Case No. A119738

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

MARGARET HILDEBRANDT AND SUSAN WOOD-DEGUILIO

Petitioners and Appellants

v.

ST. HELENA UNIFIED SCHOOL DISTRICT

Defendant and Respondent

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF RESPONDENT

Appeal from Judgment of Dismissal and Order Denying
Peremptory Writ of Mandate
of the Superior Court of California, County of Napa
Honorable J. Michael Byrne, Assigned
Case No. 26-38503

Namita S. Brown, SBN 215131
Sarah Levitan Kaatz, SBN 191355
Dulcinea A. Grantham, SBN 220993
LOZANO SMITH
2000 Crow Canyon Place, Suite 200
San Ramon, CA 94583
Telephone: (925) 302-2000
Facsimile: (925) 302-2010
E-mail: nbrown@lozanosmith.com

ATTORNEYS FOR Amicus Curiae, California School Boards Association's Education Legal Alliance

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First **APPELLATE DISTRICT, DIVISION** Three	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Namita S. Brown, SBD 215131, Sarah Levin Kaatz, SBN 191356 Dulcinea Grantham, SBN 220993 Lozano Smith 2000 Crow Canyon Place, Suite 200, San Ramon, CA 94583 TELEPHONE NO.: 925-302-2000 FAX NO. *(Optional)*: 925-302-2010 E-MAIL ADDRESS *(Optional)*: nbrown@lozanosmith.com ATTORNEY FOR *(Name)*: California School Boards Association	Superior Court Case Number: *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Margaret Hildebrandt and Susan Wood-DeGuilio RESPONDENT/REAL PARTY IN INTEREST: St. Helena Unified School District	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): California School Boards Association

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest** ***(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 5, 2009

Dulcinea Grantham
(TYPE OR PRINT NAME)

▶ Dulcinea A. Grantham
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

American LegalNet, Inc.
www.FormsWorkflow.com

Case No. A119738

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

MARGARET HILDEBRANDT AND SUSAN WOOD-DEGUILIO

Petitioners and Appellants

v.

ST. HELENA UNIFIED SCHOOL DISTRICT

Defendant and Respondent

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF RESPONDENT

Appeal from Judgment of Dismissal and Order Denying
Peremptory Writ of Mandate
of the Superior Court of California, County of Napa
Honorable J. Michael Byrne, Assigned
Case No. 26-38503

Namita S. Brown, SBN 215131
Sarah Levitan Kaatz, SBN 191355
Dulcinea A. Grantham, SBN 220993
LOZANO SMITH
2000 Crow Canyon Place, Suite 200
San Ramon, CA 94583
Telephone: (925) 302-2000
Facsimile: (925) 302-2010
E-mail: nbrown@lozanosmith.com

ATTORNEYS FOR Amicus Curiae, California School Boards Association's Education Legal Alliance

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

TO THE HONORABLE WILLIAM R. MCGUINESS, ADMINISTRATIVE PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE,

Pursuant to Rule 8.200(c) of the California Rules of Court, leave is hereby requested to file the accompanying Brief of *Amicus Curiae* on behalf of the California School Boards Association's ("CSBA") Education Legal Alliance ("Alliance") in this action in support of Respondent St. Helena Unified School District.

INTEREST OF AMICI CURIAE

This case concerns, *inter alia*, the extent of the authority of a school district to determine the type and level of services it requires, how to best provide those services to its students, and how best to assign employees to provide those services. Specifically, this case presents the issue of whether a school district's determination that a particular level of service is required must give way to the seniority order of its employees in the layoff process, thereby requiring the school district to split a single full-time position into two or more new part-time positions, in order to retain a more senior part-time employee or employees.

CSBA is a California non-profit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-

driven association composed of the governing boards of nearly all of California's more than 1,000 school districts and county offices of education, including the St. Helena Unified School District. The Alliance is composed of just under 800 CSBA members and is dedicated to addressing public education legal issues of statewide concern to school districts and county offices of education. The purpose of the Alliance, among other things, is to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law and to make appropriate policy decisions for their local educational agencies. The Alliance's activities have included, as in this appeal, joining in litigation where the statewide interests of public education are at stake. The Alliance has been granted leave to participate in numerous cases before California Courts of Appeal and the California Supreme Court.

BRIEF OF AMICI CURIAE WILL ASSIST THE COURT

Amicus Curiae's Brief will assist the Court in several ways. First, the Brief highlights existing precedent of this Court and other appellate courts establishing the proper interpretation of Education Code section 44955 and a school district's authority to determine the type and level of services it will provide as well as the manner in which such services will be provided. A complete understanding of this line of cases is essential for the Court's proper resolution of this case.

Second, the Brief details the legislative history of section 44955 and related section 44956, which provides insight into the legislative intent underlying section 44955 and a school district's authority relative to the manner in which it provides education services. This legislative history has not been presented to the Court in detail in the briefing of Appellants or Respondent, respectively, and is extremely important for the Court's proper resolution of this case.

Finally, the Brief supplements arguments in Respondent's briefing and misinterpretations of same by Appellants with regard to the authority of a school district to make determinations as to the manner in which it will provide services and the detrimental impact that a reversal of the lower court's decision will have on school districts throughout California. *Amicus Curiae's* Brief confirms why the Superior Court's Judgment of Dismissal and Order Denying Peremptory Writ of Mandate were proper.

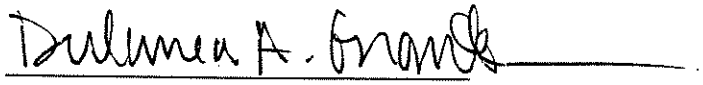
CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the Court accept the accompanying Brief for filing in this case.

Dated: January 5, 2009

Respectfully submitted,

LOZANO SMITH



NAMITA S. BROWN
SARAH LEVITAN KAATZ
DULCINEA A. GRANTHAM
Attorneys for Amicus Curiae
CALIFORNIA SCHOOL BOARDS
ASSOCIATION'S EDUCATION
LEGAL ALLIANCE

Case No. A119738

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

MARGARET HILDEBRANDT AND SUSAN WOOD-DEGUILIO

Petitioners and Appellants

v.

