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State of Minnesota
In Court of Appeals

Patricia Murphy,

Relator,

v.

St. Paul Public Schools,
Independent School District 625,

Respondent.

BRIEF, ADDENDUM AND APPENDIX OF RESPONDENT

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LEGAL ISSUES

Issue: Does Relator's temporary assignment for the 2010-2011 school year constitute a reduction in rank, a transfer to a lower branch of the service, or a transfer to a position carrying a lower salary or compensation within the meaning of Minn. Sta. § 122A.41, Subd. 1(c)?

Respondent determined the assignment does not constitute a demotion, to which Relator objected.

Apposite Statute: Minn. Stat. § 122A.41, Subd. 1(c).

Apposite Cases:

State ex rel. Ging v. Board of Education of City of Duluth, 213 Minn. 550, 7 N.W.2d 544 (1942)

State ex rel. Haak v. Independent School District No. 625, St. Paul, 367 N.W.2d at 461 (Minn. 1985)

Frye v. Independent School District No. 625, 494 N.W.2d 466 (Minn. 1993), rev. den.

* * * * * * * *

Issue: When interpreting an ambiguous statute should the Court give deference to the uniform, continuous, and longstanding interpretation of Minn. Stat. § 122A.41, Subd. 1(c) by the administrative agencies charged with the administration of Minn. Stat. § 122A.41?

The issue is raised by Respondent in this certiorari proceeding.

Apposite Statute: Minn. Stat. § 122A.41

Apposite Cases:

Independent School District No. 621 v. Public Employment Relations Board, 26 N.W.2d 410 (Minn. 1978)

Independent School District No. 192 v. Minnesota Department of Education, 742 N.W.2d 713 (Minn. Ct. App. 2008)

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Bohm v. Independent School District No. 283, St. Louis Park, 358 N.W.2d 146 Minn. Ct. App. 1984)

STATEMENT OF THE CASE

Respondent, through its Superintendent, Valeria Silva, assigned Relator to provide administrative support to the principal at Como Park Senior High School for the 2010-2011 school year. Respondent's Appendix (hereinafter "App.") 2. Relator claims the assignment constitutes a demotion as defined by Minn. Stat. § 122A.41, Subd. 1(c), and as such could not have been lawfully implemented under Minn. Stat. § 122A.41[1] in the absence of a hearing. Relator also claims that if such a hearing had been held she was entitled to assignment of a school building principalship by virtue of her seniority and tenure relative to other principals who were assigned to school building principalships. Respondent denies that the assignment constitutes a demotion as defined by Minn. Stat. § 122A.41, Subd. 1(c), that therefore no Minn. Stat. § 122A.41 hearing was required, and that the assignment was lawful without regard to Relator's seniority and tenure.

STATEMENT OF THE FACTS

Relator, a tenured principal, was assigned to the school building principalship of Arlington Senior High School for the 2005-2006 through 2009-2010 school years. Respondent's Addendum (hereinafter "Add.") 9 ¶ 5.

---

[1] As used herein the terms "teacher" and "principal" are synonymous because Minn. Stat. § 122A.41, Subd. 1 defines "teacher" to include "principal".

In the 2009-2010 school year Respondent operated 65 school buildings to which it assigned 65 of its 71 principals. Add. 8 ¶ 2. Commencing with the 2010-2011 school year Respondent closed Arlington Senior High School along with two other of its schools and merged another eight schools into four. Add. 9 ¶ 3. For the 2010-2011 school year Respondent operates 58 school buildings to which it has assigned 58 of the 65 principals it currently employs. Add 9 ¶ 4. Although Respondent needed only 58 principals for the 58 school building principalships, Respondent chose to retain the seven additional principals, assigning one to a specialty program, one to a special assignment (Patrick Bryan), Add. 9 ¶ 4 and Relator's Addendum (hereinafter "Rel. Add.") 2, and five (including Relator) to provide administrative support to school building principalships. Add. 9 ¶ 4. The seven additional principals were retained in lieu of discontinuing seven principal positions in order to retain them should vacancies due to retirement or resignation occur rather than risk losing them to another school district. Add. 10 ¶ 8.

When on June 1, 2010 Relator was first advised of her 2010-2011 assignment she apparently found it acceptable on condition that she be called a "Principal on Special Assignment (POSA)" or "Co-Principal" and that she be "a 'leading administrator in the area of curriculum and instruction'." App. 1. Respondent's Superintendent sought to clarify Relator's understanding of the assignment by her June 9, 2010 memorandum to Relator explaining that the

assignment was not that of a school building principalship but rather was to provide administrative support to a secondary school principal and thereby allow Relator to use her strengths in the areas of curriculum and instruction while also including the range of duties typically ascribed to a secondary school assistant principal. This memorandum also explained that while she could be referred to as either an "administrator" or an "assistant principal", any other title using the word "principal" could not be used because it would create ambiguity in the school building about who exactly was the building leader. App. 2. This memorandum also notified Relator that her compensation would remain at that of a principal and that she (as all of Respondent's principals) was eligible to apply for any future vacant school building principalships. App. 2.

The matter was not left there as there was a string of e-mails on June 18, 2010. Respondent's Superintendent attempted to schedule another meeting with Relator through a clerical staff person. App. 4. Relator replied nine minutes later insisting that the Superintendent telephone her in order to schedule another meeting. App. 5. Respondent acceded to Relator's demand by advising her the Superintendent's office would telephone her to schedule a meeting. App. 6. Five minutes later Relator replied that she refused to meet and would only discuss the assignment in writing. App. 7.

Respondent's Superintendent was forced to give Relator a directive to meet on June 21. App. 8 and 9.

Respondent's Superintendent met with Relator and her union representatives on June 21, 2010 to discuss the assignment. Add. 6. At the conclusion of that meeting the Superintendent believed Relator and her union representatives had agreed to the assignment (albeit reluctantly on Relator's part) and it was agreed that Relator would meet with the Como Park Senior High School Principal and Assistant Superintendent Secondary Schools to determine the exact duties Relator would have. Add. 6. That meeting was scheduled for August 5, 2010. App. 10. On July 16, 2010 Relator advised the Assistant Superintendent Secondary Schools that she would not accept the assignment, App. 11, the consequence of which was that the August 5 meeting was cancelled and the Superintendent herself established Relator's specific job duties without Relator's input. Add. 6.

Respondent's Superintendent made Relator's assignment, as she did with the assignments of all of Respondent's principals, for what she believed was in the best interests of the school and school community, App. 9-10 ¶ 6, and paying particular attention to Relator's strengths in the areas of curriculum and instruction. App. 3 and Add. 10 ¶ 7. Relator, as well as the other four principals assigned to provide administrative support to school building principalships, retains her compensation and rank as principal such

that, for instance, in the event of a discontinuance of principal positions and consequent layoff, she retains her rank as principal and her seniority rights vis-à-vis other principals, not other assistant principals. Add. 7, Add. 10 ¶ 9, Add. 11 ¶ 10, App. 3.

Respondent's Superintendent made Relator's assignment and four other similar assignments, Add. 11, as Respondent has done numerous times in years past, all without challenge from the Saint Paul Principals' Association or, except for this case, the affected principals. Add. 12 ¶ 14. Respondent's Superintendent did so with the understanding that the Minneapolis and Duluth School Districts did likewise, Add. 12 ¶ 15, which those two other School Districts do in fact do. App. 27-28 and App. 29-30.

SUMMARY OF ARGUMENT

Relator claims her position of principal has been discontinued and that her job assignment for the 2010-2011 school year constitutes a demotion from her position of principal because that assignment constitutes a reduction in rank, a transfer to a lower branch of the service, or a transfer to a position carrying a lower salary or compensation (notwithstanding the fact that her compensation remains unchanged). It is Respondent's position that Relator's position of principal has not been discontinued and her 2010-2011 school year

assignment does not constitute a demotion as defined in Minn. Stat. § 122A.41, Subd. 1(c).

To paraphrase the Supreme Court in *Strand v. Special School District No. 1*, 392 N.W.2d 881, 883 (Minn. 1986), this case presents yet another example of the recurring disputes between teachers, principals and school boards as they grapple with the difficult problems of declining enrollments and proportionate budgetary reductions. However, unlike the line of cases to which *Strand* referred, this case does not involve anyone losing a job or any diminution of compensation. This case involves Relator's subjective perception of her job assignment and her perception of how others may possibly perceive her job assignment. Those perceptions, Relator claims, rises to the level of a demotion in violation of the Teacher Tenure Act. Minn. Stat. § 122A.41 provides teachers and principals with job security in their position, not their perceptions of that position.

