understandable when we see that for rejection

> it is required that the testimony be "wholly unacceptable to reasonable minds [Citations]; "unbelievable per se" [Citations] such that "no reasonable person could believe the testimony" [Citations]. (*Evje, supra*, 120 Cal.App.2d at p.492.)

The application of the substantial evidence standard applies in cases where the trial court heard the matter on affidavits and where the determination of fact was based solely upon documentary evidence. (See e.g., *Bradley v. Superior Court* (1957) 48 Cal.2d 235 [117 P.2d 634] (motions heard on affidavits); *Denna v. Red River Lumber Co.* (1941) 47 Cal.App.2d 235 [117 P.2d 689] (determination of fact based on documentary evidence only).)

B. ON APPEAL PLAINTIFF MUST SHOW REVERSIBLE ERROR, AND THE SUPERIOR COURT'S JUDGMENT IS PRESUMED CORRECT.

Appellant must affirmatively show reversible error. (*Angelier v. State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 599 [68 Cal.Rptr.2d 213]; *Marriage of Behrens* (1982) 137 Cal.App.3d 562, 574 [187 Cal.Rptr. 200]; *County of Monterey v. W.W. Leasing Unlimited* (1980) 109 Cal.App.3d 636, 642 [167 Cal.Rptr. 12] (Even substantial errors are not reversible if the judgment is correct.).)

In attempting to establish reversible error, an appellant is restricted to specific objections raised below. The responding party, on the other hand, may "suggest any ground…to show that the ruling was right, whether advanced in the discussion below or not." (*Clarke v Huber* (1864) 25 Cal. 593, 598.)

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its

correctness. (Citations omitted) (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [275 Cal.Rptr. 797].)

As amicus curiae, California School Boards Association ("CSBA") will address primarily the first issue concerning a school district's authority to release and reemploy a temporary teacher in temporary status. To the District's brief on the second issue, CSBA adds that (1) Appellant has failed to meet her burden to prove that the District had a non-discretionary duty to employ her in probationary or permanent status or that she had a right superior to other temporary employees to be reclassified, and (2) her theory about the existence of vacancies is based on an erroneous premise.

IV. ARGUMENT

A. EDUCATION CODE SECTION 44918 EXPLICITLY AUTHORIZES SCHOOL DISTRICTS TO RELEASE TEMPORARY TEACHERS AND REEMPLOY THEM IN TEMPORARY STATUS THE FOLLOWING YEAR.

1. To determine the meaning of a statute the Code of Civil Procedure requires that a reviewing court look first to the text of the statute and then, only if it is ambiguous, to consider the Legislature's intent.

When statutory language is clear, ordinarily there is no need for judicial construction (*California School Employees Association v. Governing Board of the Marin Community College District* (1994) 8 Cal.4th 333, 340 [33 Cal.Rptr.2d 109, 115]). To determine the meaning of a statute, Code of Civil Procedure section 1858 directs a reviewing court to look first to the language of the statute.

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance therein, not to insert what has been omitted, or to omit what has been inserted; and when there are several provisions or

particulars, such a construction is, if possible, to be adopted as will give effect to all. (Code of Civ. Proc. Sec. 1858.)

Code of Civil Procedure section 1859 further directs a court to consider the intent of the Legislature.

> In the construction of a statute, the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a greater one that is inconsistent with it. (Code Civ. Proc. sec. 1859.)

However, as explained in *J.A. Jones Const. Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1575 [33 Cal.Rptr.2d 206], "courts should start, ...with the actual language of the statute, and if the text is clear as applied to a given case, and it does not fall in to any exceptions, stop there."[2] Only when the language of the statute is "ambiguous" does Code of Civil Procedure section 1859 direct a court to the Legislature's intent to determine how a statute should be applied in a given case. (*Id.* at p.1576.)

2. The text of Education Code section 44918 unambiguously authorizes the release and reemployment of temporary teachers in temporary status.

