

A09-1134

STATE OF MINNESOTA  
IN SUPREME COURT

Steven Emerson,

*Appellant,*

vs.

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

*Respondent.*

**BRIEF AND APPENDIX OF *AMICUS CURIAE*  
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTEREST OF THE *AMICUS CURIAE*

The Minnesota School Boards Association (“MSBA”) is a voluntary nonprofit association of public school boards in the State of Minnesota.<sup>1</sup> MSBA represents school boards throughout the state in public forums, such as the courts and the State Legislature. MSBA also provides information and services to its members and coordinates their relationships with other public and private groups. In addition, MSBA provides advice and guidance to its member school boards in a wide variety of areas, including policy matters, public finance and legal issues.

Many of the activities of MSBA on behalf of its members are explicitly sanctioned or recognized by the Legislature. *See, e.g.*, Minn. Stat. § 18B.095 (2008) (requiring the commissioner to consult with MSBA to establish and maintain a registry of school pest management coordinators and provide information to school pest management coordinators); Minn. Stat. § 121A.67, subd. 1 (2008) (calling for input from MSBA on rules governing aversive and deprivation procedures); Minn. Stat. § 123B.09, subd. 2 (2008) (requiring school board members to receive training in school finance and management developed in consultation with MSBA); Minn. Stat. § 125A.023, subd. 4 (2008) (requiring that MSBA appoint one member to the interagency committee to develop and implement an interagency intervention service system for children with disabilities); Minn. Stat. § 179A.04, subd. 3(b) (2008) (requiring MSBA, as the representative organization for Minnesota school districts,

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<sup>1</sup> Rule 129.03 Certification: No party to this proceeding authored this brief in whole or in part. Further, no person or entity other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

to provide a list of names of arbitrators to conduct teacher discharge or termination hearings to the Bureau of Mediation Services); and Minn. Stat. § 354.06, subd. 1 (2008 & supp. 2009) (requiring that one member of the board of trustees of the Teachers Retirement Association be a representative of the MSBA).

MSBA has an ongoing relationship with the public schools in the state of Minnesota. As *Amicus Curiae*, MSBA seeks to provide the perspectives of the public school system in this state that will be affected by this decision.

### **STATEMENT OF THE ISSUES, CASE AND FACTS**

MSBA concurs in the statement of the issues, the case and the facts contained in Respondent's brief.

### **ARGUMENT**

#### **I. Interpreting Minnesota Statutes Section 122A.40 to Provide Continuing Contract Rights to Licensed Individuals Who Do Not Occupy a "Teaching" Position Would Be Contrary to Legislative Intent**

Appellant asserts in this appeal that, notwithstanding the fact that he was not hired for a position that requires a teaching license from the state, he should be afforded continuing contract status based upon his employment as an activities director. He argues that the mere fact that he has a teaching license, or that the Respondent sought a licensed individual for the activities director position he occupied, should determine his status under the continuing contract law. There is a very unique history associated with enactment of the teacher continuing contract laws that is central to the Court's determination of whether Appellant should be afforded any rights under Minnesota Statutes Section 122A.40. This history and

the purpose behind the enactment of the continuing contract laws completely contradicts Appellant's arguments that his employment with Respondent is subject to the protections of the statute.

As noted by the Court of Appeals in its review of this case, the language contained in Minnesota Statutes Section 122A.40 is not ambiguous in its application solely to those individuals who occupy the status of "teacher" as determined by the licensing laws. *Emerson v. Sch. Bd. of Indep. Sch. Dist. 199*, 782 N.W.2d 844, 846 (Minn. Ct. App. 2010). The history of this legislation further evidences that continuing contract rights are intended to be applied only to those individuals acting in the capacity of a "teacher."

