Filed: 3/8/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ATWATER ELEMENTARY SCHOOL DISTRICT, Plaintiff and Respondent, v. DEPARTMENT OF GENERAL SERVICES, Defendant and Respondent, ALBERT G. TRUITT, JR., Real Party in Interest and Appellant.	F043009 (Super. Ct. No. 146534) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Merced County. Betty Dawson, Judge.

Driscoll & Associates and Thomas J. Driscoll, Jr., for Real Party in Interest and Appellant.

John F. Kohn for California Teachers Association as Amicus Curiae on behalf of Real Party in Interest and Appellant.

Lozano Smith, Michael E. Smith, Howard A. Friedman, Stephen A. Mendyk and Jesse J. Maddox for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Part I.

John Bukey, Richard Hamilton and Judith Cias for California School Boards Association as Amicus Curiae on behalf of Respondent.

No appearance by Defendant and Respondent.

-ooOoo-

On May 23, 2002, respondent Atwater Elementary School District (District) gave appellant Albert G. Truitt, Jr., a credentialed teacher, notice of the District's intention to dismiss him from his position (Ed. Code, § 44944). The charges alleged that appellant had engaged in sexual misconduct with five separate students during the period between 1992 and 1998. A Commission on Professional Competence (CPC) convened to hear the charges (Ed. Code, §§ 44932, 44934, and 44944).[1] Before the hearing began, Truitt filed two motions in limine which sought, respectively, an order precluding the District from offering any evidence relating to events that had occurred more than four years before the date the notice of intention to dismiss was filed and an order striking from the charges and the notice those allegations which described incidents that had occurred more than four years before the date the notice was filed. The motions were based upon section 44944, subdivision (a).[2]

The administrative hearing officer granted both motions. The District took the case to the superior court by way of a petition for writ of mandate. The trial court, after a

---

[1] All further references are to the Education Code unless otherwise noted.

[2] Section 44944, subdivision (a) provides in relevant part: "No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice."

contested hearing, granted the District's petition and ordered the hearing officer to vacate both in limine orders and enter new orders denying Truitt's motions.

Truitt remains suspended from his position, without pay, pending resolution of the charges.

We reverse. We hold that the prohibitions in section 44944 are absolute and cannot be extended by the application of equitable doctrines such as delayed discovery, fraudulent concealment, equitable estoppel, and continuing course of conduct.

DISCUSSION

I.*

The trial court did not lack jurisdiction to issue the writ of mandate. A petition for mandamus raises the question whether the inferior tribunal has failed to do an act required by law or has unlawfully precluded a party from exercising a right granted by law. (See Code Civ. Proc., § 1085 [writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or to compel the exercise of a right of which a party is unlawfully denied]; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442 [mandamus may issue to compel an official to exercise its discretion under a proper interpretation of the applicable law]; *Morgan v. Board of Pension Commissioners* (2000) 85 Cal.App.4th 836, 843 [mandamus is available to correct those acts and decisions of administrative agencies which are in violation of the law].) Respondent's claim that the trial court lacked jurisdiction to do what it did because the "District had no right [under section 44944] to any other determination" is precisely the sort of issue presented by a mandate petition -- i.e., whether in fact in this case the District had no right under the Education Code to offer the evidence and pursue the charges in dispute. Neither the trial

---

* See footnote, *ante*, page 1.

court's jurisdiction nor the scope of this court's power of appellate review is constrained by respondent's partisan conviction that the trial court decided the issue correctly.

II.

The Education Code includes a broad legislative scheme that controls, to the exclusion of any local legislation, the matter of teacher discipline. (See *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 344.) The scheme incorporates two separate but interrelated means of disciplining a credentialed teacher for misconduct or professional incompetence. The first is found in section 44932, which authorizes the local school governing board, on a variety of grounds, to suspend or dismiss a teacher from the position he or she holds. (See § 44932, subd. (a)(1).) The second is found in section 44421, which authorizes the Commission on Teacher Credentialing, on a variety of grounds, to privately admonish or publicly reprove a teacher or suspend or revoke a teacher's credential. The procedural mechanism for a dismissal or suspension is described in section 44944. The procedural mechanism for an admonishment, reproval, suspension or revocation is described in section 44242.5.