Appellant asserts that Sections 44918, subdivision (b), and 44954, subdivision (b), "provide only for the decision to release and not re-hire temporary teachers" and postulates that rehiring a released employee "as a continuing temporary employee" would be "in abrogation of the rights granted by § 44917." (Open. Brief at p. 7.) In essence she contends that, notwithstanding Section 44918, subdivisions (b) and (c), and release

---

[2] The court in *J.A. Jones Const. Co.* identified the "few exceptions" as "scrivener's errors, absurd results, and results at odds with the *unmistakable* or *clear* intent of the Legislature" (27 Cal.App.4th at p. 1575.)(Emphasis in original.)

pursuant to Section 44954, subdivision (b), Section 44917 guarantees second year probationary (hereinafter "Probationary II") status when a teacher is reemployed in the year immediately following a year of temporary service.

Contrary to Code of Civil Procedure section 1858, Appellant's suggested interpretation fails to consider that "there are several provisions or particulars" to Section 44918, specifically subdivisions (a), (b) and (c), which make the right to reemployment in probationary status conditional and which explicitly authorize school districts to release temporary teachers and rehire them in temporary status the following year.[3]

Insofar as it pertains to temporary employees, Section 44917 provides:

> 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 qualifications, 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 provides, in its entirety, as follows:

> (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

---

[3] Appellant completely omits subdivision (c) in her recitation of Section 44918 at page 20 of the Opening Brief. She later notes at page 24 that subdivision (c) "grants priority to an employee who has been released pursuant to subdivision (b) of section 44954 and still retained as a temporary…employee…," thereby implicitly acknowledging that temporary employees may be reemployed in temporary status notwithstanding Section 44917. It appears she also concedes that subdivision (c) "does little" to support her appeal. (Open. Brief, p. 24.)

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.**

(c) **If an employee was released pursuant to subdivision (b) of Section 44954** ***and has nevertheless been retained as a temporary*** or substitute ***employee by the district*** **for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained** in each school year and has performed the duties normally required of a certificated employee of the school district, ***that employee shall receive first priority if the district fills a vacant position***, **at the grade level at which the employee served during either of the two years, for the subsequent school year.** In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

(d) Those employees classified as substitutes, and who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis shall not be entitled to the benefits of this section.

(e) Permanent and probationary employees subjected to a reduction in force pursuant to Section 44955 shall, during the period of preferred right to reappointment, have prior rights to any vacant position in which they are qualified to serve superior to those rights hereunder afforded to temporary and substitute personnel who have become probationary employees pursuant to this section.

(f) This section shall not apply to any school district in which the average daily attendance is in excess of 400,000.
(Emphasis added.)

Section 44954 authorizes the release of temporary employees as follows:

> Governing boards of school districts may release temporary employees requiring certification qualifications under the following circumstances:
>
> (a) At the pleasure of the board prior to serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained.
>
> (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 succeeding year.

When a probationary or permanent employee will be absent on a long-term basis, Education Code section 44920 authorizes the employment of temporary employees as follows:

> The employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board....

a. Per Section 44918, subdivision (a), the right to reemployment in probationary status is conditional, not guaranteed (Sec. 44918(a)).

Section 44918, subdivision (a), provides that any temporary employee who serves the requisite number of days is entitled to have the year of temporary service "deemed" a year of probationary service but only "*if* reemployed as a *probationary* employee for the following school year." (Emphasis added.) The Legislature's use of the word "if" makes clear that reemployment as a probationary employee is not guaranteed.

b. Per Section 44918, subdivisions (b) and (c), the right to reemployment in probationary status in the next year is terminated by release pursuant to Section 44954(b).

Subdivisions (b) and (c) further reinforce that probationary status after service as a temporary employee is not guaranteed. The reference to "such employee" in subdivision (b) is to temporary employees who have met the length of service condition of subdivision (a). "Any such employee shall be reemployed for the following year to fill any vacant position..., *unless the employee has been released pursuant to subdivision (b) of Section 44954.*" (Ed. Code sec. 44918(b).)[4] (Emphasis added.) After release, a temporary employee's right to reemployment in probationary status in a vacant position is defined and limited by Section 44918, subdivision (c).

