

NO. A09-1134

State of Minnesota
In Supreme Court

Steven Emerson,

Appellant,

vs.

School Board of Independent School District No. 199,
Inver Grove Heights, Minnesota,

Respondent.

RESPONDENT'S BRIEF, ADDENDUM, AND APPENDIX

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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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LEGAL ISSUES

1. Was Appellant a “teacher” within the meaning of Minn. Stat. § 122A.40 when he was the Activities Director for Independent School District No. 199?

The Court of Appeals held that Appellant was not a “teacher” when he served as the Activities Director for the District, and was thus not entitled to continuing contract rights for the time that he served as the Activities Director.

Most Apposite Cases

Emerson v. School Board of Independent School District 199, 782 N.W.2d 844 (Minn. App. 2010)(Respondent’s Addendum, p. 1).

Cloud v. Independent School District No. 38, 508 N.W. 2d 206 (Minn. App. 1993).

Morgan v. I.S.D. 482, A08-0692, 2009 WL 910993 (Minn. App. April 7, 2009) (unpublished) (Respondent’s Appendix p. 28).

Board of Education of City of Minneapolis v. Sand, 227 Minn. 202, 34 N.W.2d 689 (Minn. 1948).

STATEMENT OF THE CASE AND FACTS

Respondent adopts and hereby incorporates the stipulated statement of the facts agreed to by the Parties, which is contained in the Administrative Record. (Respondent's Appendix ("App."), page 1).

Appellant Dr. Steven Emerson applied for the position of Activities Director with Independent School District No. 199 ("District") in March 2005, and was hired on May 3, 2005 for the position. (Administrative Record ("Record") Exhibit 7)(App. p. 5). The District requested that applicants for the Activities Director position "hold a current Minnesota principal license or be in the process of obtaining administrative licensure." (Record Ex. 4)(App. p. 6). The parties stipulated that no State rules or department, including the Minnesota Department of Education ("MDE"), have ever required school district activities or athletics directors to obtain a license in order to hold that position. (Stipulated Record (App. p. 1); *see also* Record Ex. 19 (App. p. 22)(MDE codification of athletic/activities directors as "School Business Official, or Administrative Positions Not Requiring Licensure"); Ex. 20 (App. p. 24)(Teachers Retirement Association ("TRA") manual outlining that Athletic directors are not TRA members)). Appellant accepted the Activities Director position by signing a two-year fixed term contract for 2005-2007, and a one-year fixed term contract for 2007-2008 with the District. (Record Exs. 8, 10)(App. pp. 9, 14). The contracts contained no language or provisions suggesting that the position was subject to Minnesota Statutes Section 122A.40 or that it was a continuing contract position. (*Id.*) The MDE did not require Appellant to obtain licensure in order to be the Activities Director for the District. (Stipulated Record)(App. p. 1).

The District posted the Interim Middle School Principal position for the 2008-2009 school year after a last minute resignation with the intention of posting the full position again in March 2009, when there was more time to interview and select candidates. (Stipulated Record)(App. p. 1). Appellant applied for and was hired as the Interim Middle School Principal on August 11, 2008. (Record Ex. 13)(App. p. 19). The principal position meets the definition of a teacher under Minnesota Statutes Section 122A.40, Subdivision 1. (Record Exs. 16-17)(App. pp. 20-21). Since Appellant attained continuing contract rights under Minnesota Statutes Section 122A.40 at a previous school district, he had a one year probationary period with the District. Minn. Stat. §122A.40, subd. 5.

On April 27, 2009, the School Board unanimously adopted a resolution to non-renew Appellant's probationary employment with the District as the Interim Middle School Principal effective June 30, 2009. (Record Exs. 16)(App. p. 20). The interim position was only available for the 2008-2009 school year. (Record Ex. 17)(App. p. 21). Appellant requested a hearing pursuant to Minnesota Statutes Section 122A.40, which was denied by the District, on the grounds that Appellant was not entitled to a hearing under the statute because he was a probationary employee. The parties stipulated that the District followed all relevant timelines and procedures for the non-renewal of Appellant's contract. (Stipulated Record)(App. p. 1). Appellant filed a writ of certiorari to challenge the School Board's decision to non-renew his employment contract on June 23, 2009.

