NO. A09-1134

# State of Minnesota
# In Court of Appeals

Steven Emerson,

*Relator,*

vs.

Independent School District No. 199,
Inver Grove Heights,

*Respondent.*

## RESPONDENT'S BRIEF AND APPENDIX


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## STATEMENT OF ISSUES

1. **Was Relator a "teacher" within the meaning of Minn. Stat. § 122A.40 when he was the Activities Director for the District?**

   The School Board found the Relator was not a "teacher" under statute.

   Most Apposite Cases

*Cloud v. Independent School District No. 38*, 508 N.W. 2d 206, 209 (Minn. App. 1993).
*Morgan v. I.S.D. 482*, A08-0692, 2009 WL 910993 (Minn. App. April 7, 2009) (unpublished) (Respondent's Appendix p. 1).
*Board of Education of City of Minneapolis v. Sand*, 34 N.W.2d 689, 695 (Minn. 1948).

2. **If the School District violated Relator's employment rights, what is the appropriate remedy?**

   The School Board did not reach this issue.

   Most Apposite Case

*Strege v. Independent School District No. 482*, C1-00-867, 2000 WL 1855070 (Minn. App. Dec. 19, 2000) (unpublished) (Respondent's Appendix p. 10).

3. **Is a writ of certiorari to this Court the exclusive forum for Relator to challenge the District's non-renewal of his contract?**

   The School Board did not reach this issue

   Most Apposite Cases

*Dokmo v. Independent School District No. 11*, 459 N.W.2d 671 (Minn. 1990).
*Christensen v. Eggen*, 577 N.W.2d 221, 224 (Minn. 1998).
*Kingbird v. Independent School District No. 38*, C8-94-63, 1994 WL 411580 (Minn. App. Aug. 9, 1994) (unpublished) (Respondent's Appendix p. 14).

## STATEMENT OF THE CASE AND FACTS

Respondent adopts and hereby incorporates the stipulated statement of the facts agreed to by the Parties, which is contained in the Administrative Record.

On April 27, 2009, the School Board of Respondent Independent School District No. 199 ("District") adopted a resolution to non-renew Relator Dr. Steven Emerson's probationary employment with the District as the Interim Middle School Principal effective June 30, 2009. (Administrative Record ("Record") Exhibits 15-17). Relator requested a hearing pursuant to Minnesota Statutes Section 122A.40 on May 22, 2009, which was denied by the District in a letter dated May 29, 2009 on the grounds that Relator was a probationary continuing contract employee with the District who was not entitled to a hearing under the statute. (Record Exs. 1-2). Relator filed a writ of certiorari to challenge the School Board's decision to non-renew his employment contract on June 23, 2009.

Relator applied for the position of Activities Director with the District in March, 2005, and was hired on May 3, 2005 for the position. (Record Ex. 7). The District requested that applicants for the Activities Director Position "hold a current Minnesota principal license or be in the process of obtaining administrative licensure." (Record Ex. 4). The parties stipulate that no State rules or department, including the Minnesota Department of Education ("MDE"), have ever required school district activities or athletics directors to obtain a license in order to hold that position. (Stipulated Record; *see also* Record Ex. 19 (MDE codification of athletic/Activities Directors as "School Business Official, or Administrative Positions Not Requiring Licensure"); Ex. 20

(Teachers Retirement Association manual outlining that Athletic directors are not TRA members)). Relator had attained continuing contract rights under Minnesota Statutes Section 122A.40 at a previous District, but accepted the Activities Director position through signing a two-year fixed term contract for 2005-2007, and a one year fixed term contract for 2007-2008. (Record Exs. 8, 10). The contracts contained no language or provisions suggesting that the position was subject to Minnesota Statutes Section 122A.40 or that it was a continuing contract position. (*Id.*) The MDE did not require Relator to obtain licensure in order to be the Activities Director for the District. (Stipulated Record).