In this regard, prior to the enactment of the continuing contract laws, teachers in the state of Minnesota were subject to arbitrary termination under the "spoils system." See *McSherry v. City of St. Paul*, 202 Minn. 102, 106, 277 N.W. 541, 543 (1938). The purpose in enacting the continuing contract laws was to do away with the then existing chaotic conditions with respect to the termination of teachers' contracts. See *Downing v. Indep. Sch. Dist. No. 9*, 207 Minn. 292, 297, 291 N.W. 613, 615 (1940). The intent of these changes was not to provide a personal benefit or special privileges to teachers as a class or as individuals. *McSherry*, 202 Minn. at 111, 277 N.W. at 546, citing *State ex rel. Clark v. Stout*, 206 Ind. 58, 64-65, 187 N.E. 267, 269 (1933). Rather, it was enacted for the benefit and advantage of the school system. *McSherry*, 202 Minn. at 108, 277 N.W. at 544. Affording continuing employment to members of the teaching profession was meant to protect the educational interests of the state by attracting better qualified individuals to the teaching profession and

to provide the educational system with more stability, certainty and employment of competent and qualified individuals. 202 Minn. at 106, 277 N.W. at 543.

Certainly, there are a number of employees that provide services for the benefit of the educational system, such as custodians, bus drivers, paraprofessionals, coaches, accountants, human resource personnel and even lawyers. Yet, neither the clear language of the statute nor the history surrounding the enactment of the continuing contract provisions evidences any intent to extend the rights afforded under the statute to any employees or professionals other than those occupying teaching positions. In fact, these privileges have been denied to all other school district employees who have not been defined as a “teacher” for purpose of licensure. *See, e.g.,* Minn. Op. Att’y Gen. 172-C-5 (July 9, 1957) (opining that the continuing contract provisions apply only to persons named therein and not to other school district employees); *Cloud v. Indep. Sch. Dist. No. 38*, 508 N.W.2d 206 (Minn. Ct. App. 1993) (Indian education project coordinator/director is not a “teacher”); *Stang v. Indep. Sch. Dist. No. 191*, 256 N.W.2d 82 (Minn. 1977) (high school basketball coach is not a “teacher”); *Hibbing Educ. Ass’n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527 (Minn. 1985) (remedial instruction program paraprofessionals are not “teachers”). In contrast, there has been and always will be a desire to obtain the most highly qualified teachers to ensure the best instructional services to our students. *See, e.g.,* Minn. Stat. § 122A.16 (requiring schools to hire not only teachers who are licensed but also teachers who meet the requirements of being “highly qualified” through a uniform state standard of evaluation in accordance with the No Child Left Behind Act).

Had the legislature wished to correct the interpretation of this provision and include other school district employees within the protections of this statute, it could have done so. In fact, the legislature did make this distinction in including a more diverse definition of “teacher” with respect to the tenure rights afforded to teachers employed by cities of the first class. *See* Minn. Stat. § 122A.41, subd. 1(a) (defining the term “teacher” without regard to the requirement that the position be one for which a teaching license is required). The difference in the language between the continuing contract law in Minnesota Statutes Section 122A.40 and the tenure law in Minnesota Statutes Section 122A.41, as well as the long-standing and unchanged language in Minnesota Statutes Section 122A.40, subdivision 1, clearly evidences the legislature’s intent that the licensure requirement of the position, not the licensure of the individual, controls whether continuing contract status is applied.

Again, the public policy behind affording teachers, and only teachers, this protection is to ensure the stability and competency of those individuals directly responsible for providing instructional services. This purpose is not furthered by extending the continuing contract laws to other individuals employed by the public school system. For the reasons stated more fully below, affording Appellant the relief he seeks provides only a personal benefit to him and no benefit, and in fact numerous detriments, to the educational system as a whole. Thus, it would be against the public policy and purpose of the continuing contract laws to afford Appellant continuing contract status simply because he is a licensed teacher when he did not perform services in that capacity for the required time period.

**II. Interpreting Minnesota Statutes Section 122A.40 to Provide Continuing Contract Rights to Licensed Individuals Who Do Not Occupy a “Teaching” Position Would Be Detrimental to the Educational System**

**A. Granting Continuing Contract Rights to Licensed Individuals Who Do Not Occupy a “Teaching” Position Will Adversely Affect the Employment Rights and Obligations of Public School Districts and Their Ability to Effectively and Efficiently Manage the Schools**

While the overriding legislative purpose behind continuing contract laws was prevention of arbitrary demotions and discharges of teachers without regard to their ability, this purpose has always been intended to be balanced with the need to allow school boards enough latitude to administer effectively the operation of public schools. *See Hudson v. Indep. Sch. Dist. No. 77*, 258 N.W.2d 594 (Minn. 1977). Under the continuing contract laws, school districts have a number of obligations in employing teachers.