ST. HELENA UNIFIED SCHOOL DISTRICT

Defendant and Respondent

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF RESPONDENT

Appeal from Judgment of Dismissal and Order Denying
Peremptory Writ of Mandate
of the Superior Court of California, County of Napa
Honorable J. Michael Byrne, Assigned
Case No. 26-38503

Namita S. Brown, SBN 215131
Sarah Levitan Kaatz, SBN 191355
Dulcinea A. Grantham, SBN 220993
LOZANO SMITH
2000 Crow Canyon Place, Suite 200
San Ramon, CA 94583
Telephone: (925) 302-2000
Facsimile: (925) 302-2010
E-mail: nbrown@lozanosmith.com

ATTORNEYS FOR Amicus Curiae, California School Boards Association's Education Legal Alliance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

STATUTES

OTHER

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following Points and Authorities, Analysis, and Argument regarding the above captioned matter.

INTRODUCTION

This case poses questions about the extent of the authority of a school district to determine the type and level of services it requires, how to best provide those services to its students and how best to assign employees to provide those services. Specifically, this case presents the issue of whether a school district's determination that a particular level of service is required must give way to the seniority order of its employees in the layoff process, thereby requiring the District to split a single full-time position into two or more new part-time positions, in order to retain a more senior part-time employee or employees.

As this Court determines how to apply the order of lay off of certificated employees, specifically whether a school district is required to split full-time certificated positions to accommodate senior part-time certificated employees, amicus curiae respectfully requests that the Court be mindful of the great importance of local control over the provision of educational services and the level of such services, the unique responsibility of the school district to determine its staffing needs and qualifications of employees to meet those needs, and the negative impact

upon school districts throughout the State should this Court reverse the trial court's decision in this case.

ARGUMENT

In difficult financial times, school districts often consider layoffs as an option for the reduction of expenses. The layoff processes for certificated and classified employees differ significantly. Because this case involves the process of layoff of certificated employees we address only that issue.

The process for layoff of certificated employees is a difficult one, both from a legal and administrative standpoint. The Legislature has created a highly technical process that must be followed before a school district may eliminate services and reduce the number of employees who provide such services. The layoff process set forth in the Education Code attempts to accommodate the interests of both the employees who are the subject of the layoff to continued employment and the school districts conducting the layoff to determine the type and level of services to be reduced and the type and level of services to be retained. All the while, school districts struggle to balance the competing need to maintain fiscal solvency with making the programmatic and staffing cuts necessary for such solvency.

The layoff process set forth in the Education Code for certificated employees is two-fold. First, pursuant to subdivision (b) of Education

Code section 44955,[1] the governing board of a school district makes a determination that it is necessary to decrease certain services provided by the district for the following school year. This determination may be based on a decline in student average daily attendance, a reduction of a particular kind of service, or a change in state law that requires the modification of the curriculum. (See generally Ed. Code, § 44955, subd. (b).) In determining which services will be decreased, the governing board identifies the positions providing the service that will be eliminated, as well as the number of full-time equivalent ("FTE")[2] positions or portion thereof that must be eliminated to effectuate the decrease in services.

Once the governing board has determined to eliminate certain positions, the school district is required to initiate the second step of the process, which is to notify affected employees by no later than March 15th that their services will not be required for the following school year. (Ed. Code, § 44955.) Following notice of layoff, an employee has the right to request a hearing to determine if there is cause for not reemploying him or her for the ensuing school year. (Ed. Code, § 44949, subd. (b).) If the employee requests a hearing, the district is required to conduct a hearing in

---

[1] All subsequent statutory references are to the Education Code, unless otherwise noted.

[2] School districts assign certificated positions a level of service in proportion to the number of hours served. For example, a 1.0 FTE position is a full-time position. A position that is less than a 1.0 FTE position is assigned a fractional FTE equal to the fraction of hours worked compared to full-time service.

accordance with Government Code section 11500 et seq. (Ed. Code, § 44949, subd. (c).)

An administrative law judge presides over the hearing and, at the conclusion of the hearing, prepares a proposed decision containing "findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof." (Ed. Code, § 44949, subd. (c)(3).) The proposed decision is sent to the governing board of the school district which then makes a determination as to the sufficiency of the cause and disposition. (Ed. Code, § 44949, subd. (c)(3).) Final notice of termination is required to be sent to the affected employees before May 15th. (Ed. Code, § 44955, subd. (c).)

In determining which employees are affected by the reduction of services, a school district is required to layoff employees in the inverse of the order in which they were employed so that "the services of no permanent employee may be terminated … while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render." (Ed. Code, § 44955, subd. (b).) Subdivision (c) of section 44955 further provides that "[t]he governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render." School districts frequently maintain seniority lists which identify

employees in seniority order by first date in paid probationary status. These lists are consulted throughout the layoff process by both the school district and the employee organizations to determine the order of layoff.

It is the interaction between these two parts of the layoff process, namely the decision to reduce services and the termination of affected employees, which is at issue in this case. As is established below, it is the position of amici that a school district retains the authority to determine the level of services that it will provide and the manner in which it will provide those services. Appellants' argument that seniority order must be preserved at all costs, even when it is contrary to a school district's determination as to the level and manner of the services it will provide, confuses the role of a school district, which is "established not to provide jobs for teachers but rather to educate the young." (*Turner v. Bd. of Trustees* (1976) 16 Cal.3d 818, 825.)

I. A SCHOOL DISTRICT HAS THE POWER TO DETERMINE THE LEVEL OF THE SERVICES THAT IT PROVIDES.

A. Section 44955 specifically authorizes a school district to determine the manner in which it will decrease the number of certificated employees.

Section 44955 specifically authorizes the governing board of a school district to decrease the number of permanent employees in the District when the governing board determines that "attendance in a district will decline in the following year[,]" "a particular kind of service is to be

reduced or discontinued not later than the beginning of the following school year" or when the "amendment of state law requires the modification of curriculum." (Ed. Code, § 44955, subd. (b).) Section 44955 does not dictate how such services are to be decreased. Thus, a school district is free to reduce full or partial FTE and retain full or partial FTE, as the district deems appropriate in order to provide the determined level of services.

Where, as here, a school district determines it necessary to decrease staff due to a reduction in particular kinds of services, it does so based on its determination as to how to best effectuate the reduction and utilize the positions that it retains. A school district is not required to simply reduce entire positions. Rather, it may determine that it can accomplish the necessary reduction by reducing only a fraction of a particular position. Similarly, a school district has the authority to determine how it will structure the positions that are retained after the layoff.