STANDARD OF REVIEW

Respondent's assignment of Relator for the 2010-2011 school year is a decision that may be set aside on appeal only if the decision is fraudulent, arbitrary, unreasonable, not supported by substantial evidence in the record, not within the school board's jurisdiction or is based on an erroneous theory of law. *Ganyo v. Independent School District No. 832*, 311 N.W.2d 497, 500

(Minn. 1981). Whether that assignment constitutes a demotion as defined by Minn. Stat. § 122A.41, Subd. 1(c) is a question of law to be reviewed de novo by the Court. *Emerson v. School Board of Independent School District No. 199*, 782 N.W.2d 844, 845 (Minn. Ct. App. 2010).

The matter before this Court is a case of first impression requiring judicial interpretation of the statutory definition of the word "demote" which is set forth in Minn. Stat. § 122A.41, Subd. 1(c). The matter is a question of law to be judicially determined, just as were the questions in *Emerson*, supra, *Cloud v. Independent School District No. 38, Red Lake*, 508 N.W.2d 206 (Minn. Ct. App. 1993) and *Frye v. Independent School District No. 625*, 494 N.W.2d 466 (Minn. 1993), rev. den.

The issue in *Emerson*, *Cloud*, and *Frye* each involved judicial interpretation of statutory definitions, in the former two cases of Minn. Stat. § 122A.40 and in the latter case of Minn. Stat. § 122A.41. The issue before the Court in *Emerson* and *Cloud* was whether the positions in question constituted a "teacher" as defined in Minn. Stat. § 122A.40, Subd. 1 of the Continuing Contract law, a statute which is a companion to Minn. Stat. § 122A.41, the Teacher Tenure Act for Cities of the First Class. Both cases were decided as a matter of law. The issue in *Frye* was whether the position in that case met the definition of "teacher" set forth in Minn. Stat. § 122A.41, Subd. 1(a). The Supreme Court in *Frye* held the position in question did not

as a matter of law fit the statutory definition. 494 N.W.2d at 466. Each of these three cases considered the duties of the positions in question.

In *Frye* the Supreme Court reversed this Court, which had remanded the case for hearing after finding the record to be insufficient (there having been no hearing) to permit meaningful appellate review because the record did not contain facts detailing the responsibilities of the position in question. *Frye v. Independent School District No. 625*, 1992 WL 104742 (Minn. Ct. App.). In reversing this Court and ruling as a matter of law, the Supreme Court in *Frye* found the record to be sufficient, although "sparse." 494 N.W.2d at 468. The record contained a job description enumerating 15 specific duties and the organizational structure. Id.

The record in this case is sufficient for the Court to determine as a matter of law whether Relator's 2010-2011 school year position constitutes a demotion as defined by Minn. Stat. § 122A.41, Subd. 1(c). The relevant job descriptions form part of the record. See Assistant Principal Job Description, App. 14, July 29, 2010 letter, Add. 6, Principal Job Description, App. 12, Bulletin 5, App. 16, and Bulletin 7, App. 18.

The standard of review is narrow in that the Court should view the record in its entirety to determine whether the evidence in the record is such that a reasonable mind might accept the conclusion that no demotion

occurred. *Whaley v. Anoka-Hennepin Independent School District No. 11*, 325 N.W.2d 128, 130 (Minn. 1982).

The fact that there was no hearing before Respondent's Board of Education does not make the record insufficient for appellate review. *Dokomo v. Independent School District No. 11, Anoka-Hennepin*, 459 N.W.2d 671, 675 (Minn. 1990). The fact that there is no record of action taken by Respondent's Board of Education likewise does not make the record insufficient for appellate review. Id. Transfers involving a teacher's assignment are generally within the discretion of a school superintendent. *Adkisson v. Independent School District No. 13*, 1998 WL 778321 (Minn. Ct. App. 1998). The record contains correspondence between Respondent's Superintendent and Relator.

The record in this case is sufficient for the Court to rule as a matter of law. Relator on page 21 of her brief states that the matter should not be remanded for a hearing and Respondent wholeheartedly concurs. Like *Frye*, the issue in this case must be understood against the public policy rationale of the Teacher Tenure Act. While Minn. Stat. § 122A.41 is intended to assure teacher security, it is not to be construed to transfer from school boards to teachers and courts the management, supervision and control of school systems. *Frye*, 494 N.W.2d at 467-68. In cases such as these involving assignments of educational administrators, to require a hearing every time

on administrator complained about the position he or she was assigned would be highly inefficient in the administration of a school system and thereby "tie the hands of the school board." *Frye* 494 N.W.2d at 469. If an administrator is dissatisfied, certiorari to the Court is available and the Court can interpret statutory definitions.

While Relator does not request the Court to remand the matter for a further hearing, she does request the Court to remand with an order for Respondent to assign Relator a school building principalship. Should the Court determine that Respondent did act on an erroneous theory of law the order Relator requests would clearly not be appropriate. If Respondent acted on an erroneous theory of law the Court should remand with directions to proceed under the correct theory of law but the Court should not itself attempt to decide the matter on its merits. *Frisk v. Board of Education of City of Duluth*, 246 Minn. 366, 381, 75 N.W.2d 504, 514 (Minn. 1956).

ARGUMENT

I. Relator Has Not Been Demoted From the Position of Principal

A. The Concept of Position Is Not Precise

The essence of Relator's Claim is that her position as principal at Arlington Senior High School was discontinued and the position she was

thereafter assigned constitutes a demotion, viz. a demotional position. Relator asserts her 2010-2011 school year assignment compared with her 2009-2010 school year assignment is a reduction in rank, a transfer to a lower branch of the service, or a transfer to a position carrying a lower salary or compensation. Minn. Stat. § 122A.41, Subd. 1(c). Respondent contends that while Relator's job assignment and related duties have been changed she maintains her position as a principal. In order for the Court to resolve this case it is necessary to determine what the exact positions in question are. To do so requires the term "position" as used in Minn. Stat. § 122A.41 to be defined. The seminal case for this task is *State ex rel. Ging v. Board of Education of City of Duluth*, 213 Minn. 550, 7 N.W.2d 544 (1942).

The *Ging* court analyzed the various contexts of Minn. Stat. § 122A.41 in which the term is used and the dictionary definition of the term to conclude the term "position" meant the "relative place, rank, or standing in the school system." *Ging*, 213 Minn. at 585, 7 N.W.2d at 562. Later, in *Strand*, the court found it necessary to develop a practical definition of the term "position" and noted that the contexts in which the term appears in Minn. Stat. § 122A.41 "are sufficiently different that the term takes on some of the coloration characteristics of a chameleon." 392 N.W.2d at 884. In fact, the *Strand* court concluded that "it is impossible to articulate a precise

definition or test by which these difficult staff reductions may be decided . . . ." 392 N.W.2d at 885.

1. "Position" As Used In Minn. Stat. § 122A.41, Subd. 1(c): Type, Grade or Rank

The *Ging* court pointed out that the term "position" as used in Minn. Stat. § 122A.41, Subd. 1(c)'s definition of "demote" is used only in the context of a transfer to a position carrying a lower salary or compensation and that the term is not used in the other two elements of the statutory definition of reduce in rank or transfer to a lower branch of the service. The disjunctive nature of Minn. Stat. § 122A.41 Subd 1(c) indicated to the *Ging* court a legislative intent that either of the three elements constitute a "demotion or loss of position" (emphasis added). 213 Minn. at 583, 7 N.W.2d at 562. Relator asserts her 2010-2011 job assignment constitutes a loss of position. Because of the singular use of the term "position" in the disjunctive, three-element statutory definition of "demote", the *Ging* court construed Minn. Stat. § 122A.41, Subd. 1(c) to mean the term "position" is used as a generic term and the words and phrases "rank", "branch of service", and comparative "salary or compensation" are the "criteria of the particular type of grade or position held." *Ging*, 213 Minn. at 583, 7 N.W.2d at 562.

Although Minn. Stat. § 122A.41, Subd. 10 does not contain the term "position", the *Ging* court addressed it. Minn. Stat. § 122A.41, Subd. 10 provides in pertinent part that "[i]f the charges, or any of such, are found to be true, the board . . . must discharge, demote, or suspend the teacher, as seems to be in the best interest of the school." The *Ging* court stated that this indicates there are "different ranks or grades of teachers' positions (emphasis added)." 213 Minn. at 585, 7 N.W.2d at 562. Thus rank is synonymous with type or grade.

The issue is then whether Relator's 2010-2011 job assignment constitutes a reduction in type, grade or rank of her previous position, a transfer to a lower type, grade or rank of position, or a transfer to a type, grade or rank of position which carries a lower salary or compensation.