The Court of Appeals upheld the decision of the District to terminate Appellant's probationary employment in a published decision on June 1, 2010. *Emerson v. Sch. Bd.*

of *Indep. Sch. Dist. 199*, 782 N.W.2d 844 (Minn. App. 2010) (Respondent's Addendum ("Add."), page 1). The Court held that the Appellant had not met the statutory definition of a "teacher" under Minnesota Statutes Section 122A.40 during his time as the District's Activities Director because the MDE did not require a license for the Activities Director position, and he was thus not entitled to continuing contract rights for his three years serving as the Activities Director. (Add. p. 1).

The Minnesota Supreme Court then granted Appellant's petition for review on September 21, 2010. (Appellant's Addendum, page 8).

STANDARD OF REVIEW

The Court's review in this case is limited to inquiring whether the District's termination of Appellant's probationary employment was fraudulent, arbitrary, unreasonable, not supported by substantial evidence, not within the School Board's jurisdiction, or based on an erroneous theory of law. *Cloud v. Indep. Sch. Dist. 38*, 508 N.W.2d 206, 209 (Minn. App. 1993); *Dokmo v. Indep. Sch. Dist. 11*, 459 N.W.2d 671, 675 (Minn. 1990). The Court must determine whether there is substantial evidence, considering the record as a whole, to sustain the School Board's decision. *See Ray v. Minneapolis Bd. of Educ.*, 295 Minn. 13, 14, 202 N.W.2d 375, 377 (1972). Substantial evidence is defined as "evidence upon which reasonable minds can rely in arriving at a conclusion." *Destache v. Indep. Sch. Dist. 832*, 434 N.W.2d 270, 271 (Minn. App. 1989) (citation omitted).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT APPELLANT WAS NOT A TEACHER WITHIN THE MEANING OF MINNESOTA STATUTES SECTION 122A.40 DURING HIS EMPLOYMENT AS AN ACTIVITIES DIRECTOR.

The Court of Appeals correctly ruled that Appellant was not a “teacher” pursuant to Minnesota Statutes Section 122A.40 during his first three years of employment with the District as an activities director. The District only employed Appellant in a “teacher” position, for which a license was required by the MDE, during the 2008-2009 school year when Appellant served as an interim principal. Appellant was not entitled to continuing contract rights when the District non-renewed his interim principal contract because he was a probationary employee. The one year of probationary employment in a “teacher” position allowed the District “an opportunity to evaluate the skills of the teacher before committing itself to a continuing contract.” *Emanuel v. Indep. Sch. Dist.* 273, 615 N.W.2d 415, 418 (Minn. App. 2000).

Probationary “teachers” do not have the right to notice and an opportunity for a hearing prior to the termination of their employment and do not have bumping and reinstatement rights, based on licensure and seniority, in the event their employment is terminated due to the discontinuance of their position. *See* Minn. Stat. § 122A.40, subd. 7.

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

The District Activities Director position does not meet the statutory definition of “teacher” included in Minnesota Statutes Section 122A.40. This statute outlines a teacher’s continuing contract rights in cities not of the first class. In order to qualify for continuing contract rights, a school district employee must be a “teacher” within the meaning of the statute, which states in pertinent part:

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

Minn. Stat. § 122A.40, subd. 1.

Since the enactment of the continuing contract law, courts have consistently held that MDE licensure requirements determine whether an employee is a “teacher” under Section 122A.40. In *Cloud*, 508 N.W.2d at 206, the court ruled that a project coordinator did not meet the statutory definition of a teacher and was not entitled to the protections of the statute because “she was not required by the state department to hold a license” for her position. *Id.* at 210. The coordinator argued that the fact that she had a teaching license meant that she was a teacher under the continuing contract law, but the court stated that the fact that she held a license did not make her a teacher unless she was required to hold a license for the position. *Id.* at 212. The court held that the statutory language stating that a teacher is “required to hold a license” means that an employee meets the statutory definition of teacher only if the state department that is responsible for

determining who must be licensed requires a license to perform the functions of the position. *Id.*

