1st Civil No. A126734

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

SUSAN KAYE

Respondent/Petitioner,

vs.

SAN LEANDRO UNIFIED SCHOOL DISTRICT

Appellant/Respondent.

After a Judgment by the Superior Court of Alameda County

Case No. RG09458514

The Honorable Frank Roesch

AMICUS CURIAE BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION EDUCATION LEGAL ALLIANCE IN SUPPORT OF APPELLANT SAN LEANDRO UNIFIED SCHOOL DISTRICT

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO:

Pursuant to Rule 8.200 of the California Rules of Court, counsel for Amicus Curiae California School Boards Association and its Educational Legal Alliance respectfully request leave to file the attached brief of Amicus Curiae in this case, in support of Appellant San Leandro Unified School District ("District"). The California School Boards Association, of which the Educational Legal Alliance is a part, is a non-profit entity established for the support of school boards throughout California and their authority in the areas of education and governance.

The California School Boards Association requests to submit this brief from the Association's perspective in an effort to illustrate that the outcome of this case will impact all types of charges for teacher dismissal, exposing students to a wide variety of unsatisfactory performance, immoral or unprofessional conduct, dishonesty, evident unfitness, or conviction of crimes involving moral turpitude. (Education Code secs. 44932(a) and 44944 ("Ed. Code").)

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I.

INTEREST OF AMICI CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND EDUCATIONAL LEGAL ALLIANCE; SUMMARY OF AMICUS POSITIONS.

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county office of education. As part of CSBA, the Education Legal Alliance ("Alliance") helps to ensure that school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local education agencies. The Alliance represent its members, over 800 of the state's 1,000 school district and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation involving the interests of public education.

The CSBA files this amicus brief in order to ensure that local school districts and their governing boards retain the authority to duly exercise the responsibilities vested in them by law. In particular, this amicus brief aims

to clarify the inherent and necessary authority vested in school boards to initiate administrative hearings pursuant to Education Code section 44944 pertaining to school teacher disciplinary proceedings.

II.

SUMMARY OF FACTS.

On January 12, 2009, the District Governing Board authorized initiation of dismissal charges against teacher Susan Kaye ("Kaye") pursuant to Education Code Section 44932 et seq. On January 14, 2009, the District served Kaye a Notice of Intent to Dismiss and Statement of Charges.

On or about February 11, 2009, Kaye timely demanded a hearing, with April 12, 2009 as 60 days from February 11, 2009. On or about March 6, 2009, the District timely filed an accusation with the Office of Administrative Hearings ("OAH"). On March 17, 2009, Kaye timely submitted her Notice of Defense and request for hearing before the OAH, pursuant to Government Code section 11506.

On April 2, 2009 the District timely submitted a Request to Set Hearing to OAH at which time the District did not request a date on or before April 12, 2009, regardless of the reason. A week later on April 9, 2009, OAH issued an order setting May 11-14, 2009 as the hearing dates.

On April 21, 2009, Kaye demanded the charges against her be dismissed for failure to commence the hearing within 60 days, while the District requested that OAH dismiss the proceedings without prejudice. On April 22, 2009, OAH dismissed the proceedings without prejudice.

On or about April 28, 2009, the District served Kaye with a Notice of Intent to Dismiss and Statement of Charges substantially similar to the one served on January 14, 2009.

Subsequently, Kaye filed a petition for writ of mandate seeking dismissal of the administrative proceedings against her on the grounds that the 60-day period in section 44944(a) of the Education Code is jurisdictional and failure to commence a hearing within 60 days from the date of the original demand for hearing permanently precludes a school district from re-filing the same charges later, even if they are re-filed within the four-year period provided for in Section 44944(a)(5). The trial court agreed.

On July 20, 2009, the court ruled:

> The issue in this case seems to me to be of statutory construction, and it all comes down to what the purpose is of the 60-day rule. The purpose of the 60-day rule is to prevent the school district from continuing with a proceeding to discharge a teacher based on a set of facts that they assert that 60 days passes; and if they fail to have the hearing by then they can no longer terminate that teacher based on that particular incident, even though there's a much longer statute where that particular incident could later be brought up in,

> perhaps a consolidated hearing where new events have occurred that cause this teacher to be fired. That's the framework I am looking at... (Reporter's Transcript of Appeal, p.1.)
>
> I think it is a deadline that came and went...my judgment is the purpose of it [44944(a)] is to present a deadline for the school district to act, and as I discussed earlier I think you've missed your opportunity if you don't make that [deadline]; although I don't think these particular charges, if this teacher does something wrong, can be raised to augment some further charges later. (Reporter's Transcript of Appeal, p. 10.)