The District posted the Interim Middle School Principal position for the 2008-2009 school year after a last minute resignation with the intention of posting the full position again in March, 2009, when there was more time to interview and select candidates. (Stipulated Record). Relator applied for and was hired as the Interim Middle School Principal on August 11, 2008. (Record Ex. 13). This position meets the definition of a teacher under Minnesota Statutes Section 122A.40, and Relator's one year probationary period with the District began at the start of the 2008-2009 school year. (Record Exs. 16-17).

On April 27, 2009, the School Board unanimously non-renewed Relator's contract and terminated his probationary employment with the District as the Interim Middle School Principal. (Record Exs. 15-16). The interim position was only available for the 2008-2009 school year, and no hearing was granted prior to Relator's termination based upon Relator's status as a probationary employee. (Record Ex. 17). The District

followed all relevant timelines and procedures for the non-renewal of Relator's contract. (Stipulated Record).

Around the time that Relator filed the writ of certiorari with the Court of Appeals, he filed a Level II grievance with the District, which was denied by the District on June 29, 2009, because Relator's claim was outside the scope of the collective bargaining agreement and was not subject to the jurisdiction of an arbitrator. (Record Ex. 3). Relator continued to pursue his grievance by submitting a Level III response on July 7, 2009, which the School Board denied on July 14, 2009, because Relator's claim was not subject to the jurisdiction of an arbitrator (Record Exs. 21-22).

Relator then filed a notice of appeal of the Level III grievance and requested arbitration in the matter on July 24, 2009. (Record Ex. 23). The District denied this request for arbitration, and refused to participate in arbitration due to Relator's writ of certiorari with this Court which had been filed a month before the arbitration request. (Stipulated Record).

## STANDARD OF REVIEW

The scope of review on certiorari appeal is limited to inquiring whether the School District's termination of Relator's employment upon the expiration of his contract was fraudulent, arbitrary, unreasonable, not supported by substantial evidence, not within the School Board's jurisdiction, or based on an erroneous theory of law. *Cloud v. Independent School District No. 38*, 508 N.W.2d 206, 209 (Minn. App. 1993); *Dokmo v. Independent School District No. 11*, 459 N.W.2d 671, 675 (Minn. 1990).

When material facts are not in dispute, the question of whether a school employee is a teacher under statute is a matter of law not requiring a hearing. *Cloud*, 508 N.W.2d at 209. The reviewing court must determine whether there is substantial evidence, considering the record as a whole, to sustain the School Board's decision. *See Ray v. Minneapolis Board of Education*, 295 Minn. 13, 14, 202 N.W.2d 375, 377 (1972). Substantial evidence is defined as "evidence upon which reasonable minds can rely in arriving at a conclusion." *Destache v. Independent School District No. 832*, 434 N.W.2d 270, 271 (Minn. App. 1989) (citation omitted).

If the reviewing court determines there is not sufficient evidence to support the School Board's decision, the court may not substitute its own judgment but must remand the matter to the School Board with instructions. *Pearson v. School Board of Independent School District No. 381*, 356 N.W.2d 438, 441 (Minn. App. 1984).

## ARGUMENT

### I. RELATOR WAS NOT A TEACHER WITHIN THE MEANING OF MINNESOTA STATUTES SECTION 122A.40 DURING HIS EMPLOYMENT WITH THE DISTRICT PRIOR TO ACCEPTING THE INTERIM MIDDLE SCHOOL PRINCIPAL POSITION ON AUGUST 11, 2008.

Undisputed facts establish that Relator's first three years of employment with the District were not governed by the continuing contract provisions of Minnesota Statutes Section 122A.40. Relator was only employed in a position with the District for which a license was required by the Minnesota Department of Education for the 2008-2009 school year. Thus, Relator was a probationary employee with the District when it non-renewed his contract.

### A. Relator's Position as the District's Activities Director Did Not Meet the Definition of Teacher Under Minnesota Statutes Section 122A.40 Because The State Department Did Not Require Him to Hold a License.

Relator was not required by the State Department to hold a license as the Activities Director for the District, thus he was not a "teacher" under Minnesota Statutes Section 122A.40 during his time as the Activities Director. Because Relator was only a probationary teacher in the 2008-09 work year, the District's non-renewal of Relator's probationary continuing contract was consistent with statute.