In *Stang v. Independent School District No. 191*, 256 N.W.2d 82 (Minn. 1977), the Court declined to provide continuing contract status to a basketball coach. The coach argued that he was a “teacher” under Minnesota Statutes Section 125.12, Subdivision 1 (the statutory definition of teacher in that case was identical to and later renumbered as Minnesota Statute Section 122A.40, subd. 1) because certification was required for all head coaches. *Id.* at 84. The Court determined that the fact that a coach must have a coaching certification did not satisfy the statutory requirement that a “teacher” must be licensed. *Id.* The Court held that coaches are not included in the statutory definition of “teacher” under the continuing contract statute, and the Appellant in that case had no continuing contract rights. *Id.* The Court went on to state that “[t]he legislature could have explicitly included coaches in the definition of ‘teacher,’ and we feel that such a revolutionary step should only be considered by that body.” *Id.*

In *Board of Education of City of Minneapolis v. Sand*, 227 Minn. 202, 211, 34 N.W.2d 689, 695 (1948), an administrative assistant to the superintendent claimed that he was a “teacher” within the meaning of the teacher tenure law and was thus entitled to tenure rights.¹ The Court held that the administrative assistant was not a teacher for the purposes of the teacher tenure act because the position of administrative assistant was not

¹ This case fell under the teacher tenure statute, now codified at Minnesota Statutes Section 122A.41, which applies only to cities of the first class. The definition of “teacher” for cities of the first class is different than the definition of “teacher” for Independent School Districts such as Respondent.

included in the statutory definition of a “teacher.” The Court provided the following rationale for its holding: “[s]chool boards and school districts only have such powers as are granted by statute. Teacher tenure is the creature of statute, and no one can have a valid claim to tenure except as authorized by statute.” *Id.*

The courts have established precedent that continuing contract rights can only be granted by statute, and employees only have a valid claim to continuing contract rights where specifically authorized by statute. *See Washington v. Indep. Sch. Dist. 625*, 590 N.W. 2d 655, 658 (Minn. App. 1999) (rejecting a teacher’s claim that tenure achieved in Minneapolis transferred with him when he went to teach in St. Paul); *see also Haddad v. Indep. Sch. Dist. 272*, C3-98-1128, 1999 WL 107738, *2 (Minn. App. Mar. 2, 1999) (unpublished) (App. p. 36) (rejecting claim that teacher acquired tenure rights because of alleged statements made by school administrators regarding how much longer she had to teach to achieve tenure); *Herdegen v. Indep. Sch. Dist. 482*, C6-00-783, 2000 WL 1778301 (Minn. App. Nov. 21, 2000) (unpublished)(App. p. 38) (rejecting claim that references in two contracts and administrative policies entitled an unlicensed administrator to the protections of the continuing contract law); *Wilson v. Indep. Sch. Dist. 720*, A08-1454, 2009 WL 1920051, *3-4 (Minn. App. July 7, 2009) (unpublished)(App. p. 41) (holding that the employee in that case had not been a teacher under Minnesota Statutes Section 122A.40 and thus had not gained continuing contract rights while in a previous position because the MDE did not require her to be licensed for that previous position); *Morgan v. Indep. Sch. Dist. 482*, A08-0692, 2009 WL 910993, *3 (Minn. App. April 7, 2009) (unpublished)(App. p. 28) (holding that “employees are only

entitled to a continuing contract if they satisfy the definition of teacher found in Minn. Stat. § 122A.40, subd. 1.”).

It is thus well-settled law that if an employee’s position with a school district does not meet the statutory definition of “teacher,” then that employee is not eligible for continuing contract rights. *See Cloud*, 508 N.W.2d at 209; *see also Stang*, 256 N.W.2d at 84 (Minn. 1977). Similarly, an individual is a “teacher” within the meaning of the statute only if the MDE requires him or her to hold a license for his or her position. *See Cloud*, 508 N.W.2d at 210; *see also Wilson*, 2009 WL 1920051 at *3 (App. p. 41).