In this dismissal proceeding under section 44932,[3] Truitt contends the trial court sanctioned a violation of section 44944 by authorizing the District to introduce at the hearing evidence of misconduct that occurred more than four years before the notice of intention to dismiss was filed. According to Truitt, section 44944 is not a statute of limitations subject to the equitable tolling exceptions relied upon by the District but instead is an evidentiary and a substantive bar that cannot be lifted by equitable considerations.

---

[3] The acts alleged to have been committed by Truitt are also within the scope of section 44421. (*In re R.G.* (2000) 79 Cal.App.4th 1408, 1416-1417.)

We agree with Truitt that the trial court should have denied the District's petition. Section 44944, subdivision (a) is in the nature of an evidentiary bar or a condition on a substantive right rather than a true statute of limitations. (*Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles* (1997) 54 Cal.App.4th 53, 59 [issues of statutory interpretation are subject to de novo appellate review].) The last paragraph of section 44944, subdivision (a) is not ambiguous. It states unequivocally that "*no* testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice [to dismiss]" and that "*[n]o* decision relating to the dismissal [...] of any employee shall be made based on charges or evidence of any nature relating to the matters occurring more than four years prior to the filing of the notice." (Emphasis added.) These words place restrictions upon the age of the information that may support a dismissal; they do not place any limits upon the time within which a section 44932 dismissal proceeding may be brought. (See *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 178.)

Section 44944, subdivision (a) is similar to former subdivision (c) of article VI, section 18, of the California Constitution, which dealt with judicial censure and which stated that "the Supreme Court may ... censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term ...." In *Dodds v. Commission on Judicial Performance*, *supra*, 12 Cal.4th 163, the court held that the section precluded the imposition of discipline based on a remark made by the judge more than six years before commencement of the judge's current term. The court did not view the provision as "a classic statute of limitations -- it does not place a limit on when an action or proceeding may be commenced. Rather, it places a limit on the total time that may elapse from occurrence of an incident to imposition of discipline based on that incident. It thus combines the functions of a statute of limitations and a rule limiting the time proceedings may remain pending." (*Id.* at pp. 178-179.)

The District says that, under the traditional delayed discovery, fraudulent concealment, equitable estoppel, and continuing course of conduct exceptions to statutes of limitations, it should be allowed to introduce acts of misconduct more than four years old. But if the District were permitted to do so, evidence that the Legislature in section 44944 has expressly said cannot be introduced or relied upon at a dismissal hearing could be introduced and relied upon at a dismissal hearing, flaunting the direct statutory command. (See *People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (2002) 95 Cal.App.4th 709, 724-725 [equitable principles did not apply to toll certain Corporations Code statutes of limitation where the relevant code language disclosed a legislative intent not to permit any extension of the stated limitations periods].) As Truitt has pointed out, even if such equitable doctrines were applied to admit evidence about events older than four years, the patent statutory language still would prohibit any decision from being "based on charges or evidence of any nature" older than four years.[4] (§ 44944, subd. (a).)

Section 44944, subdivision (a) is ambiguous only if the premise is accepted that it is unwise as a matter of policy to exclude from the evidence presented at a dismissal hearing any proof of sexual misconduct, regardless of its age. However, and even though

---

[4] As a practical matter, it is immaterial whether we classify the subject sentences, singly or in combination, as a statute of limitations, a condition on a substantive right, or an evidentiary bar. The courts have applied equitable doctrines, such as tolling, to both procedural limits and substantive conditions. (See *Downs v. Department of Water and Power* (1997) 58 Cal.App.4th 1093, 1101, and fn. 3; see generally 3 Witkin, Cal. Procedure (4th ed. 1997) Actions, § 417, pp. 525-527.) Regardless of how the pertinent statutory language may be characterized, it nonetheless manifests, as we hold, a legislative intent that the stated proscriptions be absolute. (See *People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 95 Cal.App.4th at pp. 724-725.)

