ORIGINAL

Case No. S177403

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

Second Appellate District Case No. B214119

UNITED TEACHERS LOS ANGELES,

Plaintiff and Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant and Respondent.

On Appeal from the Superior Court of Los Angeles County,
Case No. BS116739, Honorable Mary Ann Murphy, Judge Presiding

MOTION FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER OF RESPONDENT LOS ANGELES UNIFIED SCHOOL DISTRICT TO AMICUS CURIAE BRIEF OF CALIFORNIA TEACHERS ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT UNITED TEACHERS LOS ANGELES

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[Exempt from filing fees pursuant to Gov. Code, § 6103]

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Respondent and Defendant Los Angeles Unified School District ("LAUSD" or "District") hereby requests this Court take judicial notice, pursuant to Evidence Code section 452, of the following documents in support of the Answer Of Respondent Los Angeles Unified School District To Amicus Curiae Brief Of California Teachers Association In Support Of Plaintiff/Appellant United Teachers Los Angeles.

1. Petition for Review filed in this Court in case number S185651, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* on August 23, 2010.

2. Appellant's Opening Brief filed in the Court of Appeal, Sixth Appellate District, case number H033788, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* on May 14, 2009.

Under Evidence Code section 452(d) judicial notice may be taken of the records of any court of this state. "A court may judicially notice documents in the file of the case wherein the demurrer is interposed . . ." (*Saltares v. Kristovich* (1970) 6 Cal.App.3d 504, 511; see also *Britz, Inc. v. Dow Chem. Co.* (1999) 73 Cal.App.4th 177.) In addition, the Court may take judicial notice of all material facts pleaded in the complaint and those arising by reasonable implication therefrom. (*Young v. Gannon* (2002) 96 Cal.App.4th 209, 220.) The Court may take judicial notice at a hearing of the record in another action when they disclose an absolute defense to the action. (*Frommhagen v. Board of Supervisors of Santa Cruz County* (1987) 197 Cal.App.3d 1292, 1299.)

Amicus Curiae, California Teachers Association, is a party and appellant in the related case that is before this Court, case number S185651,

California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District ("*Salinas* case"). Judicial notice is requested for briefs filed by CTA in the *Salinas* case as these documents set forth the legal position advocated by CTA in the related action. These documents will further the Court's understanding of the similarities in the position taken by CTA in the *Salinas* case and the instant case.

For these reasons, the Court should take judicial notice of item 1 above and Exhibits 1 and 2 attached hereto.

CONCLUSION

The District respectfully requests that the Court take judicial notice of the document listed above.

Dated: March 24, 2011

DANNIS WOLIVER KELLEY

SUE ANN SALMON EVANS

By _____
SUE ANN SALMON EVANS
Attorneys for Respondent
LOS ANGELES UNIFIED SCHOOL DISTRICT

DECLARATION OF SUE ANN SALMON EVANS

I, Sue Ann Salmon Evans, declare as follows:

1. I am an attorney admitted to practice law before all the courts of the State of California. I am a partner in the law firm of Dannis Woliver Kelley, and attorney of record for Respondent and Defendant Los Angeles Unified School District ("LAUSD") in above matter. I have personal knowledge of the facts set forth in this declaration, and if called upon to testify under oath concerning them, I could and would testify competently to such facts.

2. I make this declaration in support of the Appellant's Motion To Take Judicial Notice In Support Of Answer Of Respondent Los Angeles Unified School District To Amicus Curiae Brief Of California Teachers Association In Support Of Plaintiff/Appellant United Teachers Los Angeles.

3. By this motion, Appellant requests that the Court take judicial notice of Petition for Review ("Petition for Review") filed in this Court in case number S185651, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* on August 23, 2010.

4. The Petition for Review is relevant to this matter because Amicus Curiae, California Teachers Association, is a party and appellant in the related case that is before this Court, case number S185651, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* ("*Salinas* case"). Judicial notice is requested for briefs filed by CTA in the *Salinas* case as these documents set forth the legal position advocated by CTA in the related action. These documents will further the Court's understanding of the similarities in the position taken by CTA in the *Salinas* case and the instant case.

5. The Petition for Review relates to proceedings before this Court and should be considered by this Court. A true and correct copy of the Petition for Review is attached as Exhibit 1.

6. LAUSD requests the Court to take judicial notice of Petition for Review filed in this Court in case number S185651, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* on August 23, 2010 and attached to this motion as Exhibit 1.

7. By this motion, Appellant requests that the Court take judicial notice of Appellant's Opening Brief ("Opening Brief") filed in the Court of

Appeal, Sixth Appellate District, case number H033788, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* on May 14, 2009.

8. The Opening Brief is relevant to this matter because it Amicus Curiae, California Teachers Association, is a party and appellant in the related case that is before this Court, case number S185651, *California Teachers Association and Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District* ("*Salinas* case"). Judicial notice is requested for briefs filed by CTA in the *Salinas* case as these documents set forth the legal position advocated by CTA in the related action. These documents will further the Court's understanding of the similarities in the position taken by CTA in the *Salinas* case and the instant case.

9. The Opening Brief relates to proceedings occurring before this Court and should be considered by this Court. A true and correct copy of the Opening Brief is attached as Exhibit 2

10. LAUSD requests the Court to take judicial notice of Appellant's Opening Brief filed in the Court of Appeal, Sixth Appellate District, case number H033788, *California Teachers Association and*

Salinas Elementary Teachers Council vs. Governing Board of the Salinas City Elementary School District on May 14, 2009 and attached to this motion as Exhibit 2.

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

Executed this 24th Day of March, 2011, at Long Beach, California.

SUE ANN SALMON EVANS

ORDER

GOOD CAUSE APPEARING HEREIN, Respondent and Defendant Los Angeles Unified School District's Motion In Support Of Answer To Amicus Curiae Brief Of California Teachers Association In Support Of Plaintiff/Appellant United Teachers Los Angeles is hereby GRANTED.

_____

Chief Justice

CASE NO. S185651

IN THE

SUPREME COURT OF CALIFORNIA

CALIFORNIA TEACHERS ASSOCIATION and SALINAS ELEMENTARY TEACHERS COUNCIL et al.,

Plaintiffs and Appellants,

v.

GOVERNING BOARD OF THE SALINAS CITY ELEMENTARY SCHOOL DISTRICT et al.,

Defendants and Respondents.

After a Decision by the Court of Appeal
Sixth Appellate District
[Civil No. H033788]

After Appeal from the Judgment of the
Superior Court, County of Monterey
Honorable Robert A. O'Farrell, Judge
[Case No. M91905]

PETITION FOR REVIEW

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To the Honorable Chief Justice Ronald George and the Honorable Associate Justices of the California Supreme Court:

Appellants Salinas Elementary Teachers Council and the California Teachers Association petition from the published Opinion of the Court of Appeal, Sixth Appellate District, filed on July 14, 2010. A copy of the Opinion is attached as Exhibit A.

I.

ISSUES PRESENTED FOR REVIEW

1.) Must teachers exhaust contract remedies on claims for violation of mandatory-guaranteed statutory rights under Education Code Section 45028 when they are not waivable pursuant to Education Code Section 44924?

2.) Does the District's practice of limiting advancement to one step and one column per year violate Education Code Section 45028? Does freezing the salary schedule for some teachers and not for others in the 2005-06 school year violate Education Code Section 45028?

3.) Does the collective bargaining agreement in this case require exhaustion of contract remedies before the teachers could file a lawsuit to enforce mandatory-guaranteed statutory rights that are not waivable pursuant to Education Code 44924?

II.

WHY REVIEW IS APPROPRIATE UNDER RULE OF COURT 8.500 (b)

The Petition for Review should be granted to settle an important matter of statutory law and to reverse the collision course the opinion below charts with numerous California statutes and the appellate court decisions that have interpreted them. In this case, the teachers filed suit to enforce their mandatory rights to a uniform salary under Education Code Section 45028. For the first time, a court held that the parties had to exhaust internal contract remedies prior to filing an action to enforce the mandatory provisions of the Education Code. The facts and claims in this dispute are substantially similar to the following cases that recognized the teachers' mandatory rights under the Education Code and invalidated numerous district violations of Education Code Section 45028. See, e.g., Palos Verdes Faculty Assn v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal.3d 650 ("Palos Verdes"); Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal.App.3d 319 ("Wygant"); United Teachers of Ukiah v. Board of Education of the Ukiah Unified School District (1988) 201 Cal.App.3d 632 ("United Teachers-Ukiah"); CTA v. Livingston Union School District (1990) 219 Cal.App.3d 1503 ("Livingston"); CTA v. Governing Board of Lancaster School District (1991) 229 Cal.App.3d 695 ("Lancaster"); San Francisco Classroom Teachers Assn. v. San Francisco

Unit School Dist. (1987) 196 Cal.App.3d 627 ("San Francisco"); CTA v. Board of Education of Whittier City Schools (1982) 129 Cal.App.3rd 826 ("Whittier"); and Adair v. Stockton Unified School District (2008) 62 Cal.App.4th 1436 ("Adair"). The above-cited cases all permitted teachers and/or their unions to file their claims in Superior Court to enforce the mandatory provisions of Education Code Section 45028, despite the fact that almost all of these districts had collective bargaining agreements.

In addition, this case is contrary to several other decisions which have authorized teachers or their unions to proceed in the courts to enforce other mandatory provisions of the Education Code and which held the teachers were not required to exhaust internal contract grievance procedures. See, e.g., Veguez v. Governing Board Long Beach Unified School District (2005) 127 Cal.App.4th 406; (Ed. Code §44977) ("Veguez"); Tracy Educators Assn. v. Superior Court (2002) 96 Cal.App.4th 530; (Ed. Code §44987) ("Tracy"); United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510; (Ed. Code §44922) ("United Teachers-Los Angeles"); See also California Teachers Assn. v. Parlier Unified School District, (1984) 157 Cal.App.3d. 174; (Ed Code §44977) ("Parlier").

The Appellate Court's decision is also contrary to and inconsistent with the Supreme Court cases of San Mateo City School District v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 ("San Mateo") and Board

of Education v. Round Valley Teachers Assn. (1996) 13 Cal.4th 26 ("Round Valley"). Most importantly, however, it challenges and undermines the legislative policy established in 1961 by the enactment of Education Code Section 44924 and as interpreted by numerous cases.

III.

STATEMENT OF THE CASE

A. The Facts.

The facts of this case are not in dispute. The district and the union are parties to a collective bargaining agreement that was in effect at all times relevant to their dispute. A negotiated salary schedule is part of that agreement. The schedule is in the form of a grid, with 22 horizontal rows or steps representing years of teaching experience and 6 vertical columns. The salary steps in each column are of unequal length. See, e.g., (Clerk's Transcript at p.14 ("CT"); Slip Op. at p. 3) representing units of training beyond a bachelor's degree. Teachers are placed and paid on the salary schedule according to their years of teaching experience (service) and education (training). As teachers gain years of service, they progress vertically on the schedule, earning salary increases called "step" increases. As they acquire training units, they progress horizontally on the schedule, earning salary increases called "class or column" increases. "**Salary Placement on [the schedule] was based solely on years of training and years of experience.**" (emphasis added) (Slip Op. at p. 3; CT at p. 3) The

salary schedule herein did not contain any contract language that limited advancement to one step per year. The district, however, applied a one-step down limitation for experience on salary advancement for many years. The union went along with the district's practice for years. (CT at p. 4)

In addition to the district's longstanding practice of limiting teachers' advancement to one experience step per year, in the 2005-2006 school year, the district and the local union agreed to freeze the advancement of salary experience steps for teachers on steps 1 through 11, whereby they lost a year of experience but permitted teachers on Steps 12, 14 and 18 to advance on the salary experience schedule, whereby gaining a year of experience.

In April 2008, the local union wrote a letter to the district stating as follows:

> "As stated in our April 29th meeting, it has come to SETC's attention that the method agreed to by the District and SETC to advance our bargaining unit members on the salary schedule is in effect, illegal. Our members are not advancing on the salary schedule as stipulated in the California Education Code Section 45028. Additionally, this very issue has been previously litigated and was decided in favor of CTA and the Whittier Elementary Teachers Association. Given this information, it is SETC's position that the District take immediate action to determine which bargaining unit members are in need of a salary correction and take the appropriate actions to compensate these bargaining unit members. In an effort to work in a proactive manner with the district to resolve this serious salary issue we hope the copies of the California Education Code Section 45028 and the Whittier legal decision provided to you at the meeting will help bring about a speedy resolution. We look forward to receiving your response at our next scheduled meeting May 8th at 3:30 in your office." (CTA v. Board of Education of

Whittier City Schools (1982) 129 Cal.App.3rd 826 ("Whittier") (CT at p. 24)

The collective bargaining agreement between the district and the local union had an arbitration clause. In the arbitration clause, a grievance was defined as follows:

> "Definitions:
>
> Grievance: A grievance is a written claim by a grievant that a controversy, dispute or disagreement of any kind exists arising out of or in some way involving an alleged misinterpretation, misapplication or violation of this agreement." (CT at p. 43)

The arbitrator's power to enforce the agreement is expressly limited in the agreement as follows:

> "The rules of the California State Mediation/Conciliation Service shall govern the arbitration with the exceptions stated within this article. The award shall be limited to the specific issue or issues contained in the grievance filed. The arbitrator shall have no authority to add to, delete, or alter any provisions of this agreement, but shall limit his/her decision to the application and interpretation of its provisions." (Emphasis added.) (CT at p. 47)

B. The Trial Court's Decision.

The union filed a petition for writ of mandate and a complaint for declaratory relief alleging that the district violated Education Code Section 45028 by limiting advancement on the salary schedule to: 1) one step or one column per year, and 2) by their agreement and action to freeze advancement on the salary schedule for some teachers, but not for others.

The district demurred on two grounds: a) failure to exhaust administrative remedies by not first processing a grievance, and b) a failure to state a cause of action. The trial court granted the demurrer without leave to amend on the basis that the union had failed to exhaust the grievance remedy contained in the collective bargaining contract.

C. Decision Of The Court Of Appeal.

The Court of Appeal affirmed the decision of the trial court. The decision was originally unpublished. Thereafter, the district asked that it be published, and it was ordered published.

IV.

ARGUMENT

A. The Court Of Appeal's Decision Is Contrary To And Significantly Undermines The Public Policy Set Forth By The Legislature In Education Code Section 44924 And Numerous Cases Which Have Interpreted Education Code Section 44924

The Court of Appeal's decision virtually ignores Education Code Section 44924 and it sabotages the public policy set forth by the legislature in Section 44924 and numerous cases which have interpreted this Section.

Education Code Section 44924 provides in pertinent part as follows: "Except as provided in Sections 44937 and 44956, any contract or agreement express or implied made by any employee to waive the benefits of this chapter or any part thereof is null and void." (Emphasis added.)

Education Code Section 44924 has been the law in California since 1961 when it was adopted as part of the statutes of 1961 as Education Code Section 1338.1. In United Teachers – Los Angeles, the court stated that "...public policy considerations counsel liberal enforcement of 44924. In addition to issues of equity and fairness, one of the purposes of Section 44924 is uniformity of treatment in the education system statewide." (See United Teachers – Los Angeles, supra, 24 Cal.App.4th at p. 1519.) The court went on to quote Supreme Court Justice Wright in his concurring opinion in Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482; ("Campbell").

> '"the Education Code which encompasses Section [44924] represents an extensive legislative effort at imposing state-wide educational standards on local school districts. ' "[T]he legislature [has] enjoined on [governing boards], within reasonable limits, the principle of uniformity of treatment ... for those performing like services with like experience.... While it is true that the relation between the [governing board] and a teacher is that of employer and employee, and that this relationship is created by contract, the terms of [the] contract are to be found in the authority granted the [governing board] by law." ' (Fry v. Board of Education (1941) 17 Cal.2d 753, 757, 760. ...Section [44924] should thus be accorded a liberal construction in keeping with the legislative policy of insuring 'uniformity of treatment' of teachers by governing boards. Statutorily enforced 'uniformity of treatment' of teachers is a step towards fulfillment of this court's call for state-wide 'uniformity of treatment' of pupils. (Serrano v. Priest (1971) 5 Cal.3d 584.)'"