For a released temporary employee, the right to reemployment arises only if the employee is "nevertheless retained as a temporary or substitute employee... for two consecutive years...," and it is expressly limited to a vacancy "at the grade level at which the employee served during either of the two years...." (Ed. Code sec. 44918(c).) When a temporary employee is released and nevertheless retained in temporary status, as Appellant herein was, subdivision (c) provides that the employee's right to reemployment is to "first priority" consideration at the grade level(s) taught in the previous two years. As discussed, *infra* at Section IV.C.3., the right to "first priority" means more than "mere consideration" for a vacancy but does not confer a right to future probationary employment.

Section 44918 is clear: reemployment in probationary status after a year of temporary service is not guaranteed. It is dependent upon the occurrence of a vacancy and expressly subject to termination by release pursuant to Section 44954(b). (Ed. Code sec. 44918(b)) After release, if

---

[4] Subdivision (e) further limits a temporary employee's right to reemployment by giving laid off employees "prior rights to any vacant position" over any temporary or substitute employees who have become probationary pursuant to Section 44918.

the employee is "nevertheless retained as a temporary...employee...for two consecutive years," the employee "shall receive first priority if the district fills a vacant position at the grade level in which the employee served during either of the two years...." (Ed. Code sec. 44918(c).) "First priority" means more than mere consideration but does not guaranty reemployment in probationary or any other capacity. Further, a school district's decision to reemploy after release discretionary as discussed *infra* at Section IV.C.3.

3. Appellant did not have any right to reemployment in probationary status because she was released pursuant to section 44954(b) at the end of Year 1 and Year 2.

In the instant matter it is undisputed that the District released Appellant pursuant to Section 44954, subdivision (b), in March of Year 1 and March of Year 2. These employment actions were specifically authorized by the unambiguous text of Section 44918(b). The District "nevertheless retained" Appellant in temporary status in Year 2 and part of Year 3. These employment actions were specifically authorized by the unambiguous text of Section 44918(c). The District's lawful action to release Appellant from employment pursuant to Section 44954(b) terminated any rights she otherwise would have had in Years 2 and 3 to reemployment in probationary status. (Ed. Code sec. 44918(b).)

When subdivision (b) to Section 44918 is considered in the context of the entire statute, with due consideration of subdivision (c), to "give effect to all" provisions and particulars as Code of Civil Procedure section 1858 requires, it is clear that a temporary employee may be released and thereafter "retained as a temporary...employee...." (Ed. Code sec. 44918(c).)

Appellant was released pursuant to Section 44954(b) after Year 1. Since she has not challenged the Trial Court's ruling that her claims as to

permanent status upon completion of the second year without regard to the actual capacity in which she was reemployed,. (Open. Brief, pp. 19-20.) Even if that were the case, Appellant would not have been permanent in Year 3 because teachers must serve two consecutive years in probationary status to advance to permanent status. (Ed. Code sec. 44929.21(b).)

After her release at the end of Year 1, the District did not have any obligation to reemploy her in any capacity. (Ed. Code sec. 44918(b).) When the District offered her employment in Year 2, it was in temporary status. Thus, even assuming Section 44917 required that Year 1 be deemed a year of probationary service simply because she was reemployed in Year 2, she served in temporary status in Year 2 and would not, in any event, have completed the two consecutive years of probationary service necessary to advance to permanent status in Year 3

B. APPLICATION OF THE RULES OF STATUTORY CONSTRUCTION ALSO LEAD TO THE CONCLUSION THAT SCHOOL DISTRICTS ARE AUTHORIZED TO RELEASE AND REEMPLOY A TEMPORARY TEACHER IN TEMPORARY STATUS AND THAT THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED.

1. Appellant Construction Fails to Harmonize Sections 44917 and 44918.

"When possible, sections of the Education Code bearing on the same subject must be read and construed together." (*Santa Barbara Federation of Teachers v. Santa Barbara High School District* (1977) 76 Cal.App.3d 223, 235 [142 Cal.Rptr. 749].) Various parts of a statutory enactment must also be harmonized "by considering the particular clause or section in the context of the statutory framework." (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d. 222, 230.) Courts should avoid interpretations that render all or part of a statute surplusage. (*Reno v. Baird* (1998) 18 Cal.4th

640, 658.) "[A statutory] interpretation which gives effect is preferred to one which makes void." (Civ. Code §3541.)