On October 6, 2009, Judgment granting writ of mandate was entered against the District and in favor of Kaye. The court ordered the District dismiss its Accusation, as it failed to comply with the 60-day requirement in section 44944(a)(1), and precluded the District from re-filing the charges.

III.

LEGISLATIVE HISTORY OF EDUCATION CODE SECTION 44944.

Section 44944 originally had two prior versions: Section 13530 (pre-1953), and section 13413 (1959). The first version, section 13530, stated: the "complaint shall be filed within 30 days from the date of the employee's demand for hearing" with the superior court. (Stats. 1943, Ch. 71, p. 570.) In addition, section 13530 included a sanction for failure to comply with the 30 days filing requirement: "If the complaint is not filed

[with the Superior Court] within such period the Board's action shall be deemed to be rescinded and all charges dismissed." (*Id.*)

In 1959, the statute was amended Section 13413 (Stats. 1959, Ch. 2, p. 944) and moved jurisdiction from the Superior Court for certificated teacher dismissal proceedings to the jurisdiction before a three-member "Commission on Professional Competence" ("Commission") with the chair of the "Commission on Professional Competence" being an administrative law judge with the State of California's Office of Administrative Hearings. (Former Section 13413 is now numbered 44944 by virtue of the 1959 Reorganized Education Code (Stats. 1976, Ch. 1010.)

Section 13413 provided: "in the event a hearing is requested by the employee, their hearing **shall** be commenced within 60 days from the date of the employee's demand for a hearing." (Ed. Code sec. 13413; *Governing Board of the Chaffey Union High School District v. Commission on Professional Competence (Pickering)* (1977) 72 Cal. App. 3d 447, 452-453; *Board of Trustees of the Compton Junior College v. Joseph Stubblefield* (1971) 16 Cal. App. 3d 820, 824; *Mass v. Board of Education of the San Francisco Unified School District* (1964) 61 Cal. 2d. 612, emphasis added; *Palos Verdes Peninsula Unified School District v. Felt* (1976) 55 Cal.App.3d 156, 158.)

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Both versions, section 13413 and the current version section 44944, provide for commencement of the administrative hearing within 60 days from the date of the demand for hearing. However Section 44944 includes subsection (c)(2) added in a 1983 amendment to section 44944 that is not found in the prior versions.

Section 44944 provides in pertinent part:

> (a) (1) In a dismissal or suspension proceeding initiated pursuant to Section 44934, **if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing.** The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all of the power granted to an agency in that chapter, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure...
>
> If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to the continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section...
>
> **(a)(5)** No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced **relating to matters that occurred**

more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice...

(c)(1) The decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition that shall be, solely, one of the following:

(A) That the employee should be dismissed.

(B) That the employee should be suspended for a specific period of time without pay.

(C) That the employee should not be dismissed or suspended.

(2) The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors. [Added in 1983.]

(3) The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of suspension pursuant to subparagraph (B)of paragraph (1) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

(4) The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

(e)(1) If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share

equally the expenses of the hearing, including the cost of the administrative law judge. The state shall pay any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of the claims. The employee and the governing board shall pay their own attorney's fees.

(2) If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee, and reasonable attorney's fees incurred by the employee.

(3) As used in this section, "reasonable expenses" shall not be deemed "compensation" within the meaning of subdivision (d).

(Ed. Code Section 44944, emphasis added.)

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IV.

THE 1983 AMENDMENT ADDED LANGUAGE TO SECTION 44944 PROHIBITING DISMISSAL OF CHARGES FOR NON-SUBSTANTIVE, PROCEDURAL ERRORS.

The legislature added language to subsection (c)(2) "in an urgency measure effective July 28, 1983, where the Legislature amended section 44944 to include the following provision: "The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors." (Stats. 1983, Ch. 498 ("SB 813"), § 59, p. 2086-2089; *Governing Board of El Dorado Union High School District v. Commission on Professional Competence (Floyd)* (1985) 171 Cal.App.3d 324, 334, rev. den.). The language of this amendment provides its own guidelines.