Furthermore, the Court in United Teachers – Los Angeles, supra, declared void provisions of a collective bargaining contract which

contradicted the statutory language of Education Code Section 44922. Id. at p. 1518. The court held that the petitioner was not required to exhaust administrative remedies before seeking relief in the court because the case was not an attempt to enforce compliance with the collective bargaining agreement but with the controlling statutes. Id. at pp. 1519-1520.

The public policy requiring uniformity of treatment in the education system statewide as expressed in Education Code Section 44924 and recognized by the courts is further supported by Government Code Section 3540. Government Code Section 3540 is a part of the Education Employment Relations Act, ("EERA") which governs the collective bargaining rights between teachers and school districts. Government Code Section 3540 in pertinent part provides: "...This chapter shall not supersede other provisions of the Education Code...." As the court in Parlier, supra, points out "Thus if there is a conflict between the Government Code provisions regarding collective bargaining powers and Education Code Sections creating non-waivable rights, the Education Code prevails." Id. at p. 184.

A teacher's right to be paid uniformly under Education Code Section 45028 cannot be waived by the teacher individually or by collective bargaining. (See, e.g., Palos Verdes, supra; Wygant, supra; United Teachers – Ukia, supra; Livingston, supra; Lancaster, supra; San Francisco, supra; Whittier, supra; Adair; supra.) Appellants submit that the policy

requiring uniformity of treatment in the education system statewide is eviscerated by the Appellate Court's decision in this case because a requirement to arbitrate mandatory provisions of the Education Code would inevitably lead into a morass of conflicting opinions based on individual collective bargaining contracts and absolutely destroy the concept of uniformity of treatment in the education system statewide.

Numerous cases have relied on Education Code Section 44924 to render null and void any contractual provisions that conflict with any of the mandatory statutory rights set forth in the Education Code. See, Campbell, supra; Wygant, supra; United Teachers-Ukiah, supra; Livingston, supra; Lancaster, supra; San Francisco, supra; Whittier, supra; Adair, supra; Veguez, supra; Tracy, supra; United Teachers-Los Angeles, supra; and Parlier, supra.

The above cases were largely ignored or summarily dismissed by the Appellate Court. Instead, the Appellate Court relied primarily on a case entitled California Correctional Peace Officers Assn. v. State of California (2006) 142 Cal.App.4th 198, a case that had absolutely nothing to do with mandatory provisions of the Education Code and the public policy and law expressed by Education Code Section 44924. Furthermore, it was an action to enforce a collective bargaining contract with an arbitration clause. It was not an action based on a violation of a mandatory statute with guaranteed rights like the present case.

B. The District Violated Education Code Section 45028 By Failing To Pay Teachers Uniformly For Their Years Of Training And Experience.

Education Code Section 45028 with limited exceptions, neither which is applicable to the facts of this case, requires that teachers be paid uniformly for their years of training and experience. In other words, if a district has two teachers with 7 years of experience in the district and 45 units over their bachelor's degree, they are entitled to receive the same salary. In order to deviate from the uniformity requirements of Education Code Section 45028(a)(1), the salary schedule must operate on some criteria other than years of training and experience. See, e.g., Livingston, supra, 219 Cal.App.3d at p. 1522; California Teachers Association v. Governing Board of Hilmar Unified School District (2002) 95 Cal.App.4th 183, 196; ("Hilmar"). In the present case, salary placement was based solely on years of training and years of experience. (Slip Op., at p. 3) Since there was no agreement with the union to advance teachers on a criterion other than uniform allowance for years of training and experience, the exception to Section 45028 does not apply and uniformity is required. See, e.g., Adair, supra)

Appellants alleged two separate violations of Education Code Section 45028 in their pleadings (CT at p. 26): 1.) The district's limitation of teachers' advancement on the salary schedule to one experience step and one column per year. (The courts in Whittier, supra, and Livingston, supra,

held that this type of salary advancement limitation violated Education Code Section 45028); and 2.) The parties' agreement to freeze the salary schedule in the 2005-2006 school year for teachers on steps 1 through 11, while allowing other teachers on different steps to advance on the salary schedule and not be frozen. (The court in Adair, supra, held this behavior and the parties' agreement violated Education Code Section 45028).

In the present case, the facts are similar to the facts in Livingston, supra, Whittier, supra, and Adair, supra. The uniform salary violation regarding the limited advancement to one step down per year occurs as follows: if a teacher did not earn enough units to move to the next horizontal column by the time she reached the last experience step in the column, she remained on the last step for as many years as it took until she earned the units to advance to the next column. However, when she eventually obtained enough units to advance, she was then limited to only one experience step no matter how many years of experience she had. This limitation resulted in disparity of salary among teachers because the teachers' placement on the salary schedule did not correlate with the years of experience they actually accrued. Teachers with the same years of experience and the same units were thus paid differently. See, e.g., Whittier, supra; Livinston, supra.

The district's salary schedule for the 2005-2006, 2006-2007 and 2007-2008 school years also violated the uniformity requirements pursuant

to Adair, supra. No step or column advances were allowed for the 2005-2006 school year for teachers on Step 1 through 11. However, teachers on Step 12, 14 and 18 were permitted to advance. This resulted in disparity of salary because teachers on Step 1 through 11, who lost a year of experience and had to work one more year to reach the same salary experience step as those teachers on Step 12 through 22 who advanced. This result is contrary to Adair, supra.

In addition, the courts have invalidated other district violations of Section 45028. See, Palos Verdes, supra; Wygant, supra; United Teachers-Ukiah, supra; Livingston, supra; Lancaster, supra; San Francisco, supra; Whittier, supra; Adair, supra. The above-cited cases all permitted the teachers and/or their unions to file an action in Superior Court to enforce the mandatory provisions of Education Code Section 45028, despite the fact that almost all of these districts had collective bargaining agreements.

C. The Court Of Appeal's Decision Is Contrary To And Inconsistent With The Cases of Veguez, United Teachers-Los Angeles and Tracy.

The Court of Appeals' decision is flawed when it states that "None of the cases the unions cite supports their conclusion that Section 44924 permits them to avoid exhausting the grievance/arbitration procedures." (Slip Op. at p. 15). This is incorrect because the case of Veguez, supra, clearly cites to and relies on Education Code Section 44924 to support its holding that "lawsuits to enforce rights guaranteed by the Education Code

are not subject to internal exhaustion requirements." Veguez, supra, 127 Cal.App.4th at p. 417

In Veguez, supra, there was a collective bargaining agreement between the district and the teachers association which contained a provision regarding differential leave that was similar to the language of Education Code Section 44977. Id. at p. 416. Moreover, the grievance procedure contained in the collective bargaining agreement further required "... a teacher challenging either the "'interpretation or application"' of the agreement or claiming a "'violation"' of the agreement to follow...internal grievance procedures, culminating in binding arbitration." Id. at p. 416.

In Veguez, supra, the teacher filed a petition for writ of mandate requesting orders directing the district to grant her five months of differential leave pursuant to Section 44977 and to reinstate her. The district contended that because the teacher's claim for differential pay fell within the terms of her collective bargaining agreement, her failure to exhaust the grievance procedures in that agreement barred her petition for writ of mandate.

However, the court found that:

> "Veguez challenges neither the district's interpretation nor its application of her collective bargaining agreement, but rather its denial of her rights under Section 44977. Lawsuits to enforce rights guaranteed by the Education Code are not subject to internal exhaustion requirements." (Tracy, supra, 96 Cal.App.4th at pp. 537-538, United Teacher-Los Angeles, supra, 24 Cal.App.4th at pp. 1519-1520; see § 44924

["[e]xcept as provided in Sections 44937 [right to dismissal hearing] and § 44956 [rights of terminated employee], any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void"].)" Veguez, supra, at p. 417

The instant Court of Appeal decision is directly contrary to the holding in Veguez and highlights the inaccuracy of the court's conclusion that "None of the cases the unions cite supports their conclusion that Section 44924 permits them to avoid exhausting the grievance/arbitration procedures." (Slip Op. at p. 15).

Like Veguez, the teachers in the present case are not seeking to enforce the collective bargaining agreement but rather mandatory statutory rights contained in Education Code Section 45028. As such, their claims do not seek an interpretation, application or violation of the collective bargaining agreement and are therefore should not be subject to the internal exhaustion requirements of the contract. There is no dispute between the teachers union and the district regarding the interpretation of their agreement.

Likewise, the Court of Appeal's decision is contrary to United Teachers - Los Angeles, supra, because it ignores the holding that Section 44924 renders null and void any collective bargaining provision that conflicts with a mandatory Education Code statute and therefore internal contract remedies need not be exhausted. The Court of Appeal's decision is flawed because it attempts to distinguish the holding of United Teachers-

Los Angles by assuming that the decision was based on the definition of grievance under the contract rather than Section 44924. (Slip Op. at p. 10).

In United Teachers – Los Angeles there was a collective bargaining agreement which contained regulations that were contrary to a mandatory provision of the Education Code, i.e., Section 44922. The Court held that the regulations in the parties' collective bargaining agreement which were contrary to the mandatory section of 44922 "were rendered null and void by operation of Section 44924 as being contrary to law." United Teachers – Los Angeles, supra, 24 Cal.App.4th at p. 1519. Thus, "[c]onsequently petitioner was not required to exhaust administrative remedies before seeking equitable relief in the trial court." Id. at p. 1519, FN 4

D. The Court Of Appeal's Decision Is Contrary To The Supreme Court's Decision In San Mateo And Is Contrary To And Misconstrues The Significance Of The Supreme Court's Decision In Round Valley.

This Supreme Court in San Mateo, supra, found that where statutes are mandatory, a contract provision which would alter the statutory scheme would be nonnegotiable under Government Code Section 3540 because the proposal would "replace or set aside" the section of the Education Code. San Mateo, supra, 33 Cal.3d at p. 866.

This Supreme Court held in Round Valley, supra, that the arbitrator exceeded his powers and could not enforce a provision in the collective

bargaining agreement that was in conflict with and was preempted by the Education Code. Round Valley, supra, 13 Cal. 4th at p. 272.

The underlying issue was whether the provision set forth in the collective bargaining agreement conflicted with the Education Code and if so, whether it was preempted from collective bargaining. Both the school district and teachers union entered into a collective bargaining with a contract provision setting forth procedures for the dismissal or non-reelection of any probationary teacher. The agreement provided that the Superintendent would give notice of the specific reasons for the dismissal or non-reelection and that "just cause" was required for dismissal or non-reelection of probationary teachers.

When the district non-reelected a probationary teacher it did not comply with the contract and did not provide reasons to the teacher for the non-reelection. A grievance was filed claiming the school district had violated the collective bargaining agreement. The district insisted the grievance was not subject to arbitration because the Education Code gave the district the power to non-reelect a probationary employee without stating a reason for their decision under Section 44929.21. The teachers' association filed a motion to compel arbitration and the arbitrator found that the district had violated the agreement and ordered it to comply with the procedures. The district thereafter filed a petition to vacate the arbitration award. The trial court granted the district's petition and concluded that "the

arbitrator exceeded his powers by giving effect to provisions of the collective bargaining agreement which were in conflict with, and superseded by section 44929.21(b), and Government Code Sections 3540 through 3549.3." Round Valley, supra, 13 Cal.4th at p. 274. The Appellate Court reversed and held there was no conflict between the collective bargaining provisions and the Education Code and thus the contract was valid and enforceable. The Supreme Court granted review.

Upon review by the Supreme Court, the district argued that the arbitrator did not have the power to determine the issue nor was it a proper subject to arbitrate because under Education Code Section 44929.21 the district had the statutory right to non reelect a probationary teacher without cause and thus, the Education Code preempted the provision in the collective bargaining agreement.

The Supreme Court reviewed the statutory scheme of the Education Code and also the purpose and scope of collective bargaining under the EERA as set forth in the Government Code at Section 3540 et seq., including Section 3543.2, which sets forth certain, limited exceptions when collective bargaining may supersede the Education Code. The Supreme Court found that "Government Code Section 3540 further mandates that the provisions of the Government Code relating to collective bargaining agreements shall not supersede the Education Code" Round Valley, supra, at p. 280. It continued, "[m]atters outside the scope of ... Section 3543.2

(a) ... may not be the subject of collective bargaining, and may not supersede other provisions of the Education Code." Round Valley, supra, at p. 283.

The Supreme Court in Round Valley relied on its decision in San Mateo, supra, where it concluded "... the Education Code preempts collective bargaining agreements if the provisions of the code would be 'replaced, set aside or annulled' by the agreement. (San Mateo, supra, 33 Cal.3d at pp. 864-866.)" Id. at p. 285

The Round Valley Court further held that "[b]ecause the contract clause in this case was directly contrary to the procedures established by Section 44929.21(b), it violated the nonsupercession clause of Government Code Section 3540." Id. at p. 284 Round Valley is consistent with the public policy set forth in Education Code Section 44924 and the Government Code and the cases of Veguez, supra,; Tracy, supra; and United Teachers-Los Angeles, supra; (all of which held that any contract provision which conflicts with the mandatory statutes in the Education Code are rendered null and void by operation of Section 44924 and lawsuits to enforce rights guaranteed by the Education Code are not subject to internal exhaustion requirements).

The decision of the Court of Appeal in the present case is contrary to the rule of law and decisions of San Mateo, supra, and Round Valley, supra, which found when the legislature has created a non-waivable

(mandatory) statutory right under the Education Code, a contract provision that is contrary or would alter the statutory scheme is non negotiable because it would "replace or set aside" the Education Code. (Round Valley, supra, 13 Cal.4th at p. 285; San Mateo, supra, 33 Cal.3d at pp. 864-866.)

In the present case, it is clear that under Section 44924 the teachers' statutory rights under Section 45028 cannot be waived by contract and thus are preempted. See, e.g., Parlier, supra; San Mateo, supra; Round Valley, supra. The Court of Appeal ignored Section 44924 and didn't even reach the teachers' second claim that their agreement to freeze the advancement of some teachers and not others in 2005-2006 school year is contrary to Section 45028 and that the enforcement of the contract provision would alter, replace or set aside the Education Code.

Here the Court of Appeal simply dismissed the underlying law regarding preemption of mandatory Education Code rights from collective bargaining set forth by this Court in San Mateo and Round Valley and tried to distinguish Round Valley on the basis that: 1.) The parties went through arbitration; and 2.) that:

> "[A] school district's decision not to reelect a probationary teacher ... is vested exclusively in the district and cannot be the subject of collective bargaining.' (Citations omitted.) Therefore, the school district's decision could not be challenged as a breach of the collective bargaining agreement. Here, unlike in Round Valley, the statutory scheme makes it clear that 'matters relating to wages ... and other terms and conditions of employment' (which include 'procedures for

processing grievances') *can* be the subject of collective bargaining. (Government Code Section 3543.2, subd. (a) ...". (Slip Op. at p. 11)

The glaring flaw in the Court's reasoning is that the right to a uniform salary provided in Education Code Section 45028 lists two exceptions that can be bargained and neither is applicable here. Section 45028(a)(1) permits bargaining "if a public school employer and exclusive representative negotiate and mutually agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience pursuant to Chapter 10.7 (commencing with Section 3540) of the Government Code." (Emphasis added) In the present case, as noted by the Appellate Court, "Salary placement on [the schedule] was based solely on years of training and years of experience." (Slip Op. at p. 3) It is settled law that a demurrer admits all material facts properly pleaded. Blank v. Kirwan (1985) 39 Cal.3d 311, 318.

When the salary schedule is limited to years of training and years of experience and no other criteria were bargained between the exclusive representative and the district, the district and the union are prevented from bargaining away the right under Section 45028 to uniform salary. See, e.g., Hilmar, supra; Adair, supra. Accordingly, just as in Round Valley, supra, the subject of uniform salary has been preempted by the legislature. See also San Mateo, supra. Therefore, like Round Valley, the arbitrator would

not have the power or authority to enforce an agreement that conflicts with the Education Code.