Here, Respondent determined that it would eliminate 1.0 FTE of school psychologist positions. Nothing in section 44955, which gives school districts the discretion to determine the number of positions to be decreased, dictates whether that reduction consist of a single 1.0 FTE position or multiple partial FTE positions that add up to 1.0 FTE. Nor does anything in the governing board resolution adopted by Respondent dictate whether the 1.0 FTE is a single position or multiple partial positions.

B. Section 44955 grants school districts the authority to determine whether a permanent employee is "certificated and competent" to render the service being reduced.

Subdivision (b) of section 44955 specifically grants school districts the discretion to determine whether an employee is "certificated and competent to render" the service provided by a junior employee in the layoff context. If a senior employee is certificated and competent to render a service provided by a junior employee, the senior employee may bump a junior employee out of his or her position resulting in the senior employee being retained to provide that service. While the term "certificated" likely means that the senior employee possesses the requisite certificate or credential authorizing them to provide the service, section 44955 does not define what is meant by "competent to render" the particular service.

Courts recognize that it is within the discretion of the governing board of a school district to determine whether an employee is competent to render a particular service. (*Martin v. Kentfield School Dist.* (1983) 35 Cal.3d 294, 299-300; *Duax v. Kern Community Coll. Dist.* (1987) 196 Cal.App.3d 555, 565.) Competency is interpreted by courts to include both the skills and qualifications necessary to provide the service. (*Duax v. Kern Community Coll. Dist.*, 196 Cal.App.3d 555 at 565.)

C. School districts generally have the power to determine staffing needs and assign employees to fill those needs.

The California Constitution empowers the Legislature to "authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." (Cal. Const., art. IX, § 14.) The Legislature has codified this broad authority in section 35160 of the Education Code, which provides that "the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established."

Education Code section 35160.1 states the legislative findings and intent relevant to section 35160. Specifically, section 35160.1 finds that "school districts ... have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs, common as well as unique, school districts ... should have the flexibility to create their own unique solutions." It further states the legislative intent to "give school districts . . . broad authority to carry on activities and programs . . . which, in the determination of the governing board of the school district . . . are necessary or desirable in meeting their needs . . . . It is the intent of

the Legislature that Section 35160 be liberally construed to affect this objective." (Ed. Code, § 35160.1, subd. (b).)

The Legislature specifically recognizes that school districts have the power to hire and assign employees of the district. This power to assign is set forth in Education Code section 35035, subdivision (c), which grants the superintendent of a school district, subject to the approval of the governing board, to "assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve . . . ."

While the Education Code sets forth the various classifications of certificated employees as substitute, temporary, probationary or permanent and the accrual of permanent status, the Education Code is silent on how school districts assign employees in those categories. (See, e.g., Ed. Code §§ 44914, 44915, 44918, 44919.) This silence is indicative of the Legislature's recognition that school districts are uniquely qualified to determine the level of services that will be provided and the employees who will provide those services. (See, e.g., *Fuller v. Berkeley School Dist.* (1934) 2 Cal.2d 152.)

Thus, the authority of a school district to reduce the level of services provided and terminate affected employees under section 44955, as well as the authority to determine how the remaining services will be provided, must be read in conjunction with the power of the school district to assign

employees, as set forth in the California Constitution and the Education Code.

II. NEITHER CASE LAW NOR EXISTING STATUTORY REQUIREMENTS REQUIRE AN EDUCATIONAL AGENCY TO SPLIT POSITIONS TO ACCOMMODATE SENIORITY ORDER.

A. This Court has twice considered the issue of seniority order in the rehire context and declined to require that positions be split.

Appellants urge this Court to "respect seniority" and order the District to split a 1.0 FTE position into two new, part-time positions. (Appellants' Opening Brief ["AOB"] at p. 22.) This position is contrary to two prior decisions of this Court and, as discussed above, would undermine the authority of a school district to determine the level of services it will provide and the manner in which it will provide such services.

In *King v. Berkeley Unified School Dist.* (1979) 89 Cal.App.3d 1016, this Court held that the Berkeley Unified School District was not required to split a new teacher-counselor position in order to reemploy a laid off employee who was only qualified for the counseling-half of the position. Rather, this Court found that the school district acted properly in assigning a more junior employee, who held both of the credentials required for the position, to the new teacher-counselor position. This Court determined that rehiring decisions involve "'discretionary decisions' by a school district's

responsible officials because they 'have a special competence' to make them." (*Id.* at p. 1023.)

While the *King* case focuses specifically on the fact that a junior employee was retained over a senior employee who was not "certificated" for the teacher portion of a teacher-counselor position, it also demonstrates this Court's deference to the district's determination that it needed a single person to hold the teacher-counselor position. While this Court could have reversed the trial court's decision and ordered the district to split the position so that the senior teacher could assume the counseling portion of the teacher-counselor position for which he was certificated, this Court did not do so. (*Id.* at pp. 1023-1025.)

Similarly, in *Murray v. Sonoma County Office of Education* (1989) 208 Cal.App.3d 456, this Court again held that an educational agency, here the Sonoma County Office of Education ("SCOE"), was not required to split a position to accommodate a senior employee. Specifically, this Court held that under Education Code section 44956, the SCOE was not required to divide or split a full-time position to allow a part-time school nurse entitled to reemployment rights following her layoff to be rehired into a portion of a full-time position. (*Id.* at pp. 460-461.)

At issue in *Murray* was whether, under Education Code section 44956, the district had re-established services that were previously provided by plaintiff Murray and, if so, whether Murray was entitled to have the

position split so that she could be reinstated to provide the service she previously provided to the school district. Murray was a nurse employed by SCOE in a part-time one-day-a-week position, which amounted to .16 FTE. (*Id.* at p. 458.) She was also employed by the Gravenstein Union School District three days a week, which is equivalent to a .60 FTE position. (*Id.*) From 1983 to 1985, the SCOE assigned Murray to work at Gravenstein School. (*Id.*) In 1985, Murray's one-day-a-week position was eliminated and she was laid off. (*Id.*) She continued to work for Gravenstein School. (*Id.*) In 1986, the SCOE hired a full-time school nurse. (*Id.* at 458-459.) It assigned the new school nurse to Gravenstein School for one day a week. (*Id.*)