Section 44918, subdivision (b), authorizes school districts to release temporary employees and thereby terminate their right to reemployment in a vacant position while subdivision (c) authorizes reemployment of released employees in temporary status. Sections 44917 and 44918 undeniably relate to the same subject. Appellant's suggested construction of Section 44917 should be avoided because it fails to "harmonize" the two statutes, is wholly without reference to the limited, conditional right to reemployment specified in Section 44918, subdivisions (a), (b) or (c), and improperly relegates subdivisions (b) and (c) to "surplusage."

2. The Particular Provisions of Section 44918 Should Be Given Paramount Effect Over The General Provisions of Section 44917.

"[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a greater one that is inconsistent with it. (Code Civ. Proc. Sec. 1859.) As discussed above, Sections 44917 and 44918 can be construed consistently. If this Court finds them to be inconsistent, the more particular of the two is controlling.

Section 44917 provides generally that a temporary employee, "if reemployed for the following school year in a position requiring certification qualification, [shall] be classified...as a probationary employee..." while Section 44918 specifically addresses the rights of temporary employees who, like Appellant, have been released pursuant to section 44954, subdivision (b). As the more particular of the two and the statute which addresses the specific facts of this case, Section 44918 must be given "paramount" effect over Section 44917.

3. As the Later-Enacted Statute, Section 44918 Should Be Construed to Repeal Any Contrary Provisions in Section 44917.

"[W]hen the provisions of one statute are in irreconcilable conflict with those of another...the later enactment by implication will be deemed to have repealed any contrary provisions contained in the earlier. [Citations.] *Santa Barbara Federation of Teachers v. Santa Barbara High School District* (1977) 76 Cal.App.3d 223, 236 [142 Cal.Rptr. 749].

Sections 44917 was enacted in 1976.[6] (M. for Judicial Notice, Exh. A., Decl. of Lillge, LIS-1.) Section 44918, on the other hand, as Appellant notes at page 22 of the Opening Brief, was introduced as SB1281 and enacted in 1992 after the decision in *Kalamaras v. Albany Unified School District* (1991) 226 Cal.App.3d 1571 [277 Cal.Rptr. 577. (M. for Judicial Notice, Exhs. A and B, Decls of Lillge and Exhs. thereto; Decl of Sanders and Attach. Nos. 1(e) and 2.) Should this Court determine that Sections 44917 and 44918 present an "irreconcilable conflict, as the later-enacted statute, Section 44918 should be deemed to have repealed any contrary provisions of Section 44917.[7]

C. THE JUDGMENT SHOULD ALSO BE AFFIRMED BECAUSE THE DISTRICT DID NOT HAVE ANY DUTY TO REEMPLOY APPELLANT IN PROBATIONARY OR PERMANENT STATUS.

---

[6] Since 1976, Section 44917 has been amended only once and without substantive change. In 2009 "person who consents to be so employed" and "Commission for Teacher Preparation and Licensing" were replaced with "person who consents to be employed" and "Commission on Teacher Credentialing," respectively. (M. for Judicial Notice, Exh. A., Decl. of Lillge, LIS-2.)

[7] Section 44918 should also be deemed to repeal any contrary provision regarding reemployment in Section 44920, which was enacted in 1976. (M. for Judicial Notice, Exh. B., Decl. of Lillge, LIS-1)

1. **The Issuance Of A Writ Of Mandate Is Appropriate Only If The Respondent Has A Clear, Present, Nondiscretionary Duty To Perform The Act Sought To Be Compelled.**

A petitioner for writ of mandate must show that respondents have a clear, present and usually ministerial duty to perform the requested act and that she has a clear and present right to that performance. (Code Civ. Proc. §§1085-1086; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845 [59 Cal.Rptr. 609].) Generally, mandamus may be used only to compel the performance of a duty that is purely ministerial in character; the remedy may not be invoked to control an exercise of discretion. (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (App. 5 Dist. 2005) 130 Cal.App.4th 986 [30 Cal.Rptr.3d 648].)