2. Reduction In Rank: Type, Grade or Rank of Position Assigned

In defining the term "position" as a teacher's relative place, rank, or standing in the school system the *Ging* court looked to the common and approved usage[2] of the term, i.e. "relative place, situation, or standing; specif. official rank or status." 213 Minn. at 583, 7 N.W.2d at 562. Relator's official

[2] "[U]nless inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: (1) words and phrases are construed . . . according to their common and approved usage; * * *." Minn. Stat. § 645.08(1).

rank or status within Respondent's school employment system is that of the position of Principal, equal to the official rank or status of all of Respondent's other principals. The only titles included in Relator's collective bargaining unit's appropriate unit are those of principal and assistant principal, Record Item No. 21, 2007-2009 Terms and Conditions of Professional Employment Agreement Between the Saint Paul Board of Education and the Saint Paul Principals' Association July 1, 2007 through June 30, 2009, Article 3, Section 3, p. 4. Relator's title as it appears in her Job Record is that of Principal, not Assistant Principal, App. 19. Relator is eligible for any school building principalship vacancies, App. 3, as are all other principals. Relator retains her relative ranking as principal vis-à-vis all other principals on the Seniority List, App. 26, Add. 11 ¶ 10. Relator was advised that she retains her rank of principal, Add. 7. Relator's 2010-2011 job assignment has not changed her relative place, situation, or standing vis-à-vis all other principals and her official rank and status remains unchanged. All that has changed for Relator for the 2010-2011 school year is her assigned job duties.

In her brief Relator does not address, unlike *Ging*, the dictionary definition of the term "position" but rather focuses on the dictionary definition of the word "rank." Regardless of the definition applied Relator's rank has not been reduced.

The dictionary definition of the term "position" applied in *Ging* is "relative place, situation, or standing; specif. official rank or status." 213 Minn. at 583, 7 N.W.2d at 562. On Page 16 of her brief Relator states the word "rank * * * connotes . . . 'a grade of official standing' ", citing Webster's New Collegiate Dictionary (1979), Relator's App. 62, which in turn defines the word "rank" in exactly those terms. Another definition of the word "rank" is "official position or grade: the rank of sergeant." The American Heritage Dictionary of the English Language (3rd ed. 1992). Under these definitions of "position" and "rank" it appears both are synonymous – official position or grade of official standing. Relator's official position, rank and standing is that of a principal as shown by her Job Record, App. 19, and the Seniority List, App. 26, maintained by Respondent's Human Resource Department. Another definition of the word "rank" is "a relative position or degree of value in a graded group." The American Heritage Dictionary of the English Language (3rd ed. 1992). Again, Relator's position has not changed. She continues to hold the rank or position of principal as shown by her Job Record, App. 19, and the Seniority List, App. 26, and her value as measured in economic terms has also remained unchanged. Relator's "position" as the term may be defined has, relative to all of Respondents principals and assistant principals, remained unchanged.

Yet another definition of "rank" proffered by Relator in Relator's App. 62 is "a degree or position of dignity, eminence or excellence." The definition of "position" is also defined as "social standing or status." The American Heritage Dictionary of the English Language (3rd ed. 1992). While Relator's official standing or status has not changed, Relator apparently believes her social standing or status has been diminished with respect to the degree of dignity in which she will be held because of her 2010-2011 job assignment. This is the crux of Relator's claim: She perceives herself – and believes others may perceive her – as having been reduced in rank or transferred to a lower branch of the service. While her official position or rank remains unchanged, she perceives her social position or rank has changed. The Teacher Tenure Act protects a teacher's official rank or position, not a teacher's social rank or position.

Under the Teacher Tenure Act relative rank or position is significant in only two ways, tenure status vs. probationary status and seniority. In relative terms "[t]enure is a status – once it is acquired, each teacher's tenure is equivalent . . . ." *Berland v. Special School District No. 1*, 314 N.W.2d 809, 814 (Minn. 1981). Relator is tenured. She is no different than other tenured principals regardless of time tenured and her tenure status - unlike probationary status – ensures she cannot be demoted except for cause. "Seniority, on the other hand, gives rights to an additional set of rights . . .

that do increase with years of service." *Berland.* 314 N.W.2d at 814. Relator's seniority rights come into play only when Minn. Stat. § 122A.41, Subd. 14(a) is applicable and her relative rights to her seniority remain unchanged relative to all of Respondent's principals and assistant principals, probationary as well as tenured, should Respondent implement Minn. Stat. § 122A.41, Subd. 14(a) layoffs.

Relator's rank has simply not been reduced. For all the foregoing reasons Relator has likewise not been transferred to a lower branch of the service.

3. Lower Branch of the Service and Position Carrying a Lower Salary: Type, Grade or Rank of Position Assigned

Relator argues her 2010-2011 school year assignment constitutes a transfer to a lower branch of service or transfer to a position carrying a lower salary or compensation. Relator's argument assumes the conclusion sought. While she continues to be paid at the principal rate, Relator argues the "position" assigned her is that of an assistant principal and she therefore has been demoted because assistant principals are paid less than principals. The job assigned Relator itself constitutes a position and that position carries a salary equal to the position she previously held. It cannot therefore be construed as a position carrying a lower salary or compensation.

In analyzing Minn. Stat. § 122A.41, Subd. 1(c) the *Ging* court held that the word "position" [which only appears in the comparative compensation element of the three prong definition] is a generic term and the "rank", "branch of service" and comparative "salary or compensation" terms or phrases are "criterion of the particular type of grade of position held." 213 Minn. at 584, 7 N.W.2d at 562. It is necessary to analyze the comparative duties of her 2009-2010 assignment and 2010-2011 assignment in order to determine the particular type or grade of position which Relator holds for the 2010-2011 school year in order to determine whether it is of a type, grade or rank reasonably classified as one in a branch of service lower than her previous assignment.

A number of cases struggling with the definition of the term "position" addressed job duties. While applying the G*ing* definition of the term "position" as a teacher's relative place, rank and standing in the school system the *Strand* court stated that ". . . it is impossible to articulate a precise definition or test by which these difficult staff reductions may be decided . . . ." *Strand*, 392 N.W.2d at 885. *Strand* explained the reason for the difficulty in precisely identifying what a "position" is as follows:

> "The difficulty in articulating a precise definition reflects the fact that although the legislature has clearly adopted a policy strongly favoring a retention of senior teachers, it has also made it clear that public school districts must be accorded sufficient

> flexibility to effectively administer the schools. See *Laird v. Independent School District No. 312*, 346 N.W.2d 153, 155 (Minn. 1984)."

392 N.W.2d at 885. *Strand* involved reassignment and realignment of classroom teaching positions under Minn. Stat. § 122A.41, Subd. 14(a) and the court did set forth relevant factors that must be considered notwithstanding the impossibility of articulating a precise definition or test. Those reassignment and realignment factors[3] of classroom teaching positions are not applicable or helpful to this case. In *Adkisson* the teacher was reassigned from classroom duties to curriculum duties without a reduction in pay. Although it was a Minn. Stat. § 122A.40 case – not a Minn. Stat. § 122A.41 case – the court applied the definition of "demotion" as contained in Minn. Stat. § 122A.41, Subd. 1(c) and held no demotion had occurred because the teacher's rank and salary remained unchanged. The court stated:

> "Transfers involving a teacher's assignment are generally within the discretion of the school superintendent. *Henderson v. City of St. Paul*, 236 Minn. 353, 359, 53 N.W.2d 21, 25 (Minn. 1952) (stating that a change in work assignment may not be considered a demotion if no reduction in salary is involved.)"

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[3] The factors are: (1) the teacher's length of service; (2) the duration and scope of the teacher's license(s); (3) the school district's needs reflecting the welfare of the students and the public; (4) the ease of reassignment or realignment of course schedules to facilitate a retention of the most senior teachers.

Id. Principals, like teachers, are often assigned duties not traditionally part of a school building principalship or a traditional classroom assignment. Hence the use of Principal on Special Assignment (POSA) positions. E.g. June 15, 2010 Board Action Update, Rel. Add. 2, assigning Patrick Bryan as Principal on Special Assignment to lead leadership work at the Center. In *Johnson v. Independent School District No. 281*, 494 N.W.2d 270 (Minn. 1992) a principal was reassigned to do a POSA position and the court held no demotion had occurred since the POSA position was at the same organizational level as her school building principalship assignment was and her status as an administrator remained unchanged. In *Spiss v. Independent School District No. 138, North Branch*, 1998 WL 40506 (Minn. Ct. App. 1998) an assistant principal was assigned to a restructured position with no supervisory duties and limited interaction with students, staff and parents while her salary remained unchanged. The court found her restructured position not to be of equal rank with an assistant principal because she no longer had the duties of a an assistant principal. The organizational level "test" of *Johnson* and specific duty "test" of *Spiss* were elaborated in more detail in *State ex rel. Haak v. Board of Education of Independent School District No. 625*, 367 N.W.2d 461 (Minn. 1985).