Murray argued she was entitled to be reemployed by the SCOE to fill the one-day a week position at the Gravenstein School. (*Id.* at 459.) This Court held that the service that Murray previously provided to the SCOE, namely service as a one-day-a-week school nurse, was not reinstated and therefore Murray was not entitled to reinstatement. (*Id.* at 461.) Rather, this Court held that the SCOE had hired a full-time nurse to, among other duties, cover Gravenstein School one day a week and the SCOE was not required to divide that full-time position to accommodate Murray. (*Id.*)

In addition to considering whether the SCOE was required to split a position to accommodate Murray, this Court also considered whether the

service previously provided by Murray, i.e., .16 FTE nursing services, was reestablished by the SCOE. This Court determined that that "service" for purpose of that determination constituted Murray's .16 FTE position, which was discontinued by the SCOE. Appellants claim that this Court's "treatment of 'service'" in the *Murray* case is dicta and is "patently incorrect." Not so. In *Murray,* the Court balanced the Legislature's intent to give school districts and county offices of education the authority to determine the level of services provided with the employees' interests in conducting layoffs in seniority order. In the *Murray* case, the *service* that was determined to be reestablished by the District (i.e., a full-time position) was a different *service* than that provided by Murray (i.e., a .16 FTE position). (*Id.*)

In this case, Respondent reduced 1.0 FTE of school psychologists. Similar to the district in *King* and the county office of education in *Murray*, Respondent exercised its discretion as to what level of service was required and specifically determined to eliminate the services provided by a .2 school psychologist and a .8 school psychologist and to retain the services provided by a full-time, 1.0 FTE, school psychologist. Again, to take Appellant's position would require the court to insert its judgment for that of the school district. [3]

[3] It should be noted that a part-time employee who is laid off may be offered, but does not have a guaranteed right to bump into a full-time

B. The legislative history of sections 44955 and 44956 demonstrate the legislative intent to provide a similar process for order of layoff and reemployment.

Appellants claim that *Murray* and *King* are inapposite because the issue in those cases was the order of reemployment of employees following a layoff under section 44956, not the order of layoff under section 44955. Appellants are incorrect. The language of sections 44955 and 44956 regarding order of layoff and reemployment rights are nearly identical. Subdivision (b) of section 44955, which addresses the order of layoff, provides in part:

> Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year ..., whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is

---

position. (See *Waldron v. Sulphur Springs Union School Dist.* (1979) 96 Cal.App.3d 503, 505, holding that under section 44956 a laid off employee is entitled to the same, but not greater employment rights than he or she would have had if no layoff had intervened.)

> retained to render a service which said permanent employee is certificated and competent to render.

(Emphasis added.) Similarly, subdivision (a)(1) of section 44956, addressing the order of reemployment of laid off employees, provides:

> For the period of 39 months from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, in the order of original employment as determined by the board in accordance with the provisions of Sections 44831 to 44855, inclusive, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render...."
>
> (Emphasis added.)

Thus, each of these sections sets forth the basic rule—namely, under section 44955 that the governing board may reduce services by terminating the services of not more than a corresponding percentage of certificated employees and under section 44956 that employees have a preferred right to reemployment if services are increased or reestablished—followed by the respective proviso regarding the order of layoff or reemployment. The words selected by the Legislature in crafting the order of layoff and reemployment are nearly identical with the exception of the use of the word "retain" in section 44955 and "employed" in section 44956 to account for the different scenarios in which the proviso is implicated.

A review of the legislative history of sections 44955 and 44956 further demonstrates the legislative intent to treat similarly the layoff and reemployment order set forth in those sections. In 1943, the Legislature added language to section 13651, now section 44955, to provide that "[n]o permanent employee may be dismissed under the provisions of this section while a probationary employee is retained or employed to render a service which the permanent employee is certificated and competent to render." (Ch. 71, Stats. 1943, p. 574, attached hereto as Exhibit A.) This provision indicated a preference for permanent employees over probationary employees, but did not offer any guidance as to the order of layoff between permanent employees. To address this issue, the Legislature amended section 13651 again in 1945, and also amended section 13652, now section 44956. (Ch. 204, Stats. 1945, §§ 1-2, p. 675-676, attached hereto as Exhibit B.)

The above-quoted language from Chapter 71 of the Statutes of 1943 was amended in 1945 to read:

> [P]rovided, that the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render. (Ch. 204, Stats. 1945 §1, p. 675.)

This language is substantially similar to the current language of subdivision (b) of section 44955.

The Legislature also added language to former section 13651, which has remained unchanged to date, requiring the governing board of a school district to "make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render."

Former-section 13652, now section 44956, was also amended in 1945 to read:

> For the period of three years from the date of such termination, any employee who in the meantime has not attained the age of 65 years shall have the preferred right to reappointment, in the order of original employment ... if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render. (Ch. 204, Stats. 1945 § 2, pp. 675-676, emphasis added.)

Thus, the Legislature added the language regarding the retention or reemployment of any employee with less seniority to both former sections 13651 and 13652 in 1945. These amendments to sections 13651 and 13652 were proposed as urgency legislation. (Ch. 204, Stats. 1945 §1, p. 677.) Pursuant to California Constitution, Article IV, section 8, subdivision (d), the Legislature stated that the proposed amendment was urgent because "[t]he statutory provisions governing the relative priorities of such [permanent] employees, both as to the sequence in which they shall suffer dismissal and the order in which they may be reinstated, and governing

their rights when reinstated, are ambiguous and of uncertain meaning and application, resulting in confusion and inefficiency in the administration of the public schools. This bill is designed to resolve such ambiguities . . . ." (Ch. 204, Stats. 1945, § 4, p. 677.)

If the Legislature intended to provide a different process for determining seniority in the layoff context and in the rehire context, it would have used different language in the two statutes. A phrase or expression may be interpreted in accordance with its use in other related statutes. (*Frediani v. Ota* (1963) 215 Cal.App.2d 127, 133.) This Court has twice refused to require a school district to split a position in order to accommodate one or more senior employees who hold part-time positions. Amicus Curiae urge the Court to again do so here.

C. If the Legislature disagreed with the *Murray* or *King* decision, it could have taken action to amend section 44955 and/or section 44956.