2. **District Did Not Have a Duty to Employ Appellant in Probationary or Permanent Status.**

Appellant has waived her right to challenge her temporary status in Year I (*Shaw, supra,* 83 Cal.App.4th at p. 1345 f.n. 6)(Reply, p. 4), and it is undisputed that District released her pursuant to Section 44954(b) at the end of that year. After her release at the end of Year 1, and as a result thereof, Appellant had no right to reemployment in probationary status in a vacant position in Year 2 (Ed. Code sec. 44918(b)) because a released temporary employee may be, and Appellant was, rehired in temporary status. (Ed. Code sec. 44918(c).)

Similarly, Appellant had no right to reemployment in probationary or permanent status in Year 3 because District released her at the end of Year 2. (Ed. Code sec. 44918(b) and (c).) As a result, her right to reemployment in Year 3 was limited to "first priority" consideration for a vacancy in 3rd or 5th grade, the existence of which Appellant has failed in her burden to establish.

3. The Right to "First Priority" Consideration Does Not Impose a Duty to Reemploy a Released Employee.

The right to "first priority" consideration under Section 44918(c) does not impose a duty to reemploy. There must be a vacancy at the requisite grade level(s). Second, the legislative history of Section 44918, confirms that "first priority" consideration does not guaranty reemployment.[8] As Senator Alquist, the author of SB 1281, stated on the floor of the Senate[9] and wrote in a July 13, 1992, letter to then-Governor Wilson, the purpose of Section 44918 is to ensure "maximum hiring flexibility":

> My Senate Bill 1281 is currently before you for consideration. It has been introduced in an effort to clarify the Education Code relative to the re-hiring of temporary employees and to ensure that school districts maintain the maximum hiring flexibility in replacing permanent teachers that are on leave.... (M. for Judicial Notice, Exh. C., Decl. of Sanders, Attach. No. 13.)

Further, in a letter to Senator Roberti, President pro Tempore of the Senate and published in the *Senate Daily Journal*, Senator Alquist explained the history and meaning of "first priority" rights set forth in Section 44918(c):

> When the bill was heard in the Assembly Education Committee..., the chair proposed an amendment to the bill.[10]

---

[8] CSBA has requested that this Court take judicial notice of the legislative history of Section 44918 if it concludes that Section 44917 creates an irreconcilable ambiguity and that examination of legislative history is required to determine how to apply Section 44918 in this case.

[9] M. for Judicial Notice, Exh. C, Decl. of Sanders, Attach. No. 12, A-2 and A-3.)

[10] Prior to the amendment, the bill provided for "first consideration" of released employees. (M. for Judicial Notice, Decl of Sanders and Attach. No. 1(c).) The referenced amendment changed the language to "first priority." (M. for Judicial Notice, Decl of Sanders and Attach. No. 1(d).)

> That amendment was to give first priority to a 'released' temporary employee who had nonetheless served for 75% of two consecutive years. Discussion in the committee centered on whether introduction of the concept of 'first priority' meant that the employee *must* be reemployed. It was clarified that such an employee should be entitled to more than mere consideration, but less than a right to reemployment. With this explanation, I accepted this as an author's amendment. (Emphasis in original.)
> (Motion for Judicial Notice, Exh. C., Decl. of Sanders and Attach. No. 14.)

Section 44920 authorizes the employment of a temporary employee on a long-term basis, thus enabling a school district to offer more consistent instruction than a succession of day-to-day substitutes could provide.[11] Section 44918 specifically authorizes school districts to release and, if desired, rehire temporary teachers in temporary status for at least two consecutive years. (Ed. Code sec. 44918(b) and (c).) Contrary to ensuring "maximum hiring flexibility," Appellant's construction of Section 44917 would mandate reemployment of temporary employees in Probationary II status, even after release, and without regard to the school district's actual need for probationary or permanent staff.