The Minnesota Court of Appeals in this case relied on this long history of cases interpreting the continuing contract statute when it ruled that Appellant did not meet the statutory definition of a “teacher” during his time as the Activities Director. *Emerson*, 782 N.W.2d at 847 (Add. p. 1). That court specifically held that the “continuing-contract statute definition [of teacher] unambiguously hinges on state licensure requirements.” *Id.* at 846. It further stated that “[f]ollowing the unambiguous language of section 122A.40, the relevant caselaw holds that Minnesota Department of Education (MDE) licensure requirements determine ‘teacher’ status under the continuing-contract statute,” specifically finding that Appellant would be a considered a teacher under the statute “only if MDE requires that an activities director be licensed.” *Id.* at 846-847.

The decision of the Court of Appeals must be upheld because the court correctly determined that Appellant was not a “teacher” as defined by statute. While Appellant argues that his position of Activities Director was that of a statutory “teacher,” it is undisputed that no state department, including the MDE, requires an activities or athletics

director to hold a license. *See* Stipulated Record (App. p. 1). There are also no state rules requiring the licensure of Activities Directors. As discussed in *Cloud*, the state department must require a license for a position in order for it to meet the statutory definition of teacher. Since the MDE does not require activities or athletics directors to have a license, the position of District Activities Director is not that of a teacher entitled to continuing contract rights.

Appellant also argues that the Court of Appeals in this case relied upon “faulty analysis” from the *Cloud* court regarding *Hibbing Education Association v. Public Employment Relations Board*, 369 N.W.2d 527 (Minn. 1985). However, Appellant’s argument is based on a misreading of both the *Emerson* opinion of the Court of Appeals and *Cloud*.

The *Hibbing* case was not cited by *Cloud* to support the proposition that the statutory definition of “teacher” was limited to persons whose jobs require that they be licensed by the state, as argued by Appellant. *See Cloud*, 508 N.W.2d at 210. Instead, the *Cloud* court stated that:

Even assuming relator was teaching in the classroom, as she asserts, she was not required by the state department to hold a license. Because relator was not “required to hold a license,” she does not fit the statutory definition of a teacher. *See* Minn. Stat. § 125.12, subd. 1; *see also Krug v. Independent Sch. Dist. No. 16*, 293 N.W.2d 26, 30 (Minn. 1980) (because a school nurse was required to hold a license, she was a teacher pursuant to Minn. Stat. 125.12, subd. 1).

Cloud, 508 N.W.2d at 210.

Appellant’s argument is incorrect because *Cloud* did not rely on the *Hibbing* case

when interpreting Minnesota Statutes Section 125.12, Subdivision 1, and the Court of Appeals did not rely on *Hibbing* when interpreting Minnesota Statutes Section 122A.40, Subdivision 1. The *Cloud* court discussed *Hibbing* in dicta later in the opinion in response to the Respondent's argument that *Hibbing* required the court to review relator's job duties in determining whether she was a teacher under the statute. *Id.* at 210-211 (the *Hibbing* case dealt with the question of whether paraprofessionals were teachers as defined by the Public Employment Labor Relations Act ("PELRA")). 369 N.W.2d at 529. However, the discussion of *Hibbing* occurred after the interpretation of Minnesota Statutes Section 125.12, Subdivision 1, cited above.

In *Cloud*, the Court of Appeals merely mentioned the *Hibbing* case and did not rely on the *Hibbing* court's review of the licensure requirement under PELRA when interpreting Minnesota Statutes Section 122A.40, Subdivision 1. *Emerson*, 782 N.W.2d at 846, n.1. The *Emerson* Court of Appeals' reliance on *Cloud* was proper, and was based on the *Cloud* court's interpretation of the continuing contract statute. Appellant's argument that *Cloud* and the decision of the Court of Appeals were based on "faulty analysis" is based on Appellant's misreading of both *Cloud* and the Court of Appeals decision in *Emerson*.

After arguing that the *Cloud* court had improperly relied on the *Hibbing* decision, Appellant cites the *Hibbing* court's analysis of the PELRA definition of a teacher as supportive of his arguments. However, as Appellant clearly points out, the *Hibbing* court was reviewing the PELRA definition of teacher, not the definition of teacher contained in the continuing contract statute.

Appellant also argues that the Court of Appeals improperly relied upon his job title instead of reviewing his job duties. Appellant asserts that school districts could abuse their power by removing continuing contract rights from employees simply by giving positions new job titles that are not licensed by the MDE. However, as stated when this general policy argument was raised in *Hibbing*, “such complaints should be directed to the board of teaching or the board of education. These state agencies possess both the jurisdiction and the expertise to decide which positions should be held only by licensed teachers.” 369 N.W.2d at 530.