E. The Court Of Appeal Misstates The Teachers' Pleadings.

The teachers' complaint herein sought to enforce their mandatory rights under Section 45028 of the Education Code. However, the Appellate Court mischaracterized their pleadings and found that they amounted to a "misinterpretation of the contract" and thus found they were required to arbitrate their claims for violation of mandatory statutory rights under the Education Code.

In several places in its decision, the Court of Appeal mischaracterized the teachers' complaint as alleging a "misinterpretation" of the collective bargaining agreement. The Appellate Court repeatedly misstated the teachers' allegations in their complaint. (See, e.g., Slip Op. at pp. 7, 8, 11, 17) For example, the court wrote:

> "Paragraph 17 alleges that SETC called the ***alleged misinterpretation of the agreement*** to the district's attention in a letter. A copy of that letter was made an exhibit to the union's complaint." (Slip Op. at pp. 7, 8)

Contrary to this statement and conclusion, paragraph 17 actually reads as follows:

> "17. Petitioners are informed and believe and upon such information and belief allege that on April 30, 2008, Petitioners demanded that the Respondents comply with the Education Code and reclassify all teachers on the salary schedule on the basis of uniform allowance for years of service and to pay back pay. A true and correct copy of this

letter is attached hereto and incorporated herein by reference as **Exhibit "C"**." (CT at p. 4)

Paragraph 17 of the complaint clearly shows that the teachers were not seeking to enforce compliance with the collective bargaining agreement but with the controlling statute. In addition, the letter that the teachers' union sent to the district in April of 2008 shows that the teachers' claim and dispute involved violation of the Education Code and was not to enforce the contract.

The present case is analogous to Tracy, supra in the sense that the teachers herein are not seeking to enforce the collective bargaining agreement but rather they seek to enforce their mandatory rights under the Education Code. The misstatement and mischaracterization of teachers' pleadings led the court to the improper conclusion that the teachers' claims herein are tantamount to an action on the contract and should therefore be arbitrated in the first instance.

Several courts including, Tracy, supra; United Teachers – Los Angeles, supra; Livingston, supra; and Ukiah, supra, have rejected similar arguments by school districts attempting to transform the action into a contract dispute or to implicate the EERA. The case law is clear that if an action is brought alleging a violation of a mandatory section of the Education Code, the parties are not required to exhaust internal grievance procedures contained in a collective bargaining agreement. See Livingston, supra; San Mateo, supra; United Teachers - Los Angeles, supra; Tracy, supra; Veguez, supra; United Teachers – Ukiah,

supra. The teachers herein seek in their petition and complaint to enforce their statutory rights under Education Code Section 45028 and seek redress in the courts to remedy the respondent district's violation thereof.

F. The Court Of Appeal's Decision Is Contrary To And Ignores The Established Rule Of Law That Exhaustion Of Administrative Remedies Is Not Required When The Remedy Is Inadequate, Unavailable, Or Futile.

The law is clear that arbitration is favored as a means of resolving disputes covered by a collective bargaining agreement. The general rule requires exhaustion of internal remedies before resorting to the courts in the absence of facts which would excuse one from pursing such remedies. Service Employees Intern. Union, Local 1000 (CSEA) v. Department of Personnel Admin. (2006) 142 Cal.App.4th 866, 869 -870; citing Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal.3d 888, 894. However, the rule requiring exhaustion of administrative remedies does not apply, for example, where an administrative remedy is unavailable, (Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 217 ("Tiernan"); Anton v. San Antonio Community Hosp. (1977) 19 Cal.3d 802, 829) inadequate, (Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal.3d 328, 342; citing Ogo Associates v. City of Torrance (1974) 37 Cal.App.3d 830, 834; Diaz v. Quitoriano (1969) 268 Cal.App.2d 807, 812) or futile (Vernon Firefighters v. City of Vernon (1980) 107 Cal.App.3d 802, 826). See also Huntington Beach Police

Officers' Association vs. City of Huntington Beach (1976) 58 Cal.App.3d 492.

In Tiernan, supra, the Supreme Court further found that "The doctrine of exhaustion of administrative remedies does not require a litigant to present his or her claim to an administrative body powerless to grant relief." Id. at p. 218.) Therefore, an administrative remedy is only available and adequate if the arbitrator has the power to enforce the right or claim sought. Thus, it is a two-step process to determine if a party to a collective bargaining agreement must exhaust its internal administrative remedies. The first step is to determine whether the dispute fits within the scope of the contract provisions and the second step is to determine whether an adequate and available remedy exists or whether it would be futile to go through the process.

With respect to the first step, the teachers' claims herein, for violation of mandatory statutory rights under Education Code Section 45028, do not fit within the scope of the definition of grievance in the contract which is defined as a dispute "involving an alleged misinterpretation, misapplication or violation of this agreement".

Here the Court of Appeal focused only on the teachers' first statutory claim for violation of Section 45028 involving the limitation of advancement on the salary schedule to one step per year (a Whittier and Livingston violation) and whether that claim fit within the definition of

grievance under the collective bargaining agreement. It erred when it did not even consider whether the teachers second claim for violation of Section 45028, regarding the agreed upon freeze in the 2005-2006 school year (an Adair violation), fit within the definition of grievance. This second claim regarding the freeze is purely a claim for violation of statutory rights and therefore does not fit within the collective bargaining agreement's definition of grievance.

Teachers submit neither of their claims fall within the definition of grievance, as alleged above, because their claims seek to enforce mandatory statutory provisions of the Education Code and not to enforce the contract. See, e.g., Tracy, supra; Veguez, supra; United Teachers-Los Angeles, supra.

1. *The arbitrator does not have the power under the contract to render a decision on statutory violations of mandatory sections of the Education Code.*

With respect to the second step of the process regarding whether an adequate and available remedy exists or whether it would be futile to go through the process, the law is well-established that an arbitrator's powers and authority to provide a remedy are limited to and solely derived from the terms of the contract. "The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate." Moncharsh v. Heily & Blasé (1992) 3 Cal.4th 1, 8; Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal.4th 362, 375; Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87

Cal.App.4th 534, 543. Therefore it is important to examine and analyze the terms and provisions of the agreement of the parties.

In the present case, the collective bargaining contract limits the arbitrator's powers as follows:

> "The award shall be limited to the specific issue or issues contained in the grievance filed. **The arbitrator shall have no authority to add to, delete, or alter any provisions of this agreement**, but shall limit his/her decision to the application and interpretation of its provisions."
> (Emphasis added)

By its own terms, the agreement requires the arbitrator to "limit his/her decision to the application and interpretation of its provisions." The internal grievance/arbitration procedure is unavailable and inadequate to remedy claims for violation of Section 45028 of the Education Code because it is a statutory right that cannot be waived. As such, exhaustion of the internal grievance provisions of the collective bargaining agreement would be futile in this case because Section 44924 renders null and void any contract provision that conflicts with a mandatory statutory right under the Education Code, including Section 45028. Under the entire legislative scheme of the Education Code, including Sections 44924 and 45028, and Government Code Section 3540 et seq., which are specific statutes, and the cases interpreting these statutes, the state of the law is clear that when mandatory rights under the Education Code are involved, a collective bargaining provision that is contrary to or would alter or set aside the

protections of the statute is null and void. (See, e.g., San Mateo, supra; Round Valley, supra; Veguez, supra; Tracy, supra and United Teachers-Los Angeles, supra) Thus, an arbitrator, given the limitations noted above, is rendered powerless to enforce the agreement and has no power to compel the district to comply with their duties under Education Code Section 45028.

In addition, requiring exhaustion of the internal procedures in this case would be futile because under the contract the arbitrator does not have the "authority" or power to "add to, delete or alter any provisions of this agreement." As such, the express provision contained in the collective bargaining agreement where the parties agreed to the 2005-2006 salary freeze and the non-uniform salary, which violates Education Code Section 45028 pursuant to Adair, supra, cannot be added to, deleted or altered by the arbitrator. Consequently, the arbitrator cannot "fix" the agreement or any provision thereof that conflict with the teachers' mandatory statutory rights in order to comply with the Education Code. Therefore, the Appellate Court was misguided in its conclusion that there was an available remedy for the teachers to exhaust when it stated "Nor do we see anything that would preclude an arbitrator from determining how that agreement must be interpreted to comply with the Education Code." (Slip Op., at p. 17)

In light of the foregoing, exhaustion should not have been required herein because there was no adequate remedy available due to the arbitrator's lack of power to modify the agreement to comply with the mandatory provisions of the Education Code.

V.

CONCLUSION

Education Code Sections 45028 and 44924 must be interpreted consistently with the public policy and legislative intent to guarantee certain basic rights to teachers uniformly throughout the State. The Appellate Court's decision is contrary to these sections and to numerous cases interpreting them and will create confusion for future courts and uncertainty for school districts and teachers statewide. The Appellate Court's decision will destroy the uniform application of mandatory provisions of the Education Code. For these reasons, review should be granted.

Dated: August 22, 2010

Respectfully submitted,

TUTTLE & McCLOSKEY
A PROFESSIONAL CORPORATION

By Ernest H Tuttle
Ernest H. Tuttle, III

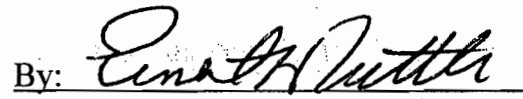
By Kay M Tuttle
Kay M. Tuttle

Certificate of Compliance

I am one of the attorneys for Appellants/Petitioners in this proceeding. I certify that the attached brief complies with California Rules of Court, Rule 8.504(d). According to the word count information provide by Microsoft Word 2000, the computer program used to prepare this document, the brief has 6,739 words, not including the Table of Contents or Table of Authorities.

Dated: August 20, 2009

TUTTLE & McCLOSKEY

By: 

Ernest H. Tuttle, III

PROOF-OF-SERVICE

Re: California Teachers Association v. Governing Board of the Salinas City Elementary School District
California Supreme Court Case No. ____
Court of Appeals, Sixth Appellate District Case No. H033788

I hereby declare that I am a citizen of the United State, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Fresno and my business address is 750 East Bullard, Suite 101, Fresno, California 93710.

On August 23, 2010, I served the attached documents described as:

PETITION FOR REVIEW

on the parties in the above-named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Fresno, California, addressed as follows:

Keith V. Breon, Esq.
George W. Shaeffer, Jr., Esq.
BREON & SHAEFFER, PLC
19900 MacArthur Blvd., Suite 1150
Irvine, California 92612

Clerk of the Court
County of Monterey
240 Church Street
Salinas, California 93901

Court of Appeal.
Sixth Appellate District
333 W. Santa Clara Street, Suite 1060
San Jose, California 95113

I, Sylvia Casaus, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 23, 2010, at Fresno, California.

Sylvia Casaus
SYLVIA CASAUS

EXHIBIT A

Sixth District Court of Appeal

Slip Opinion

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CALIFORNIA TEACHERS ASSOCIATION AND SALINAS ELEMENTARY TEACHERS COUNCIL et al., Plaintiffs and Appellants, v. GOVERNING BOARD OF THE SALINAS CITY ELEMENTARY SCHOOL DISTRICT et al., Defendants and Respondents.	H033788 (Monterey County Super. Ct. No. M91905)

Plaintiffs California Teachers Association (CTA) and the Salinas Elementary Teachers Council (SETC) (collectively, the unions) brought an action against defendants Governing Board of the Salinas City Elementary School District and the Salinas City Elementary School District (collectively, the District). The action alleged that the District's interpretation of the parties' collective bargaining agreement created teacher pay disparities in violation of Education Code section 45028,[1] and that contract language freezing advancement for some but not all teachers for the 2005-2006 school year created

[1] Further statutory references are to the Education Code unless otherwise noted.

additional salary uniformity violations. The District demurred on the ground the court lacked jurisdiction because the unions had not adequately pleaded exhaustion of the administrative remedy specified in the collective bargaining agreement. The trial court sustained the demurrer without leave to amend and dismissed the action.

On appeal, the unions claim the sustaining of the demurrer was error.[2] They contend that (1) "case law is clear that even though a salary schedule is negotiated and is a part of the collective bargaining agreement . . . , the Superior Court still has . . . jurisdiction to determine whether the salary schedule or the implementation violated . . . section 45028;" and (2) they "had no adequate or available administrative remedy to exhaust." We conclude the demurrer was properly sustained, and we affirm the judgment.

I. Background

As this case comes to us after the sustaining of a demurrer, we accept as true all properly pleaded material allegations in the unions' verified Petition for Writ of Mandate and Complaint for Declaratory Relief (the complaint). (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1087.)

CTA is an employee organization that represents its members "in all matters relating to their employment." SETC is a local chapter of CTA. SETC is "the exclusive representative employee organization for the credentialed employees of [the] District." The District has "jurisdiction and control over the employment, status, classification and salary of [the unions'] members who are certificated employees of the District."

SETC and the District are parties to a collective bargaining agreement that was in effect at all times relevant to their dispute. A negotiated salary schedule is a part of that

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[2] The unions have never argued that amendment of the complaint would cure their failure to allege exhaustion.

agreement.[3] The schedule is in the form of a grid, with 22 horizontal rows or "step[s]" representing years of teaching experience and six vertical columns representing hours of training beyond a bachelor's degree. "Teachers are placed and paid on the salary schedule according to their years of teaching experience (service) and education (training)." As teachers gain years of service, they progress vertically on the schedule, earning salary increases called "step" increases. As they acquire training credits, they progress horizontally on the schedule, earning salary increases called "'class'" or "'column'" increases.

"Salary placement on [the schedule] was based solely on years of training and years of experience." As respects advancements, however, "[t]he District . . . interpreted th[e] agreement for many years to limit . . . advancements . . . to one step and one column per year." Additionally, "in the 2005-06 school year the District [negotiated contract language that] froze the advancement . . . for teachers on steps 1 through 11 but permitted teachers on steps 12, 14 and 18 to advance . . . . This action had the effect of creating additional salary uniformity violations." The District's "failure to classify teachers on a uniform basis has caused . . . a disparity in . . . salaries, in that numerous teachers with the same experience and training are being paid at different rates in violation of their rights under the Education Code."

The collective bargaining agreement includes a five-step grievance resolution process that culminates in *binding arbitration* if the grievance is not resolved at an earlier step. A "grievance" is "a written claim by a grievant that a controversy, dispute or disagreement of any kind exists arising out of or in some way involving an alleged misinterpretation, misapplication, or violation of this [collective bargaining] agreement."

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[3] A copy of the salary schedule in effect for the 2001-2002 through 2005-2006 school years was attached as an exhibit to the complaint. A copy of the salary schedule in effect for the 2006-2007 school year was also attached.

A "grievant" is "[a]n employee or group of employees or SETC, provided an employee(s) has been adversely affected."

In April 2008, SETC met with District officials. In a letter sent the day after that meeting, SETC told the District, "As stated in our . . . meeting, it has come to [our] attention that the method agreed to by the District and SETC to advance our bargaining unit members on the salary schedule is in effect, illegal" because "[o]ur members are not advancing on the salary schedule as stipulated in . . . Education Code Section 45028." The letter demanded that the District "take immediate action to determine which bargaining unit members are in need of a salary correction and take the appropriate actions to compensate these bargaining unit members." It concluded, "We look forward to receiving your response at our next scheduled meeting . . . ."

After the District "wrongfully failed and refused . . . to reclassify [SETC's] members according to Education Code § 45028," the unions filed suit. Their complaint prayed for an order compelling the District (1) to "reclassify each teacher on the salary schedule on the basis of [a] uniform allowance for . . . years of experience and training," (2) to pay "back pay with prejudgment interest," and (3) to "calculate and pay the proper retirement contributions . . . ." The complaint also sought a declaration that the District "violated Education Code section 45028 and the teachers' rights thereunder" by failing to classify teachers uniformly according to years of experience and training, and that it was required to pay teachers back pay with interest and make proper retirement contributions.