Haak is the other side of the coin from this case because it involved promotions rather than demotions but nevertheless is appropriate to this

case. *Haak* provides guidance in determining whether certain positions therein claimed were of a higher relative place, rank or standing than the positions which had been discontinued by setting forth certain relevant factors. The factors are as relevant in determining whether Relator's 2010-2011 job assignment is of a lower relative place, rank or standing than her 2009-2010 job assignment at Arlington Senior High School.

a. Substance, Not Form

Substance, not form, is the concern. *Haak*, 367 N.W.2d at 467. In her June 1, 2010 e-mail to Respondent's Superintendent Relator, after being advised of her 2010-2011 job assignment, appears to indicate the assignment was acceptable if she would be called a "Principal on Special Assignment (POSA)" or a "Co-Principal." App. 1. In response thereto Respondent's Superintendent wrote in her June 9, 2010 letter to Relator that "You may be referred to as an 'administrator' or 'assistant principal'. Any other title in a school leads to ambiguity around who the building lead is, and in no scenario should your placement be construed as a 'co-principal.' " App. 3. While the July 29, 2010 letter of Respondent's Superintendent to Relator references an assignment position of assistant principal, it ends with the statement that Relator "may use the title of 'Administrator' and that she would retain not only her compensation but also her rank as Principal." Add. 7. The

particular form of address for Relator while she performs her duties at Como Park Senior High School is hardly substantive; it is merely form.

b. Organizational Structure

The placement of the position within Respondent's overall organizational structure is a factor. *Haak*, 367 N.W.2d at 467. *Haak* did not elaborate on what it meant by organizational structure. It could be hierarchical rank, hierarchical duties, or reporting relationship. Relator's placement in Respondent's overall organization structure is addressed above with respect to retention of her rank. A POSA position is at the same organizational level as a school building principalship. *Johnson*, 494 N.W.2d at 274. Given the duties set forth in the July 29, 2010 letter, Add. 6, Relator's position may be considered a POSA position since it differs remarkably from an assistant principal's duties. See App. 14 and 17. With respect to the placement of Relator's 2010-2011 position within Respondent's overall organizational structure in terms of hierarchy of duties, see discussion of duties, supra. As to reporting, Relator reports to the Como Park principal and she makes much of this in her brief. Every employee has to report to someone. Query whether if Relator reported to the Assistant Superintendent Secondary Schools rather than the Como Park principal that would be mere substance over form. Additionally, organizational structure is

just one of four factors relevant to the determination of whether positions are "higher" or "lower."

c. Functions and Responsibilities

The functions and responsibilities of the position in question are most germane, including whether her old duties are expanded or contracted and whether new duties are added. *Haak* 367 N.W.2d at 467. A summary perusal of the Assistant Principal Job Description, App. 14, the Principal Job Description, App. 12, and the July 29, 2010 letter spelling out nine specific duties delegated to Relator directly by Respondent's Superintendent, Add. 6, clearly indicates Realtor's 2010-2011 position is not that simply of an assistant principal but much more. Indeed, Relator's position is much closer to that of a Principal than an Assistant Principal when those respective duties are analyzed. Unlike the assistant principal in *Spiss*, Relator will continue to supervise and evaluate staff. Add. 6. Also unlike the assistant principal in *Spiss*, Relator will continue to have duties involving significant interaction with students, staff and parents.

The duties associated with Relator's assignment are set forth in the July 29, 2010 letter from Respondent's Superintendent to Relator, Add. 6, the Assistant Principal Job Description, App. 14, and Como Park Senior High School Teacher Bulletins 5 and 7, App. 16 and App. 18. The Assistant Principal Job Description and Como Park Senior High School Teacher

Bulletin 7 are essentially identical with respect to the generic (Job Description) and site specific (Bulletin 5) duties of Assistant Principals. Bulletin 5 sets forth site specific duties for the Administrator (Relator), Assistant Principal (Chou Chang), and Administrative Intern (Stacie Jones), each of which is charged with providing various administrative support functions to the Como Park Senior High School principal. Bulletin 5 and the generic Assistant Principal Job Description establish Relator's duties but overlaid on both are the duties assigned Relator by Respondent's Superintendent in the July 29, 2010 letter, Add. 6. Being assigned to Relator by Respondent's Superintendent, those duties take precedence over Bulletin 5 and the Assistant Principal Job Description duties. A quick perusal of Assistant Principal duties as contained in the above documents and Relator's duties established by the July 29, 2010 letter clearly indicates that Relator's assignment is not the same as that of Chou Chang, the Assistant Principal at Como Park Senior High School. Relator's duties delegated to her by Respondent's Superintendent are much different.

The duties of the principal at Como Park Senior High School are set forth in the generic Principal Job Description, App. 12, and the Como Park Senior High School Teacher Bulletin 7, App. 18 the latter of which adds nothing to the former. A comparison of Relator's duties as outlined in the July 29, 2010 letter and the Principal Job Description clearly establishes that

Relator shares leadership[4] with the Como Park principal in the following areas:

i. Curriculum

The principal "[s]erve[s] as the instructional leader for the building by . . . managing the curriculum . . . ." App. 12. Relator "provide[s] instructional leadership and guidance in the implementation of: . . . (3) curriculum management . . . ." Add. 6.

ii. Staff Supervision and Evaluation

The principal "[s]erve[s] as the instructional leader for the building by . . . evaluating teachers." App. 12. Relator "provide[s] instructional leadership and guidance in the implementation of: . . . (2) staff supervision and evaluation . . . ." Add. 6.

iii. Budgeting

The principal "[s]erve[s] as the instructional leader for the building by . . . allocating resources to instruction . . . ." App. 12. Relator "provide[s] instructional leadership and guidance in the implementation of: . . . (8) allocation of resources to instruction . . . ." Add. 6.

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[4] It is a "combined position." See *Brandhorst v. Special School District No. 1*, 392 N.W.2d 888 (Minn. 1986).

iv. Educational Program

"The principal is responsible for leading, managing, supervising and evaluating the school's educational programs." App. 12. Relator "provide[s] instructional leadership and guidance in the implementation of: . . . (4) program evaluation and assessment; (5) program development . . . ." Add. 6.

v. Vision

The principal "will [d]evelop a shared vision for the school by effectively engaging the school community in its creation and in identifying factors critical to its achievement." App. 12. Relator "provide[s] instructional leadership and guidance in the implementation of: . . . (7) development of a shared vision, including the identification of factors critical to achievement . . . ." Add. 6.

vi. Strategic Priorities and Goals

The principal "define[s] priorities" and "provide[s] focus on strategic priorities by setting expectations for others . . . .", and "[s]erve[s] as the instructional leader for the building by setting clear goals . . . ." App. 12. Relator "provide[s] instructional leadership and guidance in the implementation of: . . . (6) strategic priorities and goals . . . ." Add. 6.

As the foregoing demonstrates, Relator's duties are much closer to the duties of the Como Park Principal than to the duties of Chou Chang, the Assistant Principal at Como Park Senior High School. Her duties while occupying the principalship at Arlington Senior High School were as set forth in the Principal Job Description, App. 12.

vii. Qualifications Needed to Perform Duties

The last factor enumerated in *Haak* is the qualifications needed to carry out the responsibilities or duties, 369 N.W.2d at 467.

Strand stated that historically the court has "attempted" to define the term "position" in various ways. 392 N.W.2d at 885. *Ging*, according to Strand, defined the term in a general sense as a relative place, rank or standing in the school system while *Hendrickson v. Independent School District No. 319*, 228 N.W.2d 126 (Minn. 1975) defined the term as the level and curricula for which the teacher is licensed as did *Berland* (the subject area and grade level for which the teacher is qualified as evidenced by state licensure). Id. Relator holds a license for Principal Kindergarten through Grade 12. Relator's Appendix (hereinafter "Rel. App.") 50. The administrative license for principals includes assistant principals; there is no separate license for assistant principals. Minn. Stat. § 122A.14, Subd. 1 and

Minn. Stat. § 122A.15. Relator is licensed for both positions and for all grade levels of schools, be it elementary, middle, or senior.

Ging addressed licensure in attempting to craft a definition of the term "position" by addressing Minn. Stat. § 130.03, now codified as Minn. Stat. § 122A.16(a), which provides: "a qualified teacher is one holding a valid license . . . to perform the particular service for which the teacher is employed in a public school." (emphasis added). In *Ging* a teacher who had taught second grade for 40 years had had her position discontinued and was seeking reassignment to one of the primary grades. The school district held the view that there was only one type or grade of position, that a position is one in the entire school district for which the teacher is licensed, and that all teachers similarly licensed were of equal rank regardless of whether others assigned to a particular position have ever actually ever before taught the particular subject and grade level. In rejecting the school district's view the *Ging* court held that Minn. Stat. § 122A.16(a) does not make a teacher's qualifications (as shown by licensure) and that teacher's "position" coextensive. In fact *Ging* stated that quite the contrary was indicated by the language of Minn. Stat. §122A.16(a) which refers to holding a license "to perform the particular service for which he is employed in a public school." (emphasis in original). 213 Minn. at 583, 7 N.W.2d at 562. The Duluth School District at the time of *Ging* was organized into an elementary and secondary division and the

elementary division was further organized into primary grades, intermediate grades, and grammar grades. That threefold elementary division organization had to be taken into account and the teacher in question held a position in the primary grades of the elementary division such that the teacher's "position" had not been discontinued. 213 Minn. at 588, 7 N.W.2d at 564. In defining the term "position" *Foesch v. Independent School District No. 646*, 223 N.W.2d 371 (Minn. 1974) expressly overruled *Ging's* distinction between primary grades, intermediate grades, and grammar grades "in light of today's practice." *Berland* made it clear that at least for purposes of Minn. Stat. § 122A.41, Subd. 14(a) the term "position" meant subject area and grade level in the entire district for which the person is licensed.