II. APPELLANT’S APPLICATION OF THE RULE OF LAST ANTECEDENT WOULD LEAD TO ABSURD RESULTS.

Without citing a single case in support of his interpretation of Minnesota Statutes Section 122A.40, Subdivision 1, Appellant seeks to overturn well-established caselaw based upon the application of the rule of last antecedent. However, the rule of last antecedent does not apply to this statute because its plain meaning is clear and Appellant’s interpretation would lead to absurd results.

When the meaning of a statute is clear, that meaning must be given effect. Minn. Stat. § 645.16. The last antecedent rule is “not an absolute and can assuredly be overcome by other indicia of meaning.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). “Over the years, such indicia have counseled [courts] against invoking the rule (often unanimously) at least as many times as [courts] have relied on it.” *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 355 (2005) (Souter, J., dissenting). The rule will not be followed where it would create superfluous language in a statute or

lead to an unlikely meaning. *U.S. v. Hayes*, 129 S.Ct. 1079, 1086 (2009).

The statute identifies the following individuals as “teachers” for the purposes of continuing contract rights: “A principal, supervisor, and classroom teacher and any other professional employee required to hold a license.” Minn. Stat. § 122A.40, subd. 1. Appellant argues that principals, supervisors, and potentially teachers do not need to be licensed in order to be entitled to continuing contract rights based on the application of the rule because of the lack of a comma between “classroom teacher” and “any other professional employees.”

However, the plain meaning of the statute holds that to be entitled to the protections of the continuing contract statute, an employee must be required by the state department to be licensed.² The lack of a comma before “other professional employee required to hold a license” does not mean that principals, supervisors, and classroom teachers do not need a license in order to qualify for continuing contract rights. Consistent with the plain meaning of the statute, licensure is required for principals, teachers and certain supervisory personnel. *See* Minn. R. 3512.0200, subp. 1, Minn. R. 3512.0300, subd. 1, and Minn. R. 3512.0700, subd. 1 (requiring principals to be licensed); *see also* Minn. Stat. § 120A.22, subd. 10, Minn. Stat. § 122A.15, subd. 2, Minn. Stat. § 122A.22 (requiring teachers to have a license or meet one of the listed

² The “state department” language has been interpreted by Minnesota courts to refer to the Minnesota Department of Education, although this term is not defined in statute. This term predates the creation of the Board of School Administrators and Board of Teaching and logically encompasses all three bodies. The parties stipulated that “the licensure requirements for school administrators are specified by the Minnesota Department of Education.” App. p. 1.

exceptions to licensure); Minn. Stat. § 122A.15, subd. 2 (requiring supervisors to be licensed). These statutes are consistent with an interpretation of Minnesota statute section 122A.40 which requires a “teacher” to be licensed by the MDE in order to have continuing contract rights.

Contrasting Appellant’s drastic argument with the plain meaning of the statute shows the problems with Appellant’s interpretation of the statute. If the Court accepts Appellant’s suggested interpretation, it would lead to the absurd result of making non-licensed principals and teachers entitled to continuing contract rights, even though other Minnesota statutes and rules require licensure in order to be qualified for these positions. Accepting Appellant’s argument would mean that unqualified teachers or principals could receive continuing contract rights. Further, since licensure would no longer be required in order to be considered a “teacher,” the MDE, the Board of Teaching, and the Board of School Administrators would lose their ability to effectively police licensure requirements.

The fact that teachers and principals must be licensed to have continuing contract rights has been upheld many times by Minnesota courts, and by adopting Appellant’s reasoning, the Court would overturn all those cases and create new law. Overturning the plain meaning of Minnesota Statute section 122A.40 Subdivision 1, would create a statutory conflict with other statutes and rules which require licensure for teachers, principals, and supervisors, and lead to chaos for the MDE and school districts as they

have based their entire personnel systems on the requirement that employees must be licensed in order to be entitled to continuing contract rights.³

Appellant disingenuously argues that interpreting 122A.40, subd. 1 as requiring that principals be licensed by the state department of education “makes no sense because principals are not licensed by the state department.” See App. Brief p. 9. However, this argument is inconsistent with Appellant’s stipulation of facts. Appellant has stipulated that the licensure requirements for school administrators are specified by the MDE. App. p. 1. Further, Minnesota Statutes Section 123B.147 states that “[e]ach principal assigned the responsibility for the supervision of a school building shall hold a valid license in the assigned position of supervision and administration as established by the rules of the commissioner of education.”