The District demurred to the complaint on two grounds: (1) lack of subject matter jurisdiction "because [the unions] failed to adequately plead they exhausted the [grievance/arbitration procedures][4] in the . . . collective bargaining agreement," and (2)

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[4] This court granted the District's unopposed request that we judicially notice a certified copy of the grievance/arbitration procedures. The District filed a similar request in the trial court. We assume that request was also unopposed, given that a month later, the unions attached a copy of "pertinent sections" of those procedures to their brief opposing the District's demurrer. Although the appellate record contains no express

failure to state a cause of action. The trial court sustained the demurrer on the first ground. "I agree with that position. I agree that the grievance procedure must be exhausted before seeking judicial review. So I'll sustain the demurrer without leave to amend." The case was dismissed, and the unions filed a timely notice of appeal.

II. Discussion

A. Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) "This consideration of facts includes those evidentiary facts found in recitals of exhibits attached to a complaint. [Citation.]" (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 374 (*Satten*).) "'We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank*, at p. 318.) We "review the complaint de novo to determine . . . whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted.)

"[A] jurisdictional defense appearing on the face of the complaint, or based upon judicially noticeable facts, is appropriately addressed on demurrer. [Citation.]" (*Satten*, *supra*, 99 Cal.App.4th at p. 374.) On appeal, "'the plaintiff bears the burden of

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ruling on the District's request for judicial notice, the order sustaining the demurrer says the court "read and considered" it. Where, as here, the grievance/arbitration procedures were necessary for the court's decision, we assume the trial court granted the request. (Evid. Code, §§ 453, 456; *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 918-919.)

demonstrating that the trial court erred.' [Citation.]" (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020.)

B. Exhaustion of Grievance/Arbitration Procedures

The unions insist they were not required to exhaust the grievance/arbitration procedures because their action sought to enforce a statute rather than "to enforce compliance with the collective bargaining agreement." The District disagrees, arguing that because the action "clearly involves a dispute or disagreement 'of any kind' " that arises out of or in some way involves " 'an alleged misinterpretation' or 'misapplication' " of the agreement, it falls within the definition of "grievance" and is therefore subject to the grievance/arbitration procedures. The District contends the unions cannot circumvent the arbitration requirement in the grievance procedures by alleging a statutory violation. "[T]here certainly cannot be a law somewhere that says just because somebody alleges you violated the Education Code, you can ignore a . . . failure to exhaust" internal grievance/arbitration procedures. We agree with the District's position.

" 'It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citations.] This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts . . . , is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. . . .' " (*Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 894 (*Rounds*), quoting *Cone v. Union Oil Co.* (1954) 129 Cal.App.2d 558, 563-564 (*Cone*).) "Such procedures, which have been worked out and

adopted by the parties themselves, *must be pursued to their conclusion* before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Citations.]" (*Cone*, at p. 564, italics added.)

"As a matter of public policy, contractual arbitration remains a highly favored means of dispute resolution even for public sector collective bargaining units." (*Service Employees Internat. Union, Local 1000 v. Department of Personnel Admin.* (2006) 142 Cal.App.4th 866, 870 (*Service Employees*), citing *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 180 (*Grunwald-Marx*).) "A party to a collective bargaining agreement containing an express grievance and arbitration mechanism can bypass arbitration only if it can be said '"'with positive assurance'"' [that] the clause is not susceptible to an interpretation that covers the asserted dispute." (*Service Employees*, at p. 870, quoting *Rounds*, *supra*, 4 Cal.3d at p. 892.) "Doubts as to whether the arbitration clause applies are to be resolved in favor of coverage." (*Grunwald-Marx*, at p. 175.)

Here, it cannot be said that the grievance/arbitration procedures in the collective bargaining agreement are not susceptible to an interpretation that covers the parties' dispute. The agreement defines "grievance" very broadly as "a written claim by a grievant that a controversy, dispute or disagreement *of any kind* exists arising out of or *in some way involving* an alleged *misinterpretation*, misapplication, or violation of this agreement." (Italics added.) The unions allege facts that place their dispute squarely within this definition. Paragraph 13 of the unions' complaint alleges that "[a]t all times herein, a Collective Bargaining Agreement was in effect between the District and [the unions]. The District *has interpreted this agreement* for many years to limit . . . advancements on the salary schedule to one step and one column per year. The District's *interpretation* and/or restriction are contrary to Education Code § 45028." (Italics added.) Paragraph 14 alleges that the salary freeze imposed for the 2005-2006 school year, *pursuant to contract provisions* attached as exhibits to the complaint, "had the effect of creating additional salary uniformity violations." Paragraph 17 alleges that

SETC called the alleged misinterpretation of the agreement to the District's attention in a letter. A copy of that letter was made an exhibit to the union's complaint. The letter is signed by SETC's president and by the chairperson of its negotiating team. The definition of "grievant" expressly includes SETC. The complaint thus alleges "a written claim" by "a grievant" involving "a controversy, dispute or disagreement *of any kind . . . in some way involving* an alleged *misinterpretation, misapplication,* or violation of" the collective bargaining agreement. (Italics added.) In short, it alleges a "grievance."

The unions nonetheless insist "it is clear . . . that a 'grievance' is limited to contract violations and that claims to enforce the Education Code and specifically section 45028 do not fit within the definition of a 'grievance.'" We disagree. The definition of "grievance" is not limited to *violations* of the agreement. It also includes *misinterpretations* and misapplications of that agreement. The definition is more than broad enough to include the unions' claims. We reject the unions' contention that "grievances" are limited to contract violations.

1. Arbitrators May Interpret and Apply Statutes

The unions assert that "[m]any districts have raised the issue of failure to exhaust administrative remedies involving statutory rights under the Education Code." "The courts have consistently held," they contend, "that the superior court retains jurisdiction to determine if there has been a violation of the Education Code . . . ." A long string cite follows. The cited cases do not hold or even suggest the unions can circumvent the grievance/arbitration procedures in their collective bargaining agreement. Three of those cases do not even mention exhaustion of administrative remedies. (*Adair v. Stockton Unified School Dist.* (2008) 162 Cal.App.4th 1436; *California Teachers' Assn. v. Parlier Unified School Dist.* (1984) 157 Cal.App.3d 174 (*Parlier*); *Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482.) "Obviously, cases are not authority for propositions not considered therein." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

The remaining cases are readily distinguishable. In *California Teachers' Assn. v. Livingston Union School Dist.* (1990) 219 Cal.App.3d 1503 (*Livingston*), a school district contended the petitioners had to pursue their claims in the first instance before the Public Employment Relations Board (PERB). The trial court agreed, but the Court of Appeal reversed. PERB has exclusive initial jurisdiction over claims alleging "'unfair practice'" or violations of the Education Employment Relations Act (EERA). The petitioners had alleged neither. Their claims were therefore outside the limited scope of the administrative remedy, and they were not required to exhaust it. (*Livingston*, at pp. 1525-1526.) Here, there is no contention that the unions must pursue their claims before PERB. More importantly, their claims are plainly within the broad scope of the grievance/arbitration procedures. *Livingston* is inapposite.[5]

In *Tracy Educators Assn. v. Superior Court* (2002) 96 Cal.App.4th 530 (*Tracy*), the collective bargaining agreement defined "grievance" narrowly as "'an allegation that the District has violated this Agreement.'" (*Tracy*, at p. 538.) Where it was clear the teacher's claim for a leave of absence did not allege a violation of the agreement, the court held that "[t]he arbitration provision . . . does not cover this dispute." (*Tracy*, at p. 538.) Here, unlike in *Tracy*, the definition of "grievance" covers the unions' claims. *Tracy* is inapposite.

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[5] *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App.3d 319 (*Wygant*) and *United Teachers of Ukiah v. Board of Education* (1988) 201 Cal.App.3d 632 (*Ukiah*), also cited by the unions, are inapposite for the same reason. (*Wygant*, at pp. 322-323 ["The problem with the school district's contention is that in this case neither unfair practices nor violation of Government Code sections 3540-3549.3 are alleged . . . ."]; *Ukiah*, at pp. 638-639 [noting that "PERB's jurisdiction does not extend to all disputes brought by an employee against a school district employer" and "find[ing] nothing in the case or statutory law which requires that claims which assert only violations of the Education Code be directed to the PERB simply because the defendant contends the EERA may be implicated in the resolution of the claim"].)

In *United Teachers-L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 1510 (*United Teachers*), the court stated in a footnote that "[t]he petition in this case was not an attempt to enforce compliance with the collective bargaining agreement but with the controlling statutes. Consequently petitioner was not required to exhaust administrative remedies before seeking equitable relief in the trial court." (*United Teachers*, at p. 1519, fn. 4.) The only logical inference from these two meager sentences, in our view, is that in *United Teachers*, as in *Tracy*, the collective bargaining agreement defined "grievance" narrowly, and that narrow definition put the dispute outside the scope of the grievance procedures. (See *Tracy*, *supra*, 96 Cal.App.4th at p. 538.) We do not believe these two footnoted sentences can be read to support the expansive proposition the unions urge. *United Teachers* does not advance their position.

Jefferson Classroom Teachers Assn. v. Jefferson Elementary School Dist. (1982) 137 Cal.App.3d 993 (*Jefferson*) and *Dixon v. Board of Trustees* (1989) 216 Cal.App.3d 1269 (*Dixon*) are distinguishable because in both cases, the plaintiffs exhausted their administrative remedies. (*Jefferson*, at p. 995; *Dixon*, at pp. 1274-1275.) Instead of supporting the unions' position, *Dixon* lends implicit support to *the District's* position that a dispute otherwise subject to grievance/arbitration procedures is not exempted from those procedures simply because the parties' dispute involves claimed statutory violations, including a claimed violation of section 45028. (*Dixon*, at pp. 1274-1275 [trial court "denied Dixon's [first mandate] petition without prejudice [for] fail[ure] to exhaust her administrative remedies" and, after she engaged in nonbinding arbitration, abated proceedings on her second petition "so that petitioners could exhaust their administrative remedies before PERB"].)

Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal.4th 269 (*Round Valley*), is likewise distinguishable because there too, the plaintiffs exhausted internal grievance/arbitration procedures before resorting to the courts. (*Round Valley*, at p. 273.) After the dispute was arbitrated pursuant to those procedures, the school district filed a

petition to vacate the award, which the trial court granted. (*Round Valley*, at pp. 273, 274.) The California Supreme Court agreed that the arbitrator exceeded his authority by purporting to enforce a provision in the collective bargaining agreement that was in conflict with, and therefore preempted by, the Education Code. (*Round Valley*, at p. 288.) *Round Valley* does not stand for the proposition that statutory claims are exempt from collective bargaining agreement grievance procedures. Nowhere in *Round Valley* did the high court suggest the case should not have been arbitrated. Its holding was narrower: "The statutory scheme governing the proper subjects for collective bargaining . . . and the reelection of probationary teachers . . . makes it clear that a school district's decision not to reelect a probationary teacher . . . is vested *exclusively* in the district and cannot be the subject of collective bargaining." (*Round Valley*, at p. 287, italics added.) Therefore, the school district's decision could not be challenged as a breach of the collective bargaining agreement. Here, unlike in *Round Valley*, the statutory scheme makes it clear that "matters relating to wages . . . and other terms and conditions of employment" (which include "procedures for processing grievances") *can* be the subject of collective bargaining. (Gov. Code, § 3543.2, subd. (a).) *Round Valley* does not permit the unions to bypass the grievance/arbitration procedures, because their allegation that the District's *misinterpretation* of the collective bargaining agreement violates the Education Code puts their dispute squarely within the agreement's definition of "grievance."

The District relies on *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198 (*Peace Officers*) to support its contention that since arbitrators may interpret and apply statutes, the unions must exhaust the grievance/arbitration procedures in the collective bargaining agreement before resorting to the courts. We agree with the District's position.

In *Peace Officers*, the parties disputed whether supervisory employees could observe negotiations with rank-and-file employees and vice versa. The union argued that they could, and had in fact been doing so for several years pursuant to negotiated "ground

rules." (*Peace Officers*, *supra*, 142 Cal.App.4th at pp. 201, 202.) The State countered that Government Code section 3529, providing that supervisory employees "'shall not participate in meet and confer sessions on behalf of'" rank-and-file employees and vice versa, as a matter of law superseded anything to the contrary in the ground rules. (*Peace Officers*, at p. 201.) The union petitioned to compel arbitration of the dispute pursuant to a grievance resolution procedure that called for binding arbitration of "'grievances which involve the interpretation, application or enforcement of the provisions of this [memorandum of understanding] . . . .'" (*Peace Officers*, at p. 203.) The State opposed the petition, arguing that it was not required to arbitrate the dispute because only courts, not arbitrators, can interpret statutes. (*Peace Officers*, at p. 202.) The trial court denied the petition. (*Ibid.*)

The Court of Appeal reversed, holding that "[t]here is no statutory exception for arbitrations presenting issues of statutory construction." (*Peace Officers*, *supra*, 142 Cal.App.4th at p. 211.) Six reasons supported the court's rejection of the State's argument that arbitrators cannot interpret statutes.

First, the State's position ran counter to the assumptions underlying a long list of California decisions "anticipat[ing] that arbitrators will engage in statutory interpretation." (*Peace Officers*, *supra*, 142 Cal.App.4th at p. 208.) The court explained: "In *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, for example, the Supreme Court considered whether a party could be required to arbitrate a cause of action asserted under the Consumer Legal Remedies Act [citation]. . . . [T]he court noted that the United States Supreme Court 'has repeatedly made clear that arbitration may resolve statutory claims as well as those purely contractual if the parties so intend, and that in doing so, the parties do not forego substantive rights, but merely agree to resolve them in a different forum.' [Citation.] The court concluded that 'statutory damages claims are fully arbitrable.' [Citation.] Subsequently, in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, the court defined the minimum procedural

requirements that would permit arbitration of certain statutory claims. [Citation.] These cases appear to assume, if not expressly hold, that arbitrators are permitted to interpret statutes, since it is inevitable that an arbitrator asked to resolve a statutory claim will be required to engage in interpretation of the statute." (*Ibid.*)

Second, the court found the State's contentions "inconsistent with the [California] Supreme Court's still-evolving jurisprudence regarding substantive appellate review of arbitration awards." (*Peace Officers, supra*, 142 Cal.App.4th at p. 209, citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, which "left open the possibility that an arbitrator's award could be reviewed 'when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right' "].) "This provision for appellate review of possible statutory violations appears to constitute an implicit recognition that, as an initial matter, arbitrators are empowered to consider statutory defenses and therefore to interpret statutes." (*Ibid.*)

Third, "[w]hile the [State's] contention appears to be new to California courts, it is not new to the federal judiciary." (*Peace Officers, supra*, 142 Cal.App.4th at pp. 209-210 [citing federal decisions "reject[ing] claims by parties to an agreement to arbitrate that they should be allowed to bypass arbitration because the claims made by the petitioner are inconsistent with statutory law or public policy"].)

Fourth, "there is simply no authority to support the [State's] position that courts alone can interpret statutes, to the exclusion of arbitrators. It is certainly true that courts will, in some instances, be the *final* interpreters of statutory law as a result of their appellate authority, but nothing in the statutes or the case law suggests that arbitrators cannot also interpret statutes." (*Peace Officers, supra*, 142 Cal.App.4th at p. 210.)

Fifth, the existence of a potentially dispositive statutory issue does not preclude arbitration under Code of Civil Procedure section 1281.2. (*Peace Officers, supra*, 142 Cal.App.4th at pp. 210-211.) And finally, there is a strong public policy favoring arbitration. (*Id.* at p. 211.)

We find the court's analysis in *Peace Officers* persuasive. There, as here, the party attempting to avoid arbitration claimed that because a statute compelled the ultimate result it was seeking, the opposing party's position was wrong as a matter of law. But as the *Peace Officers* court explained, "Even assuming the [State] is correct . . . , [the statute] in no way prevents the presentation of this argument to the arbitrator." (*Peace Officers*, *supra*, 142 Cal.App.4th at p. 211.) "[T]he presence of a *potentially* dispositive statutory issue is not recognized as a defense to arbitration under Code of Civil Procedure section 1281.2." (*Peace Officers*, at pp. 210-211, italics added.)

We see no reason to treat the presence of a *potentially* dispositive statutory issue as a defense to arbitration on a demurrer either. For all of the reasons articulated in *Peace Officers*, we agree that "[t]here is no statutory exception for arbitrations presenting issues of statutory construction." (*Peace Officers*, *supra*, 142 Cal.App.4th at p. 211.)