In her June 1, 2010 e-mail Relator apparently found her 2010-2011 job assignment acceptable as long as she would be referred to as a POSA or Co-Principal and as long as she worked as "a leading administrator in the area of curriculum and instruction." The duties specifically delegated to Relator by Respondent's superintendent in the July 29, 2010 letter, Add. 6, include curriculum management, program evaluation and assessment, program development, strategic priorities and goals, and development of a shared vision. None of these duties appear in the Assistant Principal Job Description, App. 14. These duties were established by Respondent's Superintendent in recognition of Relator's individual qualifications in the

areas of curriculum and instruction, App. 3, qualifications over and above mere licensure. Relator is "a 'leading administrator with area of curriculum and instruction' " at Como Park Senior High School. She is not the only such leading administrator but shares in combined leadership in those areas with the Principal of Como Park Senior High School, unlike the Assistant Principal at Como Park Senior High School. She is in general terms on par with the Como Park Principal but he is first among equals. Respondent has met Relator's demands as set forth in her June 1, 2010 e-mail, App. 1, but for the title POSA or Co-principal, which is merely a matter of form, not substance.

To the extent Relator's assignment constitutes a position different than either an assistant principal or principal, the extent or degree of difference is relevant, especially in light of the countervailing purpose of the Teacher Tenure Act to accord school districts "sufficient flexibility to effectively administer the schools." *Strand*, 392 N.W.2d at 885. Being a case of first impression, there are no judicially created markers or guideposts establishing gradations of degrees of difference between positions which can be applied to determine which position is lower or higher and by how much. In now creating the first markers or guideposts the Court must recognize the public policy rationale of the Teacher Tenure Act, namely to protect teachers from arbitrary demotions and discharges without impairing the rights of school

boards to administer the school system or transfer to teachers and courts the management, supervision and control of school systems. *Frye*, 494 N.W.2d at 467, citing *Eelkema v. Board of Ed. of City of Duluth*, 215 Minn. 590, 11 N.W.2d 786 (1943). The twofold purpose of the Teacher Tenure Act must be construed in such a way "as will bring about a result in harmony with the expressed legislative policy." *Ging*, 213 Minn. at 568, 7 N.W.2d at 555. The gradations of degrees of difference between positions in determining which may be of a lower or higher branch of service cannot be cut so fine as to impair necessary administrative flexibility to manage a large school system.

Although not a Teacher Tenure Act case, *Cook v. Playworks*, 541 N.W.2d 366 (Minn. Ct. App. 1996) provides guidance with respect to the degree of demotion. *Cook* was an unemployment compensation case and the issue was whether the demotion of Cook constituted good cause attributable to the employer justifying the employee to quit. The factors applied in *Cook* were (1) loss of wages, (2) change in job duties, (3) reasonable career expectancies because of tenure, and (4) chance of advancement. Relator has lost neither wages, career expectances because of tenure, nor chance of advancement. *Cook* also stated that good cause attributable to the employer existed if a demotion entailed a position requiring substantially less skills or an inferior position with limited opportunities for advancement and pay. 541 N.W.2d at 369, n. 1. *Cook* cited *Holbrook v. Minnesota Museum of Art*, 405

N.W.2d 537, 539 (Minn. Ct. App. 1987) (reassignment of an assistant curator to a substantially different job involving clerical duties) as an example of such a demotion. While her duties have changed, those duties are much closer to the Principal Job Description than to the Assistant Principal Job Description.

Given the fact that in substance Relator shares combined instructional and curriculum leadership with the Principal at Como Park Senior High School, and is clearly more than an Assistant Principal, given the fact that Relator chose to continue to employ five more principals than it had school building principalships in order to avoid layoffs of principals, given the fact that Relator's assignment is temporary for the 2010-2011 school year and she is eligible to be assigned a school building principalship at any time when one becomes vacant, and given the legal ambiguity of the concept of "position" within the Teacher Tenure Act and the reasons therefore as articulated in *Strand*, the Court should give deference to Respondent's determination in this case.

4. "Position" as used in Minn. Stat. § 122A.41, Subd. 4(a)

Ging looked at how the term "position" was used in Minn. Stat. §122A.41, Subd. 4(a), which provides in pertinent part that "[a]fter the completion of such probationary period . . . such teachers as are thereupon

reemployed shall continue in service and hold their respective position . . . and must not be discharged or demoted except for cause after a hearing." *Ging* stated that this provision of the Teacher Tenure Act "indicates that the particular 'service' performed at the transition from probationary to tenure status is also a criterion of 'position.' " 213 Minn. at 583, 7 N.W.2d at 562. But *Ging* also held that the acquisition of tenure is not a criterion of the term "position" in analyzing the Minn. Stat. § 122A.41, Subd 6(5) "discontinuance of position" language. Relator performed service in the principalship of Arlington Senior High School at the time she became tenured. For purposes of this case that does not mean her "position" is principal at Arlington Senior High School nor does it mean her "position" as a principal was discontinued when Respondent closed Arlington Senior High School. In rejecting the argument that the term "position" meant a particular classroom or a particular school building the *Ging* court stated that

> "Notwithstanding a teacher has acquired tenure, he may be so transferred from class to class, building to building, or division to division without a resulting 'discontinuance of position', and without seeming loss caste; provided he is not thereby demoted."

213 Minn. at 581, 7 N.W.2d at 561. "The tenure act has not taken from a school board its power to 'superintend and manage the schools of the district' [citations omitted] and its incidental powers, through its superintendent, originally to assign and subsequently transfer a teacher to such classroom,

such building, and such division as it may determine to be for the best interest of the school, provided the teacher is not thereby demoted [citation omitted]." *Ging*, 213 Minn. at 581, 7 N.W.2d at 560-61.

Although her job assignment for the 2010-2011 school year was changed, Relator's 2009-2010 school year "position" as that term is used in the Teacher Tenure Act was not discontinued. Minn. Stat. §122A.41, Subd. 6(5) provides that one of the causes for demotion is "[d]iscontinuance of position or lack of principals." The *Ging* court stated that this provision indicates that a position may continue notwithstanding a lack of principals and may be discontinued notwithstanding there may be no lack of pupils and that "[h]ence sufficiency of pupils is not a criterion" of the term "position." 213 Minn. at 584, 7 N.W.2d at 562. The fact that Relator was assigned to the school building principalship at Arlington Senior High School at the time she acquired tenure is also irrelevant for purposes of identifying her position since according to *Ging* "the acquisition of tenure rights is definitely not a prerequisite and not a criterion" as indicated by the use of the term "position" in Minn. Stat. § 122A.41, Subd. 6(5). *Ging*, 213 Minn. at 584, 7 N.W.2d at 562.

5. <u>Seniority and Tenure</u>

Throughout Relator confuses a specific job assignment and a position as defined under the Teacher Tenure Act. Relator's 2009-2010 school year

assignment to the school building principalship at Arlington Senior High School was not her Minn. Stat. § 122A.41 "position". "[A] teacher's position in a school system is defined and described in a way that makes the position something separate from the individual occupying it at any given time." *Independent School District No. 621 v. Public Employment Relations Board,* 268 N.W.2d 410, 412 (Minn. 1978). The acquisition of tenure does not under Minn. Stat. § 122A.41 give a tenured teacher the right to any particular building. *Ging*, 213 Minn. at 581, 585, 7 N.W.2d at 560-61, 563. Relator's 2009-2010 school year assignment was not her "position"; rather she occupied – and still occupies – the position of principal and that position has not been discontinued under Minn. Stat. § 122A.41, Subd. 6(5). There is nothing in the record indicating Respondent discontinued any principal positions and the difference between the 71 principals employed in the 2009-2010 school year and the 65 principals employed for the 2010-2011 school year is attributable to retirements, resignations and leaves of absence. Rel. App. 7 and 10.