Furthermore, in the preamble to the final version of SB 813, the Legislature stated the purpose of the amendment which became part of section 44944 (c)(2):

> Under existing law, the governing board of a school district is required to comply with certain procedural requirement in dismissal proceedings against a certificated employee for unprofessional conduct or incompetency. This bill would reduce the period of notice required prior to any action by the governing board from charges of unprofessional conduct or incompetency from 90 days to 30 days. **This bill would**

require that the decision of the Commission on Professional Competence that the employee should not be dismissed or suspended not be based on nonsubstantive, non-prejudicial procedural errors.

(See, Request for Judicial Notice filed concurrently herewith, Exhibits A, p.3; B, p.6; & D, p.7.; see also, Legis. Counsel's Dig., Sen. Bill 813 (1983-1984 Reg. Sess.) Stats. 1983, Ch. 498, para.19, p. 169, emphasis added.)

V.

THE DISTRICT MADE A NON-SUBSTANTIVE NON-PREJUDICIAL PROCEDURAL ERROR.

If Kaye is correct, and the 60 days begins from the original demand for hearing by Kaye, then without dispute the sole error in the administrative proceedings occurred when the District requested a hearing date after April 12, 2009 (the 60th day). Otherwise, the District timely submitted a Request to Set Hearing to OAH, but requested a date on or before May 18, 2009. (Appellant's Brief, p.3; Gov't Code sec. 11505.) Other than the request for a date after April 12, 2009, there was no other error in the proceedings.

To further illustrate that the District's error is strictly procedural – If the same error had been caused by OAH itself and incorrectly sent the order for a hearing date of May 12, 2009, instead of April 12, 2009, would that mean the charges are automatically dismissed and the District is precluded from re-filing the charges, allowing no circumstance to permit the 60-day

limit be "excused?" If so, a clerical error by OAH would result in restoring a teacher with charges of serious professional concerns to the classroom with no hearing.

Like the District's error in this case, this example would create an absurd result which the Legislature did not intend in section 44944(a), hence the legislature added language to section 44944(c)(2). (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849 ["ambiguity is not a condition precedent to interpretation in all cases. The literal meaning of the words of a statute may be disregarded to avoid absurd results ...."]; *Upland Police Officers Assn. v. City of Upland*, (2003) 111 Cal. App. 4th 1294, 1304.)

The District's request for a hearing with a date after the 60 days is the specific type of nonsubstantive procedural error anticipated by the Legislature when creating Section 44944, subsection (c)(2), which provided such an error to be excused.

This contention is further supported by the 1976 decision in *Palos Verdes Peninsula Unified School District v. Felt, supra,* ("*Felt*") decided five years before the amendment to section 44944, illustrating the need for such an excuse, and in essence the *Felt* decision is a precursor to subsection (c)(2). In *Felt*, the court concluded that Education Code section 13413 [the earlier version of 44944] means the commencement of the hearing within

60 days is a deadline, but that commencement of the hearing within the statutory period is **excused**. (55 Cal. App. 3d at p. 163.)

The court in *Felt* stated that section 13413 provides "that a hearing on the accusation against a permanent teacher must commence within 60 days of the teacher's demand for it is mandatory so that the Commission on Professional Competence cannot proceed upon the accusation, **unless the delay is excused...[and/or] whether the delay was excusable."** (55 Cal. App. 3d at p. 163, emphasis added.)

Accordingly, the court affirmed a judgment ordering the commission to continue with a hearing demanded by a teacher threatened with dismissal. Similarly as in this case, the court must allow the District to withdraw charges and re-file within the four year statutory period because the delay is "excusable" in nature. (Ed. Code sec. 44944(a)(5); *Atwater Elementary School Dist. v. Cal. Dept. of General Services* (2007) 41 Cal. 4th 227, 232-233.) In fact, had *Felt* been decided in 1984 rather than 1976, the court would have likely cited to (c)(2) in addition to stating in its ruling the phrase "delay is excused."

A further inquiry into the original language of the legislative bill that amended subsection (c)(2), in section 44944, reveals the Legislature intended procedural errors—such as the hearing date in this case—should not permit the dismissal of charges against a teacher based on a procedural

error, and moreover, cannot affect the District's ability to re-file the charges within the four-year period.