Further, Minnesota Statutes Section 122A.18, Subdivision 1(c), states that “[l]icenses under the jurisdiction of the Board of Teaching, the Board of School Administrators, and the commissioner of education must be issued through the licensing section of the department.” As stipulated by Appellant and indicated by various statutes, MDE establishes the licensure requirements for school administrators and the Court must disregard any arguments to the contrary.

³ In the event the Court creates a new statutory definition of “teacher” by determining that Appellant attained non-probationary continuing contract rights with the District prior to the termination of his position, the case must be remanded for a hearing before the School Board to determine his rights, if any, to reinstatement based on the Court’s new definition. See *Strege*, 2000 WL 1855070, *4 (App. p. 13) (holding that a hearing was necessary to determine the position into which the district could put a teacher who was improperly denied continuing contract rights after her position had been eliminated).

III. THE DISTRICT DID NOT REQUIRE LICENSURE FOR THE ACTIVITIES DIRECTOR POSITION OR TREAT APPELLANT AS A TEACHER.

A. Appellant Was Not Required to Hold a License in Order to be the District's Activities Director.

Unlike statutory “teachers,” Appellant was not required by the MDE to hold a license to serve in his position. The District also did not require that Appellant hold a license in order for him to be hired as the District Activities Director.

Appellant argues that the District’s requirement that the Activities Director be a licensed school principal makes the position that of a statutory “teacher.” However, the District’s job posting for the position of Activities Director stated that the qualifications for the position included that a successful candidate must “hold a current Minnesota principal license *or be in the process of obtaining administrative licensure.*” See Exhibit 4 (App. p. 6). The job posting shows that the District wanted candidates who had the education and experience associated with pursuing or obtaining principal or administrative licensure, but clearly did not require a license in order to be hired for the position.

This preference for licensure outlined in the job posting for the Activities Director position shows just how different the Activities Director position is from that of statutory teachers. A school district is subject to a potential loss of state aid for hiring non-licensed teachers. Minnesota Statutes Section 127A.42, Subdivision 2(1), states that the MDE may reduce the amount of state aid to a district if they employ “a teacher who does not hold a valid teaching license or permit in a public school.” Minnesota Statutes

Section 127A.43 states the MDE may withhold state aid in a proportion equal to the percentage of unlicensed teachers who are employed in positions for which licensure is required. School administrators are also subject to punishment for a violation of their ethical code if they hire non-licensed teachers for positions for which licensure is required. Minn. R. 5200, subp. 2(J).

However, neither the District nor MDE required licensure in order to be hired for Appellant's position, and there would be no ethical violation or potential for a loss of state aid in hiring an unlicensed individual for the Activities Director position. As such, Appellant's position was clearly different from that of a statutory "teacher."

B. The District Never Treated Appellant as a Continuing Contract "Teacher."

In addition to not requiring licensure, the District also never treated Appellant as though he was a continuing contract teacher while he was employed as the Activities Director. Appellant was never told that he was a continuing contract employee, nor was he considered a "teacher" by the District while he was the Activities Director.

A review of the contracts further shows that the District did not consider Appellant's position to be that of a "teacher." The contracts were for fixed-terms from 2005-2007 and then 2007-2008. *See* Exhibits 8, 10 (App. pp. 9, 14). Neither contract made any reference to continuing contract rights or stated that Appellant was considered a teacher or principal by the District. Neither contract made any mention of seniority rights or placement on the District's seniority list. *See Id.* The contracts indicate that neither the Appellant nor the District considered Appellant to be a continuing contract

“teacher” because the Activities Director position was for fixed terms that ended on specified dates and did not continue automatically.

