

A09 - 1134

STATE OF MINNESOTA
IN SUPREME COURT

Steven Emerson,

Appellant,

vs.

School Board of Independent School District 199,
Inver Grove Heights, Minnesota,

Respondent.

REPLY BRIEF OF APPELLANT STEVEN EMERSON

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Rules:

None.

Other Authorities:

None.

APPELLANT EMERSON'S STATEMENT OF FACTS IN REPLY

Throughout these proceedings, respondent ISD #199 has claimed that appellant Emerson was not a “teacher” when employed as activities director because the Minnesota Department of Education (MDE) does not require licensure of activities directors. Now, in response to Emerson’s point that, though MDE did not require licensure, ISD #199 did, the district suggests that principal licensure was not a requirement of the Activities Director position that appellant Emerson held with ISD #199 for three years. *See Respondent’s Brief at 16-17.*

In its “Statement of the Case and Facts” ISD #199 asserts that when appellant Emerson applied for the Activities Director position ISD #199 “requested that applicants for the Activities Director position ‘hold a current Minnesota principal license or be in the process of obtaining administrative licensure.’” *Respondent’s Brief at 2.* As documentation of this “request,” ISD #199 cites the 2.10.2005 job posting for the Activities Director position [*Respondent’s Appendix at p. 6*] which stated that “Candidates must hold a current Minnesota principal license or be in the process of obtaining administrative licensure.” Appellant Emerson contends that “must hold” states a requirement rather than a request.

In its 2.10.2005 Position Description for the District Director of Activities position, ISD #199 listed under “Qualifications”: “B. Must hold a principal

licensure or be in the process of obtaining licensure which must be completed within 24 months from the date of employment.” *Appellant’s Appendix, A. 3.*

Clearly, ISD #199 wanted its Activities Director to be a licensed principal.

In its responses to Emerson’s Level I and Level II grievances, ISD #199 never asserted that it [ISD #199] had not required that Emerson be licensed as a school principal for the Activities Director position. *See Appellant’s Appendix, at A. 21-22 and A. 23-24.* Throughout these proceedings, ISD #199 has generally sidestepped the fact that it [ISD #199] required appellant Emerson to have principal licensure for his job as Activities Director, and focused instead on the fact that MDE does not require that “activities directors” be licensed. For example, in its response to Emerson’s Petition for Supreme Court Review, ISD #199 wrote:

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 [cite omitted]. The Minnesota Department of Education (“MDE”) does not require activities or athletics directors to obtain a license in order to hold that position.

In deciding this case the Court of Appeals did not assert that ISD #199 did not require that Emerson be licensed for the Activities Director position. In its opinion the Court of Appeals wrote that ISD #199 required its activities director to have “a certain license” as a “hiring qualification.” *Appellant’s Addendum at Add. 6.*

Emerson agrees that when he worked as Activities Director for ISD #199 his job title was not “principal”; and Emerson agrees that MDE does not require

that an “activities director” be licensed. But ISD #199 cannot claim now that it merely “requested,” rather than required, that Emerson be a licensed principal when he worked for ISD #199 as Activities Director.

APPELLANT EMERSON'S ARGUMENT IN REPLY

A licensed school principal hired for a position that requires licensure is entitled to the statutory rights and benefits of the required licensure.

Respondent ISD #199 does not dispute that [1] appellant Emerson was a licensed school principal during the time that he worked for ISD #199 as Activities Director; and [2] Emerson was hired by ISD #199 for a position, the position of Activities Director. ISD #199 disputes [1] that the Activities Director position required licensure; and [2] that Emerson is entitled to the statutory rights and benefits of the required licensure.

1. ISD #199 required licensure for the Activities Director position held by Emerson for three years.

ISD #199 now contends, for the first time in these proceedings, that it did *not* require that Emerson be a licensed principal when he worked for ISD #199 as its Activities Director. Because Emerson considers this to be a fact issue, Emerson has addressed it in his Statement of Facts in Reply.

2. Emerson is entitled to the statutory rights and benefits of the principal licensure required by ISD #199 for the Activities Director position held by Emerson for three years.