the allegations against Truitt may furnish a temptation to find some colorable ground to avoid the plain meaning of the statute, we cannot ignore the obvious expression of the Legislature's intent, whatever we or the District may think about the wisdom of the provision. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53 [the courts "may not undertake to evaluate the wisdom of the policies embodied in ... legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function"]; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1010 [when the language of a statute is clear, the court should apply its plain meaning].)

According to the District, a July 6, 1971, legislative staff memorandum concerning proposed amendments to Assembly Bill No. 293 proves that the subject language in section 44944 was intended to create a true statute of limitations. The memorandum in pertinent part states that, because "there should be some statute of limitations for teachers," the three-year time period in the earlier version of section 44944 was being changed to four years by Assembly Bill No. 293 "since the evaluations are made every other year."

As we see it, the link in the memo between the new time period and biannual teacher evaluations does not focus on the factors -- i.e., what might be a fair time for purposes of notice, preservation of evidence, extension of risk, finality and the like -- usually considered in selecting an appropriate period of limitations within which a particular action or proceeding may be initiated. (See, e.g., *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 755-756; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 650.) Rather, the reference focuses upon the time when a deficient performance by the teacher would likely be raised between the teacher and the

District and perhaps corrected, factors that suggest that the purpose of the provision was to prohibit dismissal based upon stale events.

There is nothing in the rest of the extant history of section 44944 to suggest that the words used in the statute do not reflect actual legislative intent. The legislative materials show, in fact, that the lawmakers declined to exempt allegations of sexual misconduct from section 44944's prohibitions and, instead, enacted provisions dealing with the topic in the credential revocation scheme. Senate Bill No. 1843, in the final reading dated June 30, 1994, added section 44242.7 to the credential revocation statutes.[5] The Assembly Education Committee Republican Analysis of Senate Bill No. 1843, commented on the addition of the new section as follows:

> "This proposal would mitigate the often 'undue protection' for credential holders apparent in the current process. It makes better sense to err in the best interest of student protection rather than continue a system which often impedes districts in removing child molesters and predators from schools." (Assem. Ed. Comm. Republican Analysis of Sen. Bill No. 1843 (1993-1994 Reg. Sess.) as amended June 30, 1994, p. 2.)

Though it could have contemporaneously or at any other time incorporated into local district proceedings the same exemption for sexual misconduct with a minor that it incorporated into credential proceedings by the enactment of section 44242.7, the Legislature obviously chose not to do so.

---

5 Section 44242.7, provides "[a]ny allegation of an act or omission by the holder of a credential, *except for an allegation that involves sexual misconduct with a minor or recurring conduct resulting in a pattern of misconduct,* shall be presented to the Committee of Credentials, for initial review, within four years from the date of the alleged act or omission, or within one year from the date the act or omission should reasonably have been discovered." (§ 44242.7 added by Stats.1994, c. 681 (S.B. 1843), § 3.)

The legislative materials also show that in 1993 an amendment to section 44944 was proposed which would have inserted language about sexual misconduct with a minor similar to the language in section 44242.7. For an undisclosed reason, the amendment was not put to a vote. From the scant available history of the failed amendment we cannot draw any conclusions about why the lawmakers elected not to alter section 44944, but we can conclude from this record that they have long known how to draft such an exception.