In evaluating statutory interpretation, the court "look[s] first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language." (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 246.) The meaning of the language of the statute can appear either on the face of the statute or from any established technical or common law meaning. (*In re Newbern* (1960) 53 Cal.2d 786, 792; *People v. Mirmirani* (1981) 30 Cal.3d 375, 383-384.)

Moreover, "it is a cardinal rule of statutory construction that 'courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 604.)

The following are the various versions of the 1983 Senate Bill ("SB 813") adding language to Section 44944, subsection (c)(2):

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First Version:	shall be based on procedural errors made by the District only if the employee has demonstrated that those errors have ~~seriously~~ prejudiced her or her case. (Request for Judicial Notice, Exhibit B, p. 49, as amended April 18, 1983.)
Second Version: [No change]	shall be based on procedural errors made by the school district only if the employee proves that the procedural errors have prejudiced his or her case. (Request for Judicial Notice, Exhibit C, p. 55, as amended April 28, 1983.)
Third Version: [No change]	shall be based on procedural errors made by the school district only if the employee proves that the procedural errors have prejudiced his or her case. (Request for Judicial Notice, Exhibit D, p. 60, as amended May 16, 1983.)
Fourth Version:	shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors. (Request for Judicial Notice, Exhibit E, p. 141, as amended July 19, 1983.)
Final Version:	shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors. (Request for Judicial Notice, Exhibit F, p. 111, and Exhibit G, p. 80, as amended July 22, 1983.)

(See, Request for Judicial Notice filed concurrently herewith, Exhibits "A"-"G," see also, Legis. Counsel's Dig., Sen. Bill 813 (1983-1984 Reg. Sess.) Ch. 498, para.19, p. 169, emphasis added.)

VI.

KAYE DID NOT DEMONSTRATE PROCEDURAL ERROR THAT "SUBSTANTIVELY PREJUDICED" HER CASE.

Noteworthy in the language and revisions to SB 813 is the Legislature's emphasis that the burden to show prejudice by a procedural error is on the employee, not the employer. Furthermore, the prejudice was intended to be substantive or "serious." Here, Kaye failed to establish any "seriously," prejudicial, substantive error to her case, since at the time this error was discovered no prejudice had occurred, which explains why Kaye alleges hypothetical claims of prejudice to her case.

In addition, just as "shall" is used in section 44944(a)(1) commencing the hearing in 60 days, "shall" is used in section 44944(c)(2) stating that a decision dismissing charges "shall not be based" on non-substantive procedural errors, unless the errors are prejudicial errors.

To that end, the court has held that the statutory language makes clear the amendment to the Education Code provision that a decision by the Commission that an employee should not be dismissed or suspended shall not be based on substantive procedural errors unless the errors are prejudicial is procedural, and its [further] application to nonprocedural errors did not deprive certificated teacher of a defense on the merits and was not prohibited. (*Governing Board of El Dorado Union High School*

District v. Commission on Professional Competence (Floyd) (1985) 171 Cal.App.3d 324, 333-334, rev. den.)

Kaye's claims that the District's error prejudiced her case fall far short of substantive errors that are prejudicial. First, she claims she is entitled to have the procedures strictly followed. However, continuances after the 60-day period are permitted routinely by waiver or stipulation by the parties or by the Commission's own order after the proceedings have begun allowing postponements beyond the 60-day date to a more convenient time for the Commission. (*Wilmot v. Commission on Professional Competence* (1998) 64 Cal.App.4th 1130, 1132; *Powers v. Commission on Prof. Competence (Bakersfield City School District)* (1984) 157 Cal.App.3d 560, 569.)

To that end, Kaye's claim that the 60-day limit must be strictly followed is nonexistent. In fact, postponements past the 60 days are routine and permissible, negating strict compliance, because there is no serious or substantive prejudice to the employee when a continuance does occur. If a continuance by the parties or the commission were a serious prejudice there could be NO exception to the 60 days *whatsoever* because of the grave prejudice to the employee's due process interests.

Mere logic demands that it cannot be proper to allow hearings to occur by continuances in one instance, but demand strict compliance in this

case where the procedural error has no more or greater effect on the employee than a legitimate waiver or continuance would have. Since there is no difference in the effect on the employee, the District's procedural error did not prejudice Kaye.