The unions do not challenge the *Peace Officers* court's reasoning. Instead, they attempt to distinguish the decision, asserting that that "the cases cited by the District" "all had collective bargaining provisions with a grievance procedure that applied to the claim." We have already rejected the unions' contention that their dispute is not a "grievance." (*Ante*, pp. 6-9.)

The unions' second basis for distinguishing *Peace Officers* is that "[n]one of the cases cited by the District involved mandatory statutory rights under the Education Code and therefore Section 44924 was also not an issue." Section 44924 provides that rights guaranteed by the Education Code cannot be waived by collective bargaining. As we understand the unions' argument, section 44924 "has been consistently used to render null and void any contractual provisions that conflict with any of the statutory benefits and rights set forth in the Education Code." Therefore, "[s]ince any contract provision is void which conflicts with teachers' rights under 45028, exhaustion of administrative

remedies provided in the collective bargaining agreement is not required." We are not persuaded.[6]

None of the cases the unions cite supports their conclusion that section 44924 permits them to avoid exhausting the grievance/arbitration procedures.[7] (See *ante*, at pp. 8-9 [distinguishing *Livingston*, *Parlier*, *Tracy*, *Ukiah*, *United Teachers*, and *Wygant*]; *Veguez v. Governing Bd. of the Long Beach Unified School Dist.* (2005) 127 Cal.App.4th 406, 416-417 [collective bargaining agreement required parties challenging its " 'interpretation or application' " to follow internal grievance/arbitration procedures, but where Veguez "challenge[d] neither," the dispute was not subject to those procedures, and she was not required to exhaust them].) We have found no authority supporting the unions' contention that they can avoid arbitration simply because their complaint alleges statutory violations. (*Peace Officers*, *supra*, 142 Cal.App.4th at p. 211.)

2. Unavailable and Inadequate Remedy

Citing exceptions to the exhaustion doctrine, the unions contend they can bypass arbitration because it is an "unavailable and inadequate remedy." We disagree.[8]

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[6] The District does not dispute that rights guaranteed by the Education Code cannot be waived by collective bargaining. As the District's counsel noted at the hearing on the demurrer, "We're not arguing whether or not the . . . District could collectively bargain . . . to violate the Education Code. No. We know they cannot do that. And everybody else . . . knows that you cannot do that. . . . [¶] . . . [¶] . . . [T]hat's not the issue before you. The issue before you is how do you adjudicate that? Who has the jurisdiction to determine whether or not the parties collectively bargained something in violation of the Education Code[?]"

[7] *Jefferson*, cited elsewhere by the unions, implicitly supports the opposite conclusion. (*Jefferson*, *supra*, 137 Cal.App.3d at pp. 995-998 [claimed violation of mandatory Education Code provision was arbitrated pursuant to grievance/arbitration procedures before the question was brought before the court].)

[8] In paragraph 23 of the complaint, the unions allege they "have no administrative remedies to exhaust, because [the District's] wrongful action is a violation of their statutory duty under the Education Code." This is a legal conclusion, which we need not credit on appeal from the sustaining of a demurrer. (*Blank*, *supra*, 39 Cal.3d at p. 318 [" 'We treat the demurrer as admitting all material facts properly pleaded, but not

"It is settled that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable or inadequate." (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 217 (*Tiernan*), citations omitted.) An administrative remedy is unavailable if the dispute is beyond the scope of the grievance procedure. (*Id.* at p. 218; *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 828-829 .) It is inadequate "if it does not square with the requirements of due process" (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 620) or if the decisionmaker lacks the power to fashion an appropriate remedy.[9] (*Tiernan*, at pp. 217-218.)

The unions contend arbitration is an unavailable and inadequate remedy because "[t]he arbitrator's powers are . . . limited to the 'application and interpretation of [the collective bargaining agreement's] provisions.'" "By [the agreement's] own terms," the unions claim, "the arbitrator has no authority to determine any other issues." "Therefore, the arbitrator has no power or authority to enforce or remedy violations of the Education Code. Nor does the Arbitrator have the authority to order a school district to comply with Education Code Section 45028." The unions' argument is simply a variant of their earlier arguments that the dispute is not a "grievance" and that only judges can decide statutory issues. We have already rejected those arguments. (*Ante*, at pp. 6-16.) We see nothing in the specific language the unions quote, or in the grievance/arbitration procedures generally, that would preclude an arbitrator from interpreting and applying Education Code provisions in the course of determining whether the District has

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contentions, deductions or conclusions of fact or law' "]; *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251 ["It is settled . . . that a demurrer . . . does not admit conclusions of fact or law. . . . Appellants' conclusionary statement that they exhausted their administrative remedies therefore cannot avail them"].)

[9] There is no contention here the grievance procedures do not square with the requirements of due process.

*mis*interpreted the collective bargaining agreement. Nor do we see anything that would preclude an arbitrator from determining how that agreement must be interpreted to comply with the Education Code.

"Arbitration is highly favored as a method for settling disputes. [Citation.] Courts should indulge every intendment to give effect to such proceedings [citation] and order arbitration unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. [Citation.]" (*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9-10 (*Pacific Investment*).) Here, the complaint seeks declaratory relief—a remedy well within the broad scope of the grievance/arbitration procedures. (See *Pacific Investment*, at p. 10 [arbitration clause broad enough to encompass declaratory relief on nature of partnership interest retained by removed general partner].) *If* the arbitrator determines that the District's interpretation of the collective bargaining agreement violates section 45028, while an alternate interpretation would not, and *if* the District then refuses to change its interpretation, the unions may seek a court order to enforce the arbitrator's decision. (Code Civ. Proc., § 1287.4; Gov. Code, § 3548.8; *Kerr v. Nelson* (1936) 7 Cal.2d 85, 88.) The mere *possibility* that they might need to do so in the future does not excuse their obligation to exhaust the grievance/arbitration procedures. Exhaustion is not excused merely "because the ultimate legal issues . . . are better suited for determination by the courts." (*Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 169.) The "'policy considerations which support the imposition of a general exhaustion requirement remain compelling'" and "[t]he logic holds even when no internal damage remedy is available, or a plaintiff seeks only money damages, so that resort to the courts is inevitable." (*Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 323 (*Campbell*).) "[T]he 'administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court

may review.' [Citation.]" (*Campbell*, at p. 323, quoting *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476.)

We conclude that the parties' collective bargaining agreement requires the unions to exhaust their internal grievance/arbitration procedures before resorting to the courts. The trial court did not err when it sustained the District's demurrer for failure to allege exhaustion of those procedures.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

McAdams, J.

California Teachers Association, et al., v. Governing Board of the Salinas City Elementary School District, et al.
H033788

EXHIBIT B
Order of Publication

COPY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CALIFORNIA TEACHERS ASSOCIATION AND SALINAS ELEMENTARY TEACHERS COUNCIL et al.,

Plaintiffs and Appellants,

v.

GOVERNING BOARD OF THE SALINAS CITY ELEMENTARY SCHOOL DISTRICT et al.,

Defendants and Respondents.

H033788
(Monterey County
Super. Ct. No. M91905)

BY THE COURT:

Pursuant to California Rules of Court, rule 8.1105(b), the request for publication is hereby granted. It is ordered that the opinion in this matter, filed on July 14, 2010, shall be certified for publication.

Date: JUL 30 2010

Mihara, J.

Elia, Acting P. J.

McAdams, J.

Trial Court:	Monterey County Superior Court
Trial Judge:	Honorable Robert A. O'Farrell
Attorney for Plaintiffs and Appellants California Teachers Association and Salinas Elementary Teachers Council:	Kay M. Tuttle Ernest Hastings Tuttle, III Tuttle & McCloskey
Attorney for Defendants and Respondents Salinas City Elementary School District and Governing Board of the Salinas City Elementary School District:	George W. Shaeffer, Jr. Keith V. Breon Breon & Shaeffer, P.L.C.

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CIVIL NO. H033788
(Superior Court Case No. M91905)

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CALIFORNIA TEACHERS ASSOCIATION
and SALINAS ELEMENTARY TEACHERS COUNCIL

Appellants/Petitioners

vs.

GOVERNING BOARD OF THE SALINAS CITY ELEMENTARY SCHOOL DISTRICT, et al.

Respondents/Respondents

/

Appeal from the Judgment of the Superior Court, County of Monterey
Honorable Robert A. O'Farrell, Judge

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SIXTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: H033788
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Ernest H. Tuttle, III (CSB# 051731); Kay M. Tuttle (CSB# 083116) TUTTLE & McCLOSKEY 750 E. Bullard, Suite 101 Fresno, California 93710 TELEPHONE NO.: (559) 437-1770 FAX NO. (Optional): (559) 437-0150; E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Appellants/Petitioners	Superior Court Case Number: M91905
APPELLANT/PETITIONER: California Teachers Association, et al. RESPONDENT/REAL PARTY IN INTEREST: Governing Board of Salinas, etc., et al.	FOR COURT USE ONLY

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.

This form is being submitted on behalf of the following party (*name*): CALIFORNIA TEACHERS ASSOCIATION, et al.

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) SEE ATTACHED LIST	
(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: May 13, 2009

KAY M. TUTTLE
(TYPE OR PRINT NAME)

▶ Kay M Tuttle
(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
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Additionally, Appellants/Petitioners California Teachers Association and Salinas Elementary Teachers Council (an affiliate of the National Education Association) sued on behalf of its unnamed potentially affected members, who are Salinas City Elementary School District teachers. Appellants/Petitioners California Teachers Association and Salinas Elementary Teachers Council are informed and believe that the following unnamed teachers may also be financially affected by the outcome of these proceedings, although a comprehensive list actually is only available from Respondent Salinas City Elementary School District:

Al-lami, Alison
Andreasian, Judy
Bateman, Debra
Belli, Nick
Brusa, Brian
Bush, Jae
Capuyan, Silvia
Carter, Leslie
Cornell, Darryl
Crook, Kimberly
De Leon, Hope
Dill, Carol
Duer, Karie
Edwards, Joyce
Feske, Mary
Fox, Jean
Gomez, Debra
Halbrook, Lydia
Howell, Mary M.
Jensen, Juanita
Mincheff, Sally
Naval, Lori
Newhouse, Karen
Nordin, Donna
Silveira, Darol
Swanson, Lillian
Voogd, Lori D.
Yonemitsu, Eva

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I.

INTRODUCTION

This action arose when California Teachers Association and the Salinas Elementary Teachers Council ("SETC") (collectively referred to herein as "Teachers"), filed an action asking for the interpretation and enforcement of Education Code Section 45028. The action is framed in two causes of action: writ of mandate and declaratory relief. Both causes of action allege that the Governing Board of the Salinas City Elementary School District and the Salinas City Elementary School District (hereinafter collectively referred to as the "District") have violated Education Code Section 45028. The parties have a collective bargaining agreement that contains the salary schedules for the teachers' compensation. The salary schedule is based on the number of years of experience (service) and years training (units).

For many years, the District's practice has been to limit teacher advancement on the salary schedule to one step and one column per year. Approximately 20 to 25 teachers are adversely affected by this practice and have lost salary due to this practice. As a result, teachers who have the same experience and training are on different steps of the salary schedule and have not been paid on a uniform basis as required by the Education Code. In addition, for the 2005-2006 school year, the District and Teachers entered into an agreement to freeze the step and column movement on the salary schedule for some teachers but not others.

This action seeks a declaration and determination by the court of the rights of the individual teachers of the District to uniform pay under Education Code Section 45028 and for an order requiring the District to recognize the Teachers' statutory rights and to comply with the Education Code by classifying and paying the Teachers on a uniform basis on the salary schedule according to their years of experience and training. Appellants contend that the limitation on advancement violates Education Code Section 45028.

The District filed a demurrer to the action on two grounds: (1) that the Court lacks jurisdiction because Teachers failed to plead they exhausted administrative remedies provided in grievance procedure in the collective bargaining agreement; and (2) Teachers failed to state a cause of action. (CT p. 57.)

The trial court sustained the District's demurrer without leave to amend on the grounds that the court lacked subject matter jurisdiction over the claims because Appellants failed to exhaust the administrative remedy provided in the grievance and arbitration provisions of the collective bargaining agreement. (CT pp. 115-116.)

A. Statement of Appealability

This is an appeal following the entry of judgment of dismissal after an order sustaining a demurrer without leave to amend was granted below. Accordingly, pursuant to California Code of Civil Procedure Section 904.1(a)(2), the judgment of dismissal is an appealable order.

II.

STATEMENT OF THE CASE

On June 27, 2008, this action was instituted when a Petition for Writ of Mandate pursuant to Code of Civil Procedure Section 1085 and a Complaint for Declaratory Relief was filed, along with Points and Authorities in support thereof, by Appellant Teachers, against the District. Clerk's Transcript pp. 1-33 (hereinafter referred to as "CT").

On September 10, 2008, the District filed a Demurrer to the Petition for Writ of Mandate and Complaint for Declaratory Relief, along with Memorandum of Points and Authorities in Support of the Demurrer. (CT pp. 57-79.)

On October 6, 2008, Teachers filed a Memorandum of Points and Authorities in Response to the Demurrer. (CT pp. 80-92.)

On October 14, 2008, the District filed its Reply Memorandum of Points and Authorities in Support of Demurrer. (CT pp. 100-113.) The District also filed a Request for Judicial Notice for Senate Bill No. 11600 Chapter 276, effective January 1, 2009; and No. 2 Legislative Counsel's Digest to Senate Bill 1660. (CT pp. 93-99.)

A hearing was held on October 17, 2008, before the Honorable Robert A. O'Farrell, Judge of the Superior Court, County of Monterey, State of California. (Reporter's Transcript, Pages 1-10 (hereinafter referred to as "RT").) Oral argument was heard by the trial court and the judge found that the petitioners and teachers were required to go through the grievance procedure and exhaust that

administrative remedy before seeking judicial review. The trial court sustained the demurrer without leave to amend to both causes of action for the Writ of Mandate and Complaint for Declaratory Relief. (RT p. 7, Lines 14-25 and p. 8, Lines 1-25.)

On October 17, 2008, a Minute Order was entered sustaining the Demurrer without leave to amend. (CT p. 114.) On November 4, 2008, an Order on the Demurrer was filed sustaining the demurrers to the First and Second Cause of Action without leave to amend on the ground that the court lacks jurisdiction over the subject matter because petitioners failed to exhaust the administrative remedy provided in the grievance and arbitration provisions of the Collective Bargaining Agreement between the parties. (CT pp. 115-117.) On November 14, 2008, the Notice of Entry of Order on Demurrer was filed. (CT pp. 118-123.) The trial court's order on the demurrer failed to include language dismissing the action so a Stipulated Judgment was signed by the trial court and filed January 6, 2009, dismissing the action. (CT pp. 124-126.) Notice of Entry of Judgment of Dismissal was filed January 12, 2009. (CT pp. 135-139.)

On January 7, 2009, Teachers filed a Notice of Appeal. (CT pp. 127-128.) On January 27, 2009, Teachers filed their Notice Designating the Record on Appeal to Prepare Reporter's Transcript and Clerk's Transcript. (CT pp. 129-134.) On January 12, 2009, a Notice of Entry of Judgment of Dismissal was filed by the District. (CT pp. 135.) On January 26, 2009, Teachers filed their First Amended Notice of Appeal. (CT pp. 143-144.)

III.

STATEMENT OF THE FACTS

Appellant Teachers believe the facts are undisputed in this case and issue on appeal is a question of law. Governing Boards of the School Districts are required by Education Code Section 45022 to "fix and order" the payment of compensation and salaries for its certificated employees (teachers). (CT p. 3: lines 8-10) The Board and District are also required by Education Code Section 45023 to adopt a salary schedule for certificated employees (teachers) and to classify each employee on the salary schedule on the basis of uniform allowance for years of training and years of experience. (CT p. 3: lines 11-18.)

The salary schedules have a vertical column for years of experience (service), and six horizontal columns for years of training (units). Teachers are initially placed and paid on the salary schedule according to their years of teaching experience and training/education. A teacher can receive a salary increase by either gaining years of experience teaching (commonly referred to as a "step increase"); and/or taking and passing additional units of educational course work over and above their bachelor's degree (commonly referred to as a "class or column increase"). (CT p. 3: lines 19-23.)