King was decided four years before the Legislature last amended sections 44955 and 44956 in 1983. *Murray* was decided in 1989, six years after the Legislature last amended sections 44955 and 44956. It is a common principle of statutory construction that "in enacting a statute, the Legislature is presumed to have knowledge of existing judicial decisions and to have acted in light of those decisions." (*Watts v. Crawford* (1995) 10 Cal.4th 743, 754-755, *Stafford v. Realty Bond Service Corporation*

(1952) 39 Cal.2d 797, 805; see also, *Bailey v. Super. Ct.* (1977) 19 Cal.3d 970, 977-978, fn. 10.)

Nearly thirty years have elapsed since *King* was decided and nearly twenty years since *Murray* was decided. As stated above, the Legislature is presumed to have knowledge of these decisions and, if it disagreed with the courts' interpretations of the language of section 44956, which is substantially similar to the language of section 44955, it has had ample opportunity to amend the language of one or both of those sections to override judicial interpretations.

D. The "assignments and reassignment" language in section 44955 does not distinguish it from section 44956.

Appellants make much of the fact that Education Code section 44955, subdivision (c), the statute describing the process for the layoff of certificated employees, requires the governing board of a district to "make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render[,]" while section 44956, the statute describing the reemployment rights of employees who have been laid off, does not contain such language. Appellants claim that this is a "notable distinction" because the absence of such language in section 44956 "support treating the two situations, rehire and layoff, in different manners." (AOB at p. 10.) Appellants are mistaken.

As discussed above, the language of sections 44955 and 44956 related to the order of layoff and reemployment is substantially similar. Courts have held that a statute should be interpreted with reference to the system of law of which it is a part. (*People v. Comingore* (1977) 20 Cal.3d 142, 147.) Appellants argue that this Court should ignore its prior holdings in the *King* and *Murray* cases because the order of layoff under section 44955 should be interpreted in a different manner than the order of reemployment under section 44956. The absence of the "assignments and reassignments" language in section 44956 does not dictate different treatment of the order of layoff and recall. Rather, the existence of that language is irrelevant to the issue. The "assignments and reassignments" language is necessary in section 44955 to account for the "bumping" that occurs in the layoff process. Under section 44955, an employee who is subject to layoff based on the reduction of a particular service that the employee provides may be able to "bump" into a different position for which he or she is qualified because the employee holds a credential that authorizes him or her to teach a subject other than that being eliminated and he or she is more senior than other employees in that position. In such cases, the District is required to make assignments, or possibly reassignments, to account for these considerations.

Such assignments and reassignments are not necessary in the rehire context because an employee who is eligible for rehire is reemployed only

if the number of employees is increased or the discontinued service is reestablished. In such case, it is not necessary to make "assignments and reassignments" so the language would be superfluous in section 44956.

Rather, as discussed above, the Legislature has included nearly identical language in sections 44955 and 44956 regarding the order of layoff and reemployment. This evinces an intent to treat the order of layoff and reemployment similarly. Appellants have failed to provide any reason why the Legislature intended to treat the layoff and rehire processes differently.

III. PUBLIC POLICY DICTATES AGAINST REQUIRING A SCHOOL DISTRICT TO SPLIT POSITIONS TO ACCOMMODATE SENIOR EMPLOYEES.

A. The trial court did not err in refusing to require the district to split the 1.0 FTE school psychologist position to accommodate the two senior employees.

Appellants argue that in order to make the "assignments and reassignments" required under section 44955, a school district is required to split up positions as necessary to accommodate senior teachers. (AOB at p. 8.) Appellants claim that splitting positions is required by the express language of section 44955 and to find otherwise would allow a school district to "handpick" employees to retain or terminate through the layoff process. (Appellants Reply Brief ["AR"] at p. 8.) Such claims are without merit. As discussed above, the language of section 44955 does not mandate that a school district split a position in order to accommodate senior

employees. Rather, as discussed below, splitting positions is impractical and could negatively impact the educational services provided by school districts.

In this case, Appellants argue that this Court should reject the District's determination that it needed to retain a full-time (1.0 FTE) psychologist to provide services in District and instead force the District to split the 1.0 FTE position into two separate, part-time positions. (AOB at pp. 8, 9.) Specifically, Appellants argue that the District should have split Ms. Commanday's 1.0 FTE position and offered .8 FTE and .2 FTE of the position to Appellants, respectively, rather than skipping Ms. Commanday. (AR at pp. 20-21.) Appellants attempt to argue that there is no difference in the services provided to students of the district if one full-time teacher provides the services or two part time teachers provide the services. This argument is contrary to the evidence presented by Respondent at the layoff hearing. To read a requirement of splitting positions into section 44955 would completely undermine a school district's authority to determine the manner of providing educational services to its students and would instead allow seniority to trump a school district's determination of the level and manner in which it provides services to students. As discussed below, there are significant differences between a single full-time employee providing psychology services and two part time employees providing such services.

Under the facts presented in this case, the District terminated a Memorandum of Understanding ("MOU") between the District and three neighboring school districts to provide special education services to the neighboring school districts using District employees. (See Clerk's Transcript on Appeal ["CT"], at pp. 42-44 [layoff hearing transcript].) As a result of the termination of the MOU, it was necessary for the District to reduce its psychology services by 1.0 FTE. (See CT at p. 43.) The District determined to retain a 1.0 FTE full-time school psychologist to continue to provide services to schools in the District. (See *id.*)

Appellants claim that there is no evidence presented in this case as to how retaining two part time employees to provide the psychology services would be detrimental to the services provided by the District. The record is replete with evidence related to the detriment such a decision would have on the psychology services provided by the District. Dr. Robert Haley, Assistant Superintendent for the District, testified at the layoff hearing as to why the District retained Ramah Commanday, rather than the two employees who were senior to her, in the full-time 1.0 FTE school psychologist position. Dr. Haley testified that "the District considers the full-time psychologist to be programmatically what we need for the students in our district for program continuity . . . ." (See CT at p. 52.)

Ms. Commanday testified during the layoff hearing about the nature of her 1.0 FTE position. Specifically, she testified that the position was

"designed by the District as part of a vision for a more effective and cohesive special education program." (See CT at p. 78.) The position was designed to assist special education students in the District as they transitioned between each of the four schools in the District, specifically to "bridge the gap between the four different sites and four different levels." (See CT at p. 80.) Ms. Commanday concluded her testimony by emphasizing that in the District the full-time FTE assigned to her school psychologist position was "central to the excellence" of the District's program. (See CT at p. 81.)