The District believes a literal application of section 44944 is unwise or unfair because it puts at risk the District's students, or may lead to liability on its part should a victim sue the District. These arguments are more appropriately addressed to the Legislature. We agree that conduct of the sort alleged here is reprehensible and poses a serious threat to students. We also agree that the District has a stake in the discipline process and must be permitted to protect itself and its students with immediate action. However, these factors were considered in designing the current statutory plan. The report of the Senate Rules Committee relating to Senate Bill No. 1843, which amended section 44242.5 (Stats. 1994, c. 681 (SB 1843), § 2), includes the following comment:

> "The Education Code requires that hearings conducted as part of a dismissal or suspension proceeding may include testimony or evidence introduced relating to matters that occurred no more than four years prior to the date of the filing of the notice of the hearing. As a result, school districts are, in those cases, dependent on the actions of the [Commission on Teacher Credentialing], who are not subject to a statute of limitations to revoke a credential.
>
> "A number of school districts have expressed concern to the author that the current CTC disciplinary process does not lend itself to meaningful participation by school districts in these matters. Giving the [Commission on Teacher Credentialing] the authority to investigate complaints relating to sexual misconduct filed by a school district, and permitting the school district to participate in a meeting at which testimony is taken from the

> credential holder are efforts to respond to this concern." (Sen. Rules Com., Off. of Sen. Floor Analyses, analyses of Sen. Bill No. 1843 (1993-1994 Reg. Sess.) as amended June 6, 1994, p. 3.)

Furthermore, the disciplinary statutes as a whole do not leave the District or the students entirely unprotected. When a teacher has been criminally charged with a sexual offense as defined in section 44010, he or she will be removed from the classroom because section 44940 requires that the teacher be placed immediately on a compulsory leave of absence. The District must then forward a copy of the charges to the Commission on Teacher Credentialing, which must then suspend the teacher's credential. (§ 44940, subd. (d)(2).) Upon conviction of a qualifying criminal offense, the teacher's credential *must* be summarily revoked. (§ 44424.) In addition, the Committee on Credentials has the authority to investigate, without a time limitation, allegations of sexual misconduct that have not been criminally charged and make recommendations for appropriate action to the Commission on Teacher Credentialing. (§ 44242.5.)

In sum, even though evidence of misconduct older than four years is admissible in a credential proceeding (§ 44242.7) and in a criminal prosecution (Pen. Code, § 803, subd. (g) or (h)),[6] it is not admissible, and cannot be relied upon, in a local district proceeding (§ 44944). This statutory arrangement is not absurd and represents policy choices made by an informed Legislature. (See *People v. Amwest Surety Ins. Co*. (1997) 56 Cal.App.4th 915, 919-920 [the language of a statute must be read in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute]; see also *Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735 [provisions relating to the same subject matter must be harmonized to the extent possible].) Charges of sexual

---

[6] We note again that, if Truitt is convicted of a violation of section 288 as charged, he will automatically lose his credential and his job. (§§ 44425; 44424; 44940; *DiGenova v. State Bd. of Ed.* (1955) 45 Cal.2d 255, 262.)

misconduct are explosive and may be difficult to defend, and unsubstantiated or stale allegations may unfairly place credentialed teachers at the risk of immediate, harsh consequences. The Legislature, mindful of these concerns, could logically have decided that the section 44944 bans were appropriate in local district proceedings but not in credential proceedings because the explicit prehearing review process in section 44242.5 would operate in credential proceedings to weed out dubious sexual misconduct charges regardless of age.[7]

We disagree with the District that the Supreme Court has previously found section 44944 to be a true statute of limitations. In *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, at footnote 15 (*Fontana*), the court commented:

> "Although generally 'no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice' (§ 44944, subd. (a)), this limitation seems to be more of a bar against the use of stale information to buttress a current charge than a true statute of limitations restricting a district's options. To the extent that it might be taken as an explicit statute of limitations, it would seem inapplicable to a successive application based upon the same charge of misconduct and differing only as to the proposed discipline."
>
> "Limitations questions in administrative matters are properly evaluated under rules similar to those employed in judicial proceedings. (See 2 Cal.Jur.3d, Administrative Law, § 144, p. 366.) Given that the identical conduct would be at issue in the two proceedings and that the employee would have received timely notice of the charges, could complain of no prejudice in gathering evidence and could ordinarily point to no bad faith or unreasonable conduct on the part of the employing district, the doctrine of equitable tolling would generally preserve a district's right to proceed in

---

[7] Section 44242.5 authorizes an initial investigative review by the Committee of Credentials (§ 44242.5, subds. (b) and (c)) prior to a formal review hearing. (§ 44242.5, subds. (d) and (e)). An equivalent prehearing initial review is not a part of local district proceedings.