The starting point for the analysis of Relator's employment rights is Minnesota Statutes Section 122A.40, which outlines a teacher's continuing contract rights. The statute guarantees non-probationary teachers the right to notice and an opportunity for hearing prior to termination of their employment for any reason, as well as providing bumping and reinstatement rights based on licensure and seniority in the event their employment is terminated due to the discontinuance of their position. *See* Minn. Stat. § 122A.40, subd. 7.

In order to qualify for these continuing contract rights, a school district employee must be a 'teacher' within the meaning of the statute:

> A principal, supervisor, and classroom teacher and any other professional employee *required* to hold a license from the state department shall be deemed to be a "teacher" within the meaning of this section. A superintendent is a "teacher" only for purposes of subdivisions 3 and 19.

Minn. Stat. § 122A.40, subd. 1 (emphasis added).

A probationary period of one year is required in each new district for a teacher who has already completed a three-year probationary period in another district. Minn. Stat. § 122A.40, subd. 5. This requirement for a year of probation "undoubtedly allows the new district an opportunity to evaluate the skills of the teacher before committing itself to a continuing contract." *Emanuel v. I.S.D. 273, Edina Sch. Dist.*, 615 N.W.2d 415, 418 (Minn. App. 2000).

This Court has found that "employees are only entitled to a continuing contract if they satisfy the definition of teacher found in Minn. Stat. § 122A.40, subd. 1." *Morgan v. I.S.D. 482*, A08-0692, 2009 WL 910993, *3 (Minn. App. April 7, 2009) (unpublished) (Respondent's Appendix ("App.") p. 3-4). If an employee's position with a school district does not meet the statutory definition of "teacher," then that employee is not eligible for continuing contract rights. *See Cloud*, 508 N.W.2d at 209; *see also Stang v. I.S.D. 191*, 256 N.W.2d 82, 84 (Minn. 1977). When material facts are not in dispute, the question of whether a school employee is a teacher under the statute is a matter of law not requiring a hearing. *Cloud*, 508 N.W.2d at 209.

The canons of statutory construction favor the strict interpretation of the language of the Minnesota Statutes Section 122A.40 definition of "teacher." Minnesota Statutes Section 645.08 states that the words and phrases of a statute are to be interpreted based upon the common meaning of the words or phrases. The case of *Emanuel v. I.S.D. 273* similarly held that the plain meaning of the continuing contract statutory language must be given effect, and that a teacher must satisfy the statutory requirements in order to gain the protections of that statute. 615 N.W.2d at 418-420. The Court stated that the purpose

of that statute is: "[to provide] stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession." *Id.* at 418 (quotation omitted). It further outlined that courts must balance that purpose against the "need to allow the school board enough latitude to administer effectively the operation of the public schools." *Id.* (quotation omitted).

In the case of *Cloud v. I.S.D. 38, Red Lake*, an Indian education program project coordinator challenged the actions of a school district in reducing her hours by arguing that she was a "teacher" within the definition of the continuing contract law statute. 508 N.W.2d 206. This Court ruled that Ms. Cloud was not entitled to the protections of the statute because she did not meet the statutory definition of a teacher (Minnesota Statutes Section 125.12, which contained an identical definition of "teacher" and was later renumbered as Minnesota Statute Section 122A.40, was at issue in that case). *Id.* at 210. The statutory language stating that a teacher is "required to hold a license" means that the state department responsible for licensure requires a license for the position, not a school district. *Id.*; *see also Wilson v. Independent School District No. 720*, A08-1454, 2009 WL 1920051, *3-4 (Minn. App. July 7, 2009) (unpublished) (App. p. 20-21) (holding that the employee in that case had not been a teacher under 122A.40 and thus had not gained continuing contract rights while in a previous position because the MDE did not require her to be licensed for that previous position). Ms. Cloud did not meet the statutory definition of a teacher and was not eligible for the protections of the continuing

contract statute because "she was not required by the state department to hold a license." *Cloud*, 508 N.W.2d at 210.