In its Brief to the Supreme Court respondent ISD #199 essentially argues that appellant Emerson, in addition to misinterpreting the continuing-contract statute, has misread or misconstrued nearly every appellate decision interpreting either the teacher tenure act or the continuing-contract act.

ISD #199 criticizes Emerson's interpretation of the plain meaning of the continuing-contract statute, Minn. Stat. § 122A.40, subd. 1, as unsupported by any cite to appellate case law. *ISD #199's Brief at 12*. But the first rule of statutory construction is to look at the statute itself, and not an appellate court's interpretation of it, to see whether the statute's language is clear or ambiguous. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

ISD #199 asserts that the grammatical "rule of the last antecedent" is "not an absolute and can assuredly be overcome by other indicia of meaning." *ISD #199's Brief at 12*, citing *Barnhart v. Thomas*, 540 U.S.20, 26 (2003). But what "indicia of meaning" does ISD #199 cite to overcome the rule? ISD #199 cites administrative rules, and statutes other than § 122A.40, which require principals, teachers (with limited exceptions), and supervisors to be licensed. *ISD #199's Brief at 13-14*. ISD #199 claims that these rules and statutes support its argument that the rule of the last antecedent does not apply here and that, in the continuing-contract statute, the words "required to hold a license from the state department" apply equally to "a principal," a "supervisor," a "classroom teacher" and "any other professional employee." *Id.*

Emerson's point about the rule of the last antecedent is simply that in the continuing-contract statute we cannot rightfully assume that the legislature intended the statute to apply to "a principal required to hold a license from the state department," "a supervisor required to hold a license from the state

department,” and so forth. And since only the term “principal” is at issue here, Emerson will focus the discussion on that term.

We know that the legislature intended that “a principal” have the benefit of the continuing-contract statute. What did the legislature intend “a principal” to mean? Someone with the *job title* of “principal”? What if a school district hires someone to work as a principal but gives the job a different name? Did the legislature intend that people who *work* as “principals” should have the benefit of the continuing-contract statute? Or just people whose *job titles* include the word “principal”?

Appellant Emerson contends that the legislature intended that people who *work* as “principals” should have the benefit of the continuing-contract statute regardless of their *job titles*. If the legislature had intended that the continuing-contract statute only apply to people whose job titles include the word “principal,” the legislature could easily have written the statute to define “teacher” as “a person whose job title includes the word ‘principal.’”

How do we know whether someone whose job title does not include the word “principal” is working as “a principal” and is therefore someone that the legislature intended to have the benefit of the continuing-contract statute? People who work as principals in this state are required to be licensed to work as principals. If a person’s job requires them to be a licensed principal, then that person, in that job, is working as a “principal” and is entitled to the rights and benefits of the continuing-contract statute.

Emerson claims that because he was required to be a licensed principal for his job as Activities Director he was working as a principal and in that role Emerson was someone that the legislature intended to be included in the definition of “teacher” for purposes of the continuing-contract statute. Emerson contends that simple rules of statutory construction lead to this conclusion. But does this conclusion conflict with appellate decisions on point, as ISD #199 argues in its Brief?

Emerson has already explained, in his initial Brief to the Supreme Court, that the Court of Appeals’ decision in this case was erroneous because it was based upon the *Cloud* case and the *Cloud* case misstated what the Supreme Court decided in the *Hibbing Education Association* case. In its Brief to this Court, ISD #199 argues that Emerson has misinterpreted these as well as other cases interpreting the definition of “teacher” in either the continuing-contract statute or its cousin, the teacher tenure act. Emerson’s Reply will address the cited authorities in chronological order.

The oldest case cited by ISD #199 and interpreting the definition of “teacher” is *Board of Education v. Sand*, 227 Minn. 202, 34 N.W.2d 689 (1948). In *Sand*, the Minneapolis Board of Education brought a declaratory judgment action to determine the rights of Sand under the teacher tenure act. The relevant statute defined “teacher” as including “every person regularly employed, as a principal, or to give instruction in a classroom, or to superintend or supervise classroom instruction, or as placement teacher and visiting teacher.” 227 Minn.