Since rights under Section 44918(c) do not guaranty reemployment of any kind, the District could, and did, initially reemploy her in temporary status in Year 3. Upon reclassifying her to probationary status in October of Year 3, Appellant was entitled to the benefits of Section 44917; that is, to have Year 2 "deemed one year's employment as a probationary employee for purpose of acquiring permanent status." (Ed. Code sec.

---

[11] Day-to-day substitutes are specifically excluded from the benefits of Section 44918. (Ed. Code sec. 44918(d).)

44917.)[12] Nonetheless, Appellant's Probationary II status did not impose any duty on the District to continue to employ her in any year thereafter. Probationary employees are subject to non-reelection pursuant to Education Code section 44929.21, subdivision (b). By exercising that right the District lawfully terminated its employment relationship with Appellant at the end of Year 3.

In short, Appellant had no right and the District had no duty to employ her in probationary or permanent status in either Year 2 or Year 3 because the District released her.[13] In the absence of a ministerial duty on the part of the District and a right to be reclassified on the part of Appellant, the Trial Court's denial of the Petition for Writ of Mandate was correct and should be affirmed on appeal. (Code of Civ. Proc. Sec. 1085-1086; *County of Sacramento, supra*, 66 Cal.2d at 845) The decision to non-reelect Appellant at the end of Year 3 was a discretionary decision that rests with the District (*Summerfield v. Windsor Unified School Dist.* (App.1 Dist. 2002) 95 Cal.App.4th 1026 [116 Cal.Rptr.2d 233]; *Ridgecrest Charter School, supra,* 130 Cal.App.4th 986) and likewise is not subject to intervention by writ of mandate. (Code Civ. Proc. §§1085-1086.) Similarly, as discussed *infra* at Section IV.D., the District's decision to

---

[12] By reclassifying Appellant, the District placed her in the Probationary II status she would have had (1) if there were a vacancy in 3rd or 5th grade in Year 3 and (2) the District had decided, in its discretion, after giving her "first priority" consideration, to hire her for the vacancy. For that reason, whether or not "first priority" consideration under Section 44918(c) guarantees a released employee the right to reemployment is arguably moot.

[13] The District did not have any duty to employ her in probationary status in Year 1 either because school districts are authorized to employ temporary teachers for extended periods to replace teachers on leave of absence or suffering from long-term illness (Ed. Code sec. 44920); and Appellant has not met her burden to prove the District employed more temporary employees than authorized by Section 44920. Further, the Trial Court's decision as to her Year 1 temporary status is final.

reclassify some temporary employees, and not Appellant, was also discretionary and not subject to intervention by writ of mandate.

D. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE APPELLANT FAILED TO MEET HER BURDEN OF PROOF.

1. Appellant has the Burden of Proving that She is Entitled to the Relief She is Seeking.

Appellant asserts and the District denies that, in violation of Section 44920, the District employed temporary employees in excess of the number of employees on leave of absence in Years 1, 2, and 3, and that she, therefore, is entitled to reclassification and employment in permanent status. (Open. Brief, p. 19-20.) "[T]he party who seeks a writ of mandate has the burden of proving that the official body which fails to perform an act has thus violated its duty toward him by denying him a clear and present right [Citations omitted]." (*Fair v. Fountain Valley School District* (1979) 90 Cal.App.3d 180, 186 [153 Cal.Rptr. 56].)

In *Centinela Valley Secondary Teachers Assoc. v. Centinela Valley Union High School District* (1974) 37 Cal.App.3d 35, 42 [112 Cal.Rptr. 27], where a teacher similarly sought to be deemed probationary based on substitute service, the court rejected the petitioner's claim that it is unfair to place the burden on her to prove her case and specifically recognized that school districts must have flexibility to replace staff on leave without adding unneeded permanent staff.

> Substitute teachers play a definite and beneficial role in school administration, but they exist as an aid to the school administration in preserving necessary flexibility in teacher assignments and make it possible for tenured teachers to avail themselves of sick and other beneficial types of leaves of absence, since, by law, permanent teachers who are absent from service...have the right to return to their positions. When this occurs, the inability of the school administrators to

terminate teachers who substituted during the absences could result in overstaffing. ..." (*Centinela Valley Secondary Teachers Assoc., supra,* 37 Cal.App.3d at p. 41.)