To accept Appellants' position that the District should split the 1.0 FTE school psychologist position and have retained them rather than Ms. Commanday is to force the District to change its determination as to the most effective way to provide psychology services. The language of section 44955, and its legislative history, indicate that this is not what the Legislature intended.

B. Requiring a school district to split a 1.0 FTE position will negatively impact the services of the district.

Even assuming *arguendo* that the single full-time School Psychologist position at issue here could easily be split into two separate part-time positions without disrupting the educational program of the District, such is not always the case. At the elementary school level, where school districts generally employ a single 1.0 FTE employee to teach a

particular class,[4] requiring a district to split a full-time teaching position into two or more part-time positions to accommodate the FTE of senior employees would be extremely difficult, if not impossible. Using the example of a first grade classroom with the FTE of the three employees at issue in this case, Teacher A (1.0 FTE) with the least seniority, Teacher B (.2 FTE) with the most seniority and Teacher C (.8 FTE) with the second most seniority, Appellants would have the District layoff the full-time Teacher A, split her position into two separate part-time positions and retain both Teachers B and C over Teacher A.

Under this scenario, Teachers B and C would share the duties of the first grade classroom, in proportion to their respective FTE, either on a daily or weekly basis. If the duties were shared on a daily basis, assuming a five-hour school day for ease of example, Teacher A would teach for one hour and Teacher B for four hours. Thus, the first grade students would receive instruction from Teacher B until her .2 FTE for that day was over and then the student's would resume their lesson with Teacher C. If the duties were shared on a weekly basis, Teacher B and C would again share

[4] There may be limited exceptions to this general practice such as where two employees have a job-share arrangement or there are combination classrooms with co-teachers. However, such arrangements are contingent upon the District's approval of the arrangement and, in the case of a job share, agreement between the employees and the District as to how the position will be shared.

the duties of the classroom with Teacher B teaching one day a week and Teacher C teaching four days a week.

From a student's standpoint, either of these arrangements is unworkable. The student would be expected to adapt to different teaching styles on either an hourly or daily basis. Because teachers have different preferences for student work, students would have to keep track of which teacher assigned a particular assignment in order to meet the teacher's preferences for assignments and to direct questions about assignments to the correct teacher.

From a teacher's standpoint, such an arrangement would create logistical difficulties including how to divide curricular topics, grade student work, communicate with parents, share materials, and allocate desk space. In addition, to the extent that the teachers were eligible for a preparation period under the applicable collective bargaining agreement, there would be a question as to how to split that preparation period between the two teachers.

From a school district's standpoint, requiring a position to be split would, as discussed above, undermine the district's discretion to determine how best to administer programs. Further, it creates logistical difficulties for the district in structuring the position to ensure that the needs of the students are met. If these logistical issues are not worked out and the needs of students are not met, a district could be subject to parent complaints or

possible audit if required information, for example, attendance accounting, was not accurately recorded by the teachers. In addition, such an arrangement could actually cost the district more than retaining a single full-time teacher if the District is required to provide full health benefits to the part-time employees.[5]

These logistical issues are similarly present in other positions outside of the elementary school context. For example, at the middle or high school level, where students have different teachers for each subject, splitting a position may not have the same effect on students that it does at the elementary school level assuming that the FTE of any teacher put into a split position neatly matches the number of minutes in a class period. However, frequently, a teacher's FTE does not exactly correspond with the number of minutes in a class period.

If, for example, a school district has multiple high schools, some of those schools may be on a "block schedule" while the other high schools in the district may have a "traditional" schedule. Under this scenario, the district could have an employee working a .77 FTE English position at a high school with a block schedule, which amounts to three complete

---

[5] Frequently, collective bargaining agreements will include language that indicates that employees are entitled to health benefits in proportion to the time worked. However, if the collective bargaining agreement does not include such language, a school district may be required to pay full benefits for each part-time employee which could exceed the cost retaining a single full-time employee.

teaching periods under that schedule, but which may not neatly correspond to three complete periods under a traditional class schedule. If the district in this example had a 1.0 FTE English position at a high school with a traditional schedule and the .77 FTE teacher was the most senior employee, Appellants would have the district split the 1.0 FTE English position and give the .77 FTE teacher that percentage of the position. However, the .77 FTE could be the equivalent of three and a half class periods, putting the district in the difficult position of determining how it will staff the remaining .23 FTE, including a half of a class period. Trying to find someone who would be willing to assume a .23 FTE position may be difficult, if not impossible, for the district.

Another logistical issue that arises under this scenario is that the classes a partial FTE employee in this example is qualified to teach may not be scheduled one after the other. Rather, the classes could be scheduled with one in the morning and two in the afternoon, creating a split shift where the employee has a significant time period between classes. Under this scenario, the school district will face additional difficulties in scheduling services.

C. Requiring a school district to split a 1.0 FTE position will negatively impact the district's ability to retain and hire quality employees.

Requiring a school district to piece together full-time positions out of various fractional positions will negatively impact the district's ability to

retain and hire quality employees. For example, if there is a 1.0 FTE position and a .6 FTE teacher has more seniority than a 1.0 FTE teacher, Appellants would have the district split the 1.0 FTE position so that the .6 FTE teacher can bump into it. Under this scenario, the district would be left with a .4 FTE position. While that .4 FTE position could be filled by the employee who originally held a 1.0 FTE position, that employee may not be willing to accept the reduced position and seek alternate employment. The district may not be able to find someone else who would accept a part-time .4 FTE position. Under Appellant's proposed interpretation, the district has no discretion to determine that it would be in the best interest of the district for a single employee fill 1.0 FTE position at the school site. Rather, Appellants would have the position take the form dictated by the FTE of the teachers on the seniority list, thereby completely abrogating the school district's authority to determine the manner in which it will provide educational services.

D. A school district may not be able to split a 1.0 FTE position.

Appellants take for granted that the various part-time FTE of senior employees will fit together neatly to fill a 1.0 FTE position. However, it is not uncommon for certificated employees to hold partial FTE positions that are not round figures, like the .16 FTE position held by the nurse in *Murray*. Forcing a school district that determined that a 1.0 FTE position

was required for a particular grade or subject to piece together the FTE of various senior employees to fill a full-time position may be difficult if not impossible.