Thus, an individual is a "teacher" within the meaning of the statute only if the MDE requires him or her to hold a license for his or her position. *Id.* The MDE does not require a district's activities or athletics director to hold a license. *See* Stipulated Record. There are also no state rules requiring the licensure of Activities Directors. This ends the inquiry in this case because the plain language of the statute requires that to meet the statutory definition of a teacher, a license must be required for the position by the state department responsible for licensure.

Relator was employed with the District as its Activities Director from 2005-2008, then accepted the position as Interim Middle School Principal for the 2008-2009 school year. Relator's three years of employment with the District as its Activities Director were not as a "teacher," and thus did not count towards his required one year of probationary employment in order to gain non-probationary continuing contract rights with the District. The District did not violate Minnesota Statutes Section 122A.40, and was well within its rights when it non-renewed Relator's contract as the Interim Middle School Principal while he was within the first year of his probationary employment with the District as a "teacher."

### B. The School District Cannot Create Continuing Contract Rights Beyond What is Allowed by Statute.

Relator argues that he should be deemed to have non-probationary continuing contract rights based on the fact that the Activities Director job description listed the

procurement of a Minnesota administrative license within two years of the start date or a principal's license as a required qualification for the position. However, as discussed above, the plain meaning of the statute is that a teacher must be required by the MDE to hold a license. A school district must follow the law, and cannot expand the definition of a teacher under Minnesota Statutes Section 122A.40 simply by requiring its Activities Director to have a license.

The courts have repeatedly said that a school district may *not* confer continuing contract rights on an individual who does not meet the statutory definition of a "teacher." In *Board of Educ. of City of Minneapolis v. Sand*, 227 Minn. 202, 211, 34 N.W.2d 689, 695 (1948), the court held that an administrative assistant to the superintendent was not a "teacher" within the meaning of the tenure law. The court provided the following rationale for its holding:

> School boards and school districts only have such powers as are granted by statute. Teacher tenure is the creature of statute, and no one can have a valid claim to tenure except as authorized by statute. Estoppel cannot be involved to confer upon a political subdivision of the state governmental power otherwise lacking.

*Id.* *Sand* was a case which fell under the Teacher Tenure Statute, Minnesota Statutes Section 122A.41, which applies only to cities of the first class. However, courts often rely on decisions interpreting that statute for guidance in cases regarding the continuing contract statute, Minnesota Statutes Section 122A.40. *See Stang*, 256 N.W.2d at 84 (applying the reasoning of a teacher tenure act case to a continuing contract rights case); *see also Strege v. Independent School District No. 482*, C1-00-867, 2000 WL 1855070,

*2, n.1 (Minn. App. Dec. 19, 2000) (unpublished) (App. p. 12) (finding that the two statutes are "*in pari materia*," but that the tenure statute does not take precedence over Minn. Stat. § 122A.40); *Cloud*, 508 N.W.2d at 210 (adopting the reasoning of *Frye v. Independent School District 625*, 494 N.W.2d 466, 469 (Minn. 1992), which was a teacher tenure act case); *Washington v. Independent School District No. 625*, 590 N.W. 2d 655, 658 (Minn. App. 1999) (finding that there was no need in that case to read the statutes together because there was no ambiguity in the contested portion of the teacher tenure law statute).

More recently, the Court of Appeals has continued to hold that because such rights are granted by statute, no one can have a valid claim to continuing contract rights unless authorized by statute. *See Washington*, 590 N.W. 2d at 658 (rejecting a teacher's claim that tenure achieved in Minneapolis transferred with him when he went to teach in St. Paul); *see also Haddad v. Independent School District No. 272*, C3-98-1128, 1999 WL 107738, *2 (Minn. App. Mar. 2, 1999) (unpublished) (App. p. 6) (rejecting claim that teacher acquired tenure rights because of alleged statements made by school administrators regarding how much longer she had to teach to achieve tenure); *Herdegen v. Independent School District No. 482*, C6-00-783, 2000 WL 1778301 (Minn. App. Nov. 21, 2000) (unpublished) (App. p. 7) (rejecting claim that references in two contracts and administrative policies entitled an unlicensed administrator to the protections of the continuing contract law).