The Respondent District adopted a salary schedule for the 2001-2002, 2005-2006 and 2006-2007 school years. (CT pp. 12, 14, 16.) The salary schedule remained the same from 2001-2002 to 2005-2006. Placement on the salary schedules was based solely on years of training and years of experience. (CT p. 3:

lines 12-15.) The salary schedules are contained in the Collective Bargaining Agreement, which was in effect between the District and Appellant SETC. (CT p. 04: lines 3-6.)

It has been the District's longstanding practice over many years to limit individual teacher's advancements on the salary schedule to one step and one column per year. (CT p. 4: lines 4-8.) If a teacher did not earn enough units to move to the next horizontal column by the time she reached the last experience step, the teacher remained on the last step until she earned enough units to advance to the next column. But the teacher was then limited to only one experience step. There is no express language in the collective bargaining agreement limiting advancement to one step and one column per year, but the District and SETC always believed those limitations were included and proper under the salary schedule. There was no dispute between the SETC and the District as to the language of the salary schedule.

In addition, in the 2005-2006 school year, the parties agreed that no step or column advances were allowed for the 2005-2006 school year. The teachers were frozen at the 2004-2005 placement. Teachers on steps 1 through 11 were not allowed to "make up" or accumulate the year of experience that they lost in the following 2006-2007 school year. However, teachers on steps 12, 14 and 18 were permitted in 2006-2007 to make up and accumulate the year lost in 2005-2006. (CT p. 4: lines 7-10; CT pp. 14, 16, 18, 20, 22.)

As a result of these limitations, a teacher's placement on the salary schedule did not correlate with her/his actual accrued years of experience. The District's implementation of these limitations has caused a disparity in the teachers' salaries and resulted in teachers with the same number of years of experience and same training to be on different salary steps and columns of the salary schedule. (CT p. 4: lines 14-18.)

In April 2008, SETC became aware that the District's practice of limiting the advancement of teachers on the salary schedule to one step and one column per year and the agreement for the 2005-2006 school year and its implementation regarding freezing some teachers advancement while allowing other to advance violated the Education Code. Teachers brought this to the attention of the District by letter dated April 30, 2008. (CT p. 24.) Both individual teachers and Appellants have requested that the District comply with its mandatory duty under the Education Code and to classify its teachers on the salary schedule on the basis of uniform allowance for years of experience and training and to pay the affected and injured teachers the appropriate back pay and retirement contributions. (CT p. 4: lines 19-27 and p. 5: lines 1-4.) The District refused to comply with its statutory duty under the Education Code and case law and has refused to reclassify its teachers on the salary schedules on the basis of uniform allowance for their years of training and experience. (CT p. 5: lines 15-22.) As a result, Appellants filed this action for writ of mandate on June 27, 2008 (CT p. 1).

On September 10, 2008 the District filed a demurrer to the first and second causes of action on two grounds: (1) that Teachers failed to exhaust the administrative remedy provided in the grievance procedure in the collective bargaining agreement (CT p. 57: lines 25-28); and (2) Teachers failed to state a cause of action. (CT p. 58.)

The Collective Bargaining Agreement between the parties contains the "Grievance Procedure" at Article III. (CT p. 43-47; 91-92.) A "grievance" is defined by the Collective Bargaining Agreement as follows:

> "2. A. Grievance. A Grievance is a written claim by a grievant that a controversy, dispute or disagreement of any kind exists arising out of or in some way involving an alleged misinterpretation, misapplication, or violation of this agreement." (CT p.43 & 91)

Article III 5 sets for the different steps of the grievance procedure and provides that if the grievant is not satisfied with the Board's decision at step 4, then the grievant may submit a request in writing to SETC for arbitration of the dispute. (CT 47 step 5: a.) SETC may request mediation/arbitration (CT 47: step 5 c.) The Arbitration award is limited as follows:

> "The award shall be limited to the specific issue or issues contained in the grievance filed. The arbitrator shall have no authority to add to, delete, or alter any provisions of this agreement, but shall limit his/her decision to the application and interpretation of its provisions." (CT p 47: step 5e. & p. 92: step 5e.)

At the hearing on the demurrer on October 17, 2008, the District argued that Teachers were required to submit the dispute regarding violation of the

Education Code to the grievance and arbitration procedure set forth in the collective bargaining agreement. Appellants argued that there was no such requirement and that claims for violations of Education Code Section 45028 were not covered by the grievance procedure in the Collective Bargaining Agreement and that case law has determined that the courts have jurisdiction to determine violations of the Education Code.

The trial court sustained the demurrer "without leave to amend on the ground that the Court lacks jurisdiction over the subject matter because the Appellants failed to exhaust the administrative remedy provide in the grievance and arbitration provisions of the collective bargaining agreement between the parties."(CT 114-117.)

IV.

ISSUE

Does the existence of a collective bargaining agreement with a grievance and arbitration clause divest the court of jurisdiction to determine claims for violations of mandatory provisions of the Education Code?

V.

CONTENTIONS

The District contends that the grievance policy including binding arbitration set forth in the collective bargaining agreement is an adequate and available remedy that the Teachers must exhaust prior to bringing this action.

Appellants contend the Trial Court erred and the judgment should be reversed because case law is clear that even though a salary schedule is negotiated and is a part of the collective bargaining agreement under the Educational Employment Relations Act[1], the Superior Court still has the power and jurisdiction to determine whether the salary schedule or the implementation violated Education Code Section 45028;[2] and that Teachers had no adequate or available administrative remedy to exhaust.

This case requires the interpretation and application of Education Code Section 45028, Government Code Section 3543.2, as well as Education Code Section 44924.

VI.

ARGUMENT

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED

A. Standard of Review

"The standards applicable to appellate review of a trial court's interpretation of a statute are well established. Appellate courts review statutory interpretations de novo." California Teachers Association v. Governing Board of Hilmar Unified School District (2002) 95 Cal.App.4th 183, 190-191; Adair v. Stockton Unified School District (2008) 162 Cal.App.4th 1436. In addition, since the present appeal

[1] The Educational Employment Relations Act (EERA) is set forth at Government Code Section 3540 et. seq.

[2] All references to Sections 45028 and 44924 are to the Education Code.

is from a judgment of dismissal after a demurrer was sustained without leave to amend, the Court shall assume the truth of all facts properly pleaded by the Appellant Teachers, below. SC Manufactured Homes, Inc. v. Liebert (2008) 162 Cal.App.4th 68, 82.

B. History of Section 45028

For decades California law has mandated that teachers' compensation be based upon uniform allowance or credit for years of training and years of experience. Prior to 1970, Education Code Section 13506 (now 45028) required uniformity of salary based upon training and experience, but permitted "reasonable classifications" among teachers so long as those classifications were not arbitrary, discriminatory or unreasonable. (Fry v. Board of Education (1941) 17 Cal.2d 753, 758; Rible v. Hughes (1944) 24 Cal.2d 437, 444; and Palos Verdes Faculty Association v. Palos Verdes Peninsula Unified School District (1978) 21 Cal.3d 650, 655.) In 1969, however, the Legislature eliminated the ability to make reasonable classifications for salary purposes, and instead mandated that as of 1970, all teachers would be compensated based upon salary schedules applying a "uniform allowance for years of training and years of experience." (Education Code Section 45028;[3] Palos Verdes Faculty Association, *supra*, 21 Cal.3d at p. 658, 662.) The Legislature's determination was amplified by its adoption of specific legislative intent language in the act: "It is the intent of the Legislature in

[3] Section 13506 was re-numbered in the 1976 Reorganized Education Code to Section 45028.

amending Section 13506 of the Education Code as provided in Section 1 of this act to establish a uniform base salary schedule in each school district." (Stats. 1969, ch. 1314, p. 2651.) Since that time, the courts have applied this legislative mandate of uniformity for years of training and experience to salary schedules in collective bargaining agreement and to rules or limitations imposed by Districts.

In California Teachers Association v. Board of Education of Whittier City School District (1982) 129 Cal.App.3d 826 ("Whittier"), the court invalidated a local district limitation of experience credit. The district limited teachers who moved to a new column when they obtained additional training to only one year of service credit even though the teacher had additional years of creditable service, and the new column had steps sufficient to accommodate the additional experience. This limitation meant that teachers' experience with the district was artificially limited to less than actually accrued experience with that employer. Thus, the limitation violated the uniformity requirement statutorily mandated for experience accrual. (Id., 129 Cal.App.3d at pp. 832-833.)

In Wygant v. Victor Valley Joint Union High School District (1985) 168 Cal.App.3d 319 ("Wygant"), the court invalidated a school district's attempt to condition receipt of experience credit upon completion of specified units of "professional growth" every four years. The court found the professional growth unit requirement inhibited a teacher's acquisition of experience credit for every year worked, and resulted in different compensation of teachers with the same training or experience, which the Legislature had prohibited.

In San Francisco Classroom Teachers Association v. San Francisco Unified School District (1987) 196 Cal.App.3d 627, the court invalidated a school district attempt to sub-classify its top experience classification among equally highly trained teachers serving the district an equal number of years on the sole basis of the order in which the years of training and service had accrued, effectively discriminating in favor of those who had obtained the training earlier, the court explaining that it was illogical to interpret the statutory experience criterion as experience in a certain column of the salary schedule. (Id. at p. 634.)

In United Teachers of Ukiah v. Board of Education (1988) 201 Cal.App.3d 632 ("Ukiah"), the court invalidated a district's conferral of additional experience credit to exceptionally qualified teachers beyond the five year maximum for prior experience otherwise granted teachers upon employment with the district, holding that such discrimination was an unlawful deviation from uniformity, affirming a trial court judgment requiring the conferral of additional past experience credit upon all other teachers who had such prior experience. (Id., at p. 644.)[4]

In California Teachers Association v. Livingston Union School District (1990) 219 Cal.App.3d 1503 ("Livingston"), the court invalidated a collectively bargained "over one and up one" rule, similar to that imposed by the district in Whittier, *supra*, which limited teacher advancement to one experience step upon

[4] However, Education Code Section 45028(b) now permits differential prior experience credit for initial placement on the salary schedule if agreed upon in a collectively bargained agreement between a district and the exclusive bargaining representative of the teachers.

advancement to a new training column, and was essentially an "agreed" non-uniformity of experience accrual. The court specifically rejected the district's claim that the limitation was an extra criterion for additional compensation since the only criteria encountered in applying the rule were years of experience and years of training. (Id., 219 Cal.App.3d at p. 1522.)

In California Teachers Association v. Governing Board of Lancaster School District (1991) 229 Cal.App.3d 695 ("Lancaster"), the court invalidated agreed limitations upon experience advancement tied to additional graduate course-work which froze advancement of teachers hired after 1965 who failed to obtain the additional course credit, as well as limited column advancement to a single column regardless of whether sufficient units were completed entitling a teacher to further advancement. The requirements (essentially agreed non-uniformity as to experience and training accruals) violated the uniformity standard mandated for years of experience and years of training.

In each of these cases, the court invalidated negotiated provisions in the collective bargaining agreements or District policies and limitations for violating the uniformity requirements of Education Code Section 45028.

In California Teachers Association v. Governing Board of Hilmar Unified School District (2002) 95 Cal.App.4th 183 ("Hilmar"), the district and the teachers' association agreed to a one time additional payment of salary after the school year ended for teachers who had either retired at the end of the year or who returned the next year. It did not include 8 teachers who resigned or left at the end of the year.

The court found that this disparity in pay between teachers did not violate Section 45028 because it fell within the exception of Government Code Section 3543.2(d) of additional compensation and satisfied the requirements for "criteria other than years of training and years of experience."

In Adair v. Stockton Unified School District (2008) 162 Cal.App.4th 1436 ("Adair"), the district and teachers negotiated and agreed through collective bargaining to a new "compressed" salary schedule which eliminated certain experience steps. Pursuant to the agreement, the district moved the affected teachers to the compressed step. This resulted in teachers with 18 to 26 years of experience being placed on the salary schedule at steps lower than their actual accrued years of experience. The Appellate Court found that the district violated the uniformity requirements of Section 45028 because these teachers had to work longer than less senior teachers to reach the same salary brackets. The court analyzed Government Code Section 3543.2 and found there were no exceptions to the uniformity mandate present and therefore Government Code Section 3543.2 did not apply. (Id. at 1448-1449.)

As discussed below, Section 45028 was amended in 1983 and 1996 to create certain exceptions which allow school districts and the teachers' representatives to mutually agree to a salary schedule based on criteria other than years of training and years of experience. However, unless those exceptions apply, teachers with the same years of training and experience must be treated the same for salary purposes. California Teachers Association v. Livingston Union School

District (1990) 219 Cal.App.3d 1503, 1522; California Teachers Association v. Governing Board of Hilmar Unified School District (2002) 95 Cal.App.4th 183, 196; Adair v. Stockton Unified School District (2008) 162 Cal.App.4th 1436, p. 1448-1449.

In the present case, the facts are similar and are a combination of the facts in Livingston, *supra*, Whittier, *supra*, and Adair, *supra*. The salary schedules were based and operate exclusively upon years of training and experience. The District limited teachers' movement on the salary schedules to one step and one column per year. If a teacher did not earn enough units to move to the next horizontal column by the time she reached the last experience step, the teacher remained on the last step until she did earn the units to advance to the next column. However, she was then limited to only one experience step. This limitation resulted in disparity of salary among teachers because the teacher's placement on the salary schedule did not correlate with her actual accrued years of experience. Teachers with the same years of experience and same units were paid differently. Both the courts in Whittier, *supra*, and Livingston, *supra*, have found this violated the uniformity requirements of Section 45028.

The 2005-2006 salary schedule and the District's implementation also violates the uniformity requirement pursuant to Adair, *supra*. No step or column advances were allowed for the 2005-2006 school years. The teachers were frozen at the 2004-2005 placement. Teachers on steps 1 through 11 were not allowed to "make up" or accumulate the year of experience that they lost in the following

2006-2007 school year. However, teachers on steps 12, 14 and 18 were permitted to make up and accumulate the year lost in 2006-2007.

This resulted in disparity of salary because (1) teachers who earned enough units in the summer of 2005 to move to the next column were prohibited; and (2) teachers on steps 1 through 11 had to work longer to reach the same salary brackets as those teachers on steps 12 through 22. This is contrary to Adair, *supra*.

In Adair, *supra*, the question before the Appellate Court was the same question that Appellant Teachers in the present case seek relief for in the Petition for Writ of Mandate and Complaint for Declaratory Relief. The Adair court posed the question as follows: " . . . whether the District's implementation of the compressed salary schedule violated the uniformity requirement of Section 45028 and if so, whether any statutory exception to the requirement applies." (Id. at p. 1442.) (CT, p. 1-33.)

In the present case, at the hearing on the demurrer, the District admits that the school district and the employee organization cannot bargain something in violation of the Education Code but argues,

> "The issue before you is how do you adjudicate that? Who has the jurisdiction to determine whether or not the parties collectively bargained something in violation of the Education Code? And that must go through a grievance procedure, if you have one, that applies to the provisions of your contract and obviously that grievance procedure within the contract does apply." (RT, p. 6, line 6-25.)

In Adair, the parties had a collective bargaining agreement and negotiated the new compressed salary schedule. The court found, after discussing the historical background of Education Code Section 45028 and Government Code Section 3543.2, that the District violated the uniformity requirements of Education Code Section 45028 and that no exception applied. (Id. at pp. 1440, 1452.)

The court in Adair, *supra*, felt that Whittier, *supra*, where the school board imposed a rule limiting a teacher's advancement to only one vertical step in any one year was on point. Citing Whittier, the Adair court stated as follows:

> "When this rule is applied to a teacher who has been at the maximum step of a class for more than one year and who then moves to a higher class, it has the effect of placing that teacher at a Step below her or his number of years of experience [on the salary schedule]. (Id. at p. 829, *italics added.*) The appellate court held that the rule which 'precludes teachers from receiving credit for experience solely due to their seniority within the system.' (Id. at p. 831), violated the uniformity mandate of Section 45028 (Whittier, at pp. 832-833)." (Id. at p. 1447.)