207, 34 N.W.2d at 693. The definition of “teacher” also included persons regularly employed as counselors and school librarians if they were certified as either teachers or school librarians. *Id.*

Sand claimed tenure rights (1) as a high school classroom teacher from 1934 to 1940; (2) as administrative assistant to the superintendent of schools from 1940 to 1943; and (3) as a high school classroom teacher beginning in September 1943. 227 Minn. 204, 34 N.W.2d 691. Summarizing the issue in *Sand* relevant to our inquiry here, which was whether Sand was a “teacher” as defined by the tenure act during the time that he worked as an administrative assistant, the Supreme Court wrote:

“At the outset, it appears that defendant was not employed in the superintendent’s office as a principal, a person giving classroom instruction, a placement teacher, a visiting teacher, a counselor, or a librarian. His alleged right to tenure, therefore, is made to depend upon whether he was regularly employed to superintend or supervise classroom instruction.” 227 Minn. 207, 34 N.W.2d 693.

The Court in *Sand* concluded that Sand was not a “teacher” as defined by the tenure act during the time that he worked as an administrative assistant. But in so concluding, the Court did not merely look at Sand’s *job title*; the Court looked at Sand’s *job duties*.

Also in *Sand*, the Court wrote:

The rules governing [our] decision here were settled in *Eelkema v. Board of Education*, 215 Minn. 590, 11 N.W.2d 76 (1943), where, in holding that a superintendent of schools is not entitled to tenure, we pointed out that the statutory classification of those included as entitled to tenure and those excluded as not entitled thereto was based upon the nature of their services... 227 Minn. 208, 34 N.W.2d 693.

In *Eelkema*, Eelkema had been employed as superintendent of schools for seven years when the school board chose not to renew his contract. Eelkema claimed entitlement to the benefits of the teacher tenure act, citing statutory language in the tenure act including within the definition of “teacher” persons regularly employed “to superintend.” 215 Minn. 592, 11 N.W.2d 77. The Supreme Court denied tenure rights to Eelkema, explaining:

The word “superintend” as used in the phrase “superintend or supervise class-room instruction” in the tenure act is plainly used solely in connection with the phrase “class-room instruction” and not with reference to the broad duties and responsibilities of a superintendent of schools. 215 Minn. 594-595, 11 N.W.2d 78.

In *Eelkema* the employee’s job title, superintendent, taken alone, would appear to entitle its holder to tenure. But the Supreme Court looked beyond the *job title* to the employee’s *duties* and ruled that the job was not one which the legislature intended to include within the definition of “teacher.” The *Eelkema* Court also observed that the legislature omitted “superintendent of schools” from the definition of “teacher” in the tenure act but included “superintendent” in the definition of “teacher” in the certification statute [215 Minn. 593-594; 11 N.W.2d 78]; and the Court deemed the omission intentional.

In *Stang v. Independent School Dist. No. 191*, 256 N.W.2d 82 (Minn. 1977), Stang was a “certified, continuing-contract mathematics teacher” and from 1966 through 1975 he was also a senior high school head basketball coach. In April 1975 Stang’s employer, District 191, sent him a memorandum stating that he would not be the head basketball coach for the coming year. Stang sued,

claiming he had a right to notice and a hearing under the teacher tenure act. The district court ruled against Stang and the Supreme Court affirmed.

The Supreme Court in *Stang* noted that it had decided a very similar issue in *Chiodo v. Board of Educ. of Special School Dist. No. 1*, 215 N.W.2d 2d 806 (Minn. 1974). In *Chiodo*, the statute at issue had defined “teacher” as including “every person regularly employed, as a principal, or to give instruction in a classroom, or to superintend or supervise classroom instruction, or as placement teacher and visiting teacher” and, if licensed as either teachers or school librarians, counselors and school librarians. 256 N.W.2d at 84. In *Stang*, the statute at issue was slightly different, and included an additional category of protected persons defined as “any other professional employee required to hold a license from the state department.” *Id.*

In *Chiodo* the Supreme Court had ruled that the coach did not qualify as a “teacher.” While noting that the statutory definition’s references to “instruction” and “classroom” could be broadly interpreted to encompass the function of a coach, the Court concluded that “the overall setting of the statutory language indicates that coaches were not meant to be included.” 256 N.W.2d at 84. And in *Stang* the Court wrote that “[T]he language of the *Chiodo* case indicates the result should be the same here, despite the variation in statutory language...” and “[T]he legislature could have explicitly included coaches in the definition of ‘teacher,’ and we feel that such a revolutionary step should only be considered by that body.” *Id.*

In both *Chiodo* and *Stang*, the Court's evaluations of whether the school employee was entitled to tenure focused on the employee's *duties*, not on the employee's *job title*.