C. The District Cannot Create Continuing Contract Rights.

The plain meaning of the continuing contract statute is that to be considered a teacher, the employee must be required by the MDE to hold a license. A school district must follow the law, and cannot expand the statutory definition of a teacher simply by requiring its employees to have a license.

As outlined above, the courts have repeatedly said that a school district may not confer continuing contract rights on an individual who does not meet the statutory definition of a “teacher.” *See Sand*, 227 Minn. at 211, 34 N.W.2d at 695. As stated in *Sand*, “school districts only have such powers as are granted by statute.” *Id.* The Court of Appeals in this case held that “the licensure requirement referred to in the statute equates to state regulations mandating licensure, not position qualifications set by the district. . . . To find otherwise would enable school districts to create continuing-contract rights where none exist by statute.” *Emerson*, 782 N.W.2d at 846-847 (Add. p. 1).

Appellant argues that he should be deemed to have non-probationary continuing contract rights based on the fact that the Activities Director job description listed a principal’s license or intent to obtain administrative licensure as a qualification for the position. Accepting Appellant’s argument would mean that school districts are able to confer continuing contract rights to any employee, bypassing the statute entirely, simply by requiring licensure of its employees. This would allow a school district to create

statutory rights for employees, nullify the statutory definition of a teacher, and contradict long-standing caselaw.

The fact that the position description of the Activities Director with the District expressed a preference for a principal's license does not make the position that of a "teacher" under the act. *See Krueth v. Indep. Sch. Dist.* 38, 496 N.W. 2d 829, 839 (Minn. App. 1993) (holding that such a license requirement is not determinative of whether the tenure laws apply to the position). Neither does the fact that Appellant actually held a principal's license when he was hired for the position of Activities Director with the District make him a "teacher" within the meaning of the statute. *See Cloud*, 508 N.W. 2d at 210 (holding that the employee in that case was not a teacher under statute even though she held a license from the state department). The mere procurement of a principal's license by a janitor does not transform the janitor's position into that of a principal.

The Court cannot adopt Appellant's interpretation of the statutory definition of teacher as applying to anyone whose job description includes a preference for or requires a license because it would lead to absurd results. For example, a school district would be able to transform its administrative assistants, director of human resources, business manager, coaches, food services employees, paraprofessionals, or even janitors into teachers under the statute simply by requiring a license in the job description. Accepting Appellant's argument would allow a district to create statutory rights. Such a result is clearly not within the statutory powers given to school districts.

There is also not a single case supporting Appellant's argument that a school district may independently create statutory rights for its employees. As a result, the

decision of the Court of Appeals must be affirmed because a school district may not create continuing contract rights for employees who are not entitled to such rights by statute. A school district's inclusion of licensure in a job description cannot transform an unlicensed administrative position into that of a statutory teacher.

IV. THE ACTIVITIES DIRECTOR POSITION WAS NOT A SCHOOL PRINCIPAL.

Appellant was not a principal while he was the Activities Director, and simply having a principal's license does not transform Appellant's Activities Director position into that of a principal.

Appellant incorrectly asserts that the Activities Director was considered a "principal" based on the District organizational chart. *See* Exhibit 18 (App. p. 27). The organizational chart shows that the Activities Director was not a principal because the Activities Director position reported to the Principals. The Activities Director, Assistant Principals, and Dean of Students are all listed on the chart underneath the Principals, meaning that these positions report to the Principals, not that they are each principals. *Id.* The Activities Director position is no more a principal than the Food Services Director is a Director of Business Services. Just as the Activities Director reports to the Principals, the Food Services Director reports to the Director of Business Services on the organizational chart.

Appellant states in his brief that he "believes that many of his job duties as 'Activities Director' . . . were consistent with employment as a school principal."⁴ *See*

⁴ It must be noted that what Appellant subjectively "believes" is irrelevant in this matter.

Appellant's Brief, page 8. However, a review of the actual duties of a principal show that Appellant did not perform duties that are traditionally performed by a school principal.

Minnesota Statutes Section 123B.147 states that each public school building may be supervised by a principal, and Subdivision 3 of the statute states that “[t]he principal shall provide administrative, supervisory, and instructional leadership services, under the supervision of the superintendent of schools of the district and in accordance with the policies, rules, and regulations of the board of education, for the planning, management, operation, and evaluation of the education program of the building or buildings to which the principal is assigned.”