Temporary teachers serve largely the same function in "preserving necessary flexibility" in staffing for the return of teachers on leave; accordingly, Appellant should likewise bear the burden of proving her case.

2. School Districts May Reclassify Teachers from Temporary to Probationary Status When a Vacancy Arises at Any Time During the School Year.

Appellant theorizes that the District's practice of reviewing the number of temporary employees to the number of employees on leave and thereafter recommending some for reclassification to probationary status (CT 181, para. 14, lines 11-17) is evidence that there were vacancies when she was hired and to which she was entitled to employment or reemployment in probationary status. (Open. Brief, pp. 13-14.)

There are numerous reasons why some weeks or even many months into the school year a vacancy could occur where none previously existed. To name a few: (1) a teacher on leave of absence could give notice of his/her decision not to return to service, apply and be promoted to an administrative position, or pass away; (2) an employee's 24- or 39-month reemployment period specified in Section 44978.1, during which a school district is required to hold a place for an absent employee to return to when medically able, could expire; and (3) student enrollment could be higher than expected and increase the need for teachers in any one or more grades or subject areas.

Appellant's theory is based on the erroneous assumption that an absent employee's status and the number of students in attendance remain static throughout the school year when in fact vacancies can and do occur at

any time during the year, and there is nothing improper about reclassifying a temporary employee's status to probationary when they do.

3. Appellant has not Established that She Had Superior Rights to be Reclassified in Year 1 or 2 or that District Abused Its Discretion.

Assuming *arguendo* that Appellant were correct about the number of temporary employees in relation to the number of employees on leave, she must still establish that she had a right to be reclassified that was superior to other temporary employees. Any such right could not be premised on an earlier hiring date because the rehiring of temporary employees is not governed by seniority. (See *Fountain Valley School District, supra, 90 Cal.App.3 at p. 188* (noting that a detailed seniority system is set out in statutes for other school employees but not for temporary employees).)

Choosing which temporary employees to reclassify to balance the number of temporary employees with the number of employees on leave of absence is a discretionary one which a writ of mandate will not lie to control absent a "showing that the body vested with discretion has acted arbitrarily, capriciously, fraudulently, or without due regard for his rights and that the action was prejudicial to him." (*Fountain Valley School District,* 90 Cal.App.3 at p. 187.) Appellant has not made any showing that the District abused its discretion by selecting other temporary employees, and not her, for vacant positions.

V. CONCLUSION

The express language of Education Code section 44918 authorizes school districts to release temporary teachers and reemploy them in temporary status the following year. Under Section 44918(a), a year of temporary service "shall be deemed" a year of probationary service but only "*if* [the employee is] *employed as a probationary employee for the*

following school year." (Emphasis added.) Subdivision (a) clearly expresses that "deemed" probationary service is conditioned upon reemployment as a probationary employee and not guaranteed.

Under Section 44918 (b), after serving a year as a temporary employee, a temporary employee "shall be reemployed for the following school year to fill any vacant positions...*unless*...*released* pursuant to subdivision (b) of Section 44954." (Emphasis added.) Thus, the right to reemployment is subject to termination by release pursuant to Section 44954(b).

In Year 1 the District employed Appellant in temporary status and by reason of her decision not to appeal the Trial Court's ruling as to the determination of her temporary status for that year is final. It is undisputed that the District released her pursuant to Section 44954(b) at the end of Year 1. As a result of that release, she did not have any right to reemployment in any capacity. (Ed. Code sec. 44918(b).)

In Year 2 the District employed Appellant in temporary status pursuant to Education Code section 44920 to fill in for a teacher on leave of absence. It is undisputed that the District released her pursuant to Section 44954(b) at the end of Year 2.

Having been released in Year 1 and "nevertheless... retained as a temporary...employee" for a second consecutive year, Appellant had the limited right in Year 3 to "first priority" to a vacancy at the grade level in which she served in either Year 1 or Year 2. Appellant has failed to produce any evidence of a vacancy in 3rd or 5th grade at the commencement of Year 3.