Second, Kaye claims she has a property and liberty interest in "continued employment" with the District pursuant to the procedural due process requirement in the Education Code. However, Kaye remained on "paid" administrative leave and had "continued employment with the District" at all times during this process. Kaye cites no case law that "paid" administrative leave status implicates any property or liberty interest <u>whatsoever</u>. Her failure to cite any caselaw waives her contention. (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal. App 4th 1306, 1326-1327; *Roden v. Amerisource Bergen Corp.* (2007) 155 Cal. App. 4th 1548, 1575-1576; *Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal App. 4th 1584, 1607, fn.6.)

Third, Kaye claims she would have a "stigma" and "leaves [her] out of her classroom" and "under a cloud of suspicion" that "disadvantages her in competing for employment." Kaye's claimed prejudice assumes Kaye is going to be dismissed and seeking new employment. If she is dismissed the disadvantages she will face in competing for employment would be earned

by her due to her dismissal, and any prejudice she suffers would be from the dismissal itself, not a lag in hearing dates.

Alternatively, if she is not dismissed, and is waiting for the outcome of the hearing on paid administrative leave, and ultimately returned to the classroom, she remains employed and no "cloud of suspicion" or "stigma" can harm her since she is still employed and that would not change. The "stigma" by the District's procedural error has yet to be shown by Kaye.

Fourth, Kaye claims a delay in the hearing beyond the 60 days "indefinitely delays her ability to defend herself against the allegations and requires her to incur additional litigation costs and attorney's fees." If the hearing beyond the 60 days "indefinitely delays her ability to defend herself against the allegations" then continuances of any kind would not be permitted. The delay caused by the lapse here was not an indefinite delay in this case. The District re-filed and set the hearing within 60 days.

Once refiled correctly, the second time, the District would have no reason to withdraw and re-file the second set of charges and continue to withdraw and re-file for four years. In fact, it would work against the District's interest, and create a strong case for actual prejudice by the employee, making Kaye's claim ludicrous. Withdrawing and refiling every 59th day by the District would be an actual fact for Kaye to cite, if true, rather than the hypothetical possibilities she argues.

Kaye further claims she would be prejudiced because she assumes the District would "run around the time limit" and delay her hearing for at least four years, while maintaining charges against her, preventing her from securing replacement employment and ruining her reputation.

Kaye assumes the District would want to keep an employee with serious professional issues on the payroll of the District for four years and out of a classroom, not working, only to allow the four years to run with the possibility of returning her to the classroom following four years. Where is the District's motivation for such a claim?

Whereas in this case, the District recognizes a procedural error, corrects it as soon as practicable, and refiles within the four-year statute of limitations under subsection (a)(5), with no intention to withdraw and refile again. There is no prejudice and no facts to suggest that the District's ability to withdraw and refile within four years would be abused, and in fact such a tactic is against the District's own interests, as well as the employee's. The risk or benefit of the delay is borne equally by the District and employee. Hence, the notion of prejudice here fails.

As the Legislative language makes plain, in SB 813 and section 44944(c)(2), if the procedural errors substantively or seriously prejudice the employee, then the procedural error <u>will bar</u> the dismissal on the charges. With that in mind, if the District were to choose to do as Kaye suggests and

allow the 60 days to run and re-file, leaving the employee on paid administrative leave, only to re-file continuously, the District would likely create a serious prejudice permitting dismissal of the District's charges under (c)(2). However, in this case a procedural error is found and corrected, before any prejudice occurs.

Finally, as for increased statutory attorney's fees and costs by a delay, if Kaye is not dismissed and returned to the classroom, then she does not incur any litigation fees and costs and, therefore, is not prejudiced by any delay. (*Pennel v. Pond Union School District* (1973) 29 Cal. App. 3d 832, 840-841.) Furthermore, a "prevailing" teacher in a dismissal case is entitled to recover attorney's fees. (Ed. Code sec. 44944(e).)

VII.

THE COURT'S RULING CANNOT STAND WHERE THE DISTRICT "SUBSTANTIALLY COMPLIED" WITH SECTION 44944.

If Kaye has not shown substantive prejudicial error, and the District has "substantially complied" with section 44943 and 44944, the court's ruling cannot be upheld. (*Miller v. Chico Unified School Dist.* (1979) 24 Cal.3d 70, 716-717 ["a school principal was reassigned to a teaching position. The plaintiff argued the school district had failed to comply with section 44664 by neglecting to notify him in writing of his shortcomings

and by failing to confer with him. The Supreme Court rejected this argument, finding the school board had substantially complied."]