In *Krug v. Independent School Dist. No. 16*, 293 N.W.2d 26 (Minn. 1980), Krug had worked as a school nurse for ISD #16 for 15 years and was a licensed public health nurse. Because of financial limitations and discontinuance of a position, the school district sought to remove Krug. Following a hearing, Krug was put on unrequested leave although other school nurses with less seniority were retained. The district court ruled that Krug was not a "teacher" under applicable Minnesota statutes and was thus without seniority rights. The Supreme Court reversed.

The statute at issue in *Krug* was Minn. Stat. § 125.12 (1978), which defined "teacher" as "A superintendent, principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department..." 293 N.W.2d 29-30. In *Krug* there was no dispute that Krug was a professional employee who held a license from the state department. The dispute was whether Krug qualified as a "teacher" as one who was "required" to hold a license. 293 N.W.2d 30.

The Supreme Court concluded that Krug was a "teacher" because she was "required to hold a license in order to be considered a public health nurse..." 293 N.W.2d 30. The *Krug* decision might at first blush appear to provide little guidance for us here. But the curious thing about *Krug* is that the employee's

apparent job title was “school nurse” [293 *N.W.2d* 27]; and while the board of teaching did issue licenses to school nurses a school board could also hire a “non-licensed registered nurse to provide nurse services under the direction of the superintendent or of a licensed school nurse.” 293 *N.W.2d* 30. And the Supreme Court concluded that Krug was a “teacher” not because a “school nurse” was required to hold a license, but because a “public health nurse” was required to hold a license. *Id.*

In *Krueth v. Independent School Dist. No. 38*, 496 *N.W.2d* 829 (Minn. App. 1993), the Court of Appeals wrote that a license requirement was not determinative of whether tenure laws applied to a position. Citing *Beste v. Independent Sch. Dist. No. 697*, 398 *N.W.2d* 58, 62 (Minn. App. 1986), the *Krueth* Court noted that in *Beste* the Court of Appeals had held that a teacher had the right to bump into a position supervising study halls, even though no license was required, because teachers had traditionally been assigned to the position. 496 *N.W.2d* 839.

In both *Krueth* and *Beste*, in deciding whether an employee was a “teacher” for purposes of either the tenure act (*Krueth*) or the continuing-contract statute (*Beste*), the Court looked at *job duties*, and whether they were typically performed by a teacher, rather than *job titles*; and the Court looked at *job duties* rather than whether *licensure* was required for a position. Thus these opinions support Emerson’s contention that the legislature’s intent was to afford continuing-contract status to people whose *jobs* were jobs typically performed by

a “principal,” “supervisor” or “classroom teacher” regardless of either *job title* or *licensure* requirements.

In *Hibbing Educ. Ass’n v. Public Employment Relations Bd.*, 369 N.W.2d 527 (Minn. 1985) the Supreme Court interpreted whether paraprofessionals were “teachers” as defined by the Public Employment Labor Relations Act, Minn. Stat. § 179A.01 et seq. (1984). The Act defined “teacher” as

...any public employee other than a superintendent or assistant superintendent, principal, assistant principal, or a supervisory or confidential employee, employed by a school district: (1) in a position for which the person must be licensed by the board of teaching or the state board of education; or (2) in a position as a physical therapist or an occupational therapist. Minn.Stat. § 179A.03, subd. 18 (1984) (Emphasis added). 369 N.W.2d at 529.

Paraprofessionals were not physical or occupational therapists. Noting that paraprofessionals were not required to be licensed by either the state board of teaching or the state board of education, the Supreme Court ruled that they [paraprofessionals] were not “teachers” as defined by Section 179A.03, subd. 18.