In Year 3 the District employed Appellant initially in temporary capacity and then in October, 2008, reclassified her status to Probationary II. Pursuant to Education Code section 44929.21, the District has the

authority to non-reelect probationary employees, and it is undisputed that the District non-reelected Appellant at the end of Year 3.

All of the foregoing employment, reemployment, release, and non-reelection actions were authorized by the unambiguous language of Education Code section 44918 and 44929.21. Section 44917 does not change the analysis or the result because after Appellant was released from her temporary employment pursuant to Section 44918(b), the District had the discretion to rehire her in temporary or probationary status or not at all in Years 2 and 3. (Ed. Code sec. 44918(c).)

As a released temporary employee, Appellant's rights were defined by the specific language of Section 44918(c), not the general provisions of Section 44917. Section 44918(c) authorizes a school district to rehire a released employee in temporary status and that is precisely what the District did. Had the District, in its discretion, reemployed Appellant in probationary status in Year 2, Section 44917 would have applied and required that she be classified in Probationary II status. But those are not the facts of this case.

In Year 3, upon reclassifying Appellant's status from temporary to probationary, Section 44917 came to bear and the District accordingly classified her as a Probationary II employee. As a probationary employee she was subject to and given timely notice of non-reelection pursuant to 44929.21.

The rules of statutory construction require that statutes bearing on the same matter be harmonized with the particular taking precedence over the general and the later-enacted over the earlier. Appellant proposes a construction of Section 44917 without regard to the specific provisions of Section 44918, subdivisions (b) and (c), pertaining to released employees. The construction advanced in this brief, on the other hand, harmonizes the two statutes giving full effect to both.

To the extent this Court concludes that Sections 44917 and 44918 are irreconcilable, as the later-enacted statute containing specific language as to released employees, Section 44918 should be deemed to repeal any contrary provisions in Section 44917.

The right to reemployment after release from temporary service is not guaranteed. (Ed. Code sec. 44918(b) and (c).) Appellant has failed in her burden to establish that there were vacancies in either 3rd or 5th grade that would have entitled her to "first priority" consideration in Year 3. Regardless, "first priority" consideration does not mean a released employee *must* be reemployed. Since the District had no duty to reemploy her, the Trial Court's denial of Appellant's Petition for Writ of Mandate was correct and should be affirmed. Moreover, had there been a 3rd or 5th grade vacancy, her status would have been Probationary II, which is precisely the status she was given when the District reclassified her in October of that year.

Appellant has also failed in her burden to establish that she had a superior right to be reclassified in advance of any other temporary employee or that the District abused its discretion in not selecting her from among its other temporary employees to fill vacant positions. Appellant's theory that the District's reclassification of teachers after the commencement of the school year is evidence of the existence of a vacancy to which she was entitled is premised on the erroneous assumption that vacancies occur only at the commencement of the school year and that she was guaranteed reemployment notwithstanding her release from employment.

Section 44918 affords school districts the flexibility to hire temporary teachers to provide consistent instruction during staff members' long-term absences, without obligation to reemploy temporary teachers in probationary or permanent status beyond actual staffing needs. In these

difficult financial times Section 44917 should not be construed to require school districts to make the untenable choice of employing more staff than required or, at the expense of consistent instruction, choosing day-to-day substitutes during long-term absences.

For the foregoing reasons, individually and collectively, there was no reversible error below, and the decision of the Trial Court should be affirmed.

Dated: October 24, 2011

Respectfully Submitted,

SCHOOL AND COLLEGE LEGAL SERVICES OF CALIFORNIA

By: _____
Nancy L. Klein, Sr. Assoc. General Counsel
Attorneys for Amicus Curiae California School Boards Association

Certificate of Word Count

I hereby certify that the word count of the word processing program used to prepare this brief is 7,438 exclusive of covers, certificates, tables and proof of service.

Dated: October 24, 2011

Respectfully submitted,

SCHOOL AND COLLEGE LEGAL SERVICES OF CALIFORNIA

By: _____

Nancy L. Klein, Sr. Assoc. General Counsel
Attorneys for Amicus Curiae California School Boards Association