> this fashion. (See *Addison v. State of California* (1978) 21 Cal.3d 313, 319.) Complaints of stale claims would be more appropriately subject to a laches analysis than a strict statute of limitations bar. (Cf. *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184.)" (*Fontana, supra,* 45 Cal.3d at p. 222.)

For two reasons, this footnote is not controlling here. First, it is dicta. The court in *Fontana* was not called upon to interpret or apply section 44944 in the context of stale acts of misconduct. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 928, 945-947, pp. 966, 987-989, and cases cited [dicta of Supreme Court, although persuasive when addressing issue presented, need not be followed and is not persuasive on issues not addressed].) The *Fontana* court was only called upon to evaluate whether a teacher could be suspended rather than discharged when the school district had initially sought dismissal based upon acts indisputably within the four-year period. Footnote 15 in the *Fontana* opinion was nothing but a sidebar confirmation that the section 44944 prohibitions were not implicated because the proceedings involved the same timely misconduct and differed only as to the proposed form of discipline. (*Fontana, supra,* 45 Cal.3d at p. 222.) This case, on the other hand, involves the use of old (more than four years) acts to bolster recent (less than four years) acts. More significantly, *Fontana* did not address the Legislative history of section 44944 and the opinion predated the post-1988 amendments to the statutory scheme, including the 1994 additions, which we noted earlier and which establish that the Legislature considered the very same contentions advanced here by the District. (See 9 Witkin, Cal. Procedure, *supra,* Appeal, §§ 955-956, pp. 1001-1002, and cases cited [strongest reason for inapplicability of a prior decision is failure to acknowledge a statutory decision or subsequent change in statute]; *Alferitz v. Borgwardt* (1899) 126 Cal. 201, 207 ["Laws are not made by judicial decisions"].)

We also disagree that the statute must be read in conjunction with *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (*Morrison*), which sets forth the factors relevant to a determination whether misconduct by a tenured teacher warrants credential revocation. Under *Morrison* and its progeny, the decision to revoke a teacher's credential or to dismiss a tenured teacher centers upon the question whether the current charge of misconduct reveals a pattern that suggests that the continued employment of the teacher poses a significant danger of harm to students. (*Id.* at p. 235.) We do not find anything in *Morrison* that mandates the application of the cited factors based upon the local district's ability to present and consider evidence of events occurring more than four years before a notice of intent to dismiss is filed. And, *Morrison* was a credential revocation case, not a local district case, and it thus did not address the limitations in section 44944, subdivision (a). Even though opinions subsequent to *Morrison* have applied the *Morrison* factors to local district cases (see *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1999) 2 Cal.App.4th 1429, 1456-1457), we have uncovered no authority that has expressly found *Morrison* to undermine the unambiguous restrictions in section 44944, subdivision (a). (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 [cases are not authority for propositions they do not consider].) "We have no general power to rewrite statutes to conform to some underlying [judicially perceived] 'policy.'" (*Woodland Joint Unified School Dist. v. Commission on Professional Competence, supra,* at p. 1451.)[8]

---

[8] The District also argues that it should be permitted to present evidence of the pre-1998 incidents under the general rules of evidence for the purpose of impeaching Truitt's character (Evid. Code, § 1100) or to establish a motive, intent, pattern or design of conduct (Evid. Code, § 1101, subd. (b).) However, to the extent section 44944 constitutes a rule of evidence, it overrides the more general principles found in the Evidence Code. (Code Civ. Proc., § 1859; Evid. Code, § 300; *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420.)

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to appellant.

_____
Dibiaso, Acting P.J.

WE CONCUR:

_____
Cornell, J.

_____
Gomes, J.