CONCLUSION

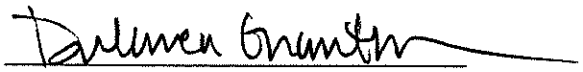
In summary, the trial court decision in this matter was correct because it followed the language of section 44955 authorizing school districts to eliminate positions, deferred to the District's discretion to determine the level of services provided and assign employees to provide those services, and it recognized the practical impossibilities of overriding a district's staffing determination and forcing a district to split a position solely to accommodate a senior employee.

WHEREFOR, *amicus curiae* pray that the decision of the Napa County Superior Court be affirmed.

Dated: January 5, 2009

Respectfully submitted,

LOZANO SMITH



NAMITA S. BROWN
SARAH LEVITAN KAATZ
DULCINEA A. GRANTHAM
Attorneys for Amicus Curiae
CALIFORNIA SCHOOL BOARDS
ASSOCIATION'S, EDUCATION
LEGAL ALLIANCE

CERTIFICATE OF WORD COUNT

COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

MARGARET HILDEBRANDT AND SUSAN WOOD-DEGUILIO
v.
ST. HELENA UNIFIED SCHOOL DISTRICT

CASE NO. A119738

Napa County Superior Court Case No. 26-38503

Pursuant to Rule 8.204(c) of the California Rules of Court, counsel hereby certifies that the word count of the computer program used to prepare this brief (excluding the cover, tables, and this certificate) is 6,953 words.

Executed in San Ramon, California, on this day, January 5, 2009.

NAMITA S. BROWN
SARAH LEVITAN KAATZ
DULCINEA A. GRANTHAM
Attorneys for Amicus Curiae
CALIFORNIA SCHOOL BOARDS
ASSOCIATION'S, EDUCATION
LEGAL ALLIANCE

ATTACHMENTS

Exhibit A

STATUTES OF CALIFORNIA

FIFTY-FIFTH SESSION OF THE LEGISLATURE

1943

BEGAN ON MONDAY, JANUARY FOURTH, AND ADJOURNED
WEDNESDAY, MAY FIFTH, NINETEEN
HUNDRED FORTY-THREE

CHAPTER 71*

An act to establish an Education Code, thereby consolidating and revising the law relating to the establishment, maintenance, government and operation of schools, libraries and institutions of learning, arts, and sciences, and to repeal certain acts and parts of acts specified herein.

In effect August 4, 1943

[Approved by Governor April 7, 1943. Filed with Secretary of State April 7, 1943.]

NOTE.—The Education Code, as prepared by the California Code Commission, consists of this chapter and Chapters 72 to 91, inclusive, all as originally enacted. As here set forth Chapter 71 contains the provisions of these chapters and also contains all of the amendments to the code made during the Fifty-fifth Session of the Legislature, namely, by Chapters 8, 16, 36, 49, 65, 126, 162, 175, 178, 264, 273, 316, 320, 364, 367, 408, 417, 575, 634, 637, 645, 649, 664, 671, 688, 694, 695, 696, 700, 704, 705, 714, 738, 756, 785, 787, 809, 810, 812, 813, 814, 815, 816, 817, 818, 819, 820, 823, 827, 828, 829, 833, 834, 836, 837, 862, 883, 906, 915, 923, 946, 976, 979, 990, 1032, 1078, 1082, 1083, 1085, and 1127.

The chapters constituting the original code are in effect August 4, 1943. For approval, filing and effective dates of the amendatory chapters, see the respective chapters in their numerical sequence.

The people of the State of California do enact as follows:

GENERAL PROVISIONS

Title

1. This act shall be known as The Education Code.

Continuation of existing law

2. The provisions of this code, in so far as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments.

Construction

3. The code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

Joint authority

4. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the provisions of the code giving the authority.

Continuation in office

5. All persons who, at the time this code goes into effect, hold office under any of the acts repealed by this code, which offices are continued by this code shall continue to hold them according to their former tenure.

Continuation of rights

6. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible.

Continuation of license or certificate

7. No rights given by any license or certificate under any act repealed by this code are affected by the enactment of this code or by such repeal, but such rights shall hereafter be exercised according to the provisions of this code.

* A cross-reference table showing the origin of each section appears in the appendix to this volume.

Article 4. Dismissal of Substitute Employees

Time of dismissal

13611. Governing boards of school districts may dismiss substitute employees at any time at the pleasure of the board.

Article 5. Dismissal of Temporary Employees

Time of dismissal

13631. Governing boards of school districts may dismiss temporary employees requiring certification qualifications at the pleasure of the board. A temporary employee who is not dismissed during the first three school months, or in the case of migratory schools during the first four school months of the school term for which he was employed and who has not been classified as a permanent employee shall be deemed to have been classified as a probationary employee from the time his services as a temporary employee commenced.

Article 6. Decrease in Number of Permanent Employees

Procedure

13651. Whenever it becomes necessary to decrease the number of permanent employees in a school district on account of either a decrease in the number of pupils attending the schools of the district, or on account of the discontinuance of any particular kind of service in the district, the governing board may dismiss so many of the employees as may be necessary at the close of the school year. In making dismissals employees shall be dismissed in the inverse of the order in which they were employed. No permanent employee may be dismissed under the provisions of this section while a probationary employee is retained or employed to render a service which the permanent employee is certificated and competent to render.

Reappointment

13652. If the number of teachers is increased, or the service is reestablished within one year from the time of the dismissal, the dismissed employees shall have the preferred right to reappointment, in the order of their original employment, unless any such employee in the meantime has attained the age of 65 years.

Honorable dismissal

13653. The board shall give any person who is dismissed under this article a statement of honorable dismissal.

Effect of war

13654. Notwithstanding the provisions of Section 13651, permanent employees dismissed because of the effect of the wars in which the United States is presently engaged upon enrollment or upon the maintenance of a particular kind of services shall have the preferred right to reappointment, in the order of their original employment, unless any such employee in the meantime shall have attained the age of 65 years, if the number of employees be increased, or such service is reestablished within two years after cessation of hostilities in such wars. As to any employee who is so reemployed the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service and any credit for prior service under any State or

Exhibit B

STATUTES OF CALIFORNIA

FIFTY-SIXTH SESSION OF THE LEGISLATURE

1945

BEGAN ON MONDAY, JANUARY EIGHTH, AND
ADJOURNED SATURDAY, JUNE SIXTEENTH,
NINETEEN HUNDRED FORTY-FIVE

CHAPTER 204

An act to amend Sections 13651 and 13652 and to repeal Section 13653 of the Education Code, relating to decrease in number of permanent employees, declaring the urgency thereof, to take effect immediately.