The Activities Director position is administrative in nature and too far removed from the education program of a building to be considered a principal. All of the duties of the position are co-curricular in nature, and none are related to the educational curriculum. While co-curricular activities have a role in a district, such activities do not rise to the core educational responsibility faced by a licensed principal. The position description outlines that the main duties of the position are limited to supervising coaches and co-curricular activity advisors, and preparing the schedule, budgets, and purchases for the District's co-curricular activities. *See* Record Ex. 5 (App. p. 7). The Activities Director position has no duties related to classroom instruction or instructional leadership.

Appellant argues that one of the twenty “Specific Responsibilities” outlined in his job description (supervising and evaluating coaches) and one of the two “Organizational Reporting” items (the fact that he was responsible to the Superintendent) support his

assertion that his position was consistent with that of a principal. However, a review of all twenty responsibilities outlined in the job description show that the Activities Director has no duties related to the planning, management, operation, and evaluation of the education program of the building. *See Id.* While Appellant was in charge of supervising coaches, many non-principal positions supervise employees but are not considered to be principals, such as the Director of Buildings and Grounds and the Food Services Director. Appellant was far removed from the classroom and the educational programs of the school, and thus was not a principal.

While Appellant was “responsible to the Superintendent,” as he argues in his brief, the job description stated that “[w]hen working in a building, the District Director of Activities reports to the building principal.” *See Id.* Under the District’s organizational chart, the Director of Curriculum and Instruction, Director of Community Education, Director of Special Services, Director of Business Services, and the District Technology Director all report directly to the Superintendent. *See Exhibit 18 (App. p. 27).* These positions are all administrative positions, showing that the fact that the District Activities Director occasionally reported directly to the Superintendent does not make the position that of a principal.

Appellant was not serving in the capacity of a principal when he was the Activities Director because his duties were largely administrative and were too far removed from the classroom. As the Activities Director, Appellant was not serving in a position for which licensure is required by the MDE.

V. REVERSING THE DECISION OF THE COURT OF APPEALS WOULD LEAD TO UNCERTAINTY FOR SCHOOL DISTRICTS AND A FLOOD OF LITIGATION.

The Court must affirm the decision of the Court of Appeals because it correctly applied the statutes and caselaw to the facts of this case when it determined that Appellant was not a continuing contract teacher while employed as the Activities Director. However, if the Court accepted Appellant's argument that any employee hired with a license is automatically a "teacher" under Minnesota Statutes Section 122A.40, Subdivision 1, it would render the continuing contract statute meaningless.

Appellant's argument that any time a school district hires a licensed employee, the district must give that employee statutory rights is backwards. Employees do not gain continuing contract rights solely based on the licensure that they possess; rather, employees have a right to continuing contract rights only when they are hired for a position for which the MDE requires licensure.

If Districts were forced to give continuing contract rights based on the licensure held by employees rather than whether the employee is a "teacher" under the statute, it would lead to continuing contract rights being given to many positions outside of the statutory definition of teacher. This would dilute the meaning of a "teacher" based on the inclusion of many individuals, like the activities director, who have nothing to do with classroom instruction or the educational program of a school.

Accepting Appellant's arguments would also lead to uncertainty for school districts as there would be many employees who would be considered "teachers" under the Court's new definition, resulting in a wave of litigation to determine the new contours

of the previously well-settled statutory definition. This could affect existing fixed-term contract employees whose positions may now be considered as entitled to continuing contract rights. This would also force school districts to reformulate seniority lists due to the new employees that would have to be included on the list. Districts would have to make individual determinations regarding seniority and placement on the list, creating the potential for even more litigation.

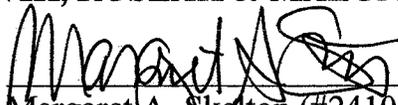
The better policy for this Court is to affirm the Court of Appeals and follow the long established precedent interpreting the statutory definition of teacher, thus granting continuing contract rights only to those individuals who meet that definition.

CONCLUSION

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

RATWIK, ROSZAK & MALONEY, P.A.

Dated: November 23, 2010

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