The fact that the position description of Activities Director with the District required a principal's license or the intent to obtain licensure does not make the position

that of a "teacher" under the act. *See Krueth v. School District 38*, 496 N.W. 2d 829, 839 (Minn. App. 1993) (holding that "a license requirement is not determinative of whether the tenure laws apply to the position"). Neither does the fact that Relator actually held licenses from the Minnesota Department of Education when he was hired for the position of Activities Director with the District make him a "teacher" within the meaning of the statute. *See Cloud*, 508 N.W. 2d at 210 (holding that the employee in that case was not a teacher under statute even though she held a license from the state department).

Relator's interpretation of the licensure requirement as applying to anyone whose District created job description requires a principal's license or requires the acquisition of administrative licensure would lead to absurd results. For example, if a District required its administrative assistants, Directors of Human Resources, Business Managers, or even the Superintendent to hold a principal's license or acquire administrative licensure, Relator's argument would make these employees teachers subject to full continuing contract rights under statute. This would allow a district to violate the meaning and intent of the statute simply by requiring licensure. Such a result is not within the intent or plain meaning of the statute.

### C. The Language of the Relator's Fixed Term Contracts in the Position of Activities Director and the Duties of that Position Further Indicate That Relator Gained no Continuing Contract Rights for that Position.

While the fact that the Activities Director position was not required to be licensed by the MDE is determinative in this case, the actual job functions of the position and the fixed-term contracts for the position in 2005-2007 and 2007-2008 signed by Relator indicate that the Activities Director position was not that of a continuing contract teacher.

An employee may not gain the rights to continuing contract laws "without first being offered and accepting a continuing contract by the school district." *Emanuel*, 615 N.W.2d at 420. Courts may examine the job functions of a position in order to determine whether the individual was a "teacher" within the meaning of the statute. *Cloud*, 508 N.W. 2d at 210.

In evaluating the duties of a position, courts have considered a "teacher" under the statute to be someone who acts to superintend or supervise classroom instruction, and not someone whose functions are more like those of an administrator or business manager. *See Sand*, 227 Minn. at 208, 34 N.W.2d at 693; *see also Cloud*, 508 N.W. 2d at 211 (holding that positions which are too "far removed" from the classroom are not teachers under statute). Employees whose duties are primarily administrative are not teachers, especially where they have no contact or only indirect contact with the classroom. *See Frye v. Independent School District 625*, 494 N.W.2d 466, 469 (Minn. 1992).

The Activities Director position is administrative, and as such, is too far removed from the classroom to be considered a "teacher" under the statute. All of that position's duties are co-curricular in nature, and none are related to the educational curriculum. The position description outlines that the main duties of the position are limited to supervising coaches and co-curricular activity advisors, and preparing the schedule, budgets, and purchases for the District's co-curricular activities. Record Ex. 5. The duties outlined for the Activities Director position are administrative with no duties related to classroom instruction.

Relator asserts on page eleven of his brief that his duties involve "the supervision of a significant component of the education program at the school district." While co-curricular activities have a role in a district, such activities do not rise to the core educational responsibility faced by a licensed "teacher."

Relator cites *Krueth*, 496 N.W. 2d 829, as supportive of his argument that he was a continuing contract teacher while he was the Activities Director. However, that case held that the tenure laws applied to a Pride Theatre Project position despite the fact that a teaching license was not required because the District consistently treated the position as that of a continuing contract teacher. *Id.* at 839. That court held that "Respondent [School District] did not treat the position as anything other than a tenured teacher position," and thus found that "the tenure law applies to this position." *Id.*

Relator also cites *Strege*, 2000 WL 1855070 (App. at 10), as supportive of his arguments that he was a teacher. That case held that the position of Director of Teaching and Learning was a teacher within the meaning of continuing contract law mainly because the "district consistently treated the position as a tenured position." *Id.* at App. 12. The district also put continuing contract rights language in the contract, including a provision which said that the contract was subject to Minnesota Statutes Section 125.12 (the predecessor of 122A.40). *Id.* at App. 10-11. The district in that case consistently identified that position as a teacher, and could not produce sufficient evidence to overcome its long-standing recognition of the Director of Teaching and Learning position as a teacher with continuing contract rights. *Id.* at App. 12.