Relator also confuses tenure status with the concept of position under Minn. Stat. § 122A.41. In crafting a definition of the term "position" the *Ging* court analyzed the context in which the term was used in the Teacher Tenure Act, including its use in Minn. Stat. § 122A.41, Subd 6(5) "discontinuance of position." As so used *Ging* concluded it indicated that a position may be

acquired during, as well as after, the probationary period and that "[h]ence the acquisition of tenure rights is definitely not a prerequisite and not a criterion." 213 Minn. at 584, 7 N.W.2d at 562. Tenure has nothing to do with "position." Both probationary teachers and tenured teachers hold "positions".

The term "position" is used multiple times in Minn. Stat. § 122A.41, Subd. 14(a) and the *Ging* court also addressed this subdivision in attempting to fashion a definition of the term. Minn. Stat. § 122A.41, Subd. 14(a) provides:

> "A teacher whose services are terminated on account of discontinuance of position or lack of pupils must receive first consideration for other positions in the district for which that teacher is qualified. In the event it becomes necessary to discontinue one or more positions, in making such discontinuance, teachers must be discontinued in any department in the inverse order in which they were employed . . . ."

Inverse order means seniority. *Harms v. Independent School District No. 300, LaCrescent*, 450 N.W.2d 571, 574 (Minn. 1990). The *Ging* court determined that the term "position" as used in Minn. Stat. § 122A.41, Subd. 14(a) indicates that a teacher may hold but one position, yet be qualified for more than one, and that a separate position exists for each subject or group of subjects for which the teacher is qualified. This, according to *Ging*, is also a criterion in determining the meaning of the term "position." 213 Minn. at 585, 7 N.W.2d at 562.

On pages 22-23 of her brief, Relator asserts Minn. Stat. § 122A.41, Subd. 14(a) requires reassignment by seniority among tenured principals, citing *Marolt v. Independent School District No. 695*, 217 N.W.2d 212, 217 (Minn. 1974) and *Klein v. Board of Education of Independent School District No. 671, Hills-Beaver Creek*, 497 N.W.2d 620, 623-24 (Minn. Ct. App. 1993) Relator applies the wrong law.

Both *Marolt* and *Klein* addressed rights under Minn. Stat. § 122A.40, Subd. 11, which is that statute's companion to Minn. Stat. § 122A.41, Subd. 14(a). The former statute expressly bifurcates probationary and tenured teachers when positions are discontinued and layoffs ("unrequested leaves of absence") necessary. Minn. Stat. § 122A.41, Subd. 11(a) deals with probationary teachers on the one hand and on the other hand Subdivision 11(b) deals with tenured teachers, each separately to be laid off in the inverse order of employment. Minn. Stat. § 122A.41, subd. 11(a) expressly provides that

> "A teacher who has acquired continuing contract rights must not be placed on unrequested leave of absence while probationary teachers are retained in positions for which the teacher who has acquired continuing contract rights is licensed;"

Minn. Stat. § 122A.41, Subd. 14(a) makes no similar distinction between probationary and tenured teachers. It merely refers to "teachers" and the

Minn. Stat. § 122A.41, Subd. 1(a) definition of teachers makes no distinction between probationary and tenured teachers. A teacher is a teacher for purposes of Minn. Stat. § 122A.41, Subd. 14(a). *Marolt* and *Klein* have no application to this case by virtue of Minn. Stat. § 122A.40, Subd. 18: "This section does not apply to any district in a city of the first class." While the concept of seniority and tenure are the same in Minn. Stat. §§ 122A.40 and 122A.41 despite differing language, *Westgard v. Independent School District No. 745*, 400 N.W.2d 341, 344 (Minn. Ct. App. 1987), *State ex rel. Buys v. Independent School District No. 891, Canby,* 398 N.W.2d 622, 624 (Minn. Ct. App. 1986), rev. den., when there is no ambiguity in the language the two statutes shall not be read together. *Emerson*, 782 N.W.2d at 846. The absence of a provision covering a particular matter in one statute and inclusion of such a provision in the other statute cannot be regarded as an oversight but rather can only be construed as differences intentionally provided by the legislature. *Graham v. Special School District No. 1*, 1989 WL 94450 (Minn. Ct. App.). Thus, while tenure has application to Minn. Stat. § 122A.40, Subd. 11, tenure has no application to Minn. Stat. § 122A.41, Subd. 14(a). Tenure simply has no application to the term "position" contained in Minn. Stat. § 122A.41, Subd. 14(a).

Relator's argument about assignment of school building principalships on the basis of seniority and tenure contains an implied assumption, viz. that

a principal without a school building principalship assignment has had his or her position discontinued and that the school district must then reassign and realign school building principalships under Minn. Stat. § 122A.41, Subd. 14(a) on the basis of seniority. This assumption itself contains two assumptions, viz. that each principal has a right to a school building principalship and that there can be no principal positions not constituting a school building principalship. Principal positions can exist without a corresponding school building principalship. Hence Principal on Special Assignment (POSA) and administrators of specialty programs for incarcerated, hospitalized, institutionalized and special needs students. Adaption of Relator's view would mean every principal not assigned to either a school building principalship, a POSA project, or specialty program is in effect de facto demoted, necessitating the school district to either create "make work" assignments or go through official demotion proceedings which would entail bumping principals to assistant principal positions, assistant principals to classroom teacher positions, and laying off classroom teachers. The Teacher Tenure Act simply does not tie the administrative hands of school districts.

Relator asks the Court not to remand this case for hearing by Respondent's Board of Education, Relator's Brief, p. 21, and to remand the case to Respondent's Board of Education directing it "appoint" (assign?)

Relator to a school building principalship. On page 9 and 23 of her brief Relator sets forth the tenure status of numerous other principals. Relator has made much ado by motion about a March 31, 2010 seniority list of Respondent's principals and assistant principals, Rel. App. 2-4. On page 23 of her brief Relator asserts priority over seven other persons who had not acquired tenure as principals either at the time they were assigned a school building principalship or at the time Relator was allegedly demoted. Relator thereby in effect asks the Court to conduct its own Minn. Stat. § 122A.41, Subd. 14(a) hearing and make a determination of which persons hold what Relator calls "priority" under Minn. Stat. § 122A.41, Subd. 14(a). The Court should not itself make such a determination but should remand with directions to Respondent to apply the correct theory of law. *Frisk*, 246 Minn. at 381, 75 N.W.2d at 514.

If the Court were to do as Relator requests such a Subdivision 14(a) determination would be subject to the following underlying premises:

1. Neither tenure nor time-in-grade in tenure status have anything to do with either "position" or Subdivision 14(a);
2. Unlike Minn. Stat. § 122A.41, probationary and tenured teachers participate in one pool in the determination of inverse order of employment;

3. Subdivision 14(a)'s inverse order of employment is to be calculated from date of initial school district employment, not date of promotion to principal. *McManus v. Independent School District No. 625*, 321 N.W.2d 891 (Minn. 1982);

4. Minn. Stat. § 122A.41 places no limitations whatsoever on a school district's hiring, promoting, or assigning employees at any time and any such employees have all rights, if any, under Minn. Stat. § 122A.41 from the moment of hire, promotion or assignment.

Relator asserts priority over four newly promoted principals who were assigned school building principalships, Michael Thompson, Deborah McCain, Alan Levin, and Steven Flucas. Rel. App. 42, and Rel. Add. 2. Whether Relator's proffered seniority list, Rel. App. 2-4, or Respondent's Seniority List, App. 24-26, is applied, under *McManus* Relator's seniority date of September 16, 2002 makes her junior to all but Steven Flucas. Of the remaining 12 principals assigned to school building principalships as indicated in Rel. App. 42 and Rel. Add. 1-3 all have *McManus* seniority dates senior to Relator regardless of which seniority list is consulted. If the Court were to utilize Relator's proffered principal seniority list, Rel. App. 2-3, Relator's *McManus* seniority date makes her junior (in addition to Flucas) to all but Hamilton Bell. If the Court were to consider principals whose school

building principalship remained unchanged for its 2010-2011 school year, Relator's *McManus* seniority date makes her junior (in addition to Flucas and Bell) to all but Tyrone Brookins, Steven Unowsky, and Brenda Lewis. If the Court should somehow determine in this case that Respondent proceeded under an erroneous theory of law, then Respondent, employing 65 principals and having only 58 school building principalships available, could discontinue seven principal positions and demote the seven junior principals, including Relator, to assistant principal positions. For the 2010-2011 school year Respondent chose not to do so.