In 1985, the court dealt with the applicability of Section (c)(2) in *El Dorado Union High School District v. Commission (Floyd), supra,* in regards to a similar procedural error. Although the administrative law judge found "**the District had substantially complied**... but that case law required strict compliance," the court in *El Dorado* ultimately overruled the administrative law judge and held that substantial compliance is all that is required, even where the language uses "shall." (*El Dorado Union High School District v. Commission (Floyd), supra,* 171 Cal.App.3d at p. 331.)

The court held, the "District substantially complied with the requirements... [and] no more is required. To allow hypertechnical procedural oversights to thwart the orderly process delineated by the statutory scheme would be to exalt form over substance and would result in an abuse of the judicial process...section 44944 (c)(2) does not deprive [a teacher] a defense on the merits; it is strictly procedural. The effect of the statute is to eliminate precisely the situation encountered in this case." (*El Dorado Union High School District v. Commission (Floyd), supra,* 171 Cal.App.3d at p. 333-334, emphasis added.)

Furthermore, the *El Dorado, supra*, court stated "'Under these circumstances we reject the trial court's finding of noncompliance and its

overly restrictive interpretation of the requirements... [Fn. omitted.]' (Id., at p. 717.) Decisional authority adequately supports our conclusion only substantial compliance with the terms...is required notwithstanding the use of the word 'shall' in the pertinent code sections, a word generally indicating a mandatory requirement." (*El Dorado Union High School District v. Commission (Floyd), supra,* 171 Cal. App. 3d at p. 333-334, quoting *Miller v. Chico Unified Sch. Dist., supra,* 24 Cal.3d at 717, emphasis added.)

Similarly, in *Felt, supra,* 55 Cal.App.3d 156, the court ruled that the "district had substantially complied with the requirement." (55 Cal.App.3d at p. 164.)

In Kaye's case, the District followed all procedures pursuant to Education Code section 44932 et seq. Although the District erred, the proceedings were occurring as statutorily required, making the error seem inconsequential, easily corrected and lacking any prejudice, since Kaye knew the charges against her, and no evidence is shown the District had tried to stall intentionally, or delay the hearing unnecessarily prior to this error.

In all other respects, Kaye's dismissal proceedings are identical in form and in content generally to the statutory proceedings, which, of course would have clearly satisfied the requirements of section 44944. Had the

District not timely pursued and executed the procedures under 44943 and 44944 and had not the District requested a hearing - at all before the 60 days, then the District would not have risen to the level of substantial compliance. However to timely request a hearing with an incorrect date upholds the spirit and intent of section 44944.

Like the teacher in *California Teachers Assn. v. Governing Board of the Livingston Union High Sch. Dist.* (1983) 144 Cal.App.3d 27, Kaye was aware of her charges and the grounds for her dismissal. She had adequate time and assistance in gathering her defense. She has not and cannot show any prejudice resulting from the District's error in mistakenly requesting a hearing after the 60 days. In light of this procedural error, it cannot be shown that this error would have made any difference to Kaye's defense. (*Id.* at p. 36.)

Similarly here, the District substantially complied and performed all parts of the procedures required where Kaye would have received a hearing within 60 days, had the District committed no error. Moreover, Kaye was aware of the error on April 9, 2009, days before the 60th day, when the District served its request for hearing with the incorrect date, illustrating it was a procedural error since the error had no other purpose.

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VIII.

THE COURT'S RULING SANCTIONS THE DISTRICT TWICE.

The overreaching ruling by the trial court sanctions the District twice for the lapse of the 60 days by first ordering the dismissal of the charges on the first accusation filed, and then by adding a second sanction without basis against the District for the same failure by precluding the District from re-filing charges altogether even within the four-year statute of limitations established by statute. (Section 44944(a)(5).)

Without a doubt, the trial court exceeded its discretion. In fact, the court in *Felt, supra,* alluded to what the procedure should be in this case where a nonsubstantive, nonprejudicial, procedural error occurs. "If the command of Education Code section 13413 is observed, only evidence relating to a period no longer than four years and 60 days from the hearing is admissible to prove the district's accusation. If the period is ignored, the time from occurrence to hearing is open-ended. **If the period is treated as mandatory and the school district neglects to follow its command, then the district must begin at the beginning the extensive process for discharge of a tenured teacher accused of unprofessional conduct or unfitness for service."** (*Felt, supra,* 55 Cal.App.3d at p. 163, emphasis added.)