At the outset, school districts must determine that the teacher is properly qualified and ensure that the teacher is hired by a written contract. *See* Minn. Stat. § 122A.40, subd. 3 (2008). Once employed, a teacher must be evaluated during his or her probationary period by the school district. *See* Minn. Stat. § 122A.40, subd. 5 (2008). School districts are obligated to provide reasons for not renewing the probationary contract of a teacher and comply with specific procedures in notifying a teacher of the nonrenewal of his or her contract. *See* Minn. Stat. § 122A.40, subd. 3(2008). Teachers must be provided a peer review process. *See* Minn. Stat. § 122A.40, subs. 6 and 8 (2009). Teachers may only be terminated based upon the reasons outlined by statute and under the procedural requirements of the law. *See* Minn. Stat. § 122A.40, subs. 7, 9 and 13 (2008 and West 2010). If teaching positions are eliminated, teachers have the right to layoff and recall in accordance with seniority. *See*

Minn. Stat. § 122A.40, subds. 10 and 11 (2008). Specific procedures are in place to protect the employment of teachers with health conditions. *See* Minn. Stat. § 122A.40, subd. 12 (2008). A teacher's employment records also receive special treatment under the continuing contract laws. *See* Minn. Stat. § 122A.40, subd. 19 (2008).

Clearly, a school district's obligations with respect to the employment of teachers are numerous and, at times, onerous. Thus, it is imperative that school districts be able to clearly identify who is and who is not subject to the statute. The failure to properly make this determination can have a multitude of adverse consequences. The employee who should be protected by the statute may not receive the benefits of evaluation or seniority. A school district who does not afford a teacher these rights can have its decisions regarding the teacher's employment overturned, often after a very expensive and time-consuming process. Where an individual is wrongly afforded continuing contract status, the rights of other teachers may be adversely affected, as discussed below.

A school district's ability to comply with the continuing contract laws is dependent upon its ability to determine who is and who isn't a teacher subject to these laws. A mistake in this area, as is alleged in this case, leads to grievances and litigation. These disputes can be both time consuming and costly, which can detrimentally impact a school district's resources and ability to provide educational services. Yet, if the Court were to adopt Appellant's position as to how a teacher is defined, school districts would be at a great disadvantage in making this determination, leading to a greater expenditure of scarce educational resources of time and money.

Presently, school districts rely upon the clear and unambiguous language of the statute as well as a long line of precedent establishing that continuing contract rights should be decided according to whether or not the position occupied by the individual is a “teaching position” requiring licensure by the state. Thus, it is relatively simple for a school district to make a determination as to the application of the continuing contract provisions as state law and the rules of the Board of Teaching or Board of Administrators spell out which positions do or do not require a license. *See, e.g.*, Minn. Stat. § 122A.15 (2008) (defining the terms “teacher” and “supervisory personnel” for the purpose of licensure).

If, however, Appellant’s position were adopted in this matter, school districts would be required to take a more investigatory role and weigh various factors in deciding if an employee is or is not a “teacher” for purposes of applying continuing contract rights. For example, Appellant argues that he is entitled to continuing contract status not because of the position in which he was employed but because of the license he holds. Thus, under Appellant’s theory, school districts would be required investigate whether each and every employee it employs has a teaching license. This investigation would be a never-ending process as employees may obtain their license not only before they are hired but also after their hire, requiring continuous review of each employee’s license status by school districts.

Not only would such an investigation require an expenditure of time and resources, under this theory, school districts may become unwittingly subjected to the continuing contract laws. An employee may be hired as a paraprofessional but attend school and later obtain a teaching license. While continuing his or her employment as a paraprofessional, the

employee later may obtain continuing contract rights based solely on his or her independent quest to obtain a teaching license. In this situation, a school district has only two choices. The first option is to terminate a valued paraprofessional to avoid the implications of the continuing contract laws. The second option is to continue to employ the paraprofessional but afford this employee all rights referenced above that accompany continuing contract status. The result is an expenditure of resources for a position that was never intended to be encompassed by the continuing contract laws.