6. Relator Has No Protectable Due Process Liberty Interest

On page 21 of her brief Relator in a terse and ambiguous fashion appears to assert a constitutional claim relying on *Sweeney v. Special School District No. 1, Minneapolis*, 368 N.W.2d 288 (Minn. Ct. App. 1985). Since Relator cannot by this certiorari proceeding bring a 42 U.S.C. § 1983 cause of action, apparently she asks the Court to nevertheless consider U.S. Const. amend. XIV, § 1 as an aid in construing Minn. Stat. § 122A.41, Subd. 1(c). In *Sweeney* five recently promoted principals and assistant principals who were demoted back to assistant principal and classroom teacher positions without notice or hearing claimed violation of Minn. Stat. § 122A.41 and 42 U.S.C. § 1983. The school district had demoted the five persons in accordance with

the seniority provisions of the applicable collective bargaining agreement which calculated seniority by time-in-grade as principal or assistant principal. The *Sweeney* Court held that application of the collective bargaining agreement provisions according seniority by time-in-grade in effect imposed two periods of tenure and contravened *McManus*, which requires seniority under Minn. Stat. § 122A.41 to be determined from date of employment in the school district. *Sweeney*, 368 N.W.2d at 291.[5]

Unlike the principals and assistant principals in *Sweeney*, Relator does not make a 42 U.S.C. § 1983 claim but merely asserts Respondent's failure to provide Minn. Stat. § 122A.41 notice and hearing violated her rights under the Minnesota and United States Constitutions. It appears Relator thereby urges the court to consider the 14th Amendment Due Process Clause in interpreting Minn. Stat. § 122A.41, Subd. 1(c). Had Relator elaborated on this point the argument would have had to assume the ultimate conclusion sought, viz. that she was demoted. Assuming, arguendo, that Relator had been demoted, the lack of notice and a hearing would have clearly violated the Teacher Tenure Act without regard to the 14th Amendment. Indeed, assuming arguendo, that Relator had been demoted, while she thereby was

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[5] *Sweeney* stands for the proposition that a tenured classroom teacher promoted to assistant principal or principal is tenured from the moment of promotion. Subsequent to *Sweeney* Minn. Stat. § 122A.41, Subd. 5a was enacted authorizing school districts and principal unions to negotiate an additional two year probationary period for promotions from within.

deprived of her notice and hearing rights under Minn. Stat. § 122A.41, she was not simultaneously deprived of any 14th Amendment rights. She has no 14th Amendment rights under the facts of this case and thereby consideration of the 14th Amendment provides no assistance in interpreting Minn. Stat. § 122A.41, Subd. 1(c).

The trial court in *Sweeney* held the five persons had been deprived of "clearly protected property interests" *Sweeney*, 368 N.W.2d at 291. Relator has not been deprived of any property interests. She acknowledges her compensation has remained unchanged notwithstanding her 2010-2011 job assignment. The only protectable interest she could possibly have is a liberty interest, but she has none.

Although *Sweeney* did not address liberty interests it did nevertheless rely on *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972), which itself did address liberty interests. *Roth* held that to construe the failure to renew a teacher's employment contract as implicating a protectable liberty interest stretches the concept of liberty too far when the contract nonrenewal does not impose a stigma involving the teacher's good name, reputation, honor or integrity foreclosing other employment opportunities. *Roth*, 408 U.S. at 573, 575. In this case Relator's contract remained in place.

With respect to foreclosure of other employment opportunities, the damage to a person's good name and reputation caused by the challenged action must be such that it will substantially interfere with opportunities for subsequent employment, *Weathers v. West Yuma County School District R-J-1*, 530 F.2d 1335 (10th Cir. Colo. 1976), consist of such complete professional misconduct that would create a roadblock to future employment, *Skiff v. Colchester Bd. of Educ.*, 514 F.2d 284 (D. Conn. 2007), aff'd 316 Fed. Appx. 83, 2009 WL 764998, or make it virtually impossible to find new employment, *Ross v. Board of Regents of University of Wisconsin System*, 655 F. Supp.2d 895 (E.D. Wis. 2009). The stigma caused by the challenged action must be so harsh as to likely dissuade any other school board from hiring the teacher. *Donato v. Plainview – Old Bethpage Cent. School Dist.*, 96 F.3d 623 (2nd Cir. N.Y. 1996), cert. den. 519 U.S. 1150, 117 S. Ct. 1083, 137 L. Ed.2d 218. There simply is no stigma attached to Relator's 2010-2011 job assignment which could possibly affect her opportunities for employment elsewhere or future employment with Respondent. She remains eligible for any school building principalship which may become vacant. Rel. Add. 6.

In addition to employment opportunities, the Due Process concept of liberty can sometimes recognize a public employee's interest in his or her good name, reputation, honor and integrity without regard to future employment opportunities, *Lipp v. Board of Ed. of City of Chicago*, 470 F.2d

802 (7th Cir. 1972), and any resulting significant damage to his or her standing and association in the community, *Buhr v. Buffalo Public School Dist. No. 38*, 509 F.2d 1196 (8th Cir. N.D. 1974). To rise to the level of a protectable liberty interest the alleged stigma must involve matters of alleged dishonesty or immorality. *Johnson*, 494 N.W.2d at 275; *Donato*, supra. Alternatively, defamatory statements can implicate protectable liberty interests. *Lassiter v. Topeka Unified School Dist. No. 501*, 347 F. Supp.2d 1033 (D. Kan. 2004), reconsideration den. 2004 WL 3048842. Neither defamation or innuendo thereof is alleged by Relator. Charges accusing a teacher of falsifying forms created no stigma triggering a liberty interest. *Gentile v. Wallen*, 562 F.2d 193 (2nd Cir. N.Y. 1977). Statements that cheating had occurred under a superintendent's administration was not an imputation of dishonesty sufficient to implicate protectable liberty interests. *Stodghill v. Wellston School Dist.*, 512 F.3d. 472 (8th Cir. Mo. 2008). Damage to the reputation of a principal arising from a report of drunken misconduct did not implicate a protectable liberty interest. *Galvin v. Town of Yarmouth*, 470 F. Supp.2d 10 (D. Mass. 2007). A paid suspension of a teacher pending an investigation of sexual abuse did not implicate a protectable liberty interest. *Purvis v. Board of Educ. of Hall High School Dist. 502*, 599 F. Supp.2d 968 (C.D. Ill. 2009). If the foregoing do not rise to the level of a protectable liberty interest, clearly Relator's job assignment does not.

The stigma, if any, associated to Relator by her 2010-2011 assignment is subjective on her part and self imposed. At best for Relator there is an implicit and unstated allegation contained within her terse liberty interest assertion that others may possibly perceive less of her because of her 2010-2011 assignment. There is no evidence in the record that this is true with respect to her or the other four principals similarly assigned for the 2010-2011 school year. Relator's professional competence has not been put in question and, even if it had, would not rise to the level of a protectable liberty interest. *Johnson,* 494 N.W.2d at 275. Additionally, in order to make a viable liberty interest claim grounded upon damage to reputation without regard to employment opportunities, there must be evidence in the record that there was a publication of reputation damaging information. See, e.g., *DePree v. Saunders,* 588 F.3d 282 (5th Cir. Miss. 2009). Any statement of the specific reasons Respondent's Superintendent may have made concerning Relator's assignment were made only to Relator and her representatives in the June 1, and June 21, 2010 meetings between Respondent's Superintendent, Relator, and Relator's representatives. App. 1 and Add. 6. These reasons were not published.

II. Judicial Deference Should Be Accorded the Practices and Interpretation of Respondent and the Minneapolis and Duluth School Districts

School districts perform administrative/executive, legislative and quasi-judicial functions and "[t]he courts can exercise little if any control over its administrative, legislative, and executive functions." *Frisk*, 246 Minn. at 381, 75 N.W.2d at 514. A school district's determination of a teacher's "position" and its assignment of a teachers' relative place, rank, or standing in the school system constitutes the exercise of administrative discretion - is an executive function - and "is not subject to review generally by the judiciary." Id.

Relator is neither the first nor only principal to be temporarily assigned by Respondent to provide administrative support to a school building principalship when Respondent has employed more principals than it has had school building principalships. For the 2010-2011 school year four other principals have assignments similar to that of Relator. Add. 11 ¶ 12. Likewise, in years past Respondent has made similar principal assignments. Add. 12 ¶ 14. Respondent's practice in this regard is not unique as the Duluth and Minneapolis School Districts have done likewise when faced with surplus principals. App. 27-28 and App. 29-30, respectively. Except for this case, a Saint Paul, Duluth or Minneapolis principal so assigned – or his or

her union - has never asserted such temporary assignments of surplus principals constitutes a demotion under Minn. Stat. § 122A.41. Add. 12 ¶ 14, App. 28 ¶ 5, and App. 30 ¶ 5.

The Minnesota Department of Education plays no role in the administration of Minn. Stat. § 122A.41. The only governmental agencies charged with the administration of Minn. Stat. § 122A.41 are Respondent and the Duluth and Minneapolis School Districts. The uniform continuous and longstanding interpretation of Minn. Stat. § 122A.41, Subd. 1(c) by these three governmental agencies is entitled to judicial deference.