As stated in *Felt*, refiling of charges is assumed to occur because it is within the four-year statute of limitations. Therefore in this case, just as in *Felt*, refiling of charges remains an option and the trial court erred. If the 60 days is mandatory, then the consequence would be solely dismissal on the current accusation, but not preclusion from re-filing of the charges under a new accusation.

As the court in *Felt* instructed, the District is to start the process again. Otherwise, to adhere to the court's ruling is to assume that the statute meant to sanction the District twice for the same procedural error, contradicting the legislative intent, public policy, and the subsequent clear, specific statutory language found in subparagraphs (c)(1)(C)(2) and (a)(5) of Section 44944.

IX.

THE COURT'S RULING NULLIFIES SECTIONS 44944 (A)(5) AND (c)(2).

Ignoring the clear, specific statutory language of sections 44944 (c)(2) and (a)(5) the trial court nullifies these sections in favor of injecting an ambiguous court ruling, which relies solely on the language of section 44944 (a)(1) at the exclusion of the other two sections. Since section (c)(2) provides that non-substantive non-prejudicial errors cannot be the basis for dismissal of charges, and while section (a)(5) provides four years as that

actual statute of limitations on dismissal charges, the trial court's ruling cannot bar the District from re-filing the charges within four years.

Inasmuch as, the ruling fails to address the other sections within 44944, the ruling creates ambiguity on how to apply Sections (c)(2) and (a)(5) with (a)(1) or reconcile the meaning of all three. The trial court stated:

> I think it is a deadline that came and went...my judgment is the purpose of it [44944(a)] is to present a deadline for the school district to act, and as I discussed earlier I think you've missed your opportunity if you don't make that [deadline]; although I don't think these particular charges, if this teacher does something wrong, can be raised to augment some further charges later. (Reporter's Transcript on Appeal, p. 10.)

Subparagraph (a)(5) states "no evidence shall be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice...no decision relating to the dismissal or suspension of any employee shall be made on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice." Recently, the court has affirmed the four years as the statute of limitations, and further ruled that four years is not an absolute bar to the introduction of such evidence. (*Atwater Elementary v. Department of General Services, supra,* 41 Cal. 4th 227, 230.)

Subparagraph (c)(2) provides "the decision of the Commission on Professional Competence that the employee should not be dismissed or

suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors." (Ed. Code §44944 et seq.)

In light of these two sections, the court's ruling has failed to properly interpret section 44944(a)(1). Since the statute does not provide specific language for a sanction for failure to meet the 60-day rule in subparagraph (a)(1), there is no interpretation within the plain meaning of the statute—when read as a whole—permitting dismissal in tandem with preclusion from refiling of charges. Had the court followed this plain meaning of the entire statute, neither the District nor the employee would be prejudiced.

X.

THE COURT'S RULING CREATES AN ABSURD RESULT.

In light of the Legislature's intent, the trial court's interpretation of Section 44944 leads to an absurd result and is not reasonable under Section 44944 as a whole. If the trial court's interpretation were to stand, then a teacher can effectively evade dismissal, with the luck of a single clerical error.

Although ignored in the trial court's ruling, the Legislature "infused a reasonableness requirement" to avoid exactly this kind of absurd result by adding the language to section (c)(2) and upholding the four year statute of limitations in section (a)(5) of Section 44944. Thus, the trial court's ruling

cannot stand. (*Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal. App. 4th 1294, 1305-1306 ["Infusion of a reasonableness requirement avoids the absurd result postulated. A reasonableness interpretation therefore carries out the legislative intent. The statutory provision must be interpreted in a reasonable and commonsense manner by all parties."].)

> "Even unambiguous statutes must be construed to avoid absurd results which do not advance the legislative purpose: Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. Nonetheless, a court may determine whether the literal meaning of a statute comports with its purpose. We need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results." (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340; *Upland Police Officers Assn. v. City of Upland, supra* at 1303-1304.)

In other words, "'[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] ... Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]' (*People v. Pieters* (1991) 52 Cal.3d 894, 898–899.) Statutory interpretation is based on implementing the intent of the Legislature." (*Upland Police Officers Assn. v. City of Upland, supra,* at p.1303.)