The Adair court concluded that the District violated the uniformity requirement of Education Code Section 45028 by reassigning certain teachers to step levels below their years of experience, even though there was a collective bargaining agreement in effect and the salary schedule was negotiated and a part of that agreement.

In Livingston, *supra*, the appellate court found that the superior court had jurisdiction to determine violations of Education Code Section 45028; that Government Code Section 3543.2(d) did not apply; and that the teachers were

not required to exhaust administrative remedies with PERB (even though there was a collective bargaining agreement) before filing an action. In California Teachers' Assn. v. Parlier Unified School District (1984) 157 Cal.App.3d, 174 ("Parlier"), there were collective bargaining agreements, but the Appellate Court found that the Superior Court had jurisdiction to determine whether or not the collective bargaining agreement violated the Education Code.

Many districts have raised the issue of failure to exhaust administrative remedies involving statutory rights under the Education Code. The courts have consistently held that Mandatory provisions of the Education Code are not within the purview of the Educational Employment Relations Act and cannot be waived by collective bargaining and that the court retains jurisdiction to determine if there has been a violation of the Education Code. California Teachers Association v. Livingston Union School District (1990) 219 Cal.App.3d 1503; California Teachers' Assn. v. Parlier Unified School District (1984) 157 Cal.App.3d, 174 (Education Code 44977); Jefferson Classroom Teacher's Association, et al. v. Jefferson Elementary School District (1982) 137 Cal.App.3d 993 (Education Code 44977); Dixon v. Board of Trustees of Saugus Unified School District (1989) 216 Cal. App.3d 1269; Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482; Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal.4th 269 ("Round Valley"); United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510 ("United Teachers"); Tracy Educators Assn. v. Superior Court (2002) 96 Cal.App.4th 530 ("Tracy").

C. The Court has Jurisdiction to Determine Violations of Education Code Section 45028 and Whether any Exceptions Apply

1. Education Code Section 45028.

Education Code Section 45023 requires the governing board of a school district to adopt a salary schedule to be paid to certificated employees. Education Code Section 45028 provides that each person employed by the district in a certificated position shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience.

Education Code Section 45028 (a) states:

> (a) Effective July 1, 1970, each person employed by a school district in a position requiring certification qualifications, except a person employed in a position requiring administrative or supervisory credentials, shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience, except if a public school employer and the exclusive representative negotiate and mutually agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience pursuant to Chapter 10.7 (commencing with Section 3540) of the Government Code. Employees shall not be placed in different classifications on the schedule, nor paid different salaries, solely on the basis of the respective grade levels in which such employees serve.
>
> In no case shall the governing board of a school district draw orders for the salary of any teacher in violation of this section, nor shall any superintendent draw any requisition for the salary of any teacher in violation thereof.
>
> This section shall not apply to teachers of special day and evening classes in elementary schools, teachers of special classes for elementary pupils, teachers of

special day and evening high school classes and substitute teachers."

The use of the word "shall" in the Education Code is mandatory and the use of the word "may" is permissive. The first sentence of Section 45028 is mandatory and requires the governing board to classify and pay its teachers on a uniform basis according to years of experience and training. The case law following Education Code Section 45028 make it clear that certificated school district employees are to be strictly classified on the salary schedule and paid based on a uniform allowance for years of training and experience. Palos Verdes Faculty Assn v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal.3d 650; Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal.App.3d 319. The courts have held that these rights are mandatory and cannot be waived by collective bargaining. Livingston, *supra*; Ukiah, *supra*.

2. Exceptions to Section 45028.

There are exceptions to the uniform salary requirements of Section 45028 which may authorize disparate salary schedule treatment. However, none of the exceptions apply to this case.

Section 45028 permits certain exceptions to its mandatory requirement of classification on the salary schedule on the basis of uniform allowance for years of training and years of experience: to wit, Section 45028(b)(1) and Government Code Section 3543.2(d) and (e).

Subsection of (b)(1) Section 45028 specifically authorizes a school District and the teachers' exclusive representative to agree to grant new hirees a different credit for years of experience or units than current employees received when they were initially hired. This exception applies only to initial placement on the salary schedule. Thus, this exception does not apply to the present case.

Section 45028(a)(1) permits two additional exceptions to the uniformity requirements pursuant to Government Code Section 3540, et. seq., if the parties mutually "agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience . . . ." These two exceptions are Government Code Section 3543.2(d) and (e).

Section 3543.2(d) authorizes deviation from the uniform salary for purposes of "payment of additional compensation based upon criteria other than years of training and years of experience." The instant case, however, does not involve any issue of "additional compensation," nor does the salary schedule utilize any criteria other than years of training and years of experience. Therefore, the exception authorized by Government Code Section 3543.2(d) is not involved in this case and not applicable. See Livingston, *supra* at 219 Cal.App.3d at p. 1522.

Section 3543.2(e) authorizes deviation from uniform salary if the salary schedule is based on criteria other than a uniform allowance for years of training and years of experience. The District contends, in essence, that these exceptions divest jurisdiction from the Superior Court to determine if Education

Code Section 45028 and the rights there under were violated. This contention is without merit.

In order to deviate from the uniformity requirements of Education Code Section 45028(a)(1) and Government Code Section 3543.2 (d) and (e), the salary schedule must operate on some criteria other than years of training and experience. Livingston, *supra* at p. 1522; Hilmar, *supra*, at p. 196; Adair, supra. The facts in the instant case show that the only criteria upon which the salary schedules operate and by which any teacher's salary is determined is only based on a teacher's experience and training. There is no other criteria and, therefore, the exceptions under Government Code Section 3543.2 (d) or (e) do not apply to the present case.

The District asserts, since the parties agreed to the 2005-2006 salary schedule and freeze of teachers' movements thereon and also agreed to the District's action limiting movement to one vertical step of experience per year, that the Collective Bargaining Agreement should control and, therefore, the teachers are required to exhaust their administrative remedies to determine whether or not an exception applied to the uniformity requirements of 45028 before proceeding to the Superior Court.

The District's contentions distorts the relationship between Education Code Section 45028 and Government Code Section 3543.2 by making the former subservient to the latter, and are in error because it fails to harmonize and consider the entire statutory scheme for teacher salary uniformity and would

also render Education Code Section 45028 meaningless. Such an interpretation must be avoided. Templeton Development Corp. v. Superior Court (Sacramento) (2006) 144 Cal.App.4th 1073, 1081.

The District's argument must fail because the Superior Court still has jurisdiction to determine if there is a violation of Education Code Section 45028. Several courts have determined the issue of whether or not an exception under Government Code Section 3543.2 applies to the uniformity requirements of Section 45028. Hilmar, *supra*; Adair, *supra*; and Livingston, *supra*. In Livingston, *supra*, when the District raised the issue of exhaustion as a defense, the Appellate court found that even if the parties had negotiated an exception to Section 45028 pursuant to Government Code Section 3543.2 (d) that it wouldn't be a violation of the EERA or Government Code but may be a violation of Section 45028. (Id. p. 1524.)

The courts have determined that Section 45028 is the controlling section, unless one of the limited exceptions applies. Livingston, *supra* at p. 1522, and Adair, *supra* at pp. 1448-1449. This is further substantiated by Government Code Section 3543.2(e) which itself expressly specifies: "If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 45028 of the Education Code requiring a salary schedule based upon a uniform allowance for years of training and years of experience shall apply." Section 3543.2 (d) also is in accord and specifically provides, "If the public school employer and the exclusive representative do not reach mutual

agreement, then the provisions of Section 45028 of the Education Code shall apply." In addition, the EERA provides that none of its provisions are intended to "supersede other provisions of the Education Code." Government Code Section 3540.

This is also further supported by California Teachers Assn. v. Parlier Unified School District (1984) 157 Cal.App.3d 174, 183-184, as discussed below which held that statutory rights conferred by the Education Code can not be waived by collective bargaining. Thus, Section 45028 is the controlling provision and default provision and that Government Code Section 3543.2(d) and (e), must be construed as an exception to the general rule of uniformity that is applicable only when criteria other than years of training and years of experience are mutually agreed to by a school district and teachers' representatives. Livingston, *supra* at p. 1522; Hilmar, *supra* at p. 196; Adair, *supra* at pp. 1448-1449. Absent such an agreement, the general rule of uniformity under Section 45028 governs.

D. Guaranteed Rights Under Education Code Section 45028 to Uniform Pay Cannot be Waived by Collective Bargaining

A teacher's right to be paid uniformly under Education Code Section 45028 cannot be waived by the teacher individually or by collective bargaining. Education Code Section 44924. The District contends that the Appellant Teachers must exhaust their administrative remedies under the Collective Bargaining Contract because they characterize the Teachers' action as a "contract dispute". This contention is without merit because Education Code Section 44924 prohibits

waiver of any benefits or statutory rights contained in Section 44800 through 45060. California Teachers' Assn. v. Parlier Unified School District (1984) 157 Cal.App.3d 174; Jefferson Classroom Teacher's Association, et al. v. Jefferson Elementary School District (1982) 137 Cal.App.3d 993.

Education Code Section 44924 provides as follows:

> "Except as provided in Sections 44937 and 44956, any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void." (emphasis added)

Education Code Section 45028 is included within the chapter of 44924 and therefore cannot be waived. See United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510; Winslow v. San Diego (1979) 97 Cal.App.3d 30; Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482; Adair v. Stockton Unified School District (2008) 162 Cal.App.4th 1436; California Teachers Association v. Governing Board of Lancaster School District (1991) 229 Cal.App.3d 695; California Teachers Association v. Livingston Union School District (1990) 219 Cal.App.3d 1503; Jefferson Classroom Teacher's Association, et al. v. Jefferson Elementary School District (1982) 137 Cal.App.3d 993.

Both California Teachers' Assn. v. Parlier Unified School District (1984) 157 Cal.App.3d 174, and Jefferson Classroom Teachers' Association, et al. v. Jefferson Elementary School District (1982) 137 Cal.App.3d 993, have expressly held that Education Code Section 44924 prohibits waiver of the statutory benefits and rights

granted in its chapter by a collective bargaining agreement. In each case, there was a collective bargaining agreement, which conflicted with certain Education Code rights of teachers. Both courts found that the collective bargaining agreement was null and void to the extent that it was in conflict with the Education Code.

In Parlier, *supra*, the issue revolved around Education Code Sections 44977 and 44978 which provides for sick leave and differential pay for teachers if they become ill. The School Districts and Teachers Associations agreed to a provision in their Collective Bargaining Agreement that imposed a five (5) to ten (10) day waiting period before a teacher could receive differential pay pursuant to Section 44977. The Teachers' representatives brought an action for writ of mandate claiming that individual teachers had a statutory right under the Education Code to receive the differential pay immediately after their sick leave was exhausted and the waiting period imposed by the Collective Bargaining Agreement violated their statutory rights. The Teachers contended that their statutory rights to differential pay could not be waived by individual teachers or by collective bargaining and therefore any provision in the collective bargaining agreement which conflicts with their statutory rights in the Education Code was null and void pursuant to Section 44924. (Id. at p. 178.)

In Parlier, *supra*, the school district argued that Section 44924 only applied to individual teacher contracts and not collective bargaining agreements. But the court rejected this contention and found that Section 44924 applied to any contract or agreement and included collective bargaining agreements. The school districts

also argued that the policy favoring collective bargaining would be defeated if the teachers were allowed to repudiate an illegal term in their contract. The trial court, however, rejected this argument and found that Education Code 44924 made the provisions of the collective bargaining agreement null and void.

The districts relied on Government Code Section 3543.2 to support their position that the collective bargaining agreement should prevail over the Education Code. Parlier, *supra*, discusses the EERA (Government Code Section 3540-3549.3) and the system of collective bargaining between school districts and their employees. The court points out that Government Code Section 3540 provides: that "nothing contained herein shall be deemed to supercede other provisions of the Education Code..."

> "Thus, if there is a conflict between the Government Code provisions regarding collective bargaining powers and Education Code sections creating non-waivable rights, the Education Code prevails. Respondents' reliance on Government Code section 3543.2 is thus misplaced." (Id. p. 184.)

While Section 45028 and Government Code Section 3543.2 have been amended after Parlier, *supra*, to permit certain exceptions to the uniformity requirement of Section 45028, Section 45028 has not been eviscerated. Adair, *supra*; Lancaster, *supra* at p. 704; and Livingston, *supra* at p. 1522. Hilmar, *supra* at p. 196-197. The law is clear and both Sections 3543.2 (d) and (e) expressly provide that if the parties don't agree to an exception then the uniformity requirements under Section 45028 apply. Lancaster, *supra* at p. 704; Adair, *supra*;

Hilmar, *supra*; and Livingston, *supra*; San Francisco Classroom Teachers Assn v. San Francisco Unified School District, *supra*; Government Code Section 3540.

Here the Salinas District contends, just as the district in Lancaster, *supra*, did, that Section 3543.2 and the EERA permits the deviation from the uniformity requirements because the parties have a collective bargaining agreement and there is much greater flexibility for bargaining today. However, this argument must fail just as it did in Lancaster, supra, Livingston, *supra*, and San Francisco, *supra*, because 3543.2 does not permit school districts to completely circumvent Section 45028 by simply reaching an agreement through collective bargaining. Furthermore, Education Code Section 44924 renders void any portion of a collective bargaining agreement purporting to waive the rights or benefits in Section 45028. Adair, *supra*.

Section 44924 of the Education Code has been consistently used to render null and void any contractual provisions that conflict with any of the statutory benefits and rights set forth in the Education Code. The cases have set forth the public policy considerations and the reasons for liberal construction of Section 44924. See Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482; United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510; Winslow v. San Diego (1979) 97 Cal.App.3d 30; California Teachers' Assn. v. Parlier Unified School Dist. (1984) 157 Cal.App.3d 174; California Teachers Association v. Governing Board of Lancaster School District (1991) 229 Cal.App.3d 695.

In United Teachers, *supra*, the school district and the teachers association entered into a collective bargaining agreement and agreed to a provision that conflicted or was contrary to a statutory benefit conferred on the teachers by the Education Code Section 44922. The court held that Section 44924 did not permit waiver of the mandatory benefits of 44922 and therefore the collective bargaining provisions were rendered null and void by operation of 44924. The court also held that since the teachers' petition was not an attempt to enforce compliance with the collective bargaining agreement, but with the controlling statutes, they were not required to exhaust administrative remedies before seeking equitable relief in the trial court (Id. at p. 1520).

In the present case, the Appellant Teachers also petitioned the court to enforce individual teachers' statutory rights conferred by Education Code Section 45028 to uniform salary. The teachers did not seek to enforce the collective bargaining agreement or any provision thereof. It is clear from Section 44924 and case law that any provision in the collective bargaining agreement or any action taken by the District that is contrary to or conflicts with mandatory statutory rights in the Education Code including Section 45028 are null and void and the teachers cannot waive those rights by collective bargaining. Since any contract provision is void which conflicts with teachers' rights under 45028, exhaustion of administrative remedies provided in the collective bargaining agreement is not required. United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510; Veguez v. Governing Board Long Beach Unified

School District (2005) 127 Cal.App.4th 406; Tracy Educators Assn. v. Superior Court (2002) 96 Cal.App.4th 530; California Teachers Association v. Livingston Union School District (1990) 219 Cal.App.3d 1503; California Teachers Assn. v. Governing Board of Lancaster School District (1991) 229 Cal.App.3d 695; Wygant v. Victor Valley Joint High School District (1985) 168 Cal.App.3d 214; California Teachers' Assn. v. Parlier Unified School Dist. (1984) 157 Cal.App.3d 174, 183- 184; Jefferson Classroom Teachers Assn., *supra*; and United Teachers of Ukiah v. Board of Education of Ukiah (1988) 201 Cal.App.3d 632.

E. Deferral To Contract Arbitration

The District asserts that because the parties have a collective bargaining agreement with a grievance procedure, which includes binding arbitration, the Teachers must file a grievance prior to bringing this action.