A. Erroneous Theory of Law Standard of Review Analysis

The fundamental issue in this case is whether Respondent's decision is based on an erroneous theory of law in its interpretation of Minn. Stat. § 122A.41, Subd. 1(c). Administrative interpretations are entitled to "great respect", although not binding on a court. *Independent School District No. 621 v. Public Employment Relations Board*, 268 N.W.2d 410, 412 (Minn. 1978). It is a "fundamental concept" that decisions of administrative agencies enjoy a "presumption of correctness" and judicial deference should be accorded to the agencies expertise and special knowledge. *Independent*

School District No. 192 v. Minnesota Department of Education, 742 N.W.2d 713, 719 (Minn. Ct. App. 2008).

The interpretation of a statute is a legal conclusion, a question of law, revisable de novo. *Education Minnesota – Chisholm v. Independent School District No. 695*, 662 N.W.2d 139, 143 (Minn. 2003). In accord, *Special School District No. 1 v. E.N.*, 620 N.W.2d 65, 68 (Minn. Ct. App. 2000); *Glazier v. Independent School District No. 876*, 558 N.W.2d 763, 766 (Minn. Ct. App. 1997). If the statutory language in question is unambiguous courts apply the plain meaning.[6] *Independent School District No. 192*, 742 N.W.2d at 719. Minn. Stat. § 122A.41, Subd. 1(c) is hardly unambiguous as applied to this case. A statute is ambiguous if subject to more than one reasonable interpretation. *Education Minnesota – Chisholm*, 662 N.W.2d at 143. When other interpretations of statute may be possible or the statutory language is doubtful, "considerable weight", *Lund v. Minnesota State Colleges and Universities*, 615 N.W.2d 420, 424 (Minn. Ct. App. 2000), or "great weight", *Mammenga v. Department of Human Services*, 442 N.W.2d 786, 792 (Minn. 1989) is accorded and given.

As a general proposition of statutory construction, it is appropriate for a court to defer to an administrative agency's <u>reasonable practice</u> in

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[6] "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16.

interpretation of an ambiguous statute. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, rev. den.; cert. den. *Minnesota v. Martin*, 539 U.S. 957, 123 S. Ct. 2668, 156 L. Ed. 655 (2002); *In re Lyon County Landfill, Lynd, Minnesota*, 406 F.3d 981 (8th Cir. Minn. 2005); *Robinson v. Lundrigan*, 227 U.S. 173, 33 S. Ct. 255, 57 L. Ed. 468 (1913). "If an agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding' (citation omitted)." (Emphasis added). *Regions Hospital v. Shalala*, 522 U.S. 448, 457, 118 S. Ct. 909, 915, 139 L. Ed.2d 895 (1998). In *Bohm v. Independent School District No. 283, St. Louis Park*, 358 N.W.2d 146 (Minn. Ct. App. 1984) a reimbursement claim under Minnesota's Teacher Early Retirement Incentive Plan statute required statutory interpretation. In light of the fact the statute was susceptible of more than one reasonable interpretation, the court recognized practical construction of the statute by administrative officials working daily with the statute and in connection therewith the fact that the administrators of the program had reimbursed other school districts was evidence entitled to "great weight" in judicial interpretation of the statute in question. 358 N.W.2d at 149. The action challenged by Relator in this case was based upon a uniform and

longstanding practice of Respondent and the Duluth and Minneapolis School Districts. Add. 12 ¶ 14, App. 27-28 and App. 29-30.

The history of Respondent and the Duluth and Minneapolis School Districts in temporarily assigning surplus principals to provide administrative support to school building principalships is significant. As a general proposition of statutory construction, in interpreting an ambiguous statute, although general acquiescence cannot justify departure from law, uniform longstanding and continuous interpretation in the course of official action by authorities charged with the statute's administration may aid in removing doubts as to the statute's meaning, *Smiley v. Holm*, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932), is entitled to much consideration by the court, *Piper v. Willcuts*, 64 F.2d 813 (8th Cir. Minn. 1933), and will not be disturbed except for cogent reasons, *U.S. v. State of Minnesota*, 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 539 (1926). When the administrative agency's interpretation is longstanding and the statutory language is technical in nature, the agency's interpretation is entitled to "some weight", *Education Minnesota – Chisholm*, 662 N.W.2d at 143, or "some deference", *Special School District No. 1 v. E.N.*, 620 N.W.2d at 68; *Glazier*, 558 N.W.2d at 766.

Respondent's interpretation of Minn. Stat. § 122A.41, Subd. 1(c) has been uniform, uniformly consistent with the interpretation by the Duluth and Minneapolis School Districts, and longstanding with respect to all three

school districts. The statutory definition in issue in this case, as applied to Respondent, is also technical in nature. Respondent employs approximately 5900 employees. Add. 9 ¶ 6. It is a matter of public record that those 5900 employees are represented by 27 separate collective bargaining agreements. Many of Respondent's employees are a part of the City of Saint Paul civil service system pursuant to Laws 1965, c. 705, § 1, Subd. 4. Respondent operates 58 school buildings, Add. 9 ¶ 4, and many other educational programs. Respondent's employment system is complex and the operation and maintenance of that system is technical in nature. In Respondent's administration of its complex employment system, application of Relator's Teacher Tenure Act rights within that system cannot impair Respondent's right to determine policy in the administration of school affairs or transfer to teachers and courts the management, supervision and control of the Respondent's school system. *Frye*, 494 N.W.2d at 467-68.

B. Arbitrary or Unreasonable Standard of Review Analysis

The foregoing discussion of deference relates to the question of law posed by this case and whether Relator's assignment of Relator is based on an erroneous theory of law. An additional applicable standard of review is whether Respondent's assignment of Relator was arbitrary or unreasonable.

Ganyo, 311 N.W.2d at 500. If an administrative agency engages in reasoned decision making, the courts will affirm even though the court may have reached a different conclusion. *Special School District No. 1 v. E.N.*, 620 N.W.2d at 68; *Independent School District No. 192*, 742 N.W.2d at 719. A determination is reasonable when the stated reasons for the decision is legally sufficient and has a factual basis. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13 (Minn. Ct. App. 2003). Respondent's decision herein challenged is legally sufficient in the context of application of an ambiguous statute and administrative agencies' past interpretation of that ambiguous statute. Respondent's decision herein challenged has a factual basis which assigns to Relator the curriculum and instruction duties she sought, App. 1 and Add. 6, while using the job title of "Administrator" rather than "Assistant Principal," App. 3 and Add. 7. Respondent's decision herein challenged was not arbitrary. A school board's action is arbitrary and capricious only if there is no rational basis for its decision or the decision is motivated by bad faith or ill-will. *S.K. v. Anoka-Hennepin Independent School District No. 11*, 399 F. Supp.2d 963 (D. Minn. 2005). Relator does not allege bad faith or ill-will. The basis for Relator's decision herein challenged has a rational basis – the duties specifically assigned Relator by Respondent's Superintendent, Add. 6 accord Relator with what she sought on June 1, 2010, App. 1, but for the title of Principal on

Special Assignment or Co-Principal, and consistent with Respondent's Superintendent's consideration of the best interests of Respondent's school system.

C. Substantial Evidence in the Record Standard of Review Analysis

The third and final standard of review here applicable is whether Respondent's decision herein challenged is supported by substantial evidence in the record. *Ganyo*, 311 N.W.2d at 500. "When deciding whether to hire or to terminate a teacher, a board of education is acting in an administrative capacity." *Whaley*, 325 N.W.2d at 130. Relator's alleged demotion is, at most, subject to the same test as hiring and firing. "Considerable judicial deference" should be extended to school boards acting in an administrative capacity. *Graham*, 1989 WL 94450. In both *Whaley* and *Graham* the court applied the substantial evidence test. The substantial evidence test is whether the relevant evidence in view of the entire record might be determined acceptable by a reasonable person to support the conclusion. Substantial evidence is more than a scintilla of evidence, more than some evidence, and more than any evidence. *Independent School District No. 192*, 742 N.W.2d at 719. The substantial evidence test as applied to school boards

acting in an administrative capacity is also deferential to the administrative decision.

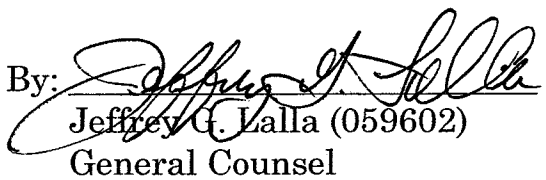
> "This limited judicial role in application of substantial evidence review stems from the recognition that considerable judicial deference should be extended to the fact finding processes of a school board acting in an administrative capacity."

Whaley, 325 N.W.2d at 130. The determination of whether there is substantial evidence in the record to support the decision herein challenged cannot ignore that the Teacher Tenure Act "was not intended to create a system which would deprive school boards of their assigned role effectively to administer and operate the public school system. (Citations omitted)." *Frye*, 494 N.W.2d at 467.

CONCLUSION

For all of the reasons above stated Respondent respectfully requests that the Court affirm the decision of Respondent.

Dated: September 16, 2010

By: 

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