Another responsibility Appellant would impose upon school districts under his theory is a requirement that school districts examine their hiring practices and make a factual finding as to whether or not a teacher license is a requirement of the position. Appellant argues that he falls under the continuing contract laws not because the state required his position to be licensed but because the school district required the position to be licensed. A determination as to the requirement of such licensure is not a black and white decision, as is evidenced by the dispute of the parties as to whether or not a teaching license was required, or simply desirable, for the position at issue in this case.

The greater burden with respect to Appellant's theory, however, rests upon school districts that subsequently hire an individual from a school district that required licensure for an unlicensed position. In this regard, Minnesota Statutes Section 122A.40, subdivision 5 provides that the first three consecutive years of a teacher's teaching experience in Minnesota in a single district is deemed to be a probationary period. After the completion of this probationary period in one district, the probationary period in each subsequent district in

which the teacher is thereafter employed is one year. *See* Minn. Stat. § 122A.40, subd. 5 (2008). Thus, each hiring school district would be required to make a factual inquiry as to whether an employee's former position in another school district constituted a "teaching" position when it determines the applicable new probationary period.

For example, in this instance, under Appellant's theory, he gained continuing contract status with Respondent when he was employed for a fourth year as an interim principal. If Appellant had applied to another school district upon the termination of his employment with Respondent, it would not be clear to the new school district that he had satisfied this three-year probationary status with Respondent. As set forth above, school districts rely not only upon the fact that an individual has a teaching license but upon whether he or she occupied the position of a "teacher" for the required probationary period. Appellant does not dispute that the position of activities director does not require a teaching license. A hiring school district would view Appellant's employment history as an activities director and would not have any reason to believe that he had attained continuing contract status prior to his hire. Thus, the hiring school district would assume that Appellant would be subject to a three-year probationary period upon his employment.

Yet, under Appellant's theory that his position required a license, the hiring school district could not rely upon the licensing provisions in determining continuing contract status but would have to conduct a factual investigation as to the terms of his former employment as an activities director. The hiring school district would have to have evidence of the job posting and/or job application of the former school, the employee's contract with the former

school, the duties of the position held by the employee, etc. Clearly, imposing such requirements would be onerous, time consuming and subject to factual dispute as to what does or does not constitute a “teaching position.”

As this Court has stated, the ability to determine whether a person is or is not a teacher for purposes of the continuing contract statutes should be determinable as a matter of law, irrespective of any evidentiary hearing. *See Cloud*, 508 N.W.2d at 209 (Minn. Ct. App. 1993). School districts should have the ability to easily determine whether or not an employee is subject to the continuing contract laws without making an extensive factual investigation into an employee’s employment history. To hold otherwise places school districts at a severe disadvantage in making important employment decisions.

Aside from ensuring that the proper employment status is afforded to employees, school districts are placed at a further disadvantage if they are required to afford a licensed individual continuing contract status despite their occupation of a licensed teaching position. As noted above, the continuing contract laws also provide teachers with the right to seniority. The intent of the seniority system is to protect the stability of the educational system by retaining those teachers with more years of experience. *See Strand v. Special Sch. Dist. No. 1*, 361 N.W.2d 69, 73 (Minn. Ct. App. 1984), *aff’d in part, rev’d in part on other grounds*, 392 N.W.2d 881 (Minn. 1986), *citing Welsko v. Sch. Bd.*, 383 Pa. 390, 392, 119 A.2d 43, 44 (1956), *superseded by statute*, 24 Pa. Cons. Stat. § 1125.1, *as recognized in Duncan v. Rochester Area Sch. Bd.*, 524 Pa. 254, 571 A.2d 365 (1990).

The purpose of providing stability to the educational system is not served if an individual who has never occupied a teaching position is afforded the job over an individual who has taught in the classroom. In this regard, under Appellant's theory, if Respondent had initiated layoffs and he had attained continuing contract status as an activities director, Respondent would have been required to discontinue the employment of a less senior classroom teacher and place Respondent in that position. This would be true whether or not Appellant had any experience teaching in the classroom or even if he had such experience and a significant time period had elapsed since he occupied such a position. Respondent would be required to place Appellant in the classroom without any opportunity to even observe his ability to perform in a teaching position.