District's contention is without merit for the following reasons:

1) Lawsuits to enforce rights guaranteed by the Education Code are not subject to internal exhaustion requirements; and

2) There is no adequate and available administrative remedy to exhaust.

1. Lawsuits to enforce rights guaranteed by the Education Code are not subject to internal exhaustion requirements.

In the present case, the teachers are challenging the denial of and violation of individual teachers rights under Education Code Section 45028. The petition for writ of mandate does not seek to enforce compliance with the collective bargaining agreement. Under these circumstance, the courts have held

that the Appellant Teachers are not required to exhaust administrative remedies including binding arbitration that are in the collective bargaining agreement before seeking a writ of mandate pursuant to Section 44924. Veguez v. Governing Board Long Beach Unified School District (2005) 127 Cal.App.4th 406; Tracy Educators Assn. v. Superior Court (2002) 96 Cal.App.4th 530, 537-538; United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510, 1519-1520; see also Education Code Section 44924 and the discussion regarding non waiver above.

In response to the District's argument for exhaustion of administrative remedies and for binding arbitration, the court in Tracy, *supra*, made clear that the collective bargaining agreement did not cover this dispute because it was a violation of the Education Code. The court stated as follows:

> "Accordingly, even assuming the association leave clause refers to the same type of leave provided by section 44987(a), the parties could not, through the Master Agreement, waive Escobedo's right to a leave of absence pursuant to section 44987 (a)."

Thus, the court found that "Deferral to Arbitration is not required." (Id. pp. 538-540.)

The Tracy court rejected the District's remaining contention that it was inequitable for the Teachers' Association to challenge the agreement on the basis of the statutory violation when it must of known of the statute and yet

negotiated the provision in the agreement anyway. The court pointed out that the District presumably also knew or should have been aware that it could not limit its employees' mandatory Education Code rights through collective bargaining. (Id. p 539.)

2. There is no adequate and available administrative remedy to exhaust.

In order to determine if there is an adequate administrative remedy that requires exhaustion, the court must look at the contract grievance/arbitration policy itself. "The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate." Moncharsh v. Heily & Blasé (1992) 3 Cal.4th 1, 8; Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 375; Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal.App.4th 534, 543. An examination of the contract language, in the case at bar, including the grievance and arbitration procedures establishes that Teachers have no adequate or available administrative remedy to address violations of the Education Code or specifically Section 45028.

A "grievance" is defined by the Collective Bargaining Agreement at Article III page 3 as follows:

> "2. A. Grievance. A Grievance is a written claim by a grievant that a controversy, dispute or disagreement of any kind exists arising out of or in some way involving an alleged misinterpretation, misapplication, or violation of this agreement." (CT p.43 & 91)

Article III 5 at page 7 of the agreement provides that "[If] the grievant is not satisfied with the decision rendered pursuant to Step 4, he/she may submit a request in writing to the SETC for arbitration of the dispute." (CT 47 step 5: a.) Article III 5 c. provides that "[u]pon receipt of the written request, the SETC **may** within ten (10) days request the California State Mediation/Conciliation Services to supply a panel of five (5) names" in order to select an arbitrator. "A copy of this request **shall** be sent to the grievant and the Superintendent." (CT 47: step 5 c.) (Emphasis added)

The Arbitration award is limited as follows:

> "The award shall be limited to the specific issue or issues contained in the grievance filed. The arbitrator shall have no authority to add to, delete, or alter any provisions of this agreement, but shall limit his/her decision to the application and interpretation of its provisions." (CT p 47: step 5e. & p. 92: step 5e.)

It is clear from this language that a "grievance" is limited to contract violations and that claims to enforce the Education Code and specifically Section 45028 do not fit within the definition of a "grievance." The arbitrator's powers are also limited to the "application and interpretation of its [contract] provisions." By its own terms, the arbitrator has no authority to determine any other issues. Therefore, the arbitrator has no power or authority to enforce or remedy violations of the Education Code. Nor does the Arbitrator have the authority to order a school district to comply with Education Code Section 45028. In addition, individual teachers have no individual right to arbitrate. They are not entitled to

proceed to arbitration on their own without the consent of the Association-SETC. Article III 5 c. makes it clear by the use of the word "may" that the decision to proceed to arbitration is SETC's decision alone and it is discretionary. Thus, grievance and arbitration procedure under the contract would not be applicable or available and adequate to address the Appellant Teachers claims for violation of their statutory rights and request for the District to comply with the Education Code.

Although the District contends that the Teachers' complaint in this case is a "contract dispute", the District's characterization thereof and its defense does not make it necessarily so. Both the courts in Livingston, *supra*, at page 1519 and Ukiah, *supra*, at p. 638-639, have rejected similar school districts' claims to transform the action or implicate the EERA. As discussed above, the case law is clear that an action alleging a violation of the Education Code, and requesting enforcement is not controlled by the collective bargaining agreement. See Livingston, *supra*. The Teachers seek in their petition and complaint to enforce their statutory rights under Education code Section 45028 and seek redress from the Respondent District for violation thereof. The Teachers have not alleged that the District breached the collective bargaining agreement.

In Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, the Supreme Court held that arbitrators may not enforce provisions of the collective bargaining agreement that are preempted by the Education Code. In that case, the Teachers Association and the School District entered into a

collective bargaining agreement with a provision that set forth procedures for the dismissal or the non-reelection of probationary teachers. The parties agreed that the superintendent was required to give notice to a probationary employee of the specific reasons for the dismissal or non-reelection and that "just cause" was required to dismissal or non reelect probationary teachers.

The District Superintendent notified a probationary teacher that his teaching contract for the 1990-1991 school year would not be renewed. The superintendent did not give the employee notice of the reasons why he was being non reelected which failed to comply with the provision in the collective bargaining agreement. Thereafter the probationary employee filed a grievance alleging that the school district had violated the collective barraging agreement. The District insisted the grievance was not arbitrable because the Education Code gave the District the power to non-reelect a probationary employee without stating a reason for their decision under Section 44929.21. The Teachers' Association filed a motion to compel arbitration in the Superior Court which was granted. The arbitrator found District had violated the agreement and ordered it to comply with the procedures. The District thereafter filed a petition to vacate the arbitration award, claiming the arbitrator exceeded his powers in ordering District to comply with the agreement.

The District argued that the arbitrator did not have the power to determine the issue nor was it a proper subject to arbitrate because the District had *the statutory right* under Education Code 44929.21 to non reelect a probationary

teacher without cause and thus, the Education Code preempted the provision in the collective bargaining agreement.

The court reviewed the statutory scheme of the Education Code and also the purpose and scope of collective bargaining under the EERA as set forth in the Government Code at Section 3540 et seq., including Section 3543.2. The Supreme Court concluded that Education Code Section 44929.21 preempts the procedural protections agreed to in the collective bargaining agreement, and that the arbitrator's decision was inconsistent with the District's statutory rights under the Education Code and thus the arbitrator exceeded his powers by ordering the District to comply with the preempted provisions in the collective bargaining agreement.

In the Vernon Firefighters vs. City of Vernon, (1980) 107 Cal.App.3d 802, the City alleged that the union and its employees fail to exhaust the grievance policy contained in the memorandum of understanding, (MOU), and thus barred them from challenging a unilateral change in City policy by the use of a writ of mandate pursuant to CCP Section 1085. The court rejected the city's contention, and held and stated, at page 826, as follows:

> "It is an established rule that administrative remedies need not be exhausted where they are inadequate, inapplicable, or futile. Glendale City Employees' Association vs. City of Glendale (1975) 15 Cal.3d 328, 343; Huntington Beach Police Officers' Association vs. City of Huntington Beach, (1976) 58 Cal.App.3d 492, 496; Sunnyvale Public Safety Officers Association vs. City of Sunnyvale (1976) 55 Cal.App.3d 732, 735.

> The grievance provision found in the MOU provides for a four-step procedure commencing with an oral complaint by the employee to his immediate supervisor and culminating in a hearing before the City Council if the grievance is not settled at one of the lower steps. The MOU defines a "grievance" as "a dispute arising out of the interpretation or application of any provision of this memorandum of understanding or any of ordinance, resolution or written policy of Vernon. . . . But excluding any and all provisions of resolution 4027."
>
> The inapplicability of this procedure to the facts in the instant case is manifest. We are not dealing with a 'grievance' as defined in the MOU. The key issue here is not the 'interpretation or application' of the disciplinary rule, but rather the city's obligation, pursuant to the MMBA, in its enactment of that rule. The rule was void for procedural violation of the above, and, therefore subject to neither interpretation nor application."

Since the relief sought by Teachers in the present case was for the interpretation and enforcement of Education Code Section 45028, and not for the interpretation of any portion of the collective bargaining contract, the grievance procedure is not applicable and obviously does not need to be exhausted. Round Valley, *supra*; Vernon Firefighters vs. City of Vernon, (1980) 107 Cal.App.3d 802; Veguez v. Governing Board Long Beach Unified School District, *supra*; Tracy Educators Assn. v. Superior Court (2002) 96 Cal.App.4th 530, 537-538; United Teachers-Los Angeles v. Los Angeles Unified School District (1994) 24 Cal.App.4th 1510, 1519-1520. Only adequate administrative remedies need be exhausted. The requirement of exhaustion does not apply if the remedy is inadequate. Glendale City Employees' Association vs. City of Glendale (1975) 15 Cal.3d 328.

3. Cases Cited By District Are Not Applicable To Education Code Section 45028.

Although the District acknowledges Livingston, *supra*, and Adair, *supra*, they argue that Charles J. Rounds Co. v. Joint Council of Teamsters (1971) 4 Cal.3d 888 ("Rounds"), Service Employees International Union v. Dept. of Personnel Administration (2006) 142 Cal.App.4th 866 ("Service Employees International Union"), and California Correctional Peace Officers v. State of California (2006) 142 Cal.App.4th 198 are somehow more applicable. (CT 101:12-28).

The District's argument is contrary to the established case law determining jurisdiction over violations of Education Code and specifically Section 45028. None of the cases cited by the District involved mandatory statutory rights under the Education Code and therefore Section 44924 was also not an issue. These cases all had collective bargaining provisions with a grievance procedure that applied to the claim.

In Rounds, *supra*, the parties agreed to a "no strike" clause in the collective bargaining agreement. When the employees went out on strike, the employer brought an action for damages for breach of contract in the superior court without going first through arbitration. The union claimed that the question of breach of contract was an issue within the scope of the arbitration clause in their agreement.

In this case the District also argued to the trial court:

> "there is no statutory exemption for arbitrations which involve issues of statutory construction. Therefore a demurrer properly lies for Petitioner's failure to exhaust the internal grievance and arbitration procedure set forth in the applicable Collective Bargaining Agreement." (CT 101: 12-28 through p.105)

This is simply not true and is misleading at best. District's argument assumes that the parties have an administrative remedy that is adequate and available which in turn means that the arbitrator has the power and authority to determine the issue. In Service Employees International Union, *supra*, the parties had an agreement in their collective bargaining agreement that permitted the union to use the employer's mailboxes to communicate with its members but were prohibited from distribution of materials of a "partisan political nature." The scope of the arbitrator's power was not at issue. The union did not contend that the arbitration procedure was deficient. The court found that the union must exhaust its contract remedy before resorting to the courts to resolve constitutional questions. The court's ruling was based on "the venerable jurisprudence principal to avoid constitutional questions where other grounds are available." (Id p. 872-873) That is not the case here.

Unlike Adair, *supra*; Livingston, *supra*; Ukiah, *supra*; Dixon, *supra*, Round Valley, *supra*; Vernon, *supra*; Veguez v. Governing Board Long Beach Unified School District, *supra*; Tracy, *supra*, at pp. 537-538; and United Teachers, *supra*, at 1519-1520, the cases cited by the District have nothing to do with

violations of mandatory statutory rights under the Education Code or Section 44924's declaration of the legislature's intent of a policy of non waiver of the benefits by contract.

VII.

CONCLUSION

Education Code Section 45023 requires the Governing Board of the School District to adopt a salary schedule to pay certificated employees. Education Code Section 45028 requires uniform pay based on years of training and experience. Section 45028 permits certain exceptions to its uniformity requirements if based on some criteria other than years of experience and years of training under Government Code Section 3543.2 (d) and (e). However, the uniformity requirements of Section 45028 control in the absence of a mutual agreement based on other criteria. Adair, *supra*; Education Code Section 45028 (a) (1); Government Code Section 3543.2 (d) and (e); Livingston, *supra*; and Hilmar, *supra*. Furthermore, the Superior court does not lose jurisdiction to determine if there is a violation of Section 45028 or whether any exceptions apply. Adair, *supra*; Hilmar, *supra*, and Livingston, *supra*. If the parties agree to a non-uniform provision or limitation, it would not be a violation of the EERA subject to exhaustion but it may be a violation of Section 45028. Livingston, *supra*. Education Code Section 44924 prohibits waiver of any mandatory rights or benefits set forth in the Education Code by collective bargaining agreement or individual teacher. Any provision in the contract that conflicts with the statutory

right is null and void. United Teachers, *supra*; Winslow vs. San Diego, *supra*; Campbell v. Graham–Armstrong; *supra*; Parlier, *supra*. Since mandatory Education Code rights cannot be waived by collective bargaining, a remedy provided in the collective bargaining agreement for contract violations would not be an adequate remedy for an Education Code violation. Exhaustion is not required. Veguez, *supra*; Tracy, *supra*; United Teachers, *supra*; Round Valley, *supra*; and Livingston, *supra*.

Dated: May 13, 2009

Respectfully submitted,

TUTTLE & McCLOSKEY

By: Kay M Tuttle
Kay M. Tuttle

Attorneys for Plaintiffs/Appellants
CALIFORNIA TEACHERS ASSOCIATION
and SALINAS ELEMENTARY TEACHERS
COUNCIL

Certificate of Compliance

I am one of the attorneys for Appellants in this proceeding. I certify that the attached brief complies with California Rules of Court, Rule 8.204(c)(1). According to the word count information provide by Microsoft Word 2000, the computer program used to prepare this document, the brief has 10,040 words, not including the Table of Contents or Table of Authorities.

Dated: May 13, 2009

TUTTLE & McCLOSKEY

By: Kay M Tuttle
Kay M. Tuttle

Re: **California Teachers Association v. Governing Board of the Salinas City Elementary School District**
Court of Appeals, Sixth Appellate District Case No. H033788

PROOF-OF-SERVICE

I, the undersigned, declare that I am a employed in the City of Fresno, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 750 East Bullard, Suite 101, Fresno, California 93710.

On May 13, 2009, I served the following documents:

APPELLANTS' OPENING BRIEF

on the following interest party(s) in aid cause:

VIA U.S. MAIL
Keith V. Breon, Esq.
George W. Shaeffer, Jr., Esq.
BREON & SHAEFFER, PLC
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VIA U.S. MAIL
Clerk of the Court
County of Monterey
240 Church Street
Salinas, California 93901

VIA INTERNET (CRC 8.212)
California State Supreme Court
350 McCallister Street
San Francisco, California 94107

[X] **BY MAIL:** I caused to be deposited such envelope with the United States Postal Service, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Fresno, California. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day 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 (1) day after the date of deposit for mailing in affidavit.

[ ] **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the offices of the addressee(s).

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[X] **BY INTERNET:** Pursuant to California Rules of Court, Rule 8.212, I caused one electronic copy to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic notification address at http://www.courtinfo.ca.gov/courtgs/supreme/

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this document is executed on May 13, 2009, at Fresno, California.

Sylvia Casaus

SYLVIA CASAUS

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 301 East Ocean Boulevard, Suite 1750, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **MOTION FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER OF RESPONDENT LOS ANGELES UNIFIED SCHOOL DISTRICT TO AMICUS CURIAE BRIEF OF CALIFORNIA TEACHERS ASSOCIATION IN SUPPORT OF PLAINTIFF/ APPELLANT UNITED TEACHERS LOS ANGELES** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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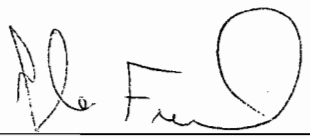
☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of 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.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 24, 2011 at Long Beach, California.

Ila Friend
Type or Print Name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