Unlike *Krueth* and *Strege*, the District never treated Relator as though he was due continuing contract rights. Relator signed two fixed-term contracts in that position, and neither contract made any reference to continuing contract rights or stated that Relator was considered a "teacher" by the District. Record Exs. 8, 10. Also unlike those cases, Relator was never told that he was a continuing contract employee, nor was he considered a teacher while he was the Activities Director.

### D. The School Board's Decision to Terminate the Relator's Contract Within His Probationary Period Was Based on Substantial Evidence and a Proper Interpretation of Law, and Was Not Fraudulent, Arbitrary, Unreasonable, or Beyond the Board's Jurisdiction.

Relator's brief argues that the District's actions were based on an erroneous theory of law. However, Relator has failed to show that the District's termination of his employment upon the expiration of his Interim Principal contract was based on an erroneous theory of law. *See Cloud*, 508 N.W.2d at 209; *Dokmo*, 459 N.W.2d at 675.

Relator's brief also lists and alleges the entire litany of possible reasons for a court to overturn the decision of a District (that the decision was arbitrary, unreasonable, not supported by substantial evidence, and not within the School Board's jurisdiction). However, Relator made no arguments related to overturning the District's decision based on these grounds, nor did he provide a factual basis for such accusations. As such, Relator's brief argues solely that the decision of the District was based on an error of law.

Relator's arguments are inconsistent with existing law. Relator relies on arguing factual distinctions of the *Herdegen*, *Strege*, *Krueth*, and *Morgan* cases. However,

Relator ignores the reasoning and holdings of those cases, and ignores the law established by the *Cloud* case.

Further, Relator argues that he is entitled to continuing contract rights due to the fact that "nothing in the employment agreement indicated that the position was not a position subject to Minn. Stat. 122A.40." However, this argument is based on an erroneous reading of the laws guiding contracts in Minnesota. While the language of a contract "must be read in the context of the entire contract," such language must be "given its plain and ordinary meaning." *Employers Mut. Liability Ins. Co. of Wis. v. Eagles Lodge of Hallock, Minn*, 282 Minn. 477, 479-480, 165 N.W.2d 554, 556 (Minn. 1969).

Nothing in the contract indicated that the District was offering anything other than a fixed-term contract for a non-teacher position. Relator argues that the absence of continuing contract language in his fixed-term contracts proves that the contracts were meant to include continuing contract rights. This argument is contrary to Minnesota law and the "plain-meaning" of the contract language.

The School Board relied on substantial evidence and a proper interpretation of law when it non-renewed Relator's contract. Relator has failed to show that the decision of the School Board was based on an error of law in any respect.

## II. THE DISTRICT DID NOT VIOLATE RELATORS RIGHT TO A HEARING UPON THE NON-RENEWAL OF HIS CONTRACT BECAUSE RELATOR DID NOT QUALIFY FOR NON-PROBATIONARY CONTINUING CONTRACT RIGHTS.

### A. Relator Was Not Entitled to a Hearing Upon the Non-Renewal of His Employment as a Probationary Principal With the District.

Relator implicitly claims that he was denied the proper process during the termination of his position with the District. This claim is based on the premise that he had acquired non-probationary continuing contract rights. Since Relator was still within his one year probationary period with the District while serving as the Interim Middle School Principal, the District provided Relator with the proper process under Minnesota Statute Section 122A.40.

To have a property interest in continued employment, a government employee must have a legitimate claim of entitlement to continued employment; a unilateral expectation of continued employment is insufficient. *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). A non-tenured teacher at a public school, however, has no constitutional right to due process after the contractual term of employment expires and the school decides not to rehire the teacher. *See Roth*, 408 U.S. at 569, 92 S. Ct at 2705; *see also Morgan*, 2009 WL 910993, *4 (App. p. 4).