In *Cloud v. Indep. Sch. Dist. No. 38*, 508 N.W.2d 206 (Minn. App. 1993), the issue was whether a Title V Project “Coordinator/Director” was a “teacher” as defined by § 125.12, subd. 1. The Court of Appeals mistakenly observed that the language used in § 125.12, subd. 1 [since recodified as § 122A.40, subd. 1], “...is similar to the language used in section 179A.03, subdivision 18” [interpreted by the Supreme Court in *Hibbing Educ. Ass’n v. Public Employment Relations Bd.*, 369 N.W.2d 527 (Minn. 1985)]. 508 N.W.2d at 210. The language of the two sections is actually quite dissimilar--§ 179A.03, subd. 18, clearly defines a

“teacher,” other than a physical or occupational therapist, as an “employee” that “must be licensed”; and § 125.12, subd. 1 only requires licensure of “any other professional employee” and, possibly, a classroom teacher.

The Court of Appeals in *Cloud* wrote that in the *Hibbing Educ. Ass’n* case the Supreme Court interpreted the statute defining “teacher” as “leaving no room for consideration of actual job function in determining whether one is a teacher for purposes of PERLA.” 508 N.W.2d 210, citing *Hibbing Educ. Ass’n*, 369 N.W.2d at 530. The *Cloud* Court was correct in this observation because the statute interpreted in *Hibbing Educ. Ass’n* clearly made licensure by either the board of teaching or the state board of education (except in the case of a physical or occupational therapist) a requirement of the definition of “teacher.” But the continuing-contract statute interpreted by the *Cloud* Court was, as has been noted, significantly different from the statute interpreted in *Hibbing Educ. Ass’n*.

With the exception of the glitch in statutory construction that occurred in *Cloud* and was repeated by the Court of Appeals in this case, Minnesota appellate courts have consistently concluded that in defining “teacher” for purposes of either the tenure act or the continuing-contract statute the legislature intended to include school employees whose jobs involved *duties* typically performed by either “a principal,” a “supervisor,” a “classroom teacher,” or “any other professional employee required to hold a license from the state department,” regardless of job titles. As to whether the phrase “required to hold

a license from the state department” refers to [A] the state department requiring that a particular job requires licensure, or [B] the employer for a particular job requiring licensure, the cited authorities provide no guidance.

When ISD #199 hired Emerson as Activities Director, ISD #199 controlled the title for the position, the job description for the position, and the qualifications required for the position. Because the State of Minnesota does not require licensure for a school employee with the job title of “Activities Director,” ISD #199 had no obligation to require that its Activities Director be a licensed school principal. But ISD #199 chose to make principal licensure a requirement of the “Activities Director” position; ISD #199 wanted its Activities Director to be a licensed school principal.

Emerson contends that the Supreme Court may conclude either that Emerson is entitled to the benefits of the continuing-contract statute because while employed in the Activities Director position Emerson was a “professional employee required [by his employer] to hold a license from the state department” or because while employed in the Activities Director position Emerson was performing job duties typically performed by a “principal.”

APPELLANT EMERSON'S REPLY BRIEF CONCLUSION

As was noted in *Dokmo v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 676 (Minn. 1990), the school board has the burden of making an adequate record to prove that its actions were justified. Appellant Emerson contends that in this case the school board for respondent ISD #199 has failed to meet that burden.

The appropriate remedy when a continuing-contract "teacher" is improperly terminated is to reinstate in accordance with the continuing-contract statute. *Pinkney v. Independent School Dist. No. 691*, 366 N.W.2d 362, 365 (Minn. App. 1985). Emerson respectfully requests that the Supreme Court reverse the decision of the Court of Appeals and remand this matter to the school board of respondent ISD #199 with an order directing that appellant Emerson be reinstated in accordance with Minn. Stat. § 122A.40, subd. 11.

Respectfully submitted,

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Dated: 12-3-10



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APPELLANT EMERSON'S CERTIFICATION OF REPLY BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,418 words. This brief was prepared using Microsoft Office Word 2007.

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