Appellant's theory that he has continuing contract status as a "teacher" further complicates the collective bargaining obligations of school districts. In this regard, the Public Employment Labor Relations Act ("PELRA") provides that school districts are obligated to meet and negotiate with an appropriate bargaining unit. *See* Minn. Stat. § 179A.01(2) (2008). For school districts, an appropriate unit "means all the teachers in the district." Minn. Stat. § 179A.03, subd. 2 (2008). "Teacher" is defined, in relevant part, as any public employee \* \* \* employed by a school district \* \* \* in a position for which the person must be licensed by the Board of Teaching or the Commissioner of Education. . . ." Minn. Stat. § 179A.03, subd. 18 (2008).

Accordingly, if Appellant were correct in his argument that his mere licensure as a teacher classifies him as a "teacher" under the continuing contract law, it would appear that

he also should be classified as a teacher under PELRA as well. Yet, PELRA, similar to the continuing contract law, specifically requires that to be included in the teachers' bargaining unit, the individual must occupy a position requiring licensure. *See* Minn. Stat. § 179A.03, subd. 18 (2008). The individual's possession of a license or job duties of the position is irrelevant in determining the person's inclusion in the teachers' bargaining unit. *See Hibbing*, 369 N.W.2d at 529. Rather, it is the position, not the status or characteristics of the person occupying the position, that determines inclusion in a bargaining unit. *See, e.g., Education Minnesota-Intermediate Sch. Dist. No. 917 v. Intermediate Sch. Dist. No. 917*, 660 N.W.2d 467, 471 (Minn. Ct. App. 2003). Thus, if the Court were to rule in Appellant's favor, there would be an inconsistency between the application of the continuing contract laws and bargaining requirements of PELRA that would be difficult to reconcile.

As these examples evidence, affording an individual continuing contract status simply because the individual possesses a teaching license or occupies a position for which a school district desires licensure creates numerous burdens upon school districts both financially and administratively. The educational system derives no benefit from such an interpretation. As Respondent explains in its Brief, Appellant's claims are unsupported by the law. Appellant's position further would create bad public policy.

**B. Granting Continuing Contract Rights to Individuals Who Do Not Occupy a "Teaching" Position Will Adversely Affect the Rights of Individuals Who Presently Occupy Teaching Positions, Further Burdening the Educational System**

In asserting his rights under the continuing contract laws, Appellant does not address how his interpretation of the law would affect those individuals who clearly are defined as

teachers under Minnesota Statutes Section 122A.40. Education Minnesota also is filing a brief of *amicus curiae*, in support of the position of Respondent. As Education Minnesota represents Minnesota member teachers, MSBA assumes that Education Minnesota will address the effect of this decision on the rights of teachers, both individually and as a group, if Appellant were to prevail. However, because Appellant's rights also affect the rights of teachers who also are employees of school districts, this issue has a resounding effect upon school district employment practices as a whole. Thus, we will briefly comment on this issue to the extent it affects Minnesota school districts.

As referenced above, the continuing contract laws provide teachers with the right to be recalled to a position, the right of realignment and the right to "bump" into a position based upon a teacher's seniority status within a school district. As in this case, when an individual does not occupy a "teaching position," that person most often is not placed on a seniority list. Accordingly, there is no determination of the seniority status of that person relative to the seniority rights of other employees. Yet, teachers who are on that list have a continued right to challenge their placement on a seniority list relative to that of other employees. *See Urdahl v. Indep. Sch. Dist. No. 181*, 396 N.W.2d 244 (Minn. Ct. App. 1986). Similarly, this Court has held that a school district can be liable for misrepresenting the seniority status of an teacher, even if it was done so in good faith. *See Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425 (Minn. Ct. App. 1985).