[Approved by Governor May 3, 1945. Filed with Secretary of State May 3, 1945.] In effect immediately

The people of the State of California do enact as follows:

SECTION 1. Section 13651 of the Education Code is amended to read:

13651. No permanent employee shall be deprived of his position for causes other than those specified in Article 2, Chapter 11, of this division except in accordance with the provisions of this article. Decrease in number of permanent employees

Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, or whenever a particular kind of service is to be discontinued not later than the beginning of the following school year, and when in the opinion of the governing board of said district it shall have become necessary by reason of either of such conditions to decrease the number of permanent employees in said district, the said governing board may terminate the services of not more than a corresponding percentage of the certificated employees of said district, permanent as well as probationary, at the close of the school year; provided, that the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

Notice of termination

Notice of such termination of services for reduction in attendance shall be given before the fifteenth of May in the manner prescribed in Section 13582 of this code, and services of said employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of Sections 13004.1 and 13004.2 of this code.

The board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

SEC. 2. Section 13652 of the Education Code is amended to read:

Rights of employees

13652. Any permanent employee whose services have been terminated as provided in Section 13651 shall have the following rights:

Reappointment

1. For the period of three years from the date of such termination, any employee who in the meantime has not attained

the age of 65 years shall have the preferred right to reappointment, in the order of original employment as determined by the board in accordance with the provisions of Sections 13004.1 and 13004.2 of this code, if the number of employees is increased or the discontinued service is reestablished, with no requirements that were not imposed upon other employees who continued in service; provided, that no probationary or other employee with less seniority shall be employed to render a service which said employee is certificated and competent to render.

Waiver

2. The aforesaid right to reappointment may be waived by the employee, without prejudice, for not more than one school year, unless the board extends this right, but such waiver shall not deprive the employee of his right to subsequent offers of reappointment.

Considered leave of absence

3. As to any such employee who is reappointed, the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service he shall retain the classification and order of employment he had when his services were terminated, and credit for prior service under any State or district retirement system shall not be affected by such termination, but the period of his absence shall not count as a part of the service required for retirement.

Substitute service

4. During the period of his preferred right to reappointment any such employee shall, in the order of original employment, be offered prior opportunity for substitute service during the absence of any other employee who has been granted a leave of absence or who is temporarily absent from duty; provided, that his services may be terminated upon the return to duty of said other employee, that the compensation he receives shall not be less than that which he was receiving at the time his services were terminated, and that said substitute service shall not affect the retention of his previous classification and rights.

Contributions to retirement system

5. At any time prior to the completion of one year after his return to service, he may continue or make up, with interest, his own contributions to any State or district retirement system for the period of his absence, but it shall not be obligatory on State or district to match such contributions.

Disability, etc

6. Should he become disabled or reach retirement age at any time before his return to service, he shall receive, in any State or district retirement system of which he was a member, all benefits to which he would have been entitled had such event occurred at the time of his termination of service, plus any benefits he may have qualified for thereafter, as though still employed.

Repeal

SEC. 3. Section 13653 of the Education Code is repealed.

Urgency

SEC. 4. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution and shall therefore go into immediate effect. A statement of the facts constituting such necessity is as follows:

Because of the effects of the war on the attendance of pupils in many school districts of the State the governing boards of such districts have dismissed many permanent employees thereof, and, so long as such conditions continue, will be required to dismiss many additional permanent employees. The statutory provisions governing the relative priorities of such employees, both as to the sequence in which they shall suffer dismissal and the order in which they may be reinstated, and governing their rights when reinstated, are ambiguous and of uncertain meaning and application, resulting in confusion and inefficiency in the administration of the public schools. This bill is designed to resolve such ambiguities and it is necessary that same become effective prior to the close of the present school year.

CHAPTER 205

An act to amend Section 13654 of the Education Code, relating to the rights of permanent certificated employees whose services have been terminated because of the effect of wars upon the attendance of pupils.

[Approved by Governor May 3, 1945 Filed with Secretary of State May 3, 1945] In effect September 15, 1945

The people of the State of California do enact as follows:

SECTION 1. Section 13654 of the Education Code is amended to read:

Rights of permanent certificated employee upon termination of service

13654. As to any permanent certificated employee whose services have been terminated because of the effect of wars in which the United States is engaged upon the attendance of pupils or upon the maintenance of a particular kind of service, the effective period covered by all rights enumerated in Section 13652 is extended until two years after the cessation of hostilities, and in addition thereto for a like period the said employees shall have the following rights:

1. He may voluntarily accept termination of service in other than the order of original employment and retain all of the other rights herein provided.

2. If he is engaged in any form of civilian or military war service, any credential or certificate he holds is continued in full force and effect until 90 days after the termination of his employment therein.

3. If, either before or after such termination, he engages in any form of war service for which provision is made in Section 13204.1 of this code or elsewhere in the laws of this State, he shall retain all rights granted by such war service legislation as though still employed; provided, that the right to reappointment shall be in the order of original employment, as determined in accordance with the provisions of Sections 13004.1 and 13004.2 of this code.

PROOF OF SERVICE

I, Vanessa Bonite, declare as follows: I am employed in the County of Contra Costa, State of California. I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action; my business address is 2000 Crow Canyon Place, Suite 200, San Ramon, CA 94583. On January 5, 2009, I served the attached

APPLICATION FOR LEAVE TO FILE, AND BRIEF OF AMICUS CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF RESPONDENT

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

Clerk of the Court California Court of Appeal First Appellate Division 350 McAllister Street San Francisco, CA 94102 (Original plus Four Copies) **VIA PERSONAL DELIVERY**	The Honorable J. Michael Byrne Napa County Superior Court 825 Brown Street, Dept. C Napa, CA 94559-3031 (One Copy) **VIA OVERNIGHT DELIVERY**
David Weintraub Beeson, Tayer & Bodine 1404 Franklin Street, 5th Floor Oakland, CA 94612 (One Copy) **VIA OVERNIGHT DELIVERY**	Lawrence Schoenke Miller Brown & Dannis 71 Stevenson Street, 19th Floor San Francisco, CA 94105 (One Copy) **VIA OVERNIGHT DELIVERY**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 5, 2009, San Ramon, California.

Vanessa Bonite