In this case, Relator signed a fixed-term contract to be the District's Activities Director. As demonstrated above, this position was not a teacher under the definition of Minnesota Statute Section 122A.40. When he accepted the Interim Middle School Principal's position, he became a "teacher" under Minnesota Statutes Section 122A.40, and his one year probationary period began. Since he was within that probationary

period at the time his contract was non-renewed, he never acquired the right to the procedures outlined in Minnesota Statute Section 122A.40 for the termination of a non-probationary teacher's employment.

### B. If the School District Violated Relator's Employment Rights, the Case Must Be Remanded for a Hearing to Determine His Rights, if Any, to Reinstatement and Back Pay.

In the event the court determines that Relator attained non-probationary continuing contract rights with the District prior to the termination of his position, the case must be remanded for a hearing before the School Board to determine his rights, if any, to reinstatement and back pay. Relator's Interim Middle School Principal position has been discontinued. A hearing would be necessary to determine what positions, if any, he would be eligible for in the 2009-10 school year based on his seniority and licensure. *See Strege*, 2000 WL 1855070, *4 (App. p. 13) (holding that a hearing was necessary to determine the position into which the district could put a teacher who was improperly denied continuing contract rights after her position had been eliminated).

## III. THE EXCLUSIVE PROCEDURE FOR THE RELATOR TO CHALLENGE THE DISTRICT'S NON-RENEWAL OF HIS CONTRACT IS THROUGH A WRIT OF CERTIORARI TO THIS COURT.

Relator's writ of certiorari to this Court is the proper forum for his challenge of the District's non-renewal of his contract. However, Relator has continued to pursue arbitration based upon the same facts which gave rise to this writ of certiorari even though an arbitrator would not have subject matter jurisdiction over such a claim.

The proper procedure for challenging a school board's non-renewal of a teacher's contract is by writ of certiorari to the Minnesota Court of Appeals. *Dokmo*, 459 N.W.2d at 673. As such, this Court has subject matter jurisdiction over this claim.

Relator filed a writ of certiorari on June 23, 2009. However, after the Court granted the certiorari request, Relator continued to pursue his grievance and requested arbitration on July 24, 2009, which the District denied on July 30, 2009. Record Exs. 23-24. As such, Relator is now positioned to bring an unfair labor practice claim or a motion to compel arbitration in the District Court against the District at any time, which puts the District at the disadvantage of having to respond to the Court of Appeals while waiting to see if it will be compelled to respond and arbitrate the claim either during this case or after the Court rules in this case. Further, the District could prevail in the case at bar, and the Relator could pursue his grievance to arbitration and obtain an inconsistent outcome.

Even if arbitration was a proper forum to review Relator's case, the election of remedies doctrine would bar his continued pursuit of arbitration. The doctrine "requires a party to adopt one of two or more coexisting and inconsistent remedies which the law affords the same set of facts." *Christensen v. Eggen*, 577 N.W.2d 221, 224 (Minn. 1998)(citation omitted). The election of remedies doctrine attempts to "prevent double redress for a single wrong." *Id.* Public policy also precludes the "arbitration of what has been litigated." *Kingbird v. Independent School District No. 38*, C8-94-63, 1994 WL 411580, *3 (Minn. App. Aug. 9, 1994) (unpublished) (App. p. 16).

Since Relator has pursued litigation to this point, and this Court has exclusive subject matter jurisdiction over the claim, a continued action by Relator for arbitration

would be inappropriate. It is the District's position that the writ of certiorari is the proper forum for review of the non-renewal of the Relator's contract.

As such, the District requests that the Court preclude any further pursuit by Relator of his grievance.

## CONCLUSION

For the reasons discussed above, the District respectfully requests that the Court affirm the decision of the School Board to non-renew Relator's probationary employment with the District within the first year of his probationary employment. Relator's position as Activities Director did not meet the definition of teacher under Minnesota Statutes Section 122A.40, and as such, Relator was not entitled to non-probationary continuing contract rights when his contract was non-renewed by the School Board.

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Dated: 10/27/09

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