Accordingly, school districts are placed in a precarious position if Appellant's arguments were accepted by the Court. Licensed individuals in non-teaching positions will

claim that they are entitled to continuing contract status. Individuals in licensed teaching positions will claim that the non-teachers should not attain these rights and usurp their seniority or right to continued employment. School districts would be placed in the middle of a dispute between employees with adverse interests to each other. Again, Appellant's position in this case benefits no one but himself and, instead, instigates a potential floodgate of claims which would tax the resources of the educational system as a whole.

### **III. Limiting the Application of Continuing Contract Status Does Not Allow School Districts to Deny Individuals Continuing Contract Status by Controlling Job Titles**

In his Brief, Appellant argues that the decision of the Court of Appeals should be reversed as the appellate court improperly relied upon his job title in determining his continuing contract rights instead of reviewing his job duties. In asserting this argument, Appellant proposes that because school districts have complete control over the job titles given to employees, under the ruling of the Court of Appeals school districts can use job titles as a means of denying licensed personnel their statutory rights. (Appellant's Brief, p. 13.) This argument is baseless and paints an inaccurate picture of the rights and obligations of school districts.

As noted in Respondent's Brief, school districts do not have the authority to remove licensing requirements from positions by simply re-titling them as something other than a teaching position. (Respondent's Brief, p. 12). School districts are obligated by statute to hire only qualified licensed teachers to perform teaching duties or face dire consequences. *See* Minn. Stat. § 122A.40, subd. 3 (2008) (contracts for teaching or supervision of teaching can

be made only with qualified teachers); Minn. Stat. § 127A.42, subd. 2 (2008) (the commissioner of education may withhold state aid to a school district that authorizes or permits the employment of a teacher without a valid teaching license); Minn. Stat. § 127A.43 (2008) (school districts face a reduction in state aid for employment of nonlicensed teacher). If there is a concern that a school district is employing an individual in a position for which the person should be licensed, the Board of Teaching and/or the Board of Education have the jurisdiction and expertise to address this issue. *See Hibbing*, 369 N.W.2d at 530.

Clearly, there are serious implications to a school district that attempts to usurp the teacher continuing contract laws by hiring unlicensed individuals in positions that should be licensed. School districts can lose a significant amount of state aid if they attempt to hire someone in a teaching position without the proper licensure. School districts would lose far more financially in paying such penalties for hiring unlicensed teachers than would be gained in averting the requirements of the continuing contract statutes. Thus, there is no incentive for school districts to take such action, as is insinuated by Appellant.

Moreover, Appellant's assertion that licensing provisions can be annulled by changing the title of a position is similarly without merit. Whether or not a position is required to be licensed is not dependent upon the title of the position. Rather a license will be required when the duties of the position encompass those for which a license is required. *See, e.g., Morgan v. Indep. Sch. Dist. No. 482*, Co. No. A08-0692, 2009 WL 910993 at \*3 (Minn. Ct. App. 2009) (unpublished) (*see App. A1 to A4*). As a school district does not have the authority to manipulate a position to avoid providing a person who is occupying a teaching

position with continuing contract rights, there would be no basis for providing continuing contract status to an individual to avoid such a situation.

## CONCLUSION

*Amicus Curiae* MSBA respectfully requests that this Court conclude that, as a matter of law, Appellant is not entitled to continuing contract rights under Minnesota Statutes Section 122A.40 as he did not complete the required probationary period in a position for which a teaching license is required by the state. The intended purpose of the law, to enhance the educational system by providing stable and quality educational services, will not be furthered if Appellant were to prevail. The intent of the law is not to provide individuals with added employment rights based upon licensure when the license they hold is not applicable to the position for which they were hired. In contrast, the opposite effect will be achieved if Appellant's arguments were accepted. School districts will be faced with added administrative and financial burdens, and the very individuals sought to be protected, licensed classroom teachers, will be forced to compete against non-classroom teachers for jobs. There clearly is no basis in the law, nor will it serve the public interest, to expand the definition of "teacher" as is requested by Appellant.

For all of the above reasons as well as those cited by Respondent, MSBA respectfully requests that the Court affirm the decision of the Minnesota Court of Appeals and Respondent School Board of Independent School District 199, Inver Grove Heights, Minnesota.

Respectfully submitted,

**KNUTSON, FLYNN & DEANS, P.A.**

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