The overriding principle is that "[i]nterpretation must be reasonable." (Civ. Code, § 3542.) The literal application of the court's ruling leads to the conclusion that a teacher can effectively have her charges dismissed by clerical error.

The Legislature did not intend to allow the teacher to so easily avoid the proceedings before the Commission on Professional Competence, where after all the District has the burden of proof. The rules established by the Legislature include rules relating to the times when and how a dismissal is to proceed. (§§ 44943 and 44944.) Nothing in section 44944 suggests that the District will repeatedly postpone the hearing. In fact the language of Section 44944 suggests the Legislature did not want procedural inconsequential errors getting in the way of a hearing to terminate a teacher. All parties would agree that interpretation of the statute must be reasonable.

XI.

THE POLICY CONSEQUENCES OF THE COURT'S RULING PROTECTS EMPLOYEES' INTERESTS WITHOUT REGARD TO SCHOOL DISTRICTS' INTERESTS TO PROTECT STUDENTS AND TO PROVIDE BEST POSSIBLE EDUCATION.

Stunningly, the court's ruling creates a stark outcome where only the interests of an employee are protected to the detriment of school districts everywhere, and the students they serve, because the court's ruling has

made it possible for any allegedly unprofessional teacher to return to the classroom without a hearing on the merits. Furthermore, the prejudice against school districts by the court's ruling places students at risk, under the guise of just punishment for an innocuous error. Although the Legislature intended to avoid this result, the trial court's ruling has summarily ignored the Legislature's safeguards.

To ensure both interests are protected, the Legislature created a doable scheme wherein the District is precluded from moving forward on a charge indefinitely – by creating a 60-day deadline – protecting the employee's interest. Likewise, school districts' interests are served by permitting the districts four years to dismiss a teacher under current charges, and prohibiting procedural errors from interfering, which maintains a district's interest that an unqualified, incompetent or otherwise unsafe person is not instructing students.

Furthermore, the rigid restriction espoused by the court's ruling is not in the public interest and is a classic example of the harmful result which flows from an inflexible, contrived interpretation of the statute, if affirmed.

Consequently, the trial court has created a procedure where a school district may procedurally err in a termination proceeding involving a teacher accused of unprofessional conduct, and will be denied a hearing.

Where most likely if allowed a hearing, the Commission will determine the nature of the unprofessional conduct was of sufficient gravity to warrant dismissal - all the more creating an absurd result by the court's ruling.

To impose against school districts a dismissal of charges AND preclusion from refiling charges will allow a teacher's alleged misconduct to prevail over a procedural error. The court's ruling in essence has permitted teachers to avoid answering a school district's charges, undermining the standard of professional conduct which the public has the right to expect of its teachers. Students must not continue to be exposed to teachers with serious professional concerns because a school district errs and does not get a hearing set within a 60 day period. In these circumstances, the public interest is best served by a just and reasonable interpretation of section 44944 as a whole.

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XII.

CONCLUSION

For the all the foregoing reasons, it is respectfully requested that the court reverse and enter judgment in favor of the District.

DATED: June 24, 2010

Respectfully submitted,

PARKER & COVERT LLP

By: _____
Spencer E. Covert
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DATED: June 24, 2010

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 14(c)(1)

OF THE CALIFORNIA RULES OF COURT

1. I am the attorney of record for Amicus Curiae California School Boards Association Education Legal Alliance.

2. Pursuant to Rule 14(c)(1) of the California Rules of Court, and in reliance on the word count feature of my word processing program, I hereby certify that this brief, including footnotes, but exclusive of cover, tables, indices, verification, proof of service, and this certification, consists of 7, 226 words.

Dated: June 24, 2010

PARKER & COVERT LLP

By: _____

Spencer E. Covert

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to this action. My business address is PARKER & COVERT LLP, 17862 East Seventeenth Street, Suite 204, East Building, Tustin, California 92780-2164. On June 24, 2010, I served the following document(s) described as **AMICUS CURIAE BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION EDUCATION LEGAL ALLIANCE IN SUPPORT OF APPELLANT SAN LEANDRO UNIFIED SCHOOL DISTRICT** on the parties in this action as follows:

☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

See Attached Address List

☒ **BY U.S. MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Tustin, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE:** I personally directed Ambassador Services to deliver such envelope by hand to the offices of the addressee(s).

☒ [State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ [Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 24, 2010, at Tustin, California.

Kathryn Minnich

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